BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H303132

MIKEL MILLER, EMPLOYEE **CLAIMANT**

vs.

SPURLOCK, INC, EMPLOYER **RESPONDENT**

BITCO GENERAL INSURANCE CORPORATION,
INSURANCE CARRIER/TPA **RESPONDENT**

OPINION FILED FEBRUARY 21, 2024

Hearing before Administrative Law Judge, James D. Kennedy, on the 9TH day of January 2024, in Little Rock, Pulaski County, Arkansas.

Claimant is represented by Mr. Gregory R. Giles, Attorney-at-Law, Texarkana, Arkansas.

Respondents are represented by Mr. Michael E. Ryburn, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on the 9th day of January, 2024, to determine the issues of compensability for an alleged work-related injury to the claimant's left wrist; medical benefits and treatment; temporary total disability; and attorney fees, with permanent partial disability reserved. The parties stipulated at the time of the hearing that the claimant earned an average weekly wage sufficient for a TTD/PPD rate of $380.00/$285.00, respectively. A copy of the Prehearing Order was marked "Commission Exhibit 1" and made part of the record without objection. The Order provided that the parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of the within claim and that an employer/employee relationship existed on May 10, 2023, the date of the claimed injury in question. There was no objection to these stipulations and the Prehearing Order was admitted.

The claimant contended he sustained a compensable injury to his left wrist while performing employment services for the respondent employer and that he was not under the influence of any illegal substance which caused or contributed to the accident.

The respondents contended compensability for any injury the claimant may have sustained was barred under Ark. Code Ann. §11-9-102(B)(iv), because the accident was substantially occasioned by the use of illegal drugs.

The claimant's and respondents' contentions are all set out in their respective responses to the prehearing questionnaire and made a part of the record without objection. The witnesses consisted of Mikel Miller, the claimant, and Mason Garner, who was still employed by the respondents at the time of the hearing and also a friend of the claimant. From a review of the record as a whole, to include medical reports and other matters properly before the Commission, and having had an opportunity to observe the testimony and demeanor of the witnesses, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. That an employer/employee relationship existed on May 10, 2023, the date of the claimed injury. At the time, the claimant earned an average weekly wage sufficient for a TTD/PPD rate of $380.00/$285.00, respectively, per week.

3. That the claimant has satisfied the burden of proof, by a preponderance of the evidence, to overcome the rebuttable presumption of Ark. Code Ann. §11-9-102(4)(B)(iv) and has proven he suffered a compensable left wrist injury on May 10, 2023. Additionally, the claimant has satisfied the burden of proof that he is entitled to reasonable and necessary medical treatment, including the reasonable and necessary medical treatment that has already occurred, plus the unreimbursed travel expenses that were introduced into the record.

4. That the claimant has satisfied the burden of proof, by a preponderance of the evidence, that he is entitled to TTD from the day following his injury through the date of July 9, 2023.

5. The claimant is entitled to attorney's fees pursuant to Ark. Code Ann. §11-9-715. This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809.

6. That all other issues are reserved.

7. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

REVIEW OF TESTIMONY AND EVIDENCE

The Prehearing Order, along with the prehearing questionnaires of the parties were admitted into the record without objection. The claimant submitted one exhibit consisting of fifty-one (51) pages, of medical and documentary evidence, that was admitted without objection. The respondents submitted two (2) exhibits with exhibit one consisting of a drug testing form, along with the results; and exhibit two consisting of case law and both were admitted without objection.

The first witness to testify was the claimant, Mikel Miller. He testified he had dropped out of the eleventh grade and attempted to obtain his GED and then went on to work construction. He felt that he went to work for the respondent around October of 2022, as a general-labor hand. The respondent employer performed a little bit of pipelining, plumbing, electrical, construction, water irrigation, and some demolition. On May 10, 2023, his first day at the job site in Cabot, they were demolishing an old strip mall that had a couple of stores in it. He stated that he would drive from Beebe, where he lived, to Searcy and they would meet at the shop every morning and then leave from the shop around seven and go where instructed. He rode with Larry Walker in his personal vehicle from the Searcy shop to the job site in Cabot where there were four (4) workers which included Larry, Mason, Tim, and himself. He thought that Mason rode with

Sammy who was the foreman and that they started to work sometime between 7:30 to 8:00. (Tr. 7-10)

They were told to cut down a canvas on the front of the building to tear down the metal framing that was holding up the canvas. To do this, claimant was instructed to get one piece of metal off the slanted metal roof, which was about 13 to 15 feet up, and Larry and the claimant used a ladder to get up there. A lot of the screws were missing off the roof and some spots were kind of rusty. An impact gun was used to unscrew the metal and when he picked it up, the claimant guessed that it made the metal where he was standing weak, and it folded and he fell through, falling on debris that had been tore down before. (Tr. 11-14) He went on to state that he nearly fell on top of Mason, and that after the fall, he was in pain in his left wrist that swelled up like a balloon, and also his back. An ambulance was called which arrived in 25 to 30 minutes.

He was drug tested upon arriving at the hospital and admitted he was concerned about the test because he had in fact smoked marijuana two (2) weeks before at his cousin's wedding, where he had taken a couple of puffs or hits, and it consisted of a half gram to a gram. He admitted to using marijuana, "probably twice every two months" and further stated that it made him feel calm, relaxed, and that it gets rid of his anxiety. He denied he was under the influence of marijuana at the time of the work-related accident and denied using marijuana at anytime since the wedding. He was not aware of a drug policy at his employer. He also testified that he did not believe he was under the influence of marijuana at the time of the accident. No one questioned his state of mind or asked him if he was under the influence of anything the morning of the accident and there was no discussion about who was at fault or what happened that caused the fall. He agreed with the hospital medical records which indicated he was oriented to person, place, and time. He received pain medicine, IV's, and a splint while at the hospital, and

was taken off work at that time. He also testified that he was left hand dominate. He was advised to see Dr. Ethan Shock and saw him on May 11. Dr. Schock gave the claimant some pain medications, took him off work, and set him up for surgery. His first post-op visit after the surgery was June 7. The cast was removed on a follow-up visit on July 5, where the claimant received a wrist splint. (Tr. 15-21) After about five or six days, the claimant started looking for work and found employment around July 10 at Hurst Audio and ATV in Lonoke, where he worked as a small-engine technician. He went on to state that his wrist has gradually gotten stronger and better. He is no longer required to go to a physical therapy location but is currently doing the exercises at home. (Tr. 22-24)

The claimant testified he felt that the marijuana had nothing to do with his injury, he was there to do his job, was instructed to get on the roof, and he did what he was told to do. He also admitted knowing his witness Mason Garner outside of work, lived with him at the time of the accident, and continued to live with him. (Tr. 26-27)

Under cross-examination, the claimant admitted smoking marijuana two (2) weeks prior to the accident and further admitted that he was not disputing anything about the drug test. He denied ever having meetings about the use of drugs on the job and was not aware of a policy in regard to drugs by his employer. He agreed that as a reasonable individual, he knew that it was not a good thing to test positive for drugs after an accident. He also stated he accepted the test which occurred at the time of the accident while at the hospital. He also admitted Medicaid had paid all of his bills. (Tr. 29-30) He also admitted he was aware that if you removed the screws from one side of a metal roof panel, it would affect another panel because he had worked on roofs before. (Tr. 32) The claimant also admitted that the witness that he had called was his friend (Tr. 34)

Mr. Mason Garner was then called to testify. He stated he was a high school graduate, was currently employed by the respondent, and was on the job site on May 10, 2023. The supervisor on the job site was Sammy Thacker. He saw the claimant in the middle of his fall and "turned around and he was on the floor" landing on insulation and a debris pile. He thought the claimant probably fell fifteen to seventeen feet. (Tr. 38-40) Mr. Garner thought that he had been with the claimant all day until he got on the roof. He had not noticed anything unusual about the claimant. He heard the supervisor say, "I need you to go up there and start taking off the roof." He also denied that the claimant was under the influence of marijuana at the time of the accident, based upon his actions and demeanor. (Tr. 41-42) He also admitted signing a written statement that provided his coworker was not under the influence of any illegal substance of any kind on May 10, 2023. (Tr. 44) "He - - he - - Like I said, he acted normal as me and you are right now, you know. Didn't seem like he was under any influence of anything, acted normal as anyone should be." (Tr. 44)

Under cross-examination, Mr. Garner admitted he had never seen the claimant under the influence of drugs. He also admitted he was not trained to detect if a person was impaired by drugs, and had little medical knowledge. He also admitted using marijuana before he got out of high school. (Tr. 45-46)

The claimant's exhibit one consisted of the signed statement which was referred to during the testimony of Mason Miller. The exhibit also consisted of medical records. The records provided that the claimant was taken by Metro EMS Ambulance on May 10, 2023, from Cabot to the ER at Baptist Medical Center in North Little Rock, due to a job-related injury. (Cl.Ex. 1, PP. 2-4) The ER report provided that the date of the injury was May 10, 2023, when the claimant fell through a roof while working, falling approximately thirteen (13) feet. The assessment

provided that the claimant was in pain, was alert and cooperative, with a brisk pupil reaction and pupils of equal size. Splinting of the left arm occurred, and the claimant's departure condition was good. The final diagnosis was a closed intra-articular fracture of the distal end of the left radius. Hydrocodone and acetaminophen were prescribed. The claimant was advised to follow up with Dr. Ethan Schock. (Cl.Ex.1, PP. 5-26) The medical records also provided that the claimant was administered a drug test at the time of the hospital visit and tested positive for marijuana metabolites. (Cl.Ex.1, PP. 27-28)

The claimant first presented to Dr. Ethan Schock on May 11, 2023. The report provided the claimant was alert, oriented, and provided appropriate answers to questions. Unfortunately, the claimant was left-hand dominant and the x-rays showed he was suffering from left distal radius fracture with loss of radial length and tilt. The report went on to provide the claimant was to remain off of work until his first post-operative visit. (Cl.Ex.1, PP. 29-32) Surgery was performed on the claimant's left wrist on May 22, 2023. The report provided that the claimant should return for a follow-up in approximately one week. (Cl.Ex.1, PP. 33-41) The claimant returned to Dr. Schock on June 7, 2023, and a short arm cast was applied and the report further provided the claimant should return in three weeks. (Cl. Ex. 1, P. 42, 43) The claimant then again returned to Dr. Schock on July 5, 2023, and rehab exercise was instructed. A cock-up wrist splint was applied and the claimant was instructed to wear this at all times except while working on range of motion type activities. (Cl. Ex.1, PP. 44-45) The claimant then returned to Dr. Schock for his final visit on August 16, 2023. The report provided that he lacked about 5 degrees of full flexion about the wrist and was then released. (Cl.Ex.1, PP. 46-47)

The claimant also submitted a record for mileage in regard to his treatment that resulted in a total of $232.44 for travel. In addition the ambulance bill was submitted for the sum of

$1,661.00, a bill for $595.00 due to Baptist Health for anesthesia/endoscopy, and bill for $3,024.00 due to OrthoArkansas in regard to the claimant's left surgery. (Cl. Ex.1, PP. 48-51)

The respondents also submitted the drug test with the results, as well as case law. (Resp. Ex.1, PP.1-3)

DISCUSSION AND ADJUDICATION OF ISSUES

In regard to the primary issue of compensability, the claimant has the burden of proving, by a preponderance of the evidence, that he is entitled to compensation benefits for the injury of his left wrist under the Arkansas Workers' Compensation Law. In determining whether the claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. §11-9-704. *Wade v. Mr. Cavananugh's*, 298 Ark. 364, 768 S.W. 2d 521 (1989). Further, the Commission has the duty to translate evidence on all issues before it into findings of fact. *Weldon v. Pierce Brothers Construction Co.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996).

From the testimony and the medical reports, there is little to no disagreement that the claimant fell thirteen plus (13+) feet from a roof which partially collapsed when he was instructed to get on it by his supervisor during a demolition project. He suffered injuries to his left wrist, which required surgery.

A compensable injury must be established by medical evidence supported by objective findings and medical opinions addressing compensability and must be stated within a degree of medical certainty. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Liaromatis v. Baxter County Regional Hospital,* 95 Ark. App. 296, 236 S.W.3d 524 (2006). More specifically, to prove a compensable injury, the claimant must establish, by a preponderance of the evidence: (1) an

injury arising out of and in the course of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16) establishing the injury; and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. If the claimant fails to establish any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). In the present matter, the testimony of the claimant along with a co-worker who was a friend, as well as the medical records from Baptist Health in North Little Rock, and surgery records by Dr. Allen Schock of Ortho Arkansas, satisfy these requirements.

However, the ultimate issue that must be determined in the present matter is the application of Ark. Code Ann. §11-9-102(B)(iv), as raised by the respondents. Ark. Code Ann. §11-9-102 provides in pertinent part:

> (B) "Compensable injury" does not include:
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> (iv) (a) injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.
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> (b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.
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> (c) Every employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.
>
> (d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's order did not substantially occasion the injury or accident.

Arkansas Code Annotated §11-9-102(4)(B)(iv) governs the compensability of the claimant's injury under the facts of this case. Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Woodal v. Hunnicut Construction,* 340 Ark. 377, 12 S.W.3d 630 (2000). Here, the claimant admitted to using marijuana two (2) weeks prior to the accident at a wedding party. He did not deny that he was drug tested on the day of the accident while at the hospital and that the test was positive for marijuana metabolites.

It is noted in *Woodall supra*, the Arkansas Supreme Court opinion issued by Chief Justice Dub Arnold, provided in regard to Ark. Code Ann. §11-9-102(4)(B)(iv), that substantial evidence is such relevant evidence as a reasonable mind might support as adequate to support a conclusion. In *Woodall*, the claimant admitted to smoking crack cocaine the night before the injury, and the Arkansas Supreme Court reversed the Arkansas Court of Appeals opinion, holding that the claimant had in fact not satisfied the rebuttable presumption as spelled out in Ark. Code Ann. §11-9-102(4)(B)(iv).

In the present matter, the claimant denied being under the influence of marijuana at the time of the accident. The claimant had driven from his home in Bebee to the respondent's shop in Searcy and then rode with a coworker to the job site in Cabot. That a claimant's testimony is self-serving is not, for that reason alone, insufficient to support a finding in his or her favor. *Brantley v. Tyson Foods, Inc.,* 48 Ark. App. 27, 31, 887 S.W. 2d 543, 545 (1994). More importantly, in the present matter, the claimant's co-worker and admitted friend, who still was employed by the respondent at the time of the hearing, testified he knew the claimant well and that the claimant did not show by his actions or speech that he was under the influence of illegal drugs, specifically marijuana. Based upon the claimant's own testimony, which was unrebutted,

he was instructed to get on the roof, and obviously, the job supervisor was not concerned about the claimant's abilities when he instructed him to crawl on the roof, since other employees were available at the time and there was no comment about his abilities or of any intoxication. The report from Baptist Health in North Little Rock and from EMS Ambulance provided that the claimant was alert and oriented with his pupils equal, round, and reactive to light. No report mentioned that the claimant was unresponsive or that he appeared to be intoxicated, an issue that is commonly observed and checked in an emergency room.

The claimant admitted to using marijuana two (2) weeks prior to the work-related accident. Mason Garner, admittedly claimant's friend and with no medical background but also still employed by the respondent employer at the time of the hearing, testified and also signed a hand-written memo that the claimant was not intoxicated at the time of the injury. There was no rebuttal to this testimony. Additionally, the ambulance crew and the emergency room personal made no mention of the claimant possibly being intoxicated. Based upon the above evidence, there is no alternative but to find that the claimant has successfully satisfied the burden of proof to rebut the presumption that the work-related injury of April 20, 2020, was substantially occasioned by the use of illegal drugs. Consequently, the claimant has satisfied the burden of proof, by a preponderance of the evidence, that he suffered a compensable left wrist injury on May 10, 2023, and is entitled to reasonable and necessary medical treatment, including the treatment that has already occurred, along with reimbursement for the travel admitted into the record.

In addition, based upon the above finding, the claimant has satisfied the burden of proof beyond a reasonable doubt that he is entitled to TTD from the date following the injury beginning on May 11, 2023, through July 9, 2023, at the stipulated rate.

The claimant and his attorney are entitled to the appropriate legal fees as spelled out in Ark. Code Ann. §11-9-715.

After weighing the evidence impartially, without giving the benefit of the doubt to either party, it is found that the claimant has satisfied his burden of proof that his claim for the injury to his left wrist is compensable, that he is entitled to reasonable and necessary medical including the treatment that has already occurred, reimbursement for the travel submitted, and TTD from May 11, 2023, through July 9, 2023. The claimant is also entitled to attorney fees as spelled out by the Arkansas Workers' Compensation Act. This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809. If not already paid, the respondents are ordered to pay the cost of the transcript forthwith. All other issues are reserved.

IT IS SO ORDERED.

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JAMES D. KENNEDY
Administrative Law Judge