NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H405400

JEFFREY MARTINEZ,
EMPLOYEE CLAIMANT

1ST EMPLOYMENT STAFFING,
EMPLOYER RESPONDENT

ZURICH AMERICAN INSURANCE
COMPANY, CARRIER /GALLAGHER BASSETT
SERVICES, INC., TPA RESPONDENT

OPINION FILED JUNE 20, 2025

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE EVELYN E. BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE RICK BEHRING JR., Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed January 29, 2025. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on October 9, 2024 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his

> right wrist and hand on August 6, 2024. Specifically, claimant failed to rebut the statutory presumption that his injury was substantially occasioned by the use of illegal drugs (marijuana).

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore, we affirm and adopt the January 29, 2025 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

_____
MICHAEL R. MAYTON, Commissioner

Commissioner Willhite dissents.

DISSENTING OPINION

The Administrative Law Judge (hereinafter referred to as “ALJ”) found that the Claimant failed to prove by a preponderance of the evidence that he

suffered a compensable injury to his right wrist and hand on August 6, 2024. Specifically, the ALJ, found that the Claimant failed to rebut the statutory presumption that his injury was substantially occasioned by the use of illegal drugs (marijuana). I disagree and would reverse the decision by the ALJ, and find that the statutory presumption was not triggered, and that the Claimant proved he sustained compensable injuries to his right hand and wrist.

To establish a compensable injury by a preponderance of the evidence the Claimant must prove: (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 and identifiable time and place of occurrence. A compensable injury must be established by medical evidence supported by objective findings and medical opinions addressing compensability must be stated within a degree of medical certainty. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Further Arkansas Code Annotated § 11-9-102(4)(B)(iv) states that a compensable injury does not include:

> (a) Injury where the accident was substantially occasioned by the use of […] illegal drugs[.]
> (b) The presence of […], illegal drugs, […] shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of […] illegal drugs[.]

The process to determine whether an accident was substantially occasioned by the use of illegal drugs is outlined by Arkansas Code Annotated § 11-9-102(4)(B)(iv)(c):

> (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.

The Claimant was hired by Respondent on July 30, 2024, as a temporary employee and was assigned to work as a drill press operator for Hickory Springs Manufacturing, one of Respondent's industrial clients. Respondent's operations manager, Mashayla Martin, testified that some of the safety training provided to the Claimant for his job included a generic video. On cross-examination, Martin states:

> Q: Okay. So the safety video that you say he watched, what did the safety video cover?
> A: It covered various safety things. It is a 30-minue long video and then they take a short 10-question test after.
> Q: Okay. And is that a generic video that works for all of your places?
> A: Uh-huh.
> …
> Q: And do you have the results of Jeffrey's safety test somewhere?
> A: Yes.
> Q: Are those not in his personnel file?
> A: They are.
> Q: What would they be under?
> A: Safety test results.
> Q: Okay. Did you give those safety test results to Mr. Behring?
> A: No, but we can.

> Q: Well, I had requested the entire personnel file, so if that is in the personnel file, what else is in the personnel file that you did not give to Mr. Behring?
> A: I am not sure. That would have went through our HR Department.

Claimant was trained on the drill press by Genoveva “Eva” Martinez. Eva Martinez testified that she had not trained anyone as a drill press operator before training the Claimant. Eva Martinez further testified that she and Claimant worked together for about two days, and on the third day she released Claimant to work on the drill press alone. On August 6, 2024, six days after Claimant began working for Respondent and three days after being released by Respondent employee Eva Martinez, Claimant was injured. As the Claimant was operating the drill press his work glove became caught in the machine, mangling his hand. Claimant was taken to the hospital and diagnosed with finger fractures and dorsal wrist injury. This required an urgent surgical procedure that included revision amputation of his little finger.

As the Claimant was being taken from the scene of the accident by EMS, plant manager Justin McCutchen allegedly found a vape pen laying on the floor underneath the Claimant. McCutchen further testified that he carried the vape pen around for a couple of hours and then gave it to Respondent’s HR Department. Mashayla Martin testified as follows regarding the vape pen:

> Q: And what did you do with the vape pen after that?
> A: I held onto it until OSHA had came to my office and when he had saw it and smelt it, he told me that I needed to give it to the police, so I had the police come then and take it.

…
Q: After handing over the vape pen, have you had anything to do with the vape pen since then?
A: No.

There is nothing further in the record as to whether the vape pen was tested by the police for the presence of marijuana. It appears that Martin's duties included determining whether a drug screen is appropriate for injured employees and she provided the following testimony:

Q: Following that, did you decide that a post-accident drug screen was necessary?
A: Yes.
Q: All right. So what did you do?
A: I called the hospital because we have to have it done within 24 hours of the incident and the hospital declined to do it for me.
Q: Anytime you have an accident, do you guys administer a drug test?
A: Yes.
Q: Okay. And so what happened after they declined – when the hospital declined to do a drug test?
A: I reached out to his family to see if I could come up and see them. He was in surgery, so I spent a little bit of time with his sister and mother. I brought them dinner. And then the next morning I reached out to Jeffrey and he said that the surgery went well, so I asked him if I could get a statement from him and a drug screen and he agreed.
Q: Okay. When did you actually come see Mr. Martinez at the hospital?
A: It was the very next day on the 7th.
Q: And tell me what happened when you got there.
A: When I walked in, he had urine in a urinal and he said he we could use that for the drug test, but I told him it would have to be a clean catch and I actually poured that urine out myself. And then he said he didn't have to go and I said, "That's okay because we still have your statement to write." So then I asked him to walk me through the steps of what happened and I typed it up.

> …
> Q: Okay. And then what happened after that?
> A: When he was ready to urinate, he peed in the cup in his bed and I stood by the door with my back towards him for some privacy.
> Q: Okay. And what happened after that?
> A: I scanned it with our tablet that reads whether it is negative or positive and it came back presumptively positive. So we sealed it and he initialed and dated the seal on it and I put in a FedEx envelope and then I left the hospital and that was it.

This drug test was positive of marijuana metabolite.

The Claimant clearly suffered an injury to his hand as a result of his employment with the Respondent. At issue is whether the injury is compensable, or whether it falls outside the scope of compensability in that it was substantially occasioned by the use of illegal drugs. Ark. Code Ann. § 11-9-102(4)(B)(iv) states that a compensable injury does not include "injury where the accident was substantially occasioned by the use of […] illegal drugs." The presence of illegal drugs potentially creates a rebuttable presumption that the injury or accident was substantially occasioned by the use of illegal drugs. Ark. Code Ann. § 11-9-102(4)(B)(iv)(b). "Substantially occasioned" requires that there be a direct causal link between the use of illegal drugs and the injury in order for the injury to be considered non-compensable. *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 71, 977 S.W.2d 212, 216 (1998).

Initially, I find that the rebuttable presumption identified by Arkansas Code Annotated § 11-9-102(4)(B)(iv)(b) was not triggered by the facts of this

case. The decision of the ALJ was based almost exclusively on the admission of a drug screen which identified a marijuana metabolite in the Claimant's urine. For reasons stated below I find that these test results were improperly admitted into evidence. The Commission has broad discretion as to the admission of evidence, and its decision will not be reversed absent a showing of an abuse of discretion. *Tenner v. Aerocare Holdings, Inc.*, 2007 Ark. App. LEXIS 670 (2007). There are several irregularities in the process which raise concerns regarding the validity of the test results. First, the statutes relating to the triggering of the rebuttable presumption must be strictly construed. Arkansas Code Annotated §11-9-704(c)(3) Further, an employee is deemed to have consented to be tested for the presence of illegal substances by only "properly trained medical or law enforcement personnel." Arkansas Code Annotated § 11-9-102(4)(B)(iv)(c). Here, the operations manager for the Respondent testified that she went to the hospital where the Claimant was being treated and personally collected a urine sample from him. There is no evidence in the record that she was properly trained to conduct the procedure or that she fell within the parameters established by Arkansas Code Annotated § 11-9-102(4)(B)(iv)(c). Additionally, the evidence in the record shows that the urine sample was collected approximately 24 hours after the Claimant's work accident after the Claimant received surgical treatment and medications made necessary by such treatment. Based upon these

irregularities, I find that the statutory presumption identified in Arkansas Code Annotated § 11-9-102(4)(B)(iv)(b) was not created.

Further, there is ample testimony in the record as to Claimant's behavior before and after the accident which I find to be sufficient to meet his burden of proof that his accident did not result from the use of illegal drugs or alcohol. Claimant's mother, Mayra Figueroa testified that she spoke to the Claimant prior to him leaving for work and that his behavior was normal. Respondent witness, Eva Quintanilla testified that Claimant's work was satisfactory on the morning of the work accident. After the work accident, EMS found that the Claimant was alert and oriented to the person, place and event. The triage nurse at the hospital found that the Claimant was alert. The emergency room physician on duty, Dr. Kaleb Smithson, also found that the Claimant was alert and oriented to person, place, and time. There is not sufficient, credible evidence in the record to support the conclusion that the work accident in this case was substantially occasioned by the use of illegal drugs. On the other hand, there is substantial credible proof that the Claimant was not impaired based upon the witness testimony, and the medical records. Moreover, the Claimant's training for his job as a drill press operator at the time of his accident was inadequate and I find that this lack of training provides a more reasonable explanation for the Claimant's work accident.

Therefore, I find that the Claimant has met his burden of proof to show he sustained compensable injuries to his right wrist and hand, and that those injuries were not substantially occasioned by the use of illegal drugs.

For the reasons stated above, I respectfully dissent.

M. SCOTT WILLHITE, Commissioner