BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H303132

MIKEL MILLER, EMPLOYEE	CLAIMANT
SPURLOCK, INC., EMPLOYER	RESPONDENT
BITCO GENERAL INSURANCE CORPORATION, CARRIER/TPA	RESPONDENT

OPINION FILED JULY 30, 2024

Upon review before the Full Commission, Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal an administrative law judge's (ALJ) opinion filed February 21, 2024. The administrative law judge found that the claimant had overcome the rebuttable presumption of Ark. Code Ann. § 11-9-102(4)(B)(iv) and proven he sustained a compensable left wrist injury on May 10, 2023. After reviewing the record *de novo*, the Full Commission finds the claimant did not sustain a compensable injury.

The claimant sustained a left wrist injury when he fell through the roof of a building he was demolishing for the respondent employer on May

10, 2023. Upon arrival at the ER, the claimant tested positive for marijuana and benefits were denied by the carrier.

A prehearing order was filed on November 7, 2023. The claimant contended he sustained a compensable injury to his left wrist and although he tested positive for an illegal substance, the accident occurred as a result of the roof collapsing and his falling through it and had nothing to do with drug use at the time of the accident.

The respondents contended the claimant tested positive for an illegal drug on the day of the accident, and the use of the illegal drug was the cause of the accident.

The parties agreed the issues to be presented were compensability of an injury to the claimant's left wrist and the entitlement to benefits.

A hearing on this matter was held before an ALJ on January 29, 2024. At the hearing, the claimant testified that he believed he went to work for the respondent employer around October of 2022 as a general labor hand.

On May 10, 2023, his first day at a job site in Cabot, employees were demolishing an old strip mall. The claimant was instructed to get a piece of metal off a slanted metal roof, which was between thirteen (13) and fifteen (15) feet high and required a ladder to access. An impact gun was used to unscrew the metal, and when the claimant picked it up, the piece of metal folded, and he fell through landing on debris below.

After the fall, the claimant testified that he had pain in his left wrist and back, and his left wrist swelled. The claimant was transported by ambulance to the Baptist Health Springhill emergency room. He was drug tested upon arrival at the hospital and testified that he was concerned about the test because he had smoked marijuana two (2) weeks before. 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.

The second witness at the hearing was the claimant’s friend and roommate, Mason Garner, who was employed by the respondent and was on the job site on May 10, 2023. Mr. Garner witnessed part of the claimant’s 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.

Mr. Garner testified he had not noticed anything unusual about the claimant that day and had no reason to believe the claimant was under the influence of marijuana at the time of the accident, based upon his actions and demeanor. He signed a written statement, submitted into evidence, stating that the claimant was not under the influence of any illegal substance of any kind on May 10, 2023. Mr. Garner went on to testify, “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.”

Under cross-examination, Mr. Garner admitted he had never seen the claimant under the influence of drugs, and he would not know the difference between if he was or was not under the influence of drugs. He also admitted he was not trained in any way to detect if a person was impaired by drugs and had little medical knowledge of anything like that. He also admitted using marijuana before he got out of high school.

Dr. Ethan Shock, an orthopedic surgeon with OrthoArkansas performed surgery on the claimant's left wrist on May 22, 2023. The claimant returned to Dr. Schock on June 7, 2023, and received a short-arm cast. Dr. Shock opined in his report from the claimant's final visit on August 16, 2023, that the claimant lacked about 5 degrees of full flexion about the wrist and released the claimant from his care.

An administrative law judge filed an opinion on February 21, 2024. The administrative law judge found, among other things, that the claimant had 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 had proven he suffered a compensable left wrist injury on May 10, 2023. Additionally, he found the claimant had satisfied the burden of proving that he is entitled to reasonable and necessary medical treatment including the reasonable and necessary medical treatment that had already occurred, plus the unreimbursed travel expenses introduced at the hearing. The respondents appeal to the Full Commission.

Arkansas Code Annotated § 11-9-102(B)(iv) provides that

> 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.

Whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Weaver v*. *Whitaker Furniture Co*., 55 Ark. App. 400, 935 S.W.2d 584 (1996).

The Commission is not required to believe the testimony of any party or witness but may accept into its findings of fact only the portions of testimony that it deems worthy of belief. *American Greeting Corp*. *v*. *Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998).

A claimant's testimony is never considered uncontroverted, and his own self-serving testimony regarding the nature and extent of drug use is insufficient to overcome this presumption. *Nix v*. *Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Ester v*. *National Home Centers, Inc*., 61 Ark. App. 91, 967 S.W.2d 565 (1998). The visual assessment by a witness of a claimant's sobriety or intoxication alone is not sufficient evidence to rebut this statutory presumption. *Papageorge v*. *Tyson Shared Servs*., 2019 Ark. App. 603, 590 S.W.3d 800 (2019).

In the present case, the claimant tested positive for marijuana upon arriving at the hospital after his fall. At the hearing, the claimant admitted to

marijuana use and asserted that he was not disputing the results of the drug test; however, the claimant testified that his last marijuana use was two (2) weeks prior to his fall.

The claimant's sole corroborating witness was his friend and roommate, Mason Garner, who was present and witnessed the claimant's fall. Although Mr. Garner testified that he did not believe the claimant was under the influence of marijuana at the time of the accident, he later admitted that he had never seen the claimant under the influence of drugs and did not know the difference between if he is and if he isn't. He further testified that he was not trained to detect if a person was impaired by drugs, had little medical knowledge of anything like that, and his testimony was strictly on a layman basis.

In *Weaver v*. *Whitaker Furniture Co*., 55 Ark. App 400, 935 S.W.2d 584 (1996), the Commission stated while some accidental injuries might occur with little relationship to intoxication, a slip and fall type injury is of the type which could be influenced by the effect of the forbidden substances. Moreover, the record does not reveal whether the other persons who allegedly did not notice intoxication possessed any special training for making such assessments. *Id*.

This case is controlling and exactly on point with the facts of this case. The type accident sustained by the claimant in the case before us is the type that could be influenced by the effect of forbidden substances and

the claimant's witness who allegedly did not notice intoxication admitted he did not possess any special training to make such an assessment.

This self-serving, uncorroborated testimony by the claimant is insufficient to rebut the presumption that marijuana was the substantial cause of his injury, and there are no facts or evidence in the record that would support his testimony. To find the claimant has overcome the statutory presumption would require conjecture and speculation and impermissibly give the claimant the benefit of the doubt.

The claimant's sole witness, a friend, attempted to substantiate the claimant's testimony that the claimant was not under the influence of marijuana at the time of his accident. However, because that friend is neither a professional nor trained in detecting the symptoms of drug intoxication, his testimony is not enough to overcome the presumption. In addition, Mr. Gardner testified he had never seen the claimant under the influence of drugs and, as a result, would be unable to tell whether the claimant was or was not under the influence of drugs.

Without any evidence substantiating the claimant's contention that he was not under the influence of marijuana at the time of his injury, the claimant has failed to rebut the presumption set forth in Ark. Code Ann. § 11-9-102(B)(iv). Therefore, the claimant did not prove he had sustained a compensable injury to his left wrist on May 10, 2023. Accordingly, the

Opinion of the administrative law judge filed on February 21, 2024, is hereby reversed.

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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MICHAEL R. MAYTON, Commissioner

Commissioner Willhite dissents.

DISSENTING OPINION

The Administrative Law Judge (hereinafter referred to as "ALJ") found that an employer/employee relationship existed on May 10, 2023, 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, that the Claimant has satisfied the burden of proof that he is entitled to reasonable and necessary medical treatment, and finally, that the Claimant has satisfied the burden of proof, by a preponderance of the evidence, that he is entitled temporary total disability from the day following his injury through the date of July 9, 2023. After conducting a *de novo* review, I would concur with the ALJ's findings.

1. 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.

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)

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 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).

The Claimant testified that the accident in question happened after he began removing a piece of metal off a slanted roof as instructed by his supervisor. Claimant testified that he noticed that a lot of screws were missing off the roof and some spots of the metal were rusty. While using an impact gun to unscrew the remaining screw from the metal piece, the metal piece folded and the Claimant fell approximately thirteen (13) to fifteen (15) feet, landing on his left wrist. The Claimant was transported by ambulance to Baptist Health Emergency Department who noted the Claimant as oriented in event, person, place, and time. (Cl. Ex. 2 p. 2). At the hospital, Claimant was seen by Dr. Raymond E. Peeples who noted that Claimant's behavior and mood was normal. (Cl. Ex. 2, p. 11). Claimant was diagnosed with an intra-articular fracture of his left wrist as visualized by X-Ray. Claimant was tested for illegal substances on the date of the accident and tested positive for marijuana.

Claimant testified that he had smoked marijuana approximately two-weeks prior and was not under the influence of marijuana at the time of the accident. Mason Garner, Claimant's co-worker, testified that the Claimant was not acting unusual on the date of the accident, that he had no reason to believe that Claimant was under the influence of marijuana at the time of the accident based upon Claimant's actions and demeanor, and that

Claimant was acting "normal." Garner also testified that he had never seen the Claimant under the influence of drugs and was not a trained toxicologist.

The question at issue is whether the Claimant can overcome the presumption that the use of illegal drugs caused the work accident. I find that the Claimant has overcome this presumption. The Claimant was told to remove a metal piece from a slanted roof, the metal piece was not secured properly and folded underneath the Claimant causing him to fall approximately thirteen (13) to fifteen (15) feet. Regardless of the Claimant's marijuana usage, the credible evidence suggests that this accident would have occurred.

The uncorroborated testimony of an interested party is never considered uncontradicted, but this does not mean that the fact-finder may not find such testimony to be credible and believable or that it must reject such testimony if it finds the testimony worthy of belief. *Continental Express v.* Harris, 61 Ark. App. 198, 965 S.W.2d 811 (1998). In the case at hand, the Claimant proved himself a credible witness. Claimant admitted to smoking marijuana two-weeks prior to the accident. Claimant willingly took the drug test as required by his workplace. Claimant testified that he has smoked marijuana in the past. Further, the EMT's in the ambulance, the physician at the emergency department, and Claimant's

coworker, Mason Garner, all found that Claimant was acting normally on the date of the accident.

Therefore, I would rule that he has overcome the presumption created by Ark. Code Ann. § 11-9-102(4)(B)(iv) and thus has satisfied the burden of proof, by a preponderance of the evidence, that he suffered a compensable left wrist injury on May 10, 2023.

2. 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.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). Reasonable and necessary medical services may include those necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; or to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. *Jordan v. Tyson Foods, Inc*., 51 Ark. App. 100, 911 S.W.2d 593 (1995).

As Claimant has satisfied the burden of proof that he suffered a compensable left wrist injury on May 10, 2023 and overcome the presumption of Ark. Code Ann. § 11-9-102(4)(B)(iv), he is entitled to

reasonable and necessary medical treatment for his injury including the medical treatment which has already occurred.

3. That the Claimant has satisfied the burden of proof, by a preponderance of the evidence, that he is entitled temporary total disability from the day following his injury through the date of July 9, 2023.

Temporary total disability benefits are appropriate where the employee remains in the healing period and is totally incapacitated from earning wages. Ark. State Highway Dep't v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

The Claimant was taken off of work by Dr. Ethan Schock on May 11, 2023 for his compensable left-wrist injury and was to remain off of work until after a post-operative visit occurred. The Claimant had surgery on May 22, 2023. Claimant was fully released at maximum medical improvement on August 16, 2023 by Dr. Schock. The Claimant began employment with another employer on July 10, 2023.

Therefore, I would rule that the Claimant has satisfied the burden of proof by a preponderance of the evidence that he is entitled to temporary total disability from the day following his injury through July 9, 2023.

For the reasons stated above, I respectfully dissent.

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M. SCOTT WILLHITE, Commissioner