

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. H010323**

|                                           |            |
|-------------------------------------------|------------|
| ANTONIO BROWN, Employee                   | CLAIMANT   |
| CITY OF FORT SMITH, Employer              | RESPONDENT |
| CENTRAL ADJUSTMENT CO., INC., Carrier/TPA | RESPONDENT |

**OPINION FILED DECEMBER 7, 2021**

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by AARON L. MARTIN, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by DOUGLAS M. CARSON, Attorney at Law, Fort Smith, Arkansas.

**STATEMENT OF THE CASE**

On September 9, 2021, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on July 7, 2021, and a Pre-hearing Order was filed on July 8, 2021. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury to his low back on July 10, 2020.
4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$369.00 for total disability benefits and \$277.00 for permanent partial disability benefits.
5. Respondents paid medical expenses through August 3, 2020.
6. Claimant was terminated on July 30, 2020.

By agreement of the parties the issues to litigate are limited to the following:

1. Claimant's entitlement to compensation under A.C.A. §11-9-505(a)(1).
2. Attorney's fee.

Claimant's contentions are:

"The claimant believes that the parties will stipulate that he sustained a compensable injury to his lower back on July 10, 2020. The claimant was fired on 7/29/20 for allegedly refusing to take a drug test. The claimant will contend that the respondent without reasonable cause refused to return the claimant to work where suitable employment was available and that the respondent is liable for benefits under §11-9-505(a)(1), not to exceed one year.

Next, the claimant will contend that the respondent has controverted the indemnity benefits sought and is entitled to controverted attorney fees.

Finally, the claimant hereby reserves all other issues at this time."

The respondents' contentions are as follows:

"Following claimant's compensable injury, he was prescribed certain medical treatment by his physician, Dr. Terry Clark. Claimant canceled his physical therapy appointment for July 23, 2020 and was a no-show for his physical therapy appointment on July 24, 2020. He was a no-show for medical appointments with Dr. Clark on July 28, 2020 and July 29, 2020, and canceled his appointment with Dr. Clark for July 30, 2020.

Claimant was required to give a urine sample for drug testing on or about July 21, 2020. The sample claimant provided was not within the temperature limits required by the Medical Drug Testing Custody and Control Form, indicating possible tampering.

The respondent's termination of claimant's employment was not 'without cause' and was not a 'refusal' to return claimant to work under Ark. Code Ann. §505(a) because claimant refused to undergo recommended medical care through repeated missed and cancelled appointments and claimant also provided a urine sample for drug testing which did not meet the temperature requirements to be considered a valid sample.

Claimant’s attorney is not entitled to an attorney’s fee.”

The claimant in this matter is a 34-year-old male who sustained a compensable injury to his low back on July 10, 2020. The claimant was employed with the respondent in their residential and yard waste department. The claimant described his injury to have occurred when throwing recycling into a bag and felt a sharp pop in the lower part of his back. The claimant was seen on July 10 of 2020 at Mercy Occupational Clinic in Fort Smith by Dr. Terry Clark. The claimant was diagnosed with “strain of muscle, fascia and tendon of lower back.” The claimant was prescribed Robaxin, 500 mg. “take one or two tablets by mouth every six hours as needed for back pain or neck pain or spasm” by Dr. Clark. The claimant was also placed on restricted duty of “Back: lifting should be limited to 20 pounds or less. Lifting repetitively should be limited to 10 pounds or less. Limit bending/stooping/twisting. Alternate sit/stand/walk as tolerated.”

On July 16, 2020, the claimant was again seen by Dr. Clark. The claimant continued to complain of back pain that was “variable – depending on activity level.” It was noted that bending and twisting made it worse and rest improved his condition. Dr. Clark’s note also states, “He feels it is improving slightly. His pain level is 6.” The claimant was recommended to undergo physical therapy three times per week for two weeks and was prescribed 30 Mobic 15 mg. pills that he was instructed to take once per day. The claimant’s restricted duty was also continued.

On cross-examination the claimant was asked about a conversation he had with his supervisor, Mitchell Parker, on July 20, 2020. Mr. Parker is the residential collection manager in the respondent’s sanitation department. Following is the claimant’s testimony:

Q The day before this visit that we are talking about, do you recall – on July 20, do you recall having a conversation with Mitchell Parker?

A Yes, I do.

Q Did you tell Mitchell Parker that you needed more pain pills?

A I told Mitchell Parker that I had been taking double my pain pills and the weekend was rolling around and it was Friday, so I knew I wasn't going to be able to get seen. I was trying to hurry up and get seen before the day ended. But, yes, I did tell Mitch Parker that I was taking double and that that was two pills.

Mr. Parker was called as a witness by the respondent in this matter and gave the following testimony on direct examination about his conversation with the claimant on July 20, 2020 and his actions shortly thereafter:

Q Do you recall a conversation with Mr. Brown that occurred on July 20 of 2020?

A Yes.

Q Can you tell the Court essentially what information he gave to you in that conversation?

A He told me that his pain meds – he was out of it and needed to go back to the doctor, so I told him that I would get ahold of HR and that he would need to contact HR because they would have to set up an appointment with him since he was on workmens' comp.

Q Now, in your job, do you keep up with Mr. Brown or any employee who may have medical issues, do you keep up with their doctors visits, medical prescriptions, and that kind of thing as part of your job?

A No.

Q It's just not part of what you are assigned to do?

A No.

Q When Mr. Brown told you that he needed more pain medications on July 20, what did you do with that information?

A I called Randy in HR and let him know.

Q And when you say "Randy," is his last name Swaim?

A Yes, it is.

Q That's S-w-a-i-m. Did you do anything personally about scheduling further medical care, or getting pain meds for Mr. Brown, or anything like that?

A No.

Q Did you have any role in setting up his doctor's office visit the next day?

A No.

Q At the time that Mr. Brown gave you this information in which he said he was running low on pain meds, did you know that only four days before, he had been at the doctor and received a 30 tablet prescription?

A No.

Q He just told you he needed pain meds, and you told him to call HR; is that right?

A Yes.

Q Did you contact the HR department yourself after this conversation?

A Yes, I contacted Randy Swaim.

Q What did you – I'm sorry, I didn't mean to speak over you.

A I called and let him know that Antonio Brown would be getting in touch with him and he needed to get back to the doctor to get some more pain medication.

Q So essentially, you told Randy Swaim what Mr. Brown told you?

A Yes.

The respondent called Randy Swaim as a witness in this matter. Mr. Swaim is employed as the respondent's Safety and Risk Coordinator. Mr. Swaim was asked on direct examination about his conversation with Mr. Parker on July 20, 2020 and the actions he took after that conversation as follows:

Q As safety and risk coordinator, were you involved in Mr. Brown's workers' compensation claim after he was injured and prior to the time he was terminated?

A Yes, sir.

Q I want to focus on the date of July 20, 2020. Were you contacted by Mitchell Parker on that date?

A Yes, sir.

Q What information did Mr. Parker relay to you?

A Mr. Parker contacted me and stated that Mr. Brown had stated he was out of pain pills and needed more pain pills.

Q When you received this information, was it correct that only four days earlier on July 16, Mr. Brown had received a 30 day supply – or a 30 day prescription from his doctor on July 16?

A Yes, sir.

Q The 30 day supply was written only four days before this conversation; is that correct?

A Yes, sir.

Q And yet Mr. Parker was telling you that the claimant said he was in need of further pain meds. Is that right?

A Yes, sir.

Q After getting this information from Mr. Parker, what did you do?

A I contacted Ms. Hannah Wiley, the claims adjuster with Central Adjustments Company who was handling that claim, and advised her that Mr. Parker had contacted me and Mr. Brown stated that he was out of his pain pills and needed more.

Q For the Judge's general information, the City of Fort Smith employs a third-party administrator known as Central Adjustment Company to handle the day-to-day decisions in matters on workers' compensation claims. Is that correct?

A Yes, sir.

Q And Hannah Wiley is an employee of that company?

A Yes, sir.

Q Did you suggest to Hannah Wiley that the claimant ought to receive a drug test?

A Yes, sir.

Q Why did you make that suggestion to her?

A At that point, I was concerned because the prescription had been filled for 30 pills on July the 16<sup>th</sup> and given a four day window I was concerned that either possibly the prescription was being abused or possibly it was being sold; that they were not being taken consistent with the prescription.

Q So you believe that the claimant telling Mitchell Parker four days after receiving a 30 day prescription that he needed additional pills gave rise to a reasonable suspicion that he might somehow be abusing his prescription drugs?

A Yes, sir.

Q And is that why you requested the drug test?

A Yes, sir.

On July 21, 2020 the claimant was again seen by Dr. Clark at 8:15 a.m. The claimant indicated that his condition was getting worse with a pain level of 9. Dr. Clark's medical record from that visit states, "He says the muscle relaxers seem to help but he was taking four at a time." I note that the claimant denied in testimony telling Dr. Clark that he was taking four pills at a time and instead insisted that he was only taking two pills at a time. The claimant was prescribed 30 Cyclobenzaprine 10 mg. pills and instructed to take one every eight hours as needed for neck or back pain/spasm. The claimant was also placed in a "no work capacity" at that time.

On that same day the claimant gave a urine sample for a drug test that had been requested by the respondent. The report from that drug screening is found at Respondent's Exhibit 1, page. 9. It indicates the "reason for the test" was "reasonable suspicion/cause." The report also indicates that the urine specimen's temperature was out of range and that the claimant left the testing facility. The respondent was notified of this result at 9:46 a.m.

The claimant was asked about this July 21, 2020 drug test on direct examination as follows:

A Well, after being seen by the doctor, I submitted a urine sample.

The urine sample was not mine. I did bring that urine sample in myself. It didn't register, so they sent me out to the lobby to re-test and once they sent me out to the lobby I received a phone call that I had a family emergency going on with my son. Once I received that message, I let Mitch Parker know first and then I let Ms. Wagner know what was going on and that was – that the temperature was not hot enough, and that I needed to re-test, and that I would be willing to take another test to come back for.

Q So you had an emergency with your son. What was the emergency with your son?

A He was exposed to Covid.

Q I think you said you notified your employer. I want to get into more specifics. Why did you notify your employer?

A I notified them by phone.

Q Who did you call?

A The first call was to Mitch Parker.

Q What did you tell Mitch?

A I let Mitch know that my urine sample wasn't registering hot enough and that I had to take a re-test and that I needed to go to the lobby for the re-test, and I had a emergency phone call about my son being exposed to Covid.

Q Did you notify anybody else?

A I notified Ms. Wagner, too, as well; yes.

Q Who is Ms. Wagner?

A Ms. Wagner is in the HR department.

Q What is her first name?

A I think it's Sarah.

Q What did you tell Ms. Wagner?

A I told Ms. Wagner that – the same thing that I told Mitch, the test registered not hot enough and I needed to re-test. I told Ms. Wagner that I did have a medical marijuana card and that I would be willing to come back up there and re-test and take that



test for her.

The claimant was also asked about his July 21, 2020 drug test on cross examination:

Q Now, on the visit the next day on July 21, 2020, you have already testified you brought a urine sample with you rather than producing that urine sample or urinating at the doctor's office to produce that sample. Is that correct?

A Yes, sir.

Q How did you know to bring a urine sample at that time?

A I didn't. I just - I brought the urine sample just because I wasn't sure if the City was going to accept my medical marijuana card that I had been taking because it was for pain.

Q You mentioned earlier that you told the City that you had a medical marijuana card. Did you tell the City that in this conversation with Samantha Wagner that you were describing earlier?

A Did I tell Ms. Wagner that?

Q Yes.

A Yes, I told Ms. Wagner on the phone that I did have a medical marijuana card.

Q Had you told anybody with the City of Fort Smith before this conversation on July 21 that you had a medical marijuana card?

A No, I did not.

The claimant was also asked on cross examination about his leaving the doctor's office after being asked to provide another urine sample and his emergency that he alleges caused him to leave as follows:

Q Thank you. And you do agree that the doctor's office asked you to wait and give a urine sample that you produced there in the doctor's office? In other words, urinating in a jar while in the doctor's office; is that right?

A Yes.

Q And you said that while you were waiting, you got this

telephone call. Is that correct?

A Yes.

Q Did the doctor's office tell you that if you left the test without providing a valid urine sample, that it would be considered a failed test?

A They did after I told them that I had that emergency.

Q But you decided to leave anyway; is that right?

A Yes.

Q Now, in fact, did you actually pick up your child at that time?

A No, I did not get to pick him up.

Q What happened to your child?

A He was exposed to Covid.

Q I didn't ask a very good question. Who was he with?

A My mother.

Q How did your child get in your mother's care at that point, or her custody, however you want to put it?

A I'm not sure. I think she had him that day.

Q Did your child stay with your mother the remainder of the day?

A I couldn't – I couldn't tell you if he did or not because I didn't – I didn't get to go check on him personally. I just got a telephone call.

Q But this much is clear; whether he stayed with your mother or someone else, you did not take – I'm going to use the word "custody" generally, not in a legal custody sense – you did not take custody of your child that day when you left the doctor's office. Is that right?

A No, I did not. I just left and then once I did leave, they basically told me he was alright or that he was just exposed to Covid.

The respondent called Ms. Samantha Wagner as a witness. Ms. Wagner is an administrative coordinator for the respondent's human resources department. Ms. Wagner stated that her job was clerical in nature and that she did not routinely handle the administration of workers' compensation claims. Ms. Wagner testified that she did speak to the claimant on July 21, 2020 and that she just happened to pick up the phone when it rang. Following is a portion of her testimony about her conversation with the claimant.

Q What information did he give you about why he was calling?

A He told me – he started talking about workers' comp things and he told me that he needed to take a test, and I told him that I would need to talk to Randy Swaim about it because I had no idea what he was talking about. He mentioned that he had his medical marijuana card and he talked to his lawyer and his lawyer said that he would be okay. Again, I had to tell him that I had to talk to Randy because I had no idea what was going on.

Q Did he tell you whether or not he had completed a test that day on July 21?

A Yes, he had told me he took a test earlier that day.

Q And he told you that he had completed the test; is that correct?

A Yes.

Q Did he give you any indication about the results of that test in this conversation?

A I asked him if the test results came back negative, and he said yes.

Q So he not only told you he had taken the test; he told you he had a negative result?

A Yes.

Q Are you positive about that?

A Yes.

Q Could you have made a mistake or a misunderstanding of

what he was trying to tell you?

A I don't believe so.

Q What did you tell him about getting a different test, or a re-test, or a test on another day?

A I didn't tell him anything about a new test.

Q Specifically, did you tell him that you would arrange for another test that day and that you would get back with him?

A No.

Q When you – before I move on, was there anything else in this conversation besides what you've already told the judge?

A He told me that he went and took a test earlier that day and that he said he had to leave the facility because of a family emergency, but he told me he got a negative test on both. I didn't know that he didn't take another test at the time he had to leave with the child emergency.

Q So your testimony is he definitely told you he completed the test and had a negative result?

A Yes, earlier in the day.

Following is a portion of Ms. Wagner's cross-examination testimony:

Q ... And just to confirm, Mr. Brown in this conversation said that he needed to take another test?

A Yes.

Q Why would he need to take another test?

A I don't know.

Q If he had taken a test and it was negative, it's kind of strange that he needed to take another one. Did it seem strange to you?

A No. I didn't know what he was talking about.

Q Was there some miscommunication?

A On that part, maybe.

Q And he said he had already taken a test earlier on that day, and you asked him if it came back negative. Do you recall if that's what he specifically said, or do you remember generally that's what he said?

A. That's what he said.

Q Specific

A Yes.

Q And he said yes?

A Correct.

Q And did you believe that he meant that the test came back negative for drugs or negative that it was invalid?

A I don't know.

The claimant continued to treat for his compensable back injury until he was released on August 3, 2020 at maximum medical improvement by Dr. Clark. The claimant did miss and change appointments for his compensable injury during that time period. It was the claimant's testimony that he had a lack of transportation due to mechanical problems with his automobile.

On July 30, 2020, Mr. Rick Lolley, the respondent's Director of Human Resources, authored a letter to the claimant. In that letter Mr. Lolley informed the claimant that his employment with the respondent had been terminated. The letter is found at Claimant's Exhibit 2, Pages 6 and 7. Following is a portion of that letter:

At the July 21<sup>st</sup> appointment, you were required to submit a urine sample for a drug screen. You submitted a sample that did not meet the temperature requirements to be a valid sample. You were given the opportunity by clinic staff to drink some water while remaining at the clinic and then submit a urine sample. Approximately ten minutes after being given that opportunity, you told a clinic staff member you had a family emergency and had to leave. You were informed by the staff member that if you did not complete the drug screen, the drug screen result

would be considered positive. You subsequently left the clinic without completing the drug screen.

After you left the clinic, you called the human resources department of the City of Fort Smith and talked to Samantha Wagner, Administrative Coordinator. You told Ms. Wagner that you had left the clinic without completing a drug test because you had a child emergency. You also told Ms. Wagner you were scared because you have a medical marijuana card. You stated you had talked to a lawyer who said you would be okay, so you took another drug test. Ms. Wagner asked if the test came back negative, to which you responded that it did. The human resources department confirmed with Mercy Occupational Medicine you did not submit a valid urine sample for a drug screen.

In addition, you rescheduled a July 23<sup>rd</sup> physical therapy appointment on your own, and did not attend or cancel the rescheduled appointment. You also rescheduled a July 28<sup>th</sup> doctor appointment on your own and did not attend or cancel the rescheduled appointment.

Mr. Lolley was called as a witness by the respondent. Mr. Lolley explained that he does not have the final decision to terminate an employee of the respondent. Instead, that responsibility falls on the respondent's City Administrator. Mr. Lolley provides a recommendation and then the City Administrator makes the decision. Mr. Lolley was asked about information he had in making his recommendation to terminate the claimant's employment on direct examination as follows:

Q What information did you receive prior to making your recommendation to terminate the claimant's employment?

A I received information from Randy Swaim, our regional safety coordinator, I received information from Samantha Wagner, and information from Mr. Swaim, including things that we've heard about missed appointments, drug screens out of range, and then a failure to submit a proper drug screen or urine sample, and then the comments that Ms. Wagner – the phone call that Mr. Brown had with her.

Q What documentation did you review, also, or did you?

A Documentation of?

Q Concerning his medical condition after the accident.

A I was kept informed from Mr. Swaim about the prescriptions and the return to work and that he was going back to the doctor for additional – he said again because he requested more pain medicine.

Q Mr. Swaim is a subordinate of you in the Human Resources Department; is that right?

A That's correct. He reports directly to me.

Q So Mr. Swaim gets information and reports it to you?

A Yes.

Mr. Lolley's testimony also included questions and answers regarding the respondent's drug and drug testing policies which can be found at Pages 8 through 14 of Claimant's Exhibit 2.

The claimant has asked the Commission to determine whether he is entitled to compensation under A.C.A. §11-9-505(a)(1) which states:

Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay the employee the difference between benefits received and the average weekly wages lost during the period of refusal, for a period not exceeding one (1) year.

The claimant's credibility in this matter is very low. Clearly it was his intent to deceive the medical provider performing his drug test and the respondent when he brought another person's urine sample to be used as his own in a drug test. I find that the respondent did act with reasonable cause in refusing to return the claimant to work by terminating his employment. Given the facts concerning the claimant's either very low or completely depleted prescription drugs that had just recently been provided to him and the respondent's written policy it was reasonable to request the drug test of the claimant. The

claimant's urine sample, that we now know was not his own, being out of temperature range and his departure from the facility prior to giving another sample are fireable offenses under the respondent's written policy and I find them to be reasonable grounds for termination. As to the claimant's conversation with Ms. Wagner and the issues with changed and missed appointments, those are more ancillary in nature. The failed drug test, however, was a reasonable cause for his termination. The claimant's emergency does not appear to really be an emergency as he did not even tend to his child, and I believe it was simply an excuse not to provide a sample on July 21, 2020. The claimant has failed to prove he is entitled to compensation under A.C.A. §11-9-505(a)(1).

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 7, 2021, and contained in a Pre-hearing Order filed July 8, 2021, are hereby accepted as fact.
2. The claimant has failed to prove by a preponderance of the evidence that he is entitled to compensation under A.C.A. §11-9-505(a)(1).
3. The claimant has failed to prove that his attorney is entitled to an attorney's fee in this matter.

**ORDER**

Pursuant to the above findings and conclusions, I have no alternative but to deny this claim in its entirety.



**IT IS SO ORDERED.**

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**HONORABLE ERIC PAUL WELLS  
ADMINISTRATIVE LAW JUDGE**