

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. G906118**

<b>JOSHUA C. BROWN, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>GEORGIA PACIFIC, LLC, EMPLOYER</b>	<b>RESPONDENT</b>
<b>ESIS, INC., INS CARRIER/TPA</b>	<b>RESPONDENT</b>

**OPINION AND ORDER FILED JUNE 9, 2020**

Hearing conducted on March 11, 2021, before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, in El Dorado, Union County, Arkansas.

The claimant was represented by the Honorable F. Mattison Thomas, III, Thomas Law Firm, El Dorado, Union County, Arkansas.

The respondents were represented by the Honorable Rick Behring, Jr., Mayton, Newkirk & Jones, Little Rock, Pulaski County, Arkansas.

**INTRODUCTION**

In the Prehearing Order filed January 14, 2021, the parties agreed to the following stipulations, which they modified and affirmed on the record at the hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed with the claimant at all relevant times including, April 9, 2019, and April 19, 2019, when the claimant sustained two (2) separate specific-incident compensable injuries, the first to his tailbone/lower back (April 9, 2019); and a second "medical only" injury to his left thumb (April 19, 2019).
3. The claimant's average weekly wage (AWW) is \$898.40 which entitles him to weekly compensation rates of \$599.00 for temporary total disability (TTD), and \$449.00 for permanent partial disability (PPD) benefits.
4. The respondents accepted these injuries as compensable and paid both medical and indemnity benefits.
5. The claimant voluntarily left his job with the respondents effective on or about May 1, 2019.

6. The respondents controvert the payment of any additional medical or indemnity benefits for either the April 9, 2019, or the April 19, 2019 compensable injuries.
7. All parties specifically reserve any and all other issues for future determination and/or hearing.

(Commission Exhibit 1 at 1-2; Hearing Transcript at 5-6).

Pursuant to the parties' mutual agreement, the issues litigated at the hearing were:

1. Whether the claimant is entitled to the payment of additional TTD benefits from the date he left work, April 25, 2019, through a date yet to be determined.
2. Whether the claimant's attorney is entitled to a controverted fee on these facts.
3. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. 5-6).

The claimant sustained compensable injuries on April 9, 2019 (tailbone/lower back), and April 19, 2019 (left thumb). The claimant contends he is entitled to TTD benefits from the date he last worked at the respondent-employer, Georgia Pacific (Georgia Pacific), April 25, 2019 to August 20, 2020, when his one (1)-time-only change of physician (COP) doctor, Dr. J. Michael Calhoun, took him off work so he could begin physical therapy (PT), at which time the respondents began paying him TTD benefits. Furthermore, the claimant contends his attorney is entitled to a controverted fee based on the TTD benefits to which the claimant contends he is entitled from April 25, 2019, through August 20, 2020. The claimant reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 2-3; T. 65-68).

The respondents contend they have accepted both the claimant's April 9, 2019 tailbone/lower back, and his April 19, 2019, left thumb laceration injury, and they have paid and

are continuing to pay, all appropriate medical and indemnity benefits to which the claimant is entitled. Moreover, the respondents contend they offered the claimant work within the restrictions his COP doctor, Dr. Calhoun, placed on him; but the claimant has unjustifiably failed and/or refused to even attempt this light duty work. Alternatively, the respondents contend that none of the claimant's treating physicians took him off work until his COP provider did so on May 13, 2020; therefore, the respondents may not properly be deemed liable for any TTD benefits before this date. Finally, the respondents hereby request a dollar-for-dollar set-off pursuant to *Ark. Code Ann.* Section 11-9-410 (2020 Lexis Replacement) for any and all benefits paid to or on the claimant's behalf from any and all third-parties, including but not limited to, group health insurance, short-term disability (STD), and/or long-term disability benefits, as well as unemployment compensation benefits. The respondents specifically reserve any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 2-3; T. 66-68).

The record consists of the hearing transcript and any and all exhibits contained therein and attached thereto, as well as the parties' blue-backed post-hearing briefs.

### **STATEMENT OF THE CASE**

The claimant, Joshua C. Brown, is 48 years old. While working for Georgia Pacific on April 9, 2019, he sustained a compensable injury to his tailbone/lower back when he slipped and fell backwards, landing on his buttocks. The respondents provided medical treatment to the claimant on the same day via their company physician, Dr. Mark Malloy. After Dr. Malloy examined him, the claimant requested he be placed on light duty; however, Dr. Malloy released him to return to work without any physical limitations or work restrictions. (Respondents' Exhibit

1 at 2-4; T. 28). At the hearing the claimant testified he returned to work the next day, April 10, 2019, performing his regular job duties. (T. 28).

The claimant continued to work performing his normal job duties without restrictions until he sustained a second, separate injury to his left thumb on April 19, 2019. This injury was a small laceration to his left thumb. (T. 26). The claimant was treated on the employer's premises for the cut to his left thumb, and was instructed to return to work. (T. 30, 56). The claimant was unhappy he had not been taken to the hospital for his cut left thumb. On April 22, 2019, on his own initiative the claimant sought additional medical treatment for his cut left thumb from his family physician at the Family Clinic of Ashley County (Family Clinic) in Crossett, Arkansas. (RX1 at 7-10; T. 30-31). The Family Clinic records contain no mention of the claimant making any lower back complaints at that time. (RX1 at 8-9). The clinic note for this visit states: "Exam: . . . Back: normal exam of spine, ribs and pelvis. (RX1 at 9). The claimant testified at the hearing he had in fact complained of lower back pain, but his primary care physician must have omitted his complaints. (T. 29).

Ms. Veronica Cameron, a nurse with Georgia Pacific, testified in person at the hearing. She testified the claimant made no mention of continued lower back pain when he was performing his normal job duties from April 10, 2019 through April 19, 2019. (T. 55). Ms. Cameron testified she tried to contact the claimant several times to follow up with him on the cut to his left thumb in order to schedule an appoint with the company physician, Dr. Malloy; however, the claimant initially refused to respond to her calls. The claimant did eventually talk to Ms. Cameron and told her he did not have time to come into work for the appointment. (T. 57).

When the claimant did return to work, Ms. Cameron took him to see Dr. Malloy so the doctor could examine his thumb laceration. (T. 27, 58). After Dr. Malloy examined the cut on the claimant's thumb, the claimant once again asked that Dr. Malloy release him to return to work with restrictions. Dr. Malloy did release the claimant to return to work; but he released the claimant to return to his regular job duties without any physical limitations or restrictions. (RX1 at 11-13; T. 27; 13, 29). The claimant was upset Dr. Malloy released him to return to full duty with no physical limitations or restrictions, so he simply did not report back to work. After being warned in writing about his failure and/or refusal to report to work, to call-in, to be available by phone when his employer called him, and in light of his unexcused absences, Georgia Pacific deemed the claimant to have abandoned his job, and terminated him effective May 1, 2019. (Respondents' Exhibit 2 at 2; T. 29-30, 31).

Thereafter, the claimant applied for and received unemployment benefits from the Employment Security Division of the Arkansas Department of Workforce Services. He applied some four (4) times for unemployment benefits, and ultimately drew a total of \$10,471.00 in unemployment compensation benefits from the State of Arkansas between November 2, 2019, through August 31, 2020. On each application for unemployment benefits, the claimant represented, under penalty of perjury, that he was both physically capable of working, and available to work during this period of time. (RX2 at 4-5; 6-25; T. 36-41). The claimant acknowledged on cross-examination he was a convicted felon, having been convicted of theft – a crime of dishonesty – in 2002. (T. 41).

The claimant testified he was continuing to have lower back pain after he abandoned his employment at Georgia Pacific in April 2019, and he requested, and the Commission granted, his

COP request to Dr. Calhoun by order dated May 4, 2020. (T. 31-32; Claimant's Exhibit 1 at 1-2). The claimant testified at the hearing that none of the physicians who treated him including Drs. Malloy, Bruffett, or his primary care physician, had ever taken him off work or placed any work restrictions on him from April 24, 2019 through May of 2020, when he first saw his COP doctor, Dr. Calhoun. (T. 33-34).

## **DISCUSSION**

### **The Burden of Proof**

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2020 Lexis Replacement.). The claimant has the burden of proving, by a preponderance of the evidence, that he is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party. *Ark. Code Ann.* § 11-9-704(c)(4) (2020 Repl.); *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep't of Corrections v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Deana Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission's exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardee's*, 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's

or any other witness's testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002).

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission's province to weigh the totality of the medical evidence and to determine what evidence is most credible. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

The claimant seeks TTD benefits from April 25, 2019, through May 13, 2020, as well as a controverted attorney's fee based on these TTD benefits. In order to prevail, he must prove by a preponderance of the evidence that (1) he was within a healing period during this time period, and (2) was totally incapacitated from earning wages. *Adams v. Georgia Pacific*, 2014 Ark. App. 558, 444 S.W.3d 897 (2014 Ark. App.). I find the claimant has failed to meet his burden of proof in this regard, for the following reasons.

First, it must be noted the claimant, who admitted he had been convicted of a crime of dishonesty, theft, in 2002, did not make a credible witness. His demeanor on the witness stand revealed him to have a rather hostile, uncooperative, defiant attitude toward his employer. In addition, cross-examination revealed a number of inconsistencies between the claimant's testimony and the medial and other evidence of record. Conversely, I found the testimony of the respondents' witness, Ms. Cameron, to be even-tempered, consistent with the medical and other evidence of record and, therefore, more credible than the claimant's own self-serving testimony.

Second, and most significant on these facts, the claimant has failed to offer any objective medical evidence to support a finding he was within his healing period and totally incapacitated from work during the time period for which he is requesting TTD benefits, April 25, 2019, through May 13, 2020. To his credit, the claimant readily admitted no physician took him off work or recommended any work restrictions during this time period. Indeed, neither Dr. Malloy, the claimant's own primary care physician at the Family Clinic, or Dr. Wayne Bruffett, an orthopedic surgeon, ever took the claimant off work. It was not until the claimant first saw his COP doctor, Dr. Calhoun, that he was given any work restrictions whatsoever and later taken off work.

Third, the claimant's request for TTD benefits relies largely on his testimony that his lower back condition was severe enough to preclude him from work. However, the evidence reveals the claimant returned to work for almost two (2) weeks before he cut his thumb. Indeed, the record reveals further the reason the claimant did not return to work after the obviously minor cut to his left thumb was because – as the parties stipulated at the hearing – the claimant voluntarily abandoned his employment, apparently because he was unhappy with his employer about issues related to the obviously minor cut on his thumb.

Fourth, the claimant testified he had spent some of the time period in question caring for his mother, which included his performing physical household chores. In addition, and significantly, the claimant completed at least four (4) applications for unemployment benefits, and represented on these applications under penalty of perjury that he was available to work full time, immediately, and that he had no disabilities that would prevent him from working. (RX2 at 6-25; T. 36-39). At the hearing the claimant testified under oath that his responses to questions on the unemployment applications were truthful. (T. 36-39). He cannot contend he was temporarily



totally disabled, while at the same time stating under penalty of perjury on his various applications for unemployment benefits that he was physically capable of immediately returning to work, and that he had no disabilities that would prevent him from working. (RX2 at 6-25).

While he testified at the hearing his family physician failed to note his alleged complaints of lower back pain when he went to see him for his minor thumb laceration, the medical records from the Family Clinic contradict his testimony in this regard. His family doctor's records contain no evidence the claimant complained of lower back pain on April 22, 2019. (RX1 at 8-10). In fact, he himself testified in his sworn deposition testimony, and as he admitted at the hearing, his lower back condition worsened about six (6) months prior to the deposition. This was at a time when the claimant had not been working for Georgia Pacific for many months, since he admitted he walked off the job, abandoning his employment, on April 25, 2019. (T. 33; 30-36).

In his brief, the claimant appears to argue that since he saw the COP, Dr. Calhoun, and the respondents commenced paying TTD benefits thereafter, this means he has been temporarily totally disabled from the time he admittedly walked away from his job at Georgia Pacific on April 25, 2019, through August 20, 2020. The claimant cites *King v. Peopleworks*, 97 Ark. App. 105 (Ark. App. 1997), for the proposition that the receipt of unemployment benefits will not preclude a claimant from being entitled to TTD benefits (and the unemployment benefits only serve as a credit toward any TTD benefits the claimant may be awarded) if it is later determined the claimant was within a healing period and totally incapacitated from earning wages during the time period he was drawing unemployment benefits. While the claimant correctly cites the holding in *King*, *supra*, the facts of this case are clearly distinguishable from those in *King*.

The facts of the present claim are more analogous to those of *Allen Canning Co. v. Woodruff*, 92 Ark. App. 237, 212 S.W.3d 25 (Ark. App. 2005). In *Allen Canning Co.*, our court of appeals affirmed the Commission's denial of benefits where, as here, the claimant could not prove he was within a healing period and totally incapacitated from earning wages. Similar to the present claim, in *Allen Canning Co.*, the claimant sought additional TTD benefits. In finding the claimant failed to meet his burden of proof in demonstrated he was entitled to TTD benefits, the court explained:

In the present case, the Commission found that appellee failed to prove by a preponderance of the evidence that he was totally incapacitated from earning wages after July 18, 2003, and there is substantial evidence to support this finding. In arriving at this conclusion, the Commission relied upon several factors that were set forth in its opinion—the physical therapist's August 8, 2003 discharge report that stated that as of July 18, 2003, the last day appellee was seen, “significant improvement was noted”; the fact that appellee filed for and began receiving unemployment compensation benefits shortly after July 18, 2003; appellee's own testimony at the hearing that he believed that he could return to some type of work at Allen Canning and that he had made several job inquiries; and the fact that there was no medical evidence indicating that appellee was totally incapacitated from working after July 18. Obviously, if appellee was applying for jobs, he was holding himself out as able to work. All of these findings support the Commission's decision that appellee was not totally incapacitated from earning wages after July 18, 2003, and therefore was no longer entitled to temporary-total disability benefits.

*Allen Canning Co.*, 92 Ark. App. at 246-247; *see also, Adams v. Georgia Pacific, LLC*, 2014 Ark. App. 558, 444 S.W.3d 897 (Ark. App. 2014) (distinguishing *King v. Peopleworks*, and finding the claimant failed to meet his burden of proving a total incapacity to earn wages).

In this case, as in *Allen Canning Co.*, there exists no medical evidence whatsoever suggesting the claimant was within his healing period and was totally incapacitated from earning wages. Also, here, as in *Allen Canning Co.*, the claimant represented on his application(s) for unemployment benefits under penalty of perjury that he was willing and physically capable of

working, that he had no disability(ties) that would prevent him from starting work immediately. As in *Allen Canning Co.*, the claimant herein testified he was performing tasks around the house and holding himself out as able to work, since he had applied for a number of jobs as is required in order to draw unemployment compensation benefits. In light of the obvious preponderance of testimony and the other credible evidence of record contradicting the claimant's own testimony, it is abundantly clear he has failed to meet his burden of proving he was within a healing period and totally incapacitated from earning wages from April 25, 2019, through May 13, 2020.

Finally, even if the claimant had been able to prove he was within his healing period and totally incapacitated from earning wages during the time period in question, he admittedly refused employment. Indeed, he stipulated he voluntarily abandoned his job as of April 25, 2019. Consequently, he is not entitled to compensation benefits during this time pursuant to *Ark. Code Ann.* § 11-9-526. The record reveals the claimant voluntarily chose to abandon his job despite Georgia Pacific's efforts to contact him and get him back to work. (T. 31). Ms. Cameron testified that, but/for the fact the claimant voluntarily abandoned his job, Georgia Pacific could have accommodated any work restrictions a physician gave him. (T. 58-60). Under such circumstances, it is both unfortunate and disappointing the claimant became angry, was uncooperative with his employer, and voluntarily abandoned – simply walked away – from a good job on April 25, 2019.

Therefore, for all the aforementioned reasons, I hereby make the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this claim.
2. The stipulations contained in the Prehearing Order Filed January 14, 2021, hereby are accepted as facts.

3. The claimant has failed to meet his burden of proof in demonstrating he was within a healing period, and totally incapacitated from working during the time period for which he is requesting TTD benefits, April 25, 2019, through August 20, 2020; therefore, he is not entitled to TTD benefits during this time period. *Ark. Code Ann.* Section 11-9-506; and *Allen Canning Co., supra.*
4. Moreover, the claimant applied for and drew a total of some \$10,471.00 in unemployment benefits from November 2, 2019, through August 29, 2020. On each of his four (4) applications for unemployment benefits, the claimant represented under penalty of perjury that he was available to work immediately, and that he had no disability(ies) that would prevent him from being able to work. He also admitted at the hearing he was able to work if someone would have hired him during this time period. The claimant cannot be heard to contend he was temporarily totally disabled during the period of time when he was drawing unemployment benefits and representing under penalty of perjury that he was physically capable of going to work immediately, and that he had no disability(ies) that would prevent him from working. This is especially true since the record is completely devoid of any physician's opinion the claimant was unable to work during this period of time.
5. Even if the claimant had been able to prove he was within a healing period and totally incapacitated from earning wages during the time period in question, he stipulated he voluntarily abandoned his job at Georgia Pacific. Therefore, pursuant to *Ark. Code Ann.* Section 11-9-526, he is not entitled to benefits. This is especially true – and especially unfortunate – since Georgia Pacific has a policy of accommodating an employee's physical restrictions and limitations in cases such as this, and they would've been able to do so in the claimant's case.
6. The claimant's attorney is not entitled to a fee on these facts.

For all the aforementioned reasons, this claim hereby is denied and dismissed.

If they have not already done so, the respondents shall pay the court reporter's invoice within ten (10) days of their receipt of this opinion and order.

**IT IS SO ORDERED.**

MP/mp

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Mike Pickens  
Administrative Law Judge

*Joshua C. Brown, AWCC No. G906118*

MP/mp