BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H003486

JEREMY CORLEY, EMPLOYEE **CLAIMANT**

SYSTEMS PLANT SERVICES, INC.,
SELF-INSURED, EMPLOYER **RESPONDENT**

CENTER STREET RISK SERVICES, INC.
CARRIER/TPA **RESPONDENT**

OPINION AND ORDER FILED OCTOBER 15, 2021

Hearing conducted on August 10, 2021, before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by the Honorable Jarid M. Kinder, Law Offices of Craig L. Cook, Fayetteville, Washington County, Arkansas.

The respondents were represented by the Honorable Michael E. Ryburn, Ryburn Law Firm, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the Amended Prehearing Order filed June 22, 2021, the parties agreed to the following stipulations, which they 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 May 26, 2020, when the claimant sustained a compensable injury to his right ankle. The respondents accepted this injury as compensable and paid both medical and indemnity benefits.

3. The parties shall confer prior to the hearing date and, if at all possible, be prepared to stipulate to the claimant's average weekly wage (AWW), and to the corresponding weekly temporary total disability (TTD) and permanent partial disability (PPD) benefit rates at the hearing.

4. The respondents controvert the payment of additional medical and indemnity benefits at this time.

5. The parties specifically reserve any and all other issues for future determination

and/or litigation.

(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. If the parties are unable to stipulate to the AWW and corresponding weekly indemnity rates, the amount of the claimant's AWW and the corresponding weekly indemnity rates.

2. If the respondents paid the claimant at a lesser weekly indemnity rate(s) than that (those) to which he was entitled, the extent of the underpayment.

3. Whether the claimant is entitled to additional benefits pursuant to ***Ark. Code Ann.*** § 11-9-505(a)(1) (2020 Lexis Supplement).

4. Whether the claimant's attorney is entitled to a controverted fee on these facts.

5. 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 contends he sustained a compensable ankle injury on May 26, 2020, while working for System Plant Services, Inc. in Columbus, Mississippi. After his treating physician released him to return to work, the respondents refused to offer him suitable job placement within his permanent restrictions. Pursuant to ***Ark. Cod Ann.*** Section 511-9-505(a), "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 to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year." The respondents did offer the claimant the opportunity to reapply for open positions within

their company, however, the Arkansas Court of Appeals has held that allowing an employee to "reapply" and "be considered" for employment does not meet the requirements of ***Ark. Code Ann.*** Section 11-9-505(a). *Ark. Dep't of Corrections v. Jennings,* 2017 Ark. App. 446, 526 S.W.3d 924 (Ark. App. 2017). The claimant contends he is owed indemnity benefits based on his correct AWW from February 1, 2021, to a date yet to be determined. The claimant contends his attorney is entitled to a controverted fee based on these facts. The claimant specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1, 2-3; T. 9-10; 81-82).

The respondents contend the respondent-employer, System Plant Services (SPS), contracts with manufacturing facilities to provide maintenance work of various types when the facility is shut down. They do not perform long-term projects. The claimant is not a full-time employee. He is hired by the job. He was injured, and his claim was accepted. When his treating physician released him to return to work, the job for which he was hired was already over, it was completed. Therefore, the respondents did not unreasonably refuse to return the claimant to work. Since the claimant only works sporadically, his total earnings per year should be divided by 52 weeks in order to correctly calculate his AWW, and the corresponding weekly indemnity rates. Finally, the respondents contend they overpaid the claimant TTD benefits in the amount of $13,405.00, and they overpaid him PPD benefits in amount of $1,476.00. The respondents specifically reserve any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 2; T. 10-11; 82-83).

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

STATEMENT OF THE CASE

The relevant facts of this case are straight-forward and beyond reasonable dispute. The claimant, Mr. Jeremy Corley, was 30 years old at the time of the subject hearing, and was 29 years old on May 26, 2020, the date of his compensable right ankle injury. He has worked for ten (10) years as a combo pipe welder, and he is now classified as a journeyman pipe welder. This work requires him to weld pieces of pipe together where the pieces meet, or to repair and adjoin damaged pipe. (T. 14; 63; 77-78).

The claimant works for different employers on different jobs, or construction and/or plant repair and/or maintenance projects. He works as a full-time employee on each project until the project is completed. When a given project on which he is working is completed, his employment for that particular employer terminates; and he either files for unemployment benefits until he goes to work for another employer on another project, or he begins work for another employer on another project. At the time of the hearing, the claimant was working for Tradesmen International on a project at Simmons Pet Food in Siloam Springs, Arkansas. (T. 12-15; 29-30).

The claimant has worked for a number of different employers on various separate projects. His employment history with SPS – which the claimant admitted under oath was an accurate record – reveals he has worked with SPS on some six (6) separate projects between 09/01/17 to 06/02/20, and that his jobs with SPS terminated for various reasons such as: having voluntarily quit to "get [a] job closer to home"; to "BE IN OKLAHOMA [F]OR A MEETING"; having voluntarily quit for a "FAMILY MEDICAL ISSUE"; and having been laid off for "COVID-19 RELATED". (T. 12-15; 30-45; 47-50; Claimant's Exhibit 1 at 1; Respondents' Exhibit 1 at 1) (Emphasis and

bracketed material added). The SPS employment history document further reveals that as of 03/29/19, the claimant had a "GOOD ATTITUDE AND GOOD WORK ETHIC. GOOD WELDER"; and as of 12/02/19 the claimant's "ATTITUDE WAS NOT THE BEST COMPLAINED MOST OF THE TIME THEN LEFT US IN A BIND DURING A MAJOR OUTAGE." (CX1 at 1; RX1 at 1) (Emphasis in original).

Prior to his compensable right ankle injury of May 26, 2020, in the year 2020 the claimant first began working for SPS on 03/16/20. He worked with SPS until he was laid-off along with other co-workers on or about 04/24/20 due to the COVID-19 pandemic. (RX1 at 1; T. 48). After this COVID-19-related lay-off, SPS reinstated the claimant effective May 15, 2020, by offering him a job at a different location than the one where he had worked at the time of the COVID-19-related lay-off. The claimant's compensable injury occurred on 5/26/2020, less than two (2) weeks after he was reinstated to work on this separate project.

SPS offered the claimant a job to work as a combo pipe welder on a specific project at the SDI plant in Columbus, Mississippi (the Columbus project). It is undisputed the terms of the SPS offer of employment to the claimant for the Columbus project, which he accepted, were that in return for his services as a combo pipe welder on the project SPS would pay him $28 per hour for up to 60 hours per week, and $100 per day *per diem*. The SPS director of human resources and recruiting (HR director), Ms. Gina Zeigler, testified – contrary to the claimant's testimony – that the claimant was not "guaranteed" 60 hours per week, but was hired to work up to 60 hours per week if needed. Ms. Zeigler credibly testified SPS does not "guarantee" hours. (T. 15; 53; 51-80).

Ms. Zeigler's formal job title is HR and recruiting director for The Systems Group, of which SPS is an affiliated company. SPS performs maintenance, repair, fabrication, and installation on and of equipment and systems for various types of plants and facilities. Ms. Zeigler oversees all the recruiting and hiring and other job duties related to SPS's recruiting and hiring operations. She testified in some detail concerning the nature of SPS's business, and how the company maintains a database of some 40,000 to 60,000 names which fit their hiring criteria. Qualified individuals may apply online for specific projects, or in some cases SPS may contact an employee whose name is already in their database to inquire as to whether the individual is interested in working on a certain project. Ms. Zeigler testified SPS's projects may have a duration of four (4) to six (6) months, two (2) to three (3) months, seven (7) to ten (10) days, etc. When a specific project is completed, workers' such as the claimant herein are considered to be in a "laid-off" status, and must either reapply or be contacted for work on any future projects. SPS hired the claimant for specific temporary projects "there was a duration to that project." The SPS records reflect the claimant was considered a "Regular, full-time", as opposed to a "Regular, part-time" employee on the Columbus project. (T. 51-80; 57-62; Claimant's Exhibit 2 at 13).

On May 26, 2020, the claimant was stepping-off a ledge when he stepped in a dried forklift tire rut. He twisted his right ankle, which resulted in a tear of a ligament in his right ankle. After a period of conservative treatment, on September 3, 2020, Dr. Justin Clayton, an orthopedic surgeon associated with Mercy Clinic Orthopedics River Valley in Fort Smith, Arkansas, performed surgery on the torn ligament in the claimant's right ankle. (CX1 at 1-7). The claimant underwent a functional capacity evaluation (FCE) on January 27, 2021, which was performed by Functional

Testing Centers, Inc. (FTC). Dr. Clayton, the claimant's treating orthopedic surgeon, reviewed and signed the FCE report. (CX1 at 27-48). Based on the reliable FCE results, Dr. Clayton assessed the claimant with a permanent anatomical impairment rating of nine percent (9%) to the right lower extremity (but it appears at least part of this rating was based on loss of range of motion), and released him from his care effective February 3, 2021. (CX1 at 48, 26). Dr. Clayton also assigned the claimant permanent restrictions of: "Occasional bi-manual lift up to 65 lbs[ ] and carry up to 60 lbs. Lift/carry up to 30 lbs[ ] on a frequent basis… . See the full FCE report for further restrictions." (CX1 at 26) (Bracketed material added).

By the time Dr. Clayton released the claimant to return to work on 2/3/2021, the SPS Columbus project on which the claimant had started work a couple of weeks before his 5/26/2020 compensable injury had been completed, so he did not return to work for SPS. (T. 55-56; 79-80). The claimant did not work anywhere between his 2/3/2021 release and the time he took another job in Missouri for a different employer at the end of June 2021. (T. 27-29). The claimant also testified he did not file for unemployment as he had in the past, "Because I had been told that I could not return to Systems by my attorney; said that they had no work for me with my restrictions." (T. 30; 31-33). Ms. Zeigler testified the claimant SPS did not refuse to rehire the claimant because of his injury, nor had they refused to rehire him for any reason. She testified further the claimant is still eligible for rehire as he has been in the past. (T. 55).

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 Supplement). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel,* 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). ***Ark. Code Ann.*** Section 11-9-704(c)(3) (2020 Lexis Supp.) states that the ALJ, the Commission, and the courts "shall strictly construe" the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles,* 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). 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 Lexis Supp.); *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. Hardees,* 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, supra*.

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 given the totality of the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Average Weekly Wage (AWW) Determination

Ark. Code Ann. Section 11-9-518 states, in pertinent part:

> (a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a fulltime workweek in the employment.
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> (c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

In order to receive benefits based on a 40-hour week, a claimant must either actually have worked at least 40 hours per week or be bound by contract to work 40 hours if the work is made available. *Metro Temporaries v. Boyd*, 314 Ark. 479, 863 S.W.2d 316 (1993). The claimant has the burden of proving that he was bound by contract to work 40 hours each week if the work was made available. *A & C Servs., Inc. v. Sowell*, 44 Ark. App. 150, 870 S.W.2d 764 (Ark. App. 1994).

Here, it is undisputed the claimant was offered and he accepted a job that required him to work at least 40, and up to 60, hours per week. Ms. Ziegler was a highly knowledgeable, professional, and credible witness. She testified the claimant was hired to work between 40 to 60

hours per week at a wage rate of $28 per hour, plus $100 per day *per diem*. (T. 53, 58). Ms. Ziegler testified the claimant never worked less than a 40-hour work week on the Columbus project. (T. 73). While there may have been no formal, written employment contract, both parties agree the aforementioned terms were the terms under which SPS employed the claimant for the separate, specific Columbus project. This agreement constitutes a "contract of hire" for purposes of ***Ark. Code Ann.*** Section 11-9-518(a)(1). For the couple of weeks the claimant worked on the Columbus project before his injury, he also worked over-time hours, which paid him time-and-a-half.

The applicable statute requires the AWW in this case to be based on the contract of hire. The claimant was a regular, full-time employee on the SPS Columbus project, just as he was on the other separate and distinct SPS projects on which he worked. Pursuant to the plain language of ***Ark. Code Ann.*** Section 11-9-518(a)(1) as it is currently written, it is of no legal consequence in computing the claimant's AWW that he did not work with SPS a full 52-weeks before he was injured on 5/26/2020. Whether the claimant worked two (2) weeks or 25 weeks or 52 weeks, the calculation of his AWW in this case is determined by the terms of his "contract of hire". Based on the undisputed terms of his contract of hire, the claimant's AWW shall be calculated as follows. Prior to his 5/26/2020 compensable injury, the claimant worked a 48-hour and 40-hour work week at $28.00 an hour with overtime being paid at time-and-a-half. Pursuant to the terms of his "contract of hire" these amounts compute to the equivalent of weekly wages of $1,456/$1,120.00, respectively, and an AWW of $1,288, entitling him to the maximum 2020 weekly indemnity rates of $711 for TTD and $533 for PPD.

The claimant testified the respondents paid him TTD benefits from the date of his injury until

Dr. Clayton released him on 2/3/2020 at the rate of $711 per week, and then he continued to receive benefits for a period of time at a lesser rate for his impairment rating. (T. 38-39; RX1 at 4). Consequently, the evidence reveals the respondents paid the claimant all the TTD benefits to which he is entitled at the correct maximum rate of $711 per week. (RX1 at 4).

However, the evidence reveals the respondents *underpaid* the claimant with respect to the PPD benefits to which he is entitled. Dr. Clayton assigned the claimant a 9% permanent anatomical impairment rating to his right lower extremity. Pursuant to ***Ark. Code Ann.*** Section 11-9-521(a)(4), this 9% impairment rating equates to 11.79 weeks of PPD benefits (131 weeks multiplied by 9%, *i.e.*, .09) at the maximum 2020 PPD rate of $533 per week. This equates to a total of $6,284.07 (11.79 weeks multiplied by $533 per week) that the respondents owe the claimant in additional PPD benefits. The respondents' indemnity payment records show they paid the claimant only a total of $2,132.00 in PPD benefits. Therefore, the respondents owe the claimant an additional $4,152.07 in PPD benefits ($6,284.07 minus $2,132.00). (RX1 at 4). The respondents have controverted the $4,152.07 in owed but unpaid PPD benefits, and they owe the claimant's attorney a fee based on this controverted amount.

Claimant's Alleged Entitlement to Section 11-9-505(a)(1) Benefits

Ark. Code Ann. § 11-9-505(a)(1) reads, in pertinent part:

> (a)(1) 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 to the employee the difference between benefits received and the average weekly wages lost during the period of such refusal, for a period not exceeding one (1) year.

In order to receive benefits under ***Ark. Code Ann.*** § 11-9-505(a)(1), the claimant has the burden of proving by a preponderance of the evidence that he:

(1) Sustained a compensable injury;

(2) Suitable employment which is within his physical and mental limitations was available with the employer;

(3) The employer refused to return him to work; and

(4) The employer's refusal to return him to work was without reasonable cause.

See Edward Torrey v. City of Fort Smith, 55 Ark. App. 226, 230, 934 S.W.2d 237 (Ark. App. 1996). The claimant has failed to meet his burden of proof with respect to elements (2), (3), and (4), *supra*.

First, despite the claimant's protestations to the contrary, the evidence reveals the reason SPS did not return him to work was that the job for which he was hired had ended before Dr. Clayton released him return to work on 2/3/2021. Consequently, there existed no job to which SPS could possibly return him. (T. 55-56; 79-80). The preponderance of the evidence conclusively demonstrates that, with respect to his SPS employment, the claimant was a regular, full-time employee for SPS on each and every single, distinct, and separate project for which he was hired. The Columbus project was a different, separate, and distinct project from any other SPS project for which the claimant had been hired in the past, or for which he may be hired in the future. Indeed, the claimant himself readily admitted that when he had worked with SPS in the past, he had left some projects voluntarily for various reasons, including to get another job closer to his residence, and to attend a meeting in Oklahoma. (T. 12-15; 30-45; 47-50; RX1 at 1).

The claimant worked as a welder for other employers, and/or drew unemployment benefits.

The claimant's separate and distinct periods of regular, full-time employment with SPS terminated with the completion of each and every separate project, at which time the claimant was free to – and testified he in fact did – either apply for and draw unemployment benefits, or work for other employers. The claimant testified he had worked for a number of other employers besides SPS in the past. Indeed, he began working for a separate employer beginning at the end of June 2021; and he was working for yet another employer at the time of the hearing. Moreover, both the claimant and Ms. Zeigler testified the claimant was considered to be "laid-off" from SPS when he was not working on an SPS project, thus freeing him up to work for other employers or to apply for and draw unemployment benefits. (T. 69; 29).

Second, the claimant failed to not prove SPS refused to return him to work without reasonable cause. *See Roark v. Pocahontas Nursing & Rehab*., 95 Ark. App. 176, 235 S.W.3d 527 (Ark. App. 2006). To the contrary, the fact the Columbus project for which the claimant had specifically been hired had ended before Dr. Clayton released him to return to work in February 2021 makes it difficult if not impossible for the claimant to meet his burden of proof in this regard. The claimant provided no credible evidence the respondents refused to return him to work without reasonable cause. The *prima facie* reasonable cause for which the respondents did not rehire the claimant was that the job for which SPS had specifically hired him – the Columbus project – no longer existed at the time Dr. Clayton released him to return to work on 2/3/2020. The claimant only offered self-serving, speculative testimony in attempting to meet this required element of proof; and speculation and conjecture are insufficient to support a claim for compensation benefits. *Deana, supra*. The claimant is free to apply for other SPS projects as he has always done in the

past. SPS may choose or choose not to hire the claimant for these separate and distinct projects based on the specific needs of the project in question.

Interestingly, the claimant testified the reason he did not apply for unemployment benefits (as he had done in the past) between 2/3/2021 and the time he went to work for another employer at the end of June 2021 is because his attorney told him he could not return to work for SPS because SPS had no work to offer him that fit within his restrictions. (T. 30; 31-33). This admission in and of itself is fatal to the claimant's contention he is entitled to additional benefits pursuant to Section 11-9-518(a)(1), as by this testimony both the claimant and his attorney admit SPS had no jobs available at the time he was released to return to work on 2/3/2021 that fit within his restrictions.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations to which the parties agreed in the Amended Prehearing Order filed June 22, 2021, hereby are accepted as facts.

2. The claimant has met his burden of proof in demonstrating his AWW at the time of his May 26, 2020, compensable injury right ankle injury was sufficient to entitle him to the maximum weekly indemnity rates for 2020, which are $711 per week for TTD benefits, and $533 per week for PPD benefits.

3. The preponderance of the evidence reveals the respondents paid the claimant TTD benefits from the date of his injury, 5/26/2020 through the date Dr. Clayton released him to return to work on 2/3/2021, at the correct TTD rate of $711 per week. Consequently, the claimant has failed to meet his burden of proof he is entitled to additional TTD benefits.

4. The preponderance of the evidence reveals the respondents underpaid the claimant PPD benefits in the amount of $4,152.07.

5. The respondents have controverted the $4,152.07 in owed but unpaid PPD benefits; and they owe the claimant's attorney a fee based on this controverted amount.

6. The claimant has failed to meet his burden of proof in demonstrating he is entitled to additional indemnity benefits pursuant to ***Ark. Code Ann.*** Section 11-9-518(a).

7. The respondents have failed to meet their burden of proof in demonstrating they are entitled to a credit for the overpayment of any indemnity benefits.

AWARD

Wherefore, for all the aforementioned reasons, the respondents are hereby directed to pay benefits in accordance with the "Findings of Fact and Conclusions of Law" set forth above. All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to ***Ark. Code Ann.*** Section 11-9-809, and *Couch v. First State Bank of Newport,* 49 Ark. App. 102, 898 S.W.2d 57 (Ark. App. 1995); *Burlington Indus., et al v. Pickett,* 64 Ark. App. 67, 983 S.W.2d 126 (Ark. App. 1998); and *Hartford Fire Ins. Co. v. Sauer,* 358 Ark. 89, 186 S.W.3d 229 (2004).

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp