BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H104889

RUTH ESCOBEDO, Employee	CLAIMANT
JAKE'S JANITORIAL SERVICES, Uninsured Employer	RESPONDENT NO. 1
UNIVERSITY OF ARKANSAS, Employer	RESPONDENT NO. 2
PUBLIC EMPLOYEE CLAIMS DIVISION, Carrier	RESPONDENT NO. 2
ABSOLUTE JANITORIAL, Uninsured Employer	RESPONDENT NO. 3

OPINION FILED JUNE 5, 2023

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

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

Respondent No. 1 appearing PRO SE.

Respondents No. 2 represented by ROBERT H. MONTGOMERY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 7, 2023, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 6, 2022, and a Pre-hearing Order was filed on April 6, 2022. 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.

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

1. Whether the employee/employer relationship existed between claimant and Respondent No. 1, Respondents No. 2, or Respondent No. 3 on November 12, 2019.

2. Whether Claimant sustained a compensable injury to her left knee on November 12, 2019.

3. Whether Claimant is entitled to medical treatment.

4. Whether Claimant is entitled to temporary total disability benefits from January 10, 2021, to a date yet to be determined.

5. Whether Claimant's attorney is entitled to an attorney fee.

6. Compensation rates.

7. Respondents No. 2 and Respondent No. 3 raise the Notice Defense.

Claimant's contentions are:

> "Claimant contends she was working for Jake's Janitorial Services, who was working for the University of Arkansas at Fayetteville, when she injured her left knee while working. She contends she is entitled to treatment for her left knee and to TTD benefits from January 1, 2021, to a date yet to be determined. The claimant reserves all other issues."

Respondent No. 1 contends the claimant was not its employee.

Respondents No. 2's contentions are:

> "The claimant contends that she sustained an injury to her left knee while working for Jake's Janitorial Services. The claimant's prehearing filing does not list a date of the alleged injury. The claimant contends she is entitled to medical treatment and TTD benefits.
>
> Respondent No. 2, the University of Arkansas, contends that the claimant was an employee of either Respondent No. 1, Jake's

Janitorial Services, or Respondent No. 3, Absolute Janitorial Services, at the time of the alleged injury and that for statutory purposes Jake's Janitorial Services and/or Absolute Janitorial Services was the claimant's employer at the time of the alleged injury. Information currently available indicates Jake's Janitorial Services directed and controlled any work done by the claimant, the claimant was hired by Jake's Janitorial Services, the claimant was paid by Rodney E. Harris and/or Jake's Janitorial Services for any work she performed, the claimant wore a shirt provided by Jake's Janitorial Services while she was working, and the claimant notified Rodney E. Harris and/or Jake's Janitorial Services of the alleged injury. The claimant was employed by Respondent No. 1 Jake's Janitorial Services and/or Absolute Janitorial Services LLC.

Respondent No. 3, Absolute Janitorial Services LLC, is located in Bentonville, AR. Absolute Janitorial Services LLC has contracted with the University of Arkansas for the past few years to perform cleaning services at certain University properties. As part of the contract with the University of Arkansas, Absolute Janitorial Services LLC is required to maintain and provide proof of adequate minimum insurance coverage, including workers' compensation coverage. Pursuant to the contract, the contractor (Absolute Janitorial Services LLC) has the sole right to direct the work performed and instruct persons hired or employed by the contractor for performance of the services enumerated in the contract. Absolute Janitorial Services LLC utilized Jake's Janitorial Services as a sub-contractor to perform the work in which the claimant herein alleges she was injured.

Based on information currently available Respondent No. 2 also contends that the claimant was not performing employment services at the time of the alleged injury. The claimant has stated she was getting out of her car in the parking lot when she slipped and fell prior to beginning any work.

Lastly, Respondent No. 2 first became aware of the filing of this claim for benefits on June 14, 2021. On that date, Respondent No. 2 received copies of a prehearing filing and Form AR-C the claimant had filed with the Arkansas Workers' Compensation Commission on June 11, 2021. While not waiving the contentions set out above, Respondent No. 2 would contend that, if the claim is found to be compensable, the notice provision of Ark. Code Ann. 11-9-701(a)(1) apply to the facts of this claim. Respondent No. 2 is not responsible for any disability, medical, or other benefits relative to the claimant's alleged left knee injury, and furthermore

> cannot be responsible for any benefits claimed by the claimant prior to June 14, 2021, which is the date Respondent No. 2 received notice that claimant had filed this claim.
>
> The claimant did not sustain a compensable left knee injury. Respondent No. 1, Jake's Janitorial Services and/or Rodney E. Harris, and/or Respondent No. 3, Absolute Janitorial Services LLC, was the claimant's employer at the time of the alleged injury. The claimant obtained medical treatment prior to Respondent No. 2 receiving any notice that the claim had been filed.
>
> Respondent No. 2 reserves the right to raise additional issues, or to modify the contentions stated herein, pending the completion of discovery."

Respondent No. 3's contentions are:

> "Respondent No. 3 contends that the claimant was not an employee. Claimant failed and/or refused to report any injury to them and they had no knowledge or notice of any injury until served with the claimant's September 28, 2021, Form C. Respondent No. 3 contends the claimant did not sustain a compensable injury and/or injury for which they would have any responsibility. Claimant's claim should be denied and/or Respondent No. 3 should be dismissed from this claim with prejudice."

The claimant in this matter is a 38-year-old female who alleges to have been engaged in the employee/employer relationship with Respondent No. 1, Jake's Janitorial Services, Respondent No. 2, the University of Arkansas, and Respondent No. 3, Absolute Janitorial, when she alleges to have sustained a compensable left knee injury on November 12, 2019. Respondent No. 1, Jake's Janitorial Services, was owned by a man named Rodney Harris and it was operated at the time of the claimant's alleged injury as a sole proprietorship. Respondent No. 3, Absolute Janitorial, is owned by James Michael Harms and is currently and at the time of the claimant's alleged injury operating as an LLC. Respondent No. 2, the University of Arkansas is, of course, a public institution of higher education which entered into a contractual agreement with

Respondent No. 3, Absolute Janitorial, to provide cleaning services to several of its facilities. Respondent No. 3, Absolute Janitorial, then entered into a contractual agreement with Respondent No. 1, Jake's Janitorial Services, or more accurately, Rodney Harris, as a sole proprietor, who was also known by many individuals as "Jake" to perform the cleaning services Respondent No. 3, Absolute Janitorial, had contracted to provide Respondent No. 2, the University of Arkansas.

Respondent No. 1, Jake's Janitorial Services, owned by sole proprietor Rodney Harris, also known as Jake, will be referred to as Respondent 1 JJS when discussing the respondent business. The name Rodney Harris will be used when he is giving testimony or referred to as a person and not as a business. While Rodney Harris is also known as Jake and testimony refers to him as Jake, for all purposes Jake and Rodney Harris are the same person in this matter and Rodney Harris will be used unless Jake is used via a quote from the hearing transcript from this point forward. Respondent No. 2, the University of Arkansas, will be referred to as Respondent 2 U of A, and Respondent No. 3, Absolute Janitorial, will be referred to as Respondent 3 AJ from this point forward.

Rodney Harris identified the claimant as a contract worker and testified on cross examination by Respondent 2 U of A's attorney, that he had "around 26 or 28" contract workers working at Respondent No. 2 U of A's campus in November of 2019.

An important question in untangling the issues before the Commission is if the claimant was an employee of any of the respondents, and if so, which respondent or respondents was the claimant an employed by.

As the Court stated in *Silvicraft, Inc. v Lambert*, 10 Ark. App. 28, 661 S.W. 2d 403 (1983), the determination of whether, at the time of the injury, a person is an employee or

independent contractor is a factual one for the Commission. A test to help determine whether an individual is an independent contractor or an employee is set out by the Court of Appeals in *Franklin v. Arkansas Craft, Inc.,* 5 Ark. App. 264, 635 S.W. 2d 286 (1982). The Court set forth nine factors which may be considered in determining whether an injured person is an employee or an independent contractor for Workers' Compensation coverage:

1. The right to control the means and method by which the work is done;

2. The right to terminate the employment without liability;

3. The method of payment, whether by time, job, piece or other unit of measure;

4. The furnishing, or the obligation to furnish, the necessary tools, equipment, and materials;

5. Whether the person employed is engaged in a distinct occupation or business;

6. The skill required in a particular occupation;

7. Whether the employer is in business;

8. Whether the work is an integral part of the regular business of the employer; and

9. The length of time for which the person is employed.

In considering the claimant's relationship with Respondent 1 JJS, along with the factors above, it is clear that the claimant was not an independent contractor but instead an employee of Respondent 1 JJS. Respondent 1 JJS had the right to control the means and method of work done by the claimant. On cross examination by Respondent 3 AJ's attorney, Rodney Harris testified as follows regarding his relationship with the claimant.

> Q Okay. Now, you hired the people that was going to perform the work; correct?
>
> A Yes.

Q And the people that were actually going to be at the Pike house or Pomfret or any of those places that there was an agreement to clean; is that right?

A Yes.

Q And you told them to show up; correct?

A Yes.

Q You told them how they were going to get paid?

A Yes.

Q You told them how to do the job if they needed to get instructions?

A Well, by the time when we started everything, pretty much everybody knew what to do.

Q Okay. And Ms. Escobedo joined Jake's sometime in late July or early August of 2019; is that correct?

A Uh-huh.

Q Is that "yes"?

A Yes.

Q And I am not picking on you. It's "uh-huh" and "huh-uh" won't come across real well.

A I got you.

Q Now, this was in response to that Facebook ad and I think you told me that Karina had put out; is that right?

A Yes.

Q And Karina at the time was a supervisor working with you; is that right?

A Correct.

> Q Okay. Now, she, being Ms. Escobedo, would have been instructed where she was going to be working; is that right?
>
> A Correct.
>
> Q And either you or Karina would have instructed her in that capacity?
>
> A Correct.

There is no evidence on the record that shows Respondent 1 JJS would have any liability for terminating the claimant. Instead, liability only existed on a per hour work basis as the claimant was paid by the hour. The claimant furnished no tools, supplies, or products for cleaning. It appears those tools, supplies, or products were provided to her at the direction of Respondent 1 JJS but were purchased by Respondent 3 AJ and perhaps to some extent, Respondent 2 U of A. The claimant was essentially a general laborer who performed multiple tasks in the process of cleaning different facilities. I find no particular skill or training as a need or requirement for her work other than basic instruction, which was provided by Respondent 1 JJS. Respondent 1 JJS was solely in the business of cleaning facilities at the campus of Respondent 2 U of A under a contractual obligation with Respondent 3 AJ. The claimant was simply hired by Respondent 1 JJS to work five days a week cleaning facilities for a set number of hours on a per hour basis. Respondent 1 JJS was the claimant's employer during her time working for Respondent 1 JJS and not an independent contractor even though Respondent 1 JJS called her, and others, contract workers and provided them 1099 forms since Respondent 1 JJS did not pay employment taxes on its employees.

The claimant also asked the Commission to consider the employee/employer relationship between herself and Respondent 2 U of A on November 19, 2019. I find no basis for that relationship to have existed at that time. While it was Respondent 2 U of A's facilities being

cleaned by the claimant, it was done so through a contractual relationship between Respondent 2 U of A and Respondent 3 AJ, who then contracted with Respondent 1 JJS. Respondent 1 JJS did have an employee/employer relationship with the claimant in November of 2019 when the claimant alleges injury. Here, Respondent 2 U of A is much like an individual who hires, via contract, a prime contractor to build a house who in turn contracts with a subcontractor to put a roof on said house.

The claimant also asked the Commission to consider whether the employee/employer relationship existed between herself and Respondent 3 AJ. In a traditional workers' compensation consideration, I find Respondent 3 AJ was not in an employee/employer relationship with the claimant in November of 2019. However, in giving consideration to ACA §11-9-402(a) and (b)(1), I do find that Respondent 3 AJ would be placed in the position of the employee/employer relationship with the claimant if liability existed for her alleged compensable injury. Arkansas Code Annotated §11-9-402(a) and (b)(1) states:

> (a) Where a subcontractor fails to secure compensation required by this chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor unless there is an intermediate subcontractor who has workers' compensation coverage.
>
> (b)(1) Any contractor or the contractor's insurance carrier who shall become liable for the payment of compensation on account on injury to or death of an employee of his or her subcontractor may recover from the subcontractor the amount of the compensation paid or for which liability is incurred.

The Arkansas Supreme Court in *Nucor Holding Corp. v Rinkines*, 326 Ark. App. 223, 931 S.W. 2d 439 (1996) discussed prime contractors and subcontractors' relationship as it relates to the above statute stating, "The person sought to be charged as a prime contractor must have been contractually obligated to a third party for the work being done at the time of the injury."

The Arkansas Court of Appeals in *Bailey v. Simmons*, 6 Ark. App. 196, 639 S.W. 2d 528 (1982) defined subcontractor within the meaning of ACA §11-9-402 as follows, "A subcontractor is one who enters into a contract with a person for the performance of work which such person has already contracted to perform. In other words, subcontracting is merely farming out to others all the parts of work contracted to be performed by the original contractor."

In the present case Respondent 3 AJ is a prime contractor in respect to ACA §11-9-402. Respondent 3 AJ was contractually obligated to Respondent 2 U of A, a third party, to provide cleaning services to Respondent 2 U of A at their facilities in November of 2019. This is evidenced by the testimony of Mr. Harms, the owner of Respondent 3 AJ, and documentary evidence found at Respondent 2's Exhibit 2, pages 1-30 in a document titled "Request for Proposal (RFP) RFP No. 681360 University Housing Cleaning Support," which was signed by Mr. Harms. Another document is found at Respondent 2's Exhibit 3, pages 1-2 titled "Maintenance Service Agreement" dated February 19, 2019, and signed by Mr. Harms and a representative of Respondent 2 U of A's Board of Trustees. That contractual agreement is for a period of 12 months for cleaning obligations in RFP No. 681360. Respondent 3 AJ is a prime contractor under ACA §11-9-402.

Respondent 1 JJS is also a subcontractor with respect to ACA §11-9-402 in that Respondent 1 JJS entered into a contract with Respondent 3 AJ to perform the work that Respondent 3 AJ had contracted with Respondent 2 U of A to perform. This is shown without dispute in testimony both by Mr. Harris and Mr. Harms. The contractual agreement itself is found in evidence at Respondent 3's Exhibit 2, pages 3-9, and is signed by Mr. Harris and Mr. Harms.

Given the statutory language of ACA §11-9-402, Respondent 3 AJ would be liable for compensation owed to the claimant if she is able to prove her injuries compensable and benefits are awarded. I also note that it is undisputed in evidence and testimony that Respondent 1 JJS and Respondent 3 AJ did not have any workers' compensation policies in effect during November of 2019.

I will now consider the claimant's allegation that she sustained a compensable injury to her left knee on November 12, 2019. The claimant was employed by Respondent 1 JJS to perform housekeeping duties. The claimant would, along with a partner named Maria, clean two different facilities each day. In November of 2019 the claimant began her day cleaning at an apartment complex on Duncan Street at 7:00 a.m. The claimant testified this would take her and her partner an hour to an hour and ten minutes to complete. The claimant gave testimony about her work duties after cleaning the Duncan Street Apartments on direct examination as follows.

> Q And after you would clean the Duncan Street Apartments, then what would you do?
>
> A I went to another house at the University, the PKA.
>
> Q Is that what you would do every day? Was that your routine?
>
> A Yes.
>
> Q And how long would you be cleaning PKA?
>
> A I cleaned there from the beginning of the school year until I stopped working.
>
> Q Okay. How long would it take you each day to clean that building?
>
> A We would be there from around 8:00 a.m. until 3:30 p.m.

Q And what was your normal work schedule each day, the hours that you would work?

A From 7:00 a.m. to 3:30 p.m.

Q And were you instructed by a superior about where to start cleaning each day?

A Yes.

Q And who was that?

A Jake.

Q And if you wanted to clean the PKA house in the morning and the Duncan Street Apartments in the afternoon, did you have that flexibility? Could you make that decision?

A No.

Q And how would you get from the Duncan Street Apartments to the PKA house?

A In my car.

Q And did you drive alone or did you transport your co-worker?

A I will transport my co-worker.

Q And how many days a week did you work?

A Monday through Friday.

Q Did you ever work on the weekends?

A Yes. It was not the norm, but there were some days.

Q And do you know what would cause you to be called in on a weekend?

A That some other building needed cleaning, like the Pomfret.

Q And how much did you make per hour?

A Usually it was 10.

The claimant was also questioned on direct examination about the incident she alleges to have caused a compensable left knee injury on November 12, 2019, and her reporting of that injury as follows.

Q Now, what happened on November 12th of 2019?

A I went to clean the office first and then I went to PKA and after I parked the car and I was getting out of the car, that is when I slipped and fell.

Q And what did you land on when you fell?

A I landed on my knee.

Q Which knee?

A The left one.

Q And did you have someone in the car with you at that point?

A Yes, Maria.

Q And did she get out of the car to see what was wrong with you?

A Yes. It was not immediately because she was seated in the back. The back door had the child lock on it, so I was going to open up her door. When she realized that I wasn't opening her door, she went through the front and opened the door and saw that I had fell.

Q Did you report the accident to Jake?

A Yes.

Q And how did you do that?

A I sent him a text.

Q And did you send a picture of your knee?

A Yes.

A copy of the text message, response, and photographs sent to and from Rodney Harris are found at Claimant's Exhibit 4, pages 1-15.

Respondent 1 JJS did not send the claimant for any form of medical treatment. Instead, the claimant went that same day to Community Clinic at her own expense. The claimant was seen by Maurice Jones, PA. At that time, the claimant reported left knee pain, swelling, and bruising. Her left knee was x-rayed which showed inflammation in the left knee and the claimant was to return on an as needed basis.

On March 3, 2020, the claimant was seen at Community Clinic in Springdale by Dr. Claire Servy. The claimant continued to complain of left knee pain. Dr. Servy ordered an MRI of the claimant's left knee at that time. The claimant testified on direct examination that she was unable to afford the MRI until her husband had saved up enough money to pay for it. On September 21, 2020, the claimant was able to receive an MRI of the left knee at MANA Medical Associates. The diagnostic report from the MRI was authored by Dr. Benjamin Lowery. Following is a portion of that report.

> IMPRESSION:
> 1. Oblique tear involving the posterior horn/body the medial meniscus extending to the tibial articular surface.
> 2. Mild thickening involving the proximal fibers of the medial collateral ligament could represent an old sprain.
> 3. Trace joint effusion.

On November 9, 2020, the claimant was seen at Advanced Orthopedic Specialists for treatment of her left knee medial meniscus tear. On November 19, 2020, the claimant returned and received a steroid injection in her left knee. The claimant continued a course of conservative treatment into 2021 which included physical therapy.

On May 18, 2021, the claimant was seen by Dr. Chris Arnold at Advanced Orthopedic Specialists for her left knee difficulties. At that time, Dr. Arnold recommended arthroscopic surgical intervention of the claimant's left knee.

On June 18, 2021, the claimant again saw Dr. Servy. At that time, the claimant requested a referral for left knee surgery to Mercy due to her lack of insurance. The claimant was seen at Mercy Clinic Orthopedics and Sports on July 28, 2021, by Corey Carver, PA. The claimant was given a left knee injection and was told to return with her MRI in one month. The claimant saw PA Carver again on August 25, 2021, reporting improvement since her left knee injection. The claimant's MRI was reviewed, and she was assessed with a left knee medial meniscus tear.

The claimant was offered additional conservative care including continuing to brace her left knee, weight loss and injections or to follow up with Dr. Kaler for surgical options. The claimant has continued with conservative care to the best she could afford it.

On October 21, 2022, Dr. Claire Servy, whose deposition is part of the record in this matter, authored a letter regarding the claimant's left knee "To Whom It May Concern." The body of the letter follows.

> I am writing on behalf of Ruth Escobedo (DOB, 08/02/1984), who is an established patient at Community Clinic. Ruth has been known to me and under my care since December 2016. Mrs. Escobedo requested that I write a letter in support of her court case discussing a meniscal tear in the left knee and a cartilage tear in the right knee. In 2019 Ruth sustained a fall on ice while at work. She initially saw Maurice Jones, P.A., a provider at the community clinic, and was prescribed an anti-inflammatory medication which did not help. Ruth was seen by me in March 2020 for low back pain and bilateral leg weakness and was referred to Jennifer Tinker, a physical therapist here at the community clinic who reported back stiffness and bilateral low back pain with left sciatica. In 2021 she was seen by an orthopedist who recommended surgery or physical therapy for bilateral knee issues. At the time Ruth opted for physical therapy due to the cost of

> surgery as she is uninsured. Mrs. Escobedo was seen by physical therapist recurrently for treatment for this without sufficient improvement. Ruth has also had unsuccessful treatment with medications and joint injections.
> Ms. Escobedo has been unable to work since the accident and has had progressive worsening of pain the b/l knees and now in the low back. Pt is unable to stand for extended periods and is unable to lift heavy objects since the accident.
> MRI performed in December 2021 showed degenerative disc disease of L3-L4 and L5-S1, and "curvillnear low signal intensity identified within the S1 vertebra best appreciated on sagittal imaging may represent an old nondisplaced fracture in this patient with a history of fall 2 years ago."
> Thank you for participating in this patient's care. Please do not hesitate to contact us with any questions.

It is the claimant's burden to prove that she sustained a compensable left knee injury on November 12, 2019. In order to do so, the claimant must show the presence of objective medical evidence of a left knee injury. Here, the claimant is able to do so in the form of her September 21, 2020, left knee MRI which showed a medial meniscus tear. That finding was confirmed by Dr. Arnold in his May 18, 2021, visit note with the claimant.

The claimant was enroute from the Duncan Street Apartments where she and her cleaning partner had begun their workday cleaning when she fell. The claimant drove her car and gave her cleaning partner a ride to the PKA facility on Respondent 2 U of A's campus. The claimant arrived at the PKA facility, exited her car and fell before entering the PKA facility to clean. Even though the claimant was not cleaning at the time of her fall, she was moving from one job duty to the next and transporting another of Respondent 1 JJS's employees for the same purpose. The claimant was performing employment services when she fell and directly furthering the interest of her employer.

A causal connection must also be shown by the claimant between her objective medical findings and the incident she alleges to have caused her compensable left knee injury. Here, the

claimant immediately reported her fall via text and provided pictures to Respondent 1 JJS within minutes after her fall. The claimant went to the doctor's office that same day, reporting her left knee injury at her own expense. The claimant continued to seek treatment since the time of her injury even without the benefit of insurance. I find the claimant's testimony to be truthful as her testimony is in line with the medical evidence presented and frankly the testimony of Rodney Harris. The claimant is able to prove that she sustained a compensable left knee injury on November 12, 2019, while performing employment services for Respondent 1 JJS.

After a review of the medical treatment regarding the claimant's left knee placed into evidence, I find all that treatment reasonable and necessary treatment for her compensable left knee injury. I also find the surgical intervention and treatment proposed by Dr. Arnold to be reasonable and necessary medical treatment for the claimant's compensable left knee injury.

The claimant has asked the Commission to determine if she is entitled to temporary total disability benefits from January 10, 2021, to a date yet to be determined. On direct examination, the claimant gave testimony about her time off work, the difficulties she was having with her work, and the end of her employment as follows.

> Q [BY MS. BROOKS]: Were you off for a period of time before you tried to return to work?
>
> A Yes, two days.
>
> Q And after those two days, did you return to work?
>
> A That's correct.
>
> Q And how was your knee doing when you returned?
>
> A It was messed up. It was bad.
>
> Q Okay. Did you have trouble doing your work because of the knee?

A That is correct.

Q Did you have to change your work in any way?

A Yes.

Q And in what way?

A Like for example, when I was cleaning the stairs, instead of going upwards, I had to go downwards.

Q And at some point did you stop working?

A What do you mean? Like if I had to stop working during the day so I could take a break or what?

Q Well, answer that, did you take breaks?

A I tried to do as much work as I could possibly do and then after I was done and I felt like I couldn't go on any longer, then I would sit down and take a break.

Q Okay. And at some point did your work end?

A Yes.

Q And how did that happen?

A Because I had a problem with my co-worker and I had told him and they didn't do anything.

Q You told who?

A Jake.

Q Go ahead. How did it affect your work?

A Supposedly he was going to be taking Maria away, but in the end it was me who was sent to a different building.

Q And what building was that?

A The Pomfret. I really don't remember. I am really not sure.

Q And did you go work at that building?

A I did go that day.

Q And were you able to do the work?

A I tried to hold on for as long as I could, but it was very heavy work.

Q And what made it heavy work?

A You had to walk a lot and there were stairs.

Q Okay. And how did that affect your knee, your left knee?

A It was very, very swollen and the pain was insufferable.

On cross examination by Respondent 3 AJ's attorney, the claimant was asked about continuing to work after her November 12, 2019, injury, and the end of her employment as follows.

Q Now, you told us you missed two days from work after this event.

A Yes, the ones that the doctor said.

Q And then you went back to cleaning like you had previously?

A Yes.

Q And you did that up until apparently you had a problem with the co-worker; is that correct?

A Yes.

Q Okay. Now, the way that problem was resolved was to move you to a different location to work; correct?

A Well, I left so I could speak to Jake.

Q And eventually you were moved to another location to clean?

A I was asked if I – I was asked – it was Karina. I spoke to Karina about it because I said I needed – that it was a lot to clean in that building and that I had already spoke to Jake because my knee was hurting. He knew that I had fallen.

Q That is not what I asked. You had a dispute with a co-worker; correct?

A Yes.

Q Okay. Now, up until the time of that dispute, you were continuing to work full time; correct?

A Yes.

Q And in resolution of that dispute, you were going to be moved to another location to continue cleaning; correct?

A Yes.

Q Okay. You didn't like that other location and you quit; correct?

A It is not that I did not like it. It was because of my knee. There were too many stairs. It was too big. It was too much for me.

Q You were asked in your deposition on Page 40 beginning at Line 9, I asked you, "Did you quit your job because you did not want to move to the other building?" And you answered, "Yes." Is that correct?

A It is not that I don't like it. I could do the job if my knee was good.

Q Because you had been working full time at the Pike house previously?

A Yeah, I did what I could.

Q In fact, you asked to go back to the Pike house and continue to work, but you were not offered that position?

A No. Yes. No. What happened was that I was with Jake and Karina on Jake's car and I told him that I had fallen and that my

knee was hurting and he started yelling to Karina saying that he did not know, that I had not told him, that no one had told him.

Q Well, we are beyond that because you continued to work for a significant period of time until this dispute with a co-worker.

A But I couldn't take the pain anymore. I was just waiting for my appointment with my doctor. Even if I had not had a problem with her or with anyone, I would not have been able to keep on working because the pain in my knee was just too much.

Q So you did or didn't quit your job because you were moved to another building as your testimony previously says?

A I did, but it was because I would not have been able to do my job because of the pain in my knee.

Q So when you told us earlier in the questioning by your attorney that you asked to go back to the Pike house to work, is that right or wrong?

A That is true.

The claimant was seen by Dr. Servy, who is a family doctor, on several occasions regarding her left knee. Medical records introduced into evidence do not show any work or other restrictions being placed on the claimant by Dr. Servy. That fact is confirmed by her deposition testimony as follows.

Q Okay. Doctor, just so that I'm clear, throughout the time that you've treated her since 2016, you have not ever limited or restricted her activities; correct?

A Correct.

Q You have not even taken her off work or given her a release from work?

A Correct.

Q You also don't have any independent knowledge as to whether she continued to work after this event or for whatever reason she may have left work?

A Correct.

Q If a patient comes in and is evaluated by you, a part of your job is to write down whatever they complain of; correct?

A Yes.

Q Whatever symptoms they may make or pain complaints?

A Yes.

Q And you use those, then, to investigate that particular problem or what may be the cause of that complaint?

A Right.

Q And you did that on each one of your visits?

A Yes.

On cross examination by the claimant's attorney, Dr. Servy was asked to speculate about if she would have placed restrictions on the claimant had she known the claimant had a torn medial meniscus and she answered in the affirmative. However, at least by the claimant's June 18, 2021, visit with Dr. Servy, she knew of the claimant's torn medial meniscus because she gave the claimant a referral to Mercy for left knee surgery at that time. Then, nor at any point after, did Dr. Servy place restrictions on the claimant. Dr. Chris Arnold, who is an orthopedic surgeon, recommended surgery for the claimant but did not restrict her from work or activities. The claimant was also seen by Dr. Ronald Kaler at Mercy Clinic Orthopedics and Sports in Rogers at the referral of Dr. Servy and he also, did not place restrictions upon the claimant. In fact, no restrictions have ever been placed on the claimant by a medical provider before or after her employment with Respondent 1 JJS ended.

When considering the claimant's testimony about the end of her employment I find that the claimant left her employment because she was unhappy with being moved to a different building, not due to reasons related to her compensable left knee injury. The claimant has not, as of the time of the hearing in this matter or before, been restricted in any capacity by a medical provider and she has been seen by several medical providers in that time period. The claimant's lack of restrictions, along with the claimant's ability to work until she became unhappy, and her willingness to continue to work if she got her way, demonstrate the claimant's ability to work, which greatly weakens her testimony that she could not do so. The claimant is not able to prove that she is entitled to temporary total disability benefits from January 10, 2021, to a date yet to be determined.

The issues of attorney's fee and compensation rates are moot as the claimant has not been awarded any indemnity benefits in this matter.

Respondent 2 U of A and Respondent 3 AJ have raised the Notice Defense in this matter. Both are moot for different reasons.

Respondent 2 U of A's Notice Defense is moot in that they have no liability in this matter as they are not an employer, prime contractor, or subcontractor. Instead, they are a third party involved without liability.

Respondent 3 AJ's Notice Defense is moot in that Respondent 3 AJ is not a traditional employer under the Workers' Compensation Act. While Respondent 3 AJ does have liability in this matter, that liability is found in ACA §11-9-402 where Respondent 3 AJ finds itself in the shoes of Respondent 1 JJS, the uninsured subcontractor who most certainly did have notice almost immediately after the claimant's compensable left knee injury occurred on November 12, 2019.

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 April 6, 2022, and contained in a Pre-hearing Order filed April 6, 2022, are hereby accepted as fact.

2. The claimant proved by a preponderance of the evidence that Respondent No. 1, Jake's Janitorial Services, and the claimant had an employee/employer relationship on November 12, 2019.

3. The claimant failed to prove by a preponderance of the evidence that Respondent No. 2, the University of Arkansas, and the claimant had an employee/employer relationship.

4. The claimant failed to prove by a preponderance of the evidence that Respondent No. 3, Absolute Janitorial, and the claimant had an employee/employment relationship.

5. The claimant proved by a preponderance of the evidence that Respondent No. 3, Absolute Janitorial, has liability for any and all compensation awarded to the claimant through her employee/employer relationship with Respondent No. 1, Jake's Janitorial Services, for her November 12, 2019, compensable left knee injury under ACA §11-9-402.

6. The claimant proved by a preponderance of the evidence that she sustained a compensable injury to her left knee on November 12, 2019, while an employee of Respondent No. 1, Jake's Janitorial Services.

7. The claimant proved by a preponderance of the evidence that medical treatment admitted into evidence by the parties is reasonable and necessary medical treatment for the claimant's compensable left knee injury. The claimant also proved by a preponderance of the evidence that the medical treatment recommended by Dr. Arnold, including surgical intervention, is reasonable and necessary treatment.

8. The claimant failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from January 10, 2021, to a date yet to be determined.

9. The issues of attorney's fees and compensation rates are moot.

10. The defense of Notice raised by Respondent No. 2, the University of Arkansas, and Respondent No. 3, Absolute Janitorial, are moot.

ORDER

Respondent No. 1, Jake's Janitorial Services, shall pay for the reasonable and necessary treatment of the claimant's compensable left knee injury, including reimbursement to the claimant for all reasonable and necessary medical expenses incurred by the claimant. Respondent No. 3, Absolute Janitorial, is liable to the claimant for compensation under ACA §11-9-402.

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

IT IS SO ORDERED.

HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE