

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H200110**

CHRISTIAN GIL, EMPLOYEE

CLAIMANT

C MAYO INC., EMPLOYER

RESPONDENT

UNION STANDARD INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED **JUNE 16, 2022**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF, in Springdale, Washington County, Arkansas.

Claimant represented by JASON M. HATFIELD, Attorney, Springdale, Arkansas.

Respondent represented by MELISSA WOOD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 5, 2022, the above captioned claim came before the Workers' Compensation Commission in Springdale, Arkansas, for a hearing. A prehearing conference was conducted on February 17, 2022, and a prehearing order filed that same date. A copy of the prehearing order has been marked as Commission's Exhibit No. 1, as modified to include the agreed upon compensation rates, and no objection was made to it being a part of the record.

The parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this case.
2. The employee/employer/carrier relationship existed on June 11, 2021.
3. Claimant sustained a compensable injury on June 11, 2021.
4. Claimant's average weekly wage was \$863.71, which would translate to a temporary total disability rate of \$576.00 and a permanent partial disability rate of \$432.

The issues to be litigated are limited to the following:

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1. Whether claimant is entitled to temporary total disability from January 4, 2022 to a date yet to be determined.
2. Attorney fees.

All other issues are reserved by the parties.

The claimant contends that “claimant sustained a compensable injury while working for respondent on or about June 11, 2021. At that time, claimant was in the course and scope of his employment with respondent when claimant’s hand was crushed when the machine malfunctioned. Numerous bones in his had were broken. When EMT’s arrived, claimant’s hand was still stuck in the machine and the machine had to be taken apart to remove claimant’s hand. Claimant was taken via ambulance to NWMC in Springdale and was then taken by helicopter to UAMS in Little Rock where he was admitted for extensive surgery. Claimant underwent surgery and has 26 screws and four plates in his right dominant hand and retains minimal use of his hand. The hand continues to be in so much pain that his treating physician is considering cutting the nerve to the hand in another surgical procedure. Claimant has continued to attempt all duties requested of him by his employer under a hostile work environment. Claimant’s restrictions include the following:

- 1) No lifting, pushing, or pulling 5 lbs. with upper extremity.
- 2) Desk duty or driving.

Respondents have continued to place claimant on the floor of the plant and refused to provide desk or driving duties. Co-employees have been irritated that he cannot perform the job duties on the floor. On January 4, he was told among other things “You’re worse than a f***ing wetback, dog. You give people a bad name... I’ll f***ing put you in your place real quick...I should have cut your hand off, is what I should have done...I should have left you there. It would have done everybody real good...You think you’re some little s***...that right there is gonna f***ing teach you a real lesson...”

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Shortly after this incident, HR came out on the floor and terminated claimant's employment. Respondents' insurer denies paying temporary total disability and claims that claimant provoked the outburst from respondent under the advice of counsel. Claimant is an American citizen born and raised in Illinois. Mr. Gil has PTSD from this incident, and the treating physician, Dr. Bracy, has recommended treatment. Respondents have denied treatment. Respondents failed to report this incident to OSHA despite requirements to do so within 24 hours of the injury and hospital admission."

The respondents contend that "all appropriate benefits are being paid with regard to claimant's compensable injury. On January 4, 2022, claimant was asked to go home for the day and come back the following day so that an investigation could take place as to what occurred between him and Greg Soto. Claimant was never fired from his job but never returned. As such, his off-work status is not due to his hand injury. Respondents are setting up an independent psychological evaluation to address claimant's claim for treatment associated with PTSD and depression. A position on compensability of the same will be made after receipt of the IPE report."

All other issues are reserved by the parties.

From a review of the entire record, including medical reports and non-medical documents, and having heard the testimony and observed the demeanor of all witnesses, the following decision is rendered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the prehearing conference conducted on February 17, 2022 and contained in the Prehearing Order filed the same date, as well as the announced stipulations at the hearing on May 5, 2022, are hereby accepted as fact.
2. Claimant has met his burden of proof by a preponderance of evidence that he is entitled to temporary total disability benefits beginning January 4, 2022 and continuing until he reaches the end

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of his healing period or returns to work.

3. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits, specifically claimant's entitlement to temporary total disability.

FACTUAL BACKGROUND

Following the hearing of this matter, the parties were asked to submit briefs in support of their respective positions regarding the issues litigated in this matter. Those briefs, as well as an email from claimant's counsel declining to file a reply brief, are blue backed to the record of this matter as Commission exhibits.

HEARING TESTIMONY

Claimant testified that on June 11, 2021, his hand was crushed in the bending machine at work when a fellow employee, Greg Soto, began operating the machine while claimant's hand was in harm's way. Claimant believes his hand was stuck in the machine for three to four minutes. When he was able to remove his hand, he was taken to Northwest Hospital in Springdale and then flown by helicopter to Little Rock for surgery. At some point, he was returned to one-handed duty. Eventually, he was placed on restrictions on his injured hand to a weight-lifting restriction of one pound, which was in time increased to five pounds. Claimant said he frequently had to exceed his doctor's restrictions in performing the work assigned to him, especially when he delivered metal pieces to a customer and had no help in loading or unloading the material.

Claimant remained under the restrictions imposed by his doctor until January 4, 2022, when an incident at work occurred involving a fellow employee. Claimant testified that on that date, he needed a forklift to take out the trash and he asked Mr. Soto for one. Claimant said there was an exchange of words between the two and he recorded those on his phone (the recording is on a flash drive as part of claimant's exhibit No. 3; that recording will be discussed below in the review of the

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exhibits). Claimant testified that he had endured some insults in the shop before that day, specifically being called the “clean-up girl”. Claimant said after the recorded portion of the altercation with Mr. Soto, he walked away from him and went to his toolbox. While there, he was approached by Courtney, who he identified as the HR lady. According to claimant, Courtney told him to grab his stuff and he was terminated. Claimant told a fellow worker named Javier that he had gotten fired and needed help loading his toolbox on the truck. Claimant believed his toolbox when loaded weighed about 3,000 pounds and was worth around \$5,000.00.

On cross-examination claimant repeated that when Courtney spoke with him, she terminated him. He said that when she told him that, he was going to ask why, but she left with no explanation. Claimant stated that there was no one around when that happened. He said that he was going to use the fork-lift to get a pallet and Mr. Soto started to call him names. There were words exchanged before he began recording so claimant asked Mr. Soto again, and that was the exchange that was recorded and introduced into evidence.

Claimant said that he was not given a reason for being terminated. Once he left the premises of respondent C Mayo, he called the police. Approximately three weeks after the incident, he told the police to drop the case because he had filed harassment against Mr. Soto and had a restraining order against him. Claimant had not called anyone at C Mayo to see if he can come back to work, nor had he applied anywhere since leaving.

Upon redirect examination, claimant said he was still scared of Mr. Soto and would be scared to go back to work with him. He said he had not been contacted by anyone from C. Mayo to let him know that it was okay for him to come back to work.

After claimant rested, Jennifer Smith testified for respondent. Ms. Smith identified the person that claimant referred to as “Courtney” as Courtney Black, her daughter that worked mostly at

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accounts receivable. Ms. Smith denied that Ms. Black has the authority to hire or fire an employee.

Ms. Smith testified on January 4, she was not at the business, as she was taking her son to the airport. She also said the foreman, Roberto, was also not at the business. Ms. Smith received a call from Ms. Black that there had been an incident between claimant and Mr. Soto. The one that reported it to Ms. Black was afraid that it might escalate. Ms. Smith said that she instructed Ms. Black to send claimant home for the day and that she and Roberto would get back with them in the morning to try to work out the situation. She chose claimant to go home because he was on light duty, and there was a product that needed to be completed. Since Mr. Soto was the one working on that product, she needed him to be there. At the time she instructed Ms. Black to send claimant home, she did not know the details of the argument.

Upon returning to work, Ms. Smith said she was still in the dark at first as to how bad the argument between claimant and Mr. Soto had been. She then received a call from the Springdale Police Department that claimant had filed a restraining order and an assault charge against Mr. Soto. From that time until the investigation was complete, Ms. Smith understood the two men would not be able to be around each other. Ms. Smith talked to Mr. Soto and asked him to write up the statement that was introduced (CL. X.2, 6-7). She said that it was pretty accurate as to what she had heard on the video. Mr. Soto was given a written warning for his conduct because Ms. Smith did not condone that kind of behavior. If any other such activity occurs, Mr. Soto would be terminated. She testified that of the date of the hearing, Mr. Soto still worked at C Mayo. Had she not been instructed by the police not to contact the claimant, she intended to call him the day after the incident to try to resolve the problem. Ms. Smith said that claimant could have continued to do his light duty.

Ms. Smith was not aware that claimant was asked to do anything outside of the restrictions placed on him by his physician. She said that he was allowed to go home frequently because his hand was

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hurting, or it was obviously swollen. Claimant was paid if he went home. She said that Christian was willing to try to spot weld a few things, and the welding torch weighted less than a pound. She noticed that claimant's attitude changed while he was on light duty, as he seemed to develop a bit of a chip on his shoulder by having to do light duty jobs instead of welding as he was hired to do. She felt that claimant was trying to be fired based on some comments said that if he couldn't work, he could get an attorney to see how much money he could possibly get.

On cross-examination, Mrs. Smith said claimant had not been paid since January 4, 2022. She said her daughter would have been in charge when she and Roberto were gone. She testified she intended to have claimant leave just for the day. She conceded she didn't know what was said between her daughter and claimant. Ms. Smith said that she had not asked claimant to come back to work and did not think it was a good idea for claimant to work in the same shop as Mr. Soto.

Ms. Smith understood that when claimant made a delivery, he was to be helped by those where he was making a delivery. She didn't see the deliveries and did not know if claimant received help, but she did testify that claimant didn't complain that he received no assistance.

Ms. Smith said that she had not contacted claimant after the restraining order was lifted because he had made a worker's compensation claim. She felt that once attorneys were involved, matters should be worked out between the attorneys. She was aware that claimant used his hands and at times they would swell. Ms. Smith said she did not know about the side effects of his medication while he was working on the welding machine, only finding those out later.

On redirect examination, Ms. Smith testified that she had not contacted claimant since January 4, 2022, because she had spoken to a police officer and understood that because of the restraining order being filed and harassment charges being brought, that would mean claimant and Mr. Soto could not be around each other.

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Respondent called Courtney Black, who testified that she was the corporate secretary at respondent C Mayo. She was present at the business on January 4, 2022, when she learned that there was a verbal altercation between claimant and Greg Soto. She called Ms. Smith, her mother, to let her know what was going on. Ms. Black stated that she was advised that it was probably best if claimant was sent home for the day, so she went to where claimant was and told him to go home for the day and that when her mother and Roberto were back, they would talk to him. She testified claimant “said okay” and she left the table. She denied telling claimant he was terminated or that she gave him a reason to believe he was terminated, but she did tell him to get his things. Ms. Black said claimant had a jacket and cell phone on his table and she meant for him to get his personal belongings that were right there. She denied that she had the authority to hire or fire at C Mayo. She was unaware that claimant took his tools that day. Ms. Black opined that claimant was trying to be fired, because he had been showing up late and had been argumentative when he was “put on low work stuff.”

On cross-examination, Ms. Black testified Mr. Soto did not tell her what happened, and she did not ask claimant what had happened. She wasn’t sure if her mother or Roberto had talked to claimant. Ms. Black testified she had no idea what verbal altercation had occurred, so she called her mother to determine how to handle it.

REVIEW OF THE EXHIBITS

Claimant’s exhibit one consisted of the medical records regarding claimant’s injury to his right hand. As respondent admits that claimant’s hand was crushed while working on June 11, 2021, an exhaustive review of those records is unnecessary. As of February 17, 2022, claimant was released to work with the following restrictions: “no lifting, pushing, or pulling greater than five pounds with upper right extremities. Okay for desk duty and driving” As of the date of the hearing, claimant had not reached maximum medical improvement and remains under the care of Dr. John Bracey.

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Claimant's non-medical index includes photographs of the injury to claimant's right hand, which would serve to prove the existence and severity of claimant's injury if such were disputed by respondent. More germane to the issues to be decided in this hearing is the written statement from Mr. Soto. In that statement, Mr. Soto readily admitted using profanity towards claimant, insulting him, questioning the severity of his injury, and telling claimant that "I should have cut his hand instead of keeping him upright and making sure he was okay." There was a photograph of claimant's toolbox being loaded onto his truck with a forklift on January 4, 2022.

The case report from the Springdale Police Department was admitted without objection. It was most interesting in what claimant and Jennifer Smith said in their statements on January 4, 2022, regarding claimant's employment. Ms. Smith said that claimant had started the argument with Mr. Soto and claimant "was asked to go home for the day and come back tomorrow to discuss how to go further with his employment but was in no way fired from his job." In claimant's call to the police at 1:35 that date, claimant said "there is a male that he was working with who will not leave him alone and [he] does not feel safe." Claimant told the person recording the information that this person had caused him to get fired from his job, that he was afraid of Mr. Soto and was concerned because Mr. Soto know where claimant lived.

Claimant's third exhibit was the deposition of Jennifer Smith from March 14, 2022. While Ms. Smith's testimony in the deposition went into more detail about many aspects of this case, she had little to add to her testimony at the hearing regarding the issues which must be decided in this matter. There were no glaring inconsistencies between what she said at her deposition and what she testified to at the hearing.

Finally, the flash drive which contained the video recording claimant made on January 4, 2022, was an exhibit to her deposition. I was able to make out the following exchange:

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[Beginning of recording]

Soto "You're worse than a f***ing wetback, dog."

Claimant: Oh yeah?

Soto: "You give people a f***ing bad name!"

Claimant: Ok

Soto: "Mother f*****s like you! You wanna come over here and f***ing try to say s*** to me, I'll f***in' put you in your place real quick!

Claimant: Ok

The two then talked over each other and I could not understand what was said.

I next heard

Claimant: "... you did this to my f***ing hand."

Soto "I did that to you?"

Claimant: "Yeah"

Soto: "Sure, OK. F***, yeah. What I should have done is f***in' cut your hand off, is what I should have done. I shouldn't have f***ing sat there with you and f***ing made sure you were OK. I should have f***ing left you there.

Claimant "Oh yeah?"

Soto: "It would have done f***ing everybody a good deal, wouldn't it? You're f***in' real (unclear), don't you? You think you're f***in' some little s***. You know what? That right there is going to f***ing teach you a real lesson.

Claimant: OK.

[End of recording]

ADJUDICATION

This case is governed by Arkansas Code Annotated section 11-9-526, which provides as follows:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

In his post-trial brief, claimant urged alternative theories for finding he should be drawing temporary total disability. He first maintained that he was fired from his job, and thus the offer of suitable employment had been withdrawn. His second basis for prevailing was that he was justified in refusing to work at respondent C Mayo following the incident of January 4, 2022. I find the evidence clearly supports the second theory put forth by claimant, and therefore will address it first.

Trying to convey on paper what was said on the recording is difficult, because the hateful tone of Mr. Soto can't be captured in words—as if the words themselves aren't bad enough. To his credit, Mr. Soto didn't sugarcoat what he said to claimant in his written statement. Some of that document recounted what was said before claimant began recording. It is apparent to me that Mr. Soto did not like that claimant was working light duty and did not appreciate being reminded of how the injury to claimant's hand happened.

The evidence at the hearing was undisputed on this crucial point: Claimant didn't think he should be working with Mr. Soto, and neither did Ms. Smith. Her testimony on cross-examination couldn't be any clearer:

Question (by Mr. Hatfield): Do you think it is a good idea to have Christian Gil work in the same shop as Greg Soto ever?

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Answer (by Ms. Smith) Not after that day, no. (TR. 58)

As the owner of respondent C Mayo did not think claimant and Mr. Soto should be working together, and as she chose to keep Mr. Soto as an employee after giving him a written warning, I find claimant has proven by a preponderance of the evidence that he was justified in refusing to continue to work for respondent C Mayo. Claimant is entitled to receive temporary total disability benefits from January 4, 2022, until he reaches the end of his healing period or until he returns to work, whichever occurs first. *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001).

Because I find claimant was justified in refusing to continue to work for respondent C Mayo, I do not need to determine whether he was terminated by Ms. Black on behalf of respondent C Mayo, or if claimant was required to perform work that was outside of his medical restrictions, thereby making the employment unsuitable to his physical capacity.

ORDER

Respondents are directed to pay benefits in accordance with the findings of fact set forth herein this Opinion.

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. § 11-9-809.

Pursuant to Ark. Code Ann. § 11-9-715, the claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein. This fee is to be paid one-half by the carrier and one-half by the claimant.

All issues not addressed herein are expressly reserved under the Act.

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of \$654.80.

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IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE