

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H301677**

ERIC G. HOLMES, EMPLOYEE	CLAIMANT
DANA TURNAGE, EMPLOYER	RESPONDENT
AMGUARD INS. CO., CARRIER	RESPONDENT

OPINION FILED MARCH 7, 2024

Hearing before Administrative Law O. Milton Fine II on January 3, 2024, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Jacobi P. Malone, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Randy P. Murphy, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 3, 2024, the above-captioned claim was heard in Little Rock, Arkansas. A pre-hearing conference took place on October 2, 2023. The Prehearing Order entered on that date pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. Following a mutually-agreed withdrawal of the fourth,¹ they read:

¹Stipulation No. 4 read: "The parties will stipulate at the hearing to Claimant's average weekly wage and compensation rates." But the parties at the outset of the hearing advised that that they were unable to arrive at an agreement. Consequently, this stipulation was withdrawn, and the valuation of Claimant's average weekly wage was added as an issue.

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer/carrier relationship existed on December 27, 2022, and at all other relevant times.²
3. Respondents have controverted this claim in its entirety.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. After the withdrawal of the stipulation concerning the valuation of Claimant's average weekly wage and its insertion into the issues to be tried, the following were litigated:

1. Whether Claimant sustained compensable injuries to his neck and back by specific incident.
2. Whether Claimant is entitled to reasonable and necessary medical treatment.
3. Whether Claimant is entitled to temporary total disability benefits.
4. Whether Claimant is entitled to a controverted attorney's fee.
5. What was Claimant's average weekly wage?

All other issues have been reserved.

Contentions

The respective contentions of the parties are as follows:

²I have overruled Respondents' motion to withdraw this particular stipulation—see *infra*.

Claimant:

1. Claimant contends that he is entitled to payment of temporary total disability benefits from the date of the injury to date. He was unable to return to work, under the physician's order. However, he has brokered small jobs between his labor team and clients.

Respondents:

1. Respondents contend that Claimant did not sustain an injury during the course and scope of his employment. There is no medical evidence to support a work-related injury or disability. Moreover, Claimant did not timely report the alleged on-the-job injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including 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, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Respondents' motion to withdraw Stipulation No. 2 is hereby denied.
4. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his neck by specific incident.

5. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his back by specific incident.
6. Because of Findings of Fact/Conclusions of Law Nos. 4 and 5, *supra*, the remaining issues—whether Claimant is entitled to reasonable and necessary medical treatment, temporary total disability benefits, and a controverted attorney’s fee, and the valuation of his average weekly wage—are moot and will not be addressed.

PRELIMINARY RULING

Motion to Withdraw Stipulation

At the hearing, the following colloquy took place:

JUDGE FINE: My understanding is that the claimant has no other proposed change to the stipulations, but the respondents do so, and I’ll now hear you on that, Mr. Murphy.

MR. MURPHY: Yes, Your Honor. Based on the information that’s come to light, we’re contending that the claimant was not an employee of Rainproof Roofing at the time of the incident. We can stipulate to the carrier relationship, of course, but it’s our position that Mr. Holmes was not an employee of Rainproof Roofing.

JUDGE FINE: All right, counsel. When you say this came to light, was this a result perhaps maybe of a deposition or something of that nature?

MR. MURPHY: It was primarily the deposition, Your Honor, but also other information that we have received during the course of our preparation for this hearing.

JUDGE FINE: Okay. I have not seen in reviewing my file any notification from your office that you were changing your approach to this. Did you send something that I’m not aware of?

MR. MURPHY: I did not.

JUDGE FINE: Did you notify Mr. Malone prior to today of the change in posture on it?

MR. MURPHY: No, Your Honor.

JUDGE FINE: Okay. Any reasoning as to why you did not do that?

MR. MURPHY: Well no, other than the fact that it was just an oversight, I guess, on my part, but it—we've challenged the compensability and, you know, I know it's a separate issue as we've talked about off the record, but we—we're not prepared and would like to hear testimony, believe there will be testimony, anyway, on the quote, alleged employment relationship.

JUDGE FINE: All right. Basically, Mr. Malone, Mr. Murphy—and I know we discussed this off the record, but Mr. Murphy is moving to withdraw Stipulation No. 2, and my understanding is that you are objecting to that, is that correct?

MR. MALONE: That is correct, Your Honor.

JUDGE FINE: All right. Do you want to give [sic] further on that to make your record as to why you're objecting?

MR. MALONE: Yes, Your Honor. I would just object to the untimeliness of the [sic] being informed as to a withdrawal of that stipulation, Your Honor. We had no time to prepare. We came with the agreement that it was already established that Mr. Holmes was an employee of Mr. Turnage's so it's just kind of last minute.

JUDGE FINE: All right. Let me advise the parties on this. I'm going to go ahead and take this proposed change to the Stipulation No. 2, the proposed withdrawal of Stipulation No. 2, under advisement. I'll rule in my opinion on whether I will allow that.

[R. 4-6]

“A stipulation is an agreement between attorneys respecting the conduct of the legal proceedings.” *Ark. Dept. of Corr. v. Jackson*, 2019 Ark. App. 124, 571 S.W.3d 539 (citing *Dinwiddie v. Syler*, 230 Ark. 405, 323 S.W.2d 548 (1959)). As a general rule, parties are bound by their stipulations. *Dempsey v. Merchants Natl. Bank of Fort Smith*, 292 Ark. 207, 729 S.W.2d 150 (1987). Nonetheless, the Commission may in its discretion permit a party to withdraw a stipulation. *Ark. Dept. of Corr., supra; Jackson v. Circle T Express*, 49 Ark. App. 94, 896 S.W.2d 602 (1995).

As the Court of Appeals wrote in *Sapp v. Tyson Foods*, 2010 Ark. App. 517, 2010 Ark. App. LEXIS 549, “elementary principles of fair play” apply in Commission proceedings. It would certainly violate those principles in this instance to allow Respondents to withdraw this stipulation so belatedly. As their counsel acknowledged, he was aware of the circumstances that led to the proposed withdrawal well in advance of the hearing, yet he did not alert opposing counsel to this at any point before the hearing. The withdrawal would mean that Claimant would have had to prove the existence of the employer/employee relationship—an element of compensability (see *supra*)—that he was not prepared to do because of the stipulation. Consequently, the motion to withdraw Stipulation No. 2 must be, and hereby is, denied.

CASE IN CHIEF

Summary of Evidence

The witnesses at the hearing were Claimant; his son, Eevan Holmes, and Respondent, Dana Turnage.

In addition to the prehearing order discussed above, admitted into evidence in this case was Respondents’ Exhibit 1, three screen shots of video footage.

Adjudication

A. Compensability

In this action, Claimant has alleged that he suffered compensable injuries to his neck and back by specific incident on December 27, 2022, when he was struck by multiple bricks while he was working for Respondent Turnage, performing demolition on a building as part of a crew. Respondents, in turn, have denied that Claimant suffered a compensable injury of any type.

Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2012), which I find applies to the analysis of Claimant’s alleged injuries, defines “compensable injury”:

- (i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is “accidental” only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2012). “Objective findings” are those findings that cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16). The element “arising out of . . . [the] employment” relates to the causal connection between the claimant’s injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant’s employment “when a causal connection between work conditions and the injury is apparent to the rational mind.” *Id.*

In *Hudak-Lee v. Baxter County Reg. Hosp.*, 2011 Ark. 31, 378 S.W.3d 77, the Arkansas Supreme Court stated:

In order for an accidental injury to be compensable, it must arise out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2009). A compensable injury does not include an injury that is inflicted upon the employee at a time when employment services are not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii) (Supp. 2009). The phrase “in the course of employment” and the term “employment services” are not defined in the Workers' Compensation Act. *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008). Thus, it falls to the court to define these terms in a manner that neither broadens nor narrows the scope of the Act. *Id.*

An employee is performing employment services when he or she is doing something that is generally required by his or her employer. *Id.*; *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002). We use the same test to determine whether an employee is performing employment services as we do when determining whether an employee is acting within

the course and scope of employment. *Jivan v. Econ. Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007). The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest, directly or indirectly. *Id.* In *Conner*, 373 Ark. 372, 284 S.W.3d 57, we stated that where it was clear that the injury occurred outside the time and space boundaries of employment, the critical inquiry is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. Moreover, the issue of whether an employee was performing employment services within the course of employment depends on the particular facts and circumstances of each case. *Id.*

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

No medical records were offered into evidence. Consequently, the evidentiary record is devoid of objective findings of injuries to Claimant's neck and/or back. He thus cannot show that he sustained a compensable injury to either of these body parts; his claim must fail at the outset. Claimant has not proven compensability by a preponderance of the evidence.

B. Remaining Issues

Because of the foregoing, the remaining issues—whether Claimant is entitled to reasonable and necessary medical treatment, temporary total disability benefits, and a controverted attorney’s fee, as well as the valuation of his average weekly wage—are moot and will not be addressed.

CONCLUSION

In accordance with the Findings of Fact and Conclusions of Law set forth above, this claim for initial benefits is hereby denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge