

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H202720**

WILLIAM L. MIDDLETON, Employee	CLAIMANT
L & L METAL FABRICATION, Employer	RESPONDENT
AMERISURE INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED **NOVEMBER 30, 2023**

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

Claimant represented by MATTHEW J. KETCHAM, Attorney, Fort Smith, Arkansas.

Respondents represented by KAREN H. MCKINNEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 28, 2023, the above captioned claim was scheduled for a hearing in Springdale, Arkansas. A pre-hearing conference was conducted on April 13, 2023 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection. Prior to the date of the hearing, the parties agreed to submit this matter on a stipulated record and briefs.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on July 3, 2021.<sup>1</sup>
3. The respondents have controverted the claim in its entirety.

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<sup>1</sup> I note a discrepancy between the stipulation as to the date of injury and the contention of claimant. The evidence showed that claimant was working a shift that began on July 3, 2021, and continued into July 4, 2021. The different dates in the issues and the contentions are of no consequence.

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The parties later submitted joint stipulations that will be discussed below.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant sustained a compensable injury on July 3, 2021.
2. If compensable, whether claimant is entitled to medical benefits past and future.
3. Whether claimant is entitled to temporary total disability benefits.
4. Whether claimant is entitled to mileage.
5. Attorney's fees.

All other issues are reserved by the parties.

The claimant contends that “He was injured on July 4, 2021, when he was struck on top of his hard hat by another employee causing an injury to his neck and head which has ultimately led to a traumatic brain injury. The claimant was seen two (2) days later at Arkansas Occupational Health Clinic for continued complaints of head injury with neck pain. Imaging was performed and the claimant was released to regular duty with instructions to return in one (1) week for follow up. On July 13, 2021, the claimant returned to Arkansas Occupational Health Clinic for continued neck pain wherein he received a steroid injection and to return in one (1) week for follow up. The claimant returned to Arkansas Occupational Health Clinic on July 20, 2021, for continued head and neck pain. The PA-C referred the claimant to physical therapy and to return in three (3) weeks. On August 18, 2021, the claimant returned to Arkansas Occupational Health Clinic for worsening pain in his neck. The claimant had not been able to start physical therapy. On September 29, 2021, the claimant was treated by Arkansas Occupational Health Clinic for continued worsening neck pain. The PA-C referred the claimant for a neurology consultation as well as an MRI or CT of his neck. The claimant had an MRI of his cervical spine performed on October 5, 2021, at Mana Medical Associates. On October 18, 2021, claimant followed up at Arkansas Occupational Health Clinic for continued

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worsening neck pain. The MRI imaging was reviewed, and the claimant was to be referred for possible ESI. On November 8, 2021, the claimant was seen by Dr. Luke Knox for continued neck pain. Dr. Knox suggested that the claimant receive epidural steroid injections prior to surgical intervention. The claimant followed up with Dr. Luke Knox approximately two (2) months later and has continued to have neck and head pain. The claimant reserves the right to amend and supplement his contentions after additional discovery has been completed.”

The respondents contend that “The claimant did not sustain a compensable injury to his head or neck. Respondents further contend that the claimant has filed a civil action in Circuit Court against L & L Metal Fabrication, Inc., Brandon White, and John Does #1-10 for this exact same injury. The claimant had previously undergone a cervical fusion and any issues with his cervical spine was pre-existing. Moreover, Ark. Code. Ann 11-9-102(4)(A)(i) defines a compensable injury as an “accidental injury.” If the injury was an intentional injury as alleged by the claimant in his civil complaint, the claimant did not sustain a compensable injury.”

From a review of the entire record, to include medical reports, documents, and other matters properly before the Commission, 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 a pre-hearing conference conducted on April 13, 2023, and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant is barred from pursuing this matter because he elected a remedy in civil court and resolved that matter via a settlement.

FACTUAL BACKGROUND

On the day before the scheduled hearing, the parties contacted me and advised they could submit this matter on a stipulated record. The hearing was cancelled, and after a delay in getting the joint stipulation executed, it was received on November 13, 2023. The joint stipulation specifically referenced seven records as joint exhibits. Respondent submitted its brief and attached 32 pages of non-medical records in support of its position on October 13, 2023. Claimant submitted his brief and 71 pages of non-medical records in support of his position. Because the supporting documents from the parties were not part of the joint stipulation agreement, I inquired of the parties if either had an objection to the documents submitted by the other party. Both advised they had no objection to the records attached to the brief of the opposing party. The email exchange between the parties and the court is blue backed to the record in this case. As such, all the documents provided by the parties are properly before me to be considered in this opinion.

THE JOINT STIPULATIONS

The parties submitted these joint stipulations, which are hereby accepted as fact:

1. The parties agreed to submit this claim on a stipulated record to consist of the stipulated facts and:
  - a. The Claimant's Prehearing Questionnaire Responses filed February 10, 2023.
  - b. Respondents Prehearing Questionnaire Responses filed April 12, 2023, with attached exhibits.
  - c. Respondents Supplemental Responses filed May 31, 2023, with attached exhibits.
  - d. The Prehearing Order filed April 13, 2023.
  - e. The Claimant's Medical Records filed September 21, 2023.
  - f. Brandon White's deposition taken on August 10, 2023
  - g. The AR-N.

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2. The Employee/Employer/Carrier relationship existed between the parties on July 3 and 4, 2021.
3. The claimant earned a sufficient average weekly wage to be entitled to the maximum compensation rates of \$736.00 per week for temporary total disability and \$552.00 per week for permanent partial disability.
4. The Respondents have controverted this claim in its entirety.
5. The claimant was employed by L & L Fabrication, Inc. as a job supervisor.
6. Brandon White, owner of Respondent Employer, struck the claimant on the top of his head with his hard hat in the early morning hours of July 4, 2021.
7. The claimant completed an AR-N on July 6, 2021, alleging an injury to his head and neck when “the owner of L & L Brandon White hit me in the top head very hard with a hard hat.”
8. Mr. White provided deposition testimony regarding this incident.
9. The claimant filed a civil complaint in the Circuit Court of Washington County, Arkansas related to this injury in the early morning hours of July 4, 2021.
10. In a Second Amended Complaint filed on July 22, 2022, the claimant dropped all allegations of negligence and alleged that he was battered by Brandon White when White “deliberately and intentionally took his hard hat and hit Plaintiff over the head with it after becoming angry with Plaintiff.”
11. The claimant further alleged in his Second Amended Complaint, “Defendant White’s anger and conduct towards Plaintiff evinces an apparent intent to injure Plaintiff.”
12. In response to a Motion to Dismiss of the claimant’s Second Amended Complaint due to the exclusive remedy being workers’ compensation, claimant contended that all allegations in the Second Amended Complaint were outside the exclusive jurisdiction of the Workers’ Compensation

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Commission pursuant to the “intentional-tort exception.”

13. Prior to receiving a ruling on the Motion to Dismiss, the parties in that civil suit reached a Settlement Agreement with a Full and Final Release of Claims.

#### REVIEW OF THE EXHIBITS

In addition to the documents referenced in #1 of the joint stipulation, claimant submitted documents from the above-referenced civil litigation in Washington County. Respondent duplicated many of those documents, and included the confidential settlement agreement which ended the Washington County lawsuit between claimant and respondent L & L Metal Fabrication, Inc.

#### ADJUDICATION

Boiled down to its simplest elements, the issue before me is whether a claimant can bring a lawsuit against a respondent in state court, pleading an intentional tort to overcome the exclusive remedy provision of the Arkansas Workers' Compensation Act, and then maintain a claim for workers' compensation benefits after settling the case in circuit court. After reviewing the stipulations and exhibits and applying the law to these stipulated facts, I find the answer to that question is “no.”

To begin with, it is the Commission that has the exclusive jurisdiction to determine whether it has jurisdiction over a claim. The Arkansas Supreme Court made that clear in *VanWagoner v. Beverly Enters.*, 334 Ark. 12, 970 S.W.2d 810 (1998):

“We hold that the exclusive remedy of an employee or her representative on account of injury or death arising out of and in the course of her employment is a claim for compensation under § 11-9-105, and that the commission has exclusive, original jurisdiction to determine the facts that establish jurisdiction, unless the facts are so one-sided that the issue is no longer one of fact but one of law, such as an intentional tort. See *Angle v. Alexander*, 328 Ark. 714, 719, 945 S.W.2d 933 (1997) (citing *Miller v. Ensco, Inc.*, 286 Ark. 458, 461, 692 S.W.2d 615 (1985) (explaining that, before an employee is free to bring a tort action for damages against an employer, the facts must show that the employer had a "desire" to bring about the consequences of the acts, or that the acts were premeditated with the specific intent to injure the employee)”

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Claimant first had sought damages for his injuries under two theories, negligence and the intentional tort of battery. When the defense raised that a negligence cause of action against the employer could only be brought in a workers' compensation claim, claimant filed an amended pleading, eliminating the negligence claim, leaving only the intentional tort theory of recovery. Thus, claimant did what he could to avoid a claim before the Commission.

The Arkansas Supreme Court dealt with a similar issue in Western Waste Indus. v. Purifoy, 326 Ark. 256, 930 S.W.2d 348 (1996), although the order of events was reversed. Purifoy first settled a worker's compensation claim against Western Waste, and then filed a civil lawsuit against that company. In granting a writ of prohibition, the Court held:

“This court has held that the general rule is that an injured employee's right to recover for job-related injuries is exclusively under the Workers' Compensation Act, but when the employee is able to show actual, specific and deliberate intent by the employer to injure him, he may avoid the exclusive remedy under the Act and proceed in a common-law tort action. *Sontag v. Orbit Valve Co.*, 283 Ark. 191, 672 S.W.2d 50 (1984). In other words, the employee has the option to pursue his or her claim for damages either in tort or under the Workers' Compensation Act. However, once the employee makes that election, the employee may not later avail himself or herself of the remedy not chosen.” (Emphasis added)

The Court concluded by observing that “in determining whether a trial court has jurisdiction in prohibition matters, this court is limited to the parties' pleadings.”

In the Washington Circuit Court action filed by claimant, the defendants abandoned their exclusive-remedy defense after claimant filed his Second Amended Complaint. (Cl. X. 32-33) In that pleading, claimant had removed all references to negligence from his initial complaint, and specifically alleged that defendant's conduct brought “Defendant's conduct within the “intentional-tort exception” to the exclusivity provision of the Arkansas Workers' Compensation Act, codified at Ark. Code Ann. §11-9-105(a).” (Cl. X, p. 50, paragraph 2) Based on that pleading, the Circuit Court could not have referred the case to the Workers' Compensation Commission, because claimant had clearly

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and intentionally placed himself out of the jurisdiction of the Commission.

In a similar fashion, the Full Commission reversed a ruling by an administrative law judge that the claimant was not an employee of a company at the time of his alleged injury. The claimant had previously filed a lawsuit which he alleged that at the relevant time, he was employed by Webb Wheel. In the workers' compensation case, he maintained he was not so employed. The relevant passage from that opinion:

“Moreover, the claimant filed a complaint in The Circuit Court of Benton County, Arkansas on April 12, 2018, and expressly stated that he "was employed at Webb-Wheel Products, Inc. ("Webb-Wheel") in Siloam Springs, Arkansas. Mr. Bunch was employed at Webb-Wheel from approximately August of 1998 through August of 1999...." A party litigant is bound by his pleadings and cannot maintain a position inconsistent with his pleadings. *International Harvester v. Burks Motors*, 252 Ark. 816, 481 S.W.2d 351 (1972). The doctrine against inconsistent positions is a form of estoppel that prevents an individual from asserting claims that are inconsistent with the individual's previous positions. *Jackson v. Smiley Sawmill*, 2019 Ark. App. 235, 576 S.W.3d 43. The Full Commission finds that the doctrine of inconsistent positions applies in the present matter. We find that the claimant should be estopped from asserting that that he was not employed with the respondent Webb Wheel Products while working there in 1999.” *Bunch v. Gates Corporation and Webb Wheel*. 2020 AR WRK. COMP. LEXIS 340. (Emphasis added)

The pleadings in the Washington County Circuit Court case could not be any clearer. Claimant specifically framed his cause of action to circumvent the Commission's jurisdiction. Having done so, and then having resolved that case by way of a settlement agreement, claimant is estopped from now bringing a workers' compensation case.<sup>2</sup>

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<sup>2</sup> I note that in the confidential settlement agreement, claimant released L and L Fabrication, Inc. of “all manners actions, suits, claims and demands whatsoever, whether known or unknown, plaintiff now has, or may hereafter have, or by reason of any cause, matter or thing whatsoever for negligence, personal injuries, pain and suffering, past medical expenses, future medical expenses, hospital expenses, mental anguish, disfigurement, disability, degradation, emotional distress, general and special damages, punitive damages attorney's fees, or any other losses or expenses, both present, past and future, arising out of, connected with, or in any way resulting from the claims or the litigation which existed as of the date this release was executed.” Because I believe the case law against inconsistent positions and election of remedies resolves this matter, I do not have to decide if that agreement would be effective in a workers' compensation case.

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ORDER

Claimant did not suffer a compensable injury on July 3 or 4, 2021, because he elected a civil remedy instead of pursuing a claim for benefits under the Arkansas Workers' Compensation Act.

This matter is therefore denied and dismissed.

**IT IS SO ORDERED.**

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JOSEPH C. SELF  
ADMINISTRATIVE LAW JUDGE