BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H106916

MIRANDA ROGERS, EMPLOYEE	**CLAIMANT**
STAFFMARK, INC., EMPLOYER	**RESPONDENT**
ACE AMER. INS. CO., CARRIER	**RESPONDENT**

OPINION FILED SEPTEMBER 6, 2022

Hearing before Administrative Law Judge O. Milton Fine II on August 5, 2022, in Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Benton Gann, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Jarrod S. Parrish, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 5, 2022, the above-captioned claim was heard in Jonesboro, Arkansas. A pre-hearing conference took place on June 13, 2022. 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

The parties discussed the stipulations set forth in Commission Exhibit 1. With an amendment of Stipulation No. 3 at the hearing, they are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The employee/employer/carrier relationship existed among the parties on the alleged date of injury, August 3, 2021.

3. Claimant's average weekly wage of $560.00 entitles her to compensation rates of $373.00/$280.00.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. The following were litigated:

1. Whether Claimant sustained compensable closed-head and scalp injuries 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.

All other issues have been reserved.

Contentions

The respective contentions of the parties read as follows:

Claimant:

1. Claimant retains the affirmative defense of *respondeat superior*.

Respondents:

1. Respondents contend that they accepted this claim initially as a medical-only claim. There was no off-work status associated with the injury.

2. It is Respondents' position that the medical documentation does not support objective findings of a work-related injury.

3. Respondents further contend that the medical documentation does not support any off-work status, in the event compensability is found.

4. Claimant was released to return to work in a full-duty capacity on August 5, 2021.

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 Claimant and to observe her 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. Claimant's Proffered Exhibit 1 will not be admitted into evidence because its contents were not furnished to Respondents at least seven (7) days before the hearing, as required by Ark. Code Ann. § 11-9-705(c)(2)(A) (Repl. 2012) and the Prehearing Order.
4. Claimant has not proven by a preponderance of the evidence that she sustained a compensable closed-head injury.

5. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury to her scalp.

6. Because of Findings/Conclusions Nos. 4 and 5, the remaining issues—whether Claimant is entitled to reasonable and necessary treatment of her alleged injuries, whether she is entitled to temporary total disability benefits, and whether she is entitled to a controverted attorney's fee—are moot and will not be addressed.

PRELIMINARY RULINGS

Admission of Claimant's Proffered Exhibit 1

Respondents objected to the admission of this proffered exhibit, which contains medical records, on the basis that it was not furnished to them at least seven days before the hearing. In a letter penned the day before the hearing, on August 4, 2022, Claimant's attorney wrote:

> Judge Fine,
>
> It was brought to my attention today that the medical records for the Claimant have not been submitted. Please see the enclosed indexed medical records for the Claimant. It is my sincere apology for this delay in submitting these records. I am asking your forgiveness in this one oversight and that these medical records be allowed into evidence for tomorrow's hearing. Respondents' Counsel were made aware of these providers through informal discovery with the Claimant signing all medical releases for these providers for the Respondents.

In the above correspondence, Claimant through counsel simply explained that the failure to furnish Respondents with the proffered exhibit was an oversight. However, in an email to the undersigned that same day, he wrote:

> Please see attached letter with Claimant's Medical Records. **I thought these records were already submitted before last Friday's deadline.** This was an oversight on my part. I ask for your permission that these records be allowed into evidence at tomorrow's hearing. The Respondents' Counsel was aware of the records through informal discovery with the Claimant signing all releases for these records. Again, I ask for your grace in allowing these records into evidence at tomorrow's hearing.

(Emphasis added)

However, the email exchange between the counsels that day appears to tell a different story. Respondents' counsel asked Claimant's counsel to confirm that he would not be offering any exhibits other than those he attached to his prehearing questionnaire response. Claimant's counsel responded that he would be offering additional documents—medical records—into evidence. In response to the statement by Respondents' counsel that he would be objecting to their admission, Claimant's counsel wrote: "**I didn't see a deadline on submitting exhibits for the hearing.**" (Emphasis added)

There was, in fact, a deadline. The Prehearing Order reads in pertinent part:

> Exhibits and the identity of witnesses must be exchanged at least seven (7) days prior to the hearing. All depositions must be completed prior to the hearing. Medical reports must be exchanged at least seven (7) days prior to the hearing pursuant to Ark. Code Ann. § 11-9-705(c)(2)(A) (Repl. 2012). Evidence not disclosed in compliance with this Order shall not be considered as evidence unless prior permission of the Commission is obtained and for good cause shown.

In turn, § 11-9-705(c)(2)(A) provides:

> Any party proposing to introduce medical reports or testimony of physicians at the hearing of a controverted claim shall, as a condition precedent to the right to do so, furnish to the opposing party and to the commission copies of the written reports of the physicians of their findings and opinions at least seven (7) days prior to the date of the hearing.

During the following colloquy at the hearing, Claimant's counsel attempted to reconcile these accounts:

THE COURT: So, just again, why—why was your—why was your exhibit not done within the seven-day deadline? And I'll just let you make your—make your explanation on the record now, even though I'm—go ahead.

MR. GANN: I thought it was already submitted, and it's not because of the seven-day deadline, like I need to submit this. When I operate and run my staff, when something's due, we do it as soon as we receive it versus waiting until the deadline.

THE COURT: Okay.

MR. GANN: **And when I was reviewing the file yesterday is when I discovered it.**

THE COURT: All right.

MR. GANN: It wasn't to formal or anything else.

THE COURT: All right. And just to confirm on the record, you wee aware of the provision in the prehearing order that said exhibits, whether they're medical or not, which is addressed in the statute, or even non-medical has to be exchanged at least seven days before the hearing. You were aware of the provision?

MR. GANN: I was—I read the provision after the hearing when it was sent out June 13th. When I responded to opposing counsel's email, I was, in my mind, thinking of a trial schedule to where everything was due, and I did not see that in our correspondence. And so in reference to the email that opposing counsel was correlating to, that was my thought process at the time, and it just didn't quite click.

A review of a totality of the evidence on this matter shows that Claimant's counsel did not submit his client's proffered medical exhibit to the other side until the day prior to the

hearing, and that he only did so when alerted by Respondents' counsel. Regardless of whether or not Claimant's counsel was aware of the above authorities, the maxim applies: *ignorantia juris non excusat* ("ignorance of the law excuses not"). *See, e.g., Owens v. State*, 354 Ark. 644, 128 S.W.3d 445 (2003). Furthermore, Claimant has cited no authority, and the Commission is aware of none, that supports its proposition that the provision of a medical records release to Respondents by Claimant is tantamount to the former having some sort of constructive notice that excuses the abridgement of § 11-9-705(c)(2)(A).

The evidence establishes that Claimant violated the Prehearing Order as well as § 11-9-705(c)(2)(A). The latter must be strictly construed, in accordance with Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2012). *See Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996). "Strict construction means narrow construction and requires that nothing be taken as intended that is not clearly expressed." *Hapney v. Rheem Mfg. Co.*, 341 Ark. 548, 26 S.W.3d 771 (2000). Respondents did not consent to a waiver of these violations pursuant to § 11-9-705(c)(4). Nonetheless, pursuant to § 11-9-705(c)(3), I have the discretion to admit or exclude the evidence. *See Coleman v. Pro Transportation, Inc.*, 97 Ark. App. 338, 249 S.W.3d 149 (2007). However, under the circumstances presented here, I cannot properly admit the evidence. Claimant's Proffered Exhibit 1 thus will not be admitted into evidence, and will not be considered. *See Jobe v. St. Vincent North/Sherwood*, 2005 Ark. Wrk. Comp. LEXIS 206, Claim No. F105594 (Full Commission Opinion filed May 27, 2005), *aff'd sub nom. St. Vincent Health Systems v. Jobe*, No. CA 05-823 (Ark. Ct. App. Feb. 8, 2006)(unpublished).

CASE IN CHIEF

Summary of Evidence

Claimant was the sole witness.

In addition to the prehearing order discussed above, admitted into evidence in this case were the following: Claimant's Exhibit 2, a photograph of her scalp; Claimant's Exhibit 3, a letter from Claimant's counsel to the Commission dated August 4, 2022, consisting of one page; Respondents' Exhibit 1, a compilation of Claimant's medical records, consisting of one index page and four numbered pages thereafter; and Respondents' Exhibit 2, non-medical documents, consisting of one index page and 34 numbered pages thereafter.

In addition, I have blue-backed to the record the post-hearing briefs of Claimant and Respondents, filed on August 6 and 11, 2022, respectively, and consisting of seven (7) and fifteen (15) numbered pages, respectively.

Adjudication

A. Compensability

Introduction. Claimant has alleged that she sustained a compensable closed-head injury as well as a compensable injury to her scalp on August 3, 2021, while she was working for Respondent Staffmark. Respondents, in turn, have denied that the alleged injuries are compensable.

Standards. In order to prove the occurrence of an injury caused by a specific incident or incidents identifiable by time and place of occurrence, a claimant must show that: (1) an injury occurred that arose out of and in the course of his employment; (2)

the injury caused internal or external harm to the body that required medical services or resulted in disability or death; (3) the injury is established by medical evidence supported by objective findings, which are those findings which cannot come under the voluntary control of the patient; and (4) the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). If a claimant fails to establish by a preponderance of the evidence any of the above elements, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). *See* Ark. Code Ann. § 11-9-102(4)(E)(i) (Repl. 2012). 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).

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). 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 Agric. 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*.

Testimony. Claimant, who is 22 years old, testified that she was an employee of Respondent Staffmark, and in this capacity, was assigned to work at Hytrol. She described the alleged August 3, 2021, incident as follows:

> I was working in breakout. I was working on the normal machine that I usually work, that they put me on. And after I started working, over a little bit, we went on our first break. And after that first break, I was told that I had to switch machines and train on the new one. I didn't get the proper training that I needed in order to work that machine. So as I started to work the machine or whatnot—it was a drill press—I was putting pieces into the machine; and as I turned to grab another piece to put inside the machine, the machine grabbed my hair from behind . . . something was yanking my hair, like pulling me really hard. And like I couldn't turn to see it, but I was going up against the machine for about a good two minutes with my hair caught into the drill press.

(T. 24, 26) Claimant explained that she had hair extensions that were braided in with her own natural hair.

The following exchange occurred:

Q. Did the drill press pull any of your hair out?

A. Yes.

Q. And did it pull any of the weave or the artificial hair out?

A. Yes. This whole side of my head.

Q. What portion of your head—or of the weave was missing after the drill press?

A. It was about a good amount of hair. I know this whole side of my head (indicating).

Q. Would you say a good amount is equivalent to 20 percent?

A. No. It's more than 20 percent.

Q. Would you say it's approximately 50 percent?

A. About 75 or more percentage of hair was gone.

(T. 26-27)

Per Claimant, the alleged incident caused her scalp to bleed. Ricky Stephens, the supervisor, discovered this. She was seen by the company doctor, Roger Troxel, M.D. She testified that despite the nature of her injuries, Troxel did not examine her scalp. Approximately one to two hours thereafter, she treated on her own with a nurse practitioner at St. Bernards Medical Center. Claimant described her head as being "swollen." (T. 29) It was swollen and numb as well. In the face of her testimony that she was seen by Troxel the day of the alleged drill press incident, she could not explain why his examination report is actually dated two days later, August 5, 2021.

Shown her Exhibit 2, Claimant related that it is a photograph of her scalp that her boyfriend took right after the alleged injury. In describing the red spot[1] on the scalp shown in the photo, she stated: "that is like a blood claw or a scratch that was in my head from the drill press." (T. 56)

The following exchange took place:

Q. Whatever human hair that you maintain had been pulled out in this incident—

A. Yes.

Q. —has grown back, correct?

A. Barely.

Q. Okay. And there's no wound or injury on your head right now that you could show the Judge from this accident, correct?

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[1]See *infra* Note 3.

A. It's not possible.

Q. There's no wound or injury on your head right now that you could show the Judge, correct?

A. No.[2]

. . .

Q. Ms. Rogers, your boyfriend is not an employee of St. Bernards or Dr. Troxel's office or your primary care doctor's office, is he?

A. No.

(T. 37, 59-60) She never received sutures, staples or stitches for any scalp wound. Claimant agreed that she would have shown any sites of bleeding to the personnel who treated her.

After treating at St. Bernards, Claimant went to her primary care physician. It was her testimony that he is treating her for headaches that were caused by the alleged accident. But when asked if the CT scan of her head and brain showed any abnormality or injury, she replied: "I'm not for sure." (T. 39) Claimant agreed that she would have no reason to dispute a radiological report to that effect. She also acknowledged that there has been no recommended treatment that she has not received.

Medical Records On August 5, 2021, Claimant presented to Dr. Troxel with pain on the front and right side of her head. She informed him that her "hair got caught in [a] machine and pulled out." His examination notes read:

> hair caught in drill press at work and pulled several strands on top of scalp; no laceration, bleeding, or otherwise issue with scalp; has scalp

[2]The context clearly shows that Claimant's answer of "[n]o" meant that as of the time of the hearing, there was no visible wound on her scalp.

> pain; will allow to return to work without restriction; rx naproxen for head pain

A CT scan of Claimant's head on August 10, 2022, showed, per Christophe Ryen, D.O., "No evidence of acute intracranial process."

Discussion. The medical evidence is devoid of any objective findings of a closed-head injury. Consequently, this portion of the claim must fail at the outset.

As for Claimant's scalp, the medical records in evidence similarly fail to document an injury. Her testimony was that she would have directed the attention of anyone who saw her to any sites of bleeding that she may have had. But again, Dr. Troxel in his examination found "no laceration, bleeding, or otherwise issue with scalp." Claimant has placed into evidence a photograph that she testified was taken by her boyfriend just after she was purportedly injured on August 3, 2022. It does not reflect the removal of substantial portions of her natural hair as outlined in her testimony. Instead, the photograph depicts a reddened[3] area of a human scalp of indeterminate dimensions (because nothing is present in the picture to give the area scale), but certainly not significant in size.

Regardless of this, the photograph was taken by a layperson: her boyfriend. He did not treat Claimant. In fact, he is not employed in the medical field. In *Overstreet v. Pontiac Coil*, Inc., 2004 AR Work. Comp. LEXIS 361, Claim No. F307136 (Full Commission Opinion filed November 3, 2004), the Full Commission reversed a finding

[3]The area depicted in the photograph only allows a description of it as "reddened." Anything more would require speculation and conjecture. But I cannot engage in this. *See Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979).

by an administrative law judge that the claimant proved that she sustained compensable injuries by showing that she had objective findings strictly through the observations of laypersons. The Full Commission wrote:

> In our opinion the testimony offered by the claimant, the claimant's daughter, and the claimant's friend is not sufficient to establish objective medical evidence. The law requires medical evidence not simply objective findings. In our opinion, observations by these lay persons of bruising to the back and thigh does not satisfy this statutory requirement.

The Full Commission in that opinion noted that none of the witnesses were "trained medical personnel"—which is likewise the case at bar. It further noted that the Arkansas Workers' Compensation Act (the "Act") requires that a compensable injury "be established by medical evidence supported by objective findings" (*see* Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2012)); and that to allow lay testimony to suffice to establish it would violate the section of the Act (*see supra*) that states that its provisions are to be strictly construed by the Commission and the courts.

In a related vein, this photograph—assuming for the sake of argument that it depicts that condition of Claimant's scalp just after the alleged drill press incident—is not medical evidence, even if it objectively documents a reddened area on the scalp. The "medical evidence" (i.e., the medical records in evidence) is silent concerning a scalp injury of any type or size. Therefore, Claimant's claim regarding her scalp must likewise fail for a lack of "medical evidence supported by objective findings" of any injury thereto.

In sum, Claimant has not proven by a preponderance of the evidence that she sustained a compensable closed-head injury or a compensable scalp injury.

B. Remaining Issues

Because of the foregoing, the remaining issues—whether Claimant is entitled to reasonable and necessary treatment of her alleged injuries, whether she is entitled to temporary total disability benefits, and whether she is entitled to a controverted attorney's fee—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.

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Hon. O. Milton Fine II
Chief Administrative Law Judge