

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO.: G701898**

JOSHUA RUFFIN, Employee	CLAIMANT
COMMAND CENTER, INC., Employer	RESPONDENT
ACE AMERICAN INSURANCE CO., Carrier	RESPONDENT
GALLAGHER BASSETT SERVICES, INC., TPA	RESPONDENT

**OPINION AND ORDER FILED JULY 15, 2021**

Hearing conducted before ADMINISTRATIVE LAW JUDGE TERRY DON LUCY, in Pulaski County, Arkansas.

Counsel for the Claimant: HONORABLE ROBERT CORTINEZ, II, Attorney at Law, Little Rock, Arkansas.

Counsel for the Respondents: HONORABLE JAMES A. ARNOLD, II, Attorney at Law, Fort Smith, Arkansas.

**Statement of the Case**

The above-captioned matter came on for a hearing on May 4, 2021, before the undersigned Administrative Law Judge. A Pre-hearing Order was entered in this matter by the undersigned Administrative Law Judge on March 24, 2021, which reflected the following stipulations:

- (1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim; and,
- (2) The employee/employer/carrier relationship existed at all relevant times, including March 9, 2017, on which date the Claimant sustained multiple compensable injuries for which certain benefits have been paid.

The pre-hearing Order of March 24, 2021, also reflected the issues to be adjudicated, as set forth below:

- (1) The Claimant's correct average weekly wage and corresponding compensation rates in association with his compensable injuries of March 9, 2017, his entitlement to a corresponding underpayment award; and,

(2) Attorney's fees in relation to potentially underpaid indemnity benefits.

During preliminary discussions, and with it noted by respective Counsels that the Claimant contends the correct average weekly wage applicable to the date of injury herein to be \$404.00 weekly, and that the Respondents contend such to be \$121.68 weekly, the pre-hearing Order of March 24, 2021, was introduced into evidence as Commission's Exhibit No. 1 without objection. (TR 7-10) The parties' respective exhibits were likewise introduced into evidence without objection. (TR 10-13)

**Testimony**

**Joshua Ruffin**

The Claimant, who was thirty-three years-old at the time of the hearing, testified that on March 9, 2017, he sustained significant injuries that included a traumatic brain injury, a punctured lung, fractured ribs, and injuries to his shoulder, hip, and pelvis as the result of falling some thirty feet through a ceiling onto a concrete floor. At that time, the Claimant was on his second day as a temporary laborer (debris removal) on his most recent assignment from Respondent Employer (hereinafter referred to as "the Air Base job"). (TR 15-17)

The Claimant further testified that when he initially applied for work with Respondent Employer on October 11, 2016, he had indicated on his application that he would be available seven days a week for all shifts available (e.g., first, second, and third) and was interested in both full and part-time work as well as permanent placement. (TR 18-19) According to the Claimant, his hourly rate of pay on the Air Base job was to be \$10.10 per hour for eight hours per day, and he was also told that the job "would take months to complete." (TR 20-22) Just prior to beginning the Air Base job, the Claimant had been on a different assignment for Respondent Employer but

had applied for and accepted the former in light of its higher rate of pay. (TR 23-24)

During cross-examination, the Claimant agreed that he had begun working for Respondent Employer on November 11, 2016, the same day as he had completed his employment application (it is noted, however, that the Claimant's application is actually dated October 11, 2016; see CX 1 at 2). (TR 26) When asked if he had ever filled out any other applications, the Claimant answered in the affirmative; however, upon further questioning by Counsel for the Respondents, he appeared to express some degree of confusion with respect to the difference between signing a "job assignment" as to opposed to filling out an entirely new employment application for each. (TR 26-28)

The Claimant was unable to specifically recall whether he had ever worked a full forty-hour week for Respondent Employer but did concede that while working for the latter he would occasionally accept assignments from a different temporary service if the former had no work available. (TR 28) The Claimant went on to clarify; however, when asked if he was thus not obligated to work a forty-hour week for Respondent Employer, that "If I took on [an] assignment from them I would have been obligated, yes, sir." (*Id.*) With respect to certain assignments prior to the Air Base job, the Claimant agreed that he had been \$9.94, \$8.00, and \$8.50 respectively, and that there were some weeks when he did not work for Respondent Employer at all. (TR 28-29) Ultimately, the Claimant was essentially unable to affirmatively state whether he had ever earned as much as \$404.00 per week while employed by Respondent Employer. (TR 32)

Whitney Moore

Ms. Moore testified that she lives with the Claimant, that they have been boyfriend and girlfriend since high school, that she presently works full-time for the Arkansas Department of Workforce Services, and that she has acted as a caregiver for the Claimant since his compensable

injury. (TR 40) Mr. Moore essentially corroborated the Claimant's testimony that his assignment for the Air Base job would entail a \$10.10 hourly pay rate, eight-hour days, and that he expected it to be of "long-term" duration. (TR 41-42)

**Findings of Fact and Conclusions of Law**

(1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim; and,

(2) The Claimant has failed to prove, by a preponderance of the evidence, that he is entitled to an average weekly wage of \$404.00 with respect to his compensable injuries of March 9, 2017 and has thus failed to prove that he is entitled an award for an underpayment of indemnity benefits paid to date in relation to such.

**Applicable Law**

The party bearing the burden of proof in a workers' compensation matter must establish such by a preponderance of the evidence. See Ark. Code Ann. §§11-9-704(2) and 11-9-705(a)(3). With respect to a given Claimant's appropriate average weekly wage, Ark. Code Ann. §11-9-518 states as follows:

(a) (1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.

(2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

(b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

Also, it is long-settled those questions concerning the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. (See, for instance, *Yates v. Boar's Head Provisions Co.*, 2017 Ark. App. 133 (2017). It is further well-settled that determinations of compensability may turn solely upon matters of weight and credibility, particularly when such matters relate to a given claimant's credibility. (See *Yates, supra*. In addition, see *Daniel v. Wal-Mart Stores, Inc.*, 2014 Ark. App. 671 (2014); *Kanu-Polk v. Conway Human Dev. Ctr.*, 2011 Ark. App. 779 (2011); and *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43 (Ark. App. 2011)). Finally, a claimant's testimony is never considered to be uncontroverted. *Gentry v. Ark. Oil Field Servs.*, 2011 Ark. App. 786 (2011) (citing *Nix v. Wilson World Hotel*, 46 Ark. App. 303 (1994)).

### **Documentary Evidence**

Although I have reviewed the entirety of the documentary evidence, the most pertinent of such appears to be the Claimant's employment application with Respondent Employer prepared on October 11, 2016, which reflects that he could first be available to work the following day. (CX 1 at 2) In addition, both parties have submitted the Claimant's pay history beginning with October 12, 2016, albeit in different formats. (CX 1 a 3-4; RX 1 at 1) Both are discussed below in further detail.

### **Adjudication**

I note from the outset that I found both the Claimant and Ms. Moore to be entirely credible and sincere witnesses and am well aware of the severity of the Claimant's injuries. Nonetheless, I

am constrained to find that the Claimant has failed to prove that he is entitled to an average weekly wage of \$404.00 or to an award for an underpayment of indemnity benefits paid to date.

Both parties submitted wage records pertaining to the Claimant's earnings with Respondent Employer for the period of October 12, 2016, through March 9, 2017. (CX 1 at 3; RX 1 at 1) Both parties' exhibits arrived at the same total gross amount of pay, e.g., \$1,460.11, although the Claimant's exhibit offers a period of twenty-one weeks while the Respondents' Exhibit describes the twelve weeks for which the Claimant worked for Respondent Employer which resulted in the latter's average weekly wage calculation of \$121.68. (*Id.*)

I find that this matter is controlled by *Metro Temporaries v. Boyd*, 314 Ark. 479, 863 S.W.2d 316 (Ark. 1993), which involved a temporary services employee and in which our Supreme Court wrote and held that:

In conclusion, *Travelers Ins. Co. v. Perry* holds that an injured worker like Boyd cannot receive benefits based on a forty-hour week without actually having worked forty hours, unless the worker can prove he or she was bound by contract to work the forty hours if the work were made available...Metro anticipated assigning Boyd to different jobs, with different hours, and at different wages. Metro assigned Boyd to different jobs pursuant to the contract of hire in force at the time of the accident. Under the cases interpreting the statute, Boyd is entitled to receive benefits based upon averaging the hours worked at the different jobs. (Citing *Travelers Ins. Co. v. Perry*, 262 Ark. 398, 557 S.W.2d 200 (1977).

The Claimant's mere employment application does not constitute a contract of hire, nor does the apparent contract between Respondent Employer and Source Building Construction (the former's client), which I have declined to take into consideration and is included as pages 5-9 of Claimant's Exhibit One. While I have found the Claimant and Ms. Moore's testimony to have been sincere and credible, I respectfully decline to rely upon such to establish a preponderance of the evidence in favor of a contract of hire for \$10.10 weekly for a forty-hour week in the absence of

any other corroborating evidence.

In addition, given the absence of any authority to the contrary, I note that *Boyd, supra*, remains controlling over the facts presented herein, and thus respectfully decline the Claimant's invitation presented during the hearing to attempt an invocation of Ark. Code Ann. §11-9-518(c). (TR 44-46)

Based on the foregoing discussion, consideration of the testimony, record presented herein, and applicable law, I specifically find that the Arkansas Workers' Compensation Commission has jurisdiction of this claim and that the Claimant has failed to prove, by a preponderance of the evidence, that he is entitled to an average weekly wage of \$404.00 with respect to his compensable injuries of March 9, 2017, and has thus failed to prove that he is entitled an award for an underpayment of indemnity benefits paid to date in relation to such.

**Order**

Given the findings above, this claim is respectfully denied and dismissed, and the Respondents are ordered and directed to pay the Court Reporter's fee within 30 days of billing for such pursuant to Rule 099.20 of the Arkansas Workers' Compensation Commission.

IT IS SO ORDERED.

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TERRY DON LUCY  
Administrative Law Judge