BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H305461**

TOMMY J. SHELTON, EMPLOYEE	CLAIMANT
CITY OF BOONEVILLE, EMPLOYER	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE, CARRIER	RESPONDENT

OPINION FILED **MARCH 14, 2024**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL L. ELLIG, Attorney, Fort Smith, Arkansas.

Respondents represented by MARY K. EDWARDS, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 23, 2024, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 30, 2023, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order with modifications has been marked as Commission's Exhibit #1 and made a part of the record without objection.

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 August 14, 2023.
3. The respondents have controverted the claim in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the forthcoming hearing were limited to the following:

1. Whether claimant sustained a compensable injury on August 14, 2023.

2. If compensable, the claimant's average weekly wage.

3. If compensable, whether claimant is entitled to temporary total disability benefits.

4. If compensable, whether claimant is entitled to medical benefits.

5. Attorney's fees.

All other issues are reserved by the parties.

The claimant contends that "On or about August 14, 2023, he stepped on a wire, and it punctured his shoe and left foot. This wound subsequently became infected and has resulted in the need for medical treatment and has produced temporary total disability beginning on August 16, 2023, and continuing through a date yet to be determined. He further contends that his attorney is entitled to the statutory attorney's fees on appropriate benefits."

The respondents contend that "Claimant cannot prove by a preponderance of the evidence that he sustained a compensable injury on August 14, 2023. Claimant cannot prove that his injury was caused by a specific incident and was identifiable by time and place of occurrence."

From a review of the entire record, 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, 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 November 30, 2023 and contained in a pre-hearing order filed that same date are hereby accepted as fact, as is the stipulation announced at the hearing of this matter.

2. Claimant has met his burden of proof by a preponderance of evidence that he suffered a compensable injury on August 16, 2023.

3. Claimant is entitled to temporary total disability benefits beginning August 16, 2023, and continuing to a date to be determined.

4. Claimant is entitled to reasonable and necessary medical benefits for his lower left extremity injury.

FACTUAL BACKGROUND

Before any testimony was taken, the parties stipulated that claimant's average weekly wage was $680.80, which yields a temporary total disability rate of $454.00 per week.

Claimant had failed to provide to respondent a copy of the records he intended to introduce as required by the scheduling order, sending only the index to both respondent and to the court. Respondent raised an objection to those records being admitted. After claimant's counsel conferred with his legal assistant, he advised that the email containing those records did not appear in the "sent" folder at his office, and he did not know if it was human error or mechanical error, but the failure to provide the records was an error on his part. Mr. Ellig advised that those records would be helpful in deciding the case. Respondent's attorney was given the option of continuing the hearing or withdrawing her objection. Ms. Edwards advised that she had seen the records in question and wanted to proceed with the hearing. The claimant's records were then received without objection. I appreciate the candor both attorneys showed to the court in addressing this matter.

HEARING TESTIMONY

Claimant testified that in August 2023, he was working for the City of Booneville in the Sanitation Department. His job consists of operating an automated truck which picked up the trash can and emptied it into the truck bed. He made two trips a week to the landfill approximately fifty miles away from Booneville. When he was not operating the truck, he would work on maintenance for it. Claimant said there was a trough on the truck that caught small items that fell into it and had to

be cleaned out manually. Claimant testified that the debris was on the ground because there was nowhere else to put it. It was necessary for him to walk across the ground where the material had been dumped. Over a five-year period, claimant said he found knives, nails, a saw blade, and all sorts of small stuff that would not compact. The compactor on the truck shoves everything to the front but there was a gap between the compactor and the truck where the materials fell into a trough. Over time, after enough materials accumulated on the ground, it was removed using a backhoe. Claimant estimated that the cleanup of the ground took place maybe twice a year. Claimant testified that he wore tennis shoes at work.

Claimant has been diagnosed as a diabetic for around five to six years and could not feel the bottom of his left foot because of neuropathy. On August 16, 2023, claimant felt sick, and noticed on August 17, 2023, that his foot was infected. Claimant went to the doctor where the foot was x-rayed and a piece of wire was discovered in his foot. On August 19, 2023, claimant had an operation, and the metal was removed. He remained in the hospital for two weeks treating the wound. After claimant was discharged from the hospital, he continued to see his treating physician; after six weeks, claimant's left foot was amputated due to the infection.

The claimant and his attorney had this exchange:

> Q. (By Mr. Ellig) How do you think you got that wire in your foot?
> A. I stepped on it at work.
>
> Q. And why do you think that?
> A. Because I didn't go nowhere. I went home, I went to work, you know, and I parked the car on the carport, which is concrete. Now if it needed gas, I go get gas, but it is still all on concrete. If I stepped on that on concrete, it never went, you know, in my foot like that so, you know, one hundred percent that it happened at work.
>
> Q. Were you around any other kind of trash or wires?
> A. No. No, not beside work.
>
> Q. Do you know exactly when it stuck in your foot?

> A. No, I don't know for sure when it was, but it was – it was around that August 17, sometime before then, but I could not tell you when.
>
> Q. But the medical records show you gave history that the problem with your foot started about a week prior to that time when you went to the doctor on the seventeenth, you think that's somewhere in the area?
> A. I think so.

On cross-examination, claimant said he typically worked alone, and no one saw him step on that piece of metal at work. He admitted he did not know when or exactly where he stepped on the piece of metal. He said he did not feel the piece of metal go into his foot.

The following exchange took place between respondent's attorney and claimant:

> Q. (By Ms. Edwards) In fact, you do not know for certain that you stepped on this piece of metal at work?
> A. It's the only place that I could have-
>
> Q. I understand.
> A. -then.
>
> Q. I am going to need a yes or no from you. You do not know for certain you stepped on this piece of metal at work?
> A. No.

Claimant testified that he did not see the specific piece of metal that is represented by Respondent's Non-Medical Exhibit page 3. Claimant conceded the first time he saw it was when the doctor showed him a picture of it. Claimant agreed that he wears tennis shoes to places other than work, such as the gas station, the post office, and from his house to get into the truck.

Claimant related that he had neuropathy of his left foot and had been diagnosed with diabetes prior to this incident. As part of his diabetic care, claimant had regular foot examinations.

The following exchange then took place between respondent's counsel and claimant:

> Q. (By Ms. Edwards) And we talked about shoes a little bit. They were tennis shoes, but did you ever notice any wire in any of your shoes?
> A. No.
>
> Q. Did you ever notice any blood on the socks?

A. No.

Q. And you do your own laundry, right?
A. Yes.

Q. And we talked about neuropathy a bit, but your left foot could bleed, correct?
A. Yes.

Q. You just didn't see any blood there?
A. Right.

Claimant agreed that some of the medical records mentioned that his left foot had been bleeding. Claimant admitted that in 2022, he had an infection on his left foot that was treated by wound debridement and then eventually two toe amputations. Claimant agreed that when he went to the doctor in August 2023, he was unaware that he had stepped on the metal object, but he felt the symptoms of infection, was feeling bad, and noticed an odor coming from his left foot.

On redirect-examination, claimant said he did not attribute any of his prior difficulties with his left foot to his job. He said he was comfortable in his own mind that the most likely or probable place that he stepped on the piece of wire was at work. He had not seen any other pieces of wire, trash, debris of any kind around his premises or at the gas station or any other place. While claimant did not see the particular piece of wire that he stepped on, he had seen other pieces of wire in the debris he described earlier.

Claimant's supervisor, John Slinker, testified that part of claimant's job was to wash out trash and debris from what he called a trough on the back of the truck. The trash goes on the ground and then is to be picked up in a reasonable amount of time. The truck was washed out at the same place each day and material fell to the ground in that place. To perform his job, Mr. Slinker said claimant had to walk through the trash that could have been on the ground for months. Mr. Slinker described the material as anything small enough to fit through a quarter or half-inch gap in the compactor of

the truck, and that he had seen pieces of wire, nails, and the like in that material on the ground.

On cross-examination, Mr. Slinker stated he did not see the injury and had no personal knowledge of when it had taken place. He said there was too much stuff to pick out a specific piece of trash. Mr. Slinker said that his only personal knowledge was that Mr. Shelton told him he stepped on a piece of metal at work.

Claimant's sister, Judy Schultz, stated that she had not noticed any wire or other metallic materials laying around his house. She said that he did not go out much other than to the store, and the post office, and things like that.

On cross-examination, Ms. Schultz conceded the only personal knowledge that she had about whether claimant stepped on a piece of metal at work was what he told her.

While Ms. Schultz's testimony was largely unhelpful on the issues in this matter, I found all the witnesses to be credible on the matters to which they testified.

REVIEW OF THE EXHIBITS

The extent of the injury in this case is not in dispute, and as such, a detailed review of the medical exhibits is unnecessary. The records before August 2023 show that claimant suffered from diabetes for years, and as he testified, two toes had been amputated on his left foot before the injury that gave rise to this claim. After the foreign object was removed, the treatment for the infection was unsuccessful, and claimant's left foot was amputated.

The non-medical exhibits included respondent's First Report of Injury, which includes the notation that claimant was "unsure when/what happened; metal in foot." There was also a photograph of the piece of metal that was removed from claimant's foot; it is laid beside a ruler and looks to be about four inches long, although it is bent at nearly a 90-degree angle, almost in an "L" shape.

ADJUDICATION

In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630. The medical records provide objective findings that claimant had a problem with his foot that required medical services to remedy, thus satisfying the second and third elements of proof as set out above.

Claimant was unsure of the precise date that the alleged injury occurred, but that is not fatal to a claim, *Edens v. Superior Marble & Glass*, 346 Ark. 487, 492, 58 S.W.3d 369, 373 (2001): "Although the inability of the claimant to identify the exact date of an injury might be considered by the Commission in weighing the credibility of the evidence, the statute does not require that the exact date be identified in order for the injury to be compensable." A person without neuropathy would have felt the piece of metal go into his heel. However, claimant is not such a person; I decline to hold him to an impossible standard in that regard.

That then leaves the question of whether claimant established by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment. "The burden of proof for causation is a preponderance of the evidence, which is more likely than not or more than 50% probability." *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). I am satisfied from the testimony of both claimant and Mr. Slinker, claimant's supervisor, that small pieces of wire, nails and other debris were on the ground in the area where claimant worked, and that such

debris was left there for extended periods of time after the compactor was cleared after each use. Claimant testified that he had to walk across that debris daily, and Mr. Slinker confirmed that was part of claimant's job. As such, I am satisfied that it is more likely than not that claimant stepped on the piece of metal that was embedded in his foot while working for respondent, City of Booneville, and therefore, I find that he has established by a preponderance of the evidence that he is entitled to workers' compensation benefits for the injury to his left foot beginning on August 16, 2023.

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 $579.50.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE