

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G900641

JAMES SHAVER,
EMPLOYEE

CLAIMANT

JOHNNY DRAPER, d/b/a DRAPER
TRANSPORT, EMPLOYER

RESPONDENT

UNINSURED,
INSURANCE CARRIER/TPA

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION FILED JULY 7, 2021

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant appeared Pro Se.

Respondents No. 1 represented by the HONORABLE JOHN D. LIGHTFOOT, Attorney at Law, El Dorado, Arkansas.

Respondents No. 2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as Modified.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed March 10, 2021. The administrative law judge found, among other things, that the claimant did not prove he was employed with Respondent No. 1 at the time of the claimant's accidental injury. After reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove he was employed with Respondent No. 1 at the time of the accidental injury which

occurred on August 3, 2018. We therefore find that the claimant did not prove he sustained a compensable injury.

I. HISTORY

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction over the claim. James Shaver, now age 38, testified on direct examination:

Q. How did the employment relationship begin with Johnny Draper?

A. He went to Auto Zone and asked Annaliesa where I was and that he needed me to work.

Q. Okay. And who is Annaliesa?

A. My fiancé....

Q. Okay. Did you tell him that you would work for him as an independent contractor only?

A. No, ma'am.

Q. Okay. What kind of work did he ask you to do?

A. I was going to be a saw hand. Trim the limbs off the logs and cut the logs and trim the trucks.

Q. Did he give you any additional details about the job, like how much it would pay?

A. I'd asked him, and he said five hundred a week and fifteen dollars a load.

Q. Okay. Did he say anything to you about transportation to work, bringing your own equipment, anything like that?

A. No. I rode in with them on the work truck.

Q. Okay. Who's them?

A. Quinton and Kolby and James and whoever.

Q. Okay. So you were riding in a truck provided by Johnny Draper to a job site?

A. Yes.

Q. Okay. Can you describe in more detail what type of work he had you doing?

A. Stripping the limbs off the logs as the skidder pulled them up, and then you had to get a tape measure and mark the logs out and cut that, and then whenever the loader loaded them on the truck, you had to trim the truck.

Q. Now, were you working consistently for Johnny Draper since 2016 or was it an off and on situation?

A. Kind of off and on....

Q. Did you say in July of 2018, you were working for him again?

A. Yes.

Q. Were you working for him every day?

A. Yes.

Q. Let's just say, for example, in the week before the accident on August 3, 2018, were you working for him daily?

A. Yes....

Q. Tell me what businesses Mr. Draper owns that you're aware of.

A. He has M & A Wrecker Service, Draper's Transport and a couple of gravel trucks.

Annaliesa Casteel testified and corroborated the claimant's testimony that Johnny Draper had hired the claimant as an employee. The record contains a check written to James Shaver from the account of M & A Wrecker Service on July 27, 2018 in the amount of \$400.00 for "Labor." The claimant testified that the \$400.00 he received from M & A Wrecker Service was payment for "Logging work."

Johnny Draper, owner of Respondent No. 1 Draper Transport and M & A Wrecker Service, testified on direct examination:

Q. Did you and [James Shaver] have a conversation thereafter, when that job ended, did he continue to do any more work for you?

A. No. We moved....We finished that job, and we moved to another job that was all pine, and he had not been around in three or four days. The guys had moved the equipment. He came in on Friday because he knew I was going to pay all of them on Friday. We had a little talk about the money, because I felt like he really didn't do what he should have done in the first place. It took us an extra week to get off of it.

I think, in the two weeks, he might have worked five or six days total.

Q. Okay. What did you tell Mr. Shaver about any further work?

A. That we didn't have any right now. We was moving to a pine tract, and I don't need a saw hand....That was it. That was the end of the conversation....

Q. So, basically, would you say that his services were terminated, whatever the nature of the services, were terminated on that day?

A. Yes, sir....That was exactly one week. It was exactly the Friday before he got hurt....

Q. How did he wind up on this other job the week later?

A. A week later, he just showed up that morning and got in the truck with the guys and told them that he had talked to me and I said he could go.

Q. Okay. Had you?

A. No. I hadn't spoke to him since he walked out of my office the week before....

Q. So did you consider having hired him either as an independent contractor or as an employee on this new tract the week after the oak job wrapped up?

A. No, I didn't hire him for that.

Q. Okay.

A. He wasn't supposed to be there.

The claimant testified on direct examination:

Q. Mr. Shaver, next I want to take you to the date that your accident occurred. My file shows that it was August 3, 2018, is that correct?

A. Yes.

Q. Okay. Who told you to come to work that day?

A. Johnny.

Q. Okay. What led you to believe that you were expected to work for Johnny Draper that day?

A. It was a normal work day.

Q. All right. How did you get to the job site on the day that the injury occurred?

A. Rode in the company truck....

Q. Who was with you in the work truck on the way to the job site?

A. Quinton Brown, Kolby Gay and me....

Q. On the day of the accident, did you show up there without permission?

A. No.

Q. Had anybody told you not to go to the job site that day?

A. No.

Q. Mr. Shaver, if you can, briefly describe how your injury occurred, what you were doing when that happened.

A. I was stripping the limbs, and I got all of the limbs off of the log, and I was marking it to cut a log, and when I cut the log in two, it had pressure on it and it rolled and knocked the saw out of my hand and landed on me.

Q. What parts of your body were injured?

A. My left leg.

Q. Okay. Now, after this occurred, what happened next?

A. Kolby had called 9-1-1 to get an ambulance and, I guess, after he got off the phone there, somebody called Johnny, and Johnny said just put him in the back of a truck to the hospital and that's where Johnny met me at the hospital, and he said take that hat off, you don't work for me and tell them that you fell at the wrecking yard.

Q. Okay. Did he tell you why he said that?

A. That way he could collect me on the wrecking yard's insurance.

Q. Now, you're at the hospital. Was there anybody there with you whenever Johnny said this?

A. Annaliesa.

Annaliesa Casteel testified on direct examination:

Q. Were you there at the hospital?

A. I was before they were, yes, ma'am....

Q. So what happened then whenever you saw him coming up to the hospital, whenever you saw the truck pull up, what happened?

A. James was in the back of the pickup truck. They let the tailgate down and tried to get him out, you know. I don't remember who it was, but somebody went in to get a nurse to get him out. Mr. Draper had shown up at that time, and they were trying to get him out, you know, and as they did that, Mr. Draper had taken the hat off of James' head, which had M & A Towing on it. To my knowledge, you only have those hats

when you work there, so I don't know, and he looked at him and he said, James, you're going to go in here....He said when you go in here, tell the doctor that you were a customer, not an employee. Tell them you were a customer looking at tires and you got your foot caught in a rim on a tire and you tripped and fell.

The claimant's attorney cross-examined Johnny Draper:

Q. Did you show up at the hospital after this accident occurred?

A. Yes, I did meet him up there at the hospital.

Q. Okay. Did you take the hat off of Mr. Shaver's head?

A. No, ma'am. I didn't take his hat off.

Q. So you did not take the M & A hat off his head and say you don't work for me?

A. No, ma'am. It's not a uniform. If you lived in El Dorado, I'd give you a hat. It's just advertising.

Q. But my question is, you didn't show up and take the hat off of his head and say you don't work for me?

A. No, ma'am.

Q. You realize you're under oath?

A. I did not show up there....I did not just go to the hospital and jerk a hat off of his head and tell him you don't work for me....

Q. So you didn't tell him at the hospital you don't work for me?

A. Yeah. I probably did tell him he didn't work for me, because he didn't. I was in shock. I mean, he wasn't supposed to be on that job. I did not hire him to come and work on that particular tract.

Q. So you think that he just somehow knew when to show up, got in the work truck with your workers and went to the job when he wasn't supposed to be there?

A. Yeah. They leave the same time every morning.

Q. So you think he just showed up with no expectation of getting paid? Is that yes?

A. Yes, ma'am.

The administrative law judge examined Johnny Draper:

Q. Now, you were sitting in the courtroom because, obviously, you were allowed to be in the courtroom as your own representative, you heard Mr. Shaver testify and, also, Ms. Casteel testified that you, basically, told him to “lie” about how he had gotten hurt.

A. I did hear the testimony.

Q. Okay. Is that testimony accurate?

A. Yes, sir. But there’s a little more to it than that.

Q. Okay. Tell me.

A. Okay. When I went to the hospital, he started in about, man, I don’t have any insurance. I mean, he’s in pain and he’s freaking out. Of course, you know, I’m freaking out because I just got through throwing a fit because he wasn’t even supposed to be there. I didn’t know it. I’d just found out about this, and he’s talking about the insurance, the insurance, man, I don’t know how I’m going to pay for this. You’re going to have to pay for this and everything and what are we going to do? I’m like, look, man, the only thing I know is I can tell them that you got hurt at my shop. I did. I’m going to be honest with you. I called my insurance company, and I told them that, and the lady told me, she said, well, I don’t think we’re going to be paying on this, she said, but we’ll look into it. She called me back approximately maybe a week and a half or a couple of weeks later, and she said he has insurance and we’re going to stay out of this.

Q. They said who had insurance?

A. Mr. Shaver. Said she checked him out and said that he was, actually, insured, and I said, well, he told me he didn’t have any insurance, and she said, well, he does.

According to the record, the claimant treated at Medical Center of South Arkansas on August 3, 2018: “Patient states: I was in a wrecker yard and stepped back into a hole and fell and I think I broke my leg.” An x-ray of the claimant’s tibia and fibula was taken on August 3, 2018 with the impression, “Acute comminuted fractures of mid diaphyses of left tibia and fibula. Adjacent soft tissue swelling.”

The claimant was transported to University of Arkansas for Medical Sciences on August 3, 2018 at which time a physician noted, "Patient is a 35-year-old male with past medical history of hypertension who presents for left leg injury. He states that he thought he saw a snake working in a junkyard and jumped backwards catching his leg in a tire. He instantly felt like he had fractured the left lower leg. He was taken to an outside facility where he is found to have a left tibia and fibula fracture." An RN noted on August 3, 2018, "Pt states that he is not employed and has no income."

Dr. Steven M. Cherney performed a procedure on August 4, 2018: "Treatment of left comminuted tibial shaft fracture with intramedullary device, tibial nail[.]" The pre- and post-operative diagnosis was "Left comminuted displaced tibial shaft fracture." A Physical Therapy Evaluation on August 5, 2018 indicated, "Pt was admitted with left leg pain after a 3 foot fall yesterday around 3:30 p.m. Patient was reportedly scavenging at a junkyard and was standing on tire rims when he lost his balance and fell onto his buttocks. He reportedly felt a 'pop' and was immediately unable to bear weight. He was seen at an OSH, where they did xrays and brought him to the UAMS ED for further care....Work/Leisure Activity: employed, owns tree cutting business self employed." The claimant followed up at UAMS on August 11, 2018 for a "Ruptured fracture blister."

The claimant treated with Dr. Jerry H. Grant beginning August 14, 2018. The claimant followed up with Dr. Grant on February 6, 2019. A handwritten note at that time appeared to indicate, “States he had lied about his injury & that his FX occurred [due to] injury at work – log fell on leg – his lawyer recommended he tell his doctors [due to] law suit.” It was also noted, “I spoke [with] attorney – they said Mr. Shaver’s employer told him to lie to doctors [due to not] wanting workers comp involved.”

A pre-hearing order was filed on June 26, 2020. According to the text of the pre-hearing order, the claimant contended, “The claimant contends that on August 3, 2018, while in the course and scope of employment for respondent Johnny Draper, claimant was cutting a log and the log was in a bind. When he cut the log in half, it rolled into him, causing fractures to his left leg, bilateral hips, neck, and back. Claimant sought emergency treatment on the date of accident. He had surgery on the following day. He later followed up with the doctor and went to physical therapy. Claimant contends that he sustained compensable injuries to his left leg, bilateral hips, neck, and back. He contends that he is entitled to TTD benefits, medical treatment, and that his attorney is entitled to an attorney’s fee. The claimant specifically reserves any and all other issues for future litigation and/or determination.”

The parties stipulated that the respondents “have controverted this claim in its entirety.” Respondent No. 1, Draper Transport, contended, “Respondent No. 1 contends the claimant was an independent contractor, and not an employee, on the date of the alleged incident, August 3, 2018. Respondent No. 1 further contends the claimant cannot meet his burden of proof in demonstrating he has sustained a ‘compensable injury(ies)’ within the meaning of the Act.”

Respondent No. 2, Death & Permanent Total Disability Trust Fund, contended, “Respondent No. 2 contends the employee-employer-insurance carrier relationship existed on August 3, 2018. The claimant alleges injuries sustained on August 3, 2018 to claimant’s left leg, bilateral hips, neck and back. Respondent No. 2 is unable to determine the average weekly wage until wage record/AR-W has been received. The Trust Fund needs the wage records/AR-W to compute the AWW. The Trust Fund defers to litigation on the compensability issue. The Trust Fund will waive its appearance if the parties agree to the AWW.”

The text of the pre-hearing order indicated that the parties agreed to litigate the following issues:

1. Whether the claimant has was (sic) an employee or an independent contractor as of the date of his alleged injury, August 3, 2018.
2. If the claimant was an employee and not an independent contractor as of the date of his alleged injury, August 3, 2018, whether he sustained a ‘compensable injury(ies)’ to his left

leg, both hips, neck and back within the meaning of the Arkansas Workers' Compensation Act (the Act); and whether and to what extent (sic) he is entitled to medical and indemnity benefits.

3. Whether the claimant's attorney is entitled to a controverted attorney's fee on these facts.

4. The parties specifically reserve any and all other issues for future litigation and/or determination.

After a hearing, an administrative law judge filed an opinion on March 10, 2021. The administrative law judge found, among other things, that the claimant was a "temporary employee" of Respondent No. 1 from approximately July 15, 2018 through July 27, 2018. The administrative law judge found that "the claimant's temporary employment status ended as of Friday, July 27, 2018." The administrative law judge therefore denied and dismissed the claim. The claimant appeals to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-102(4)(Repl. 2012) provides, in pertinent part:

(A) "Compensable injury" means:

(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[.]...

(B) "Compensable injury" does not include:

(iii) Injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated[.]

In the present matter, an administrative law judge found that the claimant was “a temporary employee” of Respondent No. 1 from approximately July 15, 2018 through July 27, 2018. The administrative law judge found that “Respondent No. 1 terminated the claimant’s employment effective Friday, July 27, 2018.” The administrative law judge found that the claimant was not authorized to be on the work site on August 3, 2018 and concluded “It is the claimant’s deception that led to his August 3, 2018 injuries.” The claimant contends on appeal that he “was an employee of Respondent on August 3, 2018 and that on this date, claimant sustained compensable injuries to his left leg, hips and back and that he is entitled to all medical and indemnity benefits associated with that injury and that his attorney be awarded costs and fees.” The claimant does not brief the Full Commission on appeal. Respondent No. 1 also does not brief the Full Commission on appeal and does not otherwise contend to the Full Commission that the claimant was an independent contractor on August 3, 2018.

It is the duty of the Full Commission to enter findings in accordance with the preponderance of the evidence and not on whether there is substantial evidence to support the administrative law judge’s findings. *Roberts v. Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983). The Full Commission reviews an administrative law judge’s opinion *de novo*,

and it is the duty of the Full Commission to conduct its own fact-finding independent of that done by the administrative law judge. *Crawford v. Pace Indus.*, 55 Ark. App. 60, 929 S.W.2d 727 (1996). The Full Commission enters its own findings in accordance with the preponderance of the evidence. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

“Employee” means any person employed in the service of an employer under any contract of hire, written or oral, expressed or implied. Ark. Code Ann. §11-9-102(9)(A)(Repl. 2012). An employee is typically one who renders labor or services to another for salary or wages, and there must be employment before a person qualifies for workers’ compensation. *Dixon v. Salvation Army*, 360 Ark. 309, 201 S.W.3d 386 (2005).

In the present matter, the Full Commission finds that the claimant was not employed with Respondent No. 1 on August 3, 2018, the date of the accidental injury. The record indicates that the claimant sporadically worked as a logger for Respondent No. 1, Draper Transport, for possibly three or four years. The only documentary evidence in this regard was a check in the amount of \$400.00 from M & A Wrecker Service for “Labor” performed by the claimant. This check was dated July 27, 2018, and the claimant testified that the \$400 he received from M & A Wrecker Service was payment for “logging work.”

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. *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007). In the present matter, the Full Commission finds that Johnny Draper credibly testified that he terminated the claimant's employment effective July 27, 2018. Johnny Draper expressly testified that he terminated the claimant's employment "exactly the Friday before he got hurt," *i.e.*, July 27, 2018. Three witnesses credibly corroborated Johnny Draper's testimony that he had terminated the claimant's employment as of July 27, 2018. Quinton Brown, a former employee of Respondent No. 1, testified that Mr. Draper "told us not to take him back to the woods." Kolby Gay, another former employee of Respondent No. 1, credibly corroborated Quinton Brown's testimony. The administrative law judge allowed Respondent No. 1 to proffer the testimony of Gary Ruffins. Gary Ruffins testified that he was present in Johnny Draper's office when Mr. Draper informed the claimant, "Basically, he didn't need his services anymore." The claimant does not contend on appeal that Gary Ruffins' testimony should be excluded from the record. The Full Commission finds that Mr. Ruffins' testimony should be admitted into the record on appeal. *See Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001).

The probative evidence before the Commission demonstrates that Respondent No. 1, Johnny Draper, terminated the claimant's employment effective July 27, 2018. The record indicates that the claimant appeared at the work site on August 3, 2018 and dishonestly told Quinton Brown and others that Johnny Draper had re-hired him. According to the record, the claimant did not actually speak with Johnny Draper but told Quinton Brown that Mr. Draper had authorized him to return to work. This statement was inaccurate according to several credible witnesses. Apparently, a rolling log struck the claimant's left leg that day and caused a serious fracture to the lower tibia and fibula. The work crew contacted Johnny Draper who arrived at the Emergency Room just as the claimant was about to go in. Mr. Draper testified that, because the claimant was "freaking out" with regard to insurance, he informed the claimant, "Tell them that you got hurt at the shop." This was a lapse in judgment on Johnny Draper's part. The claimant therefore told the medical providers beginning August 3, 2018 that he had fallen in a wrecker yard and injured his leg. The claimant told UAMS physicians that "he thought he saw a snake" and fell, injuring his leg. The claimant did not inform any physician about the apparent logging injury until he reported the accident to Dr. Grant on February 6, 2019.

The evidence before the Commission demonstrates that Respondent No. 1 terminated the claimant's employment effective July 27, 2018. The

evidence does not demonstrate that the claimant was ever an “employee” of Respondent No. 1 at any time after his employment was terminated on July 27, 2018. The claimant attempted to return to work on August 3, 2018 but the probative evidence does not show that there was a contract of hire, written or oral, express or implied, on August 3, 2018. *See Ark. Code Ann. §11-9-102(9)(A)(Repl. 2012)*. The claimant testified that a log struck his left leg and caused physical harm on August 3, 2018. Nevertheless, the record shows that the accidental injury occurred after the employment relationship was terminated and was therefore not a “compensable injury.” *Ark. Code Ann. §11-9-102(4)(B)(iii)(Repl. 2012)*. There must be employment before a claimant qualifies for workers’ compensation. *See Dixon, supra*.

After reviewing the entire record *de novo*, therefore, the Full Commission finds that the claimant did not prove he was employed with Respondent No. 1 at the time of the accidental injury which occurred on August 3, 2018. The Full Commission therefore finds that the claimant did not prove he sustained a compensable injury. This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

CHRISTOPHER L. PALMER, Commissioner

M. SCOTT WILLHITE, Commissioner