BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

AWCC FILE № G708180

CLINT A. VICK, EMPLOYEE	**CLAIMANT**
McGEHEE HOUSING AUTHORITY, EMPLOYER	**RESPONDENT № 1**
AR MUNICIPAL LEAGUE-WCT, TPA	**RESPONDENT № 1**
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	**RESPONDENT № 2**

OPINION FILED 27 OCTOBER 2023

Heard before Arkansas Workers' Compensation Commission (AWCC) Administrative Law Judge JayO. Howe on 27 April 2023 in McGehee, Desha County, Arkansas.

Mr. Daniel A. Webb, Attorney-at-Law, in Little Rock, Arkansas, appeared for the claimant.

Ms. Mary K. Edwards, Attorney-at-Law, in North Little Rock, Arkansas, appeared for the respondents #1.

Ms. Christy L. King, Attorney-at-Law, in Little Rock, Arkansas, appeared for respondent #2.

I. STATEMENT OF THE CASE

The above-captioned case was heard on 27 April 2023 in McGehee, Arkansas, after the parties participated in a prehearing telephone conference on 27 December 2022. A Prehearing Order, admitted to the record without objection as "Commission's Exhibit № 1," was entered on 28 December 2022. The Order stated that the ISSUE TO BE LITIGATED was compensability. All other ISSUES were reserved.

The Prehearing Order set forth the following STIPULATIONS:

1. The AWCC has jurisdiction over this claim.

2. An employee/employer/carrier relationship existed between the parties on 11 October 2017, when the claimant was involved in a motor vehicle accident.

The following WITNESSES testified at the hearing: the claimant and Mr. James Valentine, the claimant's supervisor.

The parties' CONTENTIONS, as set forth in their prehearing questionnaire responses, were incorporated by reference into the Prehearing Order and were as follows:

The claimant CONTENTDS that he suffered compensable injuries on 11 October 2017 and that he is entitled to associated benefits.

Respondent № 1 CONTENDS that the claimant was not performing employment services at the time of the motor vehicle accident. Prior to the presentation of evidence at the hearing on this matter, Respondent № 1 added that they contend, in the alternative, that the claimant cannot prove objective medical findings to support finding a compensable injury associated with the October 2017 motor vehicle accident.

Respondent № 2 CONTENDS that if the claimant is found to be permanently and totally disabled, it will comply with ACA § 11-9-502.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record as a whole and having heard testimony from the witnesses, observing their demeanor, I make the following findings of fact and conclusions of law under ACA § 11-9-704:

1. The AWCC has jurisdiction over this claim.

2. The claimant failed to establish by a preponderance of the evidence that he was performing employment services at the time of the motor vehicle accident.

3. Accordingly, his claim is dismissed.

III. HEARING TESTIMONY and MEDICAL EVIDENCE

A. *Claimant on Direct Examination*

Mr. Clint Vick testified that he was forty-two years old and that he had lived in McGehee for his entire life. He worked for the McGehee Housing Authority (Respondent №

1) at the time relevant to this matter. [TR at 11.] The claimant worked on-and-off for the respondents prior to this incident. [TR at 12.[1]] He appeared to state that his primary role was replacing subflooring at properties owned by the Housing Authority [TR at 13], but went on to say that he did "just any and all things possible that you – you could possibly imagine… and I would do some plumbing work, you know." [TR at 14.]

It is not disputed that the claimant left the job site on 11 October 2017 and was in an accident on the roadway near the job site on the way back. When pressed on the "point of leaving" that day, the claimant offered:

> A: Because they don't have tools. They don't have tools. It's an impoverished part of our community and everything is locked up and what's locked up isn't much, so I had—I have to bring my own tools to work and –
>
> Q: So what were you going to get when you left the job site?
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> A: I was going to get my plumbing bag, because they had so many roaches that you can't leave that like in your house or anything. I have to leave it outside by a shed and I won't bring it in my home. And the gentleman I was working with that I was told to keep a eye on and make sure he had material, he had came to me and told me that he needed –
>
> . . .
>
> Well, we were going to pick up the sheetrock material and plumbing tools basically.
>
> Q: Okay. What did you need the materials for?
>
> A: A basin – a basin wrench, it's about this big, and it's only good for one thing and that's taking the bottom of a sink, the big basket. It's a specialty tool. [TR at 17-18.]

[1] Claimant's counsel stopped the claimant early in his examination to admonish that he should, "[j]ust answer my questions and then move onto the next one, okay?" He soon interjected again, stating, "I'm sorry, Your Honor… I don't want to interrupt, but he—he doesn't have a… Clint, you've got to stop after you answer the questions [or we will] end up with a record that just goes on forever." See TR at 15.

According to the claimant, who stated that his memory was refreshed by reviewing the police report from the crash, he left sometime around 1:00 PM that day. [TR at 19.] When asked if he was directed by the foreman to leave, he answered:

A: That morning – and please tell me if this is hearsay – each morning that we worked together, he and I delegate what jobs, who's going to do what, and before I leave the premises, I'd call him and tell him where I'm going to be, if an emplolyee a coworker is going with me to pick up material or tools where they're going to be, and then we'll confirm if he needs to get the material and if I need to go get the tools, then we meet right back up at the same time. That way we're not missing a beat.

> Q: So – so you left the job site in your vehicle to get the wrench. Was there anything else you were going to get?
>
> A: Yeah. My entire tool bag that's sitting outside because I didn't want roaches.
>
> Q: Okay. And do you remember what was in the tool bag that you needed besides the wrench?
>
> A: The terminology for it would be flux, but layman's terms is pipe dope, and it seals off things like that. [TR at 19.]

The claimant went on to explain that his tool bag was at a shed at his mother's house and that "I didn't even get out of the vehicle. I had my coworker go grab that up and put it back in the truck and went back to work." [TR at 20.] The claimant denied buying lunch or making other stops while away from the job site.

When asked if the work crews took regular lunch breaks, the claimant began answering with, "In truth, they hire people. I don't want to hearsay, but--." His counsel admonished, "Answer the question. Had you been taking lunch breaks on a regular basis?" In response, Mr. Vick explained, "I'd been paying for everybody's lunch, and since the time I've been there, I've been paying for every single person's lunch, every single lunch… No, we

had not took lunch, and it was—I went—I was losing more money on this job than I was making." [TR at 21.]

Inconsistent with his earlier statement about a coworker getting the tool bag and putting it in the truck before returning to work, Mr. Vick then said that nobody else was in his vehicle when the accident occurred:

> Q: All right. So you go the materials, the – the pipe dope and the wrench. Was there anybody else in your car with you?
>
> A: No, sir.
>
> Q: Okay. And then were you headed back to the job?
>
> A: Yes, sir.
>
> Q: And did – and did you get in a car accident?
>
> A: Yes. Would you like me to…
>
> Q: Well, you did. You said "yes." That's what I asked you.
>
> A: Yes, sir.
>
> Q: Okay. That's all I needed—You know, just answer the question. [TR at 21-22.]

The claimant stated that his vehicle was struck from behind while waiting to make a turn towards the job site. [TR at 22.]

According to the claimant, he exited the vehicle after the collision and passed out. [TR at 24.] He said that the wreck hurt his back and groin. [TR at 25.] Mr. Vick was transported to the local emergency department via ambulance. [TR at 26.] After discharge, he eventually followed up with his primary care provider and then another provider who ordered an MRI on 2 November 2017. [TR at 28.]

Mr. Vick went on to describe ongoing pain in his back and shoulder and his groin and hip. [TR at 29-32.] He stated that he presented for physical therapy, but was advised against treatment there. [TR at 33.] He explained that he saw several different providers,

experienced ongoing hip and back, that he can "bend over and tie a shoe about once, twice a week without pain," and that he eventually had surgery with Dr. O'Malley on his hip and lower torso. [TR at 36-37]. When asked to "keep this simple" and tell what he injured in the 11 October 2017 accident, he responded:

> Okay. It was the lower right – It was more or less the lower right side of my back initially… And on over—after a wreck, you know, you expect to be a little bit sore the following day, but it didn't dissipate like previous. My shoulder, I felt – Well, I had a torn rotator cuff in my shoulder and I had a preexisting injury in my shoulder, but it wasn't like this. I can't have surgery until they said I get a letter from a judge stating that I have a workman's comp claim. They won't even touch me. So my groin still to – the rest of my life, that's not ever – If it was going to get better, it would have been better by now, and I know that, and that is – and speaking in a – I don't know how to say this in a – in a nice way – it affects the way I walk. I wear my shoes out a certain way like the – everything. I walk differently. I can't sleep. You can't lay on your – you'll toss and turn, insomnia. I went from wheelchair, crutches, to urinating on myself for – trying to get to the restroom for months and fighting with this. [TR at 38-39.]

The claimant described other previous injuries or conditions and frustration with available treatment options, stating, with regard to his pain, that "a pain clinic masks what's going on, and sometimes you need to know what's going on." [TR at 42.] Before his direct examination closed, the claimant stated that the accident also caused worsening pain in his left hip, which was already giving him trouble from previous, unrelated injuries. [TR at 43.]

B. *Claimant on Cross Examination by Ms. Edwards*

Mr. Vick corrected an earlier misstatement and confirmed that Daniel Garner, another employee, was in his vehicle at the time of the accident. [TR at 46-47.] According to the claimant, Mr. Garner needed some sheetrock and some trowels or a trowel to complete something he was working on at the job site. The claimant went on to explain that he kept a

second timecard while working for the respondents "because they'd cheat us out of our hours every two weeks." [TR at 48.][2]

The claimant confusingly testified back-and-forth again on whether the employees took lunch breaks, seeming to settle his position on the workers not taking lunch breaks because he could not personally afford to buy lunch for everyone every day. [TR at 50.] When asked by the respondents' counsel about the "L" notation and time deduction on the time cards admitted into the record (see Resp. Ex. № 2 at 1-4), the claimant attacked the credibility of the evidence, saying that he and his son were not paid for working past midnight because "Human Resources left at 5:00." [TR at 51.] "We never seen the time card 'til the next—the following morning," he said. [TR at 52.]

Mr. Vick confirmed that he did not return to work for the respondents and that he had not undertaken any substantial work since the accident. [TR at 53.] He stated that he had not looked for or applied for any work. The claimant stated that he was unable to drive and that his supervisor Mr. Valentine, who had hired him to work for the respondents, had driven him to a previous hearing on this matter in Little Rock. [TR at 54.]

After a series of questions and responses about whether or how employees could or should go about getting tools and materials from the local lumber store, the claimant said that he had Mr. Valentine's permission to get whatever tools or materials he and/or Dan Garner needed. [TR at 66.] He said that he drove his vehicle because he was not allowed to drive the employer's work truck. The claimant also said that they "had already finished picking up the tools by the time that [they] were in the auto accident." [TR at 66-67.]

The claimant reviewed with counsel some of his past health complaints and medical records and discussed his past pain management treatment. [TR at 73.] He acknowledged a

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[2] It is difficult to ascertain from the record, but during cross examination, the claimant produced what he purported to be his duplicate timecard during the questioning. It was not offered into evidence.

positive drug test result, but disagreed that he was discharged from care. [TR at 74.] He then recalled being released by the providers from one program and withdrawing himself from another. Mr. Vick offered that he was not treating at the time of the hearing. [TR at 75.]

C. *Examination of James Valentine*

Mr. Valentine stated that he had known the claimant for "twenty-some years." [TR at 77.] He was in his second year of employment with the Housing Authority at the time relevant to this claim. [TR at 78.] The witness recalled being the claimant's supervisor on the day of the accident and thought that Mr. Vick was working on some plumbing that day. He testified that Mr. Vick could leave the job site and that it was common for people to use their own tools on the job. [TR at 79.] According to Mr. Valentine, he did not know of the claimant's plans, if any, for lunch on the day of the accident. [TR at 80-81.] It was not uncommon for the claimant to leave for materials in his vehicle. [TR at 82.]

The witness recalled the scene of the accident and thought that the claimant had been working for the respondent for a couple of months around that time. [TR at 84.] He also said that Mr. Vick was a good worker. [TR at 85.]

On cross-examination, Mr. Valentine explained the organization structure at the work site, with Kenny Gober being the "overseer of everything" and Melissa Gober working as the accountant who "also helped with some other things." Recalling some others on the job, Mr. Valentine had trouble remembering someone's name. The witness and the claimant were instructed not to communicate while the examination was underway.[3] [TR at 86.] Mr.

[3] The interaction is captured on the record, but without clear indication of to whom I was speaking. "Don't look at him" was directed to the witness, while "[you] don't look at him and don't respond [in the] affirmative" was directed to the claimant, who was attempting to communicate from counsel's table. I admonished, "he had to sit outside. You can't let him know if he's saying something right." See TR at 86. Still, the claimant continued, "may I add, I have worked with him several times on and off, so."

Valentine confirmed that the two touched base most mornings so that each knew what the other would be working on. [TR at 87.]

Mr. Valentine said that he asked the claimant to get whatever he needed for that day's work. When the respondents' counsel brought up a note from 2017 that stated otherwise, he said that getting tools "was discussed." [TR at 88.] When pressed further on whether he told the claimant "I need you to do this," he was uncertain, asking counsel, "It's kind of understood if we discussed it, right?" She disagreed, and the witness responded, "I'm not sure how to answer this." He said that he believed that he told the claimant to go get the tools.

> Q: So this happened six years ago, right? And I just noticed that you looked at him. So this happened six years ago, right?
>
> Judge: Don't [look for an answer from the claimant]—talk to her [Ms. Edwards].
>
> A: Ma'am, this happened six years ago.
>
> Q: Okay. That's what I'm asking. Okay. So is it possible that you don't remember the context, the entire context of the conversation that y'all had? Is it possible?
>
> A: Yes, ma'am, it could be possible.
>
> Q: Okay. So I also have a note that back in 2017, that you stated that Mr. Vick was on lunch at that time, and you're saying that's not true?
>
> A: Yes, ma'am. I—He was not on lunch, no, ma'am.
>
> Q: Okay.
>
> A: May—can I – May I see this statement that I— [TR at 89.]

The witness went on to affirm that he and Mr. Vick had known each other for 20 years and that he had asked Mr. Vick to come work at the Housing Authority. [TR at 90.]

After some questions about materials and getting tools to the job site, Ms. Edwards asked if in the past, Mr. Valentine recalled asking Mr. Vick to bring his tools to the job site. He said that he did not recall. [TR at 94.] When asked about the company truck, Mr.

Valentine said he wasn't sure whether Mr. Vick was allowed to drive it.[4] If Mr. Vick provided transportation for other employees to and from work, that would have been of his own choosing, as "it was their responsibility to get there." [TR at 96.]

At the conclusion of Mr. Valentine's testimony, all parties indicated the close of evidence. No additional witnesses were called. I reminded Mr. Webb that his objection to Respondents' Exhibit № 2 at 16, a letter from Brooke Cingolani, was noted and that that my opinion would address the issue. He did not add to his earlier objection based on any other the testimony or other evidence on the record. Mr. Vick attempted to go on as his attorney left:

> Claimant: May I just say that y'all—
>
> Judge: No. That's—your'e—
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> Claimant: — y'all—I mean, I'm just going to tell you, y'all—that was—I mean, that was—I've never been in—
>
> Judge: All right. Well, I don't know if your lawyer wants you to provide any narration.
>
> Claimant: I'm just saying, y'all—well, I mean—
>
> Judge: … you're not called as a witness at the moment, so let's cut that out. I'm sure he'll thank you for—whatever. With that, the case is submitted, so we're off the record. [TR at 98-99.] There, the record ended.

IV. ADJUDICATION

The stipulated facts are outlined above. It is settled that the Commission, with the benefit of being in the presence of a witness and observing his or her demeanor, determines a witness' credibility and the appropriate weight to accord their statements. See *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 448, 990 S.W.2d 522 (1999). The Commission must

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[4] Mr. Vick was reminded again from the bench to avoid attempting to coach an answer: "Try not to be responsive. You were kind of shaking your head a little bit. Don't do that." See TR at 94.

sort through conflicting evidence and determine the true facts. In so doing, the Commission is not required to believe the testimony of the claimant or any witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). It is further settled that a party's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

A. *The Claimant Failed to Prove by a Preponderance of the Evidence that he Suffered a Compensable Injury.*

Under Arkansas's Workers' Compensation laws, a worker has the burden of proving by a preponderance of the evidence that he sustained a compensable injury as the result of a workplace incident. Ark. Code Ann. § 11-9-102(4)(E)(i). In order for an accidental injury to be compensable, it must arise out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i). A compensable injury does not include an injury that is inflicted upon the employee at a time when employment services are not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii). Neither "in the course of employment" nor "employment services" are clearly defined in the Workers' Compensation Act, so it has fallen on the courts to frame those terms in a way that neither broadens nor narrows the scope of the Act. *Texarkana Sch. Dist. V. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008).

Employment services are generally considered those things that an employer requires of its employees. *Pfifer v. Single Source Transp.*, 3247 Ark. 851, 69 S.W.3d 1 (2002). The test for whether an employee is acting within the course and scope of his or her employment usually involves considering whether an employee is directly or indirectly advancing an employer's interest at the time a thing is being done. *Jivan v. Econ. Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007).

This case turns primarily on whether the claimant was acting in the course of employment or performing employment services at the time of the car accident. I find it more likely than not that he was acting outside of the course of his employment at the time of the accident and that he, thus, cannot prove a compensable injury related thereto.

My finding is not tied to any particular previously litigated pattern of behavior reviewed by and then found by our courts to be or not be, for the purposes of the Arkansas Workers' Compensation Act, working behavior. I am mindful, though, that many past cases offer guidance. See, e.g., *Shelton v. Qualserv & Am. Cas. Co.*, 2013 Ark. App. 469, 2013 Ark. App. LEXIS 492 (noting several other holdings around working behavior). Rather it rests on the credibility—or a lack thereof, of the testimony now attacking the contemporaneously documented version of the events.

The claimant was not a credible witness. The transcript reflects at times, and the footnotes above do as well (to some extent), that the claimant's demeanor on the stand was difficult towards those asking questions of him. He was evasive and often more inclined to tell a story around a question's answer than simply answering a question. Mr. Vick was inconsistent on whether he or others took lunch breaks—an important part of the issue at hand. In one instance there were no lunch breaks, while in another he personally bought lunch for everyone he worked with until he grew tired of paying for everyone's lunch. He stated that his *job duties* included "picking every single employee up," while Mr. Valentine said that it was each employee's responsibility to get to and from work and that if or when someone rode with Mr. Vick, it was probably just because they happened to ask Mr. Vick for a ride.

Mr. Vick disputed the veracity of his time cards, which were marked to indicate time off for lunch. While he acknowledged that the cards were hand-marked with time deductions and an "L" for time off the clock while away on lunch, he claimed that those cards were not

accurate because they were taken by HR when they left every day at 5:00 pm. Those cards, however, clearly indicate that his testimony was not true in that regard. See Resp. № 1 Ex. № 2 at 1-4. His time card for 28 August to 1 September, for example, shows that he punched out at the clock at 6:08, 7:14, 6:24, 8:16, and 8:19 on each of those days. These records stand in plain contrast to his claims that "they clocked us out when they wanted to" so they could "cheat us out of our hours." [TR at 48.]

Mr. Vick's claim was denied by the respondents from the outset because they asserted that he was out and returning from lunch at the time of the accident. Their records reflect the same. See Resp. № 1 Ex. № 2.

The claimant objected, on the basis of hearsay and a supposed violation of the Sixth Amendment [TR at 8-9], to the admission of a letter from the respondents authored by Brook Cingolani and dated 5 December 2022. See Resp. № 1 Ex. № 2 at 16. First, I do not find that the Sixth Amendment[5] is at all implicated here. Second, the Commission "shall not bound by technical rules of evidence." Ark. Ann. § 11-9-705(a)(1). It is not clear if Ms. Cingolani was the intended witness noted in Respondent № 1's Prehearing Questionnaire Response as a "Representative of the McGehee Housing Authority." Respondent № 1 argued, without further explanation as to why, that Ms. Cingolani was not available to testify at the time of the hearing. Still, I find the record admissible, but not of much value beyond that it was prepared by the respondents in the course of this litigation and apparently for the purpose of this litigation (it is dated more than three weeks prior to the date of the prehearing telephone

[5] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S. Const. amend. VI.

conference) and that it is consistent with the respondents' position on this matter since the time around the accident.

As to Mr. Valentine's testimony, I find it of little evidentiary weight. He acknowledged that he hired the claimant to work for the Housing Authority, that they had known each other for two decades, and that Mr. Vick "went through a lot since the accident." [TR at 83.] Mr. Valentine even drove Mr. Vick to Little Rock for a previous hearing on a motion to dismiss this case. [TR at 90.] Mr. Valentine could not recall generally telling the claimant that he was to bring any specific tools to work. [TR at 94.] When pushed, he conceded that he could not recall exactly the context of that morning's conversations and whether he directed the claimant to leave the site to retrieve some tools or whether he was only aware that the claimant would leave at some point during the day (which his time cards reflect he regularly did). When he stated that Mr. Vick was not on lunch at the time of the accident, he did not recall an earlier statement, in a note from 2017, to the contrary. Despite Mr. Vick's urging from across the room, as he was admonished against more than once, Mr. Valentine did not provide sufficient credible testimony to refute the respondents' position that Mr. Vick was not performing work services at the time of the accident. At best, I believe that Mr. Valentine wrestled with his responsibility to tell the truth, his faded actual memory of that day's events, and the "version" that he knew Mr. Vick was urging he remember on the stand.

I would be remiss to not make note of what was not mentioned in Mr. Vick's testimony in-line with his purported version of that day's events. He said that Mr. Garner left with him so that they could get sheetrock supplies and trowels that Mr. Garner needed for what he was working on that day. There is, however, no mention of those materials in relaying their trip to Mr. Vick's mother's shed for Mr. Vick's plumbing bag and their returning to the job site. If, call it, "half" of the reason for the trip was getting tools and supplies for Mr. Garner, why not include the what's and where's of accomplishing that in the story about leaving and

heading back to work? That gap in Mr. Vick's story is certainly not dispositive, but it is another reason I call into question his version of the events and his stated purposes for leaving the job site that day.

As I do not find it more likely than not that the accident occurred during the performance or work duties or within the course of Mr. Vick's employment, I decline to reach the merits of the defense that he cannot prove a compensable injury for lack of objective medical findings associated with the accident. That issue is moot.

B. *Attorney's Fee*

Consistent with the above, the claimant fails to establish that he is entitled to an attorney's fee.

V. ORDER

Consistent with the Findings of Fact and Conclusions of Law set forth above, this claim is DENIED AND DISMISSED.

SO ORDERED.

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JAYO. HOWE
ADMINISTRATIVE LAW JUDGE