BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H109299**

DAVID J. WISE, Employee — CLAIMANT

MIDLAND INDUSTRIAL SERVICE LLC, Employer — RESPONDENT

LIBERTY MUTUAL GROUP, Carrier — RESPONDENT

OPINION FILED **NOVEMBER 10, 2022**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by DAVID C. JONES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 15, 2022 the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 19, 2022 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order 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 26, 2021.
3. The respondents have controverted the claim in its entirety.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability.
2. If compensable, whether claimant is entitled to temporary total disability benefits and

medical benefits.

3. Compensation rate.

4. Attorney fee.

5. Respondents raise lack of notice as a defense.

6. Whether respondents are entitled to appropriate setoffs, should benefits be awarded.

All other issues are reserved by the parties.

The claimant contends that "he is entitled to medical treatment for his injury and to repayment for medical expenses he has incurred. He contends he is entitled to temporary total disability benefits from October 3, 2021, to the end of January 2022. The claimant reserves all other issues."

The respondents contend that:

1. "The respondents contend that the claimant did not sustain specific incident injuries to his great toes during the course and in the scope of his employment on August 26, 2021. In that regard, the respondents contend that the claimant had no objective medical findings to support compensability until what appears to be more than a month later and that his condition is a result of his diabetic preexisting conditions and not a result of the work-related activities for the respondent/employer herein.

2. The respondents contend that the claimant's subsequent work activities after his resignation from the respondent/employer herein and his failure to properly maintain his diabetic medical condition led to his ultimate need for treatment and surgical intervention, and not the alleged exposure to heat with the respondent/employer herein. Furthermore, the respondents contend that the claimant's subsequent activities would be considered an independent intervening event, and his failure to maintain control of his diabetic condition and preexisting conditions led to his ultimate need for surgery.

3. The respondents contend that the claimant's temporary total disability benefits would be limited to what appears to be on or about October 6, 2021 through January 2022.

4. The respondents contend that the claimant would not be entitled to any type of permanent partial disability ratings as the "major cause" of any impairment would be a result of his preexisting condition, not a result of the work-related injury alleged herein.

5. The respondents contend that they would be entitled to an offset for any unemployment benefits paid to the claimant should the claimant have applied for and received said benefits.

6. The respondents would reserve the right to amend and supplement their contentions after the discovery has been completed."

From a review of the record as a whole, to include 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 May 19, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury on August 26, 2021.

FACTUAL BACKGROUND

As the hearing began but before any testimony was taken, claimant amended his contention above to include periods of temporary total disability from October 3, 2021 through January 18, 2022, and April 27, 2022 through June 7, 2022. Being no objection from respondents, that amendment was

allowed.

HEARING TESTIMONY

Claimant said on August 26, 2021 he had been hired as a project manager for respondent Midland Industrial Services LLC (hereinafter "Midland"). He had traveled to Vernon, Texas to meet with a crew and observe what was going on, as he had not yet been assigned to a project. While claimant's duties did not include physical labor, he got on a roof and cut stainless steel brackets all day because the crew was not adequate. He said it was very hot on the roof and he was wearing low-top leather shoes with steel-toes. Claimant believed the temperature was over one hundred degrees on the black roof where he worked about ten hours. Around noon or one o'clock, claimant felt his feet getting a little scalded and hot, like walking on hot pavement. By the time he'd finished, he knew that he had scalded his feet. He went to Walmart to get icepacks and aloe vera, took a cold shower and tended to his feet the best he could. He returned to work the next day and told the foremen of the job, Tyler Hayden, that he had burned his feet. At the time he didn't think it was that bad, but he could feel it in both his feet as he worked three or four days like that. He did not get back on the roof during those days. After three or four days, he left that job site, telling Mr. Hayden that "my feet don't feel right". Claimant said he went home and took off thirteen days while he doctored his feet with Epsom salts, and aloe vera, and antibiotics. He thought it would go away and heal up.

Claimant testified he was then hired by Multi-Craft. He was sent to Jonesboro, Arkansas to work on a project, where he spent about ten days of walking for ten hours a day. He stated after ten days, the blisters on his feet finally burst and got much worse very quickly. Claimant returned home from Jonesboro, went to the emergency room, and was put in the hospital for five days. While he was in the hospital, he spoke with David Rook at Midland and told him what happened. Eventually, he heard from "the insurance lady".

Claimant said after he was released from the hospital, he was treated for about eight weeks with an infusion of an antibiotic, and oral medication. He said he had to stay at home in his recliner with a pillow under his feet. Claimant denied he had had any problems with his feet before August of 2021 when he burned them on the roof. He is diabetic and controls his blood sugar with oral medication.

Claimant said that after he was released from treatment that he went to work for Clorox and the sores on his feet which had healed reopened after two and a half weeks. He said that he was currently off work from Clorox and did not believe he was going to be able to stay there. Claimant said his left big toe was not completely healed; if he is on it a lot, it starts bleeding a little bit.

On cross-examination, claimant was asked about the chain of command at the job site in Texas and he conceded that those working there were subordinates to him. He said it was Mr. Hayden's job, though, and not his. Claimant did not call David Rook with Midland, who is the person who had gone through the orientation process with claimant.

Claimant said that while he was in Texas, he did not have a busted blister or anything like that on his feet, just discoloration. Claimant conceded that he had been through the orientation process including the part that said, "any accident resulting in injury regardless of how slight the injury must be reported immediately to the supervisor." He said that he was familiar with how to report claims, because it was the same with every company. However, in August, he didn't talk to anyone at Midland other than Tyler Hayden and the crew in Texas.

Claimant began working at Multi-Craft on September 13 and the ulcerations on his feet did not come open until he had been at work at Multi-Craft for a couple of weeks. He said his condition worsened after he went to Multi-Craft. He first called someone at Midland on October 3, when he was put in the hospital.

Claimant recognized that the ulcerations were on both the top and bottom of his feet but attributed those on the top of his feet to the boot he was wearing. He did not know that it was called a diabetic ulceration.

When claimant started working at Clorox, he told them about his foot problem but believed it was seventy percent healed on the bottom when he went to work. He was on his feet twelve hours a day at Clorox and the skin started coming apart again, so he went to the doctor before it got bad. He applied for short term disability with Clorox. His physician talked to claimant about the ulcerations occurring because he had been walking a lot more.

On redirect-examination, claimant explained that the burns to his feet occurred when he was on the roof, with the hottest part of the day being between eleven a.m. and five p.m. He said the burns "puffed up and then they gradually busted." While he was at Multi-Craft, the burns started cracking a little bit and they finally busted in Jonesboro. At that point, he was indoors, and he walked a lot.

Claimant said that in the construction industry, you don't want to report every little cut or other minor injury because it doesn't make your company look good. He said he had no idea that it was going to be that bad with his feet.

In response to questions from the court, claimant clarified the timeline from the day he alleged he was injured while in Texas until he went to the hospital and that he had put himself on the roof to work rather than being directed to do so by Midland.

Claimant's wife, Barbara Wise, testified that she remembered when her husband had worked in Texas for Midland and when he returned home, she saw he had blisters on his feet. She said that he soaked them in Epson salts and put antibiotic ointment on it as well as Neosporin, which was to prevent any leakage or any infection from developing. She was present when her husband called David Stone at Midland to let him know that he was at the hospital because he had burned his feet while

working in Texas. He apologized for calling at a late date, but he thought he could take care of the injury. She knew her husband was diabetic but had not had any complications from his diabetes and specifically had not had any problems with his feet. Ms. Wise remembered that when he came home from Texas, he put his feet up to rest them and take care of them. After twelve or thirteen days, he went to work at a different company.

On cross-examination, Ms. Wise was asked about her husband's elevated blood sugar, and she knew that he had that condition, but he worked on it and took care of it with his food and diet as well as oral medication.

After claimant rested, respondent called David Rook. Mr. Rook is the division manager for the industrial refrigeration safety division with Midland. Mr. Rook explained the orientation process which included a form that claimant signed indicating that claimant understood that he was to report an injury no matter how slight to his supervisor. He said claimant was a project manager and he was over a foreman or anyone else at a job. He said that injuries need to be reported immediately so a risk to other team members could be mitigated and a root cause analysis could be done. He disagreed with claimant regarding not reporting minor accidents that did not result in loss time situations. He testified that had claimant called from Texas and said that he had been hurt he would have been pulled off the job, brought back to restricted duty, and more than likely gotten the medical treatment he needed.

Mr. Rook said the first he heard about the incident was October 6 and he was unaware that anyone at Midland had been told about his foot being injured before October. When someone from the HR department called him about an injury to claimant, he didn't know that it had been five weeks prior. He called claimant, who explained to him then what he had testified to earlier. There were no other reports of injuries or blisters on the feet from being on a roof that he had heard of. He said because of the delay in calling, he was not able to fill out a first report for compensation, so he filled

out an incident report and submitted that to the insurance carrier.

Mr. Rook said he spoke with Tyler Hayden, who remembered claimant saying that it was hot out there and Mr. Hayden agreed. Mr. Hayden did not recall any mentions of complaints claimant had about his feet. There was another employee named Kanoe who did not recall anyone having issues with their feet.

REVIEW OF THE EXHIBITS

Because the existence of the diabetic ulcers on claimant's left great toe and right great toe is not an issue in this case, but rather whether those injuries are compensable, an extensive summary of the medical records is unnecessary. The records from claimant's hospitalization from October 3, 2021, thru October 6, 2021, demonstrates that claimant presented to the emergency room with ulcerations on the great toe of both feet, but it was the left great toe which was of the greatest concern to the treating physicians. Recognizing that claimant had osteomyelitis of the left great toe, APN Rachel Reynolds recommended an amputation of that toe. However, it was determined that amputation was not necessary. There were few entries regarding the treatment to the right great toe.

After discharge, claimant continued to be followed by Mercy Clinic and a debridement of the wound on the left great toe was performed on October 20, 2021. When next seen on October 27, 2021, there was improvement noted with the wound.

On November 5, 2021, claimant underwent an aortoiliofemoral angiography procedure which was followed by a successful percutaneous transluminal angioplasty on claimant's left popliteal artery, left posterior tibial and left interior tibial. When examined on November 10, 2021, Dr. Shawn Brummett recorded that "the wound is smaller but very slow. May need hbot [hyperbaric oxygen treatment]." An excisional debridement was performed on the left great toe.

When claimant was next seen on November 23, 2021, it was recorded that the wound

continued to be smaller, but another excisional debridement was performed "down to healthy bleeding tissue." Claimant returned a week later, and it was noted that the wound was "slightly smaller today but is hyper granulated." The long-term goal for claimant was a complete wound closure after sixteen weeks. On his December 14, 2021, visit with Dr. Brummett, it was recorded that the wound was again smaller, and the goal remained the same. On December 28, 2021, Dr. Brummett recorded that the wound was improved and nearly closed, however, on the next visit with Dr. Brummett on January 11, 2022. it was recorded "wound worsened this week. Was up more last week. Was wearing tennis shoes without insoles. Needs to start wearing afo [ankle-foot orthosis] more." Claimant then saw Dr. Brummett on January 18, 2022 and was given discharge instructions to "cleanse with normal saline as instructed."

Claimant returned to Mercy Clinic on April 27, 2022, presenting with "patient burned his big toe on his left foot a few months ago, he recently went back to work and now the skin is peeling off and bleeding. Would like to go back to wound care if possible." The treatment regimen was very similar to that claimant received from October 2021 through January 2022.

ADJUDICATION

Boiled down to its simplest elements, claimant maintains that the diabetic ulcers on his toes which resulted in his hospitalization in October were causally connected to the day he burned his feet while working on a roof during the August Texas heat.[1] After considering all the evidence in this case, I disagree, as I believe there was an independent intervening cause for claimant's injury.

In order for a claimant to meet his burden of proof to receive benefits, he must show that: (1) an injury occurred that arose out of and in the course of his employment; (2) the injury caused internal

[1] During his testimony, claimant referred to his feet at various times as being burned, blistered, or scalded. I too am using those terms synonymously

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. 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).

By his own testimony, claimant did not meet the second criteria before he first sought medical treatment for his blistered feet. The harm he and his wife described after scalding his feet on the roof may well have needed medical care, but claimant did not receive any treatment until October 3, 2021. By that time, though, he was no longer working for Midland; he had been on the job for Multi-Craft for almost three weeks. So, even if I accept that claimant burned his feet while in the course of his employment with Midland on August 26, 2021 (and I found he and his wife to be credible witnesses on this point) and further accept that the diabetic ulcers were due to the blisters on his feet, the earliest date the claim could be deemed compensable would be October 3, 2021.

However, I do not find claimant proved by a preponderance of the evidence that the burns on his feet were the cause of the diabetic ulcers. I agree with respondent that there is an independent intervening cause—the ten-hour days claimant spent on his feet in steel-toed boots for during the two weeks before the ulcers appeared. I base my finding on two factors. First, the ulcers were not present during the two weeks claimant was home nursing his burns, but rather appeared after many days of extensive walking in his work boots at Multi-Craft. Because they weren't there before he started with Multi-Craft, I cannot call the ulcers a recurrence, which could make respondent responsible for benefits. As outlined above, at the time claimant started with Multi-Craft, he did not have a compensable condition because he had not received medical treatment for his blistered feet. "An

aggravation of a preexisting non-compensable condition by a compensable injury is, itself, compensable. *Oliver v. Guardsmark*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. *Crudup v. Regal Ware*, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

The second factor in my decision were the records from the second bout of diabetic ulcers on claimant's left big toe. Claimant had been released from care with no restriction and no impairment rating in January 2022. He testified that he walked as many as 12 hours a day while working for Clorox. It appears the common denominator for the occurrences of the ulcers were many hours of walking in steel-toed boots.

Since claimant did not prove by a preponderance of the evidence entitlement to benefits for the first ulcer, the same reasoning applies to the second one. Claimant had been released to full duty with no impairment rating at the conclusion of the first course of treatment (January 18, 2022). Any injury to his foot while he was working for Clorox would not be the responsibility of Midland.

Because claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed with Midland and did not establish that his injury while with Multi-Craft was a recurrence rather than an aggravation of a pre-existing condition, I cannot find respondents are liable for any benefits for claimant's injury to his toe. It is therefore unnecessary for me to decide the compensation rate or if claimant made a timely report of his injury.

ORDER

Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury on August 26, 2021. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondent is responsible for paying the court reporter her charges for preparation of the

hearing transcript in the amount of $798.00.

IT IS SO ORDERED

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE