

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F600208

GEORGE W. LAKING, EMPLOYEE

CLAIMANT

**WAL-MART ASSOCIATES, INC.,
EMPLOYER**

RESPONDENT

**CLAIMS MANAGEMENT, INC.,
TPA**

RESPONDENT

OPINION FILED MAY 16, 2007

Hearing before Administrative Law Judge O. Milton Fine II on March 20, 2007, in Harrison, Boone County, Arkansas.

Claimant represented by Mr. Steven R. McNeely, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Curtis L. Nebben, Attorney at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On March 20, 2007, the above-captioned claim was heard in Harrison, Arkansas. A prehearing conference took place on January 8, 2007. A Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. Claimant and Respondents added an additional stipulation, resulting in the following four, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The employee/employer/carrier relationship existed at all relevant times, including December 30, 2005.
3. This claim has been controverted in its entirety.
4. Claimant's average weekly wage was \$336.00, giving him compensation rates of \$224.00 for temporary total disability and \$168.00 for permanent partial disability.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1.

The following were litigated:

1. Whether Claimant sustained a compensable injury.
2. Whether Claimant is entitled to temporary total disability benefits.
3. Whether Claimant is entitled to medical treatment.

Contentions

Claimant. Claimant modified his first contention. The three read as follows:

1. Claimant sustained a compensable injury to his head, neck, and shoulders on or about December 30, 2005, when a co-worker attacked him with a hammer and beat him severely.
2. Claimant is entitled to temporary total disability benefits from December 30, 2005 to February 3, 2006.
3. Claimant is entitled to reasonable necessary medical treatment.
4. Claimant is entitled to payment of outstanding medical bills, mileage, and prescriptions.

5. Claimant is entitled to the maximum attorney's fee on all benefits awarded herein.

Respondents.

1. Claimant did not sustain an injury arising out of and in the course of his employment as defined by the Arkansas Workers' Compensation Act.
2. Claimant's injury was the result of non-employment hostility.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, 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, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his head and shoulder on December 30, 2005.
4. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his neck on December 30, 2005.
5. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from December 30, 2005 to January 10, 2006 at the stipulated rate of \$224.00 per week.

6. Claimant has proven by a preponderance of the evidence that the treatment that was rendered to him as set forth in the medical record evidence, with the exception of the examination by the cardiologist, Dr. Ron Revard, was reasonable and necessary.
7. The Claimant's counsel, the Hon. Steven McNeely, should be awarded the maximum attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2002).

CASE IN CHIEF

Summary of Evidence

_____ Four witnesses testified at the hearing: Claimant; Jonathan Estes, the assailant; Rex Williams, Claimant's supervisor; and Wayne Shankle, Claimant's landlord.

In addition to the pre-hearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Claimant's Exhibit No. 1, which is Claimant's prehearing questionnaire in this case; Claimant's Exhibit No. 2, consisting of pages 13-27 of Claimant's medical records, and pages 28-35 of non-medical reports, including a written statement by Sherry Henson, EOBs, and medical bills; Claimant's Exhibit No. 3, another compilation of his medical records, consisting of one index page and 12 unnumbered pages; Claimant's Exhibit No. 4, non-medical records, consisting of one index page and seven numbered pages, including pictures of Claimant, records from the Harrison Police Department regarding the assault, and Claimant's earnings statement; and Respondents' Exhibit No. 1, a one-page signed statement by Jonathan Estes.

Testimony

Jonathan Wayne Estes. Called by the Claimant, Estes testified that while he did not know Claimant personally, he worked with him at Wal-Mart, at the same store, in the same department. Their shifts overlapped. They did not have a lot of conversations together. Estes testified that he “made a mistake and they fired me.” Elaborating, he stated that his “mistake” was that he “hit George.” Asked to explain what happened on the date of the incident at issue, Estes stated that “I got hot and remembered three, three incidents, but I really, what I did, I agree what I did was uncalled for. And, and I honestly, I honestly hope George is okay. I mean, I made a mistake.”

On cross-examination, Estes testified that he went to the police department to give a statement. This statement is part of Claimant’s Exhibit 4. He was charged with aggravated assault for attacking Claimant, but the charges have since been dropped. Estes told the police that Claimant had been harassing him for months, telling him that he was going to kill him and use his organs in witchcraft rituals. He further told the police that on the day of the assault, Claimant dropped a small box in front of Estes and stated that the box was for the body of Estes’ infant daughter, and that he was going to use her organs in witchcraft rituals. Estes testified that Claimant’s laughing about a co-worker cutting off the end of her finger, along with the box incident and another he could not recall, led him to attack Claimant.

On the stand, Estes recanted his statement to the Harrison Police Department concerning what Claimant allegedly told him regarding the box. He denied that he told the police that when Claimant told him that he was going to kill Estes’ daughter, that he had to do something to protect his family. Estes stated that he “told a member of the sheriff’s

department about how I felt and everything.” Asked to explain his statement then versus his recollection on the stand, Estes testified that “I was probably just worrying too much.” When asked if he was worried on the day of the hearing, he stated, “I probably should be, but I’m not.” He elaborated that he should be worried “[b]ecause I made a mistake.”

Estes also identified Respondent’s Exhibit 1, the handwritten statement he gave to Respondent employer after the assault. On the stand, he recanted the statement he had made concerning Claimant’s alleged threats to him and his daughter regarding Claimant’s plans for Estes’ organs and the box. Estes admitted that he hand-wrote the statement on January 5, 2006. He testified that he had initially stated that he did not know what had happened to Claimant, and that a few people had told him to make that statement. Estes stated that he hit Claimant because he believed that he was provoked, and that the provocation had nothing to do with Respondent employer other than Estes’ being offended at Claimant’s laughing about his co-worker’s accident. As to the source of Estes’ belief that Claimant was involved in witchcraft, he stated,

Well, what brought that thought to me was there’s a young lady named Leigh there, and I think that she was suing him. And I don’t think George [Claimant] realized it. And she claimed to be witchcraft [sic], and she’d brag about it. And I know it sounds like a bunch of nonsense to y’all, but that’s how I believed and feel.

On redirect, Estes testified that Claimant did nothing to provoke him on the day of the assault, that he had said nothing. The two were not actively in an argument that day. Estes stated that he did not believe that Claimant even knew he was going to be attacked.

On recross-examination, Estes denied that his provocation was brought on by previous threats made by Claimant concerning Estes and his daughter. He stated that he

made those statements to the police and to Respondent employer “because that’s how I felt,” even though it was not “100%” truthful at the time.

When questioned by me, Estes stated that he struck Claimant with a mallet. He did so “[w]hen I seen my daughter’s name on that box, and I guess I got the wrong idea or whatever.” According to Estes this box was made of black plastic, had a red sticker on the front of it, and measured “about two cubits by one cubit.” Estes stated that the box had his daughter’s name on it—“Julia” (no last name) was written in white letters. But Estes said that the boxes “were made that way”—Claimant did not put the name there. The box did not come from the department in which Claimant and Estes worked. Claimant set the box on a pallet in front of Estes, but did not look at Estes or say anything when he did so.

Thereafter, Estes testified that he walked 15 feet, picked up the mallet, and followed Claimant into the cooler. Estes waited for Claimant to turn around; and when he did, he struck him on the left side of his head, in front of his ear. Estes stated that Claimant “looked at me and cussed, and I hit him again. I hit him about four times.” The second blow was to Claimant’s nose, and the third and fourth were to the back of his head. Estes testified that he then placed the mallet behind the scale. The management came in and asked Estes to help Claimant. Larry Phillips told Estes to go wash his hands, and not too long after that, he was questioned and taken in.

Claimant testified that he gave statements to Respondent employer and to the Harrison Police Department (which he later testified was actually the Boone County Sheriff’s Office). He testified that “[a]ctually, the reports I gave there at the sheriff’s station is, lines up with my true feelings. But the paper that I read today [his statement to Respondent employer—Respondent’s Exhibit 1] wasn’t 100% true.” He stated Claimant did

not tell him that black box was for Estes' daughter's body and about using her organs for witchcraft rituals, although that is contained in his statement that is part of Claimant's Exhibit 4, his statement to the Harrison Police Department. While Estes stated that he was truthful to the police, he did not remember telling them about the box and witchcraft, but did remember telling them about being disturbed about Claimant laughing about the co-worker's finger injury.

On further re-cross examination by Respondents, Estes testified that the incident involving Claimant and the box occurred in the back hallway between the freezer and the emergency exit.

Rex Allen Williams. Williams testified that he worked with Claimant. He was Claimant's supervisor in the produce department for awhile at Wal-Mart. Williams stated that he had never known Claimant to have a violent temper or to start a fight—he felt that Claimant had a “good personality.” He never saw Claimant and Estes have a confrontation. It was Williams' understanding from a Wal-Mart representative that Estes was terminated over an incident in the cooler at work involving a hammer.

On cross-examination, Williams testified that he and Claimant were not friends and did not socialize; his knowledge of Claimant's behavior came only from observation as his supervisor. Claimant was one of five employees that Williams supervised, and he did not follow his employees around and watch them throughout their shift. Williams stated that Wal-Mart has loss control personnel, and that it is not unusual for them to come in and take written statements from everyone involved in an incident—although he had no personal knowledge of whether that occurred regarding Claimant's injury.

Wayne Andrew Shankle, Jr. Shankle testified that he knows Claimant well, and certainly knew him in December 2006. They met in 1994. Claimant lives with and rents from the Shankles. Shankle described Claimant as “Friar Tuck”; he stated that he “is quiet, but does what’s right.” Shankle stated that he had never seen Claimant in any kind of argument, and that he is not very physical. Prior to the incident at issue, he never observed Claimant to have any problems with his head or right shoulder. Shankle described Claimant “beat up pretty good.” He was in pain and not sleeping well. His right shoulder would hurt, and he had headaches. His mobility became limited. Shankle stated that after Claimant had shoulder surgery in April 2006, the shoulder mobility improved.

On cross-examination, Shankle testified that Claimant lives with Shankle and his family. Claimant pays rent, and helps with dinner. He sleeps on a hide-a-bed in the living room in the winter, and sleeps in the garage with his dog during the warmer months. Shankle’s wife worked with Claimant at Wal-Mart and became friends. Claimant likes to travel to renaissance festivals, which he likes to photograph.

George W. Laking. Claimant testified that he is 60 years old and has a bachelor of arts degree. He was previously married and has two sons, but does not owe any child support. He began working for Wal-Mart for the second time on June 21, 2004. He was working there on December 30, 2005. Claimant was a sales clerk in the produce department. Most days, he worked from 9:00 or 10:00 a.m. to 6:00 or 7:00 p.m. His job was to take stock and organize the produce on the shelves, cull bad product, and keep the shelves and floors clean. Prior to December 30, 2005, his right shoulder was fine, and he had no physical limitations that kept him from doing his job.

Claimant stated that on the day of the assault, which he believed was a Friday, his shift was to be from 9:00 a.m. to 6:00 p.m. He clocked in and went to work. Claimant visited with Estes and asked him what the conditions were—what was the floor like, how much product had come in, and had management said anything. According to Estes, someone from Bentonville was coming to make an inspection. Claimant got to work putting product out.

Sometime between 9:20 and 9:30 a.m., Claimant went into the cooler with a little cart and was putting turnip and mustard greens on it. He turned around and saw Estes with a mallet in his hand, which was used to assemble and disassemble the steel shelving. Estes struck Claimant over his right eye. Claimant saw a flash of light and then found himself blinking and standing in the middle of the cooler, which was to the right of where he was at the time of the blow. His arms were lying at his side; and while he had a tingling sensation in his arms, he could not move them. Claimant stated that based on his training in the Coast Guard and U.S. Navy, to avoid further injury to himself by falling he walked over to the shelving, leaned against it and slid to the ground. He called for help. Claimant testified that blood was flowing down his head in front of his eyes. On the stand, Claimant displayed the scar near his left eyebrow. He stated that the hammer came down and caught his eyeglasses, so that he ended up with a cut above and below his eyebrow and to his ear.

Claimant stated that he believed that he took seven or eight blows to the head, including to the chin, plus one to his right shoulder blade, which raised a knot three or four inches across. He had trouble raising his arm. Claimant stated that he was unable to go to work, and did not return to Wal-Mart until February 4, 2006. Dr. Kevin Jackson released

him to return to work with limited duty because Claimant's arm was not getting better. Prior to the assault, Claimant never had any trouble with his shoulder. He had shoulder surgery on April 17, 2006, and eventually regained full use of his right arm. Claimant testified that he is still working for Wal-Mart.

Prior to this incident, according to Claimant, he and Estes had never had any kind of altercation. There were no heated words between them that day.

On cross-examination, Claimant testified that other than asking him what the work situation was on a given day, he and Estes did not converse. All Claimant knew about Estes' personal life came from overheard conversations. He did not know the name of Estes' daughter until the hearing. In Claimant's opinion, Estes was a good worker, but quiet. Claimant testified that the assault came out of nowhere. The two were not fighting about anything. Nothing about working at Wal-Mart played a part in the altercation.

Claimant stated that he attends renaissance festivals, but not the ones involving jousting and battle recreations. He belongs to the Universal Life Church. Claimant testified that he found a reference on the internet to the Mallias Malificarion (phonetically spelled), a German book published in 1450 from the Catholic Church concerning what witches do and how to find them.

Since returning to work, Claimant has received a raise.

When questioned by me, Claimant stated that the only conversation he had with Estes on the date of the incident concerning the work conditions that day. The only detail he could recall from the conversation was that a female executive from Bentonville was supposed to be coming through. While he could only recall the one blow over his eye, Claimant testified that he believed that he was struck seven or eight times based upon

pictures taken of him and what he could observe in the mirror. He thought that he “was out on my feet for a minute.”

Under re-cross examination, while Claimant did not state that he lost consciousness, he said that there is about one minute he cannot account for.

Respondents called no witnesses.

Records–Medical

Claimant’s Exhibits 2 and 3. The medical records of Claimant that were introduced at the March 20, 2007 hearing and are part of Claimant’s Exhibits 2 and 3 reflect that on December 30, 2005, he presented to North Arkansas Regional Medical Center with a head injury following an assault. Providing his medical history to triage at 11:23 a.m., he stated that the onset of his symptoms was 20 minutes prior. Claimant had several lacerations totaling four to six centimeters, with bleeding controlled by direct pressure. The nursing notes reflect that he told the LPN that he was assaulted at Wal-Mart, and that the problem was job related. He denied that he lost consciousness.

He presented with a large hematoma with laceration of the left forehead, just above the eyebrow, that was eight centimeters in length. His left ear had a small laceration, three centimeters long. He also had a hematoma in the right occipital region. His neck was non-tender with free range of motion. Claimant presented with right shoulder pain, “but without obvious external deformation.” The CT scan of the head and facial bones was negative. The shoulder x-rays were “highly suspicious for a scapular fracture just medial to the glenoid area.” As a result of a CT scan of the area, Dr. Bennett could not definitely state that Claimant had a fracture. Discharged on December 30 as stable, Claimant was given the following diagnoses:

1. left orbital hematoma
2. left eyebrow laceration
3. left ear laceration
4. right occipital contusion
5. right shoulder pain

Claimant presented to Dr. Kevin Jackson for a follow-up visit on January 3, 2006 with continued pain in his right shoulder. He developed a mass over the posterior right shoulder that was 10 to 15 centimeters in diameter. Claimant also presented with significant bruising about both eyes, and blurred and spotty vision in the left eye. An ultrasound of the shoulder revealed no evidence of hematoma. Dr. Jackson assessed the condition as appearing to be a swollen, enlarged muscle. Regarding the eye condition, Dr. Jackson stated that an ophthalmology evaluation would be arranged.

In a second follow-up visit to Dr. Jackson on January 10, 2006, Claimant continued to complain of severe right shoulder pain and kept his right arm in a sling. The notes for this states that Claimant saw an ophthalmologist and that his eye examination was okay. Claimant reported improved vision. He was to be scheduled for physical therapy and encouraged to remove the sling. He was released to light duty, using only his left side, with the possibility of release to full duty following his next visit. When seen on January 17, 2006, it was noted that because of Respondents' controversion of the claim, Claimant had not started physical therapy.

On February 20, 2006, Claimant was referred to Dr. Ron Revard of the Harrison Cardiology Clinic for a cardiac consultation due to a slow heart rate. He presented with shortness of breath and dizziness. Following an EKG, Dr. Revard diagnosed Claimant with bradycardia and recommended a DDD pacemaker and intense blood pressure treatment. On

April 4, 2006, Dr. Revard had Claimant undergo a Bruce protocol and myocardial perfusion imaging. The overall quality of the study was good, and the imaging was normal.

On March 6, 2006, Claimant presented to Dr. Jackson with a lump in the area of his right scapula. An ultrasound showed it to be a fat density lesion below the fascia measuring 1.6 centimeters in depth and approximately 6 centimeters in length, lying in the subfascial plain. Dr. Jackson diagnosed it as soft tissue swelling of that area, and recommended incision of it to determine whether the condition was post-traumatic or not. Dr. Jim Langston performed this procedure on April 17, 2006, and determined following surgery that the swelling was not a hematoma secondary to trauma, but a posterior shoulder lipoma measuring five to six centimeters.

On August 8, 2006, Dr. Jackson wrote the following letter:

To Whom It May Concern:

There appears to be a claim that Mr. Laking's right shoulder injury suffered on Friday December 30th of 2005 was not related to his workman's [sic] comp injury. Please refer to his prior medical notes where on 1/03/06 this injury is described as part of his workman's [sic] comp claim. In fact, he had x-rays of his right shoulder in the emergency room immediately following the claim. There is no doubt that his shoulder injury was part of the initial claim.

Records-Non-medical

Claimant's Exhibit 1. This exhibit is Claimant's prehearing questionnaire. In addition to the information that was appropriated into Commission's Exhibit 1, the prehearing order in this case, this exhibit also contains Claimant's contention that the facts of this case are controlled by *Flowers v. Ark. Hwy and Trans. Dept.*, 62 Ark. App. 108, 968 S.W.2d 660 (1998).

Claimant's Exhibit 2. In addition to EOBs and medical bills for Claimant, the exhibit contains two statements from Sherry Iverson. The first, signed at 10:55 a.m. on January 3, 2006, reads:

At apprx. 10:00 a.m. on Friday 30 2005 Debbie Turner ask me to do produce water. While do so she came and ask me and Jhonnton to do a walk through we came back. I ask Jhonnathon to get green beans and change a sign. I went back to do water I heard a noise like something drop for fell then hear George called for help. I went in side to cooler George was on his knees with his head on the bottom steel. I went to change my gloves and call for a code white. I had Jhonnath get paper tow[el]s I had George to lay down on the cooler floor Debbie Turner and Jhonnath went to get coats to cover him. When then (gro. mgr.) Ask George what happen he said Jhonnathan hit him with a mallet. Then said George if it was the apples George said yes. George said his arms was numb. Jhonnathan Debbie Jhon and I stayed with him to help with bleeding George never acted afraid of Jhonnatha

The second statement, given at 2:25 p.m. on January 3, reads:

When I went into the cooler George was on the floor on his knees with his head on the steel. There was no carts or anything around him the ladder was to the left of him no [unreadable] had following on the floor. The floor had blood on it where he was nowhere el[se]. I was right out side the cooler doors with the doors open. I did not see or hear anyone go in or out of the cooler.

Claimant's Exhibit 4. Contained within this exhibit is a two (2)-page copy of an electronic mail message from Claimant to his counsel that contains three (3) photographs of Claimant that show injuries to his left ear and over his left eyebrow. Pages three (3) through six (6) of the exhibit is the Harrison Police Department's incident report regarding the incident at issue. The report contains interviews of Larry Phillips, Sherry Iverson, Claimant and Estes. According the report by Detective Jack Gospodarek, when he interviewed Estes on January 3, 2006, Estes "denied ever striking Laking with a mallet but

did retract an earlier statement about hand[ing] a rubber mallet at work.” The detective also notes:

[T]here is a discrepancy in the information given by Laking and the observa[tion] made by Iverson. Laking stated to me in his interview that he was placing items on a cart in the cooler and Iverson stated there was no cart in the cooler when she went to Laking’s aid.

In a subsequent passage in the report dated January 5, 2006, Detective Gospodarek writes:

I met Jay Shanda, Johnna Cole and Jonathan Estes [outside] the grocery entrance at Wal-Mart. Jonathan Estes agreed to come to the [Harrison] Police Department and discuss the assault. I transported Estes to the Harrison Police Department. In a post Miranda taped interview, Estes admitted assaulting Laking with the rubber mallet. Estes stated he had been provoked by Laking. Estes stated Laking had been harassing him for months saying he, Laking, was going to kill Estes and utilize his body organs in witchcraft rituals. On the date of the assault, Estes stated Laking went too far in his threats when he, Laking, dropped a small box in front of Estes and stated the box was for Estes’ infant daughter’s body and that her organs were also going to be utilized in witchcraft rituals. Estes stated that when Laking stated he was going to kill his daughter, he felt he had to do something to protect his family. It was then Estes retrieved the rubber mallet from the file cabinet and went into the cooler and assaulted George Laking.

Claimant’s Exhibit 4 also includes a copy of a pay stub for Claimant.

Respondents’ Exhibit 1. This one (1)-page exhibit is a statement Claimant gave to Wal-Mart that is dated January 5, 2006 at 12:00. It reads:

I Jonathan Estes admit[ing] striking George in produce with a rubber hammer. He provoked me and I let it go. He provoked my daughter and I struck him down. He threatened to kill me, and said he had plans for my organs for wi[th]ch craft hobby practices. I just ignored him until he through a box empty at my feet and said it was for my daughter and he threatened to kill her, so on instin[ct] I assaulted him with the rubber hammer as a act of defense for my family and I. I just wanted him to get the message to mind his own bu[si]ness and leave his threats to peopl[e] and children [unreadable] his self. I realize I probably didn’t make the best decision. I love my wife and kids and I believe in defending them to my best. I decided to take the

pressure off every one and tell the truth. I would have told so[o]ner. I was hoping it would ride out.

ADJUDICATION

A. Compensability

Claimant has contended that he incurred compensable injuries to his head, neck and shoulders as a result of the assault by Jonathan Estes on December 30, 2005. Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2002), which the I find applies to the analysis of all of Claimant's alleged injuries, defines "compensable injury":

(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[.]

The element "arising out of . . . [the] employment" relates to the causal connection between the claimant's injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant's employment "when a causal connection between work conditions and the injury is apparent to the rational mind." *Id.*

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). "Objective findings" are those findings which cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997); *Bivens v.*

Conagra Poultry, 2006 AWCC 57, Claim No. F212239 (Full Commission Opinion filed March 26, 2006).

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, 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. *Id.*

At this point, I must state that I do not find Estes to be a credible witness. This determination is based upon not only the nature of his testimony when arrayed against the balance of the evidence and his multiple recantations, but his demeanor on the witness stand and the inconsistencies in his hearing testimony. Therefore, I will not consider his testimony when making findings in this case.

Based upon the evidence, it is clear that Claimant suffered injuries to his head and shoulder as a result of the December 30 assault. This is shown not only by Claimant's uncontroverted testimony (I note that even Estes, though thoroughly discredited, admitted assaulting Claimant in the cooler with the rubber mallet), but the medical records contain objective findings of these injuries, with multiple cuts to the head on December 30 and an injury to the shoulder that Claimant complained of on December 30 and exhibited swelling on January 3. In other words, Claimant suffered an accidental injury that required medical services. But no evidence, either in the records or the testimony, shows that Claimant suffered an injury to his neck.

However, Respondents contend that Claimant did not sustain an injury that arose out of and in the course of his employment. To show that it arose out of his employment, a claimant must show that a causal connection existed between the injury and his employment. *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs “in the course of employment” when it occurs “within the time and space boundaries of the employment, while the employee is carrying out the employer’s purpose or advancing the employer’s interests directly or indirectly.” *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997); *Pilgrims Pride Corp. v. Caldarera*, 54 Ark. App. 92, 923 S.W.2d 290 (1996). See *Sartor*, *supra*.

Claimant’s uncontroverted testimony was that at the time of the assault, he had reported for work and was working in the cooler on the premises of Respondent employer. He was placing turnip and mustard greens on a cart when Estes approached him and struck him with a rubber mallet. I note for the record that the Harrison Police Department report makes reference to a discrepancy between Claimant’s statement on this point and Sherry Iverson’s statement regarding the presence of a cart in the cooler, which is also referenced in her second statement that is part of Claimant’s Exhibit 2. However, while Iverson was listed as a potential witness in the prehearing order, she did not testify. Claimant was a credible witness. I thus find that there was a causal connection between Claimant’s employment and his injury, and that he was on the clock and on the premises of Respondent employer while carrying out duties for the produce department, and thereby advancing the employer’s interests.

However, under Ark. Code Ann. § 11-9-102(4)(B)(i) (Repl. 2002), the definition of “compensable injury” excludes the following:

Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of nonemployment-related hostility or animus of one, both, or all of the combatants and which said assault or combat amounts to a deviation from customary duties[.]

In *Flowers v. Ark. Hwy. And Transp. Dept.*, 62 Ark. App. 108, 968 S.W.2d 660, (1998), the Arkansas Court of Appeals ruled that the above provision is written in the conjunctive and that it contains three prongs that must be satisfied before the exception acts as a bar to a claim. Under *Flowers*, a claim is not compensable only if it is shown:

- (1) that the injured employee was an active participant in the assault or combat;
- (2) that the assault or combat is the result of nonemployment-related hostility or animus; and
- (3) that the assault or combat amounts to a deviation from customary duties.

In the case at bar, Respondents have argued that the reason for Estes' assault upon Claimant had nothing to do with their jobs. Other than Estes' inconsistent testimony, along with his statements to the police and Respondent employer, there is no evidence in the record that provides what the motivation for the attack was. And it is without question that the assault was a deviation from customary duties. But irrespective of the second and third prongs, the first prong has not been met. There is no evidence in the record that Claimant was an active participant in the assault. Claimant's uncontroverted testimony was that Estes appeared in front of him with the mallet and struck him. Because of the failure of the first prong, § 11-9-102(4)(B)(i) does not preclude the compensability of this claim. See *Flowers, supra*; *Eckwood v. Aert*, 2001 AWCC 50, Claim No. E912606 (Full Commission Opinion filed February 16, 2001).

In summary, Claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his head and shoulder, but not to his neck.

B. Temporary Total Disability

Claimant asserts that he is entitled to temporary total disability benefits from December 30, 2005, the date of the assault, to February 3, 2006. Claimant's compensable injuries to his head and shoulder are unscheduled. See Ark. Code Ann. § 11-9-521 (Repl. 2002). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he or she has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Also, a claimant must demonstrate that the disability lasted more than seven days. Ark. Code Ann. § 11-9-501(a)(1).

Claimant testified that he did not return to work until February 4, 2006. But Dr. Jackson wrote following Claimant's January 10, 2006 visit that Claimant could "continue on light duty for the next week in regards to his right upper extremity." Thus, while his healing period had not yet ended, for purposes of entitlement to temporary total disability Claimant no longer had a total incapacity to earn wages after that date. Hence, Claimant is entitled to temporary total disability benefits from December 30, 2005 until January 10, 2006 at the stipulated rate of \$224.00 per week.

C. Entitlement to Medical Treatment

Claimant contends that he is entitled to the payment of outstanding medical bills, mileage, and prescriptions. Arkansas Code Annotated § 11-9-508(a) provides that an employer shall provide for an injured employee such medical treatment as may be

necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown, supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

Based upon a review of the medical records in evidence, I find that all of the treatments of Claimant's head and shoulder documented therein were reasonable and necessary. In so finding, I note that, while Dr. Langston found following Claimant's surgery that the shoulder swelling was not a hematoma secondary to trauma, but rather a posterior shoulder lipoma, the swelling in the shoulder did not appear until after the assault, and was closely related in time to it. Moreover, Dr. Jackson in his August 8, 2006 letter opined that the shoulder condition was related to the December 30, 2005 injury. This opinion was stated with a reasonable degree of medical certainty under *Wal-Mart v. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999).

As for Claimant's referral and assessment by an ophthalmologist, I find that while the examination ultimately revealed no eye problem, in light of the documented significant bruising about both of his eyes, and his complaints of blurred and spotty vision in the left eye, this examination was reasonable and necessary.

Finally, with reference to Claimant's examination by a cardiologist, I do not find that his treatment was causally related to his compensable injuries.

D. Entitlement to Controverted Attorney's Fee

Claimant contends that he is entitled to a controverted attorney's fee. The parties have stipulated, and I accept, that Claimant's entire claim was controverted. Claimant's attorney is thus entitled to a fee on all indemnity benefits to which he was entitled from December 30, 2005 forward, one-half of which is to be paid by Claimant and one-half to be paid by the Respondents, in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2002); and *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

CONCLUSION AND AWARD

Claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his head and shoulder on December 30, 2005.

Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his neck on December 30, 2005 .

Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from December 30, 2005 to until January 10, 2006 at the stipulated rate of \$224.00 per week.

Claimant has proven by a preponderance of the evidence that the treatment that was rendered to him as set forth in the medical record evidence, with the exception of the examination by the cardiologist, was reasonable and necessary.

The Claimant's counsel, the Hon. Steven McNeely, is hereby awarded the maximum attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2002).

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge