

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504723

JAMES PLYMALE, EMPLOYEE	CLAIMANT
WEST ARKANSAS STEEL & PIPE, EMPLOYER	RESPONDENT
AIG CLAIM SERVICES, INSURANCE CARRIER	RESPONDENT

OPINION FILED MAY 2, 2006

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed October 20, 2005. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 20, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his left arm and wrist while working for the respondent.

3. Claimant is entitled to temporary total disability benefits beginning May 1, 2005 and continuing through a date yet to be determined.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

5. Claimant earned an average weekly wage of \$508.28 which would entitle him to compensation at the rate of \$339.00 for temporary total disability benefits and \$254.00 for permanent partial disability benefits.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the October 20, 2005 decision of the Administrative Law Judge, including all

findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof. Accordingly, I would reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a welder. The claimant testified that on the morning of April 30, 2005, he was assigned a job polishing hand rails. The claimant took his lunch break at noon and at 12:30 he proceeded back to the shop area. The claimant alleged that he was told by someone that there was a grinder under the bench in Hank Snow's office. The claimant stated that he needed a grinder because the one he was using was about "ready to burn up." The claimant stated that when he was in Mr. Snow's office, someone called him as he was going out the door and he tripped and fell in the doorway. The claimant landed on his left wrist. The claimant drove himself to the emergency room at the Northwest Medical Center where he was diagnosed with a distal radial fracture of the

left wrist. The claimant was referred to Dr. Powell who ultimately performed surgery on May 6, 2005. The claimant underwent a second surgical procedure on May 13, 2005. The claimant has also been referred to Dr. Tang for an additional evaluation.

The main issue to be litigated in this case is whether or not the claimant was performing employment services at the time of his injury. It is without a doubt that the claimant broke his wrist while he was on the premises of the respondent employer. However, the compensability of the claimant's injury turns on whether or not the claimant was performing employment services at the time he fell. In my opinion the claimant was not performing employment services at the time he fell.

Arkansas Code Ann. § 11-9-102(4) (B) (iii) (Repl. 2002) states:

An injury is not compensable if it was inflicted upon the employee at a time when employment services were not be performed, or before the employee was hired or after the employment relationship was terminated.

Whether the claimant is performing employment services depends on the particular facts and circumstances of each case. The following factors are to be considered in determining whether the claimant's

conduct falls within the meaning of "employment services":

(1) whether the accident occurs at a time, place, or under circumstances that facilitate or advance the employer's interests;

(2) whether the accident occurs when the employee is engaged in activity necessarily required in order to perform work;

(3) whether the activity engaged in when the accident occurs is an unexpected part of the employment;

(4) whether the activity constitutes an interruption or departure, known by or permitted by the employer, either temporally or spatially from work activities;

(5) whether the employee is compensated during the time that the activity occurs; and

(6) whether the employer expects the worker to stop or return from permitted non-work activity in order to advance some employment objective.

Clardy v. Medi-Homes LTC Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001). See; Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002); Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997); Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999); White

v. Georgia-Pacific Corporation, 66 Ark. App. 337, 989 S.W.2d 942 (1999); Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998); Beaver v. Benton County, 66 Ark. App. 153, 991 S.W.2d 618 (1999); Hightower v. Newark Public School System, 57 Ark. App. 159, 943 S.W.2d 608 (1997).

The record demonstrates that the claimant's reason for being in Hank Snow's office was not related to employment at all. The testimony of Darrell Day, as well as Mr. Snow and Doris Tollison establishes that the claimant had no business being in Mr. Snow's office. Ms. Tollison testified that employees were not to be in Mr. Snow's office for any reason unless Mr. Snow or another supervisor was present. The claimant's assertion that the employees took lunch breaks in Mr. Snow's office was completely baseless. The respondents offered the testimony of Darrell Day, the supervisor who was present the day of the claimant's fall. Mr. Day rebutted the claimant's assertion that he was looking for a grinder in Mr. Snow's office. Mr. Day testified that nobody really has any business being in there. He affirmed the claimant's testimony that welding pipes and chalk were kept in Mr. Snow's office. However, Mr. Day stated that they had to get a supervisor to go get those supplies. Mr. Day testified that the grinders were readily

available in the tool boxes that were located in the shop.

The respondents also offered the testimony of Hank Snow, who was the supervisor for the entire shop. He testified that nobody had any business being in his office. He testified that he left the door to his office closed and that the only things that might be in his office were specialty tools, broken tools, and assorted miscellaneous supplies stored in a file cabinet. He adamantly testified that there were no grinders located in his office. In fact, Mr. Snow and Mr. Day both stated that it was common knowledge that all the grinders were kept in the tool boxes out in the shop. Mr. Day or Mr. Snow opened those tool boxes each morning so the tools were readily accessible to all employees.

The heart of the issue in this case is whether the claimant was doing something that would directly or indirectly promote his employer's interest. After reviewing the testimony of Mr. Day, Ms. Tollison, and Mr. Snow, it is apparent that the claimant had no business being in Mr. Snow's office. Ms. Tollison testified that the claim was investigated and there was nobody in the shop that was able to corroborate the claimant's story that he was told that there was a grinder in Mr. Snow's office. The claimant conveniently

forgot who told him that, as well as conveniently forgetting who called him when he fell. In my opinion, the claimant lacks credibility and his testimony should be given little weight. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. 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.

The claimant's story was replete with inconsistencies. The claimant testified at the hearing that someone told him after lunch that the grinder was in Mr. Snow's office. However, at his deposition the claimant indicated that someone told him before lunch that the grinder was the office. Further, the claimant testified that he bent over to get the grinder but he never actually got it. The claimant testified at the hearing that he never actually found the grinder in the office but he just wanted to go in there and see if

there was one. There is also the discrepancy with respect to the time. The claimant testified that he walked directly into Mr. Snow's office after returning from his truck, where he ate his lunch, at 12:30. At the deposition, he testified that he fell at 12:45. When the claimant was confronted with this inconsistency he quickly changed his story and stated, "that's exactly what happened. I came in at twelve thirty and I fell, what, fell roughly, what, what, twelve forty five." The claimant provided a third account of when his work began and ended when he called Doris Tollison to ask her to complete his timecard for that Saturday to reflect that he had worked from 7:15 to 1:00, "when he got hurt." It appears that the claimant is willing to alter his story when confronted with contradictory evidence.

Further, the claimant has a long history of dishonest behavior. The claimant has been involved in at least five other workers' compensation claims. He has also applied for Social Security disability and has been denied. After he was denied Social Security disability he returned to heavy manual labor for at least five different employers. Further, the claimant did not receive an honorable discharge from the military. He also has at least two felony convictions on his record, as well as a possible third conviction for theft by

receiving. The claimant had an outstanding warrant for his arrest in the State of Oklahoma. The claimant tried to lie about the warrant during the hearing, but he confessed that he did have a warrant when he learned it was about to be introduced into evidence.

Perhaps the most notable fact is that the claimant is currently being investigated for workers' compensation insurance fraud for drawing temporary total disability benefits from a work related rotator cuff injury with BASIC Construction while he was a full time employee with P.A.M. Transport. Although there is a presumption that you are innocent until proven guilty, I do believe it goes to the claimant's credibility that he was even under investigation by the Insurance Department for workers' compensation fraud.

After considering all the evidence in the record, I cannot find that the claimant was performing employment services at the time that he sustained his injury. The evidence demonstrates that the claimant had absolutely no business whatsoever in Mr. Snow's office when he fell. That coupled with the fact that the claimant completely lacks credibility, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

Therefore, for all the reasons set forth herein I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner