

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H203556

JAMES E. BARLOW, Employee	CLAIMANT
ARKANSAS SUPPORT NETWORK, INC., Employer	RESPONDENT
BRIDGEFIELD EMPLOYERS INSURANCE CO., Carrier	RESPONDENT

OPINION FILED NOVEMBER 2, 2022

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant appearing *pro se*.

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 3, 2022, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on August 31, 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 the within claim.
2. The claimant was employed by the respondent.

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

1. Compensability of injury to claimant's left shoulder on April 1, 2022.

2. Medical.

3. Temporary total disability benefits from April 2, 2022 through a date yet to be determined.

The claimant contends he suffered a compensable injury to his left shoulder on April 1, 2022. He requests payment of medical and temporary total disability benefits from April 2, 2022 through a date yet to be determined.

The respondents contend the claimant was not working or being paid at the time of the alleged injury. He is a home health aid and lives with the person he is hired to help. He is paid for 48 hours per week which is 8:00 a.m. on Saturday to 8:00 a.m. on Monday every week. April 1, 2022 is a Friday. The claimant was not performing employment services. He did not sustain a compensable injury.

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 August 31, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. The claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on April 1, 2022. Specifically, claimant was not performing “employment services” at the time of his injury.

FACTUAL BACKGROUND

The facts in this case are somewhat unusual and require some explanation. The claimant works for respondent as a home health aide. He has been assigned as a home health aide for Dalton Barnes, an individual who suffers from cerebral palsy and is confined to a wheelchair. Claimant works a 48-hour weekend shift at Barnes' home beginning at 8:00 a.m. Saturday and continuing through 8:00 a.m. Monday.

Cheri Lassiter is the mother of Dalton Barnes and lives in the same home with him. She also works as a home health aide for respondent and has been assigned as a home health aide for her son. She works a shift for respondent from 11:00 p.m. to 7:00 a.m., Sunday through Friday.

In addition, Lassiter and claimant are in a relationship, with claimant living in the household of Barnes and Lassiter at times.

Q. And you live in her household at certain times; is that right?

A. That's true.

In fact, at the time of the hearing, claimant was living with Barnes and Lassiter.

Prior to March 31, 2022, Barnes had been able to use his upper arms for transferring himself. According to an incident report, Barnes suffered an injury to his shoulder when he was lifted out of his wheelchair by an individual named Matthew Tucker. Barnes was taken to the hospital and was restricted from using his upper arms to lift himself or assist in lifting himself for 6-18 weeks. The evidence indicates that there was some effort by respondent to obtain a Hoyer lift to lift Barnes, but the sling on the lift was

too large for Barnes.

On the night of Friday, April 1, 2022, claimant was present in the home of Barnes and Lassiter. At a time that was outside the time periods of work for both of their shifts, claimant and Lassiter attempted to perform a two-man lift of Barnes to get him into the bed. During that process Lassiter lost control, causing all of Barnes' weight onto claimant and he fell to the floor along with Barnes. This resulted in an injury to claimant's left shoulder. Claimant went to Mercy for medical treatment and on May 31, 2022, underwent arthroscopic surgery by Dr. Tobey to repair a left shoulder rotator cuff tear.

Claimant has filed this claim contending that he suffered a compensable injury to his left shoulder on April 1, 2022. He requests payment for medical treatment as well as temporary total disability benefits from April 2, 2022 through a date yet to be determined.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his left shoulder when he was injured while attempting to lift Dalton Barnes on the night of Friday, April 1, 2022. A compensable injury is one that (1) arises out of and in the course of employment; (2) causes internal or external harm to the body that requires medical services or results in disability or death; and (3) is caused by a specific incident identifiable by time and place of occurrence. A.C.A. §11-9-102(4)(A)(i).

A compensable injury does not include an "injury which was inflicted upon the employee at a time when employment services were not being performed." A.C.A. §11-9-102(4)(B)(iii). An employee is performing employment services when he is doing something generally required by his employer. *White v. Georgia-Pacific Corporation*, 339

Ark. 474, 6 S.W. 3d 98 (1999). The same test is used to determine whether an employee is performing employment services as is used when determining whether an employee was acting in the course and scope of employment. *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W. 3d 1 (2002). The test is whether the injury occurred within the time and space boundaries of the employment when the employee was carrying out the employer's purpose or advancing the employer's interest, either directly or indirectly. *Id.*

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on April 1, 2022. Specifically, I find that claimant was not performing employment services at the time of his injury.

Initially, I note that claimant's injury occurred on Friday, April 1, 2022, and claimant was not scheduled to begin his 48-hour weekend shift until 8:00 a.m. Saturday morning. Claimant's injury clearly occurred outside of his scheduled work hours.

I find insufficient evidence that respondent was even aware that claimant was present in Barnes' home on April 1, 2022, or that respondent expected claimant to perform any job duties if he were present. Testifying at the hearing was Robin Hudson-Montoya who is employed by respondent as a Division Manager for its Fort Smith office. Hudson-Montoya acknowledged that respondent was aware that claimant sometimes resided with Barnes at certain times. However, there is no indication that respondent was aware that claimant was present on Friday night, April 1, 2022, or that respondent expected claimant to perform any job duties at that time.

Furthermore, I believe it is important to note that Hudson-Montoya testified that

some of their patients do require 24/7 care and that Barnes was one of those individuals. However, she also noted that some of that care is provided by “natural support.” Hudson-Montoya testified that natural support is typically a parent, family member, friend, or someone who volunteers to provide care without being paid just as a parent would for their child when staff is not available.

Hudson-Montoya specifically testified that respondent did not have a contract to provide Barnes with support 24/7. In fact, she testified that respondent had not agreed to provide any services during the hours during which claimant was injured.

THE COURT: I have a question.

THE WITNESS: Sure.

THE COURT: So is it my understanding that you guys did not have a contract to provide services for Dalton Barnes 24 hours a day, seven days a week?

THE WITNESS: I don't know how it is exactly written in there. I think that he is eligible to receive services, but there is not a contract, per se. And I believe that when Dalton came from a different agency to us, that it was - - we let people know, you know, if you come and transfer from one agency to the next, if you don't have all of your staff coming with you, like you know who is going to work 8:00 to 4:00, 4:00 to midnight, midnight to 8:00, and the weekend shift, then we let people know that there will be times that they don't have staff and that will be when the parent or the loved one, the boyfriend, the whoever, will have to provide natural supports.

THE COURT: And that is what you are saying happened on the night of April 1?

THE WITNESS: Right. Cheri wasn't on the clock. James wasn't on the clock.

THE COURT: Well, not only were they not on the

clock, you were not under any obligation. You had not agreed to provide any services during those hours.

THE WITNESS: Correct.

In short, there is no evidence that respondent agreed to provide support services for Barnes 24/7 and that claimant was expected to provide those services outside of his normal working hours.

Notably, claimant admitted that he could have worked somewhere else during the week for another employer and that at one point he did work at a convenience store during the week in addition to his job duties with respondent on the weekend.

There was also testimony regarding some training which was performed on Thursday, March 31, 2022. Claimant testified that on Thursday an individual named Landon Peoples gave Barnes staff training on a two-person lift. However, there is no indication that that training continued until Friday or that claimant was expected to be present in Barnes' home and perform those job duties outside his normal work hours.

As previously discussed, prior to April 1, 2022, claimant on occasion spent the night at Barnes' home. He did so not because he was working for the respondent taking care of Barnes, but because he was in a relationship with Lassiter, Barnes' mother. I find insufficient evidence that claimant was present in Barnes' home on Friday night because he was expected to perform job duties for respondent as opposed to being there because he was in a relationship with Lassiter. If claimant's contention were accepted, claimant could have moved into Barnes' home full time due to his relationship with Lassiter and if at any point if he was doing anything to benefit Barnes and was injured he could make this same claim. I do not find that the evidence supports such a conclusion.

In short, claimant has the burden of proving by a preponderance of the evidence that he was performing employment services at the time of his injury on April 1, 2022. While claimant was present in Barnes' home at that time and was helping Lassiter lift claimant into bed, there is no indication that claimant was present and performing those job duties at the request of respondent. Nor is there evidence that respondent was aware that claimant was present on April 1, 2022 or that respondent expected claimant to be present and provide services to Barnes. Hudson-Montoya testified that respondent was not obligated to provide Barnes with support services 24 hours a day and in fact had not agreed to provide any services at the time of claimant's injury. Accordingly, I find that claimant was not performing employment services at the time of his injury.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on April 1, 2022. Specifically, claimant was not performing employment services at the time of his injury. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondents are liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$422.95.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE