

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. H109611**

|                               |            |
|-------------------------------|------------|
| STEVEN DAWSON, Employee       | CLAIMANT   |
| NATIONAL LIFT TRUCK, Employer | RESPONDENT |
| LIBERTY MUTUAL GROUP, Carrier | RESPONDENT |

**OPINION FILED OCTOBER 10, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MATTHEW J. KETCHAM, Attorney at Law, Fort Smith, Arkansas.

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

**STATEMENT OF THE CASE**

On July 13, 2023, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on April 24, 2023, and a Pre-hearing Order was filed on April 25, 2023. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 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 relationship of employee-employer-carrier existed between the parties on December 3, 2021.
3. The respondents have controverted the claim in its entirety.

4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$667.00 for temporary total disability benefits and \$500.00 for permanent partial disability benefits.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether Claimant sustained a compensable injury to his left upper extremity and left shoulder on or about December 3, 2021.

2. Whether Claimant is entitled to medical treatment for his left upper extremity and left shoulder injury.

3. Whether Claimant is entitled to temporary total disability benefits from December 4, 2021, to a date yet to be determined.

4. Whether Claimant's attorney is entitled to an attorney fee.

Claimant's contentions are:

"1. The above listed proposed stipulations.

2. The Claimant was injured on December 3, 2021, when he was at a place of business, Whitt Truck Repair, to deliver materials on behalf of Separate Respondent, National Lift Truck, where an altercation ensued between the Claimant and D. Joshua Whitt, son of the business owner, wherein the Claimant received an injury to his left upper extremity and shoulder.

The Claimant was treated the same day at Mercy Hospital Fort Smith wherein he complained of left shoulder and facial pain. The Claimant was treated with a left shoulder dislocation which was successfully reduced into place in the emergency room and he was referred to an orthopedic surgeon for additional follow-up.

On December 13, 2021, the Claimant followed up with Patrick Walton, PA, at Mercy Clinic Orthopedics for continued left shoulder pain. Dr. Walton referred the Claimant for an MRI of his left shoulder and was instructed to return upon completion of same.

On January 11, 2022, after the Claimant's MRI had been performed, he followed up with Dr. Walton wherein the results were discussed and a rotator cuff repair surgery was scheduled.

On February 7, 2022, the Claimant underwent a left shoulder scoped with rotator cuff repair, subacromial decompression at AC joint repair performed by Dr. Steven Smith at Mercy Orthopedic Hospital.

On February 9, 2022, the Claimant started physical therapy for his left shoulder at Mercy Therapy Services.

The Claimant continued to follow-up with Dr. Walton and Mercy Therapy Services until he reached MMI.

3. The Claimant reserves the right to amend and supplement his contentions after additional discovery has been completed.”

Respondents' contentions are:

“The claimant was not performing employment services at the time of the injury. The claimant was an active participant in an altercation.”

The claimant in this matter is a 62-year-old male who has alleged to have sustained compensable injuries to his left shoulder and upper left extremity on December 3, 2021. The claimant was employed by the respondent on December 3, 2021, but was not engaged in his normal job duties that particular day. The respondent-employer is in the business of “trucking” or moving large equipment and renting out forklifts. The claimant normally worked for the respondent-employer hauling equipment with a semi-truck and trailer. However, on December 3, 2021, the claimant was unable to perform his normal job duties because the semi-truck he operated was being repaired. The claimant testified that at times previously when the truck he operated was unavailable to him, he would make sales calls for the respondent-employer in the Fort Smith area. On December 3, 2021, the claimant was performing those sales call duties for

the respondent-employer. The claimant gave direct examination testimony about his day making sales calls on December 3, 2021, as follows:

Q Okay. And what was wrong with it? Do you recall?

A The air conditioner was broken and there was just – no major issues other than the air conditioner.

Q Do you remember about when the truck went down?

A It would probably be – I think I went about five days without an air conditioner.

Q Okay. So it was at the Peterbilt dealership being repaired on the day that this incident occurred?

A Yes, sir.

Q Okay. Were you, in fact, doing that portion of your job which called for you to cold call businesses and try to drum up business?

A Yes, sir.

Q Okay. Do you remember where you had been that day prior to the location upon which you were injured?

A I had a blue legal pad that every place I stopped I would get a business card as I was instructed and then I would staple it to the legal pad and write a little note of what I talked about. And I started up in Greenwood and made a loop down 71 Highway and then down by the river down Wheeler is where I went and just making – I was instructed to make ten calls a day. Then I would take my iPhone and take pictures of it, photos for the file deal, and I would email them to the Little Rock office as instructed.

Q Who was your supervisor, if you had one?

A Mike Vickers.

Q Is that who you reported to?

A Yes.

Q Okay. Was that your sole authority was Mike Vickers?

A Yes.

Q Was that the only person you ever dealt with?

A Yes.

Q Okay. Where was Mike located?

A Little Rock, Arkansas.

Q The Little Rock office?

A Yes, sir.

Q And they actually had a brick-and-mortar building down there?

A Yes, sir. They have about five trucks.

Q Okay. And was it Mike Vickers that gave you this assignment to make contacts and sales calls on the day that the truck was not in operation?

A Yes, sir.

Q Okay. Is he the one that came up with the number ten?

A Yes, sir.

Q Okay. What about the business card and the proof, whose idea was that?

A His idea.

Q Okay. And do you know why you were required to keep detailed logs like that?

A I think he passed it onto a salesman. I was like an icebreaker and then he actually had a salesman in the area and then they would follow up.

Q Okay. Whose idea was it to bring a business card from each call you made?

A Mr. Vickers.

Q Okay. And you were instructed to do that?

A Yes, sir.

Q So on December 3<sup>rd</sup>, this was not the first day that you had gone out and made sales calls?

A No, sir.

During the claimant's sales calls on December 3, 2021, he decided to stop at a business named "Whitt Truck Repair" located on Wheeler Street in Fort Smith. The claimant was asked on direct examination about why he decided to make a sales call to Whitt Truck Repair as follows:

Q Okay. All right. So what led you to stop at Whitt Truck Repair?

A I had known David and he had done work on my personal trucks in the past and he was on my trail and I thought, well, I will go ahead and talk to David. They use some forklifts because they do heavy truck repair.

Q Okay. So David Whitt is the owner of Whitt Truck Repair?

A Yes, sir.

Q Okay. And you had a prior business relationship with him?

A Yes, I did.

Q Okay. So do you stop in there?

A I did that day, yes.

The claimant, prior to and at least through the time of the hearing in this matter, owned his own business by the name of "Town & Country Contractors" in addition to his employment with the respondent-employer. The claimant testified that he started Town & Country

Contractors roughly 25 years before his employment with the respondent-employer. That company performs services including tree cutting and earth moving with a bobcat and dump truck. The company also grades lots and can dig swimming pools. The claimant testified that while working for the respondent-employer he performed jobs through Town & Country Contractors on the weekends.

The claimant described his personal business relationship with David Whitt, the owner of Whitt Truck Repair, on direct examination as follows:

Q Okay. So getting back to the original point, your Town & Country business is how you knew David Whitt prior to 12/3?

A Yes, sir.

Q Okay. Was it payment or did you all swap services, barter?

A Sometimes I would just pay him if he wanted to get paid, but if he needed tree work, I would do tree work for him. He had multiple rentals. It was a real casual thing.

Q Okay. And how long had that been going on between you and David Whitt?

A Probably seven years, six or seven years.

On December 3, 2021, the claimant entered Whitt Truck Repair to make a sales call to David Whitt, the owner of Whitt Truck Repair. The claimant gave direct examination testimony about the events that followed:

Q Okay. So you are in your own truck. You stop by Whitt Truck Repair?

A Yes, sir.

Q Can you take us through what happened next.

A Well, I stopped in to Whitt and I had previously called him to see if he could fix the air conditioner on the truck.

Q The one that was out at Peterbilt?

A Yes, sir.

Q Oh, okay.

A And it was about three weeks before and he recommended I take it to Jody's, which is down the street, a repair place, because he didn't have time to mess with it because he does a lot of, I guess, big stuff. That was small potatoes to him.

Q Okay.

A So I said okay.

Q So you actually talked to him about your actual truck that was sitting out at Peterbilt.

A Yes, I did.

Q So do you go in?

A I go in. I walked in and I know where his desk is and I walked around the corner and say hi and told him I had a pamphlet and a business card from National Lift. And I told him that I was shaking the bushes to see if I could interest him in any forklift parts or just trying to break the ice.

Q Okay.

A And do what I was instructed to do, one of my ten calls for the day.

Q All right. And did he recognize you?

A I don't know if he did or not. I don't know.

Q Okay.

A I recognized him. I have had multiple dealings with him. He would do mobile truck repair for my trucks and my trucks have been in his shop many times.

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Q Okay. So you indicated that you had gone in and handed him a pamphlet, a business card. By whom were those supplied to you?

A From National Lift of Arkansas.

Q So those came from Little Rock?

A Yes.

Q And business card, was that a business card for you or just the company in general?

A It had the salesman's name on it that was for the Fort Smith salesman.

Q Okay.

A His name was – I can't remember.

Q Okay. So how far into this sale call did you all talk about the services that National Lift provides?

A Well, for several minutes we did and I was at his desk. Then he brought up that I owed him some tree work is what he said. I didn't do a job that I was supposed to do.

Q Okay. Had he likewise exchanged business cards? Did you have one of his business cards?

A Yes.

Q Okay. And what was your intent on having that business card?

A To staple it to the legal pad and be able to take a picture of it that night like I was instructed.

Q Okay. And that you had done on five or six other occasions?

A I think that was six or seven for the day.

Q Okay. That day, you are saying that was the sixth or seventh call that day?

A Yes.

Q But I mean on other occasions prior to December 3<sup>rd</sup>?

A Oh, yes.

Q Okay. So you have his card and he has your brochures and sales card from National Lift?

A Yes, sir.

Q Tell me what happened then.

A At the point that he said I owed him, I said, “Well, David, look up in the computer and show me what you’ve got,” and it was as friendly as it could be and he was right there, you know, because I couldn’t remember. It wasn’t that big of deal because what I had on the truck fixed was so minor. If I remember the last time he worked on my truck, it was an adjustment of the valve on a boom truck where it couldn’t go all the way down, like the scissors didn’t go all the way down.

Q So admittedly, the conversation did turn from National Lift business to your prior engagements with him as the owner of Town & Country?

A Yes, sir.

Q Okay. And tell me what you all discussed about this debt he felt you owed him.

A Well, he showed me on a computer. He said, “It’s right here.”

And I said, “Okay.” Well, that is fair enough.”

I said, “Well, David, there is two options we’ve got here.” I said, “I will write you a check or I’ve got some tree work to do,” because I had no idea he would be upset over anything like that.

Q Okay.

A And then I asked him, I said, “David, see Town & Country right there, see the phone number? I have had that phone number

for 20 years. If you had any issues with me, why didn't you give me a call?"

You know, like it was – if I am correct, it was a valve adjustment on a truck so I am thinking, well, maybe a couple of hours, 100 bucks an hour, 200 bucks. It was peanuts.

Q Did you try to pay him?

A Yes, I did.

Q And?

A And he said, "No. We are done."

And I said, "Okay. Fair enough."

And he started getting hostile and I just got nervous and I thought I am getting out of here.

Q Okay. And then what did you do?

A I attempted to leave. I turned around and walked out as the video shows. I was just walking out like this and I had his card and he grabbed me from behind. And then he spun me around and then we kind of like (indicating) played patty-cake for a minute like this (indicating) because I guess he was attacking me over the business card. And I was halfway out of the office and then another guy come up from behind and grabbed me from behind and slammed me on the ground.

Q Okay. Had you ever talked to that other person?

A No.

Q Who had it turned out that person was?

A His son.

Q Okay. Adult son?

A (The witness nods his head up and down.)

Q Okay. When you hit, what part of your body hit the floor?

A My left shoulder.

Q Okay. Carpet, concrete?

A Concrete.

Q Concrete. Okay. Did you feel pain as soon as you it the floor?

A I couldn't move.

The claimant was also questioned on cross examination about the events at Whitt Truck

Repair on December 3, 2021, as follows:

Q Whitt Truck Repair. You go in there on a cold call as directed by your employer; is that right?

A That is correct.

Q But you knew Mr. Whitt?

A Yes, sir.

Q But why did you say you don't know if he knew you or not?

A Because he acted – when he said, “Well, you owe me money.” It happened all at once. He might have just been pulling something, but he might have known me. I don't know. I can't answer for him.

Q How could he say that you owe him money if he didn't know you?

A It's when – when I went up there – I will start from the beginning. I gave him the card and brochure from National Lift and we talked about that for a couple of minutes. And then he went in, “Well, you owe me money.” But we had a civil conversation for several minutes about National Lift.

Q Okay.

A And I had no idea that he would be hostile towards me or violent; otherwise, I wouldn't have went in there.

Q Now, you said you were shocked that he said you owed him money, that you didn't realize you did owe him money; is that right?

A That is correct because we went back and forth multiple times over the years. He owed me. Sometimes I owed him. So if I did tree work, I didn't go and call him and say, "You owe me money for tree work." I just waited until I needed some truck repair and then we would barter it.

Q And that is in your capacity as the owner of Town & Country?

A I went in there in the capacity of National Lift and we talked about that money for a period of time before we went back to in the capacity of National Lift with the business card. He spun me around mad because he wanted his business card back and he shoved the pamphlets at me of his. So at that point I was just trying to exit, as an employee of National Lift exit the building. And I don't know if you have seen the video, but I was hunched over just a little bit and I was headed out the door and he grabbed me like a bear. He is about 6 foot 6 and he is a professional bicycle rider and I am an old man. That's when he spun me around wanting that card back and I needed that card because I was instructed by my company to get the card for proof that I made these stops and to transfer that information over to the full-time salesman.

Q But the money that was owed to Whitt Service Company was owed to them by Town & Country? This money that he said that you owed him is because you had some of your equipment from Town & Country worked on?

A That is correct, a bucket truck.

Q Okay. So that is all Town & Country's debt that was owed that wasn't paid?

A That's what he claimed.

Q Okay. And then as he pulls this up, you said you made some comments?

A I made a comment.

Q That might have made him angry?

A Maybe so, but it was truth. Right next to my name is my phone number and I said, “David, why didn’t you call me?” And I got it still to this day in my phone all of his information. And it wasn’t because I had put it in there. It’s because he sent it to me.

Q Okay.

A Why he acted like an animal, I don’t know.

Q So he grabbed you following this conversation about the money that Town & Country owed him; correct?

A I don’t know why he grabbed me. He grabbed me because he wanted his business card back that I needed for National Lift. He didn’t grab me because – the money thing was over. He said, “We’re done.” That chapter was closed per David Whitt.

Q Okay.

A Now I am leaving, okay, with my business card that says David Whitt that is going to go on – as my employer instructed me to do. We were done with that conversation. And then he snatches me, this monster snatches me and spins me around and we do this (indicating). And then another monster impales me to the ground and it changed my life.

The claimant was seen at Mercy Hospital Emergency Department in Fort Smith, Arkansas, after his altercation at Whitt Truck Repair. Following is a portion of the emergency department record from that visit:

#### HISTORY OF PRESENT ILLNESS

Steven P. Dawson, a 60 y.o. male presents to the ED

Steven P. Dawson is a 60 y.o. that presents with left shoulder pain secondary to an assault, onset unclear. Patient states that a guy threw him on the ground resulting in pain to the facial area and left shoulder that radiates downward to the forearm. Patient reports that the pain improves when he props his arm on the counter. He denies LOC. He denies any other injuries at the time.

On December 29, 2021, the claimant underwent an MRI of his left shoulder. Following we find the Impressions section of that MRI report performed at Mercy Hospital and signed by Dr. Leo Drolshagen.

**IMPRESSION:**

1. Fracture of the inferior bony glenoid and tear of anterior cartilaginous labrum. Also could be correlated with CT findings.
2. Fracture of the humeral head/greater tuberosity without displacement.
3. Tear of supraspinatus tendon.
4. High-grade partial tear subscapularis tendon.
5. Hypertrophy acromioclavicular joint. Moderate shoulder effusion. Extensive edema in proximal humeral marrow.

On February 7, 2022, the claimant underwent surgical intervention at Mercy Orthopedic Hospital at the hands of Dr. Steven Smith. Following is a portion of that operative report:

**PREOPERATIVE DIAGNOSES:**

1. Rotator cuff tear, left shoulder
2. Biceps tendinopathy
3. Acromioclavicular arthropathy.

**POSTOPERATIVE DIAGNOSES:**

1. Rotator cuff tear, left shoulder.
2. Biceps tendinopathy.
3. Acromioclavicular arthropathy.

**PROCEDURE:**

1. Left shoulder arthroscopy.
2. Arthroscopic rotator cuff repair.
3. Arthroscopic biceps tenotomy.
4. Arthroscopic acromioplasty with subacromial bursectomy.
5. Arthroscopic distal clavicle resection with resection AC joint meniscus.

The claimant introduced a CD into evidence that contains two videos, seemingly the same events from two different views. In the video the claimant is seen entering a room where David Whitt is seated. They briefly talk and exchange objects, presumably David Whitt's business card for the respondent-employer sales information given by the claimant. The men

continue to talk until eventually the claimant begins to leave. Mr. Whitt gives chase and grabs the claimant by his arm. Brief shoving between the two occurs until a man described by the claimant in testimony as David Whitt's son intervenes. The son puts his arms around the claimant and releases him towards the ground. The claimant hits the ground and remains there for some time. I note that the video provides no audio recording and is very grainy in appearance. It appears from the video evidence that the claimant's injuries were sustained when he hit the floor at the end of the altercation.

It is the claimant's burden to prove by a preponderance of the evidence that he sustained compensable injuries to his left upper extremity and left shoulder on or about December 3, 2021. In review of the medical evidence submitted into the record, the claimant is able to prove the existence of objective medical evidence to support his claim on an upper left extremity and left shoulder injury. Both the MRI and operative reports support the occurrence of such injuries. However, the claimant must also prove by a preponderance of the evidence that the injury arose out of and in the course of employment. *Deffenbaugh Indus. v. Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993). The claimant in this matter was certainly in the time, place and circumstance of his employment given his duties to make sales calls on December 3, 2021, which would give rise to a finding that the claimant was in the course of his employment at the time that he was injured. The claimant's burden, however, is more in depth than merely being in the course of employment. He must also prove that his injuries arose out of that said employment. "Arising out of employment" refers to the origin or cause of the accident/incident, while "in the course of employment" refers to the time, place circumstance under which the injury occurred. *Little Rock Convention and Visitor Bureau v. Pack*, 60 Ark. App. 8959 S.W.2d 415 (1997).



After a review of the claimant's testimony and the video evidence submitted into the record, I find the origin or cause of the claimant's incident to be that of a personal dispute over money Mr. Whitt believed the claimant owed him. The claimant was not involved in a physical altercation by chance, random act, or Mr. Whitt's dislike of the respondent-employer. Instead, the altercation occurred because Mr. Whitt, rightfully or not, believed the claimant owed him a personal debt arising from his personal business, Town & Country Contractors. This altercation that caused the claimant's injuries had nothing to do with his employment with the respondent-employer and is solely based on his personal business issues.

The claimant might argue the positional-risk doctrine, which stands for compensability when "conditions related to employment contribute to the risk by placing the employee in a position that increases the dangerous effects of the incident." This is stated through a defense discussion of idiopathic falls in *ERC Contractors Yard and Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998). However, here there is no positional risk. The claimant was not in the process of performing some activity that was inherently risky, such as driving a semi-tractor trailer or being at a great height while working. Instead, the claimant walked into a business and was involved in an altercation, not because of his work for the respondent-employer, but because of what Mr. Whitt believed was a debt owed to him personally by the claimant. That belief by Mr. Whitt is the origin or cause of the claimant's injuries, not his employment with the respondent. This case is supported by the outcome of *Kendrick v. Peel, Eddy and Gibbons Law Firm*, 32 Ark. App. 29, 795 S.W.2d 365 (1990), in which the Court of Appeals cited 1 Larson, the Law of Workers' Compensation 61.50 (3/90), as follows:

An important and growing number of courts are accepting the full implications of the positional-risk test: An injury arises out of employment if it would not have occurred but for the fact that the

conditions and obligations of the employment placed claimant in the position where he was injured.... This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he was injured by some neutral force, meaning by “neutral” neither personal to the claimant nor distinctly associated with the employment.

The claimant has failed to prove by a preponderance of the evidence that he sustained compensable injuries to his upper left extremity and left shoulder on or about December 3, 2021.

The respondent made a motion to supplement the record with the claimant’s deposition transcript in an email to the Commission on August 18, 2023. The respondent’s motion to supplement is denied.

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 witness and to observe his 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 the pre-hearing conference conducted on April 24, 2023, and contained in a Pre-hearing Order filed April 25, 2023, are hereby accepted as fact.
2. The claimant has failed to prove by a preponderance of the evidence that he sustained compensable injuries to his left upper extremity and left shoulder on or about December 3, 2021.
3. The claimant has failed to prove that he is entitled to medical treatment for those alleged injuries.
4. The claimant has failed to prove his entitlement to temporary total disability benefits.

5. The claimant has failed to prove that his attorney is entitled to an attorney's fee in this matter.

**ORDER**

Pursuant to the above findings and conclusions, I have no alternative but to deny this claim in its entirety.

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

**IT IS SO ORDERED.**

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**HONORABLE ERIC PAUL WELLS  
ADMINISTRATIVE LAW JUDGE**