

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H108270

ORVI GALEAS, EMPLOYEE	CLAIMANT
EVER CONSTRUCTION & FIRSTCOMP INSURANCE CO., EMPLOYER	RESPONDENT #1
VG CONSTRUCTION & LIBERTY MUTUAL INS. COMPANY, INSURANCE CARRIER/TPA	RESPONDENT #2
REYES PEREZ, UNINSURED	RESPONDENT #3

OPINION FILED JUNE 13, 2023

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

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

Respondents No. 1 represented by the HONORABLE RANDY P. MURPHY, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE ZACHARY F. RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondents No. 3 *pro se*.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents No. 2 appeal an opinion and order of the Administrative Law Judge filed January 11, 2023. 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 a pre-hearing conference conducted on May 18, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his head and left elbow on August 5, 2021.
3. Claimant is entitled to all reasonable and necessary medical treatment provided in connection with his compensable injury.
4. Claimant is entitled to payment of temporary total disability benefits from August 6, 2021 through December 10, 2021.
5. Claimant earned an average weekly wage of \$880.00 per week which would entitle him to compensation at the rates of \$587.00 for total disability benefits and \$440.00 for permanent partial disability benefits.
6. Respondent #2 is liable for payment of compensation benefits pursuant to A.C.A. §11-9-402(a).
7. Respondent #2 has controverted claimant's entitlement to compensation 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 January 11, 2023 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 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. 2012).

For prevailing on this appeal before the Full Commission, claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2012). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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M. SCOTT WILLHITE, Commissioner

Commissioner Mayton concurs, in part, and dissents, in part.

CONCURRING and DISSENTING OPINION

I concur, in part, and dissent, in part, from the majority opinion.

Specifically, I concur with the majority's finding that the claimant suffered compensable head and left elbow injuries on August 5, 2021, and that the claimant is entitled to temporary total disability benefits from August 6 through December 10, 2021 to be paid by Respondent Number 2, VG Construction. However, I dissent from the majority's finding regarding the claimant's average weekly wage and his compensation rates.

The testimony regarding the claimant's average weekly wage is speculative, at best. Conjecture and speculation, even if plausible, cannot take the place of proof. *Ark. Dept. of Correction v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991). When the sole evidence of a claimant's wages is biased testimony, that evidence is speculative at best and cannot form the basis of a claimant's weekly compensation rate. Importantly, a claimant's testimony is never uncontroverted as a matter of law. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

Here, the claimant provided no pay stubs, bank records, or employer testimony reflecting his weekly pay. At the December 7, 2022 hearing, the claimant testified that he was paid cash at the end of each work week. (Hrng. Tr., P. 15). His work had no predictability, sometimes working six

days in a row, and sometimes not working at all. (Hrng. Tr., Pp. 15-16). The claimant's testimony on cross-examination reflects this unpredictability.

When asked, "So about how often would that happen that you would make that low amount of money? Would that be once a month? Once every two months," the claimant explained "Every month per month, I don't know.

Sometimes it rained a month. Sometimes. I don't know." (Hrng. Tr., P. 31).

At another point in his testimony, the claimant was asked, "On the times when it would rain a lot, would you work a little less than six days," to which he responded, "Yes." (Hrng. Tr., P. 6). Ultimately, the following exchange illustrates the unpredictability of the claimant's work:

Q: So the way I understand the roofing business is some weeks you are working full time and other weeks it might be one or two days a week, depending on whether the work is there; is that correct?

A: Yes.

Q: Some weeks you could work six days, some weeks you could work no days?

A: Sometimes three or four days. . . Well, like when it was cold, we didn't work much.

Q: Okay. It depends on the weather and also whether the work was there; is that correct?

A: Yes.

(Hrng. Tr., Pp. 15-16).

The claimant's testimony reflects that there is, in fact, no record at all of his income from the time prior to August 5, 2021. When asked on cross-examination if there was a tax record of what the claimant was paid in years past, he responded, "No." (Hrng. Tr., P. 23). When asked if he has a bank account that could reflect his income from this time, the claimant explained "I just opened that bank account so it doesn't have – it has not been there a long time. When I worked for [the respondents], I didn't have one." (Hrng. Tr., P. 24). During the hearing, the claimant admitted that he has no records to show that this was a full-time position. *Id.* The entire basis of the average weekly wage determination here is the claimant's own recollections. The claimant describes entire months when he could not work at all and periods where he worked for six days at a time. *Id.*

"Pursuant to Ark. Code Ann. §11-9-518(c) if exceptional circumstances indicate that the average weekly wage cannot be fairly and justly determined by using any other formulas set forth in that statutory provision, the Commission can determine the average weekly wage by a method that is just and fair to all parties concerned. The claimant has failed to produce any testimony from an uninterested party or any physical proof of his average weekly wage as of August 5, 2021. Since the claimant's

average weekly wage cannot be determined, the claimant's weekly wage should be the minimum of \$20.00 per week. The record contains no proof of the claimant's average weekly wage except for the confusing and self-serving statements of the claimant which do not support his position.

Accordingly, for the reasons set forth above, I respectfully concur, in part, and dissent, in part from the majority opinion.

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MICHAEL R. MAYTON, Commissioner