NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H300192

RONNIE CORTER, EMPLOYEE	CLAIMANT
COMMERCIAL AUDIO SYSTEMS, INC., EMPLOYER	RESPONDENT
STONETRUST INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 20, 2024

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 represented by the HONORABLE, JASON M. RYBURN, 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 January 10, 2024. 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 September 6, 2023 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 left shoulder on September 26, 2022.

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

4. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning September 29, 2022 and continuing through a date yet to be determined.

5. 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 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(a)(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.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents

DISSENTING OPINION

I respectfully dissent from the majority opinion. In my *de novo* review of the record, I find that the claimant has not proven by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on September 26, 2022.

The claimant in this matter has a long history of bilateral shoulder issues and had surgery on his left shoulder in May 2022, approximately four (4) months prior to the accident in question. (Hrng. Tr., P. 6). The claimant returned to work for the respondent employer in early September 2022 with lifting restrictions. (Hrng. Tr., P. 7).

On September 26, 2022, the claimant walked to work. When he arrived prior to beginning work for the day, the claimant attempted to open the building's front door. A coworker, Miguel, walked in the door in front of him and pulled the door shut while the claimant held the handle. (Hrng. Tr., Pp. 8, 27, 31).

The claimant would later seek medical treatment for his shoulder on September 29, 2022, three days after the alleged injury. (Hrng. Tr., P. 11). The claimant's treating physician, Dr. Wesley Cox, later performed a total left shoulder arthroplasty. (Resp. Ex. 1, P. 35)

After a hearing on December 13, 2023, an administrative law judge (ALJ) found the claimant has proven by a preponderance of the evidence that he sustained a compensable left shoulder injury. However, there were no objective findings of an injury, and the claimant was not performing employment services at the time of his injury.

Arkansas Code Annotated section 11-9-102 (4)(A)(i) provides that a compensable injury includes "[a]n accidental injury causing internal or external physical harm to the body. . . An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence."

Generally, a specific incident injury is an accidental injury arising out of the course and scope of employment caused by a specific incident

identifiable by time and place of an occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i). This requires that a claimant establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury as defined in Ark. Code Ann. §11-9-102(16) and; (4) that the injury was caused by a specific incident identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i).

The injury in question falls under the “aggravation” classification since the claimant’s left shoulder condition was clearly pre-existing. An aggravation of a pre-existing non-compensable condition is, itself, compensable but must meet the definition of a compensable injury in order to establish compensability. *Oliver v. Guardsmark*, Inc., 68 Ark. App. 24, 3 S.W.3d 336 (1999); *Farmland Insurance Company v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 5 883 (1996); *Ford v. Chemipulp Process, Inc*., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

A compensable injury must be established by medical evidence supported by "objective findings." Ark. Code Ann. § 11-9-102(4)(D). Objective findings cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16).

It is within the Commission's province to weigh all the medical evidence, to determine what is most credible, and to determine its medical soundness and probative force. *Sheridan Sch*. *Dist*. *v*. *Wise*, 2021 Ark. App. 459, 637 S.W.3d 280 (2021). In weighing the evidence, the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. *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. *White v*. *Gregg Agricultural Ent*., 72 Ark. App. 309, 37 S.W.3d 649 (2001).

Here, there were no new objective findings of an injury to the claimant's left shoulder. The claimant presented to the emergency room at Washington Regional Medical Center on September 27, 2022, complaining of groin pain. (Resp. Ex. 1, Pp. 33-36). He did not mention shoulder pain at this time and did not, in fact, seek treatment for his left shoulder until September 29, 2022. (Resp. Ex. 1, P. 37).

On May 23, 2022, only four (4) months prior to the accident in question, Dr. Wesley Cox performed a left open glenoid allograft (Latarjet) surgery on the claimant and implanted screws in the claimant's left shoulder. (Cl. Ex. 1, Pp. 3-7). Dr. Cox had contemplated an arthroplasty at that time but believed the Latarjet was more appropriate for the claimant.

(Cl. Ex. 1, P. 3). The risks of the Latarjet procedure included recurrent instability and hardware failure. (Cl. Ex. 1, P. 6).

In August of 2022, an X-ray revealed, "breakdown of the coracoid transfer fragment is seen with loose inferior screw." (Cl. Ex. 1, P. 14). This screw fragment and "erosive changes of the glenoid articular surface" were noted after an X-ray at the Washington Regional emergency department on September 29, 2022. (Cl. Ex. 1, P. 18).

The September 29 X-ray was "compared to the patient's x -ray on his phone showing the fractured screw previous," and there were no findings of "acute fracture or dislocation of the shoulder." *Id*. The only objective findings at that time were clearly pre-existing.

The claimant was examined by Dr. Cox on December 21, 2022, who opined that there "really has not been much change here. He had this incident at work with his arm being pulled on the door and he has had significant pain since then his X-rays do not look a ton different that they did before, but his symptoms are certainly worse." (Cl. Ex. 1, Pp. 23-24).

On April 5, 2023, Dr. Cox wrote that, "I do not have a perfect explanation for the pain that he is having, but he has a multiple E operated shoulder that is [sic] been through several very significant surgeries, and after any sort of traumatic event, there may be significant pain without new obvious structural injury." (Cl. Ex. 1, P. 26).

As of July 12, 2023, an MRI showed post-surgical changes from Latarjet, rotator cuff intact on the left shoulder with no tearing. (Cl. Ex. 1, P. 33). Dr. Cox ultimately performed a full arthroplasty due to the claimant's ongoing complaints of pain, writing in his operative report that, "[f]ortunately, he is not dealing with recurrent instability as much as he is dealing with pain." (Cl. Ex. 1, P. 35).

The record is clear that there were no new objective findings of an injury after September 27, 2022. The only objective findings reflect the pre-existing failure of the Latarjet procedure that began in or around August of 2022.

The claimant's treating physician, Dr. Cox, repeatedly opines that there was no acute injury associated with the alleged September 26, 2022 incident but rather the claimant was suffering from subjective pain. Without any objective findings indicating that the claimant injured his shoulder on September 26, 2022, his claim fails and the ALJ should be reversed on this point.

Our rules define a compensable injury as "[a]n accidental injury . . . arising out of and in the course of employment." Ark. Code Ann. § 11-9-102(4)(A)(i). A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when employment services were not being performed." Ark. Code Ann. § 11-9-102(4)(B)(iii). The Act, however,

fails to define the phrase "in the course of employment" or the term "employment services." *Wood v. Wendy's Old Fashioned Hamburgers*, 2010 Ark. App. 307, 374 S.W.3d 785 (2010).

Our Supreme Court has held that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer." *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008). We use the same test to determine whether an employee was performing employment services as we do when determining whether an employee was acting within the course of employment. *Id*.

Specifically, it has been held that 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 directly or indirectly." *Id*. The critical inquiry is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. *Id*. The issue of whether an employee was performing employment services within the course of employment depends on the particular facts and circumstances of each case. *Id*.

In short, an employee is performing employment services when engaged in the primary activity that he or she was hired to perform, or in incidental activities that are inherently necessary for the performance of the

primary activity, or when an employee is performing employment services when he or she is engaging in an activity that carries out the employer's purpose or advances the employer's interests. *Olsten Kimberly Quality Care v. Pettey,* 328 Ark. 381, 944 S.W.2d 524 (1997); *Hightower v. Newark Pub. Sch. Sys.,* 57 Ark. App. 159, 943 S.W.2d 608 (1997).

An employee is generally not said to be acting within the course of employment when he is traveling to or from the workplace, and thus, the "going and coming rule" ordinarily precludes compensation for injuries sustained while an employee is going to or returning from his place of employment. *Linton v. Arkansas Dep't of Corrections*, 87 Ark. App. 263,190 S.W.3d 275 (2004).

However, there are exceptions to the "going and coming rule" where the journey itself is part of the employment service, such as traveling men on a business trip and employees who must travel from job site to job site. *Id*. Whether an employer requires an employee to do something has been dispositive of whether that activity constituted employment services. *Campbell v. Randal Tyler Ford Mercury, Inc*., 70 Ark. App. 35, 13 S.W.3d 916 (2000).

In the present case, the claimant was injured after walking to work. (Hrng. Tr., P. 27). Although the claimant and other employees may access a phone app called EzClocker to clock in and out for the day, the claimant

testified that he had not clocked into work prior to reaching the respondent employer's front door. (Hrng. Tr., Pp. 30-31). He had not even entered the building for the day. (Hrng. Tr., P. 31). In fact, the injury occurred when a coworker, Miguel, pulled the door shut as the claimant was attempting to open it. (Hrng. Tr., Pp. 8, 31).

Prior to entering the building, there was no expectation that the claimant perform any work activities in the parking lot. (Hrng. Tr., P. 32). The claimant testified that he did not have any job duties until entering the building, and often not until morning meeting with the supervisor. *Id*. Although the claimant did some exterior work on the building from time to time, this was not a regular part of his job duties and he would not know whether he had any of this work to do until entering the building and receiving an assignment. (Hrng. Tr., P. 33).

The claimant testified that he had no responsibilities regarding opening the building. (Hrng. Tr., P. 34). He had received no instructions the previous day regarding what to do that morning. *Id*.

The claimant was clearly not performing employment services at the time of his injury. Although he was on the respondent employer's property, it is undisputed that he had not entered the building when the alleged injury occurred and would not have been performing employment services until he received instruction on the day's tasks. The claimant had not clocked in at

the time of his injury, nor had he started work. There were no preliminary tasks that the claimant must complete prior to work. He was not doing any work and he was not expected to be working. There is no exception under which we can find that the claimant was providing employment services at the time of his injury and for this reason.

Accordingly, for the reasons set forth above, I must dissent.

MICHAEL R. MAYTON, Commissioner