

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H206243

MICKEY T. MCNAIR, Employee	CLAIMANT
CENTURY LEASING, Uninsured Employer	RESPONDENT #1
KIMBALL & THOMPSON PRODUCE, INC., Employer	RESPONDENT #2
AMTRUST NORTH AMERICA, Carrier	RESPONDENT #2

CLAIM NO. H208493

MICKEY T. MCNAIR, Employee	CLAIMANT
KIMBALL & THOMPSON PRODUCE, INC., Employer	RESPONDENT
AMTRUST NO. AMERICA, Carrier	RESPONDENT

CLAIM NOS. H208492/H206220

MICKEY T. MCNAIR, Employee	CLAIMANT
KIMBALL & THOMPSON PRODUCE, INC., Employer	RESPONDENT
SUMMIT CONSULTING, Carrier	RESPONDENT

OPINION FILED JULY 24, 2024

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by DAVID L. SCHNEIDER, Attorney, Fort Smith, Arkansas.

Respondent, Century Leasing, not represented by counsel and not appearing at hearing.

Respondents, Kimball & Thompson Produce and AmTrust North America, represented by WILLIAM C. FRYE, Attorney, No. Little Rock, Arkansas.

Respondents, Kimball & Thompson Produce and Summit Consulting, represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 26, 2024, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 3, 2024 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 and issues:

H206243 (October 8, 2020 DOI)

Stipulations:

None

Issues:

1. Jurisdiction.
2. Whether claimant was an employee of Century Leasing (hereinafter "Century" on October 8, 2020.
3. Whether claimant was a dual employee of Century and Kimball & Thompson Produce (hereinafter "K&T" on October 8, 2020.
4. Whether claimant suffered a compensable injury to his right shoulder and right hand on October 8, 2020.
5. Claimant's entitlement to medical benefits.
6. Claimant's entitlement to temporary total disability benefits.
7. Compensation rate.
8. Attorney's fee.

H208493 (January 8, 2021 DOI)

Stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
1. The employee/employer/carrier relationship existed between the claimant, K&T, and Technology Insurance on January 8, 2021.

Issues:

1. Compensability of injury to claimant's right shoulder on January 8, 2021
2. Related medical.
3. Claimant's entitlement to temporary total disability benefits.
4. Attorney's fee.

H208492 (February 5, 2022 DOI)

Stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed between the claimant, K&T and Bridgefield Insurance on March 5, 2022.

Issues:

1. Compensability of injury to claimant's right shoulder on February 5, 2022.
2. Related medical.
3. Claimant's entitlement to temporary total disability benefits.
4. Attorney's fee.

H206220 (August 23, 2022)

Stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed between the claimant, K&T, and Bridgefield Insurance on August 23, 2022.

Issues:

1. Compensability of injury to claimant's right shoulder on August 3, 2022.
2. Related medical.
3. Claimant's entitlement to temporary total disability benefits.
4. Attorney's fee.

Claimant's contentions are set forth in his pre-hearing questionnaire attached to the pre-hearing order marked as Commission Exhibit #1 as Exhibit 1.

Century Leasing did not set forth any contentions.

Respondent, Kimball & Thompson and Technology Insurance Company's contentions are set forth in its pre-hearing questionnaire attached to the pre-hearing order marked as Commission Exhibit #1 as Exhibit 2.

Respondent, Kimball & Thompson and Bridgefield Insurance Company's contentions are set forth in its pre-hearing questionnaire attached to the pre-hearing order marked as Commission Exhibit #1 as Exhibit 3.

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 April 3, 2024 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right shoulder or right hand on October 8, 2020.

3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right shoulder on January 8, 2021.

4. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right shoulder on February 5, 2022.

5. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right shoulder on August 23, 2022.

FACTUAL BACKGROUND

In July 2020, claimant responded to a job listing on Craig's List. He testified that he went to Respondent 2's office in Lowell where he was given an application and various forms to complete. The employment application had Respondent 1's name on it, but the other forms, mostly dealing with training and policy of Respondent 2, had Respondent 2's name on them. These documents were submitted into evidence as Claimant's Exhibit #2.

Claimant completed the forms on Respondent 2's premises and was sent to a clinic for a drug test. The drug screen was negative and claimant was hired that same day. Claimant testified that he never visited the office of Respondent 1 and never had any

contact with Respondent 1. Claimant testified that he was paid by Respondent 1 until January 2021 when he began receiving payment from Respondent 2. Claimant testified that although he knew Respondent 2 had a payroll service, he was not aware that he was supposed to be an employee of Respondent 1 until December 2020. He testified that he received his job instructions from Kenny Blalock, who was the route manager for Respondent 2.

Testifying at the hearing was Gina Brown, Chief Financial Officer for Respondent 2. She testified that Respondent 1 leases employees to Respondent 2 and that some of those employees eventually become employees of Respondent 2. She testified that in January 2021 claimant went from being an employee of Respondent 1 to being an employee of Respondent 2.

Claimant contends that at the time of his first injury on October 8, 2020, he was a dual employee of Respondent 1 and Respondent 2. At that time Respondent 1 was uninsured and Respondent 2 was provided workers' compensation insurance by AmTrust (Carrier #1). At the time of the other alleged injuries claimant was admittedly an employee of Respondent 2. At the time of the injury on January 8, 2021, Respondent 2's coverage was still provided by AmTrust. At the time of the third and fourth injuries on February 5, 2022 and August 23, 2022, Respondent 2's coverage was provided by Summit Consulting (Carrier #2).

Claimant's job duties were to drive a box truck, delivering produce to restaurants, schools, hospitals, nursing homes, Native American facilities, et cetera. At many of these locations, claimant had to get the appropriate produce and dolly it in to the facility. At some locations such as the Cherokee Nation, the produce was unloaded by employees

of the facility.

Claimant has filed this claim contending that he suffered four separate compensable injuries to his right shoulder while performing his job. He has requested payment of medical benefits relating to his compensable injuries as well as temporary total disability benefits and a controverted attorney fee.

ADJUDICATION

Claimant contends that he suffered compensable injuries to his right shoulder and hand on October 8, 2020; his right shoulder on January 8, 2021; his right shoulder on February 5, 2022; and his right shoulder on August 23, 2022. All of these claims are for specific injuries identifiable by time and place of occurrence. In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630.

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 meet his burden of proof for all four injuries.

Claimant has alleged that he suffered four separate compensable injuries. Each of these injuries involves his right shoulder (the first injury also involves his right hand).

Some of the evidence presented is relevant to more than one particular injury. For instance, prior to discussing the merits of each particular claim, I note the following with respect to claimant's credibility. Claimant acknowledged that from 2007 through 2015 he was incarcerated for endangering the welfare of a minor. Claimant was subsequently charged with two failures to register as a sex offender in Benton County that resulted in additional terms for both charges. Claimant also acknowledged that he was convicted of embezzlement in Oklahoma. Finally, claimant was terminated by Respondent 2 in August 2022 for theft of property in connection with the unauthorized use of Respondent 2's fuel card. Gina Brown testified that while going through credit card logs she discovered charges on two Sundays that should not have been made on those days. She testified that each employee has their own PIN number and that claimant's PIN number was used in those purchases. She stated that this resulted in criminal charges being filed against claimant.

Obviously, these facts do not exclude claimant from prevailing and proving a compensable injury while performing his job duties; however, they are relevant when considering his credibility as a witness.

With respect to claimant's claims of injuries to his right shoulder, I note that there are credibility issues as well. Claimant testified on direct examination that prior to his injury in October 2020 he had not had any problems with his right shoulder. However, when claimant sought medical treatment on January 15, 2021 from the emergency room, the following history is noted:

Mr. McNair is a 41-year-old male that presents to the emergency department complaining of some right sided anterior shoulder pain that has been present for a year

but has been worse over the last week after he was hit in the back of the shoulder by a door that was swung shut and hit him. He states that about a year ago he had an MRI of the shoulder that showed a minor tear of the rotator cuff but he did not follow-up. (Emphasis added.)

In response to this history, claimant testified:

Q Now, the medical records indicate that you had told the doctor you had an MRI of your shoulder a year before. Do you remember anything about that?

A No, not a year.

Q Had you ever had any problems with your shoulder before?

A No. Nothing out of the normal.

Further, Dr. Dougherty in his report dated September 20, 2021, notes that claimant has had right shoulder issues for more than five years and that he had failed conservative care.

Patient reports he's been having pain in his right shoulder. He was here last year for the same reason (2020) for an injection in his right shoulder but refused to get it and now he is regretting it.

His x-rays of the right shoulder today show severe AC joint arthritis. His exam is also consistent with impingement syndrome. He has failed conservative care and over 5 years of symptoms including a physician based home exercise program. (Emphasis added.)

In response to this history, claimant testified that he does not know where Dr. Dougherty got this history and that it is incorrect.

Thus, claimant contends that two medical reports from two different physicians noting a history of prior right shoulder complaints is incorrect. I do not find this testimony credible. Dr. Dougherty's statement that claimant had a five-year history of right shoulder complaints and failed conservative treatment is part of the basis for his decision to perform surgery on the claimant's right shoulder.

In short, based on the foregoing, I find claimant's credibility to be suspect and significant in all four of his right shoulder claims.

Turning to the claims in particular, the first claim is for an injury to claimant's right shoulder and right hand on October 8, 2020. Claimant testified that while making a delivery to a restaurant that day he reached out to grasp a handle on the truck and the handle came off, causing him to slip and land on the top of his two-wheel dolly. Claimant testified that after this incident he called his supervisor, Blalock, reported the injury, and sent him a picture of his hand.

Claimant did not seek any medical treatment for this injury. The first medical report after October 8, 2020 is from an emergency room visit on January 15, 2021, for the alleged January 8, 2021 injury at which time claimant gave a history of right shoulder pain present for one year. Claimant not only indicated that he had shoulder pain for a year, but also gave a history of having undergone an MRI of the shoulder which showed a minor tear of the rotator cuff. Claimant denies giving this history. Notably, the emergency room report makes no mention of an accident or injury on October 8, 2020.

In addition, with respect to the October 8, 2020 claim, I note that there is no objective evidence of injury to claimant's right hand or right shoulder. Therefore, I find that claimant has failed to offer medical evidence supported by objective findings

establishing a compensable injury to his right shoulder and right hand on October 8, 2020.

Based on claimant's credibility, the lack of medical treatment until after another alleged injury, the history of prior right shoulder complaints and the lack of objective findings, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury, or an aggravation of a pre-existing condition to his right shoulder and right hand on October 8, 2020.

Having found that claimant failed to prove a compensable injury on October 8, 2020, the issue of whether claimant was a dual employee of Respondent 1 and Respondent 2 on that date is moot.

Claimant also contends that he suffered a compensable injury to his right shoulder on January 8, 2021. Claimant testified that on that date he and one of Respondent 2's maintenance men were standing at the back of his truck looking at damage to the floor of the truck. The wind caught one of the doors which was loose due to a broken hook and struck him in the back and shoulder. Claimant testified that he told the maintenance man that he was going to leave and go get checked out.

Q Who did you notify besides this maintenance gentleman that there was there at that time? Who else did you notify?

A He was the only one that - - on that one, he was there and I told him I was leaving to go get checked out.

However, there is no medical report indicating that claimant sought medical treatment on that day. There is the aforementioned medical report from the emergency room dated one week later on January 15, 2021. That report does indicate that claimant mentioned having been struck in the back of the shoulder a week ago by a door. As

previously discussed, the report also indicates that claimant gave a history of right shoulder pain a year ago that resulted in an MRI scan showing a minor tear in the rotator cuff. More importantly, the report contains no objective findings of injury. The report does contain notations of complaints of pain and decreased range of motion. It also notes that no effusion, spasm, laceration, or swelling are present. At that time claimant was diagnosed with chronic right shoulder pain.

Based on claimant's credibility, the history of prior shoulder complaints and the lack of objective findings, I find that claimant has failed to meet his burden of proving a compensable injury or an aggravation of a pre-existing condition to his right shoulder on January 8, 2021.

Claimant does not allege another compensable injury until February 5, 2022, more than a year after January 8, 2021; however, he did seek medical treatment for his right shoulder from Dr. DeClerk on August 17, 2021. The report indicates that claimant's right shoulder has been bothering him but does not mention any injuries. The report states that claimant had seen an orthopedic doctor and was supposed to get an injection but did not. The report also states that claimant has seen Dr. Dougherty and that therapy in the past has provided little relief. None of these other medical reports are in the record. Dr. DeClerk diagnosed claimant with pain in his right shoulder joint; prescribed medications; and referred claimant back to Dr. Dougherty.

Claimant was seen by Dr. Dougherty on September 20, 2021. His report indicates that claimant's problems included tendinitis of the right rotator cuff with an onset date of July 15, 2020. Notably, this is before claimant's first alleged injury date and again contradicts claimant's testimony that he had no right shoulder problems prior to October

2020. The problems list also indicates that claimant has pain in the right shoulder joint with an onset date of August 17, 2021. (Not a claimed injury date.) His report also indicates that there was no work-related injury. The report then goes on to state that claimant had shoulder issues for five years and that he had failed conservative care. Dr. Dougherty went on to recommend a right shoulder arthroscopy with subacromial decompression and distal clavicle resection.

Dr. Dougherty performed this surgery on September 28, 2021, with a post-op diagnosis to include: impingement syndrome with acromioclavicular arthritis; intact rotator cuff; pristine articular surfaces; and intact biceps. According to claimant's testimony he has not seen Dr. Dougherty since September 2021.

Claimant claims a third injury to his right shoulder on February 5, 2022. Claimant testified that on that date he was walking when he slipped on ice and fell, injuring his right shoulder. In support of this claim, claimant offered a video of the incident. The video is approximately three seconds long and does show the claimant as he started to slip and/or fall. Claimant was seen at the emergency room later that day complaining of pain in the right AC joint. Given the video evidence, there is no question that this incident occurred as described by claimant. However, in order to prove a compensable injury, claimant must also medical evidence supported by objective findings establishing an injury. I find that he has failed to meet that burden of proof.

X-rays of the claimant's right shoulder were negative for acute bony pathology. In addition, the physical exam revealed a full range of motion, both passive and active. Claimant was given Tylenol and Motrin and diagnosed with a strain of the muscle and tendons of the rotator cuff of the right shoulder.

Absent objective findings, claimant cannot meet his burden of proving a compensable injury. Therefore, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury or an aggravation of a pre-existing condition on February 5, 2022.

The final claim for compensability is for August 23, 2022. Claimant contends that on that date he injured his right shoulder while lifting a box of apples. The circumstances surrounding this injury are suspect. Claimant testified as follows:

I came in after my school, after I got out of class, to check my route load. It was kind of a habit because we didn't always have the best people stacking the pallets and loads and wrapping them like they should. And the load I was on was a really picky one. If something fell off, they would reject loads, so I would go in after class and check it and make sure it was right.

And I had seen a box of apples that was on the pallet, you know, if someone moved it or something it was liable to fall. So I picked it up to put it back on the pallet further up and when I kind of tossed it up there, I felt my shoulder kind of roll. As it rolled, it kind of popped and started hurting.

Claimant acknowledged that he was not scheduled to work on the night of August 23, but simply decided to show up, clock in, work 15 to 20 minutes and then leave.

Q Now, you weren't scheduled to work on the evening of August 23; were you?

A I was on no schedules.

Q Well, would it surprise you to learn if Ms. Brown and Mr. Blalock testify that you have to be on the schedule to work and clock in?

A This is incorrect.

Q They are just lying?

A I hadn't been on the schedule in a year and I made many trips. I would be called in by Amanda Blalock and Kenny Blalock and Luke.

Q So you could just show up, clock in, and do anything anytime and anywhere?

A Yes, sir.

Q So at 9:30, approximately, on August 23rd of 2022, it was completely acceptable for you just to appear out of nowhere and try to go to work; if that what you are telling us?

A Yes, sir.

Q Okay. And that you did it routinely; is that what you are telling us?

A Yes, sir.

Gina Brown testified that claimant was not scheduled to work on the night of August 23, but showed up and clocked in. She testified that employees are not supposed to be at Respondent 2 if they are not on the schedule and that employees can't just show up and work. In response to Brown's testimony, claimant testified that he had shown up on other occasions but admitted that most of the time he did not clock in.

Q Had you been paid for those? [Nights he had gone to the warehouse while not on the schedule.]

A No, sir. Sometimes I didn't - - most of the time I didn't clock in, I would just come by, because it made my life easier if the pallets weren't leaning and falling over.

Thus, claimant was not scheduled to work on the night of August 23, but shows

up, clocks in, and plans to work only 15 to 20 minutes before leaving. Other than claimant's testimony, there is no evidence that he had ever done this before. In fact, even claimant admitted that most of the time when he allegedly did this in the past he did not clock in. It seems more than coincidental that claimant would appear at work on the night of August 23, clock into work 15 to 20 minutes, and just happen to have an injury during that time.

As between the testimony of Brown and claimant, I found Brown's testimony more credible. Her testimony is that claimant was not supposed to be present unless he was on the schedule. I do not find credible claimant's testimony that he was not on the schedule and that he would routinely show up and work when he wanted.

Having accepted Brown's testimony as credible, I find that claimant was not performing employment services at the time of his alleged injury. An employee is performing employment services when he is doing something that is generally required by his employer. *Texarkana School District v. Conner*, 373 Ark. 372, 284 S.W. 3d 57 (2008). 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 interest, directly or indirectly. *Javan v. Econ. Inn & Suites*, 370 Ark. 414, 260 S.W. 3d 281 (2007).

I do not find that claimant was doing something that was required by his employer or that he was within the time and space boundaries of his employment at the time he contends his injury occurred. According to Brown's testimony, claimant was not scheduled to work on the night of August 23 and was not to be present unless he was on the schedule. Therefore, claimant was not performing an activity that was required by his employer during the time and space boundaries of his employment. The fact claimant

was picking up a box of apples is not controlling given the evidence indicating that claimant was not supposed to be present unless he was scheduled to work. An employee cannot simply create a situation of performing employment services by showing up at work and clocking in if they are not supposed to be present and working.

Even if it were determined that claimant was performing employment services on August 23, claimant still has the burden of proving by a preponderance of the evidence that he suffered a compensable injury. Here, a finding that the injury occurred is dependent on claimant's credibility. For reasons previously discussed, I find that claimant's testimony is not credible.

Accordingly, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury or aggravation of a pre-existing condition to his right shoulder on August 23, 2022.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered compensable injuries to his right shoulder and right hand on October 8, 2020; his right shoulder on January 8, 2021; his right shoulder on February 5, 2022; or his right shoulder on August 23, 2022. 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 \$1,065.45.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE