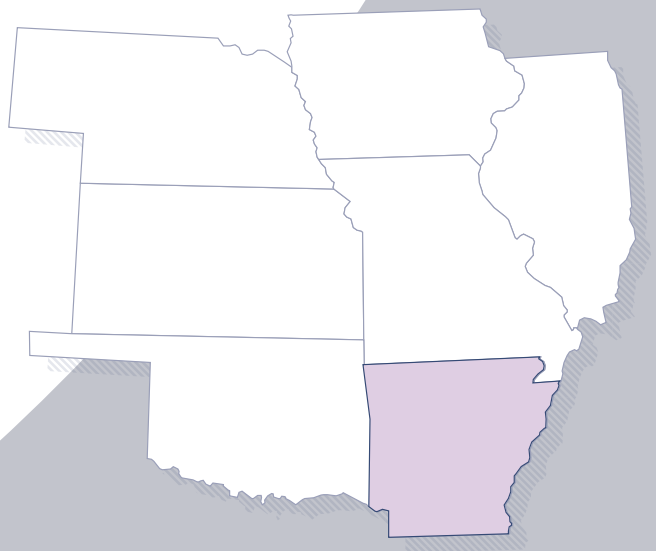
Workers' Compensation Reference Guide

Arkansas



ARKANSAS WORKERS' COMPENSATION

I. JURISDICTION

A. Act will apply where:
   1. The injury occurred in the state of Arkansas.
   2. The contract of employment is entered into in Arkansas between an Arkansas resident and an employer who is a resident or who maintains an office in Arkansas exercising general control over the employee, even if the injury occurred in a different state in which both parties contemplated the employment would be performed.
   3. Claimant is entitled to a presumption of jurisdiction, but such presumption is rebuttable. Multiple factors are considered for jurisdiction determinations.

II. ACCIDENTS

A. Compensable Injury Ark. Code Ann. § 11-9-102(4)(A)
   1. Specific Incident – Claimant must prove each element by a preponderance of the evidence:
      a. An injury arising out of and in the course of employment;
         i. "Arising out of" refers to the cause of the accident. An injury arises out of employment if the employee is carrying out the employer's purpose or advancing the employer's interests.
         ii. "In the course of" refers to the time, place and circumstances of the accident. The accident must occur within the time and space boundaries of the employment
      b. That the injury caused internal or external harm to the body which required medical services or resulted in disability or death;
         i. An aggravation of a pre-existing condition can be compensable if all of these elements are met for the aggravating incident
      c. Medical evidence supported by objective findings, as defined in Ark. Code. Ann. 11-9-102(16);
      d. That the injury was caused by a specific incident identifiable by time and place of occurrence.
   2. Gradual Onset/Repetitive Motion: Injuries caused by rapid repetitive motion (carpal tunnel specifically included) or gradual onset injuries to the back or hearing loss require proof of the following elements:
      a. An injury arising out of and in the course of employment;
      b. That the injury caused internal or external harm to the body which required medical services or resulted in disability or death;
      c. The injury was the major cause of the disability or need for treatment;
      d. Medical evidence supported by objective findings.
   3. Mental illness Ark. Code Ann. § 11-9-113

a. For mental illness to be a compensable injury it must be caused by physical injury to the employee's body, demonstrated by a preponderance of the evidence, and diagnosed by a licensed psychiatrist or psychologist.
b. Exception: victims of crimes of violence.
c. Maximum compensation is 26 weeks.

4. Heart or cardiovascular injury, accident, or disease Ark. Code Ann. § 11-9-114
   a. Compensable only if an accident is the major cause of the physical harm.
   b. The employee must show that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work or that an unusual and unpredicted incident occurred which was the major cause of the physical harm and stress must not be considered.
5. Hernia Ark. Code Ann. § 11-9-523
   a. Employee must show that the hernia occurred immediately following and as a result of sudden effort, severe strain, or the application of force directly to the abdominal wall; that there was severe pain in the hernia region that caused the employee to immediately cease work; that the employee gave the employer notice within 48 hours afterward and that medical attention was required within 72 hours.

B. Occupational Disease Ark. Code Ann. § 11-9-601
1. Occupational Disease is defined as any disease that results in disability or death and arises out of and in the course of the occupation or employment or naturally follows or results from a compensable injury.
2. There must be a causal connection between the occupation and the disease established by a preponderance of the evidence.
3. An occupational disease is characteristic of an occupation, process or employment where there is a recognizable link between the nature of the job performed and an increased risk in contracting the disease in question.
4. The test of compensability is whether the nature of the employment exposes the worker to a greater risk of the disease than the risk experienced by the general public or workers in other employments.
5. The amount of compensation will be based on the average weekly wage of the employee when last exposed to the occupational disease.

III. NOTICE Ark. Code Ann. § 11-9-701

A. Notice of the accident should be given immediately after it occurs and must be reported on the appropriate form prescribed or approved by the Commission (Form N).

B. Failure to give notice will not bar a claim if:
1. The employer had knowledge of the injury; or
2. If the employee had no knowledge that the condition or disease arose out of and in the course of employment; or

3. If the Commission excuses the failure due to a satisfactory reason that the notice could not be given.

IV. REPORT OF INJURY Ark. Code Ann. § 11-9-529

A. Employers must file a report of injury (Form 1) with the Arkansas Workers' Compensation Commission within 10 days of receiving notice or knowledge of the injury.

B. The report filed with the Commission must include:
   1. Name, address, business of the employer;
   2. Name, address, occupation of employee;
   3. Cause and nature of the injury; and
   4. Date, time and location of the injury.

C. Failure to file a report could result in a $500 fine.

V. CLAIM FOR COMPENSATION

A. A claim for an injury other than an occupational disease must be filed within 2 years from the date of the injury unless compensation has been paid, in which case a claim for additional compensation must be filed within 1 year from the date of the last payment of compensation or 2 years from the date of the injury, whichever is greater.
   1. The date of the injury is defined as the date of the occurrence of the accident from which a compensable injury results.

B. Claims based on occupational diseases must be filed within 2 years from the date of the last injurious exposure to the hazards of the disease. The statute of limitations does not begin to run until the employee knows or should be reasonably expected to be aware of the extent or nature of the injury.

C. If the employee has not made a request for a hearing within six months of filing a claim for compensation the employer may move to dismiss the claim without prejudice.

D. Failure to file a claim within the statutory time limits is not a bar to the right to file a claim unless the employer objects at the first hearing on the claim.

E. Benefits not claimed on the Form C are barred by the SOL, if later claimed, but more than 1 year from last payment of compensation. *Flores v. Wal-Mart Dist. and Claims Mgmt. Inc.,* 2012 Ark. App. 201.

VI. INTENT TO ACCEPT OR CONTROVERT CLAIM Ark. Code Ann. § 11-9-803

A. Employer must file a statement of its intent to accept or controvert a claim (Form 2) within fifteen days of the date upon which it receives notice of the alleged injury.

B. Employer may request a time extension if it has made a good faith effort to obtain medical records, but has been unable to do so and is therefore unable to determine the validity of the employee's claim.

C. Note that this step must be done within fifteen days of the injury, **not** within fifteen days of the claim for compensation, so that this step will typically be required before the employee has even filed a claim for compensation.

VII. MEDICAL TREATMENT Ark. Code Ann. § 11-9-508

A. Employer has the right to select the initial treating physician. If the employer has contracted with a certified managed care organization, then the employer has the right to select the initial primary care physician from among those in the organization.

B. However, the employee may request a one-time change of physician from the employer or carrier.
   1. If the employee's request for a change of physician is denied, the employee can petition the Commission and if the Commission agrees, they may select the physician if they do not agree with the employee's choice.
   2. When the employee petitions for a change of physician, the new physician must be either:
      a. Associated with the managed care entity chosen by the employer, or
      b. The regular treating physician of the employee provided the following factors are met:
         i. the physician maintains the employee's medical records;
         ii. the employee has a bona fide doctor-patient relationship with they physician;
         iii. there is a history of regular treatment prior to the onset of the compensable injury;
         iv. the primary care physician agrees to refer the employee to the managed care entity for specialized treatment; and
         v. the primary care physician agrees to comply with the rules, terms, and conditions regarding services performed by the managed care entity chosen by the employer.

C. Treatment furnished by any physician other than the ones selected according to these methods, except emergency treatment, will be at the employee's expense.
   1. Exception: If the employer does not deliver to the employee, either in person or by certified mail, a copy of a notice which explains the employee's rights and responsibilities concerning a change of physician, then the changes of

physician rules do not apply and the employer will be responsible for the unauthorized treatment.

D. If the employer fails to provide prompt medical services within a reasonable time, the Commission may direct that the injured employee obtain the medical service at the expense of the employer.

VIII. VOCATIONAL REHABILITATION Ark. Code Ann. § 11-9-505

A. Upon a finding by the commission that a vocational rehabilitation program is reasonable, an employer will be liable to an employee for vocational rehabilitation costs if the employee:
   1. Is entitled to receive compensation benefits for permanent disability; and
   2. Has not been offered an opportunity to return to work or reemployment assistance.

B. Employer's responsibility for payments for the program will not exceed 72 weeks.

C. Employee will not be required to enter a program against his or her consent.
   1. If employee waives rehabilitation or refuses to participate in an offered program, the employee will not be entitled to benefits beyond the established percentage of permanent physical impairment.

D. Employee must request the program by filing a request with the Commission prior to a determination of the amount of permanent disability benefits payable to the employee.

IX. AVERAGE WEEKLY WAGE Ark. Code Ann. § 11-9-518

A. Computed based on the contract of hire in force at the time of the accident, considering the fifty-two weeks prior to the accident, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer as well as tips and commissions.

B. Piece-basis employees: divide the earnings by the number of hours required to earn those wages during the fifty-two weeks preceding the week in which the accident occurred, then multiply this hourly wage by the number of hours in a full-time workweek.

C. Overtime: add to the regular weekly wages, compute by dividing the overtime earnings by the number of weeks worked by the employee.

X. DISABILITY BENEFITS

A. Temporary Total Disability (TTD) Ark. Code Ann. §§ 11-9-501(b), 11-9-519

1. Compensation rate is two-thirds of average weekly wage (AWW) up to statutory maximum.
2. If an injured employer refuses suitable employment he loses any entitlement to compensation unless the Commission determines the refusal is justifiable.
3. Waiting period:
    a. For the first seven calendar days, no TTD is due.
    b. For more than seven, but less than fourteen days, only the second week is due.
    c. For more than fourteen days of disability, go back to the first day of disability.
    d. The waiting period does not include the date of injury.
4. TTD is calculated using the calendar week with each day being one-seventh of the week.
5. Failure to pay TTD without an award within fifteen days after it becomes due is an eighteen percent penalty which must be paid at the same time as the installment unless notice of controversion is filed or an extension is granted.
6. If a TTD installment payable under an award is not paid within fifteen days after it becomes due, there is a twenty percent penalty.
7. Willful failure to pay a benefit results in a penalty up to thirty-six percent.

B. Temporary Partial Disability (TPD) Ark. Code Ann. § 11-9-520
    1. Compensation rate is 2/3 of the difference between the employee's average weekly wage prior to the accident and his wage-earning capacity after the injury.

C. Permanent Partial Disability (PPD) Ark. Code Ann. §§ 11-9-501(d)(1), 11-9-521
    1. Compensable injury must be the major cause (more than 50%) of the injury for Claimant to receive permanent benefits.
    2. Compensation rate is 75% of TTD rate up to the statutory maximum if the TTD rate is $205.35 or greater. If TTD rate is below $205.35, PPD rate is 2/3 of average weekly wage.
    3. Permanent partial disabilities not listed in the statutory schedule will be apportioned to the body as a whole with a value of four hundred fifty weeks.
    4. In claims for disability in excess of permanent partial impairment for unscheduled injuries (wage loss claims), the Commission may take into account the employee's age, education, work experience, and other matters that may affect his future earning capacity.
    5. Compensation is allowed after twelve months after the injury, for serious and permanent facial or head disfigurement for not more than $3,500.
    6. The clinical impairment rating must be pursuant to the AMA Guides to the Evaluation of Permanent Impairment (4th Edition).
        a. If the employee is back to work, only the clinical rating is due.
        b. If the employee is unable to return to work, the rating is negotiable and can be awarded by the ALJ.

7. PPD payments should start from the date the rating is given and notification in writing should be given to the injured employee.

D. Permanent Total Disability (PTD)
   1. Permanent total disability means the inability because of compensable injury or occupational disease to earn any meaningful wages in the same or other employment.
   2. Compensation rate is 2/3 of the average weekly wage.
   3. The employer or carrier may, annually, require the injured worker receiving permanent total disability benefits to certify that he is permanently and totally disabled and not gainfully employed.
   4. As of January 1, 2008 the cap for PTD is 325 times the maximum total disability rate established at the date of injury.

E. Death
   1. For deaths occurring as the result of an injury that occurred on or after July 1, 1993, the employer is responsible for funeral expenses of $6,000 or less.
   2. There is a rebuttable presumption that death did not result from the injury if:
      a. death does not occur within one year from the date of the accident; or
      b. within the first three years of the period for compensation benefits.
   3. Compensation for death of an employee is payable to the dependents in the following percentages of the average weekly wage and in the following order of preference:
      a. Widow/Widower with no children: 35% paid until his/her death or remarriage;
      b. Widow/Widower with children: 35% paid until his/her death or remarriage and15% for each child;
      c. One child with no widow/widower: 50%;
      d. More than one child with no widow/widower: 15% for each child and 35% to the children as a class to be divided equally among them;
      e. Parents: 25% each;
      f. Siblings, grandchildren, grandparents: 15% each.
   4. If a spouse remarries before complete payment of benefits, he/she must be paid a lump sum equal to compensation for 104 weeks.
   5. Benefits to children will terminate at age eighteen unless the child is a full-time student under the age of twenty-five.
   6. Incapacitated dependants are entitled to compensation regardless of age or marital status.

F. Illegally Employed Minor
   1. Minors employed in violation of federal or state statutes pertaining to minimum ages for employment of minors are entitled to double the statutory amounts of compensation or death benefits.

2. This provision applies unless the minor misrepresented his or her age, in writing, to the employer.

G. Attorney's Fees Ark. Code Ann. 11-9-715
   1. Capped at 25% of compensation for indemnity benefits.
   2. Attorney's fees are not payable on medical benefits.
   3. Where the Commission determines that a claim has been controverted, in whole or part, attorney's fees are paid ½ by employer in addition to compensation awarded and ½ by the claimant out of compensation payable to them.

XI. PROCEDURE

A. Pre-Injury Posting (Form P)
   1. Employers should have Form P displayed in a conspicuous place to instruct employees in how to deal with an injury.

B. Employee's Notice of Injury (Form N)
   1. Employee is required to fill out Form N and provide notice of his injury to the person and place specified by the employer.
   2. Employer is not responsible for any benefits to the employee incurred prior to notification of the injury, except for emergency treatment that occurs outside the normal business hours of the employer, so long as a report of injury is made the next day.
   3. Employee can be excused for failure to file Form N if:
      a. the injury renders the employee incapable of informing the employer of it;
      b. the employee did not know a condition arose out of employment; or
      c. the employer had actual knowledge of the injury.

C. Employer's Report of Injury (Form 1)
   1. Employer must report an employee's injury to the workers' compensation commission within ten days from receipt of notice of actual knowledge using Form 1.
   2. Failure to do so may result in a fine up to $500.

D. Claim for Compensation (Form C)
   1. Employee must file a claim for compensation using Form C within the limitations period, which is 2 years from the date of injury or 1 year from the last payment of compensation.
   2. The claim will be assigned to one of six geographic districts throughout the state, based on the county in which the injury occurred or the district in which the respondent's place of business is located if the injury occurred outside the state.

3. Ark. Code Ann. § 11-9-704. The Commission must notify the employer and any interested parties that an employee has filed a Claim for Compensation within ten days of such a filing.
4. Ark. Code Ann. § 11-9-702. If the employee fails to request a hearing within six months of filing his or her claim the claim may, upon motion and hearing, be dismissed without prejudice, allowing the employee to refile his claim within the two-year statute of limitations.

E. Employer's Response (Form 2)
   1. Employer must file a statement of its intent to accept or controvert a claim (Form 2) within fifteen days of the date upon which it received notice of the alleged injury.
   2. Form 2 may be required well before the employee files a Form C.
   3. Employer may request a time extension if a good faith, but unsuccessful effort has been made to obtain medical records rendering the employer unable to determine the validity of an employee's claim.

F. Payment of Benefits
   1. The first installment of compensation must be paid on the fifteenth day after the employer received notice of the injury, with payments to continue every two weeks thereafter.

G. Disputed Claims
   1. Preliminary Conference
      a. Mediation Conferences will be held in all cases in which the amount in dispute is less than $2,500.
      b. For cases in which the amount in dispute is more than $2,500 the parties may request a voluntary mediation if all parties agree.
      c. The conference will be informal, nonbinding, and confidential, by telephone or in person.
      d. Attendance by the parties or a representative is required and the mediator is authorized to compel attendance, however the mediator is not authorized to compel settlement.
      e. Following the conference, the Report of Mediation Conference (Form R) is placed in the file and copies are sent to all the parties.
   2. Depositions
      a. Any party may conduct depositions after the claim has been controverted by the filing of Form 2, however prior to the time a case has been controverted, the Commission may order depositions for good cause shown and upon application of either party.
   3. Settlement
      a. If both parties agree to a settlement a joint petition must be filed with the Commission.
      b. The Commission will hear the petition, take testimony, and make investigations to determine whether to allow the final settlement.

c. Neither party may appeal an order or award denying a joint petition, however the denial is made without prejudice to either party.

4. Hearing
    a. Either party may file an application for a hearing that clearly identifies the specific issues of fact or law in controversy and the applying party's contentions.
    b. If ordered, the Commission must give interested parties ten days notice of the hearing.
    c. The hearing will be held in the county where the accident occurred, or the county of the employer's residence or place of business if the injury occurred outside the state.
    d. Evidence may include verified medical reports provided the party using the reports has given opposing counsel notice and copies of all records and reports within seven days of the hearing.
    e. Expert testimony is only permissible if such testimony complies with the requirements of Daubert and Kumho.
5. Award
    a. The order denying the claim or making the award will be filed in the office of the Commission and a copy will be sent to each party.
6. Appellate Process
    a. Full Workers' Compensation Commission
        i. 30 days from the date of receipt of the order or award to file application for review
        ii. Will review the evidence, or hear the parties, their representatives, and witnesses.
    b. Court of Appeals
        i. 30 days from the date of receipt of the order or award to file notice of appeal
        ii. Notice filed in office of commission
        iii. Court will review only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award upon any of the following grounds, but no others:
            (a.) The commission acted without or in excess of its powers
            (b.) The order or award was procured by fraud
            (c.) The facts found by the commission do not support the order or award
            (d.) The order or award was not supported by substantial evidence of record

XII. DEFENSES

A. Assault
1. Employee's claim will be barred if it occurred as a result of an assault absent a showing by a preponderance of the evidence that the incident arose out of a

work related animus or hostility between the claimant and the co-worker who caused the assault.

B. Horseplay
    1. An injury that occurs as a result of horseplay will not be compensable except as to innocent victims of the playing.
    2. Arkansas statutes and cases do not define horseplay, but find it synonymous with the terms “skylarking,” or “rough or boisterous play.” *Morales v. Martinez,* 88 Ark. App. 274.

C. Going and Coming Rule
    1. Precludes recovery for an injury sustained while the employee is going to or returning from his place of employment.
    2. Premises exception no longer exists in Arkansas. The 1993 Act excludes from compensation injuries that occur “at time when employment services were not being performed.”
        a. Merely walking through an employer’s parking lot will not qualify as performing “employment services” and therefore a claim for injury arising out of that activity will likely be precluded. *See Hightower v. Newark Public School System*, 57 Ark. App. 159.
    3. The rule does not preclude benefits where the journey itself is part of employment services, such as in the case of delivery drivers.
    4. Dual Purpose Exception
        a. An injury occurring during a trip that serves both a business and personal purpose is within the course of employment.
            i. A trip that involves the performance of services for the employer which would have caused the trip to be taken by someone else falls under this exception
        b. Applies to out of town trips, trips to and from work, and miscellaneous errands such as visits to bars and restaurants if motivated in part by the intention to transact business there.
        c. Exception will not apply to identifiable deviations from the business trip for personal reasons until the employee returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial.

D. Recreational or social activities
    1. An employee injured while engaging in or performing or as a result of engaging in or performing any recreational or social activities for the employee’s personal pleasure is precluded from receiving compensation benefits.

E. Employment services were not being performed, employee had not yet been hired or employment relationship had terminated.

F. Intoxication Ark. Code Ann. § 11-9-102(4)(B)(iv)
    1. An injury “substantially occasioned” by the use of alcohol or drugs is not compensable.

2. The mere presence of alcohol or drugs creates a rebuttable presumption that the accident was substantially occasioned by the use of the drugs or alcohol.
3. By performing services for the employer, the employee has impliedly consented to reasonable drug and alcohol testing for the presence of these substances in the employee's body at the time of the accident and refusal to test precludes the employee from receiving benefits unless he proves it did not substantially cause the injury.
4. The employee must prove by a preponderance of the evidence that the alcohol or drugs did not substantially occasion the accident.
5. If a reasonable suspicion of alcohol exists at the time of the accident testing must be done within eight hours.
6. If a reasonable suspicion of drugs exists at the time of the accident testing must be done within thirty-two hours.

G. "Shippers Defense" from *Shippers' Transport of Georgia v. Stepp,* 265 Ark. 365.
   1. A false statement in an employment application will bar workers' compensation benefits if the following conditions are shown:
      a. The employee knowingly and willfully made a false representation as to his or her physical condition;
      b. The employer relied upon the false representation;
      c. The reliance upon the false misrepresentation was a substantial factor in hiring the employee; and
      d. There is a causal connection between the false representation and the injury.
   2. For the defense to apply, the questions asked on the employment application must request factual information, not an opinion.

RECENTLY ASKED QUESTIONS IN ARKANSAS

FROM ISSUES ADDRESSED IN RECENT ARKANSAS CASES

Q. Are parent corporations immune "employers" under the exclusive-remedy provision of the Workers' Compensation Act?

A. Yes. In *Myers v. Yamato Kogyo Co.*, a steel plant worker died while working. The worker's employer, Arkansas Steel Associates, did not dispute that his death was work-related, and their insurance carrier paid death benefits to his wife. In May of 2016, the deceased worker's wife, Mary Myers, filed a lawsuit against ASA's parent companies and various third party entities in the White County Circuit Court. The circuit court, in part, transferred jurisdiction to the Arkansas Workers' Compensation Commission, who in June of 2018 found that the parent companies were entitled to the exclusive-remedy provision of the Arkansas Workers' Compensation Act. Myers appealed, arguing that there was no "employer-employee" relationship between her deceased husband and ASA's parent companies.

While the appellee parent companies were, either indirectly or directly, owners of ASA, they were separate and distinct entities from ASA: they had their own headquarters; their own officers, directors and managers; and they did not hire, fire, pay salaries to or set the work schedules of ASA workers. According to Myers, ASA was her deceased husband's sole employer because no agents of the parent companies were present at the jobsite where her husband was killed, and they did not treat him as an employee. Therefore, she argued, she could not sue ASA in tort, but could sue the parent companies.

The parent companies, in contrast, argued that there does not have to be an "actual" or "true" employer-employee relationship for an entity to qualify as a statutory "employer." They argued the statutory language that "any principal, officer, director, stockholder, or partner acting in his or her capacity as employer" applied to them since ASA was a subsidiary of theirs, meaning they owned a controlling share of ASA, and that all an entity must do to qualify as immune is meet the statute's requirements.

The court sided with the appellee parent companies, holding that parent companies that own subsidiaries which have a direct employment relationship with the injured worker are statutory "employers". This holding was based on the plain language of the section 11-9-105(a), which at the end of the second sentence omits the word "partner" but includes the words "principle" and "stockholder." The court also noted that, in the first sentence of the subsection, there is no comma between the word "partner" and the phrase "acting in his or her capacity as an employer," which indicates that the phrase "acting in his or her capacity as employer" modifies only "partner," and not the other nouns listed before it. As such, the court reasoned, the statute counsels to look to whether a partner is acting as an employer, but not to whether a principal or stockholder is acting as an employer. The court distinguished such entities from those of third parties, such as the lessor or manufacturer of equipment, against whom an action may be maintained if responsible for a worker's injury. But since it was stipulated that the companies in question were

stockholders and principals in the company, those companies were, by definition, statutory employers.

Myers v. Yamato Kogyo Co., Ltd., __S.W.3d__ (Ark. Ct. App. May 29, 2019)

Q. If a claimant files a claim for additional benefits but names the wrong employer on the form, and then files for the same additional benefits with the correct employer named on the form after the two-year statute of limitations period, does the statute of limitations still preclude the claim?

A. Yes. In *Farris v. Express Services, Inc.*, Walter Farris injured his head, neck and left shoulder while working when a crane fell on him. Express Services, Inc., the temporary employment agency that employed Farris at the time of his injury, paid benefits for his workers' compensation claim. About two years after he was injured, Farris submitted a Form AR-C through which he sought additional benefits. On the form, he named Great Dane Trailers as his employer.

While Express Services had assigned Farris to a Great Dane location, he actually worked for the temporary agency. Upon realizing his mistake, he filed a new, amended claim naming the correct employer. However, the amended claim was filed one day after the 2-year statute of limitations had passed.

The Administrative Law Judge who conducted a hearing on Farris' entitlement to additional workers' compensation benefits found that his claim was barred by the statute of limitations. The Commission affirmed, adopting the ALJ's findings. Farris appealed to the Arkansas Court of Appeals who, relying on *Dillard v. Benton County Sheriff's Office,* 192 S.W.3d 287 (Ark. Ct. App. 2004), held that his mistake on his original additional benefits claim form was a "mistake to form and not to substance*." Farris v. Express Servs., Inc.*, 546 S.W.3d 530, 532 (Ark. Ct. App. 2018). In *Dillard*, the claimant filed a timely claim form for additional benefits but checked the "initial benefits" box instead of the "additional-benefits" section. The *Dillard* court held that the claimant's failure to correctly fill out the form should not be fatal to his claim, and that there was insufficient evidence to support the Commission's finding that his claim was properly dismissed. Relying on *Dillard*, the court of appeals in Farris' case concluded that the statute of limitations was tolled and reversed and remanded to the Commission.

The Supreme Court of Arkansas disagreed with the appeals court, holding that Farris' claim for additional benefits was barred by the statute of limitations. The reasoning behind their holding was that the case at bar was distinguishable from *Dillard*. There, the claimant mistakenly checked the wrong boxes on one claim form, whereas here, the claimant had filed two claim separate forms for additional benefits. Farris corrected his error by adding the correct employer on the second form he submitted, but the second form itself, unlike the individual timely but improperly submitted form in *Dillard*, was submitted after the period set forth by in section 11-9-702(b)(1). Accordingly, claimant failed to meet his burden of timely filing his additional benefits claim within the statutory time frame.

Farris v. Express Services, Inc., 572 S.W.3d 863 (Ark. 2019)

Q. ***Is a one-car, motor vehicle accident which is suffered by a home health aide, while traveling in between two patient's homes, and after stopping at the employee's own home, compensable?***

A. Yes. Stacy was a home health aide for Absolutely Care Management. As a part of her duties, she was required to travel to the homes of her clients and give them aide. On September 16, 2015, she was scheduled to see 2 clients. For the first client, she ran to the grocery store and delivered groceries. When she completed her duties there, she decided to go home and get a battery charger for her cell phone, as well as a bite to eat. On her way to her house, she stopped at her son's house to check in, then eventually went home, got her charger, a sandwich, and a soda. She then headed out to her next client, and called to let the client know she was on her way. She also called her office at ACM to inform them she was on her way to the next client. As she was leaving her home heading to her next client's house, she had a single vehicle accident and sustained severe injuries, including a brain injury and broken spinal cord.

The employer denied based on the coming and going rule. As a general rule, an employee traveling to and from the work place is not within the course and scope of their employment. However, the court likened this to the *Olsten* case where employee was a nursing assistant required to travel to patient's homes to provide nursing services. The court reasoned that Stacy was required to travel to her client's home and provide aide, she had completed her first client and traveled home before going to see her second client. The court determined it was of no consequence that she returned home before going to her second client's house as she was in route to the second client when she sustained her accident. The Court of Appeals affirmed the Commission.

Absolute Care Management v. Stacy, _____ S.W.3d _____ (2018 Ark. App. 166) Opinion delivered February 28, 2018.

Q. ***Is weed eating sufficiently repetitive enough to establish a "gradual onset injury?"***

A. No. This case posed to the Court of Appeals whether or not an Arkansas Highway & Transportation Department's employees' weed eating activities equated to a rapid repetitive movement as defined by the Workers' Compensation law. Dale Carlat is a 54 year old man who worked for the highway department since 2002. In October 2014, he complained of sharp pain in his shoulder, but did not report it as work-related until March 2015. Carlat ultimately had shoulder surgery for his reported injury, and the medical records note that Carlat complained that his shoulder pain was related to using a weed eater. The Commission rejected Carlat's claim indicating that while weed eating was arguable a repetitive activity, the Claimant failed to prove that performing this task was repetitive as required under the statutory provisions for establishing a gradual onset injury. Claimant testified that during mowing season he was required to conduct various work-related duties in his position, and these duties were verified by other witnesses. They included other duties that did not require weed eating. The Commission indicated that while weed eating was an integral part of Claimant's work-related activities at a certain time of the year, the record demonstrated that weed eating was neither the

Claimant's sole or primary responsibility, nor was Claimant required to perform this activity on a constant basis. Therefore, he failed to meet his burden of proof to show that weed eating was repetitive for purposes of the claim.

The Court of Appeals stated that for an injury to be compensable under gradual onset rapid repetitive motion law, a Claimant must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; (3) the injury was caused by rapid repetitive motion; and (4) the injury was a major cause of disability or need for treatment. The Court noted that no case in Arkansas had yet decided whether weed eating is repetitive movement. In fact, the Court cited that most of the repetitive movement cases involved factory or assembly line jobs. The Court likened this case to *Lay v. UPS,* in which the court affirmed the Commission's denial of benefits because a delivery truck driver, who briefly performs several different rapid motions, repeated at different intervals and separated by periods of several minutes, did not engage in rapid repetitive motion. Therefore, the Court of Appeals found that while Carlat had a physical job that required hard work, on the whole, the Commission's decision was not insufficiently supported and was therefore affirmed.

Carlat v. Arkansas Highway & Transportation Dept., _____ S.W.3d _____(2018 Arkansas App. 157). Opinion delivered February 28, 2018.

Q. ***In order for a Claimant to receive additional medical treatment, after a claim is denied, must they prove a change in their physical condition after the initial case was denied?***

A. Yes. On April 3, 2015, appellant sustained a compensable injury to his low back at work when he was lifting a tub of melted plastic that weighed an estimated 40 to 50 pounds. Claimant underwent care at UAMS and eventually had an MRI in July 2015 at Washington Regional Medical Center. He returned to follow-up with Dr. Knox, and Dr. Knox recommended an injection and physical therapy. Appellant sought compensation for the 2015 treatment at UAMS, as well as treatment with Dr. Knox. The employer controverted the additional treatment, and a hearing was held in which the ALJ issued an opinion denying the employee's claim and specifically ruling that employee failed to prove that the 2015 treatment was reasonable and necessary. That decision was not appealed.

Dr. Knox then corresponded with the employee's attorney in 2016 concerning causation and continuing difficulties. The employee saw Dr. Knox in June 2016 and the history provided on that date was essentially the same as given in 2015. The employee subsequently filed another claim for additional treatment contending that he was presenting a new issue as to whether or not he was entitled to additional medical care after the April 4, 2016 opinion by the ALJ. The only record of treatment after that decision was the visit with Dr. Knox on June 6, 2016, when he discussed the possibility of surgery. The employer contended that this additional treatment was barred by res judicata and collateral estoppel, and by the statute of limitations at a hearing. The hearing was held

in November 2016 and the ALJ ruled in a 2017 opinion that appellant's claim for additional treatment was not barred by the statute of limitations, but barred by res judicata. The court ultimately held that Claimant must first prove by a preponderance of the evidence that he sustained a change in his physical condition in order to overcome an application of the doctrine of res judicata. The Claimant, in this case, failed to prove by a preponderance of the evidence that he sustained a change of physical condition since the prior hearing, and therefore, res judicata applied. Claimant's underlying need for additional medical treatment was the same as it was in the previously denied claim, and that is why the claim was barred by res judicata. Substantial evidence supported the Commission's finding and appellant's claim was barred. The Court of Appeals affirmed the Commission.

Rothrock v. Advanced Environmental Recycling, _____ S.W.3d _____ (2018 Ark. App. 88). Opinion delivered February 7, 2018.

Q. ***Can a Claimant be entitled to additional medical treatment when a work-place injury aggravates or accelerates a pre-existing condition, to the point where additional treatment has been recommended?***

A. Yes. Claimant sustained an injury to her right index finger and left knee while working for the Arkansas Department of Human Services. She was 49 at the time of the injury. In 2013, a hearing was held to determine the compensability of her knee, and the Administrative Law Judge found that she proved by a preponderance of the evidence the injury to her knee was compensable. It was appealed and affirmed in 2014.

A second hearing was held in 2016 regarding if Claimant was entitled to a total knee replacement, entitled to permanent partial disability benefits in the form of an impairment rating, determination of temporary total disability and permanent partial disability rates, and whether Claimant was entitled to additional TTD benefits spanning from 2013 through August 2015. The employer argued that Claimant was not entitled to a knee replacement for her work-related injury, but rather to pre-existing, longstanding, degenerative joint disease. The Administrative Law Judge found that Claimant gave credible testimony with regard to her knee being asymptomatic prior to her injury; but that she did not dispute that she had pre-existing degenerative changes in her knee as shown by her medical records. The Administrative Law Judge found Claimant was entitled to 50% impairment to the left lower extremity, and that her rates for temporary total and permanent partial disability benefits established in a prior order would remain the same, and she would be awarded TTD from December 2013 through August 2015.

The employer argued on appeal that the Claimant's claim for a total knee replacement and corresponding disabilities benefits were barred by res judicata because she did not present evidence to preserve the issue regarding the surgery at the 2013 hearing, and despite having made an argument to the Commission, the Commission did not rule on the issue. The court found that the issue had been waived, and the merits did not need to be readdressed on appeal. As to additional care and benefits, the court found that

employers take employees as they are found, and an aggravation of a pre-existing, non-compensable condition by a compensable injury is compensable. The Administrative Law Judge had previously found that Claimant gave credible testimony as to not having had difficulties with her knee prior to her 2012 injury, and that after her fall, her knee became symptomatic. The Administrative Law Judge concluded that whatever damage was done to the Claimant's left knee due to her specific injury in 2012, caused the pre-existing condition to accelerate that resulted in the need for the total knee replacement, therefore, the surgery was a reasonable and necessary medical treatment. The court went on to affirm all of the other issues as found by the Administrative Law Judge below.

Arkansas Dept. of Human Services v. Shields, _____ S.W.3d _____ (2018 Ark. App. 247). Opinion delivered April 11, 2018.

Q. ***Can a worker be found to still have access to the open, competitive labor market, after an upper extremity amputation?***

A. Yes. It was undisputed in this case that the Claimant sustained a compensable work-related injury on September 15, 2013, while working for Tyson. Claimant injured his left hand and amputation below his elbow was necessitated. He was given prosthesis and reached maximum medical improvement on June 24, 2015. The Claimant sought permanent total disability benefits and provided a lengthy "constitutional brief" where he challenged the constitutionality of the Workers' Compensation Act, and indicated that he had submitted evidence that established the executive branch of the State of Arkansas and private interest had exerted pressure on the workers' compensation Administrative Law Judge Commissioners that infringed upon their decision independence and results.

The injury he sustained was to his non-dominant left hand, rather than his dominant right hand. He testified that although his left hand was injured, he had not been able to work since the injury. He had graduated from high school and before his employment with Tyson, was in the Navy for 9 years as a machine operator. Claimant also testified that after the injury, he received psychiatric treatment and had previously felt suicidal and useless. He was diagnosed with PTSD, was still experiencing nightmares, and wanted to return to a psychiatrist at the time of the hearing. The court found that the Commission did not err in concluding that Claimant had failed to prove that he was permanently and totally disabled and unable to earn any meaningful wages as a result of the compensable injuries. The court noted that the Commission had found that Claimant was able to perform household chores, cook for himself, had graduated high school, and 2 vocational rehabilitation assessments had identified potential jobs for him. As to the constitutionality arguments, these were rejected without discussion.

Woods v. Tyson Poultry, _____ S.W.3d _____ (2018 Ark. App. 186). Opinion delivered March 7, 2018.

Q. ***Can a claim which is not filed against the proper employer under the Statute, until after the Statute of Limitations has expired still proceed, when the Claim for Compensation itself was timely filed, but an improper employer was originally named?***

A. Yes. In this case, the court found that a Claimant who had initially named the wrong employer on his claim for additional benefits, but then amended the claim to correct the named employer had his statute of limitations tolled despite his initial mistake. The Claimant here appealed from a Commission decision finding that his claim for additional benefits was barred by the statute of limitations. The Court of Appeals agreed with the Claimant and reversed and remanded the case. Claimant was injured on May 12, 2014, when a crane fell on him. The only question on appeal was whether Farris's claim for additional benefits was time barred because he mistakenly named the wrong employer, in an otherwise timely filed claim. The court found that Claimant's action of filing, even an incorrect claim, tolled his statute of limitations. The court noted that in previous cases it was found that the failure to technically comply with the "call of the form should not be fatal to a claim when it was clear what was intended." Farris's mistake in his claim form for additional benefits incorrectly naming an employer who had previously paid benefits to him is a mistake as to form and not substance, and the statute of limitations was tolled. The case was reversed and remanded.

Farris v. Express Services, Inc. _____ S.W.3d _____ (2018 Ark. App. 189)
Opinion delivered Marcy 7, 2018

Q. ***Can a claim be denied when an alleged work-related injury which is controverted, is worsened by a subsequent non-work related accident?***

A. Yes. Claimant, Alice McCutchen, appealed the decision of the Commission and the Administrative Law Judge that she failed to prove by a preponderance of credible evidence that she had sustained a compensable injury to her right knee. The Court of Appeals affirmed.

Claimant worked for the Human Development Center in 2013 as a food prep specialist. Her duties included cooking, cleaning, sweeping, prepping food, and answering the phone. She claimed that while working on May 9, 2016, she injured herself between 2:45 p.m. and 5:00 p.m. while on break. She testified that she was preparing to eat a sandwich, and the stool she was attempting to sit on moved, causing her to fall and land on top of it. After the fall, she received a phone call to prepare more food for a client, which she did and completed the remainder of her duties and left. After her shift, she went to church and while standing at church, she felt a crack and noticed immediate pain and swelling in her right knee. She went to the emergency room the following day and reported the injury to her employer that same day. She was ultimately diagnosed with a meniscal tear, osteoarthritis, synovitis and chondromalacia, and underwent surgery on July 1, 2016. She was released to return to work the following August.

Claimant testified she was unsure of the time of her injury, but believed it was around 5:00 p.m. She was unsure when she fell if her knee twisted, but she indicated to the Court her ankle went one way and her knee went the other, and all of her weight was on her right knee. She indicated that a co-worker saw her on the floor and asked if she was okay. She denied doing anything to her knee between the time she left work and arrived at church and felt the crack in her knee. When questioned by the Administrative Law Judge at trial, she stated she really didn't experience any pain or symptoms after her fall until she went to church following her shift at the time her knee popped. The Administrative Law Judge found that Claimant injured her knee at church and denied benefits.

The Commission affirmed and adopted the Administrative Law Judge's findings. The Court of Appeals noted the only testimony reflecting that appellant fell at work on the claimed date of injury came from appellant. They noted that the testimony of an interested party is always considered to be controverted, and it was within the Commission's province to determine the credibility and weight to give her testimony. Because Claimant did not have evidence that she had experienced any pain, swelling, or symptoms until her knee popped and buckled while she was sitting at church, and she was able to complete all of her job duties during her shift that day, they affirmed the Commission's decision and the claim
was denied.

McCutchen v. Human Development Center, _____ S.W.3d _____(2018 Ark. App. 239). Opinion delivered April 4, 2018.

Q. ***Can a claim still be compensable, even though the claimant admits to illicit drug use within 24 hours to the work place injury?***

A. Yes. The issue in this case was whether methamphetamine was present in the Claimant's body when he was injured, and if the employer and insurer were entitled to receive a rebuttal presumption that the work place injury was substantially caused by the drug use. The Commission denied that assertion and the employer/insurer appealed the decision. The Court of Appeals affirmed.

Claimant was employed as a truck driver and was carrying a load from Van Buren to St. Louis on June 4, 2015. Claimant was injured at a nursery loading dock when his left hand became wedged between two plates and a hydraulic lift. The Claimant was able to free himself, phone a friend for directions to a nearby hospital, and drove himself for medical treatment. The emergency room doctor noted that Claimant had a normal mood and affect, and the orthopedic surgeon who removed the Claimant's thumb stated in her preoperative and postoperative diagnosis that Claimant suffered acute methamphetamine use in that he had admitted to recreational drug use of methamphetamine every month or two, and that patient stated he smoked and injected "go fast," another name for methamphetamine, within the last 24 hours and he appeared to be intoxicated.

At trial when the Claimant was questioned about his deposition testimony, he stated he did not know why the history within the medical records noted that he would have used methamphetamine within 24 hours of the injury. The court noted that under Arkansas law, workplace injury is not compensable if it is substantially occasioned by the presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's order. The court noted that given the evidence in the medical records and the Claimant's testimony, a conclusion contrary to the one made by the Commission was conceivable, but that they were going to have to make a close call on a conflicted record. After having considered the whole record, the court held the Commission did not commit reversible error by deciding that the accident that occurred on June 4, 2015 was not substantially occasioned by the use of an illegal drug. No drug or paraphernalia was found on Claimant's person, and there was no other physical clue that he had ingested methamphetamine in reasonable proximity to the injury. Therefore, the Commission was confirmed.

National Transit Staffing, Inc. v. Norris, _____ S.W.3d _____ (2018 Ark. App. 229). Opinion delivered April 4, 2018.

Q. ***Can a work-place accident be found compensable even when there are no witnesses to the accident, and no physical evidence or symptoms of an injury?***

A. Yes. Migliori was an administrative analyst for Northwest Arkansas Community College. When she arrived at work on July 28, 2016, she retrieved a yoga ball from a co-worker's office and used it in place of her office chair. When she stood up to get a book behind her and turned around and pushed off from her desk, she fell off the ball and hit the left side of her head on the desk. She reported it that day and sought medical treatment. She was ultimately diagnosed with post concussive headaches, reported ringing in her ears, reported having a bump on her head, as well as issues with vertigo and visual impairment. The employer argued that Claimant did not sustain disability, and that the fall did not happen.

The Commission found that there was enough medical evidence to substantiate Claimant's story that she fell. Despite that the employer argued there were no witnesses to the fall, it did not knock off her glasses, and no one saw a cut, bump, bruise, or swelling to her head immediately after the accident. The court found that Claimant had established a compensable head injury, including the diagnosis of post concussive headaches, as well as a contusion of the scalp. In fact, one of the doctors had ordered face and CT scans based upon the diagnosis of contusion of the scalp after examining Claimant. The court found the Commission did not disregard medical evidence, but rather weighed it, giving more weight to the experts that indicated the Claimant's current complaints were caused by the fall from the yoga ball rather than any pre-existing conditions. Therefore, the case was affirmed.

Northwest Arkansas Community College v. Migliori, _____ S.W.3d _____ (2018 Ark. App. 286). Opinion delivered May 2, 2018.

ARKANSAS SUPREME COURT

Q. ***Are attorney's fees awarded to a Claimant calculated based upon the amounts owed to Claimant prior to any statutory offset?***

A. Yes, but with a strong dissent. This case was a decision appealed from the full Commission, regarding Oscar Gerard, who was sustained a compensable injury on May 12, 2002. It was an accepted claim paid by the Arkansas Game & Fish Commission. Between 1999 and 2013, Gerard had 3 surgeries for his work-related injuries while employed by the Arkansas Game & Fish Commission. He was declared to be at maximum medical improvement and the Arkansas Game & Fish Commission accepted liability for 16% impairment rating, and a 10% wage loss. The Arkansas Game & Fish Commission accepted Gerard's 23% injury rating.

In 2015, Gerard sought additional temporary total disability benefits stating that he was entitled to either permanent total disability of benefits or alternatively, wage loss disability benefits as a result of his work-related injury. Gerard argued that he was entitled to permanent partial disability benefits in excess of the 10% due to the 7% increase in his impairment rating, entitled to additional temporary total disability benefits. The ALJ held that Gerard established that he was entitled to a 35% wage loss and that the Arkansas Game & Fish Commission was allowed to take a credit for the previous 10% wage loss paid. Further, the ALJ found that that Arkansas Game & Fish Commission was entitled to the offset provided in Arkansas Code Ann. 11-9-411, because it appeared that Gerard's Arkansas public Employment Retirement System benefits would far exceed his monthly worker's compensation rates. The ALJ also found that Gerard's attorney was entitled to a 25% fee on the indemnity benefits awarded with one-half to which was to be paid to Claimant and one-half to be paid by the respondent in accordance with Arkansas Code Ann. 11-9-715. Gerard filed a motion to enforce payment of the attorney's fees and asserted that his disability retirement compensation exceeded the award of additional benefits and the offset depleted the payable benefits from which the attorney's fee should be paid. Gerard argued that he never received any compensation because Arkansas Code Ann. 11-9-715(a)(b)(2)(B)(i) requires that Gerard's payment of attorney's fees come from any benefits he was awarded, and the Arkansas Game & Fish Commission must pay the remaining half of the fees.

The court found applying those rules and statutory construction that 11-9-715 provides that attorney's fees will be paid one-half by the employer or carrier in addition to compensation awarded and one-half by the injured employee or dependents of the deceased employee at compensation payable to them. Compensation in this case, meant money allowance payable to the employee or his dependents under 11-9-102. The amount of attorney's fees calculated was based on Gerard's additional award of benefits, specifically, the 7% increase in the impairment rating and 25% wage loss that the Arkansas Game & Fish Commission challenged. Gerard's one-half was to be paid

from the amount payable to him from the Arkansas Game & Fish Commission for his compensable injury.

The court indicated that based on the plain language of the statute, Gerard's one-half of the fee is to be derived from the sum he is paid by the Arkansas Game & Fish Commission for his injury. The Arkansas Game & Fish Commission must provide Gerard's one-half of the fee from the compensable award because the plain language provides that Gerard's fee is to come from compensation to his him for his work-related injury. In other words, one-half of Gerard's fee to his attorney is to come from the Arkansas Game & Fish Commission, the party that caused the litigation. The court indicated the plain language of the statute dictates that the parties here each pay one-half of the attorney's fees. For Gerard, that one-half is derived from compensation payable to him because of his compensable injury, and the court found to hold otherwise would punish Gerard, an injured employee involved in a controverted claim, and that the amount of the fee thus comes from the payable amount owed to Gerard *pri*or to any offset. The interpretation, the court stated, was supported by the case law surrounding Arkansas Ann. Code 11-9-715, in *Cleak v. Great Southern Metals,* 335 Ark. 342 , 981 S.W.2d 529 (1998).

Dissent:

Chief Justice Kemp dissented indicating that strict construction meant narrow construction indicating the doctrine of construction was to use the plain meaning of the statute. Judge Kemp noted that §11-9-715 and §11-9-411 should be read harmoniously and expressly provided that each party be responsible for one-half of the attorney's fees, and that the Claimant's one-half is paid out of the compensation payable to the Claimant. Therefore, if the compensation was zero, because §11-9-411's offset eliminates Arkansas Game & Fish Commission's obligation to pay any additional benefits to Gerard, then deducting from zero still leaves Arkansas Game & Fish Commission with no responsibility to pay Gerard's share of the attorney's fee. Judge Kemp further noted there was no statutory provision for employers to be fully responsible for attorney's fees, and no provision that permitted them to seek reimbursement from employers for 100% of attorney's fees when no compensation is due to the Claimant. Judge Kemp believed that the Commission erroneously interpreted §11-9-715 and §11-9-411. Therefore, Judge Kemp indicated he would reverse the Commission's decision rather than affirm it.

Arkansas Game & Fish Commission v. Gerard, _____ S.W.3d _____ (2018 Ark. 97). Opinion dated March 29, 2018.

Q. ***Can a business contest Workers' Compensation benefits to an employee who is injured on-the-job, if that same worker is an employee of a separate employer providing a shared employee on an independent contractor basis?***

A. Yes. Deputy Morgan injured his ankle on February 19, 2014, while working a part-time security job at Brookshire Grocery Store. He noticed a female in the store, who he

believed was shoplifting, approached her, found several pieces of merchandise concealed on her person. Upon speaking with the manager, who insisted the shoplifter go to jail, he handcuffed the female suspect and formally placed her under arrest. She was then uncuffed when she asked to go to the restroom and when the restraint was unlocked, she bolted. Deputy Morgan pursued her and sprained his ankle while sprinting after her down the stairs. Deputy Morgan informed the sheriff's department of his injury, and his medical expenses were submitted to his health and accident insurance carrier, but personnel at the sheriff's department told him it was a worker's compensation claim. Brookshire contested its liability for Deputy Morgan's worker's compensation benefits arguing that he was an independent contractor, not an employee.

The court noted it was consistent in its holdings that an independent contractor is one who contracts to do a job according to his or her method, and without being subject to the control of the other party, except as to the result of the work. There was no fixed formula for determining who is employee versus an independent contractor, therefore, the determination will be particular to the facts of each case. The court noted that Deputy Morgan testified he is a certified law enforcement officer 24 hours a day, and the sheriff's department required that he secure from them "permission" to provide security for Brookshire. Brookshire did not control what he wore, as the sheriff's department would have when he was on duty, Brookshire did not provide his tools, and his job duties were sworn to him by a fellow deputy, whereas Brookshire never provided him training. Deputy Morgan stated that his formal training as a law enforcement professional was from the police academy. There was nothing in the record that indicated that Deputy Morgan should be considered an employee of Brookshire, as Brookshire did not interview him for his position, though his time at Brookshire was scheduled by an independent agent that was not directly connected with the store. Deputy Morgan was essentially a uniformed deputy who was assigned a time slot to provide a police presence at Brookshire to maintain law and order. Therefore, the court found that Deputy Morgan was an independent contractor and the court reversed and remanded the case to the Workers' Compensation Commission for further proceedings.

Dissent:

Chief Justices Kemp, Goodson & Wendt dissented, with Chief Just Kemp writing the dissent indicating that while there was no hard and fast rule for determining employee versus independent contractor and each case must be analyzed as to its facts, if this case presented facts upon which reasonable minds could differ, the court should have deferred to the Commission and affirmed the decision.

Brookshire Grocery Co. v. Morgan, 218 Ark 62 (2018), 539 S.W.3d 574.
Opinion delivered March 1, 2018.

Q. *Should a single eye injury be converted to a body as a whole disability rating, when the work-place injury causes other ratable impairments?*

A. No. On February 24, 2012, Yousey was severely injured while unloading equipment from Multi-Craft and suffered multiple facial fractures. He also suffered a broken foot, a broken hand, and a torn rotator cuff. Yousey underwent surgical repair, but was left with a misalignment of his eyes to the left eye being sunken in and downwardly displaced. Because of the left eye injury, he had ongoing issues with double vision and was unable to pass a required physical, and it prevented him from holding his commercial driver's license. He also continued to have problems with ongoing headaches that required medication, would have to get injections in the back of his head to treat headaches, had ongoing problems with short term memory, as well as facial numbness and sensitivity to cold food or beverages. He also had issues with ongoing depression issues.

When tried before the ALJ, the opinion issued indicated that Yousey was entitled to 29% impairment to the body as a whole for his brain injury, but not entitled to a 100% impairment to his vision. In addition, he was awarded $3,500.00 for his facial disfigurement, and an additional 15% impairment rating for facial disfigurement, and 20% for uncontrolled facial neuralgia pain. The employer appealed indicating that the ALJ award of a 15% rating for facial disfigurement and an award of a 20% impairment for uncontrolled facial neuralgia pain was contrary to facts and law. Yousey filed a cross-appeal indicating that the ALJ erred in concluding that he failed to prove he was entitled to a 29% whole body impairment from his brain injury and a 100% rating for the loss of vision in his left eye. He also believed that the ALJ erred in concluding that he attempted to prove a 100% impairment to his visual system, whereas Yousey indicated he was asking for impairment only to his left eye, not his entire visual system. The Commission affirmed in part, and reversed in part, the ALJ's decision.

The Commission found Yousey was entitled to the 29% for his brain injury, and 24% for the left eye, maintained the award for $3,500.00 for facial disfigurement, but that Yousey was not entitled to permanent anatomical impairment for facial disfigurement in excess of the cap imposed by the statute. They also found that Yousey was not entitled to benefits based on a permanent anatomical impairment rating based on pain. Again, the employer appealed indicating that the Commission's determination that Yousey was entitled to the 29% impairment rating for the brain injury was not supported by substantial evidence and the Commission was in err in determining that the 25% impairment to the body as a whole for the left eye injury was not supported by evidence. Yousey filed a cross-appeal indicating that the Commission was in err in determining he was not entitled to the 25% impairment to the body for damage to the cranial and trigeminal nerves that resulted in uncontrolled facial neuralgia and pain, and the Commission was in err in determining he was not entitled to a 15% impairment for structural integrity of the face.

The court found the Commission's decision that Yousey was entitled to 29% impairment rating was supported by substantial evidence citing that the neuropsychological testing presented without more was not adequate to establish organic brain injury by objective findings within the meaning of the statute. However, Yousey had presented neurological testing and additional medical evidence of his brain injury. Yousey did not simply suffer a mere concussion or scalp laceration, but was so severely fractured according to Dr. Morse that his CT scan revealed skull fractures that were so severe that air was able to

go from the outside to the inside of his skull surrounding his brain. As to the left eye injury, the court found that Yousey was entitled to 100% vision loss of his left eye, and that the Commission should not have converted such impairment to the body as a whole. Because Yousey's impairment came within a scheduled injury category, he would be limited to the 100% impairment of the left eye and the award should be modified accordingly. The court cited Dr. Andrew Lawton, an ophthalmologist with specialty in neuro-ophthalmology who testified that Yousey had surgery, but continued to have issues with movement of the left eye, as well as additional vision problems because of the misalignment of the left eye being sunken in and downwardly displaced permanently following surgery. As to the trigeminal nerve injury claim, the court affirmed the Commission's denial of these benefits indicating that when determining physical or anatomical impairment, a physician or other medical provider, nor the judge, can consider complaints of pain. Therefore, Yousey was not entitled to an impairment rating for the nerve injuries because the rating by Dr. Morse was solely based on a level of pain.

Multi-Craft Contractors, Inc. v. Yousey, 218 Ark. 107 (2018).
Opinion delivered April 5, 2018.

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