BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

AWCC FILE № H006469

JAMES W. BROWN, EMPLOYEE	**CLAIMANT**
L & R DISTRIBUTORS, INC., EMPLOYER	**RESPONDENT**
LIBERTY MUTUAL FIRE INSURANCE COMPANY, CARRIER/TPA	**RESPONDENT**

OPINION FILED 25 AUGUST 2023

On hearing before Arkansas Workers' Compensation Commission (AWCC) Administrative Law Judge JayO. Howe, 9 March 2023, Pine Bluff, Jefferson County, Arkansas.

Mr. Steven R. McNeely, Attorney-at-Law, of Jacksonville, Arkansas, appeared for the claimant.

Mr. Jason M. Ryburn, Attorney-at-Law, of Little Rock, Arkansas, appeared for the respondents.

I. STATEMENT OF THE CASE

The above-captioned case was heard on 9 March 2023 in Pine Bluff, Arkansas, after the parties participated in a prehearing telephone conference on 24 January 2023. A Prehearing Order, admitted to the record without objection as Commission's Exhibit № 1, was entered on 25 January 2023. The Order stated the following ISSUES TO BE LITIGATED:

1. Whether the claimant is entitled to additional indemnity benefits and medical treatment.

2. Whether the claimant is entitled to any attorney's fee.

All other ISSUES were reserved.

That Order set forth the following STIPULATIONS:

1. The AWCC has jurisdiction over this claim.

2. An employee/employer/carrier relationship existed on 24 August 2020 when he sustained a compensable injury to his back.[1]

3. The respondents accepted the back injury and paid accompanying benefits, including payment for a back surgery.

4. The respondents denied an injury to the claimant's right foot

5. The parties would stipulate to the applicable compensation rates.

The claimant was the sole WITNESS at the hearing.

The parties' CONTENTIONS, as set forth in their prehearing questionnaire responses, were incorporated by reference into the Prehearing Order. Those responses were also admitted to the record as Commission's Exhibit №s 2 (for the claimant) and 3 (for the respondents). The CLAIMANT CONTENDS:

1. That he is entitled to additional TTD for his back injury through his return to work on 21 December 2020.

2. That he is entitled to reimbursement for purchasing a power lift recliner, an adjustable bed, and a Teeter inversion table.

3. That he is entitled to additional mileage.

4. That he is entitled to medical treatment, to include a surgical procedure, and additional TTD for his right foot.

The RESPONDENTS CONTEND:

1. That all appropriate benefits have been paid and that the statute of limitations bar portions of the additional claims sought.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

[1] The Order correctly notes that the claimant sustained a compensable injury to his back. It erroneously states, at Stipulations Paragraph 2, that he also sustained an injury to his right foot. As noted in Stipulations Paragraph 4, and consistent with the respondents' actual position, the respondents denied a compensable injury to the claimant's right foot. This was addressed on the record before any testimony was offered. See TR at 8.

Having reviewed the record as a whole and having heard testimony from the witness, observing his demeanor, I make the following findings of fact and conclusions of law under Ark. Code Ann. § 11-9-704:

1. The AWCC has jurisdiction over this claim.

2. The previously noted stipulations are accepted, specifically that a back injury was accepted as compensable, but not the claimant's foot injury.

3. The claimant produced a preponderance of evidence that his TTD benefits were underpaid due to a mathematical error on the Form W and is entitled to the balance owed for the underpaid TTD benefits.

4. The claimant failed to prove, by a preponderance of the evidence, that he was entitled to TTD benefits between the last posted payment and his return to work on 21 December 2020.

5. The claimant failed to prove, by a preponderance of the evidence, that he suffered a compensable foot injury, that he is entitled to additional TTD benefits related to his foot, and that he is entitled to additional treatment related to treatment for his foot.

6. The claimant failed to prove, by a preponderance of the evidence, that the purchase of an adjustable bed, power recliner, and Teeter device were reasonable and necessary for the treatment of any health condition.

7. The claimant is entitled to mileage associated with approved care for his back injury.

8. The claimant's attorney is entitled to a fee in an amount consistent with the indemnity benefits noted above.

III. HEARING TESTIMONY and MEDICAL EVIDENCE

A. *Claimant on Direct Examination*

James Wesley Brown is a fifty-three (53) year old man who began working for L & R Distributors in 2009 and remained employed there at the time(s) relevant to this case. [TR at 13] He was working as a warehouse supervisor in August of 2020 and was responsible for ensuring merchandise moved from one area of the warehouse to another. [TR 17-18] Mr. Brown stated that he injured his back on 24 August 2020 while operating a stand-up forklift. [TR at 19] He felt a "tweak" when the forklift bumped over a crack in the floor.

The claimant felt increasing pain through that night and reported the injury the next day. [TR at 20] He was sent to Healthcare Works and was initially taken off work pending further diagnosis and treatment. He ultimately did not return to work until 21 December 2020. [TR at 28]

Mr. Brown stated that he did not experience any specific incident or injury to his foot, separate from the incident that he claimed injured his back. [TR at 29] He said that he was paid TTD beginning in August and through October. He acknowledged the payments reflected on the respondents' payment printout [see Cl. Ex. № 2 at 18-19], but denies receipt of the last payment listed, which would have covered 26 October to 8 November 2020. [TR at 30] The claimant stated that he returned to work at light duty on 21 December 2020. [TR at 31]

The claimant said that he did not care much for Dr. Paulus, who was treating him at the end of 2020 and who returned him to work without any restrictions. [TR at 32-33] When an adjuster explained that his benefits stopped, he sought a Change of Physician. Mr. Brown also took issue with his mileage payments stopping after Dr. Paulas released him to work. [TR at 33-34]

Mr. Jones was later seen by Dr. Samuel Overly at UAMS, who eventually performed a spinal decompression and fusion surgery on 15 November 2021. [TR at 36, Cl. Ex. № 1 at 76-83] The claimant said that the surgery helped his back pain. About a year[2] before the surgery, he bought an adjustable bed, which he claims he "had to get." [TR at 38] He also bought a power lift recliner and Teeter Hang Up inversion table. [TR at 39-40] He does not

[2] Claimant erroneously testified that he purchased the bed about a month before the surgery. The records, however, reveal that the surgery was in November of 2021 and the bed was purchased in October of 2020.

take issue with his TTD benefits paid between his surgery in November and his subsequent return to work in February. [TR at 41]

While Dr. Overly was seeing the claimant for his back, he referred Mr. Brown to Dr. Chelsea Matthews for the ongoing nerve issue in his foot. [TR at 42] The claimant is seeking payment for surgery to address the nerve issue in his foot. [TR at 43] He said that he began reporting trouble with his foot when he was seeing providers for his back problem. He suffered no injury or trauma to his foot. [TR at 44]

After returning to work at L & R, the claimant continued until his position was eliminated after a management change. [TR at 45] He signed a separation agreement and received $8,034.00 in severance under the terms of the agreement.

Apart from his employment with the respondents, the claimant also worked for Holiday Inn, beginning around August of 2021. In November of 2022, after separating from L & R, the claimant filed for unemployment. [TR at 47] His unemployment claim was accepted, and he began receiving benefits accordingly. [TR at 48]

The claimant closed his direct examination by explaining that he hopes to find new work and reiterating his request for reimbursement for the bed, recliner, and Teeter device. [TR at 49] On brief examination from the Commission, he did not dispute that Dr. Matthews noted in February of 2022 that he had no work restrictions. [TR at 50]

B. *Claimant on Cross Examination by Mr. Ryburn*

Mr. Brown stated again that he denied receiving TTD payments for the October/November period in 2020. [TR at 51] Mr. Ryburn noted the respondents' documentation showed the check being issued, but did not have any record proving that it was actually deposited by the claimant. [TR at 52]

The claimant confirmed that he was let go from his employment, along with several others, as part of a restructuring. *Id.* On the issue of whether his foot problem was related to

his back injury, counsel asked, "it turned out to be a Morton's neuroma, and not radicular pain referred from your back?" [TR at 55] Claimant answered, "Well, that's what they called it. I don't know. But that's what, you know, they called it when I started complaining to them about it." *Id*.

Mr. Brown acknowledged a previous injury to his foot that he failed to report to his providers when seeking treatment relevant to this case. [TR at 56] He said that was "because I didn't feel it at the time." *Id*. He also agreed that he did not list a foot injury on his Form AR-C in this case was dated October of 2022. [TR at 57] Nor did he list his foot on the Form AR-N, Employee's Notice of Injury, dated September of 2020. [TR at 58]

After surgery, Dr. Overly charted that the claimant "had complete resolution of radicular issues. He is still having pain the right foot that is likely a Morton's neuroma. I'm referring him to see my partner, Dr. Matthews, for this." [TR at 59] Dr. Matthews listed the Morton's neuroma as a chronic problem. [TR at 58] On the distinction between his back injury and the foot issue, respondents' counsel asked, "in your mind, the fact that the radicular pain was going down your right leg and you have a Morton's neuroma in your right foot, that those things must be tied together?" The claimant answered, "Yes, sir, for me it is. Yes, sir." [TR at 61] He then reaffirmed that he suffered no specific injury to his foot around the time that he began complaining about it to the providers. When asked, "can you point out an instance in Dr. Overly's reports where he said a Morton's neuroma is caused by a back injury?" he admitted, "I can't point that out… but anything can happen to the body." [TR at 62]

Mr. Brown went on to agree that his severance was paid out by the respondents as agreed and that it was paid out as "salary continuation." [TR at 65]

He acknowledged that when applying for unemployment benefits he said that he was willing and able to work. [TR at 66] "Yes, sir, I did do that, because I was wanting my check."

Regarding the conflict between that statement and his present claim for TTD related to the foot issue, he admitted that he was "willing to state on that unemployment application that [he was] not temporarily and totally disabled by saying that [he] could work." [TR at 67] He went on to say, "I don't think I ever lied." [TR at 70]

> Q: But you did to the Department of Workforce Services.
>
> A: About when they said was I was able to work?
>
> Q: Correct.
>
> A: Well, that wasn't intentionally. Like I said, I did it based upon to get my check… I was looking to receive my check, cause I've got bills to pay.
>
> Q: And you're looking to receive a check now, are you not, from this workers' comp claim?
>
> A: Yes, sir. *Id.*

Regarding the medical bed, recliner, and Teeter device, the claimant acknowledged that they do not appear mentioned in the medical records until more than two (2) years after the purchase of the bed, when Dr. Overly noted that he was seeking reimbursement through Workers' Compensation for those purchases. [TR at 72] On examination by the Commission, the claimant acknowledged that he could not point to any place in the medical record prior to purchasing any of the devices where they were ordered or recommended by a treating physician. [TR at 75] He nonetheless maintained that someone told him at some point in his treatments that he should buy them. [TR at 75-76]

C. *Claimant on Redirect and Recross*

The claimant offered brief testimony around the TTD payment he claims he did not receive, with counsel noting that the coding on the payment sheet [Cl. Ex. № 2 at 18-19] was different for the October/November check versus those issued before it. No party from the respondent was present to explain the payment coding.

The entire file was incorporated by reference and, pending receipt of post-hearing briefs, the case was submitted.

D. *Post-hearing Briefing*

Upon conclusion of the testimony, post-hearing briefing was discussed. By agreement, those briefs were due by Friday, 7 April 2023. Both parties offered timely submitted filings.

In his brief, the claimant urged that he was entitled to: (1) a correction in the compensation rates paid for the TTD benefits he received; (2) benefits for the foot issues; (3) additional TTD benefits between the last Respondent-noted payment and his self-reported return to work on or about 20 December 2020; (4) reimbursement for the medical bed, recliner, and Teeter device; (5) additional mileage; (6) denial of any respondent credit for the severance payments; and (7) attorney's fees. [See, generally, Cl. Brief]

In its simultaneously submitted brief, the respondents argued: (1) that the claimant did not sustain a compensable foot injury; (2) that he was not a credible witness; (3) that the severance payments foreclosed any right to TTD during the time relevant to those payments; and (4) that he was not entitled to any reimbursement for the medical devices. [See, generally, Resp. Brief]

IV. ADJUDICATION

The stipulated facts are outlined above. It is settled that the Commission, with the benefit of being in the presence of the witness and observing his or her demeanor, determines a witness' credibility and the appropriate weight to accord their statements. See *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 448, 990 S.W.2d 522 (1999).

A. The Claimant is Entitled to Additional Monies for Underpaid TTD Benefits for his Back Injury.

The claimant notes a discrepancy in the wage information provided by the respondents and the information provided to the Commission from which his TTD payments

were calculated. The respondents offer no explanation for why the total wage amount of $32,509.08 [Cl. Ex. № 2 at 24] is not used for the gross wage calculations appearing on Form W [Cl. Ex. № 2 at 26]. The $32,468.90 and $31,993.88 totals appearing on the Form W appear to be entered on the form in error. The TTD benefit payments should be adjusted accordingly, with the claimant being entitled to the balance owed against the miscalculated amounts.

Additionally, the claimant asserts that he did not receive the terminal payment on 2020 TTD benefits for the period listed as 26 October 2020 to 8 November 2020. At the hearing, the respondents offered no proof of receipt or deposit by the claimant on that payment. Absent presentation of proof of the claimant's actual receipt of those funds, he is entitled to a reissue of that payment in the adjusted amount noted above.

B. The Claimant Failed to Prove that he was Entitled to Additional TTD in 2020 on his Back Injury.

Temporary total disability (TTD) is that period within the healing period in which the employee suffers a total incapacity to earn wages. *See Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Gaps appear in the claimant's medical documentation supporting his time off work. Here, the medical evidence shows that the claimant was first taken off work until 31 August 2020 after his initial presentation to a provider on 25 August 2020. [See Cl. Ex. № 1 at 2, 6] At the next appointment, he was kept off work until 7 September 2020. *Id.* at 11. Another note shows him ordered off work until 6 October 2022. *Id.* at 16.

Mr. Brown then saw Dr. Paulus for the first time on 20 October 2020. *Id.* at 17. Dr. Paulus noted, "I'm not sure the chronic pathology noted by the radiologist on MRI fits with this mechanism of injury, but again I'd like to review the MRI myself." *Id.* at 20. He prescribed physical therapy and Gabapentin, but did not order the claimant off work. *Id.*

Testifying about having to return to work, the claimant stated, "if I wouldn't have came [sic] back, then they was going to terminate me. And I was trying to get, what led me there was the note that the nurse sent to [the insurance adjuster] Ms. Dianne Day saying I could come back full duty with no restrictions. And that was my first meeting with their doctor, Stephen Paulus." [TR at 32] That return-to-work note does not appear in the record.

The claimant testified at the hearing:

> Q: … And explain to the judge why you think you were disabled during that period of time, the problems you were having.
>
> A: Oh, why they didn't pay me?
>
> Q: No, why you weren't working.
>
> A: Oh, because I couldn't work, I mean, because of my, like I said, my back and what I do at the job, so I couldn't at the time.
>
> Q: All right. [TR at 31]

Dr. Paulus next saw the claimant on 5 November 2020 stating again that, "[g]iven the nature of his degenerative changes noted on imaging, I'm not sure the chronic pathology fits with this mechanism of injury." *Id.* at 23. They discussed possible injections for his back pain, but no work restrictions were ordered.

That visit appears to correlate with the time that the TTD payments stopped and with the time that the claimant explains he was told by the adjuster that the respondents were "not going to pay you anymore because they said you had no restrictions." [TR at 33] He objected and was told the "only way I [the respondents] can start paying you back again is for you to go back and have them to overrule that return to work notice." *Id.*

After returning to work on 21 December 2020, the claimant presented to Dr. Paulus for the last time. The 31 December 2020 physician's note states:

> I had a lengthy conversation with Mr. Brown, his wife, and our WCC liaison Zorian about the pathophysiology of his symptoms, *physician-directed work restrictions vs self-imposed limitations*, work safety, and the causality (or

> in this case, I believe the lack thereof) between the work accident he described and the chronic pathology revealed by his advanced imaging. I offered for him to seek a second opinion, as he's clearly displeased that (A) I have continued his work status and (B) that I cannot causally link his injury to the MRI findings, and he will contact his worker's compensation adjuster with his decision… [See Cl. Ex. № 1 at 27] (emphasis added).

Dr. Paulus provided a work notice on the day of that visit making clear that the claimant had no physician-directed work restrictions. *Id*. at 28.

Even absent the availability of the actual return-to-work form noted earlier, there is clear evidence that the claimant chose, of his own accord, not to return to work.[3] The claimant offers little beyond his own belief to advance his (otherwise unsupported) claim for additional TTD benefits before returning to work in December. The record does not indicate a finding that he was both within a healing period *and* totally incapacitated from earning wages during the relevant times. See, e.g., *Davis v. Remington Arms Co.*, 2018 Ark. App. 390, 557 S.W.3d 894. He is, therefore, not entitled to the additional TTD benefits sought for his back injury in 2020.

C. The Claimant Failed to Prove by a Preponderance of the Evidence that he Suffered a Compensable Foot Injury.

Under Arkansas' Workers' Compensation laws, a worker has the burden of proving, by a preponderance of the evidence, that he sustained a compensable injury. Ark. Code Ann. § 11-9-102(4)(E)(i). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). The parties stipulated to an accepted back injury, but they do not agree on whether the claimant also suffered a compensable work injury to his foot while driving a forklift. He is not clear as to whether the foot problem arose as gradual onset or by specific incident, though the specific incident of driving the forklift

[3] The claimant makes no allegation that he was threatened with termination for absenteeism during any period of time off work actually ordered by a physician or provider. Instead, it appears his refusal to return to work because he disagreed with Dr. Paulus led to the threat of termination for the same.

over the cracked floor seems most likely from his testimony. Regardless, his claim for a compensable foot injury fails either way.

To prove a specific incident injury, the claimant must establish four (4) factors, by a preponderance of the evidence: (1) that the injury arouse during the course of employment; (2) that the injury caused an actual harm that required medical attention; (3) that objective findings support the medical evidence; and (4) that the injury was caused by a particular incident, identifiable in time and place. See *Cossey v. G. A. Thomas Racing Stable*, 2009 Ark. App. 666,5, 344 S.W.3d 684, 689.

To prevail on that claim for a gradual onset injury, he must prove, by a preponderance of the evidence that: (1) the injury arose from his employment; (2) the injury caused actual harm that required medical attention; and (3) the injury was a major cause of the need for treatment. The existence and extent of the injury must be proven by objective medical evidence. See *Wal-Mart Stores, Inc.*, *supra* at 446; Ark. Code Ann. 11-9-102(4)(E)(ii). For an injury to be considered a "major cause" for a need for treatment, it must be more than fifty percent (50%) of the cause and it must be established, by a preponderance of the medical evidence. Ark. Code Ann. §11-9-102(14)(A-B).

The claimant failed to prove, by a preponderance of the evidence, that he sustained a compensable foot injury under either theory. While his foot complaints appear regularly in the medical records, he cannot show a causal link between his driving a forklift in August of 2020 or some other workplace conditions creating a causal link between his work and his Morton's neuroma. At best, he can rely on a June 2021 note that states "the pain in his foot, which he seems most concerned about, is not a classic dermatomal manifestation of L5 pain, though it certainly can be." [See Cl. Ex. № 1 at 61] His foot pain was addressed again, however, in a December 2021 post-surgical follow-up note with Dr. Overly. "He is happy to report that his radicular complaints have resolved, though he still does feel like he has a rock

[under his foot] an issue which *I told him initially was likely a Morton's neuroma*." [See Cl. Ex. № 1 at 84] (emphasis added). The note continues, "[h]e has had complete resolution of his radicular issues. He is still having the pain in the right foot that is likely a Morton's neuroma. I am referring him to see my partner Dr. Matthews for this." *Id.*

The claimant then saw Dr. Matthews in January of 2022, who noted, "[h]is radicular complaints have resolved but he still has lingering forefoot pain." [See Cl. Ex. № 1 at 87] Confirming Dr. Overly's earlier thoughts, Dr. Matthews assessed "right foot 2nd and 3rd webspace Morton's neuromas," and described it as a "chronic problem." [See Cl. Ex. № 1 at 90] Again in February it was noted that "he has had complete resolution of his back pain and radicular issues. He is still having the pain/numbness in the right foot that is likely a Morton's neuroma rather than a persistent radiculopathy presenting itself." [See Cl. Ex. № 1 at 94]

The neuroma is clearly a separate, *chronic condition*, not related to his back injury, and without any evidence supporting a causal relationship with his work environment or workplace activities. And as noted above, the claimant admitted on examination that he cannot point to any medical opinion linking the neuroma to his back injury or any work-related activity. Having failed to prove by a preponderance of the evidence that his foot condition is a compensable injury, his claims for benefits related thereto must fail.

D. The Claimant is Not Entitled to Reimbursement for the Devices he Purchased Without a Physician's Order.

Arkansas law provides that an "employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee." Ark. Code Ann. § 11-9-508(a)(1). The claimant urges

that the bed, recliner, and Teeter device were reasonable and necessary purchases for which he should be reimbursed. I disagree.

Claimant admits that no contemporaneous documentation orders or prescribes any of the purchases, which occurred in October (the bed) and December (the Teeter device) of 2020, long before his back surgery, and then on the day he discharged after surgery in November of 2021 (the recliner). [See Cl. Ex. № 2 at 1-3.] Instead, he represents only that someone along the course of his many doctor's appointments told him he should buy these things. The claimant's testimony in this regard is not credible.[4] "Where there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and determine true facts. [It] is not required to believe the testimony of the claimant or any other witness… [m]oreover, a claimant's testimony is deemed controverted as a matter of law." *Davis*, 2018 Ark. App. 390, 398, 557 S.W.3d 894, 900 (cleaned up).

The only mention of the devices in the records relied upon by the claimant appears to be from his final visit with Dr. Overly, which notes in the history section what the claimant relayed, "[h]e says that [the bed and recliner are] very helpful for him. He is having to have reimbursement for these 2 medical necessities." [See Cl. Ex. № 1 at 136] That visit occurred on 16 November 2022, several weeks after he filed his 7 October 2022 request for a hearing on this matter was filed with the Commission. I do not find that any of the devices purchased were reasonable or necessary and, thus, fall outside of the respondents' responsibility for payment.

E. The Claimant is Entitled to Medical Mileage.

[4] The respondents remind the Commission in their brief that the claimant admitted being untruthful, or at least plainly inconsistent, in his unemployment application. There, he certified that he was willing and able to work while, at the same time, claiming here that he was entitlement to TTD benefits related to his foot problems.

The claimant produced evidence for mileage he incurred while seeking treatment and for which he claimed no payment was remitted. See Cl. Ex. № 2 at 27-32, TR at 33-34, Cl. Brief at 10. Besides mention during a brief discussion on the record before the claimant's testimony [TR at 9-10.], the respondents offered no evidence or argument objecting to the appropriateness of payment on those mileage submissions. To the extent that any properly submitted mileage remains unpaid, the respondents are to remit payment accordingly. See AWCC Advisory 89-2, Revised May 2022.

F. Attorney's Fee

Arkansas law provides for an attorney's fee of twenty-five percent (25%) on indemnity benefits payable to the claimant. Ark. Code Ann. § 11-9-715(a)(1)(B). While the respondents accepted the claimant's back injury and paid for most benefits related thereto, the applicable compensation rate on those TTD benefits was not resolved prior to the hearing, despite indications that it would be or that it might be addressed between the date of the hearing and the submission of the post-hearing briefs. The record, however, reflects no resolution on the TTD underpayments or the unreceived payment. Accordingly, the claimant's attorney is entitled to a fee associated with the amounts awarded on those unpaid benefits.

V. ORDER

Consistent with the findings of fact and conclusions of law set forth above, the respondents are to remit to the claimant and his attorney all amounts owed, consistent with this Order. This claim is otherwise denied and dismissed.

SO ORDERED.

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JAYO. HOWE
ADMINISTRATIVE LAW JUDGE