

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F902731

DANIEL E. LILZE, Employee	CLAIMANT
UNIVERSITY OF ARKANSAS, Employer	RESPONDENT #1
PUBLIC EMPLOYEE CLAIMS, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED OCTOBER 30, 2023

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

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by CHARLES H. MCLEMORE, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID L. PAKE, Attorney, Little Rock, Arkansas; not participating in hearing.

STATEMENT OF THE CASE

On September 20, 2023, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 2, 2023 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The prior Opinion of September 23, 2019 is final.

3. The claimant sustained a compensable injury to his left shoulder, neck, and low back on January 28, 2009/

At the pre-hearing conference the parties agreed to litigate the following issue:

1. Claimant's entitlement to medical treatment by Dr. Knox.

Subsequent to the pre-hearing conference claimant also added as issues to be litigated: (1) His entitlement to payment for physical therapy and mileage from Dr. Larry Weeks from April 2015 through August 2015; and (2) his entitlement to additional speech therapy and/or ear, nose and throat specialist to treat his dysphagia resulting from his cervical surgery in November 2020.

The claimant contends he is entitled to medical treatment for his back by Dr. Knox, as well as payment for physical therapy and mileage from Dr. Larry Weeks from April 2015 through August 2015 and additional speech therapy and/or ear, nose and throat specialist to treat his dysphagia resulting from his cervical surgery in November 2020. Claimant reserves all other issues.

Respondent #1 contends that the claimant, who has a preexisting condition in his low back including a previous surgery, cannot establish that medical treatment for his low back he may need at this time is reasonable and necessary for, or causally related to, his January 28, 2009 injury.

Respondent #2 contends that the Trust Fund is not legally responsible for medical expenses and therefore takes no position on the only issue before the Commission at this time.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear

the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on August 2, 2023 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to medical treatment from Dr. Knox for his low back. Specifically, claimant has failed to prove that his current need for medical treatment relating to his low back is causally related to his January 28, 2009 compensable injury.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to payment for physical therapy and mileage from Dr. Weeks from April 2014 through August 2015. This only includes payment for physical therapy provided for the claimant's left shoulder injury. It does not include any treatment Dr. Weeks provided for claimant's cervical spine or lumbar spine.

4. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to an evaluation by an ear, nose and throat specialist for his dysphagia resulting from his cervical surgery in November 2020.

FACTUAL BACKGROUND

The claimant is a 61-year-old man who began working for respondent in 2006 as a skilled trades worker; he primarily performed maintenance work. The parties have stipulated that claimant suffered compensable injuries to his left shoulder, neck, and low

back on January 28, 2009. On that date, the claimant was removing ice from sidewalks when he slipped and fell. In addition to these injuries, the claimant also suffered a compensable injury to his right shoulder on February 14, 2019; however, that claim is not at issue in this proceeding.

After his compensable injury, claimant underwent a cervical spine fusion at C5-7 by Dr. Knox in 2010. He also underwent surgery on his left shoulder to repair a torn rotator cuff by Dr. Arnold on April 1, 2015. On February 2, 2016, Dr. Arnold assigned claimant a 6% impairment rating to the body as a whole for his left shoulder injury; opined that claimant had reached maximum medical improvement; and released him to return to work with restrictions.

Claimant continued to receive medical treatment for his left shoulder from Dr. Arnold for continuing complaints. Initially, Dr. Arnold believed that claimant's continued complaints were due to underlying glenohumeral arthrosis and that additional surgery would not be necessary. Eventually, Dr. Arnold ordered a new MRI scan which revealed a probable superior labral tear and posterior labral tear. Dr. Arnold recommended a second arthroscopic procedure on claimant's left shoulder which was denied by respondent. A hearing on claimant's entitlement to the second procedure by Dr. Arnold was conducted on August 28, 2019, and in an opinion filed September 23, 2019 this administrative law judge found that claimant had met his burden of proving that he was entitled to additional medical treatment recommended by Dr. Arnold. This opinion was not appealed and the parties have stipulated that it is final.

Dr. Arnold performed the second arthroscopic procedure on claimant's left shoulder on December 27, 2019. In addition, claimant also underwent a second cervical

spine surgery by Dr. Daniel Shepherd on November 2, 2020. One week later, claimant underwent an emergency surgery by Dr. Garney Fendley to remove a hematoma resulting from the cervical surgery. After the cervical surgery claimant developed dysphagia and underwent therapy to address his difficulties swallowing.

Claimant has filed this claim requesting additional medical treatment from Dr. Knox for his low back complaints. In addition, he requests payment for mileage and physical therapy he received from Dr. Weeks from April 2015 through August 2015 following his initial left shoulder surgery and he requests additional speech therapy and/or an evaluation by an ear, nose, and throat specialist for continued issues with dysphagia from the cervical surgery in November 2020.

ADJUDICATION

The first issue for consideration is claimant's request for additional medical treatment from Dr. Knox for his low back complaints. If an injury is compensable, every natural consequence of that injury is likewise compensable. *Air Compressor Equipment Company v. Sword*, 69 Ark. App. 162, 11 S.W. 3d 1 (2000); *Hublely v. Best Western Governor's Inn*, 52 Ark. App. 226, 916 S.W. 2d 143 (1996). The test is whether a causal connection exists between the two episodes. *Sword, supra*; *Jeter v. McGinty Mch.*, 62 Ark. Appl. 53, 968 S.W. 2d 645 (1998).

I find that claimant has failed to prove by a preponderance of the evidence that his current low back complaints are causally related to the compensable injury of January 28, 2009; therefore, respondent is not liable for additional medical treatment from Dr. Knox for the low back.

According to claimant's testimony and the history noted in the medical records, claimant underwent surgery in either 1986 or 1987 for a low back injury at the L5-S1 level. This surgery consisted of a discectomy with a bone graft and fusion. Claimant testified that he recovered from this injury about one year later.

The parties have stipulated that claimant suffered a compensable injury to his low back as a result of the slip and fall on January 28, 2009. According to claimant's testimony, he has had pain in his low back at the beltline that runs down into his right buttock and leg since the date of his injury.

The medical records indicate that following claimant's compensable fall on January 28, 2009, he was initially diagnosed at respondent's health center as suffering from lumbar syndrome. Claimant was referred by the health center for treatment with Dr. Berestnev who noted that claimant was suffering from low back pain. In addition to claimant's low back pain, claimant was also complaining of neck pain and as a result Dr. Berestnev referred claimant to Dr. Michael Morse, neurologist, for further evaluation. With respect to claimant's low back, Dr. Morse ordered an MRI scan which he read on May 19, 2009 as showing evidence of a laminectomy and fusion with instrumentation at the L5-S1 level. According to Dr. Morse, there was no evidence of a recurrent disc herniation. In his report of June 3, 2009, Dr. Morse noted that the MRI of the claimant's lumbar spine showed no new significant pathology and he encouraged claimant to continue receiving medical treatment from Dr. Weeks. Subsequently, Dr. Morse in a report dated June 24, 2010 indicated that claimant's MRI scan showed no new pathology other than the old fusion.

According to claimant's testimony, he did receive some therapy for his lumbar

spine complaints in 2010 and 2011.

Significantly, even assuming that claimant's testimony is correct that he received therapy for his low back pain in 2011, the medical records contain no mention or complaints of low back pain again until back pain is noted by Interventional Pain Specialists on July 1, 2019, some eight years later. During this period of time claimant had received medical treatment from numerous physicians including Dr. Knox, Dr. Arnold, Dr. Weeks, and undergone physical therapy with their medical records containing no notation of any continuing low back complaints. In addition, on December 15, 2015, claimant underwent a functional capacity evaluation which determined that at that time the claimant was capable of performing work in the heavy lifting category with the ability to lift up to 100 pounds. There is no indication in the functional capacities evaluation of December 15, 2015 that claimant was suffering from any complaints of low back pain.

At the hearing, claimant acknowledged that until recently he had no received any treatment on his low back since 2010 or 2011.

Q Now, in your records, I don't know, about six months or so after your fall in 2009, your low back is mentioned, but then it is not really mentioned in your records. What was your focus during the years from 2010 or 11 until recently?

A The pain in my left neck, left head, and left shoulder.

Q So it has been since 2010 or 11 since you've had treatment on your low back?

A Yes.

Q Okay. And why haven't you tried to get more treatment on your low back?

A Because at that time it was not the main issue.
The main issue was my neck and my shoulder.

While it is understandable that claimant may have been more focused on his cervical and left shoulder complaints, given the extensive amount of medical treatment claimant received from 2011 through 2019-20 it strains credibility to believe that at some point during that eight or nine-year period of time claimant did not make any complaints of low back pain to any of his treating physicians or therapists given his current testimony that he had daily back pain. In addition, as previously noted, an FCE taken in December 2015 determined that claimant was capable of performing heavy work lifting up to 100 pounds.

In short, I simply find that claimant has failed to prove by a preponderance of the evidence that his current low back complaints are causally related to the compensable low back injury he suffered as a result of the slip and fall in 2009. The medical records immediately after the accident indicate that there were no new objective findings and after some physical therapy, claimant did not receive any additional medical treatment nor make any complaints of low back pain to any of his treating physicians or therapists until 2019, some eight years later. Given this evidence, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that his current low back complaints are causally related to the original compensable injury; therefore, respondent is not liable for payment of additional medical treatment from Dr. Knox for claimant's low back.

The next issue for consideration involves claimant's request for payment of treatment and mileage he received from Dr. Weeks in April 2015 through August 2015

following his first left shoulder surgery. With respect to this issue, respondent contends that this claim is barred by the doctrine of res judicata. Specifically, respondent contends that this issue could have and should have been raised at the time of the last hearing on August 28, 2019.

The Courts have determined that the doctrine of res judicata applies to workers' compensation decisions. *Craven v. Fulton Sanitation Serv., Inc.*, 361 Ark. 390, 206 S.W. 3d 842 (2005); *Nucor Moto Yamato Steel Co. v. Kennedy*, 217 Ark. App. 126, 513 S.W. 3d 895. Res judicata in the form of claim preclusion bars the relitigation of claims the parties litigated or could have litigated. *Id.* Respondent contends that this issue could have been litigated at the time of the prior hearing. However, I do note that at the time of the prior hearing claimant as reflected in his contentions reserved all other issues. Having reserved all other issues, I find that the doctrine of res judicata is not applicable to this particular claim or issue.

Turning to the merits of this particular issue, I note that claimant had previously undergone some sort of therapy from Dr. Larry Weeks, chiropractic physician. On April 1, 2015, Dr. Arnold performed the first arthroscopic procedure to repair a torn rotator cuff on claimant's left shoulder. Following that surgery Dr. Arnold recommended that claimant begin immediate physical therapy. Specifically, he recommended physical therapy at AOS ("Arnold Orthopedic Services"). In fact, the medical evidence indicates that claimant underwent an evaluation at AOS on April 6, 2015.

According to claimant's testimony, he had a conversation with Dr. Arnold and requested to undergo physical therapy with Dr. Weeks because Dr. Weeks' office was located several miles closer than AOS. According to claimant's testimony, Dr. Arnold

indicted that this change for physical therapy was okay. Obviously, claimant's testimony regarding statements made to him by Dr. Arnold is hearsay. If claimant's testimony were the only evidence in support of his claim it would not be sufficient. However, in a report dated March 10, 2016, Dr. Arnold stated the following:

Also of note, I do recommend doing formal therapy with one of our therapists at AOS. However, due to location, he would prefer to go to Dr. Weeks which I think is absolutely reasonable. I would recommend that Workmen's Comp cover Dr. Weeks' physical therapy.

Granted, this report from Dr. Arnold is several months after the last therapy treatment provided by Dr. Weeks. Nevertheless, it does indicate that Dr. Arnold believed that the treatment from Dr. Weeks as opposed to AOS was reasonable.

Accordingly, based upon the report of Dr. Arnold, I find that the physical therapy claimant received from Dr. Weeks for his left shoulder from April 2015 through August 2015 is reasonable and necessary.

Notably, only one of Dr. Weeks' medical records covering this physical therapy period is contained in the documentary evidence. That report is dated August 3, 2015 and it reflects that Dr. Weeks provided chiropractic treatment to claimant's cervical and thoracic spines. I note that in his referral for physical therapy which is contained at Page 75 of respondent's medical exhibit, that Dr. Arnold initially referred claimant to physical therapy of two times per week for six weeks and that the physical therapy was to follow a rotator cuff protocol. I also note that in his report dated July 14, 2015 Dr. Arnold, with respect to physical therapy, noted that the therapy should follow an attached protocol.

Given the fact that only one of Dr. Weeks' medical records for the treatment he

provided from April 2015 through August 2015 is contained in the documentary evidence, it is impossible to determine exactly what treatment Dr. Weeks provided. Suffice it to say, to the extent that Dr. Weeks provided physical therapy in line with Dr. Arnold's recommendations, respondent is liable for payment of that physical therapy treatment provided to claimant's left shoulder. Respondent is not liable for payment of any spinal manipulation or treatment provided in connection with claimant's cervical spine injury or his thoracic spine. The referral to Dr. Weeks was specifically for physical therapy relating to the claimant's left shoulder surgery. The physical therapy by Dr. Weeks was to be in lieu of the physical therapy to the left shoulder that would have been provided at AOS. I also note that claimant was receiving authorized medical treatment from Dr. Knox for his cervical spine. Accordingly, respondent is only liable for payment of Dr. Weeks' medical treatment which is specifically related to the physical therapy recommended for claimant's left shoulder surgery.

The final issue for consideration involves claimant's request for additional speech therapy and/or an evaluation by an ear, nose, and throat specialist to treat his dysphagia resulting from his cervical surgery in November 2020. As previously noted, claimant developed dysphagia as a result of the cervical surgery performed by Dr. Shepherd in November 2020. As a result, he underwent extensive therapy which included swallowing therapy. Although Dr. Shepherd performed the cervical surgery, claimant has received follow-up treatment from Dr. Knox. In his report dated May 4, 2021, Dr. Knox noted that claimant's dysphagia was markedly improved with his speech therapy. Furthermore, on June 30, 2021, claimant saw Kelsey Harper, a PA in Dr. Knox's office, who noted that claimant preferred to allow more time before undergoing additional swallowing

investigation and options. Claimant subsequently returned to Dr. Knox on April 13, 2023, who noted that claimant was suffering from persistent dysphagia following his surgery three years ago. As a result, Dr. Knox recommended an ENT consult. Dr. Knox recommended that claimant return to him for follow up after the ENT evaluation.

In short, Dr. Knox has recommended that claimant undergo an ENT evaluation for his persistent dysphagia. I find that Dr. Knox's opinion is credible and entitled to great weight. Accordingly, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to an evaluation by an ENT for his dysphagia.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment from Dr. Knox for his low back complaints. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to payment for treatment and mileage from Dr. Larry Weeks for physical therapy provided in connection with his left shoulder surgery from April 2015 through August 2015. This does not include any chiropractic treatment provided in connection with claimant's cervical spine or thoracic spine. Finally, claimant has met his burden of proving by a preponderance of the evidence that he is entitled to an ENT evaluation for his dysphagia.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical

providers pursuant to A.C.A. §11-9-715(a)(4).

Respondents are liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$985.95.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE