BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H206962 & H206963**

JAMES G. GODWIN, Employee CLAIMANT

MID SOUTH MILLING COMPANY INC., Employer RESPONDENT

TRAVELERS INDEMNITY COMPANY, Carrier RESPONDENT

OPINION FILED **JULY 20, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JARID M. KINDER, Attorney, Fayetteville, Arkansas.

Respondents represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 16, 2023, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 16, 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 this claim.
2. The employee/employer/carrier relationship existed on August 5, 2022, regarding file number H206962 and September 2, 2022 regarding file number H206963.
3. The respondents have controverted the claim in its entirety.

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

1. Whether claimant sustained a compensable injury on August 5, 2022, and September 2, 2022, regarding his right lower extremity.

2. Compensation rate.

3. If compensable, whether claimant is entitled to medical benefits and temporary total disability benefits.

4. Attorney's fees.

All other issues are reserved by the parties.

The claimant contends that "He sustained a compensable lower extremity injury on August 5, 2022, while working for Midsouth Milling Company in Fort Smith, Arkansas. Despite objective evidence of injury, the respondents denied compensability of the claimant's injury. The claimant contends that he is owed medical benefits as well as temporary total disability benefits from September 23, 2022, through a date yet to be determined. Due to the controversion of entitled benefits, the respondents are obliged to pay one half of the claimant's attorney's fee. Claimant reserves the right to raise additional contentions at the hearing of this matter."

The respondents contend that "the claimant did not sustain a compensable injury on either date. Claimant's complaints are the result of a preexisting condition and/or condition which did NOT occur at work. As a result, the claimant is not entitled to any medical or indemnity benefits."

From a review of the entire record, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on March 16, 2023, and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a

compensable injury to his right Achilles tendon on August 5, 2022, or on September 2, 2022.

FACTUAL BACKGROUND

As reflected in the heading of this case, there are two separate claims for benefits that were decided in this matter. Since the proof in the two cases overlapped, the two claims were tried together.

HEARING TESTIMONY

Claimant testified that he injured his lower right extremity on August 5, 2022, when a piece of equipment malfunctioned, and he hurried to address the problem as quickly as he could. He had only taken a step or two when he felt something give, which claimant said he later found out was a partial tear in his Achilles tendon. Claimant stated that he fell down and remained on the floor for five to ten minutes, during which time he felt "something retract up to about mid-calf." After getting up, claimant said he went to the office of the plant manager, Ben Smith, to tell him what happened and that he was going to the hospital.

At the hospital, claimant said that he was seen in the ER and did not receive any treatment, only an ultra-sound to confirm that there was a partial tear in his Achilles tendon. Claimant next saw his primary care physician who then referred him to an orthopedic surgeon. Claimant said he wore a walking boot on the advice of his primary care physician.

Claimant testified that he had a "reinjury, another partial tear" on September 2, 2022. On that day, claimant was changing a screen on the hammer mill and while doing so, felt the Achilles tendon snap again. Once again, claimant said he reported the incident to Ben Smith. It was after the second incident that claimant saw Dr. Justin Clayton, an orthopedic doctor. Claimant was released from Dr. Clayton without restrictions on December 8, 2022; claimant testified that this release was at his request. As of the date of the hearing, claimant had no appointments to see any other medical providers for his right Achilles tendon injury and said that the tendon was slowly getting better.

Claimant was terminated from respondent Mid South on September 23, 2022. He believed that it was because he asked for workmen's compensation coverage. Claimant remained off work from September 23, 2022, through December 8, 2022, during which time he was going to physical therapy but was afraid to work full-time because he did not want to have a full tear in his Achilles tendon.

On cross-examination, claimant said he had started working at Mid South Milling in February of 2019. Claimant worked in the mixing room as an operator, which meant he would formulate a recipe, which would then be entered into the computer, creating a mix of the chicken food. Claimant was required to watch the operation process, but he was not physically pouring materials to make the mix. He was required to take care of the equipment and watch it during the mixing process.

Claimant testified that if he was injured on the job, he was supposed to report it to Ben Smith. On August 5, 2022, claimant conceded he alone determined that he was going to Mercy Hospital; he did not ask Mr. Smith where he should go for treatment. Claimant did not ask Mr. Smith to file anything for him on that date, and in fact, it was not on his mind at that time that this was going to be a work injury or claimed as a work injury. Claimant confirmed that he returned to work on the next scheduled workday and worked until September 2, 2022, when he had a similar injury. Once again, claimant said he told Mr. Smith what had happened, but he was not sent for treatment, nor asked if he wanted to fill out any forms. Following the September 2, 2022 incident, claimant remained off work until he saw Dr. Clayton on September 7, 2022. He verified that before September 23, 2022, he had not asked Mr. Smith to file a workers' compensation claim for him.

Respondent's attorney asked about the record from Mercy Hospital on August 5, 2022. The following exchange occurred:

> Question (by Mr. Wade) On this day it says, "this began to bother him six weeks ago." That is Page One of Respondent's Exhibit. So, the pain you are describing, "leg pain: patient complains of light posterior leg pain that begins at ankle region and extends at his posterior leg." And then they say, "this

began to bother him six weeks ago." So, they are saying that the same pain you are complaining of on August 5 had been going on for six weeks?
Answer (by claimant) I do not recall that.

Q. Now you have already gone to your doctor, Dr. Ellis, with the same complaints, correct?
A. Correct.

Q. OK, because on page 24 of the same record the August 5, 2022 Mercy Hospital emergency room record, "patient states his right Achilles tendon pain for approximately six weeks and has seen his primary care physician with this. Patient was initially referred for an MRI to evaluate the extent of his injury, but it was denied by his insurance company, so he was scheduled to start physical therapy this next week." So, you had seen Dr. Ellis before August 5. She had recommended an MRI which was denied, but she had already scheduled you for physical therapy; correct?
A. She had not scheduled me for physical therapy until after the tendon tear.

Q. Well this says she scheduled the therapy because you couldn't have the MRI so is this wrong?
A. The MRI was not scheduled until after the tear. She tried to refer me for it.

Q. Sir, she tried to refer you for an MRI before August 5 of 2022, but because of the Achilles pain you were having six weeks before August 5, correct?
A. This is not correct.

Q. That is the way the record reads. That's what someone told the emergency room.
A. I have never been referred for an MRI for anything before my tendon tear.

Q. Did you tear your tendon before August 5 of 2022, because you are complaining that the same pain began in June?
A. No, sir.

Q. So you are saying this medical record is wrong?
A. I am saying that the dates may be mixed-up….

Q. This is August 5 of 2022. So, you are telling us today that all of this happened: you saw your primary care physician, you had an MRI denied and you have physical therapy scheduled all on that day?
A. I told her I had pain in my foot prior, but I had not been referred for an MRI before the tendon tear. And my insurance did deny it.

Q. Sir, that didn't all happen on August 5. That happened before August 5 because you told them that.

> A. Then that is something I don't recall. I suppose it did happen, then. (TR.31-34)

At that point, the court and counsel discussed how neither party had introduced any records from before August 5, 2022, to shed light on what the previous visit with Ms. Ellis[1] had documented. The parties were given the opportunity to supplement the exhibits with the earlier medical records, but claimant objected to doing so.

Respondent continued his cross-examination:

> Q. When you were in the emergency room on August 5, 2022, when it says "patient states his right Achilles pain had been going on for approximately six weeks" is that reporting what you told them?
> A. I don't remember.
>
> Q. When it says, "he has seen his primary care physician for this." That was already in the works because you had seen Dr. Ellis or APN Ellis not on August 5, 2022, because you didn't see her that day, correct?
> A. I didn't start physical therapy until after the tendon.
>
> Q. I am not denying that. What it says it was already scheduled to start because Dr. Ellis had scheduled it before August 5, 2022. Do you understand? August 25 [sic] the only medical provider you saw was the hospital emergency room, correct?
> A. On August 5?
>
> Q. OK?
> A. The next person I seen was my primary.
>
> Q. I understand that.
> A. Then she referred me to physical therapy.
>
> Q. Well I understand that's what your mind may tell you, but you had already been scheduled for physical therapy before that, correct?
> A. If that's what's she says, then it is true.
>
> Q. Listen to my question. August 5, the day you claimed you were injured, you went to the emergency room, correct?
> A. Yes.

[1] The parties referred to Stefanie Ellis, APN, as "Dr. Ellis" at times during the testimony. Any references to Dr. Ellis or Ms. Ellis are to the same person.

Q. And that's the only place you went that date?
A. Yes.

Q. And that day you told the emergency room personnel this has been going on for six weeks, correct, based on this record?
A. I suppose so.

Q. You also told them you had seen Nurse Ellis or APN Ellis before August the 5, 2022, correct?
A. Yes.

Q. You also told them you had been initially referred for any MRI that was denied, correct?
A. I suppose. I don't recall.

Q. You also told them you were scheduled to start physical therapy the next week based on what Dr. Ellis did or APN Ellis, correct?
A. I do not remember.

The Court: Mr. Wade, you can call her Dr. Ellis if you want to. I just wanted to make sure you are talking about the same person.

Q. (by Mr. Wade) But you would not have gotten that information from anywhere else because you didn't see Dr. Ellis that day, correct?
A. (by claimant) Correct.

Q. Ok. Now, when you did see Dr. Ellis, as the court has pointed out on page 59, that was August 9 of 2022, so it would be four days later, correct?
A. Sounds right.

Q. And at that time she says, "James has come in today for his pain in his right Achilles regions times three months," that you have been having this pain in this area for three months. Do you know where she would have gotten that if he did not get it from you?
A. I don't know.

Q. And it goes on the say "patient was initially referred for an MRI, but it was denied by his insurance company, so he was scheduled for physical therapy to start this week." That's the same thing the emergency room record says, isn't it?
A. I don't know. I was not scheduled for physical therapy until after the tear.

Q. I understand it didn't take place until after the tear, but it was scheduled beforehand based on these records, correct.
A. I don't know. That has been a while. (TR.38-41)

On redirect, claimant was again read the portion of the August 5, 2022, record that mentions problems in his leg from six weeks prior and was then read the subsequent line of the report "But significantly worsened. Patient fell after feeling something move and his leg give out." Claimant testified that he was not denying that he had leg pain prior to August 5, 2022. The redirect examination concluded with claimant verifying that he told physical therapist Lane Carter on August 11, 2022: "54-year-old male with complaints of right ankle pain and disfunction. Symptoms started in early June and have worsened with more acute worsening episodes happening last Friday, August 5, 2022, when he shifted his weight and had increased pain and swelling."

After claimant rested, Benjamin Smith was called as a witness for respondent. He is the operations/plant manager at Mid South Milling in Fort Smith. After describing claimant's job duties, Mr. Smith verified that he was at work on both August 5 and September 2, 2022. Mr. Smith said on August 5, 2022, "He did not come to the office at all. He actually went to his vehicle, and I assume went to get a doctor's advice or whatever it was, but he basically tried calling and ended up sending a text message to my assistant plant manager stating he had to leave." At that time, claimant did not say why he had to leave or state that he was injured at work. Mr. Smith said claimant's version of what happened on August 5--claimant coming into Mr. Smith's office and telling him what had happened, and that claimant was going to the emergency room – did not happen. Had claimant reported an injury on the job, Mr. Smith said that he would have filled out a form and he personally would have taken claimant to MedExpress.[2]

Mr. Smith had noticed that claimant had issues walking: "He has always had issues walking,

[2] Claimant objected to this testimony from Mr. Smith on the grounds that lack of notice was not raised by the respondents. I allowed this testimony for the purpose of assessing claimant's credibility, see *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998) (Overruled on other grounds by *Frances v. Gaylord Container Corp*., 341 Ark. 527, 20 S.W.3d 280 (2000))

but for a few months before that he was definitely hobbling around." After again denying that there had been a report on August 5, 2022, that claimant suffered an injury at work, Mr. Smith said that claimant told him "he was having issues and went to a doctor." Claimant returned to his job as an operator when he was next scheduled to work.

Regarding the second event of September 2, 2022, Mr. Smith again denied that an injury was reported to him on that date and repeated what his course of action would have been had such a report been made. On September 23, 2022, Mr. Smith said that was the first time that he had learned of any claimed work injury. The following then took place with Mr. Smith and respondent's counsel:

> Q. (by Mr. Wade) Now what did you ask him at that point and time?
> A. (by Mr. Smith) I stated, "Do you feel like this is work related?" And his comment was "That doesn't matter."
>
> Q. Meaning what?
> A. I didn't know. I basically stated to him. "Well, it does matter. If you feel it is work related, we have ways to deal with it." He then walked away, and I had conversations with HR and stopped like that.
>
> Q. So you specifically inquired if it was work related and he didn't really have a response at that time?
> A. His response was "It didn't matter."
>
> Q. Ok. Now, did you have another conversation with him later on that same date?
> A. I do not recall.
>
> Q. Ok. Now, at some point he was suspended, is that correct?
> A. That is correct.
>
> Q. And what was the purpose of that suspension?
> A. We felt he was wrongfully trying to claim workers' comp on something that again, he never previously stated was.

On cross-examination, Mr. Smith said claimant was not terminated for filing a workers' compensation claim, but rather because he thought claimant was asking about filing a fictitious claim. When asked if claimant fell on August 5, 2022, Mr. Smith said he did not deny that happened, but he

honestly did not know. Mr. Smith did not keep a copy of the text message that was sent to Steve Stanart because it didn't say that claimant had an injury but that he was going to the hospital.

Claimant testified in rebuttal that he had a Cricket cellphone and did not send texts on it. He specifically denied that he had sent a text about his injury to anyone at his employer.

REVIEW OF THE EXHIBITS

Dr. Seth Bartholomew made this entry in the Fort Smith Mercy Hospital Emergency Room notes on August 5, 2022, at 1:52 P.M.:

> "Mr. Godwin is a 54-year-old man who presents to the emergency department today with complaints of right heel and leg pain. Patient states his right Achilles tendon pain for approximately 6 weeks and has seen his primary care physician for this. Patient was initially referred for an MRI to evaluate the extent of his injury, but it was denied by his insurance company, so he was scheduled to start physical therapy this next week. Patient states at work today that he lunged forward quickly and bore all of his weight on the ball of right foot. Patient states he felt an instant pain extending from the heel of his right foot up through the calf muscle and states he feels like something is 'moving in there'. Patient states the leg gave way causing him to fall." (CL.X. 24)

An ultrasound test was conducted that same day at 5:01 P.M. with the following impression:

> "Intact but thickened and heterogeneous right Achilles tendon at real time imaging. This is consistent with tendinopathy and/or partial tear. No full-thickness tear." (CL.X 40)

Claimant was discharged by APRN Paula Ballard at 6:30 P.M. with the following entry:

> "Wrap the affected foot for comfort. Consider an insole to absorb shock. Use NSAIDs for pain and swelling. Start with physical therapy as directed by your primary care physician. Return to emergency department for further evaluation of any red flag or concerning symptoms." (CL. X. 37)

On August 9, 2022, claimant saw APN Stefanie Ellis at Mercy Clinic Free Ferry. Her entry copied much of what Dr. Bartholomew recorded on August 5, 2022:

> "Subjective: James has come in today for his pain in the rt Achilles region x ~ 3 months. Patient was initially referred for an MRI to evaluate the extent of his injury, But it was denied by his insurance company, so he was scheduled to start physical

> therapy this week. Last week states while at work launched forward quickly and bore all of his weight on the ball of his right foot. States he felt an instant pain extending from the heel of his right foot up through the calf muscle and states he felt something was " moving in there." Patient states the leg gave way causing him to fall. Went to the ER, u/s completed and Achilles tendinopathy and partial tear ID'd. Has continued with pain. The history is provided by the patient."

This entry concludes with a referral to Orthopedic Surgery (R.Med. X. 59), but claimant began a course of physical therapy on August 11, 2022, which continued until November 22, 2022. Nothing in those notes is critical to a determination of the issues in this matter.

Claimant was seen by orthopedic surgeon, Justin Clayton, at Mercy Clinic River Valley on September 7, 2022. Dr. Clayton reported as follows:

> "History: 54-year-old male who had an Achilles injury on the right about a month ago or a little bit more than that. He had another injury just about 5 days ago which seems to have completed a partially torn Achilles as best he can tell. In a walking boot…
>
> Exam: 54-year-old overweight male in no distress who is alert and oriented. He has a palpable defect in his Achilles and some tenderness to palpitation in that location. compression of his calf does not cause plantarflexion of the foot. Skin is intact.
>
> Imaging: I reviewed the plain radiographs that were done previously [which] are unremarkable.
>
> Medical decision making: 54-year-old male with an Achilles tendon rupture on the right. I discussed with him how this would best be treated without surgical intervention. It is important that he follows the non-surgical protocol which we have given him, and he can also give a copy to his physical therapist. We will place a heel lift into his boot today. He should not be on ladders and should have a 15 lb lifting restriction. We will see him in 4 weeks for exam only no imaging." (CL. X. 77)

Claimant returned to see APN Ellis on October 4, 2022, but little about that visit related to his Achilles' tendon injury. He completed his course of physical therapy and on December 7, 2022, returned to Dr. Clayton. His report of that date reads as follows:

> "HPI: Patient who has been treated non-surgically for an Achilles tendon rupture on the right. He has been a little more aggressive than we would like to have seen, however he needs to be back at work and at this point is not having a significant amount of pain nor is he having significant dysfunction."
> (CL. X. 128)

Dr. Clayton released claimant as of December 9, 2022, with no restrictions.

ADJUDICATION

In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630. After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury.

Initially, I do not find claimant's testimony particularly credible. As there were only two witnesses with diametrically opposed testimony on crucial issues, it is necessary to determine which witness was the more credible. In virtually every discrepancy between claimant's testimony and that of Mr. Smith, I believed Mr. Smith; most significantly, I believe what Mr. Smith said regarding claimant's failure to report a work-related injury on August 5, 2022. Claimant's dispute with the entries in the emergency room records about when the MRI was denied and when physical therapy was scheduled to begin also served to undermine his credibility on both of his claims.[3]

[3] Claimant's failure to provide the medical records of the medical treatment for his right Achilles tendon during the previous few months before his August 5, 2022, visit to the emergency room was puzzling. Claimant was evasive when questioned about when an MRI was turned down by his private insurance and when physical therapy was due to commence; if his version of the events leading up to August 5, 2022, was accurate, those records should have supported his contentions.

The August 5, 2022, claim

Before claimant left work on August 5, 2022, to go to the ER at Mercy Hospital, he had already been examined by his personal physician, and a course of physical therapy had been ordered for him. The provider that treated him prior to August 5, 2022, thought the problem was severe enough to warrant an MRI, but according to claimant, his insurance denied coverage for that test. At the ER on August 5, 2022, an ultrasound test was conducted with results that were "consistent with tendinopathy and/or partial tear. No full-thickness tear." Claimant was returned to his primary care physician and began the previously scheduled course of physical therapy. There are no objective findings from the August 5, 2022, ER visit or from the follow-up with APN Ellis on August 8, 2022, that what was seen on the ultrasound at the ER did not exist prior to August 5, 2022. Claimant's planned course of treatment before August 5, 2022, was to begin physical therapy the following week; his course of treatment after August 5, 2022, was the same. As such, claimant lacks an objective finding that his work activity on August 5, 2022, caused tendinopathy and/or a partial tear of his right Achilles' tendon.

The September 2, 2022, claim

Claimant's proof as to his second claim is even more scant than that of the August 5, 2022, claim. The only objective finding in the September 7, 2022, record from Dr. Clayton was "He has a palpable defect in his Achilles…" The other entries are either a subjective finding of tenderness or what claimant related in the history: "He had another injury just about 5 days ago which seems to have completed a partially torn Achilles as best he can tell (emphasis added)." That is not an objective finding by Dr. Clayton. Dr. Clayton did not see the need for further imaging but noted that those done previously were "unremarkable." The course of treatment was: "He should not be on ladders and should have a 15 lb. lifting restriction. We will see him in 4 weeks for exam only, no imaging."

However, there is no evidence that claimant provided his employer with these restrictions.

Conclusion

In his post-hearing brief, claimant correctly stated that an employer takes an employee how he finds him, and pre-existing conditions that are aggravated by work-related activities can be compensable injuries. However, the credible evidence in this case does not support the contention that claimant suffered tendinopathy and/or a partial tear of his right Achilles' tendon as a result of work-related activities on either August 5, 2022, or September 2, 2022. Further, it was claimant's testimony that he chose not to work from September 23, 2022, through December 7, 2022; the restrictions placed on him by Dr. Clayton on September 7, 2022, did not prevent him from working for the two weeks prior to his termination. As such, I find claimant failed to prove his claim by a preponderance of the evidence. It is therefore unnecessary for me to determine claimant's average weekly wage for the purpose of temporary total disability payments.

ORDER

Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right Achilles tendon on August 5, 2022, or on September 2, 2022. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE