

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO.: G801912**

SAMMY HARRISON, Employee	CLAIMANT
EVERGREEN PACKAGING, LLC, Employer	RESPONDENT
ACE AMERICAN INSURANCE COMPANY, Carrier	RESPONDENT
ESIS, INC., TPA	RESPONDENT

OPINION AND ORDER FILED FEBRUARY 1, 2021

Hearing conducted before ADMINISTRATIVE LAW JUDGE TERRY DON LUCY, in Pulaski County, Arkansas.

Counsel for the Claimant: HONORABLE AARON L. MARTIN, Attorney at Law, Fayetteville, Arkansas.

Counsel for the Respondents: HONORABLE WILLIAM C. FRYE, Attorney at Law, North Little Rock, Arkansas.

Statement of the Case

The above-captioned matter came on for a hearing on November 4, 2020, before the undersigned Administrative Law Judge. A Pre-hearing Order was entered in this matter by the undersigned Administrative Law Judge on September 9, 2020, which reflected the following stipulations:

- (1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
- (2) The employee/employer/carrier relationship existed on March 21, 2018, on which date the Claimant sustained compensable bilateral upper extremity injuries for which certain benefits have been paid and are not presently in controversy;
- (3) The Claimant's average weekly wage on the date of injury was sufficient to entitle him to compensation rates of \$673.00 and \$505.00 for temporary total and permanent partial disability benefits, respectively; and,
- (4) The Respondents have controverted the Claimant's alleged

cervical injury of March 21, 2018, in its entirety.

The pre-hearing Order of September 9, 2020, also reflected the issues to be adjudicated, as set forth below:

(1) Whether the Claimant sustained a compensable cervical injury on March 21, 2018, and is entitled to appropriate benefits associated therewith inclusive of reasonably necessary medical care and related expenses, and temporary total disability benefits from August 21, 2019, through April 15, 2020;

(2) Whether the Respondents are entitled to an offset pursuant to Ark. Code Ann. §11-9-411 for certain short-term disability and group health benefits paid in relation to the Claimant's alleged cervical injury of March 21, 2018; and,

(3) Attorney's fees associated with controverted indemnity benefits.

All other issues were reserved. During preliminary discussions, the Commission's pre-hearing Order of September 9, 2020, was introduced into evidence without objection as Commission's Exhibit No.1 (TR 8-9) It was also noted on the record that the Claimant's previous attorney had waived her lien with respect to this matter. (TR 9-10) In addition, the parties' respective exhibits were introduced without objection. (TR 10-11)

Findings of Fact and Conclusions of Law

(1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim;

(2) The Claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable cervical injury on or about March 1, 2018; and,

(3) All other issues are rendered moot.

Applicable Law

The party bearing the burden of proof in a workers' compensation matter must establish such by a preponderance of the evidence. See Ark. Code Ann. §§11-9-704I(2) and 11-9-705(a)(3).

In order to demonstrate a compensable “specific incident” injury, as alleged herein, a claimant must prove, by a preponderance of the evidence, that he or she sustained an “accidental injury causing internal or external physical harm to the body...arising out of and in the course of employment,” and which is identifiable by time and place of occurrence. Ark. Code Ann. §§11-9-102(4)(A)(i). The alleged injury must also occur at a time when “employment services” were being performed and must be established by medical evidence supported by “objective findings.” Ark. Code Ann. §§11-9-102(4)(B)(iii) and (D). In turn, “objective findings” are those findings “which cannot come under the voluntary control of the patient.” Ark. Code Ann. §11-9-102(16)(A)(i).

Also, it is long-settled that questions concerning the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. (See, for instance, *Yates v. Boar’s Head Provisions Co.*, 2017 Ark. App. 133 (2017). It is further well-settled that determinations of compensability may turn solely upon matters of weight and credibility, particularly when such matters relate to a given claimant’s credibility. (See *Yates, supra*. In addition, see *Daniel v. Wal-Mart Stores, Inc.*, 2014 Ark. App. 671 (2014); *Kanu-Polk v. Conway Human Dev. Ctr.*, 2011 Ark. App. 779 (2011); and *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43 (Ark. App. 2011)). Finally, a claimant’s testimony is never considered to be uncontroverted. *Gentry v. Ark. Oil Field Servs.*, 2011 Ark. App. 786 (2011) (citing *Nix v. Wilson World Hotel*, 46 Ark. App. 303 (1994)).

Testimony

Sammy Harrison

The Claimant began working for Respondent Employer in January of 2000. (TR 12) On March 21, 2018, the Claimant tripped on an anchor bolt during the course of his duties and

sustained bilateral upper extremity injuries that ultimately resulted in surgeries on both of his upper extremities performed at different times by Drs. Burrell and Hussey. (TR 14-16; see also TR 18; 20) According to the Claimant, following Dr. Hussey's operation on his left upper extremity in May, 2018, such had initially "stopped the numbness and tinglin' in my left hand," although he subsequently experienced said symptoms in his fourth and fifth digits some two months later. (TR 19)

With respect to his right upper extremity, the Claimant testified that Dr. Hussey had performed a Spurling's maneuver in August, 2018, which the former recalled made the "tinglin' in my right arm and hand gettin' worse." (TR 20) Thereafter, Dr. Hussey performed surgery on the Claimant's right elbow in October, 2018, with the result that "a lot of the numbness and tinglin' was gone." (*Id.*; see also TR 21) Unfortunately, in November, 2018, and according to his testimony, the Claimant began to experience a "numb feelin', tingly" in the "pinky and ring finger" of his left hand. (TR 21-22)

Thereafter, according to his testimony, the Claimant came under the care of Dr. Bruffett, who performed surgery on his neck on January 31, 2020. (TR 27-28) Following such procedure, the Claimant testified that "The numbness in both hands and arms went away the next day; it was gone when I woke up." (TR 28) The Claimant acknowledged that following his neck surgery, he was released from care on April 15, 2020, had applied for and received short-term disability benefits during the interim, although he was uncertain as to whether he or his employer had paid for such benefits. (TR 29)

Upon cross-examination, *inter alia*, the Claimant acknowledged that the initial medical history procured by Dr. Burrell did not include any reference to his neck or to numbness involving either arm. (TR 35) The Claimant further conceded that he had received chiropractic treatment in

2014 and 2017 which he agreed would have involved chiropractic manipulation of his neck. (TR 36) With respect to the lack of neck or neurological upper extremity complaints in his initial post-injury medical records, the Claimant participated in the following exchange:

Q: Would a fair characterization be that at that point you didn't have numbness, tingling, or loss of motor function?

A: Like I said, it would come and go.

Q: Okay. Well, up until August 24th, 2019, would you agree with me that it wasn't coming at any time that you saw Dr. Burrell?

A: Like I said, I -- I can't just -- it's just been too long and so much has happened.

Q: Okay. So if your medical records say that you weren't having those, you don't have any independent recollection to say that's not correct?

A: No. (TR 37-38)

With regard to his initial visit with Dr. Hussey, some two months post-injury, the Claimant testified that:

Q: And he's got down that you were denying any type of paresthesia in your right arm, which would be numbness. So did you tell him, also, the same thing; that you weren't having any numbness in --

A: At that time with Dr. Burrell -- Dr. Hussey, I really don't think the numbness was -- was bad enough to where I felt like it needed to be reported.

Q: Okay.

A: Like I said, it would come and go, come and go.

Q: Well, where I'm confused here, Mr. Harrison is that you told the doctors all about your medical history. I mean, it went on for two (2) pages and, you know, when you get to be our age you have a lot of things that are in there, but you, at no time, mentioned any of that to either Dr. Burrell or --

A: I understand.

Q: -- Dr. Hussey. Do you have -- so you're saying it probably wasn't bothering you at that point?

A. Not to where it was disabling me. (TR 38-39)

With respect to the patient history sheet that he completed upon presenting to Dr. Bruffett, the Claimant testified as follows:

Q: Where is (sic) says date of onset, what did you put down?

A: [As read] "Four (4) months."

Q: Is there a reason that you put four (4) months?

A: Yes, sir, because I noticed four (4) months before that, that I was havin' a slight weakness in my arms and stuff, and I was afraid -- and -- but I was thinkin' it would come back, I'd get it back eventually, you know, workin', and I would think -- I thought it would come back but it never did, and then it eventually got to the point I couldn't do my job. (TR 46-47)

During further cross-examination and upon further examination by the Commission, the Claimant conceded that he had returned to his lawn service following his release from Dr. Hussey in April, 2019, and that he performed some of the work for such himself using a riding mower. (TR 47-48)

Medical and Documentary Evidence

I have reviewed the entirety of the medical and documentary evidence submitted herein, the most salient and relevant of which are discussed below in further detail.

The Claimant presented to Jefferson Regional Medical Center on March 21, 2018, with respect to his bilateral upper extremity injuries and subsequently underwent right elbow surgery performed by Dr. Roy Burrell on March 26, 2018. (CX 1 at 1-18) It appears that the Claimant did not describe any upper extremity numbness or tingling, or cervical complaints, upon his initial presentation to Dr. Burrell (nor did he during an additional presentation to Dr. Tim Wilkin on

March 21, 2018; RX 1 at 5-6). During his first post-operative visit with Dr. Burrell on March 27, 2018, the latter noted intact motor and sensory function (distally) with respect to the Claimant's right upper extremity. (CX 1 at 19)

Unfortunately, the Claimant's left upper extremity became more problematic as noted by Dr. Burrell on April 13, 2018. (CX 1 at 27) However, on this occasion, Dr. Burrell specifically noted that the Claimant "does not report tingling, or loss of motor function," and so recorded again on April 24, 2018. (*Id.*; CX 1 at 32) At the latter point, Dr. Burrell referred the Claimant to Dr. Michael Hussey, an orthopedic elbow specialist, for further management. (CX 1 at 35)

Dr. Hussey initially evaluated the Claimant on May 2, 2018, pursuant to an Independent Medical Examination with "option to treat." (CX 1 at 37) Among the Claimant's other left upper extremity symptoms, Dr. Hussey noted that the Claimant "has occasional paresthesia radiating into the hand." (*Id.*) Dr. Hussey agreed to take over the Claimant's care, and thereafter performed surgery on the latter's left elbow on May 15, 2018. (CX 1 at 39; 41) The Claimant followed-up with Dr. Hussey post-operatively on June 20, 2018, and offered no complaints with respect to his neck. (CX 1 at 46)

However, on July 18, 2018, the Claimant presented to Dr. Hussey with what the latter characterized as "symptoms of right elbow ulnar nerve dysfunction." (CX 1 at 49) Specifically, "There is tenderness on the cubital tunnel with positive Tinel sign and hyperflexion compression test causing increased paresthesia in the fourth and fifth digit." (*Id.*) Consequently, Dr. Hussey recommended an EMG study of the Claimant's right upper extremity in relation to "possible ulnar nerve damage." (*Id.*) Such study was actually performed bilaterally on August 2, 2018, with normal results that offered "no electrodiagnostic evidence of a cervical radiculopathy, carpal tunnel syndrome, cubital tunnel syndrome, or generalized peripheral neuropathy in bilateral upper

limbs of the nerves that were tested." (RX 1 at 27; see also CX 1 at 52; 54)

Upon review of such electrodiagnostic testing, Dr. Hussey noted the normal results on August 6, 2018, but also noted that the Claimant's exam suggested an "ulnar nerve dysfunction problem." (CX 1 at 52) On August 22, 2018, Dr. Hussey noted the "possibility of cervical spine dysfunction," following application of a Spurling maneuver which resulted in "pain in the arm and paresthesia." (CX 1 at 57) Ultimately, on October 23, 2018, Dr. Hussey performed additional surgery on the Claimant's right elbow (with the first having been performed by Dr. Burrell as above-noted), for "Right elbow ulnar nerve dysfunction. Right elbow painful hardware. Right elbow lateral collateral ligament insufficiency." (CX 1 at 65)

During his first post-operative visit on November 5, 2018, the Claimant still presented with "decreased sensation to the fourth and fifth digit (sic)" with respect to his right upper extremity. (CX 1 at 70) However, on November 28, 2018, the Claimant reported to Dr. Hussey that "his right elbow is doing great and his grip strength has improved." (CX 1 at 72) On January 1, 2019, the Claimant advised Dr. Hussey that he was "doing well and his symptoms have improved significantly." (CX 1 at 77) Unfortunately, at that point, the Claimant also reported "some tingling of the left shoulder which extends distally toward his left hand," and which was resolved by the Claimant "shaking the hand." (*Id.*)

Curiously, the Claimant presented to Dr. Hussey on June 3, 2019, and informed the latter that on May 30, 2019, "he was pouring some heavy polyethylene and felt a pop in his right elbow, followed immediately by pain and numbness in his right hand. His pain radiates proximally to his right shoulder. He notes that he has a history of carpal tunnel, which felt similar to the acute onset of numbness in his right hand." (CX 1 at 84) Dr. Hussey considered such episode as a "re-aggravation" of the Claimant's right elbow that appeared to be "related to a right extensor tendon

strain." (CX 1 at 85)

On August 21, 2019, the Claimant presented to Dr. Kimberly Golden with complaints of "same neck pain has had, with right ue (sic) numbness worsening p (sic) few weeks." (CX 1 at 89) In addition, the Claimant advised Dr. Golden that he suffered from left upper extremity numbness, was "seeing Ortho LR *for neck*," had seen his chiropractor the preceding Monday, and could not have any surgery "until wife completes RN school." (*Id.*; emphasis added) After a follow-up visit on September 3, 2019, Dr. Golden recorded that the Claimant had "Crushed arm in 2018 both ue due to fall and fx both ue and *hurt neck*, fell platform requiring cadavior tendons and ligaments." (CX 1 at 96; emphasis added.)

Ten days later, the Claimant returned to Dr. Hussey, who opined as follows:

I discussed with the patient that his right elbow appears fine with no new injury or instability. I believe his current problem is likely related to cervical spine derangement. I am unsure if this is related to his previous work-related injury. As I am not a spine specialist, I have recommended he be seen by a spine specialist to see if his current problem is related to his work-related injury. (CX 1 at 102)

The Claimant underwent a cervical MRI on September 20, 2019, which revealed "Straightening of the cervical spine may be secondary to muscle spasm or positioning," and degenerative disk disease at the C3-C7 levels. (CX 1 at 109-110) A subsequent cervical CT scan performed on January 15, 2020, also essentially revealed degenerative changes, along with "Nonspecific straightening of the cervical spine which may be related to patient positioning or muscle spasm." (CX 1 at 116)

Ultimately, the Claimant came under the care of Dr. Wayne Bruffett, who performed multi-level cervical surgery on January 30, 2020, and opined as follows on April 15, 2020:

Sammy returns and is doing great. The pain in his neck and arm is (sic) basically been relieved. He has a bit of tenderness in his neck posteriorly off to the left side. He has had quite a bit of increase in

his strength as well in his right arm. He has been going through physical therapy. He is at a point to where he is ready to return to work and I agree with him. His x-rays show his plate and bone graft to be in good position. His fusion appears to be consolidating. I am going to release him today without any restrictions. I will give him 1 final prescription for some pain medicine to have on hand. He understands he may have increasing pain to some degree when he returns to work. I am very proud of him. To go through a 3 level anterior cervical fusion and return to work as (sic) a testament to his fortitude. (CX 1 at 113)

Previously, on October 16, 2019, Dr. Bruffett wrote as follows:

I would say within a reasonable degree of medical certainty that when Mr. Harrison got hurt at work the degenerative foraminal stenosis and his cervical spine was rendered symptomatic. He did not have this radicular pain nor this weakness prior to his work injury and I do not think his weakness is related to his fractures that have since healed. He had electrical test today but I do not have the results of these yet.

I had a long visit with Sammy and his wife today. I think the truth is that this is a work-related problem. I am going to have him use this document to have this issue addressed with his case manager an (sic) adjuster and then we can reschedule an appointment, hopefully soon, under Workers' Comp to further direct his care. She (sic) will need an anterior cervical decompression of the spinal cord and exiting nerve roots with interbody fusion at C5-6 and C6-7 levels. I will see him back once this is properly filed under Workers Comp. I think it is the honest thing to do. (CX 1 at 122)

Apparently, the cervical EMG referred to above by Dr. Bruffett was performed on October 16, 2019, and suggested "electrodiagnostic evidence of severe right polyradiculopathy involving C5-C7 nerve roots." (CX 1 at 129)

Respondents' Exhibit No. 1 appears to reflect that the Claimant obtained chiropractic treatment involving his cervical spine as late as November 14, 2017, ahead of his injury date of March 21, 2018, and then again on January 23 and August 16, 2019. (RX 1 at 1) On the latter date, it further appears that in addition to his right upper extremity complaints, the Claimant was also suffering from bilateral lower extremity issues. (*Id.*) Respondents' Exhibit No. 1 further

reflects that the Claimant presented for neck pain to APRN Byron Montgomery on December 30, 2015, since the former "thinks he gave his self whip lash (sic) going down a ladder." (RX 1 at 2) On May 9, 2018, the Claimant again presented to APRN Montgomery with complaints of bilateral knee complaints and a request for "arthritis and pain medication refill," with no mention of symptoms involving either his neck or his upper extremities. (RX 1 at 23)

Interestingly, further according to Respondents' Exhibit No. 1, the Claimant presented to Dr. Golden on October 9, 2019, with "worsening right ear pain," and also with:

[L]eft anterior shoulder pain x 3 weeks after falling on shoulder. Reports he has had a right rotator cuff repair done on the right shoulder recently. Reports left shoulder is painful at night and after continuous activity. Described as sharp, unrelieved with ice or heat. Pt states he has not taken medication for symptoms. (RX 1 at 36)

Moreover, on October 28, 2019, the Claimant informed Dr. Golden of:

[N]eck pain and bilateral shoulder pain x several months. Reports he has had right shoulder repaired after a fall at work and left shoulder pain has improved since last visit. Pt states he was told that he needs C4-6 operated on *due to degeneration and arthritis*. Pt reports that he has intermittent pain through bilateral shoulders, increased pain with ROM of neck, intermittent numbness and tingling of BUE." (RX 1 at 40; emphasis added)

Adjudication

In addition to the applicable law cited above, I note that an employer takes an employee as he finds him, and that pre-existing conditions that are aggravated or accelerated by employment circumstances can be compensable. *Hickman v. Kellogg, Brown, & Root*, 372 Ark. 501, 277 S.W. 3d 591 (2008). However, an aggravation of a pre-existing condition amounts to a new injury, which must meet the definition of a "compensable injury." (*Id.*) In addition, Ark. Code Ann. §11-9-102 (16)(B) requires that:

Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical

certainty.

Although the radiographs performed on the Claimant's cervical spine on September 20, 2019, and January 15, 2020, were not necessarily introduced as medical opinions addressing compensability, it is clear that both radiographic reports were equivocal as to whether the straightening of the Claimant's cervical spine was secondary to muscle spasm or patient positioning. I thus decline to accept either report as objective findings in support of the Claimant's alleged cervical injury, and note that the additional findings on both were purely degenerative. I thus specifically find that the Claimant has failed to prove, by a preponderance of the evidence, that his alleged cervical injury of March 21, 2018, is supported by objective medical findings.

Further, I afford greater weight to the electrodiagnostic study conducted on August 2, 2018 (closer in time to the alleged date of cervical injury on March 21, 2018), than that conducted on October 16, 2019, particularly given Dr. Golden's reference on October 9, 2019, to the Claimant's left shoulder pain of some three weeks duration after a "recent" fall. In addition, the Claimant herein failed to mention cervical and/or upper extremity (neurological) complaints to his physicians until May 2, 2018, after denying such on previous occasions as above discussed.

Also, it is unclear what the Claimant may have meant with respect to "the same neck pain has had" during his visit with Dr. Golden on August 21, 2019, given that such is the first mention of post-incident neck pain in the available records. As previously noted, however, APRN Montgomery recorded such pain on December 30, 2015. In sum, given his testimony and comparison of such with the available medical records, I specifically find that the Claimant was not a credible witness with respect to the onset of his neck pain.

With due respect to Dr. Bruffett and the excellent result he apparently achieved for the Claimant, I am not persuaded that his opinions offered herein are sufficient to cure the deficit in

objective findings as above described.

Order

Based on the foregoing discussion, including my observation of the witness and his testimony, comparison of such with the documentary evidence supplied by the parties, and application of the statutory and case law cited above, I specifically find that the Claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable cervical injury during the course and scope of his employment on or about March 21, 2018, due to a lack of objective findings and a lack of witness credibility. All other issues are rendered moot and this claim is respectfully denied and dismissed.

The Respondents are ordered and directed to pay the Court Reporter's fee within thirty (30) days of billing pursuant to Rule 099.20 of the Arkansas Workers' Compensation Commission.

IT IS SO ORDERED.

TERRY DON LUCY
Administrative Law Judge