

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G705847

JERRY HARRIS, Employee	CLAIMANT
TYSON POULTRY, INC., Employer	RESPONDENT #1
TYNET, Carrier/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED JUNE 24, 2022

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Harrison, Boone County, Arkansas.

Claimant represented by F. S. "RICK" SPENCER, Attorney, Mountain Home, Arkansas.

Respondent #1 represented by R. SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

Respondent #2 represented by DAVID L. PAKE, Attorney, Little Rock, Arkansas; although not present at hearing.

STATEMENT OF THE CASE

On June 2, 2022, the above captioned claim came on for hearing at Harrison, Arkansas. A pre-hearing conference was conducted on August 24, 2020 by Administrative Law Judge Milton Fine and an amended 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 employee/self-insured employer relationship existed on August 16, 2017,

when claimant sustained compensable injuries to his left ribs, left wrist, left lung, left hand and left small finger as a result of a work-related motor vehicle accident.

3. Respondent #1 accepted the above injuries as compensable and paid medical and temporary total disability benefits pursuant thereto.

4. Claimant's average weekly wage entitles him to the maximum compensation rates.

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

1. Whether claimant also sustained compensable injuries to his neck, back, clavicle, shoulders and knees in the work-related motor vehicle accident.

2. Whether claimant is entitled to reasonable and necessary medical treatment of the above alleged injuries.

3. Whether claimant is entitled to additional temporary total disability benefits.

4. Whether claimant is entitled to impairment ratings in connection with his alleged right knee and left shoulder injuries, and permanent partial disability benefits pursuant thereto.

5. Whether claimant is permanently and totally disabled or, in the alternative, entitled to wage loss disability benefits.

6. Whether claimant is entitled to a controverted attorney's fee.

At the time of the hearing claimant chose to reserve the issues of temporary total disability; impairment ratings; and any entitlement to permanent partial disability benefits or permanent total disability benefits. The issues for consideration include compensability of injuries to claimant's neck, back, clavicle, bilateral shoulders and bilateral knees as a result of a motor vehicle accident on August 16, 2017, and medical related to those

conditions.

The claimant contends that he sustained compensable injuries as a result of the motor vehicle accident on August 16, 2017. He contends that he sustained compensable injuries to his neck, back, clavicle, shoulders and knees. Claimant also contends that he is entitled to additional temporary total disability benefits.

Respondent #1 denies that claimant sustained compensable injuries on August 16, 2017 to any body parts other than his left ribs, left lung, left hand and left small finger. It provided reasonable necessary medical treatment for those injuries and paid temporary total disability benefits while claimant healed from those injuries. Claimant's additional conditions are not causally related to the compensable incident and preexisted August 16, 2017. Respondent #1 further contends that claimant is not entitled to medical treatment, temporary total disability benefits, or to a controverted attorney's fee in connection with the neck, back, clavicle, bilateral shoulders, and bilateral knee condition.

Respondent #2 defers to the outcome of litigation and waives its right to attend the hearing.

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 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 August 24, 2020 and reflected in an amended pre-hearing order dated August 24,

2020 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 neck, back, clavicle, bilateral shoulders, or bilateral knees on August 16, 2017.

FACTUAL BACKGROUND

The claimant is a 63-year-old man who has worked for respondent on two different occasions. Claimant was employed by respondent to drive a feed truck, delivering feed to various farms. He was involved in a motor vehicle accident (“MVA”) on August 16, 2017. He testified that he was driving his truck in the rain to make a delivery and he looked down to check a clipboard. While he was looking at the clipboard, a front tire slipped off the road resulting in his truck striking a tree, a telephone pole, and a culvert causing his truck to overturn on to the passenger side. Claimant testified that he never hit his brakes but just let off the throttle.

At his deposition claimant testified that the accident occurred in front of a first responder’s house who took him to his garage and placed him in a lawn chair. Claimant stated that as he was sitting in the chair he began having really sharp pain in his ribs. Claimant was taken by ambulance to the hospital where he was diagnosed with multiple rib fractures and an injury to his left hand. Claimant received treatment for his rib injury from Dr. Guy Peebles and from Dr. Jeff Johnson for his left hand/small finger. Respondent #1 has accepted liability for compensable injuries to claimant’s left ribs, left wrist, left lung, left hand and left small finger.

The medical evidence indicates that claimant was referred for a functional capacity

evaluation by Dr. Johnson and the evaluation was performed on February 1, 2018. The evaluation was determined to be reliable with 55 of 55 consistency measures within expected limits. The evaluation determined that claimant demonstrated the ability to perform work in the Medium classification of work.

Following the evaluation, claimant returned to Dr. Johnson who in a report dated February 7, 2018 released claimant to return to work per the FCE with respect to his injuries from the MVA. At the time of the February 7 visit with Dr. Johnson, he noted that claimant was complaining of pain in other parts of his body including his knees, left shoulder, and back. Claimant did not return to work for respondent or any other employer, but instead filed for and is receiving social security disability benefits.

Since his release by Dr. Johnson, claimant has sought medical treatment from various physicians. For his left shoulder claimant has sought medical treatment from Dr. B. Ryan Benafield who gave claimant injections before performing arthroscopic surgery which included a rotator cuff debridement, distal clavicle excision and subacromial decompression on January 7, 2019.

For his knees, claimant has treated with Dr. Mark Powell who ordered an MRI scan of both knees. On July 12, 2019, Dr. Powell performed surgery on claimant's right knee which included partial medial and lateral meniscectomies and chondroplasty of the patella. The last medical report of Dr. Powell submitted into evidence is from November 21, 2019, with an assessment of left knee medial meniscal tear; lateral meniscal tear; and tricompartmental chondromalacia.

For his back and neck, claimant has been evaluated by Dr. Luke Knox who ordered an MRI scan. According to his report dated October 13, 2021, the MRI scan shows

degenerative disc changes at multiple levels. Dr. Knox indicated that he did not observe any compressive pathology that would be “remediable to surgical intervention.” He indicated that he would recommend physical therapy and that there was not much to offer from a neurosurgical standpoint.

Claimant has filed this claim contending that he suffered compensable injuries to his neck, back, clavicle, bilateral shoulders and bilateral knees as a result of the MVA on August 16, 2017. He requests payment of medical treatment related to those conditions.

ADJUDICATION

Claimant contends that in addition to the compensable injuries previously accepted by respondent as a result of the MVA, that he also suffered compensable injuries to his neck, back, clavicle, bilateral shoulders and bilateral knees. Claimant’s claim is for a specific injury identifiable by time and place of occurrence. 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.

First, I note that claimant has a history of complaints involving most of these body parts prior to the MVA, some of those complaints have been more significant and numerous than others. However, a pre-existing infirmity does not disqualify a claim if the

employment aggravated, accelerated, or combined with the infirmity to produce the disability for which compensation is sought. *St. Vincent Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W. 2d 550 (1996). An aggravation being a new injury with an independent cause, must meet the requirements for a compensable injury. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W. 3d 900 (2000).

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 proof. Specifically, I find that claimant has failed to prove that any of the body parts in dispute were injured as a result of the MVA on August 16, 2017.

First, as previously noted, claimant has a history of complaints involving each of these respective body parts with some of those complaints being more extensive than others. For instance, claimant suffered a compensable injury to his cervical spine in 2009 when he hit a tree while driving a riding lawnmower. This resulted in a neck fusion at the C3-C5 levels in 2011. At his deposition claimant testified that after he had healed from that surgery he had no other complaints involving his neck.

Q Have you gone to see any doctor - - not necessarily Armstrong - - but any doctor with complaints about your neck after you had the surgery, and you healed from the surgery, and before this truck accident?

A No.

Q So since May or June of 2011, have you seen any doctor with complaints about your neck?

A No.

Q But before you get to the truck accident?

A No.

A review of the medical records indicates that claimant sought medical treatment from his primary care physician, Dr. Dunaway, on several occasions with complaints of neck pain. Dr. Dunaway diagnosed claimant's condition as degeneration of the cervical intervertebral disc for which he prescribed medication including Tramadol for pain. In fact, as late as April 4, 2017, just four months before the accident, Dr. Dunaway prescribed claimant Tramadol with up to five refills.

At the hearing claimant admitted that he was receiving the same treatment for his neck after the accident as he was receiving before.

Q And rather than me going through all of these records, would you agree with me that you have been treating with Dr. Dunaway for your neck and he has been prescribing you medication for years before this accident?

A Diclofenac, anti-inflammatory.

Q Okay. And he has also given you tramadol.

A Tramadol.

Q Okay. And you were getting that treatment right up until this accident happened; correct?

A Yes, sir.

Q And that's the same treatment you were getting for your neck after the accident; correct?

A Yes, sir.

Claimant did indicate that in his opinion his neck pain was worse after the accident than before.

Likewise, with respect to claimant's left and right knee, he had previously undergone surgeries on both knees. At his deposition, claimant testified that he had not had any issues with either his left or right knee since those surgical treatments.

Q The right knee and the left knee, obviously you had problems with them before - -

A Uh-hum.

Q -- because you had surgeries on both of them?

A Yes.

Q One on the left, and two on the right in the past?

A Yes, ma'am.

Q When is the last time that you saw any doctor with a complaint related to your right knee before the truck accident?

A It's - -

Q Again, months, weeks, years. I don't expect you - -

A I'm just going to throw a date at you, but I think the surgery was done in 2006.

Q The second - -

A The second surgery.

Q Okay.

A You know, it was - - it was sore there for six to eight weeks. But after that I've never - - I haven't had no trouble with it.

Q Okay. So six to eight weeks after surgery no further problems with your right knee before the truck accident?

A No.

Q And no complaints to the doctor after that six to eight weeks had elapsed - -

A No.

Q -- after the surgery? Okay. The same question for the right knee.

When is the last time that you saw a doctor for your - - I mean left knee - - that you saw a doctor for your left knee, or had any kind of complaints related to your left knee?

A I think it was 19 - - 1989. Because after the first of the year somewheres, that's where I had the meniscus tear and fixed it. And I haven't had no trouble with this knee at all since then.

Thus, according to claimant's testimony, he had no additional problems with his right knee since approximately six or eight weeks after the surgery in 2006 and for the left knee had no problems since sometime in 1989. However, Dr. Dunaway's medical report of December 24, 2013, indicates that claimant had fallen on December 9 and at that point was having right knee pain. A subsequent medical report from Dr. Dunaway dated January 27, 2015 also indicates the claimant was complaining of right knee pain. Medical reports from Dr. Dunaway dated February 23, 2016 and March 17, 2016 indicate that claimant was complaining of bilateral knee pain. In fact, Dr. Dunaway indicated that with respect to the claimant's left knee pain, "will watch this, if no improvement he will call and we can refer to Orthopedist."

Furthermore, the medical records indicate prior complaints of pain involving the claimant's low back as well as the shoulders. These complaints were not as significant as the prior complaints to claimant's neck and bilateral knees. However, they are relevant in noting that claimant had some pre-existing complaints involving most of the body parts

now in question.

The claimant's accident in this case occurred on August 16, 2017. The first medical report submitted into evidence subsequent to the accident is a report from Dr. Peeples dated October 9, 2017. Dr. Peeples primarily treated claimant for his rib fractures. Dr. Peeples' medical report makes no mention of any complaints involving claimant's neck, low back, bilateral knees, or bilateral shoulders. Likewise, claimant sought medical treatment from his primary care physician, Dr. Dunaway, on October 25, 2017. Dr. Dunaway's report of that date indicates that claimant was seen for a lab review and medication refills. His report does indicate that claimant had a collapsed left lung and broken ribs as the result of an automobile accident, but it does not indicate that claimant made complaints of pain or any aggravation of his neck, low back, knees or shoulders.

The first medical report mentioning any of these complaints is Dr. Johnson's report of February 7, 2018, after the functional capacity evaluation. In his report of that date, Dr. Johnson stated:

He did a functional capacity evaluation 02/01/2018, revealing that he had 55 of 55 consistency of measures and was able to work at a medium classification of work with reliable results. Mr. Harris tells me has been having terrible problems since his FCE. He started having pain in both his knees, his left shoulder, his back and his ribs. He was having 6 weeks of pain in his left shoulder prior to this with no particular injury, but then he said the FCE made it worse. He had no injuries during the exam, but started hurting all over. He wanted to know if this was Worker's Compensation because he has done exactly what he was told over the last 6 months.

Based on his FCE, I am going to release him work per

the FCE. With respect to his shoulder, he wants to be seen locally for this. We will send him to see either Dr. Bryan Benefield or Dr. Andrew Heinzelmann. I assured him that I did not think was a Worker's Compensation injury from 6 months ago because his pain started 6 weeks ago. I also do not think the FCE caused any significant damage. Especially because he has pain now in both his knees, his back and his ribs and he does not feel like he can do anything. His return to work per his FCE would be outstanding his current pains, but really respect to his injury. (Emphasis added.)

A review of the functional capacity evaluation report indicates that claimant was making complaints of problems with these body parts at the time of the evaluation, but he specifically indicated that they were not attributable to his work-related accident:

Mr. Harris describes his pain as being in his left hand. He reports additional areas of pain that include: left side of his chest that he attributes to his work-related injury, and he also reports pain in his left shoulder, neck, and both knees, which he does not attribute to his work-related accident. (Emphasis added.)

Notably, the evaluation contains several notations of claimant complaining of pain in his right knee when performing various tests such as crouching, kneeling, and climbing stairs and that this pain is similar to the pain he experiences every day. The evaluation also contains the following:

He reported that the pain he experienced today is similar to the pain "that is normal for my hands and ribs and my knees feel about like they did when I worked even before the injury." (Emphasis added.)

At the hearing, claimant testified that he did not remember informing Dr. Johnson that his shoulder and knee pain did not begin until the functional capacities evaluation

and he did not know why he informed the functional capacity evaluator that those problems were not related to his accident.

Q Why did you tell the person who gave you the functional capacities evaluation that you had pain in your left shoulder, both knees, and neck, but you did not attribute them to the accident?

A I figured the shoulder pain was due to my neck. I figured my neck pain was causing the shoulder pain.

Q Okay. Why did you tell them that the knees weren't because of your neck – or because of the wreck?

A Well, the knees were hurting because of the wreck.

Q They were?

A Yes.

Q Well, why did you tell the functional capacities evaluator that they weren't?

A I don't know.

Furthermore, claimant testified at his deposition that these problems did not begin until after the first of the year in 2018.

Q So when did your left shoulder start bothering you?

A Well, it was sometime after the first of the year, because I called Susan Randolph, my caseworker with the workman's comp, and I told her that I was having a lot of trouble with my left shoulder. I couldn't reach back. I couldn't scratch my back. I had this real sharp pain that ran plumb down, I guess, the bicep next to the bone. Then the other side, it was the same way, but it didn't go as far.

Q The right shoulder was the same way?

A Yes.

Q And both those - - the left shoulder and the right shoulder problems started hurting after the first of the year?

A Probably after the first of the year, because I had been walking around protecting the ribs. If you ever had any broken ribs, it's just a habit to try to protect them. After the soreness got to where I could move my left shoulder, that's when all this pain started coming up.

Q What other injuries do you have that you attribute to this truck accident?

A Lower back.

Q And when did you - - this lower back started bothering you?

A About the same time the shoulder did.

Q So the first of 2018?

A Or towards the end of 2018. It's 2019 now; right?

Q Yes, sir.

A So, it would have been towards the end.

Q Of 2018?

A Yeah.

In summary, the medical records submitted into evidence subsequent to the claimant's injury do not mention any complaints of pain involving claimant's neck, back, bilateral shoulders, or bilateral knees as a result of the accident. Nor do they indicate that claimant had an aggravation of pain in those body parts. The first mention of any of those complaints to a physician is contained in Dr. Johnson's report of February 7, 2018, at

which time claimant attributed his problems to the FCE. According to Dr. Johnson, he did not believe claimant's complaints could have been related to the workers' compensation injury that had occurred six months ago. Furthermore, according to the functional capacities evaluation report, claimant was making those complaints at the time of the evaluation but did not attribute any of those complaints to his work-related accident. Furthermore, claimant specifically indicated that his knee complaints that day felt like they did when he worked even before the injury.

Accordingly, given the fact that the claimant had pre-existing complaints involving all of these body parts to some extent prior to August 16, 2017, as well as the fact that there were no new complaints or complaints of an aggravation of a pre-existing condition until some six months after the motor vehicle accident, I find that claimant has failed to prove by a preponderance of the evidence that he suffered compensable injuries to his neck, back, clavicle, bilateral knees, or bilateral shoulders as a result of the MVA on August 16, 2017. Claimant has failed to prove by a preponderance of the evidence that he suffered a new injury or an aggravation of a pre-existing condition.

In reaching this decision, I do note that claimant has offered into evidence signed statements from both Dr. Knox and Dr. Dunaway attributing claimant's complaints to the accident on August 16, 2017. According to Dr. Knox's medical records, his opinion is based upon the history given to him by the claimant. There is no indication that Dr. Knox was aware that claimant did not make any complaints of low back pain until six months after the accident. Likewise, although Dr. Dunaway has also given his opinion, I note that Dr. Dunaway's initial medical report makes no mention of any additional complaints or problems as a result of the accident other than claimant's lung and ribs. Again, claimant

made no complaints of additional problems until six months after the accident and even at that time he initially indicated that those complaints were not related to the accident.

Accordingly, I find claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his neck, back, bilateral knees, bilateral shoulders, or clavicle.

ORDER

Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his neck, back, bilateral shoulders, bilateral knees, or clavicle as a result of a motor vehicle accident on August 16, 2017. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondent #1 is responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$962.92.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE