

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H103797, H103798, H201158**

ROBERT POWERS, EMPLOYEE	CLAIMANT
UNIVERSITY OF ARKANSAS FAYETTEVILLE, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS DIVISION, INSURANCE CARRIER	RESPONDENT

OPINION FILED **AUGUST 18, 2022**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF, in Springdale, Washington County, Arkansas.

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

Respondents represented by CHARLES H. MCLEMORE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 23, 2022, the above captioned claim came before the Workers' Compensation Commission in Springdale, Arkansas, for a hearing. A prehearing conference was conducted on April 21, 2022, and a prehearing order filed that same date. A copy of the prehearing order has been marked as Commission's Exhibit No.1 and is made part of the record without objection.

1. The Arkansas Workers' Compensation Commission has jurisdiction of this case.
2. The employee/employer/carrier relationship existed on January 18, 2022.
3. The respondents have controverted the claim regarding claimant's left knee.

The issues to be litigated are limited to the following:

1. Whether claimant is entitled to medical benefits regarding his left knee.

The claimant contends that "he is entitled to medical benefits for his left knee, injured as a result of his compensable back injuries. The claimant reserves all other issues."

The respondents contend that “the claimant reported having an injury to his low back on August 29, 2019 which has been accepted as compensable. The respondent has provided the claimant with medical treatment reasonable and necessary for the compensable injury, including treatment with Dr. Mark Miedema who treated the claimant conservatively with injections, physical therapy, and an MRI. No surgery was recommended by Dr. Miedema, only Gabapentin and Medrol had been prescribed, and no work restrictions were given by Dr. Miedema. In April 2021, the claimant reported having had an injury to his low back in November 2020. The respondent accepted this as a medical only claim, and the claimant continued to be provided treatment for his low back for his August 29, 2019 injury. The claimant had his onetime Change of Physician to Dr. Blankenship, who saw the claimant on July 26, 2021 and additional treatment with Dr. Blankenship, including a second MRI study was provided by respondent. Dr. Blankenship offered the claimant lumbar interbody arthrodesis at L4-5 and L5-S1, but the claimant declined surgery. Dr. Blankenship then ordered a functional capacity evaluation. At the January 18, 2022 FCE, the claimant performed unreliably with 26 out of 54 consistency measures, after which Dr. Blankenship wrote in his January 31, 2022 letter that he would not operate on this claimant because of the claimant’s “inappropriate illness behavior.” Dr. Blankenship discharged the claimant from his clinic and released the claimant at maximum medical improvement. After this FCE appointment, at which the claimant tested unreliably, the claimant alleged to have sustained an injury to his left knee during the FCE. Respondent contends that the claimant did not sustain a compensable injury to his left knee at the FCE or as a compensable consequence of a compensable injury. The claimant was not taken off work by his physicians, and Dr. Blankenship released the claimant at maximum medical improvement on January 31, 2022, at which time Dr. Blankenship assigned the claimant a 6% rating to the body as a whole. The claimant returned to work and respondent has accepted this rating and is paying permanent partial disability benefits to

the claimant. The respondents reserve the right to raise additional contentions, or to modify those stated herein, pending completion of discovery.”

The above stipulations are hereby accepted as fact. From a review of the entire record, including medical reports, documents, and having heard testimony and observed the demeanor of the claimant, the following decision is rendered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the prehearing conference conducted on April 21, 2022 and contained in the Prehearing Order filed the same date are hereby accepted as fact.
2. Claimant has met his burden of proof by a preponderance of evidence that he is entitled to additional medical treatment from Dr. Christopher Dougherty for his left knee injury.

FACTUAL BACKGROUND

There are three file numbers referenced above. Only H201158 involved claimant’s left knee; nothing about claimant’s back injuries (H103797 and H103798) was litigated as part of this hearing. While the parties did not specifically identify the issue of compensability of the left knee injury, it was litigated as the respondent had controverted the left knee injury in its entirety.

As documents were being introduced before testimony began, respondent objected to Claimant’s Exhibit #2, a printout of three text messages from claimant’s cell phone. The first was from someone known only as Cody, a person associated with Functional Testing Centers, Inc. Cody had contacted claimant to verify claimant’s appointment with Functional Testing Centers, Inc. which is why claimant had his contact information. The second was a text to Cody, advising him that claimant maintained that he injured his knee during the evaluation the day before. The third was to claimant’s case manager for his back injury, identified at the hearing only as Debbie; this text also reported that claimant hurt his knee during the FCE and wanted to see a doctor.

Respondent's objection was that those texts were not provided seven days before the hearing as required by the Prehearing Order. Claimant's position is that those texts were solely for the purpose of rebutting one of respondent's exhibits, and as such, he was not required to provide it as other exhibits are to be exchanged as per the Prehearing Order. I find claimant is correct; the texts would have little relevance without portions of Respondent's Exhibit #2, and therefore are proper rebuttal evidence that did not need to be supplied to respondent before claimant knew the contents of respondent's exhibits. As such, Claimant's Exhibit #2 will be received as rebuttal evidence.

At the close of the testimony, the parties were asked to submit a post-hearing brief on the issue of whether the left knee injury as described could be considered a "compensable consequence" of claimant's compensable back injury. These briefs are blue-backed and made part of the record.

HEARING TESTIMONY

Claimant was the only witness that testified at the hearing. He testified that he is a plumber, working in that capacity for respondent University of Arkansas, Fayetteville. He had a work-related back injury in 2019 and following treatment for that injury, he was sent for a Functional Capacity Evaluation (FCE). Claimant testified that towards the end of the FCE, he was asked to pick some weights off the ground and was concerned that he might injure his back as he did so. Claimant stated that he spread his legs and used his knees instead of bending his back. As he got the weights about twelve inches off the ground, he felt his left knee pop. Claimant testified that he told the person administering the FCE that he had popped his knee, but the test kept going and he carried the weight across the room, turned and came back to where he began to set it in a chair.

Claimant said he went home after the FCE and put ice on his left knee. The next day, his knee was hurting worse, and he texted the therapist to let him know he had hurt his knee during the FCE. Claimant stated he was told to talk to his doctor and the case worker. When he returned to work on

Monday, he reported the incident to his supervisor. Claimant said it took a few days before he was approved to see a doctor, but then respondent denied he had a Workers' Compensation claim. Claimant then saw Dr. Dougherty in Bentonville, who gave him a knee brace and suggested physical therapy. Since the claim for Workers' Compensation benefits for his knee was denied, claimant testified that he was not able to afford the therapy; after watching some videos online, he did his own physical therapy. While claimant stated that his knee was sore as of the date of the hearing, he said it had improved, "but it comes and goes."

Claimant denied having problems with his knees prior to his FCE. Claimant was shown page 35 of respondent's non-medical exhibits and verified that he had drawn lines on that diagram to indicate that he had problems in his lower back and then down his legs and his heels. He denied making marks of circles around his knees. He denied telling the therapist at the FCE that he had had problems with his knees prior to the end of the evaluation. Claimant said the problems he had with his legs were just cramps which he attributed to his work. Claimant believed that his knee required professional physical therapy. He had not seen Dr. Dougherty in three to four weeks prior to the hearing and did not have an appointment to return to see him.

On cross-examination, claimant said he felt he gave his best effort at the FCE, but he had been asked to lift weight in excess of his doctor's restrictions. Claimant testified that he had told the examiner about his limitations before the FCE started and while he did not know exactly how much weight he was asked to lift, he knew it was more than 20 pounds. He said he had to lift the weight off the ground with his left hand, so he positioned himself with his legs spread open to use his legs and knees instead of his back when he picked up the weight. He testified that when he picked it up, his knee just popped. Claimant stated that "I felt an excruciating pain in my left knee." Claimant said he reported to the examiner he felt a pop in his knee, but he completed the task of walking what he guessed was about 20 feet.

Claimant said that he sent a text the next day to a person named Cody who had scheduled the appointment for the FCE, and he assumed he was the therapist or examiner that gave him the test.

Claimant explained that he did not receive any treatment for his knee until January 27, 2022, because his claim was initially denied.

Claimant believed that Dr. Dougherty told him that he tore his LCL, and the doctor wanted him to do physical therapy.¹ He hoped he did not have to have surgery on his left knee and did not have another appointment to see Dr. Dougherty. Claimant said he was doing physical therapy exercises on his knee each morning because when he gets up, his knee has locked up overnight.

On redirect examination claimant said he had texted his case worker for his back (identified only as “Debbie”) as he wanted to let someone know right away about the knee injury. Claimant said he had never spoken to or heard from Debbie again after he reported the knee injury.

REVIEW OF MEDICAL RECORDS

The records that were admitted into evidence included those from claimant’s treatment for his compensable back injury from September 3, 2019, through December 23, 2021. I reviewed those looking for any mention of an injury to claimant’s left knee prior to the functional capacity evaluation and did not find such. On July 26, 2021 claimant complained of “occasional bilateral lower extremity pain to his feet.” (R.X.33) On October 25, 2021, claimant noted “right calf pain and decreased strength in the right lower extremity.” (R.X.44) In his final visit with Dr. Blankenship before the FCE on January 18, 2022, claimant reported that he was still having low back pain that radiated into his hips and buttocks. Other than mentioning claimant’s assertion that he had radicular pain into his legs (and

¹ While claimant testified that his understanding after the MRI was that he had torn his LCL (lateral collateral ligament), Dr. Dougherty’s records indicate that he initially thought there was a tear in the anterior cruciate ligament (ACL). After reviewing the results of the MRI, he began treating claimant for a sprain of ACL.

predominantly his right leg), there was nothing in the records before claimant underwent the functional capacity evaluation that mentioned a specific problem with his left knee.

The FCE that claimant discussed in his testimony was conducted on January 18, 2022. It was submitted as a non-medical record and will be reviewed below.

The first medical record following the FCE was a January 27, 2022 visit with APR Dana Fields at the University of Arkansas, Pat Walker Health Center. Claimant's complaint was a knee injury and in the subjective portion of the record from that visit "PT. reports injuring his left knee during his workmen's compensation evaluation 1/18/22." However, claimant was not evaluated but rather given a contact number for the "state workmen's comp. contact." (R.X.53-54)

On January 28, 2022, claimant saw Dr. Debra Deere and again reported that he had to do a functional capacity testing and when he picked up a weight, he felt his left knee pop. (R.X.55) During Dr. Deere's evaluation, she noted "no swelling, no fusion, no pain, or crepitus with patellar compression, full ROM, negative interior drawer signed, negative posterior drawer signed, negative valgus stress test, negative parus stress test, and no joint line tenderness." Her plan was "sleeve for support. Worker's comp. ortho evaluation given pop and location of pain and history-may need imaging and/or PT."

After his claim for benefits was denied, claimant saw Dr. Christopher Dougherty on March 16, 2022. The office notes from that visit reflect that claimant used his health insurance for this service. Dr. Dougherty's assessment was that claimant's "exam is consistent with a tear of the left ACL. He will need an MRI of the left knee for further assessment. He will follow up once his MRI is complete." (R.X.59-61).

On March 23, 2022, Dr. Michael Flick performed an MRI, and his impression was "1. Minimal heterogeneity of the ACL suggestive of a very mild sprain. ACL is intact. 2. Mild subcutaneous swelling along the anterior aspect of the knee." (R.X.66) On March 30, 2022, claimant returned to see Dr.

Dougherty who recorded in his record “His MRI of the left knee was reviewed and discussed today. It shows a mild ACL sprain. We will treat this conservatively at this time. He will get started in physical therapy. He will return in two months for recheck.” (R.X.69) When claimant returned to Dr. Dougherty on June 1 the assessment/plan states “he has been working on a home exercise program with only slight improvement. He will continue with this, and we will see him back if symptoms warrant and he gets everything worked out with work.” (C.X.3)

REVIEW OF NON-MEDICAL DOCUMENTS

On January 18, 2022, claimant underwent a functional capacity evaluation at Functional Testing Centers Inc. The results of this examination were that claimant put forth an unreliable effort, with twenty-six of fifty-four consistency measures within expected limits. Many of his efforts considered inconsistent involved the use of his hands in grip testing and in horizontal strength change tests. It appears that claimant limited himself on lifting due to complaints that he was straining his lower back. (R.DE.14-32)

After claimant reported that he hurt his left knee during the examination, Verlene Williams, the claims specialist for respondent Public Employee Claims Division, posed the following questions to Functional Testing Centers, Inc.:²

1. Can you tell me if Mr. Powers reported an injury to his left knee at anytime during his testing?
2. Did he tell you his left knee popped or that he felt a pop at anytime during this testing?
3. After testing, did he report his left knee was hurting or injured.

The response to these questions were all in the negative. “Mr. Powers walking was reassessed at the conclusion of the evaluation and his pace and gait patterns remained completely normal. He did

² The email from Ms. Williams was not included in the exhibits, but the reply from Functional Testing Centers, Inc. was addressed to her, and the questions were repeated in that response.

not have a limp present and actually walked at an improved pace as compared to that noted at the onset of the evaluation.” The answer to the query concluded with “there is absolutely no indication of injury during this FCE regardless of Mr. Powers’ complaints. (R.DE.33-34).

On February 7, 2022, Ms. Williams denied the claim on behalf of respondent. (R.DE. 39)

ADJUDICATION

This case presents two issues to be decided: First, did claimant sustain an injury to his left knee during the FCE administered on January 18, 2022? Second, if the first question is answered in the affirmative, was that injury one that would entitle claimant to workers’ compensation benefits? Claimant has the burden of proving both contentions by a preponderance of the evidence.

1. Did claimant injure his left knee on January 18, 2022, during the FCE?

There is a direct contradiction in the evidence in this matter. Claimant said that he felt a pop in his left knee while he was attempting to lift a weight and reported what happened to the evaluator that was conducting the exam. Respondent produced both the written report from the FCE and a letter from the evaluators which denied claimant complained of injuring his left knee during any part of the evaluation.

Although a claimant's testimony is never viewed as uncontroverted, the Commission need not reject the claimant's testimony if it finds that testimony worthy of belief. *Ringier America v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993). It is not essential that the causal relationship between the accident and disability be established by medical evidence. *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).” Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Arkansas Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but

may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995).

While I have tried to reconcile the conflicting evidence, the testimony of the claimant when compared to the FCE report and subsequent letter cannot be squared. Faced with the binary choice of which to accept, I find claimant was more persuasive in his testimony, as I believe it is more likely than not that he was injured as he alleged for the following reasons:

1. I found him to be a credible witness when hearing him testify and observing his demeanor. The way he described how he injured his left knee is plausible and had enough detail that satisfied me that he was telling the truth.
2. The medical reports before the FCE have no record of a left knee injury; there are notes that refer to pain radiating from claimant's back into his hip and legs, mainly in the right leg.
3. Claimant did not reveal a specific knee injury before the FCE commenced, and given his cautious nature about doing anything to his injured back during the exam, I find it hard to believe that he would not have mentioned an injured knee prior to the evaluation.
4. After a day had passed following the FCE, during which time claimant said he had iced the knee and the pain in it increased, he texted the person with Functional Testing Centers, Inc. that had communicated with him. When that person told him that he needed to contact his adjuster, claimant reached out to her promptly.

While I have questions as to the discrepancy in the evidence regarding claimant advising the evaluator at the FCE about his knee "popping" at the time of the evaluation, I am satisfied by a preponderance of the evidence that the injury happened during the FCE as claimant testified, and he thus satisfied his burden of proof that he was injured during the FCE.

2. Was claimant's injury compensable under Arkansas law?

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 12 App. 450, 384 S.W. 3d 630.

Claimant's medical records proved he suffered internal harm (sprained ACL) which was supported by objective findings (the MRI), and identified precisely when the injury happened. However, claimant clearly was not engaged in the course of his employment at the time he underwent the FCE; he was not on the premises of respondent University of Arkansas, Fayetteville working as a plumber at the time that he injured his knee. Nonetheless, the parties agreed in their respective briefs that an injury is compensable if it is a natural consequence that flows from the injury, both citing *Jeter v. B. R. McGinty Mech.*, 62 Ark. App. 53, 968 S.W.2d 645 (1998) for that proposition. After reviewing the law that applies to this matter, I find that claimant's left knee injury was a compensable consequence of his compensable back injury.

In support of its position that this injury is not compensable, respondent cited several cases; however, three of those are not applicable due to my prior findings on the first question presented. *Tammy L. Young v. Arkansas Senate*, AWCC Claim No. G602502 (Full Commission Opinion filed February 21, 2019), *Schulterman v. Becko Machine Works*, 2015 Ark. App. 482 and *Ingram v. Tyson Mexican Original*, 2015 Ark. App. 519 all hinged upon a finding that the claimant was not a credible witness; that factor is not present in the instant case.

In *Nichols v Omaha School District*, 2010 Ark. App. 194, the claimant failed to meet her burden of proof that her present problems with her shoulder were related to a compensable injury because almost two years had passed between the time she had been released at maximum medical improvement and when she filed a claim for additional benefits for that injury. Under those circumstances, it was incumbent on Nichols to show a causal connection between her original injury, which involved the "left shoulder rotator cuff strain/possible tendinopathy and chronic periscapular pain associated with fibromyalgia" and the subsequent complaints she had with "joint pain" in that same shoulder, and she failed to do so. In the instant case, claimant's injury was to a separate part of his body and was filed as a new injury.

Similarly, the claimant in *Koster v. Custom Pak & Trissel Grabam & Tool, Inc.*, 2009 Ark. App. 780, failed to provide adequate proof that his right elbow injury was causally connected to overuse due to a compensable injury to his left elbow (and the record contained ample evidence to the contrary). In *Koster*, the claimant did not attempt to make the casual connection with his right elbow problem to the compensable left elbow injury until after he had completed treatment. In the case at bar, claimant immediately maintained that it was the FCE he was undergoing because of his compensable back injury that caused him to injure his left knee.

I am more persuaded by the cases cited by claimant in his brief. *Air Compressor Equipment v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (Ark. App. 2000) involved a claim for the loss of a toe, which was surgically removed by claimant's doctor to attach to claimant's hand following a compensable injury in which he had lost all the fingers and thumb on one hand. The operation failed, and claimant made a claim for the loss of the toe. The Court of Appeals upheld a decision from the Commission that awarded benefits, finding that that injury due to medical treatment was causally connected to the original injury.

Likewise, the accidental overdose of pain medication taken by the injured worker in *Eagle Safe Corp. v. Egan*, 39 Ark. App. 79, 842 S.W.2d 438 (1992) was found to be related to his employment. Discussing the application of “quasi-course of employment,” the Court of Appeals found: “The concept includes as compensable those injuries resulting from activities undertaken by the employee following a compensable injury which, although the activities take place outside the time and space limits of the workplace, are nevertheless related to the employment in the sense that they are necessary or reasonable activities undertaken only because of the compensable injury.”

While claimant was not receiving medical treatment from Functional Testing Centers, Inc. at the time of his left knee injury, he would not have been testing at that facility on January 18, 2022, if not for his compensable back injury, thus establishing the necessary causal connection between the back injury and his left knee injury. I therefore find claimant met his burden of proof on the issue of whether this injury arose out of the course of his employment. Therefore, claimant is entitled to additional medical treatment for his left knee injury.

ORDER

Claimant has proved by a preponderance of the evidence that he sustained a compensable injury to his left knee on January 18, 2022, while undergoing a functional capacity evaluation, and as such, is entitled to additional medical treatment for that injury as directed by Dr. Dougherty.

Pursuant to A.C.A. § 11-9-715(a)(1)(B)(ii), attorneys fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." In this case, there was no claim that indemnity benefits have been controverted up to the date of the hearing, and as all issues other than medical benefits were reserved, no attorney's fee can be awarded in this matter at this time. Claimant's attorney is free to voluntarily contract with medical provider pursuant to A.C.A. § 11-9-715(a)(4).

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of \$491.65.

IT IS SO ORDERED

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE