

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H304672

GREGORY ROBERSON, Employee	CLAIMANT
PEPPER SOURCE LTD, Employer	RESPONDENT
BRIDGEFIELD CASUALTY INSURANCE CO., Carrier	RESPONDENT

OPINION FILED MARCH 13, 2024

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by JASON M. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 12, 2024, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on December 20, 2023 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The claimant sustained a compensable injury to his right shoulder on July 14, 2022.

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

1. Compensability of injuries to claimant's neck and back on July 14, 2022.

The claimant contends he sustained compensable injuries to his neck and back as well as his right shoulder. He contends that the respondents did not dispute liability for the neck and back until after he filed a Petition to Change Physicians. Claimant is not requesting any specific benefits at this time; rather, he is requesting a determination regarding compensability so that he can exercise his one time right to change physicians. The claimant contends he is entitled to additional compensation in the form of a change of physicians; however, he acknowledges that issue cannot be determined at this time and therefore reserves his right to exercise his one time change of physicians.

The respondents contend the claimant did not sustain a compensable neck or back injury.

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

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on December 20, 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 cervical spine on July 14, 2022.

3. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his thoracic and lumbar spine on July 14, 2022.

## FACTUAL BACKGROUND

The parties have stipulated that claimant suffered a compensable injury to his right shoulder while working for respondent on July 14, 2022. On that date the claimant was pinned between two totes which weighed 160-200 pounds. Claimant testified that after this incident he had pain in his mid-back and shoulder area; chest; and his neck.

Claimant was taken to Baptist Health where he was noted to have abrasions to his right upper back and bruising to his upper abdomen. Claimant was diagnosed with a crush injury to his right arm; crushed chest; abrasion of right side of back; injury of abdomen; and crushing injury of right hand. After his initial treatment, claimant was evaluated by Cynthia Johnson, APRN. In her report of July 27, 2022, she diagnosed claimant's condition as (1) pain in right shoulder; (2) strain of muscles, fascia and tendons at shoulder and upper arm level, right arm; (3) abrasion of right back wall of thorax; (4) abrasion of right front wall of thorax; (5) contusion of thorax; (6) cervical back pain; (7) sprain of ligaments of thoracic spine; and (8) sprain of ligaments of lumbar spine.

Johnson's treatment included physical therapy, but when claimant's complaints continued she ordered MRI scans of claimant's thoracic and lumbar spines which were performed on August 24, 2022. Based on the test results which revealed protrusions and bulges, Johnson referred claimant for a neurosurgical evaluation with Dr. Tomecek.

Claimant's initial visit with Dr. Tomecek occurred on October 6, 2022, at which time he noted that claimant's lumbar MRI revealed a small disc herniation at L4-5 and that the thoracic MRI showed a disc protrusion at T5-6 and T8-9 with disc bulges at T2-3 and T3-4. Dr. Tomecek stated that claimant would benefit from additional physical therapy and an L4-5 injection from Dr. Goodman.

Claimant returned to Dr. Tomecek on December 1, 2022, and he noted that claimant had undergone the injection and therapy and indicated that claimant felt 80-90% better. Dr. Tomecek stated:

In regards to his low back injury I feel he has reached maximal medical improvement. On releasing him from active medical care and regards to his thoracic and lumbar spine today. He can continue to work at his new regular job without restrictions.

At the time he was seeing Dr. Tomecek for his spinal complaints claimant was also seeing Dr. Smith for his right shoulder complaints. Dr. Smith ordered a functional capacities evaluation which was considered to be reliable and indicated that claimant could perform work in the medium classification.

Claimant returned to Dr. Smith on June 28, 2023 for a follow-up visit. Dr. Smith noted that claimant was making complaints of additional pain during and after the functional capacities evaluation. Dr. Smith stated:

Right shoulder and upper extremity pain. This seems to be a little bit different of presentation the last time I saw him. I am more concerned with cervical radiculopathy given the location and the constellation of symptoms. I am recommending that we get x-rays of his cervical spine. I would also recommend an EMG nerve conduction study of the right upper extremity. Pending the results of the x-rays of his c-spine, may give consideration to an MRI of the cervical spine.

That same day claimant underwent x-rays of his cervical spine which revealed degenerative changes. Claimant also underwent an MRI scan of his cervical spine on July 11, 2023 with the following impression:

C3-C4 Small central disc protrusion without significant indentation subarachnoid space. Mild foraminal spurring. Diffuse mild disc bulges C5-C6, C6-C7 with foraminal spur.

Subsequent to the cervical MRI scan claimant returned to Dr. Tomecek on September 7, 2023. Dr. Tomecek noted the MRI findings and prescribed physical therapy. Following physical therapy claimant returned to Dr. Tomecek on October 5, 2023, at which time he opined that claimant had reached maximum medical improvement and released claimant to return to work with no restrictions.

As previously noted, the parties have stipulated that claimant suffered a compensable injury to his right shoulder on July 14, 2022. In addition to providing medical treatment for the right shoulder, respondent also provided medical treatment for claimant's cervical, thoracic, and lumbar spine complaints. After claimant was released by Dr. Tomecek on September 7, 2023, claimant filed a petition for a change of physician. At that point, respondent chose to deny compensability of injuries to claimant's neck and back on July 14, 2022. Claimant has filed this claim contending that he suffered compensable injuries to his neck and back on July 14, 2022.

### ADJUDICATION

Claimant contends that he suffered compensable injuries to his neck and back as a result of the accident on July 14, 2022. Claimant's claim is for a specific incident, 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 there is no question that the accident occurred on July 14, 2022 since the parties have stipulated that claimant injured his right shoulder as a result of that accident. Therefore, I find that claimant has proven that his injury arose out of and in the course of his employment and that the injury was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has proven that his injury caused internal or external harm to his body that required medical services. The medical records indicate that claimant complained of pain in both his neck and back which resulted in him receiving medical treatment. This treatment included physical therapy and a lumbar epidural injection. In addition, because of claimant's complaints, medical tests in the form of cervical, thoracic, and lumbar MRI scans were performed.

The primary issue in this claim is whether claimant has satisfied the last element of compensability – medical evidence supported by objective findings establishing the injury. I find that claimant has met his burden of proof with respect to his thoracic and lumbar spines. I also find that claimant has failed to meet his burden of proof with respect to his cervical spine.

Based on claimant's complaints of thoracic and lumbar pain, claimant underwent a thoracic MRI and lumbar MRI on August 24, 2022, approximately seven weeks after his

accident on July 14. The MRI reports contain the following impressions:

8/24/22 MRI Lumbar Spine:

Mild degenerative changes of the lumbar spine as described above. Small far left lateral protrusion L4-5 with mild left L4-5 foraminal stenosis. No canal stenosis.

8/24/22 MRI Thoracic Spine:

Multilevel degenerative changes as above with left-sided disc bulges at T2-3 T3-4. Left-sided disc protrusion T5-6 with some left ventral thecal sac compression. No canal stenosis. No compression fractures.

After the MRIs were performed, claimant was referred to Dr. Tomecek for treatment. In his report of October 6, 2022, he noted that claimant's lumbar MRI scan showed a small disc herniation at L4-5 and that the thoracic scan showed disc protrusions at T5-6 and T8-9 with disc bulges at T2-3 and T3-4. He diagnosed claimant's condition as a lumbar herniated disc at L4-5 and a thoracic disc at T5-6. He also prescribed physical therapy and a lumbar epidural injection.

While Dr. Tomecek did indicate that the MRI scan revealed degenerative changes, he also noted that there was a lumbar herniated disc and disc bulges present. These are objective findings and satisfy the remaining element of compensability.

Accordingly, based on the foregoing, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered compensable injuries to his thoracic and lumbar spine as a result of the accident on July 14, 2022.

With respect to the claimant's cervical spine, I find that he has failed to meet his burden of proof. The medical records do indicate that claimant made complaints of neck pain immediately after the accident on July 14. However, unlike the lumbar and thoracic

MRIs, there was no MRI performed on the claimant's cervical spine in August 2022. After those MRIs were performed and claimant began treating with Dr. Tomecek, claimant's treatment focused on the thoracic and lumbar spine. In his report of December 1, 2022, Dr. Tomecek indicated that he was releasing claimant from his care for his thoracic and lumbar spine. He also indicated that claimant could return to work without restrictions.

Claimant subsequently underwent a functional capacities evaluation and was released by Dr. David Dimet, an associate of Dr. Smith who is treating claimant for his compensable shoulder injury. After this release claimant did not return to see Dr. Smith again until June 28, 2023. Dr. Smith reported that claimant gave a history of a burning pain in his upper trapezial region as well as numbness down into the hand which he noticed during the FCE and afterwards. Dr. Smith noted that this presentation was "a little bit different of presentation the last time I saw him." Dr. Smith was concerned with cervical radiculopathy and ordered an EMG nerve conduction study, x-rays, and a cervical MRI.

The EMG of July 27, 2023 was interpreted as normal. The x-rays of June 28, 2023 were interpreted as showing multilevel degenerative changes. The July 11, 2023 cervical MRI scan contained the following impression:

C3-C4 small central disc protrusion without significant indentation subarachnoid space. Mild foraminal spurring. Diffuse mild disc bulges C5-C6, C6-C7 with foraminal spur.

A small disc protrusion would be considered an objective finding; however, according to Dr. Tomecek, the findings on the cervical MRI scan were degenerative in nature and not acute. In his report of September 7, 2023, Dr. Tomecek stated:



On objective testing he has a normal EMG of the right upper extremity with no sign of nerve injury. He has an MRI of the cervical spine that shows no acute injury fractures or subluxations. This appears to be a soft tissue injury. (Emphasis added.)

Dr. Tomecek reiterated that the MRI scan showed only degenerative changes in his report of October 5, 2023, in which he stated:

He has undergone an EMG on 7/27/2023 and this was a normal study with no evidence electrographically of cervical radiculopathy, plexopathy, no evidence of peripheral neuropathy or any peripheral nerve entrapment syndrome or injury in the arm. He has had an MRI on 7/11/2023 that I have reviewed that only shows minimal degenerative disc bulges at C3-4 C4-5 C5-6 and C6-7. There is mild degenerative change of the disc and with loss of cervical lordosis. (Emphasis added.)

Thus, according to Dr. Tomecek, the findings on claimant's cervical MRI scan are degenerative in nature. Based upon Dr. Tomecek's opinion that these findings are degenerative in nature and not acute, I find that claimant has failed to offer medical evidence supported by objective findings establishing an injury to his cervical spine on July 14, 2022.

#### AWARD

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his cervical spine on July 14, 2022. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his thoracic and lumbar spine on July 14, 2022.

Respondents are liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$393.45.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE