

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H202784**

**LAROY ROGERS,
EMPLOYEE**

CLAIMANT

**RESOLUTE FOREST PRODUCTS US, INC.,
EMPLOYER**

RESPONDENT

**AMERICAN ZURICH INS. CO./
ZURICH INS. CO.,
INSURANCE CARRIER/TPA**

RESPONDENT

OPINION AND ORDER FILED AUGUST 18, 2023

Hearing conducted on May 16, 2023, before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, in El Dorado, Union County, Arkansas.

The claimant was represented by the Honorable Mark Alan Peoples, The Peoples Law Firm, Little Rock, Pulaski County, Arkansas.

The respondents were represented by the Honorable Michael C. Stiles, Newkirk & Jones, Little Rock, Pulaski County, Arkansas. The parties submitted their respective responses to the prehearing questionnaire prior to the conference.

INTRODUCTION

In the prehearing order filed May 16, 2023, the parties agreed to the following stipulations which they affirmed on the record at the hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed at all relevant times including March 18, 2022, when the claimant sustained a compensable injury to his right foot and ankle for which the respondents paid medical and indemnity benefits.
3. The claimant's average weekly wage (AWW) is \$863.71, which is sufficient to entitle him to weekly compensation rates of \$576.00 for temporary total disability (TTD), and \$432.00 for permanent partial disability (PPD) benefits.
4. At this time, the respondents have controverted only the claimant's request for additional medical treatment after October 27, 2022.

5. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Commission Exhibit 1 at 1-2; Reporter's Transcript at 4).

1. Whether the claimant is entitled to the additional medical treatment Dr. D'Orsay Bryant has recommended at this time: namely, physical therapy (PT) for his admittedly compensable March 18, 2022, right foot and ankle injuries.
2. Whether the claimant's attorney is entitled to a controverted fee on these facts.
3. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; RT. 4).

The claimant contends he is entitled to the medical treatment – at this time namely, PT – the claimant's one (1)-time-only change of physician (COP), Dr. D'Orsay Bryant, has recommended for the claimant's admittedly compensable right foot and ankle injuries. The claimant hereby specifically reserves any and all other issues for future determination and/or litigation. (Comms'n Ex. 1 at 2; RT. 4).

The respondents contend they have paid the claimant all medical, indemnity, and any and all other benefits to which he is entitled pursuant to the Arkansas Workers' Compensation Act (the Act), and that to date they have not controverted the payment of any benefits whatsoever. The respondents contend they have paid all related medical expenses on the claimant's behalf. The respondents contend they have paid all TTD benefits to which the claimant is entitled while he was off work as a result of the March 18, 2022, compensable incident. The respondents contend that on May 10, 2022, the claimant's original treating physician, Dr. Robert A. Watson II, released

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him to full duty work without any physical limitations or restrictions. Thereafter, the claimant exercised his COP right to Dr. Bryant, who has at this time has recommended the claimant undergo additional medical treatment in the form of PT. The respondents have not yet agreed to pay for Dr. Bryant's PT recommendation. Finally, the respondents contend that pursuant to *Ark. Code Ann.* Section 11-9-411 (2023 Lexis Replacement), if the Commission awards the claimant any additional benefits they are entitled to a dollar-for-dollar set-off/credit for all benefits paid by the claimant's group health carrier, as well as any and all short-term disability (STD), long-term disability (LTD), and unemployment benefits paid to the claimant by any third-party. (Comms'n Ex. 1 at 2-3; RT. 4).

STATEMENT OF THE CASE

The claimant, Laroy Rogers (the claimant), is 57 years old. On March 18, 2022, he was working with Resolute Forest Products (Resolute) running a stick machine when the cart at the end of the conveyor belt began to move as he was stepping on it in order to facilitate the sticks moving forward on the belt where they would then fall into the loading cart and a forklift would haul them to another location for disposal. When the cart moved this caused the claimant to catch his right foot in between a railing and the cart, and he injured his right foot and ankle. The respondents accepted these injuries as compensable and paid medical and indemnity benefits. (RT. 7-9; Comms'n Ex. 1 at 2).

On March 19, 2022, the claimant presented himself for evaluation and treatment at the Medical Center of Central Arkansas. Diagnostic imaging revealed the claimant had sustained a, "Minimally displaced fracture of the third metatarsal", as well as "Possible nondisplaced fractures

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at the base of the third and fourth proximal phalanges.” (Respondents’ Exhibit 1 at 1). The claimant attended a follow-up visit with Dr. Robert Watson, a physician with the Family Medical Care clinic in El Dorado. Dr. Watson’s clinic notes the claimant stated, “overall he is a lot better”, but he was still having “soreness and struggles with bending toes.” (RX1 at 2). Dr. Watson’s impression at that time was that the claimant’s right metatarsal fracture was healing, and he had right foot pain, cellulitis, and a bunion. (Id.). Two (2) weeks later, on May 10, 2022, the claimant followed-up with Dr. Watson. Dr. Watson’s clinic note for this visit indicates the claimant told him, “his right foot is feeling a lot better.” (RX1 at 3). Dr. Watson’s impression of the claimant’s condition at that time was that he had a metatarsal fracture, foot pain, and cellulitis. (Id.). The claimant testified he was released to return to full duty work around May 22 or 23, 2022, but that he was unable to perform full duty work because he was still wearing an ankle/foot stabilizing boot and, in essence, he was still healing, and his right foot and ankle were swollen and still hurting. (RT. 9-11).

Because he was still experiencing swelling and pain in his right foot and ankle, on May 4, 2023, the claimant presented himself for evaluation and treatment to Dr. D’Orsay Bryant, an orthopedic surgeon associated with the Tri-State Orthopedic and Sports Medicine Center in El Dorado. Dr. Bryant’s clinic note for this visit noted the claimant had, “tenderness at the hallux and first and second metatarsal”; “pain on flexion and extension of the great toe MTP joint/hallux”; “difficulty with flexion and extension of the toes of the right foot with decreased sensation along the dorsal and plantar aspects.” (Claimant’s Exhibit 1 at 1). Dr. Bryant’s impression of the claimant’s right foot and ankle condition at that time was, “Right foot third metatarsal fracture by history with healed laceration.” (Id.). Dr. Bryant concluded the claimant:

...[I]s a suitable candidate for the conservative treatment program recommended in the initial office visit. Physical therapy three times a week for six weeks with range of motion and strengthening exercises is recommended. He is a suitable candidate for physical therapy, right foot range of motion and strengthening exercises three times a week for six weeks.

CX1 at 2). Dr. Bryant also prescribed the claimant Gabapentin, medication designed to treat nerve pain. (*Id.*). The respondents did not approve Dr. Bryant's aforementioned conservative treatment recommendations. (Comms'n Ex. 1 at 2-3; RT. 10-15) (Bracketed material added).

The claimant returned to see Dr. Bryant on June 1, 2023. Dr. Bryant noted the claimant had continued to work, and that the PT he had recommended was not approved [by the respondents]. (CX1 at 1 at 3, RT. 37). In his clinic note of this 6/1/2023 visit Dr. Bryant went on to describe his impression the claimant's right foot/ankle condition as, "Persistent foot pain with un-rehabilitated foot." (*Id.*). Dr. Bryant also reiterated his 5/4/2023 PT, etc., recommendation, specifically noting the claimant had, "not had any substantial treatment since his injury on 03/18/2022 for over a year." (*Id.*). He ended his clinic note by clearly and bluntly stating: "Physical therapy is mandatory for long-lasting effective result. Follow up in six weeks." (CX1 at 4, RT. 38).

At the hearing the claimant testified his right foot/ankle were swollen and still hurt. He also agreed to allow the ALJ and both attorneys to visibly see the obvious swelling in the area of his right foot and ankle. He further testified he was self-treating by rubbing and soaking his foot every evening after he had worked 12-hour days. (RT. 12-25).

DISCUSSION

The Burden of Proof

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2023 Lexis Replacement). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). *Ark. Code Ann.* Section 11-9-704(c)(3) (2023 Lexis Repl.) states that the ALJ, the Commission, and the courts “shall strictly construe” the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party. *Ark. Code Ann.* § 11-9-704(c)(4) (2023 Lexis Repl.); *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers’ compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep’t of Corrections v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Dena Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission’s exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees*, 51 Ark. App. 116, 912

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S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles, supra*.

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission's province to weigh the totality of the medical evidence and to determine what evidence is most credible given the totality of the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

The claimant has met his burden of proof in demonstrating he is entitled to additional medical treatment – specifically, the PT and strengthening exercises – Dr. Bryant has recommended.

Ark. Code Ann. Section 11–9–508(a) (2022 Lexis Supp.) requires employers to provide medical services that are reasonably necessary in connection with a compensable injury. A claimant may be entitled to additional medical treatment after his healing period has ended if the proposed treatment is geared toward management of symptoms associated with his compensable injury. *Santillan v. Tyson Sales & Distribution*, 2011 Ark. App. 634, 386 S.W.3d 566 (Ark. App. 2011); *Cossey v. Pepsi Beverage Co.*, 2015 Ark. App. 265, 3, 460 S.W.3d 814, 817 (Ark. App. 2015). Of course, significantly, in addition to being reasonably necessary for treatment of her compensable injury, the requested additional medical treatment must be *causally related* to the compensable injury.

In applying the applicable law to the facts of this case, I am compelled to find the claimant has met his burden of proof in demonstrating the PT and strengthening exercises Dr. Bryant has recommended for the claimant are both causally related to and reasonably necessary in light of his admittedly compensable right foot and ankle injuries of March 18, 2022.

Indeed, not only the law, but common sense, life experience, and the Commission's superior knowledge, experience, and issues within its jurisdiction and purview, support the claimant's contention he is entitled to the conservative treatment Dr. Bryant has recommended. Just as a juror is not required to set aside his common knowledge (and common sense), likewise an ALJ as a finder of fact may consider all relevant evidence in light of his or her, "own observations and experiences in the affairs of life." *Ark. Model Jury Instr., Civil*, 104. Both common sense and life experience, as well as the Commission's knowledge and experience in hearing and rendering opinions, demonstrate that oftentimes foot and/or ankle injuries often result in swelling and/or pain for extended periods of time – especially when an employee is working on their feet for long periods of time.

In summary, I found the claimant to be a credible witness, and the additional medical treatment he is requesting to be eminently reasonably necessary and related to his admittedly compensable injury. *See, Santillan, and Cossey, supra*. To quote Dr. Bryant: "Physical therapy is mandatory for [a] long lasting effective result" in the claimant's case. (CX1 at 4; RT. 38) (Bracketed material added).

Therefore, for all the aforementioned reasons, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations contained in the prehearing order filed May 23, 2023, which the parties affirmed on the record at the hearing, hereby are accepted as facts.
2. The claimant has met his burden of proof in demonstrating he is entitled to the additional medical treatment, specifically, the PT and strengthening exercises Dr. Bryant has recommended.
3. Since the only issue litigated at the subject hearing was the claimant's entitlement to additional medical care, the he claimant's attorney, of course, is not entitled to a fee on these facts.

If they have not already done so the respondents hereby are ordered to pay the court reporter's invoice within twenty (20) days of their receipt of this opinion and order.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp