BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

AWCC FILE № H303578

BRANDON G. SHACKLEFORD, EMPLOYEE	**CLAIMANT**
ALLEN FAMILY ENTERPRISES, LLC, (AFE, LLC,) EMPLOYER	**RESPONDENT**
NATIONAL INSURANCE COMPANY/SEDGEWICK CLAIMS MANAGEMENT SERCVICES, INC, CARRIER/TPA	**RESPONDENT**

OPINION FILED 3 MAY 2024

Heard before Arkansas Workers' Compensation Commission (AWCC) Administrative Law Judge JayO. Howe on 7 February 2024 in Little Rock, Arkansas.

Mr. Gary Davis, of the Davis Law Firm, appeared for the claimant.

Mr. Jason Ryburn, of the Ryburn Law Firm, appeared for the respondents.

I. STATEMENT OF THE CASE

The above-captioned case was heard on 7 February 2024 in Little Rock, Arkansas, after the parties participated in a pre-hearing telephone conference on 19 September 2023. The subsequent Prehearing Order, admitted to the record without objection as Commission's Exhibit № 1, was entered on the same day that the conference was held. The Order stated the following ISSUES TO BE LITIGATED:

1. Compensability.
2. Temporary Total Disability (TTD) benefits.
3. Medical Benefits.
4. Controverted Attorney's Fee.

The parties' CONTENTIONS, as set forth in their Prehearing Questionnaire Responses, were incorporated into the Prehearing Order. The claimant contends:

1. That he sustained compensable injuries on or about 5 May 2023 to his right arm and elbow.

2. That he is entitled to TTD benefits from 15 May 2023[1] through a date yet to be determined.

3. That he is entitled to coverage for reasonable and necessary medical expenses.

4. That he is entitled to a controverted attorney's fee.

The respondents contend:

1. That the claimant did not sustain a compensable injury.

2. That the claimant sought and underwent unauthorized treatment.[2]

3. That to the extent that the claimant may be entitled to TTD benefits, the respondents are entitled to a credit for any unemployment benefits he received during a period of TTD entitlement.[3]

That Order also set forth the following STIPULATIONS:

1. The AWCC has jurisdiction over this claim.

2. An employee/employer/carrier relationship existed on or about 5 May 2023, at which time the claimant sustained alleged injuries to his right arm and elbow.

3. Claimant's Average Weekly Wage of $771.00 entitles him to compensation rates of $514.00/$386.00.[4]

The following WITNESSES testified at the hearing: the claimant testified on his own behalf, Ms. Teresa Tessman testified on behalf of the respondents, and Mr. Chandler Jackson Brinkman was called by the respondents for the purpose of rebuttal testimony.[5]

---

[1] See TR at 7-8.
[2] See FN 1.
[3] See FN 1.
[4] See TR at 5.
[5] The claimant objected to Mr. Brinkman's testimony because he was not identified with at least seven days' notice, per the Prehearing Order. That objection was sustained. His testimony was then proffered as a rebuttal witness.

Admitted into evidence were Commission's Exhibit № 1 (the Prehearing Order), Claimant's Exhibit №s 1 (medical records between 05/15/2023 and 08/03/2023), 2 (medical records between 09/28/2023 and 01/22/2024), and 3 (a text message dated 05/15/2023); and Respondent's Exhibit №s 1 (miscellaneous records) and 2 (the transcript from the claimant's deposition).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record as a whole and having heard testimony from the witnesses, observing their demeanor, I make the following findings of fact and conclusions of law under ACA § 11-9-704:

1. The AWCC has jurisdiction over this claim.

2. The previously noted stipulations are accepted as fact.

3. The claimant proved by a preponderance of the evidence that he suffered a compensable injury to his right arm/elbow by specific incident.

4. The claimant proved by a preponderance of the evidence that he is entitled to TTD benefits from 15 May 2023 to a date yet to be determined, less the amount of credit the respondents may claim against any unemployment benefits received by the claimant.

5. The claimant proved by a preponderance of the evidence that all treatment in evidence of his compensable right arm/elbow injury was reasonable and necessary.

6. The claimant proved by a preponderance of the evidence that he is entitled to a controverted attorney's fee, under ACA § 11-9-715, on the indemnity benefits awarded herein.

III. HEARING TESTIMONY & MEDICAL EVIDENCE

Claimant Brandon Shackleford

The claimant is a 38-year-old male with a high school diploma. At the time relevant to this matter, he had been on the job with the respondent-employer for about ten months, working on a crew that performed parallel drilling and placed conduit for underground utilities. [TR at 17.]

According to the claimant, he and his crew were working at a residential neighborhood in Benton on 5 May 2023. They were having trouble breaking through the ground, so the claimant borrowed a rock bar tool from other contractors also on the site. [TR at 18-19.] A rock bar, he explained, is a heavy steel pole, about six feet long and weighing thirty-five or so pounds, with a sharpened point on one end that can help loosen solid ground. Mr. Shackleford said that when he stabbed the bar into the ground, he felt something in his elbow and knew that "[s]omething was not right." [TR at 20.] He described the pain as a sharp, ripping pain, but tried to keep working. The claimant stated that he later struggled to manage a water line issue by himself (as he normally would) and that others on the crew ultimately had to join in to help with the fix. [TR at 22.] The claimant testified that Chandler Jackson Brinkman was with him when he first hurt his arm, that he told his supervisor "B.J." that his arm was "messed up" from using the rock bar, and that B.J. did not ask him any questions about it afterwards. [TR at 23.]

Mr. Shackleford testified that the next week everyone knew he had been hurt and that he reported his arm being swollen to "Trevor" (his contact for work scheduling), but that he received no direction on seeking care. [TR at 25.] He went on, "It came around Sunday and I'm still no better and I said, 'I've had enough of it,' and I ended up contacting the owners of the company." [TR at 28.] Mr. Shackelford recalled sending a text message: "Look I need to get the workers' compensation information and get something going, 'cause my arm ain't no better." The text was sent on Sunday, 14 May 2023, to owner Jeremy "Beau" Allen. [TR at 29.]

Mr. Shackleford stated that the next day he presented to the emergency department at Saline Memorial Hospital, following direction from Teresa Tessman, a co-owner of the respondent employer. [TR at 30.] The encounter notes from that visit show that the claimant reported pain in his elbow and arm after using a heavy metal bar to break up the ground. He

was diagnosed with Lateral Epicondylitis of the elbow.[6] [Cl. Ex. № 1 at 2.] The claimant testified that he followed up days later at a Concentra clinic, again at the direction of his employers. [TR at 31.] He then went sometime without care because, according to his testimony, he did not have adequate health insurance after separating from his employment. The claimant explained that he had difficulty arranging physical therapy treatments that were recommended because the respondents "ghosted" him. [TR at 33-34.] That led him to contacting counsel and then reengaging in treatment after he received approval for Medicaid coverage. [TR at 35.]

The claimant explained that he saw a physician again and began physical therapy. "So, I did the nine weeks of physical therapy, and it did no good. Then, they did an injection, and it did no good either. Then, he referred me to the doctor that I have now, Dr. Norton." *Id.* He continued, "Dr. Norton did everything. He got me a MRI, and then, identified that there was significant tear damage, and then repaired the damage, and then, I'm ongoing in his medical care right now." [TR at 36.] He said that his then-current treatment included physical therapy two times per week. *Id.*

After reporting the injury, seeking care, obtaining restrictions, and following up with the respondents about returning to work, Mr. Shackleford stated that he was told that light duty was not available. They offered, according to his testimony, to match his accrued and available paid time off (PTO) of five days with another five days of paid time off work.

> By then, after they tell me, after my last day of being on PT – or the day that they matched me, which was going to be ten paid days altogether that, hopefully, by then my workers' compensation would kick in. On the – my 10th day of being paid this PTO that they was matching, they ended up sending me a letter and it was resigning me from my job, terminating me.

[6] The diagnosis line on the note mistakenly lists the *left* arm, while the rest of the note consistently refers to the right arm, which is consistent with the claimant's testimony and the issues before the Commission. The reference to his left arm is clearly a scrivener's error.

[TR at 38.]

Mr. Shackleford eventually applied for unemployment and testified that the respondent-employer objected to his unemployment benefits, so a hearing was scheduled on that matter. [TR at 37.] He said that for their argument against benefits being granted, the respondents cited excessive absenteeism. The claimant eventually prevailed and received benefits. He recalled that the amount was around $4,800 or consistent with the amounts reflected in the records provided by the respondents.[7]

In closing his testimony on direct examination, the claimant stated that he did not experience problems with his right arm prior to the work incident at issue in this claim. [TR at 39.]

On cross examination, the claimant confirmed that the rock bar he used at the work site was borrowed from another crew on location and that it was bent. Still, the bar was heavy, and he hoped it would help break through the hard ground. [TR at 43-44.] Mr. Shackleford recalled stabbing the bar at the ground only once, and then his coworker tried a time or two before Trevor told them to stop because he thought that a gas leak might have caused the ground to harden. [TR at 45.] He testified again that he tried to continue working that day, but that he did not do any more digging after hurting his arm. He also said that as he continued to experience trouble with his arm, he attempted to seek guidance from his employer on obtaining care. [TR at 46.] The claimant agreed that he was paid through 26 May 2023 and that the last ten days of his pay were from earned PTO combined with the matching time offered by the respondents. [TR at 51.]

The examination then turned to the claimant's application for unemployment benefits. He affirmed that he supplied the responses and information submitted on his benefits

[7] The total amount paid in benefits, as reflected in Resp. Ex. № 1 at 1, is $4,880.00.

application [Resp. Ex. № 1 at 1-30] and offered that any inconsistency between the statements in the application and those related to his workers' compensation claim could be attributed to the direction or assistance of the staff to whom he explained his situation and who helped him complete the forms. [TR at 59.]

He went on to say that when he returned to work on the Monday after injuring his arm, "[e]verybody's talking to me about my arm," which was notably swollen at the time. [TR at 68.] Mr. Shackleford opined that in addition to those discussions that day, everyone on the crew was in contact on the job site via Bluetooth headsets and all would have already known about him getting hurt.

Witness Teresa Tessman, co-owner of the respondent-employer

Ms. Tessman testified that she handles "everything" regarding business administration, "[e]xcept for operations." [TR at 75.] She stated that she first became aware of the claimant's injury on May 14th after co-owner Beau Allen advised her that the claimant was requesting information on filing a workers' compensation claim. Ms. Tessman spoke with the claimant and directed him to seek appropriate care. She said that he reported hurting his elbow, but that she did not know when the injury occurred until she was told by other members of the crew. [TR at 76.] Ms. Tessman set the date of injury as 1 May 2023. [TR at 77.] She denied that the claimant ever told her that he was injured on 5 May 2023. [TR at 81.]

On cross examination, Ms. Tessman testified that even if the claimant had indicated a date of injury as May 1st, instead of May 5th, she still would have denied his claim. [TR at 82.] She then stated that B.J. Coburn, another employee, was not present at the hearing because he was out working. She also said that Trevor, another employee whose name appears on some text messages offered as evidence [Resp. Ex. № 1 at 79-81], was not present as a witness for the same reason. [TR at 84-85.]

Ms. Tessman then offered, under redirect examination, that Trevor was not present to testify because he was the company's only driller, and that "[t]aking him off the job puts us completely out of production for a day. So in the—what he could testify to versus us losing the money for the day was a decision that was made." [TR at 88.]

Medical Evidence

A Saline Memorial Hospital emergency department note reflects that the claimant presented on 15 May 2023, with a complaint of right arm/elbow pain that was worsening over the previous two weeks. The record includes the following:

> 37-year-old male presents [to] emergency room for complaints of pain in his right elbo[w] extending distally down his right forearm. Patient states that he is a line worker and was using a heavy metal bar to break up the ground and the bar twisted and got out of balance causing him to twist his elbow. Onset x2 weeks. States it is just gradually getting worse, and he is having difficulty using his arm.
>
> . . .
>
> Sudden onset of symptoms, 2 weeks ago, Symptoms are worsening.

[Cl. Ex. № 1 at 1-11.] X-ray findings were negative, and he was discharged with a diagnosis of Lateral Epicondylitis or tennis elbow, a splint/sling for his arm, and prescriptions for Medrol and Ketorolac.

He followed up at a Concentra clinic on 19 May 2023. The record from that visit reflects a diagnosis of Right Elbow Tendonitis, more medication(s) being prescribed, orders for physical therapy, and work restrictions of "No lifting more than 10 lbs right arm" and "May not grip/squeeze/pinch with right upper extremity." *Id.* at 12.

Mr. Shackleford received a referral for physical therapy from Dr. Michael Weber on 3 August 2023. *Id.* at 13. An MRI report dated 28 August 2023 included the following impressions:

> Lateral epicondylitis, manifested by high-grade intrasubstance tearing of the common extensor tendon, on a background of severe tendinosis.

> Low-grade lateral ulnar collateral ligament sprain.
>
> Mild common flexor tendinosis.
>
> Low-grade sprain anterior band ulnar collateral ligament.
>
> Mild distal biceps tendinosis. Mild reactive bicipitoradial edema and/or bursitis is noted.
>
> Mild elbow osteoarthritis.

[Cl. Ex. № 2 at 1.]

He subsequently underwent surgical repair with Dr. Brian Norton for lateral epicondylitis and common extensor tendon tear of the right arm. The operative note, dated 9 October 2023, indicated that surgery was the best option as conservative treatment had failed. [Cl. Ex. № 2 at 2-3.] The claimant followed post-surgically with Dr. Norton, who restricted him to off-work status for four weeks in a note dated 22 January 2024. [Cl. Ex. № 1 at 4.]

IV. ADJUDICATION

The stipulated facts, as agreed during the pre-hearing conference, are outlined above. It is settled that the Commission, with the benefit of being in the presence of the witness and observing his or her demeanor, determines a witness' credibility and the appropriate weight to accord their statements. See *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 448, 990 S.W.2d 522 (1999).

A. THE CLAIMANT MET HIS BURDEN IN PROVING THAT HE SUFFERED A COMPENSABLE INJURY.

Under Arkansas' Workers' Compensation laws, a worker has the burden of proving by a preponderance of the evidence that he sustained a compensable injury as the result of a specific incident. Ark. Code Ann. § 11-9-102(4)(E)(i). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-

102(4)(D). Objective medical findings are those findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). Causation does not need to be established by objective findings when the objective medical evidence establishes that an injury exists and other nonmedical evidence shows that it is more likely than not that the injury was caused by an incident in the workplace. *Bean v. Reynolds Consumer Prods*., 2022 Ark. App 276, 646 S.W.3d 655, 2022 Ark. App. LEXIS 276, citing *Wal-Mart Stores, Inc. v. VanWagner*, *supra*.

The claimant alleges that his injury occurred by specific incident. The claimant must establish four (4) factors by a preponderance of the evidence to prove a specific incident injury: (1) that the injury arose during the course of employment; (2) that the injury caused an actual harm that required medical attention; (3) that objective findings support the medical evidence; and (4) that the injury was caused by a particular incident, identifiable in time and place. See *Cossey v. G. A. Thomas Racing Stable*, 2009 Ark. App. 666,5, 344 S.W.3d 684, 689.

Based on the credible evidence presented, I find that Mr. Shackelford met his burden of establishing that he sustained a compensable injury. The claimant testified credibly that he hurt himself while using a rock bar and trying to dig a hole. He made reports to others about his injury and did not work most of the next week because he continued having trouble with his arm or because of rain. Over the course of that week and through the weekend, his condition continued to worsen, and he did not receive direction from the respondents about seeking care. Mr. Shackleford eventually contacted the company's owners, who provided claim information and directed him to either emergent or urgent care.

The claimant's medical notes record his report of injuring his arm and elbow while using a heavy metal bar at work and that the problem worsened over the two weeks preceding his presentation for treatment. The note specifically relays, "Time Course: Sudden onset of

symptoms, 2 weeks ago, symptoms are worsening." This is consistent with Mr. Shackleford's version of the events. He was initially diagnosed with epicondylitis or tendonitis. That diagnosis was later confirmed via an MRI scan which also found a high-grade tendon tear and a low-grade ligament sprain, in addition to mild tendinosis and arthritis. A causal relationship may be established between an employment-related incident and a subsequent physical injury based on the evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). Mr. Shackleford testified that he had not previously missed work for an arm injury.

The respondents denied this claim altogether. They argued that they do not agree with the claimed date of the injury. Ms. Tessman was asked, "can you tell me as far as your understanding from your investigation as to what the date of the injury was?" and she answered, "Yes. May 1st." She was later asked if the claim would have been denied even if the claimant alleged, consistent with her own investigation's findings, a date of injury of May 1st instead of May 5th. She responded that she would "absolutely" have denied it anyway because, somewhat quizzically, she did not "think it happened."

As discussed during Ms. Tessman's examination,[8] an earlier scheduled hearing date on this matter was continued, at least in part, due to the unexpected unavailability of the respondent's employee/intended witness named Trevor. When asked about Trevor's absence, in light of the earlier continuance requested on that basis, she said that Trevor was working and, thus, not made available to testify. She explained that Trevor was the company's only driller and that without him on the job, they would have lost money for the day. She also

[8] TR at 87-90.

suggested that he was not made available because "he was not there when *it* happened" (emphasis added). The "it" here appears to be the same "it" that she thought did not happen.

Having observed her demeanor throughout her testimony and specifically regarding Trevor's absence and considering her poorly supported, if not inconsistent, position on the claimant's injury either happening on a date other than he recalled or supposedly not happening at all, I find her credibility to be very suspect.

Still, I will address the possible discrepancy regarding the actual date of the injury, because I do not find some question between whether Mr. Shackleford took up the rock bar on May the 1st or May the 5th to be fatal to his claim for a compensable injury by specific incident. While the respondents attempted towards the end of the hearing to offer an alternative argument towards the claimant not meeting his burden for the injury occurring via gradual onset, this claim was not brought as a gradual onset injury. In *Pulaski County Special Sch. Dist. V. Laster*, 2015 Ark. App. 206, *6; 465 S.W.3d 421, 425; 2015 Ark. App. LEXIS 262, ***7 our Court of Appeals helpfully explained:

> This case was tried as an accidental injury case, not a gradual-onset one. So, [Claimant] had the burden to prove, by a preponderance of the evidence, that he sustained an "accidental injury . . . arising out of and in the course of employment[.]" Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2012). "An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]" Ark. Code Ann. § 11-9-102(4)(A)(i). In *Edens v. Superior Marble & Glass*, our supreme court held that "identifiable by time and place" meant subject to identification and did not require the claimant to specify the exact time of the occurrence. 346 Ark. 487, 492, 58 S.W.3d 369, 373 (2001). A claimant's inability to specify the exact date and the precise time of the accidental injury is a credibility issue that the Commission may weigh. *Pafford Med. Billing Servs., Inc. v. Smith*, 2011 Ark. App. 180, 381 S.W.3d 921. Still, [Claimant] must show a causal relationship between his employment and the injury. *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 72 S.W.3d 889 (2002). Whether the causal connection exists is a fact question the Commission settles. *Jeter v. B.R. McGinty Mech.*, 62 Ark. App. 53, 59, 968 S.W.2d 645, 650 (1998).

Id. Whether the claimant was working with a rock bar on a Monday or a Friday, I find him to be credible in relaying that that is the incident that caused his injury, and he reported the same to medical providers at the time he first sought treatment for his injury. No other possible intervening incidents were offered into the record as an alternative to the claimant's version of events, even if his recollection of the particular day may have been off. And the available medical evidence supports his report of a workplace injury with a rock bar and subsequent treatment efforts related to the same. His explanation of the cause of his injury and the objective findings support resolving his claim for a compensable injury by specific incident in his favor. In *Edens*, *supra*, the Arkansas Supreme Court made clear that the statute only requires that a claimant prove that the occurrence of the injury is capable of being identified.

B. THE CLAIMANT MET HIS BURDEN IN PROVING THAT HE IS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS.

The claimant has proven a compensable scheduled injury in this claim. He is, thus, entitled to temporary total disability (TTD) benefits during his healing period or until he returns to work, whichever happens first. Ark. Code Ann. § 11-9-521. The claimant must prove his entitlement to TTD benefits by a preponderance of the evidence. Ark. Code Ann. § 11-9-705(a)(3).

It is not disputed that the claimant has not worked since his 15 May 2023 visit to the emergency department, the date on which they contend his TTD benefits should begin. He continued to seek treatment at various times between his initial presentation to the emergency department and the hearing on this claim. In fact, at the time of the hearing, the claimant was under a physician's post-operative order, dated 22 January 2024, to remain off work for four (4) weeks. The preponderance of the evidence establishes that he has not yet

reached the end of his healing period. Mr. Shackleford has, therefore, proven that he is entitled to TTD benefits from 15 May 2023 to a date yet to be determined.

It is also not disputed, however, that the claimant received unemployment benefits during some of this time. "[I]f a claim for temporary total disability is controverted and later determined to be compensable, temporary total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment benefits but only to the extent that the temporary total disability otherwise payable exceeds the unemployment benefits." Ark. Code Ann. § 11-9-506(b). The respondents are, thus, entitled to a credit against the TTD benefit amount owed for those weeks that the claimant received unemployment benefits in an amount equal to the weekly unemployment benefit he received.

C. THE CLAIMANT IS ENTITLED TO REASONABLE AND NECESSARY MEDICAL BENEFITS ASSOCIATED WITH HIS COMPENSABLE INJURY.

Employers are responsible for providing medical services which are reasonably necessary in connection with compensable injuries. Ark. Code Ann. 11-9-508(a). Employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. See *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004). The Commission must resolve, at times, conflicting medical evidence. See *Cedar Chemical Co. v. Knight*, 99 Ark. App. 162, 258 S.W.3d 394 (2007). Here, however, I am presented only with the medical evidence offered by the claimant which evidences treatment from 15 May 2023 and on, with an operative noted dated 9 October 2023 that is consistent with the diagnosis reported in his other medical notes and which states, "[h]e has failed conservative treatment. I felt the best treatment option would be to proceed [with surgical repair]." I may not arbitrarily disregard medical evidence. See *Patchell, supra.* The record

does not contain any evidence suggesting that the care sought by the claimant has been unreasonable or unnecessary.

Accordingly, I find that the claimant is entitled to payment and/or repayment for the medical services provided in the diagnosis and treatment of his compensable injury and for the allowable costs associated with the same.

D. THE CLAIMANT IS ENTITLED TO A CONTROVERTED ATTORNEY'S FEE.

The respondents controverted this claim in its entirety. The claimant is, accordingly, entitled to a controverted attorney's fee consistent with the indemnity benefits associated with these findings and Ark. Code Ann. § 11-9-715.

V. ORDER

The respondents are directed to pay all benefits awarded under these Findings of Fact and Conclusions of Law. The accrued sums are owed in a lump sum without discount, and this award shall earn interest at the legal rate until paid. Ark. Code Ann. § 11-9-809.

The claimant's attorney is entitled to a fee of twenty-five (25%) percent of the indemnity benefits awarded, with one-half (1/2) to be paid by the claimant and one-half (1/2) to be paid by the respondents. Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

_____

JAYO. HOWE
ADMINISTRATIVE LAW JUDGE