

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **G900748**

DALE A. SHEARBURN, EMPLOYEE

CLAIMANT

TYSON POULTRY INC., SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED OCTOBER 7, 2021

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF, in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL L. ELLIG, Attorney, Fort Smith, Arkansas.

Respondents represented by R. SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On August 31, 2021, the above captioned claim came before the Workers' Compensation Commission in Fort Smith, Arkansas, for a hearing. A prehearing conference was conducted on June 17, 2021, and a prehearing order filed that same date. A copy of the prehearing order has been marked as Commission's Exhibit No. 1 with modification and no objection is made part of the record. The parties' exhibits were both admitted into evidence without objection.

The parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on January 25, 2019.
3. On January 25, 2019, claimant was involved in an accident at work.
4. The compensation rates are the maximum.

The issues to be litigated are limited to the following:

1. Whether claimant sustained a compensable injury to his cervical spine on January 25, 2019.

2. If found to be compensable, whether claimant is entitled to medical benefits for the injury to his cervical spine.

All other issues are reserved.

The claimant contends that he sustained a compensable injury to his cervical spine in the employment related accident that reasonably requires medical services, as recommended by Dr. Arthur Johnson. He contends that the respondents have controverted such benefits and are liable for the statutory attorney's fee on all appropriate benefits.

The respondents contend that claimant did not sustain a compensable injury to the cervical spine as that term is defined by Act 796.

The above stipulations are hereby accepted as fact. From a review of the record as a whole to include medical reports, documents, and having heard testimony and observed demeanor of all witnesses, 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 June 17, 2021, and contained in the Prehearing Order filed the same date, as well as the announced stipulations at the hearing on August 31, 2021, are hereby accepted as fact.

2. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on January 25, 2019.

3. Claimant has met his burden of proof by a preponderance of evidence that he is entitled to additional medical treatment from Dr. Arthur Johnson for his cervical spine injury.

FACTUAL BACKGROUND

Before the hearing began, claimant withdrew his claim for temporary total disability benefits, agreeing with respondent that while being treated for his lower extremity injuries he received

temporary total disability benefits, and as of the date of the hearing was not due any additional temporary total disability benefits. As such, the claim for those benefits, which was included in claimant's prehearing questionnaire, was removed from claimant's contentions set out above. Since no indemnity benefits are being requested, the attorney fee issue has been removed as well.

Hearing Testimony

Claimant testified on January 25, 2019, he was at work at respondent's place of business where he had worked for approximately 38 years. During the course of his duties on that date, he opened the doors to a trailer and about ten to twelve pallets fell out of the trailer onto him. Claimant testified the pallets weighed about sixty-four pounds each. He said he received seventeen stitches in his head from where he was struck by a falling pallet, but his primary concern was the pain in his knee and ankle. Claimant said that his neck started hurting right after the incident. He testified that respondent sent him to a doctor in Fayetteville, but declined to provide further medical benefits for his neck. He went to his family doctor, who then referred him to Dr. Arthur Johnson, a neurosurgeon practicing in Fort Smith. Claimant testified that the pain was in the back of his neck and that he sometimes has pain in his left arm.

On cross examination claimant stated that he was taken from the scene of the incident by ambulance. He did not know why there was a note by the EMT that said he denied neck pain. Claimant testified that his neck pain has been gradually getting worse since the accident. Claimant agreed that he had ridden his horse about a year and a half to two years following the accident and has also begun riding a four-wheeler. Claimant said that prior to this accident, he had not had neck problems. He agreed that he had returned to work doing everything he used to do, but he did it slower. He said his neck affects him when he is backing up a vehicle, in that he must turn his whole body to see behind him.

On redirect examination claimant testified he didn't notice the neck problems immediately because the knee was the most painful thing, but he did notice neck pain a couple of days after the accident. Claimant stated that what he did at home on the four-wheeler and his horse was no more strenuous than what he did at work every day.

Review of the Medical Records

Many of the medical records submitted by both respondent and claimant deal with the injuries to claimant's lower extremities; as the lower extremity injury is not contested, little review of those records is necessary.

On the day of the accident, the notes from the emergency room contain this entry:

“Neck: C-Spine: Nexus Criteria: there is no tenderness to the posterior midline, the patient is not clinically intoxicated, the patient displays normal alertness, no focal neurological deficit is appreciated, no distracting injury is present, vertebral tenderness is not appreciated.” (R.X. 10)

However, for reasons not explained in the records, a CT scan of claimant's cervical spine without intravenous contrast was ordered, and the impression was “degenerative change in the cervical spine with no acute osseous abnormality.” (R.X. 21)

Claimant was discharged with instructions to see his Workers' Compensation doctor on January 28, 2019, which was Dr. Duane Lukasek at Sparks Occupational Medicine South. Dr. Lukasek recorded that the visit on January 28, 2019, was “ONLY for head injury, laceration. Employer declines treating anything associated with existing referral to orthopedic.” Dr. Lukasek noted that claimant's “tertiary problem is pain located in the neck, right ankle. He describes it as aching. He considers it to be moderate. The problem began on January 25, 2019. Dale says it seems to be intermittent. He feels that it is improving significantly. His pain level is five.”

An “occupational injury/illness medical treatment and work status summary” form was

completed and submitted to the respondent employer. Dr. Lukasek stated that the reason for claimant's visit on January 28, 2019 was "dizziness and pain in back of neck." (CL.X.31).

The next time Dr. Lukasek saw claimant was February 7, 2019, and he limited his examination to the removal of the sutures from claimant's head. Dr. Lukasek made no mention of the neck injury in his follow-up visit, which appears to be in accordance with the instructions from respondent to not treat "anything associated with the existing referral to the orthopedic." Even though claimant presented to Dr. Lukasek in a wheelchair with lower extremities splints on both legs, Dr. Lukasek found that claimant had reached "maximum medical improvement on February 7, 2019 and was recommended for regular duty at his employment." (R.X.31-33) I have no doubt this is correct as far as claimant's recovery from the laceration on his head, but it demonstrates how limited Dr. Lukasek felt by the respondents' authorization of care, making no reference to the dizziness or pain in claimant's neck in this visit.

Claimant continued to undergo treatment for his knee injury, and it appears the focus of the orthopedic specialists that treated him was his lower extremity. For instance, Dr. Jody Bradshaw saw claimant on February 19, 2019. At that time, claimant was still prescribed Norco, 7.5 for the pain. Claimant apparently mentioned, and Dr. Bradshaw duly recorded, that he was having "numbness and tingling in the ring and small finger of both arms and did not have that before the injury." However, that was the only mention in Dr. Bradshaw's records regarding anything other than the left knee injury in the records introduced. (R.X.34)

After claimant had a knee replacement and was able to return to work, he continued to have problems with his neck. Because respondent denied the neck injury was compensable, he went to Dr. Thanh Tan Le, a family medical specialist. Dr. Le took x-rays of the cervical spine and found severe degenerative changes at C5-C6 and C6-C7. (R.X.58-60)

Claimant was then referred to Dr. Arthur Johnson at Baptist Health. In his assessment of April 7, 2021, Dr. Johnson found:

- “1. Degenerative cervical spinal stenosis moderate C4-C5, C5-C6.
2. Neural foraminal stenosis of cervical spine right C3-C4, severe, moderate bilateral C6-C7. “The patient’s symptoms of neck pain and arm pain were precipitated by pallets landing on his head on January 25, 2019. His underlying problem is degenerative cervical spinal stenosis that was asymptomatic prior to the accident. The accident did cause the symptoms but not the underlying problems.”

Dr. Johnson listed as his plan following that visit as beginning cervical traction with cervical physical therapy. If claimant’s symptoms did not improve with the physical therapy, he would then recommend cervical epidural steroid injections, and if that failed to address claimant’s issues, he would then consider surgery on claimant’s cervical spine. (CL.X.54-59)

ADJUDICATION

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.

It was stipulated there was a specific incident on January 25, 2019, in which claimant was injured, and that he was in the course of his work at the time when pallets fell on him; however, respondent controverted a cervical spine injury on that day. Within three days, claimant mentioned to Dr. Lukasek that he was having neck pain. Dr. Johnson’s report of April 7, 2021, is unambiguous in providing both the existence of cervical spinal stenosis by objective findings, and in relating it to

the specific injury of January 25, 2019. I therefore find claimant has met his burden of proof that his cervical spine injury is compensable.

While the respondents have no obligation to prove anything, I have considered the defense raised by respondent to counter claimant's proof. From the questions asked in cross-examination, respondent found some significance that claimant denied neck pain to the EMS crew that came to the scene of the accident, and that claimant could now ride a horse and operate a four-wheeler. I give both no weight in deciding this matter. Claimant had serious injuries to other parts of his body when talking to the EMS crew, and claimant has not claimed his cervical injury has rendered him a total invalid; to the contrary, he has returned to full duty, which claimant said was more strenuous than the activities away from work. I am also mindful of the CT scan taken on the date of the accident. I am not convinced that it shows claimant had no injury to his cervical spine following the accident, but rather that there was nothing in claimant's neck that needed immediate care at the emergency room.

Aside from the entry on the EMS patient care record and the CT scan, there was no medical evidence offered by the respondents to counter Dr. Johnson's findings. "Where there is little or no medical evidence to the contrary, it is error to deny compensability where reasonable minds cannot differ," *Estridge v. Waste Mgmt.*, 343 Ark. 276, 33 S.W.3d 167 (2000). I believe it would be an error to rely on the EMS report and CT scan but disregard the other medical evidence in this case. The employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee, Ark. Code Ann. 11-9-508(a). In this case, respondent provided prompt care for claimant by calling an ambulance for him after the accident at its place of business and complied with its obligations regarding claimant's injuries to his lower extremities. However, I find that it has not provided claimant with the reasonable and necessary treatment to which he is entitled for his cervical spine injury and has controverted all benefits

associated with said injury.

ORDER

Claimant has met his burden of proving by a preponderance of the evidence that he sustained a compensable cervical spine injury on January 25, 2019. Claimant has likewise met his burden of proving by the preponderance of the evidence that he is entitled to additional medical treatment for his cervical spine injury as directed by Dr. Johnson.

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 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 \$425.75.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE