

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO.: G900092

ERNEST VANDERVER, Employee CLAIMANT

HARVEY PRESTON ELECTRIC CO., Employer RESPONDENT

ACCIDENT FUND INSURANCE CO., Carrier/TPA RESPONDENT

OPINION AND ORDER FILED AUGUST 9, 2022

Hearing conducted before ADMINISTRATIVE LAW JUDGE TERRY DON LUCY, in Craighead County, Arkansas.

Counsel for the Claimant: HONORABLE PHILLIP J. WELLS., Attorney at Law, Jonesboro, Arkansas.

Counsel for the Respondents: HONORABLE KAREN H. MCKINNEY, Attorney at Law, Little Rock, Arkansas.

Statement of the Case

The above-captioned matter came on for a hearing on May 13, 2022, before the undersigned Administrative Law Judge. A pre-hearing Order was entered in this matter on March 1, 2022, which reflected the following stipulations:

- (1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
- (2) The Employee/Employer/Carrier/TPA relationship existed at all relevant times, including July 3, 2018, on which date the Claimant sustained a compensable left shoulder injury for which certain benefits have been paid and alleges that he also sustained a compensable cervical injury;
- (3) The Claimant's average weekly wage on the date of injury was sufficient to entitle him to the maximum compensation rates in effect in 2018; and,
- (4) The Respondents have controverted the Claimant's alleged cervical injury of July 3, 2018, in its entirety.

The pre-hearing Order also reflected the issues to be adjudicated, as set forth below:

(1) Whether the Claimant sustained a compensable cervical injury on July 3, 2018, and is entitled to reasonably necessary medical treatment, related expenses, and a permanent anatomic impairment rating associated therewith; and,

(2) Attorney's fees in relation to controverted permanent indemnity benefits.

During preliminary discussions, the Commission's pre-hearing Order of March 1, 2022, was introduced into the record as Commission's Exhibit No. 1 without objection. (TR 7) The parties' respective exhibits were likewise introduced into the record without objection, inclusive of Respondents' Exhibit No. 3, a medical deposition which was retained in the Commission's file. (TR 7-10)

Findings of Fact and Conclusions of Law

(1) The parties' stipulations are accepted as findings of fact herein, inclusive of the Commission's jurisdiction over this claim;

(2) The Claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable cervical injury in relation to his compensable left shoulder injury of July 3, 2018; and,

Applicable Law

The party bearing the burden of proof in a workers' compensation matter must establish such by a preponderance of the evidence. See Ark. Code Ann. §§11-9-704(c)(2) and 11-9-705(a)(3). In order to demonstrate a compensable "specific incident" injury, as alleged herein, a claimant must prove, by a preponderance of the evidence, that he or she sustained an "accidental injury causing internal or external physical harm to the body...arising out of and in the course of employment," and which is identifiable by time and place of occurrence. Ark. Code Ann. §§11-9-102(4)(A)(i) and (E)(i). The alleged injury must also occur at a time when "employment services" were being performed and must be established by medical evidence supported by

“objective findings.” Ark. Code Ann. §§11-9-102(4)(B)(iii) and (D). In turn, “objective findings” are those findings “which cannot come under the voluntary control of the patient.” Ark. Code Ann. §11-9-102(16)(A)(i). In addition, Ark. Code Ann. §11-9-102(16)(B) requires that “Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty.” Terms such as “could,” “may,” and “possibly” do not meet the requisite degree of medical certainty required by said statute. *Frances v. Gaylord Container Corp.*, 341 Ark. 527 (Ark. 2000).

Further, if an injury is compensable, then every natural consequence of that injury is also compensable. The basic test is whether there is a causal connection between the two events. *Walker v. Fresenius Med. Care Holding, Inc.*; 2014 Ark. App. 322.

Also, it is long settled that the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. (See, for instance, *Yates v. Boar’s Head Provisions Co.*, 2017 Ark. App. 133 (2017). It is further well-settled that determinations of compensability may turn solely upon matters of weight and credibility, particularly when such matters relate to a given claimant’s credibility. (See *Yates, supra*. In addition, see *Daniel v. Wal-Mart Stores, Inc.*, 2014 Ark. App. 671 (2014); *Kanu-Polk v. Conway Human Dev. Ctr.*, 2011 Ark. App. 779 (2011); and *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43 (Ark. App. 2011)). Finally, a claimant’s testimony is never considered to be uncontroverted. *Gentry v. Ark. Oil Field Servs.*, 2011 Ark. App. 786 (2011) (citing *Nix v. Wilson World Hotel*, 46 Ark. App. 303 (1994)).

Testimony

Earnest Vanderver

The Claimant, an electrician with thirty-three (33) years’ experience, sustained a

compensable left shoulder injury on July 3, 2018. (Comm. Ex. 1 at 2; TR 60) Thereafter, the Claimant experienced “off and on” neck pain that he did not pay much attention to in comparison with his left shoulder pain. (TR 19-20) The Claimant also participated in the following exchange:

Q: When you saw Dr. Wallace, do you remember whether you complained of any kind of neck pain at that time?

A: I don’t remember.

Q: Okay.

A: I really don’t.

Q: And obviously, if his office notes don’t recall that you complained of any neck pain, would that be an inaccurate assumption?

A: It could be, yes. I – again, I don’t – I just don’t remember if I told him about it or not. (TR 20-21)

With respect to post-operative physical therapy in relation to his left shoulder, the Claimant testified that he experienced neck pain during such. (TR 22; see also TR 38) Also, the Claimant testified that he experienced neck pain during a post-operative visit to Dr. Wallace, the initial operative physician in relation to his left shoulder. (TR 25-28) Ultimately, the Claimant came under the care of Dr. Tuck, inclusive of surgery, in relation to his cervical issues. (TR 29-30) Upon inquiry by the Commission, the claimant testified as follows:

JUDGE LUCY: Now, did your neck go bad at physical therapy or did it go bad when Dr. Wallace was pushing your left arm?

A: I had issues with it before we had to cut back on the physical therapy. But when I was seeing Dr. Wallace, that’s when the – when he – when I had to stretch – move my arm to the position he wanted it and then it was maneuvered, that’s when the – the hand – the numb hand – the neck – it went from the knot to my neck, and now half this hand [indicating] is numb.

JUDGE LUCY: All right.

A: And that was after his – my examination with him.

JUDGE LUCY: All right. Thank you, Sir. (TR 42-43)

During cross-examination, *inter alia*, the Claimant essentially conceded that he could not identify a particular incident that resulted in his neck and right shoulder issues during physical therapy and that he was “not sure exactly when it did start.” (TR 47) However, the Claimant did maintain that his “charley horse” began the morning after the alleged incident during Dr. Wallace’s exam. (TR 48; see also further examination by the Commission at TR 53-54) Upon re-cross examination, the Claimant acknowledged his prior deposition testimony in which he acknowledged that his neck problems were not precipitated by the compensable event of July 3, 2018. (TR 55-56) At a further point in re-cross examination with respect to his previous deposition testimony, the Claimant answered in the affirmative when asked if he had actually experienced “charley horse frog-type pain before the visit with Dr. Wallace,” but that stated that such “was not as in-depth.” (TR 57)

Dr. Rebecca Barrett-Tuck

Dr. Rebecca Barrett-Tuck (hereinafter “Dr. Tuck”) provided oral deposition testimony for evidentiary purposes on March 4, 2021. During such, *inter alia*, and upon examination by Counsel for the Respondents, Dr. Tuck explained the reference in her records to a “soft” disk rupture at the Claimant’s C6-7 level, as noted during her initial evaluation of the Claimant on March 5, 2020, as follows:

As opposed to a calcified bone spur, that, you know, you would think had been there for years. This looked like a fresh rupture that, you know, should be present within a year or two. Not enough time to calcify. (RX 3 at 8)

When asked whether the Claimant’s “soft rupture” noted on March 5, 2020, would be

consistent with an original injury that occurred in July, 2018, Dr. Tuck replied that “It still didn’t ossify or calcify that quick,” but further stated that it would be “very speculative” to opine as to how long it would take a herniated disk to calcify. (RX 3 at 8-9) Dr. Tuck also stated that:

I suspected that probably a little injury had occurred, *possibly* at the time of his original injury to that covering of the disk...and then it sounds like the [disk] really completely ruptured that day that he was in clinic, January 8th, it sounds like when it completely extruded. Even though I suspect that there was some ongoing injury *possibly* from the beginning. We don’t know. We don’t have any MRIs of his neck, you know, any earlier. (RX 3 at 9-10; emphasis added.)

Additionally:

Q: And, everything you just said is, you’ve used the word suspect and possible and probable, you don’t know for sure; is that correct?

A: No, sir (sic), if – not if there was an annular injury, you know, at the very beginning, or whether the whole injury occurred during physical therapy. No, there’s no way that I can say absolutely whether there was or was not an injury to the annulus of January of ’19, or whether that injury occurred during physical therapy when he seemed to have increasing pain in November. (RX 3 at 10)

And, with reference to her response to an opinion letter provided to her by Counsel for the Claimant, Dr. Tuck testified as follows:

Q: All right. So, are you stating by checking that mark that Mr. Vanderver injured his cervical disk on the job pulling the wire? And we’re showing the injury date of July of 2018. Is that what you’re indicating?

A: I don’t know whether he injured the disk originally pulling the wire or whether he injured it disk while he was doing therapy for that injury. But, in either way, in my mind, whether he injured it at the time or whether he injured it while he was doing physical therapy, because of that, it still all goes back, to, in my opinion, the fact that he was injured at all to begin with.

Q: And, again, this is assuming that he has provided you with a truthful history of the onset of his pain?

A: Of course. (RX 3 at 26-27)

Further:

Q: Are you at all relating the herniated disk to the examination performed by Dr. Wallace?

A: I don't know. It sounds like when I (sic) was having some trouble before, but, you know, he reports that, on that particular day, while he was there performing these maneuvers, the pain became absolutely excruciating, and it may have really ruptured out at that time.

Q: Do you know what maneuvers Dr. Wallace was performing when this pain occurred?

A: No. I don't. (RX 3 at 28)

Finally:

Q: Can you state within a reasonable degree of medical certainty that he injured his cervical spine at C6-7 with the initial injury in July, 2018?

A: I can say, I feel with a reasonable degree of medical certainty, that if there wasn't – that most likely there was an initial injury, but that clearly if the injury wasn't then, it was during treatment for that injury. Physical therapy and further manipulations to his shoulder. (RX 3 at 35-36)

Upon examination by Counsel for the Claimant, *inter alia*, Dr. Tuck participated in the following exchange:

Q: And, Doctor, you've been asked that question if your – if you didn't have an accurate history, have been provided by Ms. McKinney anything specific as to what is inaccurate about the history that would change your opinion?

A: No. If all of a sudden someone said, oh, this was all a big lie, there wasn't really an accident, all of this never happened, of course, nothing would change. But I don't think that that was the truth or the case, if nothing on which to base a thought that any of this is an inaccuracy. (RX 3 at 44)

Discussion of the exhibits attached to Dr. Tuck's deposition is not necessary, as they are

encompassed within the medical records submitted by the parties during the hearing held on May 13, 2022.

Medical and Documentary Evidence

I have reviewed the entirety of the medical and documentary evidence submitted herein, the most salient and relevant of which are discussed below in further detail. Medical and documentary records duplicated by the parties in their respective exhibits will only be cited to one party's exhibit.

The Claimant sustained a considerable and compensable left shoulder injury on July 3, 2018, which ultimately required three operations. The first two were performed by Dr. Aaron Wallace on January 24, 2019, and on February 13, 2020. (CX 1 at 12 and 18) The third was performed by Dr. Ronald Sismondo on October 29, 2020. (CX 1 at 36) During the interim between his second and third shoulder surgeries, the Claimant underwent an anterior cervical discectomy and fusion at the C6-7 level performed by Dr. Tuck on April 15, 2020. (CX 1 at 24) By way of written communication to Counsel for the Claimant dated October 27, 2020, Dr. Tuck indicated that, in her medical opinion, the "major cause" of the Claimant's cervical injury was the compensable incident of July 3, 2018. (CX 1 at 34)

On August 4, 2021, Dr. Kirk Reynolds deferred to Dr. Tuck's opinion in relation to cervical issues as he addressed several other questions posed to him in relation to other issues involving the instant matter. (CX 1 at 53) Dr. J. Michael Calhoun subsequently opined on September 30, 2021, in response to an Independent Medical Evaluation procured by the Respondents, that he did not consider the Claimant's alleged cervical injury to be related to the latter's initial compensable injury of July 3, 2018. (RX 1 at 112; see also TR 12-13)

As of August 21, 2018, the Claimant had offered no complaints concerning his neck;

indeed, on said date, he presented with a “normal range of motion” with respect to such. (RX 1 at 7)

On April 10, 2019, the Claimant presented for physical therapy in relation to his most recent shoulder surgery and related to his therapist that “I think I slept wrong last night my neck hurts the shoulder is not bad.” (RX 2 at 14) During a subsequent physical therapy visit on September 23, 2019, in relation to his ongoing post-operative left shoulder therapy, the Claimant simply advised that “My neck feels like it has a crick in it and my shoulder.” (RX 2 at 62) A week later, upon his 50th visit to his apparently 66 approved physical therapy visits for his left shoulder, the Claimant reported “pain and numbness (R) sided neck to armpit.” (RX 2 at 65) However, there is no mention of any occurrence with respect to Dr. Wallace’s treatment and there is no mention of any particular incident with respect to the Claimant’s physical therapy that might have affected his cervical spine.

Moving forward to his physical therapy visit of October 21, 2019, the 58th of 66 that were apparently approved in relation his left shoulder, the Claimant reported that he could not pick up a skillet and turn it because of pain in his left elbow. (RX 2 at 74) It appears that, by April 8, 2020, the Claimant had been approved for an additional 24 physical therapy visits in relation to his left shoulder, the 3rd of which occurred on said date. (RX 2 at 99) Interestingly, the Claimant related to his physical therapist that he would have neck surgery on April 15, 2020, but offered no explanation as to why. (*Id.*)

On May 28, 2020, upon his 14th visit of the approved 24 additional physical therapy visits for his left shoulder injury and resulting operations, the Claimant was noted by his physical therapist to have been crying because of pain in relation to his neck. Curiously, the Claimant reported to his physical therapist that he had “contacted Dr. Wallace’s office regarding

[increased] pain” and was awaiting a call; however, the Claimant did not mention any particular examination incident involving Dr. Wallace that may have resulted in his alleged cervical injury. (RX 2 at 110)

Adjudication

Although the Claimant presented as a polite and courteous witness, I am unable to afford any credibility to his account of the onset of his cervical issues subsequent to July 3, 2018. In particular, neither Dr. Wallace’s records nor the submitted physical therapy records contain any reference to an incident in which the Claimant experienced an onset of neck pain during one of Dr. Wallace’s post-operative examinations with respect to the Claimant’s left shoulder. Further, the Claimant conceded that he could not identify any particular incident during the course of physical therapy for his left shoulder that precipitated the onset of his neck pain. In fact, upon the first mention of his neck pain in the submitted records, April 19, 2019, the Claimant simply advised his physical therapist that he may have “slept wrong” the previous night. Moreover, the Claimant has essentially conceded that his cervical issues were not occasioned by the otherwise compensable event of July 3, 2018.

With due respect to Dr. Tuck and her opinion herein, I find that her testimony given via deposition, and as discussed above, is far too equivocal to satisfy the “reasonable medical certainty” requirement of Ark. Code Ann. §11-9-102(16)(B), regardless of whether this matter is considered as an original neck injury that occurred on July 3, 2018, or as a compensable consequence of treatment rendered for the Claimant’s accepted left shoulder injury of such date. Accordingly, I am compelled to afford more weight to Dr. Calhoun’s opinion of September 30, 2021, as also noted above. In sum, I specifically find that the Claimant’s testimony, Dr. Tuck’s opinion, and the remainder of the documentary evidence herein fall short of establishing a

preponderance of the evidence in favor of the Claimant, and that he has thus failed to prove that he sustained a compensable cervical injury on July 3, 2018, and has likewise failed to prove that his cervical issues subsequent to that date were a compensable consequence of his accepted left shoulder injury.

ORDER

Based on the foregoing discussion, including my observation of the witness and his testimony, review of the documentary evidence supplied by the parties, and application of the statutory and case law cited above, I specifically find the Claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable cervical injury on July 3, 2018, during the course and scope of his employment with Respondent Employer and has likewise failed to prove, by a preponderance of the evidence, that his cervical issues were a compensable consequence of his accepted left shoulder injury of the same date. This claim is respectfully denied and dismissed. If they have not already done so, the Respondents are ordered and directed to pay the Court Reporter's fee within 30 days of billing pursuant to Commission Rule 099.20.

IT IS SO ORDERED.

TERRY DON LUCY
Administrative Law Judge