

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H009352

DONALD K. VIA, EMPLOYEE

CLAIMANT

CITY OF MAUMELLE, EMPLOYER

RESPONDENT

**ARKANSAS MUNICIPAL LEAGUE
WORKERS COMPENSATION TRUST FUND
INSURANCE CARRIER**

RESPONDENT

OPINION FILED OCTOBER 27, 2021

Hearing before Administrative Law Judge, James D. Kennedy, on the 21st day of September 2021, in Little Rock, Arkansas.

Claimant is Pro Se.

Respondents are represented by Melissa Wood, Attorney at Law, of Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on the 21st day of September 2021, to determine the issue of compensability of an alleged compensable work-related hearing loss to the claimant's left ear, following a motor vehicle accident on January 15, 2019. The respondents contend the claimant did not sustain a compensable work-related hearing loss involving the left ear and consequently is not entitled to additional benefits. The respondents also raised the statute of limitations. A copy of the Prehearing order was marked "Commission's Exhibit 1" and made part of the record without objection. The Order provided that the parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of the within claim and that an employer/employee relationship existed on January 15, 2019, the date of the claimed injury in question.

The claimant's and respondent's contentions are set out in their respective responses to the Prehearing Questionnaire and made a part of the record without objection. The witnesses consisted of Donald Via, the claimant, Mike Hogan, the claimant's supervisor, and the stipulated testimony of Roy Lee, an individual supervised by the claimant. The claimant introduced no medical evidence into the record. The respondents submitted a packet of medical evidence and a packet of non-medical evidence, which were admitted into the record without objection. From a review of the record as a whole, to include medical reports submitted by the respondents and other matters properly before the Commission and having had an opportunity to observe the testimony and demeanor of the witnesses, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. That an employer/employee relationship existed on January 15, 2019, the date of the claimed injury.
3. That the claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable work-related hearing loss involving his left ear on January 15, 2019.
4. That all remaining issues are moot.
5. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

REVIEW OF TESTIMONY AND EVIDENCE

The Prehearing Order along with the Prehearing Questionnaires of the parties were admitted into the record without objection. The claimant submitted no medical records and no medical providers testified. The respondents submitted two exhibits without objection, with Exhibit 1 consisting of eighteen (18) pages of medical records and Exhibit 2 consisting of seven (7) pages of workers' compensation forms and a hearing request.

The claimant was the first witness to testify and stated that when he had the motor vehicle accident, it was caused by a third party. "I have been diagnosed with a concussion that I had some problems from, and I had a narrowing of my spine that caused some sciatic pain. I worked through that with physical therapy. I didn't really miss any work besides just a couple of days right after the accident. An MRI for my back and a CT and a MRI was recommended for my brain, cause immediately after the accident my chief complaint, even when the ambulance came, was my ears are ringing like crazy and my head hurts." "I never knew or associated this ringing in my ears with hearing loss. For a year, I mean, all the way through I thought I was hearing because of this loud ringing in my hears. I'm hearing it now." "I never dreamed that I had any hearing loss because of this ringing in my ears. I'm hearing it." "I'm at work one day and I'm talking on the telephone, and I had to write something down, so I switched hands and I thought the phone went dead. I mean, there was nothing." (Tr. 7, 8) "I told my boss that day. I then went to Urgent Care, and it was determined that I had a hearing, ear infection. I had no pain in my ear. I didn't have any inkling that I had an infection. The doctor gave me some

antibiotics.” (Tr. 9) “It was assumed that my hearing would return after the antibiotics, but it didn’t. Later, my pulmonologist referred me to an ear doctor.” (Tr. 10)

The claimant was allowed to proffer that there were three reasons for hearing loss and ear infection was not one of the reasons for his hearing issue. (Tr. 11) The claimant also contended there were inconsistencies in the medical records. He testified in the records provided that “both my father and I had a history of diabetes and heart conditions” which was not true. The records also provided “I had a side impact collision” and that also was not true, because it was a frontal impact. Additionally, the claimant contended the records provided he was currently a smoker and he had not smoked since 2018. (Tr. 13)

It is noted there were continued issues and struggles with hearsay from the *pro se* claimant, who attempted to comply with the rules, but often failed, and continued appropriate objections made by the respondents in regard to the admissibility of the evidence. (Tr. 14, 15)

Under cross examination, the claimant admitted to the taking of his deposition on April 26th. (Tr. 16) He admitted to a previous workers’ compensation claim in 1994 due to a hernia and also additional injuries over the years. (Tr. 17) The claimant stated that his current position with the city of Maumelle was as a building maintenance supervisor and that he acts as a supervisor over three people, with his direct supervisor being Mike Hogan, who will later testify. (Tr. 18) He also stated that Ray Lee would testify, and he works as the claimant’s “right-hand man.” The claimant also admitted that if he had been aware of his hearing loss, he would have made it part of his third-party claim. (Tr. 19) He had his seat belt on at the time of the accident, but the shoulder strap was under his arm due to his short stature. He testified the EMT came and cleaned up the glass in his arm

and that he did not go anywhere for treatment immediately after the accident, but stated that he had a headache, ringing in his ears, and was kind of shook up at the time. (Tr. 20)

After some discussion, the claimant later presented to Doctor Hashmi, who became his workers' compensation doctor. He exclusively went to Doctor Hashmi's office for treatment due to the accident, but usually saw a nurse practitioner. (Tr. 21) The claimant admitted he had some back strains over the years "but there's nothing skeletal or any what I would call back problems" and further admitted that following the accident he did receive some therapy for his back and suffered from some narrowing of the spine in the lower lumbar region of his back, which caused some sciatic pain, but that he was not asking for any benefits for his back. The claimant confirmed that it was his left ear that he could not hear with. (Tr. 22) He stated that his pulmonologist, Dr. Szwedo, made the referral to her friend, Dr. Jason Smith, about his hearing loss. The claimant admitted he had suffered common ear infections before, but nothing chronic. (Tr. 23) He had never experienced hearing loss before and that the "tinnitus drives me insane."

The claimant was questioned about the medical report from Dr. Hasmi's office dated January 16 of 2019, the day after the accident. The report referred to injuries to the claimant's arm, his back, and his hip. (Tr. 24) The claimant was asked about the report providing that he denied hitting his head or passing out and the claimant responded that the report was not correct. The claimant admitted to going for an MRI on February 14, 2019. He was also questioned about a physical therapy report dated April 3, 2019, that provided he had a concussion. (Tr. 25) The claimant contended that he continued having ringing in his ears and admitted that his last visit to Dr. Hasmi occurred on June 3, 2019. (Tr. 26)

The claimant was also questioned about the Form-N and admitted that the form contained his handwriting and it provided for “Head injury, scrapes on left wrist, bruising and stiffness to the abdomen, back and shoulders.” The claimant also admitted to signing the Form-C. (Tr. 27) He also admitted he only checked the box for additional permanent partial at the advice of the legal advisor who walked him through the process. The claimant also admitted he had sent the hearing request listed on page 6 of the respondent’s non-medical evidence. (Tr. 28)

The claimant called Mr. Mike Hogan as his first witness. Mr. Hogan testified he picked the claimant up from the accident scene. (Tr. 31) Mr. Hogan denied the claimant mentioned ringing in his ears, but that he did maybe mention his elbow, arm, forearm, and wrist. (Tr. 32) Mr. Hogan testified that when the claimant returned from the doctor, “I remember you coming back with the doctor’s note after you had been checked out. I think they kept you off work for a few days. I don’t recall any of the issues to my knowledge.” Under further questioning, he testified that “I think that was the reason for being checked out” referring to the concussion. He also testified he did not remember the claimant complaining about the ringing in his ears within the week of the accident or the week after. (Tr. 33)

Under cross examination, Mr. Hogan agreed the claimant went to treatment as directed by the city. (Tr. 37) At this point, it was stipulated by the parties that Mr. Lee would testify as Mike Hogan had in regard to the claimant. (Tr. 38)

The claimant had no medical records to offer but the respondents submitted a packet of medical reports that consisted of eighteen (18) pages, which were admitted into the record without objection. A treatment survey in regard to Dr. Hashmi and the

Maumelle Medical Center provided that the claimant first presented to the Maumelle Medical Center Clinic and Dr. Hashmi on January 16, 2019, the day following a car accident, with arm, back, and hip pain. The report further provided that the claimant denied hitting his head or passing out during or after the motor vehicle accident but “has been having headaches” with “ringing in his ears.” The assessment provided for headache episodic tension type not intractable, with lumbar pain and muscle spasms of the back. The claimant returned to Dr. Hashmi on January 21, 2019, with the same complaint and the report did not mention ringing in the ears. The claimant again returned to Dr. Hashmi on January 30, 2019, with the report providing that the claimant was still having headaches and lumbar pain and mentioned that the tinnitus was continuing. The claimant returned to Dr. Hashmi on February 6, 13, and March 6, 2019, with no mention of tinnitus or hearing issues. A lumbar MRI was ordered on February 14, 2019, and a report by Dr. Hashmi, dated March 6, 2019, provided that the MRI of the low back was consistent with decreased disk height and mentioned a referral to physical therapy. (Resp. Ex. 1, P. 1)

The claimant continued to present to Dr. Hashmi with no mention of hearing loss or tinnitus in the provided records until a report dated April 28, 2020, by Dr. Maria Dominika, which provided that the claimant had an ear infection that was treated by a primary care physician two weeks earlier with no pain, but that hearing had not returned to the left ear. The type of hearing loss was unspecified, but the claimant still had fluid or infection behind the tympanic membrane. The claimant was then referred to Dr. Smith of Arkansas Otolaryngology with that report dated May 13, 2020. The report provided that the claimant had been unable to hear for two months. An MRI dated June 5, 2020,

provided that the findings were suggestive of idiopathic intracranial hypertension. A report by Dr. Smith dated June 10, 2020, provided that the MRI was clear but that the claimant still complained of continued difficulty hearing. (Resp. Ex. 1, P. 2, 3)

A report from the Maumelle-Sherwood Urgent Care and Kimberly Tanner, APRN, dated April 28, 2019, provided that the claimant presented with acute problems of dizziness, chest pain, and discomfort, and a reported headache. It also provided the claimant denied ear pain. (Resp. Ex. 1, P. 4 – 7) A second report from the same provider dated April 13, 2020, provided that the claimant reported hearing loss, ringing in his ears, and earache. The report went on to diagnose otitis media of the left ear and the prescription of Augmentin, a common antibiotic for otitis media. (Resp. Ex. 1, P. 8 – 10)

The claimant presented to Dr. Szwedo on April 28, 2020, with the statement providing the claimant reported hearing loss, pain in the left ear, and ringing in the ears bilaterally, but significantly worse in the left ear. (Resp. Ex. 1 11 – 13) The claimant then presented to the Baptist Health Medical Center in North Little Rock for an MRI on June 5, 2020, due to an unspecified sensorineural hearing loss. The MRI report provided there was no mass of the internal auditory canals, but there was moderate right mastoid effusion and moderate to large left tympan mastoid effusion. The findings were suggestive of “idiopathic intracranial hypertension.” (Resp. Ex. 1, P. 12 – 15) A follow up at Arkansas Otolaryngology Center on June 10, 2020, provided that there was “no reason for dead ear seen on MRI.” (Resp. Ex. 1, P. 16, 17)

The respondents also submitted a packet of non-medical evidence that consisted of seven (7) pages that was admitted without objection. The AR–N Form dated January 22, 2019, only listed a head injury, scrapes on the left wrist, and bruising and stiffness to

the abdomen, back, and shoulders. No mention of an ear issue was mentioned. (Resp. Ex. 2, P. 1) A report from the Arkansas Municipal League Workers' Compensation Trust provided the payments made in regard to the claim and the actions taken in regard to the claim. (Resp. Ex. 2, P. 2 -4) The AR-C Form was also submitted by the respondents and it provided that the claimant was only asking for additional permanent partial benefits. (Resp. Ex. 2, P. 5)

DISCUSSION AND ADJUDICATION OF ISSUES

In regard to the primary issue of compensability, the claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation benefits due to the alleged work-related hearing loss involving his left ear. In determining whether the claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann § 11-9-704. Wade v. Mr. Cavanaugh's, 298 Ark. 364, 768 S.W. 2d 521 (1989). Further, the Commission has the duty to translate evidence on all issues before it into findings of fact. Weldon v. Pierce Brothers Construction Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

Here, the claimant failed to submit any medical evidence to support the claim. Under workers' compensation law in Arkansas, a compensable injury must be established by medical evidence supported by objective findings and medical opinions addressing compensability and must be stated within a degree of medical certainty. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. Liaromatis v. Baxter County Regional Hospital, 95 Ark. App. 296, 236 S.W.3d 524 (2006). More specifically, to prove a compensable injury, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of

and in the course of employment; (2) that 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, as defined in A.C.A. § 11-9-102(16) establishing the injury and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. If the claimant fails to establish any of the requirements for establishing the compensability of the claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997). An injury for which the claimant seeks benefits must be established by medical evidence supported by objective findings which are those findings that cannot come under the voluntary control of the patient. A.C.A. § 11-9-102(16). It is also important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co. 14 Ark. App. 88, 684 S.W.2d 842 (1985).

Further, it is noted that a claimant is not required in every case to establish the causal connection between a work-related incident and an injury with an expert medical opinion. See Walmart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). Arkansas courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on 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. Hail v. Pitman Construction Co. 235 Ark. 104, 357 A.W.2d 263 (1962)

Here, the claimant was involved in a work-related automobile accident on January 15, 2019. The Arkansas N Form made no mention of hearing loss to his left ear. The

claimant received initial treatment for his injuries. His witness, Mike Hogan, the claimant's supervisor, testified he picked up the claimant from the accident scene and the claimant made no mention about a ringing in his ears when he picked up the claimant or the following week. It was stipulated that Mr. Lee, the claimant's right-hand man, would testify to the same. The claimant admitted under cross examination that if he had been aware of his hearing loss, he would have made it part of his third-party claim. Although the claimant submitted no medical records, the records provided by the respondents stipulates that the claimant presented to Dr. Hashmi on January 16, 2019, the day following the accident. The assessment provided episodic tension type headaches with lumbar pain and muscle spasms of the back, but no mention of ringing in the ears or of hearing loss to the left ear was provided. The claimant returned to Dr. Hashmi on January 21, 2019, and again the report made no mention in regard to ringing in the ears or of hearing loss to the left ear. However, on January 30, 2019, the report by Dr. Hashmi provided the claimant mentioned that the tinnitus was continuing. An MRI of the lower lumbar back was taken but one involving the head and ears was apparently not provided at that time.

The claimant continued to present to Dr. Hashmi with no additional mention of tinnitus until an office visit dated April 28, 2020, when the claimant was apparently referred to Dr. Dominika. Dr. Dominika provided that the claimant had been treated for an ear infection by a primary care provider with no pain and that hearing had not returned. The type of hearing loss was not specified but fluid was still found behind both right and left tympanic membranes. The claimant was then referred to Dr. Smith of Arkansas Otolaryngology on May 13, 2020, and an MRI of the head, dated June 5, 2020, was

ordered. The MRI report provided there was no mass of the internal auditory canals, but there was moderate right mastoid effusion and moderate to large left tympan mastoid effusion. The report further provided the MRI findings were suggestive of idiopathic intracranial hypertension.

In the present matter, it appeared the claimant was a likable individual, who both his supervisor and one of the people that he supervised greatly cared for. However, as stated above, the workers' compensation claimant bears the burden of proving the compensable injury by a preponderance of the evidence. A.C.A. § 11-9-102(4)(E)(i). A compensable injury is one that was the result of an accident that arose in the course of his employment and that grew out of/or resulted from the employment. See Moore v. Darling Store Fixtures, 22 Ar. App 21, 732 S.W.2d 496 (1987) Preponderance of the evidence means the evidence having greater weight or convincing force. Metropolitan Nat'l Bank v. La Sher Oil Co., 81 Ark App. 263, 101 S.W.3d 252 (2003). Here, there are no objective findings and insufficient testimony connecting the hearing loss to the work-related accident. Based upon the available evidence in the case at bar, there is no alternative but to find that the claimant has failed to satisfy the required burden of proof to show that the claimed loss of hearing to the left ear was caused by the work-related automobile accident on January 15, 2019.

After weighing the evidence impartially, without giving the benefit of the doubt to either party, there is no alternative but to find that the claimant has failed to prove by a preponderance of the credible evidence that his claim for hearing loss involving the left ear is a compensable work-related claim under the Arkansas Workers' Compensation

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Act. Consequently, all other issues are found to be moot. If not already paid, the respondents are ordered to pay the cost of the transcript forthwith.

IT IS SO ORDERED:

JAMES KENNEDY
ADMINISTRATIVE LAW JUDGE