

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

AWCC FILE No H204211

ERWIN EZELL, EMPLOYEE	CLAIMANT
H.W. TUCKER Co. INC., EMPLOYER	RESPONDENT
NATIONAL TRUST INSURANCE Co., CARRIER	RESPONDENT
FCCI INSURANCE GROUP, TPA	RESPONDENT

OPINION FILED 19 JULY 2023

On hearing before Arkansas Workers' Compensation Commission (AWCC) Administrative Law Judge JayO. Howe, 8 February 2023, Little Rock, Pulaski County, Arkansas.

Ms. Laura Beth York, Attorney-at-Law of Little Rock, Arkansas, appeared for the claimant.

Mr. James A. Arnold, II, Attorney-at-Law of Fort Smith, Arkansas, appeared for the respondents.

I. STATEMENT OF THE CASE

The above-captioned case was heard on 8 February 2023 in Little Rock, Arkansas, after the parties participated in a prehearing telephone conference on 22 November 2022. A Prehearing Order, admitted to the record without objection as "Commission's Exhibit No 1," was entered on that same day. The Order stated the following **ISSUES TO BE LITIGATED**:

1. Whether the claimant sustained a compensable injury to his back by specific incident or, in the alternative, by gradual onset.
2. Whether the claimant is entitled to reasonable and necessary medical treatment.
3. Whether the claimant is entitled to temporary total disability (TTD) benefits.
4. Whether the claimant is entitled to a controverted attorney's fee.

All other issues were reserved.

The parties' **CONTENTIONS**, as set forth in their pre-hearing questionnaire responses, were incorporate by reference into the Prehearing Order. The **CLAIMANT CONTENTS**:

1. That he suffered a compensable back injury in the scope and course of employment and that he is entitled to medical benefits and TTD from 3 May 2022 to an unknown date and that he is entitled to an attorney's fee.

The RESPONDENTS CONTEND:

1. That the claimant's injuries do not meet the requirements for compensability under the applicable law.
2. That the claimant failed to notify the respondents of a work-related injury that he alleges occurred on 29 April 2022.

That Order also set forth the following STIPULATIONS:

1. The AWCC has jurisdiction over this claim.
2. An employee/employer/carrier relationship existed on 21 April 2022 and at all other times relevant to this claim.
3. The respondents have controverted this claim in its entirety.
4. The parties would further stipulate to average weekly wage and compensation rates.

In addition to the Commission's previously mentioned Exhibit № 1, three (3) more EXHIBITS were entered into the record. "Claimant's Exhibit № 1" consisted of a three-page index of medical records and sixty-five (65) subsequent pages. "Respondents' Exhibit № 1" consisted of one (1) index page of medical records and eighty (80) subsequent pages. "Respondents' Exhibit № 2" consisted of one (1) index page of non-medical records and twenty-two (22) subsequent pages.

Three (3) WITNESSES provided sworn testimony—the claimant spoke on his own behalf and the respondents called Mr. Eric Jackson and Ms. Julie Sanders.

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 Ark. Code Ann. § 11-9-704:

1. The AWCC has jurisdiction over this claim.

2. The previously noted stipulations are accepted as fact.
3. The claimant failed to prove, by a preponderance of evidence, that he suffered a work-related injury by either specific incident or gradual onset.
4. Because he failed to prove a compensable injury, the claimant's request for reasonable and necessary medical treatment and TTD benefits are moot and will not be addressed below.
5. Consistent with the above, the claimant's attorney is not entitled to a fee.

III. HEARING TESTIMONY and MEDICAL EVIDENCE

A. *Claimant on direct-examination by Ms. York:*

Claimant, Ervin Ezell, is a sixty-two (62) year old male with a high school diploma and approximately a year and a half of college credit. He has worked pouring concrete since 1987, and his testimony evidences knowledge around the many different roles or tasks associated with installing concrete surfaces. His work with respondent, H.W. Tucker, began on 6 December 2021.

According to the testimony, he presented to the emergency department in March of 2022 with complaints of back pain. He attributed the pain to possible "fatigue" [TR at 15] and denied making any report to his employer before or after returning to work. This was not his first episode of back pain; rather, he noted that he experienced back pain "many times" before and that "it's a strenuous job." *Id.*

Before describing any events in April of 2022 or after, the claimant discussed an accident and injury sustained on another job in 2017, when he was struck by the extended concrete chute of a mixing truck making a sudden turn. He described being off from work for some time while seeking treatment for the injuries sustained in that incident. Mr. Ezell stated that he eventually returned to full-duty work, although intermittent back pains persisted. "That's every day. That's every day. That's why they tell you to go home, soak in Epsom salt and, you know, get ready for the next day... a few times I have to take a few pain

pills or whatever, you know, muscle relaxers or something, but...I got a job to do. I'm fixing to go do it." [TR at 19]

Mr. Ezell next described his work shoveling concrete on Friday, 29 April 2022, when he felt his back pop. When asked if anything was wrong, he stated "Nothing, I'm good. Nothing." [TR at 21] He says that he worked on and took a muscle relaxer before finishing out the day. Comparing at the hearing the pain he felt in April to the pain he felt in March, he said it felt "sharp." [TR at 24] He reiterated that he denied an injury while at the jobsite and when asked specifically if he reported to his supervisor that he needed medical treatment, he said, "No, no. I never told him." [TR at 25] Mr. Ezell denied working any other jobs or reporting any injury to his employer over the weekend, saying that he rested and cooked some meals with his family. *Id.*

According to his testimony, Mr. Ezell arrived at work the following Monday, 2 May 2022, "really limping." [TR at 26] Mr. Ezell testified that he mentioned hurting himself on the Friday before, but that he was not offered any workers' compensation paperwork at the time. He stated that Bubba, the foreman, told him to go home "and get yourself together." Mr. Ezell states he went to bed early that night, but woke up in pain and struggled to get out of bed the next morning, to the extent that he called his children to get him up and drive him to the hospital.

He disagreed with the employer's work records that showed he claimed an injury on 21 April. Reviewing the records, he was back-and-forth on whether he worked on the Monday following the date he claims the injury occurred, before agreeing that he worked a full day on Monday, 2 May 2022. [TR at 32] He stated again that he did not report an injury to his employer. Mr. Ezell testified that he hurt all day that Monday and took muscle relaxers to ease the pain. He then disagreed with the work records showing that he worked full days on Tuesday May 3rd and Wednesday May 4th, saying that he was sent home that Tuesday and

went to the hospital that night. [TR at 34-35] He disagreed again with records showing that he worked the following Monday, 9 May 2022, and that he “sat in truck all day, ten hours.” He further disagreed that he was told to stay home on 10 May 2022, reiterating that his last day to show up for work was 2 May 2022. The claimant agreed that he eventually filled out some workers’ compensation forms, but was unsure of the dates they were received or returned. [TR at 35-36]

He claimed that he did not perform any work for the respondents between 3 May 2022 and his full-duty release on 31 October 2022. Since his release he claims no problems with his back. [TR at 38] His direct-examination concluded with Mr. Ezell stating that the pain he claims he felt on 29 April 2022 was greater than any past back pains. Relating to his injury from 2017, when he was hit by a concrete truck, he said, “[t]hat piece of steel hit me, knocked me up in the air, okay. In no time I was back to work. A couple of months I was back to work, but the pain in the—on the 29th, that was—that was a greater pain. That was a greater pain.” [TR at 39]

B. Claimant on cross-examination by Mr. Arnold:

The claimant confirmed on cross-examination that his work at H.W. Tucker, which began on 6 December 2021, was not different in the approximate five (5) months he worked there from his work pouring concrete for the previous thirty-five (35) years. In the five (5) to six (6) years prior to joining H.W. Tucker, Mr. Ezell worked for himself. [TR at 41-42] He also confirmed that his 2017 injury was handled as a personal injury matter for which he received a settlement and not through workers’ compensation. Mr. Ezell’s back pains persisted periodically after the 2017 accident and he took pain medication, muscle relaxers, and wore a back belt as needed for help with pain. “So in order to keep on, you take a muscle relaxer or a pain pill.” [TR at 44]

Mr. Ezell testified that despite other incidents or doctor's visits prior to 29 April 2022, he was not having any back pains on that day, or at least, "no more than usual." [TR at 48-49] The muscle relaxers and pain pills he had on-hand the Friday he claims he was injured were prescribed by providers for earlier-reported pains. The claimant re-asserted that he went to the Baptist Emergency Room on 3 May 2022, despite neither party having any records relating to such a visit. As for the absence of medical records supporting his version of the events, Mr. Ezell only offered, "I have no idea." [TR at 51]

The questioning went on as to what medical complaints and treatments were reported or provided and when.

C. Claimant on re-direct and re-cross:

Answering additional questions, Mr. Ezell reiterated that he experienced back pains prior to the alleged injury in April of 2022. "I mean, with this job, everything hurts," he said. [TR at 59] He went on to deny recalling earlier sworn statements made during his deposition.¹ [TR at 60-61]

D. Respondent employee, Eric Jackson:

The respondents called Mr. Eric Jackson to the stand, and he testified that he worked for H.W. Tucker for approximately twenty (20) years, with about the last six (6) of those being in management. Mr. Jackson recalled telling the claimant in May of 2022 to go home if he was hurting, but denied that the claimant told him that his pain was related to a workplace injury. According to Mr. Jackson, the conversation occurred on the Tuesday after the

¹ Respondents' counsel provided, and I accepted, the claimant's deposition transcript as a proffer. I am not relying on any of the sworn testimony found in that transcript in this Opinion. Rather, I am limiting my consideration to the testimony offered at the hearing. That said, and the actual specifics of the deposition testimony aside, I do not discount respondent counsel's use of the deposition testimony and the claimant's denial of that testimony for impeachment purposes and/or attacking his credibility.

claimant spent the previous day sitting in the truck all day (which is reflected as the 9th and 10th of May in “Respondents’ Exhibit № 2”).

He further testified that employees are supposed to report workplace injuries to their supervisors, but that he did not recall Mr. Ezell telling him that he was hurting because of an injury sustained at work. Nor did he recall another employee telling him at the time that Mr. Ezell had hurt himself while working.

E. Respondent employee, Julie Sanders:

Ms. Julie Sanders testified that she worked in administration, handling “payables, receivables, a lot of HR.” [TR at 73] She confirmed the accuracy of the work-related records provided by the respondents and admitted into evidence. According to Ms. Sanders, the claimant called her office on 24 May 2022, saying that he had been seeing a doctor and that he might need surgery, so he “needed to get on workers’ comp.” [TR at 74] She stated that call was the first she heard about a workplace injury. After some forms were provided to Mr. Ezell, another worker told Ms. Sanders that he remembered the claimant mentioning his back hurting at some point, but that he denied that it was anything that needed to be reported.

F. Medical Records:

The parties submitted medical records ranging between October 2017 and November 2022. See, “Claimant’s Exhibit № 1” and “Respondents’ Exhibit № 1”. Mr. Ezell acknowledged that he lived and worked in Chicago for about thirty (30) years before moving to Arkansas some six (6) years or so prior to the time of the hearing. [TR at 41-42] He acknowledged that his out-of-state medical records were not available. *Id.*

Mr. Ezell discussed at the hearing the injuries he sustained in October of 2017 when he was struck by the cement chute of a moving mixing truck while working for another employer. He presented for treatment complaining of pain in his back, right hip, and his

side. The emergency department records reflect that he was diagnosed with multiple contusions and a thoracic strain after the accident. [Resp. Exhibit № 1 at 6] The imaging reflected no acute fractures, but noted “multilevel degenerative changes.” [Id. at 12-13] He was prescribed muscle relaxers and pain medication upon discharge. [Id. at 17]

The medical evidence reflects that the claimant presented to PrimeCare on 15 June 2019. [Resp. Exhibit № 1 at 21] He complained of back pain caused by work, coming home from work with back pain, wearing a back belt, and that the pain gets worse when he takes the back belt off. Mr. Ezell requested muscle relaxers, noting that they had helped before. Regarding his back pain, the chart noted that he worked with concrete. [Id. at 22] He was again prescribed muscle relaxers. Muscle spasms in the back are noted on another visit dated 10 December 2019. [Id. at 23]

The claimant presented again to PrimeCare on 4 December 2020, with a primary complaint of back pain. [Id. at 27] The chart reflects that Mr. Ezell noted pain the day before Thanksgiving, but that he had only lifted turkey and ham [for holiday meals]. He reported, “I’m talking about pain...if I tried to get up right now, I couldn’t just get up.” The provider assessed lumbar pain, strain of the lumbar region, and midline low back pain. He received an injection for his pain, and imaging was ordered. [Id. at 28] The x-ray impression from the following day revealed “mild lower lumbar spine degenerative change/facet arthropathy.” [Id. at 29]

Mr. Ezell later reported to the Baptist emergency department on 2 March 2022, complaining of low back pain that started 9 days earlier. [Id. at 33] He stated, “I was able to walk until today and now the pain is so bad, I can’t even walk to the bathroom.” He was diagnosed with a strain and provided intramuscular medication.

His next presentation to PrimeCare was on 3 May 2022, where he noted some cramping on the lower right side of his back for about three days. [*Id.* at 41] The entry notes that he lays concrete and thought he had a pulled muscle, but he denied a fall or injury. He was started on Naproxen, received a Toradol injection, and was told to follow up for continued monitoring of his hypertension, which he stated had improved recently.

Mr. Ezell then presented to PrimeCare again on 9 May 2022, again complaining of back pain. [*Id.* at 43] He stated that he could not take off from work² because he had to pay bills and requested a note for nonstrenuous activity at work. Another intramuscular injection was administered.

The claimant was seen again at the Baptist emergency department on 11 May 2022. He complained of persistent low back pain for four weeks. [*Id.* at 46] More injections were administered, while x-ray impressions returned no acute findings.

Mr. Ezell then presented to a North Little Rock Urgent Care on 13 May 2022, complaining of right knee pain. [*Id.* at 51] According to the note, “on 5/9/2022 he noticed some knee pain while at work. He noticed some weakness in the right lower extremity. His boss told him to go home and rest up.” [*Id.* at 53] He later saw Dr. Tad Pruitt on 8 June 2022 for right knee pain he said began about fifteen (15) years earlier. [*Id.* at 60]

The records reflect numerous other visits over the next few months.

V. ADJUDICATION

The stipulated facts, as agreed during the prehearing 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

² His testimony at the hearing, however, indicated that his last day at work was 2 May 2022. [TR at 35.]

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 Failed to Prove by a Preponderance of the Evidence that he Suffered a Compensable Workplace 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. 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). Here, the claimant alleges that his injury occurred either by specific incident or gradual onset.

As noted in the respondents' hearing brief, 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.

Should he fail to prove a specific incident, the claimant also offers that he is entitled to compensation under the theory that he sustained a gradual onset injury. To prevail on that claim, he must prove, by a preponderance of the evidence that: (1) the injury arose from his employment; (2) the injury caused actual harm that required medical attention; and (3) the injury was a major cause of the need for treatment. The existence and extent of the injury must be proven by objective medical evidence. See *Wal-Mart Stores, Inc., supra* at 446; Ark. Code Ann. 11-9-102(4)(E)(ii). For an injury to be considered a "major cause" for a need for treatment, it must be more than fifty percent (50%) of the cause and it must be established by a preponderance of the medical evidence. Ark. Code Ann. 11-9-102(14)(A-B).

As a threshold matter the claimant failed to prove, by a preponderance of the evidence, that he sustained a compensable injury under either theory. Without the benefit of medical records or imaging pre-dating the claimant's time in Arkansas, the records still show a history of degenerative changes on the imaging studies after his 2017 accident. The presentation and complaints back then were nearly the same as the ones presented here, and the objective medical evidence does not support a finding of a compensable injury.

In July of 2019, well before beginning his work for the respondent, he reported back pain and requested muscle relaxers for that pain. He reported back pain again in December of 2020, just a year before beginning his work for the respondent. The imaging associated with that visit again showed lumbar spine degenerative changes and facet arthropathy.

When he reported to the emergency department on 11 May 2022, after his alleged workplace injury, the physician notes show no relevant report of trauma and "persistent" low back pain for four weeks. The imaging from that visit was compared to the study from 2020, and no significant deviations from the previous imaging or acute injuries were reported. His 13 May 2022 imaging also revealed degenerative disc disease and retrolisthesis.

The claimant's testimony lacked credibility. His version of the events was not consistent as to what happened when, nor was it consistent with the workplace records, nor was it consistent with the medical records presented (beyond the fact that he had before and continued to have back problems around the date(s) in question). Rather than attempting to square potentially or plainly conflicting narratives, he adopted an evasive demeanor. For example:

Q: And you wore a back belt pretty continuously?

A: Not often, but I did wear one occasionally.

Q: If the medical records reflect that you found it necessary to wear a back belt, you wouldn't deny that, right?

A: Yes.

Q: And you had muscle spasms pretty consistently from 2017, up to when you went to work for H.W. Tucker?

A: Over a period of time.

...

Q: Okay But did you need [pain medication] periodically throughout that period of time?

A: I don't know.

Q: Correct?

A: It depends on what you call periodically... . [TR at 43-44]

He testified that he was sent home on a Monday, 2 May 2022 [TR at 26], but then agreed that he must have worked all day that Monday, before being sent home the next day (Tuesday) [TR at 32], and then denied the accuracy of records showing he worked full days that Tuesday and Wednesday [TR at 34].

The claimant did not make any reasonable and timely effort to advise his employer that he sustained a workplace injury, as required by the company's policy. Mr. Ezell did not even attempt to report an injury until he thought he might need surgery if the treatments he'd earlier begun and continued on his own for his chronic pain were not successful. He has failed to prove, by a preponderance of the evidence, with credible testimony or objective medical findings that he suffered a compensable injury.

B. Benefits

Because he failed to prove a compensable injury, the claimant's request for reasonable and necessary medical treatment and TTD benefits are moot.

C. Attorney's Fee

In accordance with the above, the claimant is not entitled to an attorney's fee.

VI. ORDER

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Consistent with the findings of fact and conclusions of law set forth above, this claim is denied and dismissed.

SO ORDERED.

JAYO. HOWE
ADMINISTRATIVE LAW JUDGE