

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H000196

BILLY WAYNE KEELING, EMPLOYEE

CLAIMANT

**THOMPSON CONST. GROUP, INC.,
EMPLOYER**

RESPONDENT

**ZURICH AMERICAN INS. CO.,
CARRIER**

RESPONDENT

OPINION FILED JUNE 13, 2022

Hearing before Chief Administrative Law Judge O. Milton Fine II on April 1, 2022, in Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Bill E. Bracey, Jr., Attorney at Law, Blytheville, Arkansas.

Respondents represented by Mr. Randy P. Murphy, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 1, 2022, the above-captioned claim was heard in Jonesboro, Arkansas. A prehearing conference took place on January 24, 2022. A prehearing order entered that day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. With an amendment of the fourth, they are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

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2. The employer/employee/carrier relationship existed at all relevant times.
3. This claim has been controverted in its entirety.
4. Claimant's average weekly wage of \$1,120.88 entitles him to the maximum compensation rates.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit

1. The following were litigated:

1. Whether this claim is barred by the statute of limitations.
2. Whether Claimant sustained injuries by specific incident in the form of welding burns to his neck/back and scalp.
3. Whether Claimant sustained injuries in the forms of removal of lymph node(s) and aneurysms as a compensable consequence of his alleged compensable welding burn injuries.
4. Whether Claimant is entitled to reasonable and necessary medical treatment.
5. Whether Claimant is entitled to temporary total and/or temporary partial disability benefits.
6. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved.

Contentions

The respective contentions of the parties read as follows:

Claimant:

1. Claimant contends that he was permanently and totally injured arising in and out of employment when welding solder caused burns to his neck resulting in bilateral brain aneurysms.
2. Claimant is not related by blood to his sister. Therefore, her propensity to have aneurysms, cited in the medical causation opinion, is irrelevant in this proceeding.
3. All other issues are reserved.

Respondents:

1. Respondents contend that Claimant did not sustain an injury during the course and scope of his employment.
2. Respondents further contend that Claimant's claim is barred by the statute of limitations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, deposition transcript, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the hearing witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. The evidence preponderates that Claimant's claim for initial benefits in connection with the alleged welding burns to his neck/back and scalp is barred by the statute of limitations set out in Ark. Code Ann. § 11-9-702(a)(1) (Repl. 2012).
4. The evidence preponderates that Claimant's claim for initial benefits in connection with the removal of his lymph node(s) and aneurysms as an alleged compensable consequence of his alleged compensable welding burn injuries is barred by the statute of limitations set out in Ark. Code Ann. § 11-9-702(a)(1) (Repl. 2012).
5. Based on Finding/Conclusion No. 3 *supra*, Claimant has not proven by a preponderance of the evidence that he suffered compensable consequence(s) in the form(s) of aneurysms and the removal of his lymph nodes.
6. Because of the above findings, the remaining issues are moot and will not be addressed.

CASE IN CHIEF

Summary of Evidence

The hearing witnesses were Claimant and Dennis Robinson. Robert McBride testified via deposition.

Along with the Prehearing Order discussed above, the exhibits admitted into evidence in this case were Claimant's Exhibit 1, a compilation of his medical records, consisting of six index pages and 41 numbered pages thereafter; Claimant's Exhibit 2, six color photographs of Claimant; Respondents' Exhibit 1, another compilation of Claimant's medical records, consisting of two index pages and 356 numbered pages thereafter; Respondents' Exhibit 2, another compilation of Claimant's medical records, consisting of three index pages and 383 numbered pages thereafter; and Respondents' Exhibit 3, non-medical records, consisting of one index page and 22 numbered pages thereafter.

In addition, the following have been blue-backed to the record: the transcript of the April 25, 2022, deposition of McBride, consisting of 24 numbered pages; and Claimant's Prehearing Questionnaire Response filed on November 18, 2021, consisting of four pages.

A. Statute of Limitations

Introduction. In this action, Claimant is alleging that he suffered two different types of injuries. First, he has asserted that he sustained injuries by specific incident: welding burns to his neck/back and scalp. Second, he has argued that he suffered injuries in the forms of removal of lymph node(s) and aneurysms that are a compensable consequence of his alleged compensable welding burn injuries. Respondents, in turn, have alleged that the claim for all of these alleged injuries is barred by the statute of limitations.

Standards. As the parties have stipulated, Respondents have controverted this claim in its entirety. Arkansas Code Annotated § 11-9-702(a)(1) (Repl. 2012) sets out the applicable statute of limitations concerning a claim for initial benefits:

A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury. If during the two-year period following the filing of the claim the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter. For purposes of this section, the date of the compensable injury shall be defined as the date an injury is caused by an accident as set forth in § 11-9-102(4).

The burden rests on Claimant to prove that his claim was timely filed. *Stewart v. Ark. Glass Container*, 2010 Ark. 198, 366 S.W.3d 358; *Kent v. Single Source Transp.*, 103 Ark. App. 151, 287 S.W.3d 619 (2008). Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), he must do so by a preponderance of the evidence. The standard "preponderance of the evidence" means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness's credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant

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or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

Discussion. With regard to that portion of the claim concerning the alleged welding burns, the only Form AR-C that was filed in this matter—which was filed on January 13, 2020—makes no mention of any such burns. Instead, it reflects that Claimant “was exposed to chemicals sprayed on grass and steel on [the] job site,” and that he “experienced brain injuries and other whole body injuries” as a result thereof. Because that form makes no mention of Claimant’s welding burns, its filing does not toll the running of the aforementioned statute of limitations. *See Wynne v. Liberty Trailer*, 2022 Ark. 65, 641 S.W.3d 621.

A Form AR-C is the means for filing a “formal claim.” *See Yearwood v. Wal-Mart Stores, Inc.*, 2003 AR Wrk. Comp. LEXIS 739, Claim No. F201311 (Full Commission Opinion filed June 17, 2003). *See also Sinclair v. Magnolia Hospital*, 1998 AR Wrk. Comp. LEXIS 786, Claim No. E703502 (Full Commission Opinion filed December 22, 1998)(a claim is “typically” filed *via* a Form AR-C).

I recognize, however, that other means exist to file a claim for initial benefits other than a Form AR-C. In *Downing v. Univ. of Ark.*, 1999 AR Work. Comp. LEXIS 979, Claim No. E209360 (Full Commission Opinion filed March 16, 1999), the Commission stated:

While it appears that no court has addressed the minimum requirements under Arkansas law to state an adequate “petition for review”, in *Cook v. Southwestern Bell Telephone Company*, 21 Ark. App. 29, 727 S.W.2d 862 (1987) the Arkansas Court of Appeals discussed the minimum requirements necessary for correspondence to the Commission to

constitute a claim for additional compensation for the purposes of tolling the applicable Statute of Limitations. In that case, the Court held that an attorney's correspondence notifying the Commission that he has been employed to assist a claimant in connection with unpaid benefits is sufficient to state a claim for additional compensation where the correspondence also lists the claimant's name, the employer's name and the WCC file number. *Id.*, See also, *Garrett v. Sears Roebuck and Company*, 43 Ark. App. 37, 858 S.W.2d 146 (1993). Moreover, we have interpreted *Cook* as requiring that correspondence intended as a claim for additional benefits (1) identify the claimant, (2) indicate that a compensable injury has occurred, and (3) convey the idea that compensation is expected.

(Citations omitted) *Cf. White Cty. Judge v. Menser*, 2018 Ark. App. 297, 549 S.W.3d 416.

My review of the Commission's file discloses a document sufficient to constitute a filing of a claim for initial benefits under the factors cited above. That document is Claimant's Prehearing Questionnaire Response, filed with the Commission on November 18, 2020. In that response, the Claimant identified himself, requested medical and indemnity benefits, and stated: "Claimant contends that he was permanently and totally injured arising in and out of employment when welding solder caused burns to his neck resulting in bilateral brain aneurysms, and total disability."

That said, what must be determined is whether the November 18, 2020, filing occurred within two years of Claimant suffering the burns in question. At the hearing, Dennis Robinson, who was the lead man on the welding project where Claimant allegedly suffered the burns, gave the following testimony:

- Q. You described this event [Claimant being struck by hot welding spatter] to the Court in response to questions by your attorney, but you didn't provide any dates. When did—when did this occur?

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A. I could not—

Q. We—we need to know what year.

A. 2018.

Q. Okay.

A. I'm saying 2018.

Q. Do you know approximately what month?

A. It was in [the] middle of summer so I—you know, anywhere from May to August.

Q. Okay.

A. It was very hot.

(T. 24-25) According to Robinson, he observed the burns the day after they occurred.

(T. 37)

When he took the witness stand, Claimant related that he first went to work for Respondent Thompson Construction Group in January 2018. (T. 45) The following exchange took place:

Q. What—what was the date of that?

A. Of the burn?

Q. Of the burn.

A. It was, I want to say, February. It wasn't very long after I got hired on.

(T. 46) He later repeated this, and related that the burns occurred over a period of five to seven days. (T. 50, 72) However, the following exchange took place during his cross-examination:

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Q. Now . . . in regard to this incident that you described—and I know you said you believe there were more burns, but just for purposes of this conversation, let's just talk about the 34 burns—

A. Yes, sir.

Q. Okay. Those—did those happen all in one day? Was this a specific event or gradual?

A. Well, I mean, I got burnt all—that day everything that was burnt at the end—

Q. Okay.

A. —of the job I was still burnt.

Q. Okay. No, I understand. But as far as the splatter itself, it occurred on one day? One a day?

A. No, it was through a course of—

Q. The course of—

A. But I mean, I completely burned, but I just kept getting the same burns every day.

(T. 84-85)

When asked why his Form AR-C would reflect a date of injury in May 2018, Claimant responded that he still had the burns at that time, and that he went to “the cancer doctor” during that period. (T. 73-74) Near the end of his testimony, while being questioned by the Commission, Claimant altered his earlier estimation and stated that he was burned between mid-January and mid-February of 2018. (T. 95)

Regarding the timeline laid out by Robinson, Claimant disputed it. The following exchange occurred under questioning by the Commission:

- Q. Can you explain why [Robinson] recalls the time period differently than you? Did you have a second period of time when you suffered burns—
- A. No, sir.
- Q. —welding burns?
- A. He works at the Yamato site and I work at—I worked at the JMS site. And we stayed at the JMS site to finish that job and they stayed at Yamato. So when we finished the JMS site and we went to the Yamato site, it was roughly around that time that—I still had burns. I still got—I got pictures of the burns that—everybody already knew about it. And I showed him some burns and I'm thinking that's what—what he's—
- Q. All right. Let's do—do the math here really quickly. That's a difference of five months, you understand, between February—
- A. Um-hmn.
- Q. —and July?
- A. Correct.
- Q. You understand that? Would you have waited five months before showing him the—the burns on your neck?
- A. Yeah. I still had burns. If you look at that picture where I had this first surgery, you can look and see I'm still pink and I'm peeling. I don't remember what the date was that I had it.
- Q. All right. Would that—would—what I'm asking is this. Would five months later than February of 2018—and that's again, assuming he—he pegged it as mid-summer if you—if you remember on that—
- A. Yeah.
- Q. —what he said. And assuming that's mid-summer because I know summer starts on June 21. Would—would that have been the first time that you would've told him about these burns and showed them to him? Five months after they—they happened?

A. No, it would've been sooner than that.

Q. All right.

A. Because sometimes we jump—like I may go help at Yamato for an hour or two and come back . . . [o]r he may come to our job site.

(T. 97-99)

Despite the fact that the medical records that are in evidence reflect that Claimant saw providers in January, February, March and April of 2018, no reference to welding burns (or to burns of any type) appears therein until May 8, 2018. On that date, Claimant informed Dr. Kirby Smith that “[t]wo months ago he sustained a burn to the right posterior neck.” This would date the occurrence of the burn around March 8, 2018. During an examination of Claimant on that date, Dr. Smith wrote: “There is area of hyperemia of skin on posterior neck with 34 shallow, small ulcerations secondary to burn.” Smith on October 19, 2021, issued a letter in which she stated: “[Claimant] is a 49 year old male referred to my office in April 2018 for evaluation of cervical lymphadenopathy following burns to posterior scalp and upper back from a welding incident while at work.” There is no report from that particular month in evidence; so this leads me to conclude that the doctor was actually referring to the aforementioned May 8, 2022, encounter.

As the foregoing shows, there is a marked discrepancy in the evidence concerning when Claimant allegedly suffered these welding burns. However, the May 8, 2018, report by Dr. Smith makes it clear that they were present at least as of that date. That said, under the statute of limitations, Claimant must prove by a

preponderance of the evidence that his claim was timely filed. But even assuming for the sake of argument that the burns did not take place until May 8, 2018,¹ he had to file a claim for workers' compensation benefits in connection therewith on or before May 8, 2020. But this he did not do. The earliest arguable filing of such a claim did not happen until November 18, 2021—over 18 months too late. The portion of this claim concerning the welding burns that Claimant allegedly suffered at work at Respondent Thompson Construction Group is, consequently, time-barred under § 11-9-702(a)(1).

As for his alleged compensable consequences—the aneurysm(s) and removal of lymph node(s)—the Full Commission in *Johnson v. Elkhart Prods. Corp.*, AWCC No. D303314 (Full Commission Opinion filed March 28, 1995), found that “the statute [of limitations] bars an award for the [alleged compensable consequence] only if it bars an award for injuries causally related to the [alleged work-related] incident.” The Commission added that if a claim for a compensable injury is timely filed, then “the statute [of limitations] does not bar an award of compensation for [the alleged compensable consequence].” Of necessity, the converse is true, as well: if the original alleged injury is barred by the statute of limitations, the alleged compensable consequence of that original alleged injury must run afoul of the limitations period as well. The viability of alleged compensable constructively depends on the viability of the original injury. Since Claimant has not met his burden of proving that the claim for the

¹Even if the timeline given by Robinson were accurate, the above analysis shows that the claim would still be untimely.

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alleged welding injuries was timely filed under § 11-9-702(a)(1), he cannot do so regarding the alleged compensable consequences.

Notwithstanding the above finding, in the event that Commission finds that there is no compensable consequence, it may decline to address the statute of limitations issue regarding it and proceed to address the compensable consequence issue itself. *See Malone v. Mid-South Mfg., Inc.*, 2003 AR Work. Comp. LEXIS 638, Claim No. F100223 (Full Commission Opinion filed April 28, 2003). *See also Estrada v. AERT, Inc.*, 2014 Ark. App. 652, 449 S.W.3d 327.

If an injury is compensable, every natural consequence of that injury is likewise compensable. *Air Compressor Equip. Co. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000); *Hublely v. Best West. Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996). The test is whether a causal connection between the two episodes exists. *Sword, supra*; *Jeter v. McGinty Mech.*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). Because the original alleged injuries—the welding burns—have not been shown to be compensable because they are time-barred, Claimant cannot show that he suffered compensable consequences of these alleged burns in the forms of aneurysms and the removal of lymph node(s).

B. Remaining Issues

Because of the above findings, the remaining issues are moot and will not be addressed.

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CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, this claim for initial benefits is hereby denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge