

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H100646

JAMES P. TURNER, Employee	CLAIMANT
DAVID STEPHENSON, Employer	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JUNE 1, 2022

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON M. HATFIELD, Attorney, Springdale, Arkansas.

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 18, 2022, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 23, 2022 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on January 4, 2021.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$736.00 for total disability benefits and \$552.00 for permanent partial

disability benefits.

4. Respondents have controverted this claim in its entirety.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's neck (alternatively, an aggravation of a pre-existing condition) on January 4, 2021.

2. Medical, including surgery recommended by Dr. Jones.

3. Temporary total disability benefits from October 14, 2021 through a date yet to be determined.

4. Attorney's fee.

Since the time of the pre-hearing conference claimant has clarified that he wishes to have the surgery recommended by Dr. Blankenship instead of the surgery recommended by Dr. Jones.

The claimant contends he sustained an injury while working for respondent on or about January 4, 2021. At that time claimant was in the course and scope of his employment with respondent when a freezer evaporator coil fell injuring his neck. Claimant was initially treated with Dr. Jacobelli for his shoulder pain and was told to return if problems persisted. Claimant was referred to Dr. Jones for evaluation of his neck. Dr. Jones recommended surgery on 12/04/21. In a return visit with Dr. Jones on January 22, 2021, imaging was reviewed of the cervical region. Dr. Jones stated that the symptoms coincide with the traumatic injury. Dr. Jones recommended a posterior cervical laminectomy and fusion of the C3-7 with right sided foraminotomies. Claimant's job was terminated on October 14, 2021. Additionally, the respondents have failed to pay medical bills and temporary total disability payments.

The respondents contend the claimant did not injure his neck on January 4, 2021. He has no objective medical findings. Dr. Charles Jones has stated that “I do not see any particular evidence of acute trauma on the MRI. Therefore, I do not see a structural connection with this injury.” No one has taken him off of work. He continued to work full duty until October 14, 2021.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on March 23, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his cervical spine on January 4, 2021.
3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant’s compensable injury. This includes the surgery which has been recommended by Dr. Blankenship.
4. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning March 28, 2022 and continuing through a date yet to be determined.
5. Respondent has controverted claimant’s entitlement to all unpaid indemnity

benefits.

FACTUAL BACKGROUND

The claimant is a 59-year-old man who began working in service installation and maintenance of HVAC and refrigeration equipment in 1986. Claimant began working for respondent as a service technician in October 2012. Claimant's job with the respondent required various physical activities such as climbing ladders, crawling under houses, and lifting up to 100 pounds. Claimant testified that prior to January 4, 2021, he was able to perform his job functions without any physical problems.

Claimant testified that on January 4, 2021, he and other individuals were changing out a unit in a walk-in freezer at Arby's. Claimant testified that as he was talking to David Stephenson, owner of respondent, and Bill, the Arby's maintenance man, a unit from the ceiling fell and struck him in the neck and right shoulder area. Claimant was not permitted to drive his company truck home that night, but instead was picked up from the work location by his stepson. Claimant also testified that Stephenson's wife came to the Arby's location and he completed workers' compensation paperwork.

Claimant testified that on the morning of January 5 he could barely move and as a result sought medical treatment at the emergency room. A medical record from Dr. Teresa Clark dated January 5 indicates that claimant underwent a CT scan of the cervical spine which was read as showing a nondisplaced fracture of the C7 transverse processes. Claimant was given work restrictions and instructed to receive follow-up care from Dr. Jacobelli.

Claimant's initial evaluation with Dr. Jacobelli occurred on January 12, 2021. He

diagnosed claimant's condition as a nondisplaced fracture of C7 and ordered an MRI scan of claimant's cervical spine. The MRI was performed on January 13, and claimant returned to Dr. Jacobelli on January 14, 2021 who indicated that the MRI scan did not show any evidence of a fracture but it did show severe spinal stenosis. Dr. Jacobelli also indicated that this was not an acute finding, but instead was a finding that had been there for a while "and when his neck got jarred the symptoms got acutely worse." Dr. Jacobelli recommended that claimant undergo an evaluation and evaluation by Dr. Jones, a spine surgeon, and he released claimant to return to work as of January 18, 2021, with no restrictions.

Claimant returned to work for the respondent at full duty but testified that he was given lighter work than he had previously performed. Claimant continued working for respondent until he was terminated on October 14, 2021.

Claimant did not see Dr. Jones after the initial recommendation of Dr. Jacobelli, but instead continued to be evaluated by Dr. Jacobelli. Subsequent reports from Dr. Jacobelli indicate that claimant was given an injection in his shoulder for rotator cuff signs. Finally, on November 16, Dr. Jacobelli again referred claimant to Dr. Jones for an evaluation.

Claimant was evaluated by Dr. Jones on December 4, 202 and in his report of that date stated:

I told him I do not see any particular evidence of acute trauma on his MRI. Therefore, I do not see a structural connection with his injury. However, with his underlying cervical stenosis, I think this likely reflects a mild form of central cord syndrome. To that end, it has been almost a year and he is still with symptoms. I told her my recommendation would be for surgery at this point, and

that would be posterior cervical laminectomy and fusion C3-7. I think I would do a right-sided foraminotomies at the time of surgery. (Emphasis supplied.)

Respondent initially accepted claimant's injury as compensable and paid some compensation benefits apparently through the date of claimant's termination. Sometime after Dr. Jones' recommendation of surgery claimant on his own sought medical treatment from Dr. Blankenship who in a report dated March 28, 2022 also indicated that he would recommend that claimant undergo surgery. However, Dr. Blankenship recommended an anterior cervical arthrodesis and fusion as opposed to a posterior procedure. Based upon Dr. Blankenship's recommendation, claimant is requesting that his surgery be performed by Dr. Blankenship.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his cervical spine on January 4, 2021, when he was struck in the head and neck by a refrigeration unit. Claimant's claim is for a specific injury identifiable by time and place of occurrence.

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.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proof.

Initially, I find that claimant has met his burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment with respondent and that it was caused by a specific incident, identifiable by time and place of occurrence. Claimant testified that on January 4, 2021 he was struck in the head and neck area by a refrigeration unit while he was talking with the owner of respondent and a maintenance man who worked for Arby's. At the time claimant was struck he was in the process of changing out this refrigeration unit in a walk-in freezer at Arby's.

With respect to claimant's testimony, I note that the medical records contain a history of injury consistent with claimant's testimony and I also note that there is no indication that claimant had any neck complaints prior to January 4, 2021. I find that claimant's testimony is credible and entitled to great weight.

I also find that claimant's injury caused internal or external physical harm to his body that required medical services or resulted in disability and that the injury was established by medical evidence supported by objective findings.

As previously noted, claimant initially sought medical treatment at the emergency room where a CT scan of his cervical spine was read as showing a fracture at C7. A subsequent MRI scan was interpreted as showing only degenerative changes. However, both Dr. Jacobelli and Dr. Jones acknowledged that claimant's pre-existing condition was aggravated by the incident on January 4, 2021. In his report dated January 14, 2021, Dr. Jacobelli noted that claimant's MRI scan revealed severe spinal stenosis. While it was

not an acute finding, he noted that “when his neck got jarred, the symptoms got acutely worse.”

Likewise, in his report dated January 22, 2021, Dr. Jones stated:

Although I do not think his arthritis is new, the symptoms are coincident with his injury. Therefore, I think it is completely reasonable to continue this is [sic] a Workmen’s Compensation claim.

While both Dr. Jacobelli and Dr. Jones were of the opinion that claimant had a degenerative condition which had been aggravated by the incident on January 4, 2021, it was the opinion of Dr. Blankenship that claimant actually suffered a herniated disc as a result of that incident. In his report dated March 28, 2022, Dr. Blankenship stated:

I told the gentleman that he needs to have surgery based on his disc. There is no doubt that the gentleman does have cervical spondylosis and degenerative changes. His main problem and his tight area in his canal is 6 mm at C4-C5 and there is most definitely a soft disc herniation at this level. He has a probable broad-based disc protrusion at C5-C6 with an 8 mm canal. The bottom line is none of his symptoms occurred until this heating and air unit hit him on top of the head. There is absolutely no doubt in my mind and this is based on a reasonable degree of medical certainty that the causation of the gentleman’s need for treatment is his work-related injury.

Both Dr. Jacobelli and Dr. Jones are of the opinion that claimant’s pre-existing condition was aggravated by the incident on January 4, 2021. On the other hand, Dr. Blankenship is of the opinion that claimant suffered a herniated disc as a result of the incident on January 4. A herniated disc is an objective finding. Irregardless, all of these opinions support a finding that claimant suffered a compensable injury as a result of the

incident on January 4, 2021. I find that the opinion of Dr. Blankenship is credible and entitled to greater weight.

Accordingly, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his cervical spine while working for respondent on January 4, 2021.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes the surgery which has been recommended by Dr. Blankenship.

Claimant also contends that he is entitled to temporary total disability benefits beginning October 14, 2021 and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

While claimant may have remained within his healing period since the time of his compensable injury, he has failed to prove by a preponderance of the evidence that he has suffered a total incapacity to earn wages beginning on October 14, 2021. As previously noted, after claimant's injury he was returned to work by Dr. Jacobelli on January 18, 2021 with no restrictions. Although claimant testified that he was given lighter jobs, he nevertheless continued to work for the respondent until he was terminated on October 14, 2021.

Claimant has requested temporary total disability benefits as of October 14, 2021; however, he admitted that he was not taken off work by any physician on that date.

Q And my next question was no doctor took you off work on October 14th?

A No, sir. They did not.

Q And when was it until somebody did take you off work?

A It was the first part of this year because I was looking for answers to why my body is getting worse instead of better since that accident.

Q So sometime in January of '22? Who is the doctor who took you off work then?

A Dr. Blankenship.

Q Okay. But you didn't see Dr. Blankenship until it looks like March 28th of '22.

A Then that would be when I was taken off work, sir.

Claimant testified that he was not taken off work by any treating physician from October 14, 2021 until March 28, 2022, and he also acknowledged that during that period of time he performed refrigeration jobs for a company he started. While claimant testified that he performed work of less than five hours per week, I note that claimant was not placed upon any work restrictions by any treating physician during this period of time and therefore find that he has failed to prove by a preponderance of the evidence that he was totally incapacitated from working beginning October 14, 2021, the date of his termination. Instead, claimant did not become totally incapacitated until Dr. Blankenship indicated that claimant should be off work beginning March 28, 2022.

Accordingly, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning March

28, 2022, and continuing through a date yet to be determined.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his cervical spine on January 4, 2021. Respondent is liable for all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes the surgery which has been recommended by Dr. Blankenship. Claimant is also entitled to temporary total disability benefits beginning March 28, 2022 and continuing through a date yet to be determined.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

Respondent is responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$412.80.

All sums herein accrued are payable in a lump sum and without discount.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE