

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM № H101491

EARVIN DAVIS, JR., EMPLOYEE

CLAIMANT

vs.

BERNHARD MCC, LLC, EMPLOYER

RESPONDENT

**TRAVELERS PROPERTY CASUALTY INSURANCE
COPMANY OF AMERICA, CARRIER**

RESPONDENT

OPINION & ORDER FILED 4 APRIL 2025

This claim was heard before Arkansas Workers' Compensation Commission Administrative Law Judge JayO. Howe on 8 January 2025 in Little Rock, Arkansas.

The claimant was represented by Tolley & Brooks Law Firm, Ms. Evelyn Brooks.

The respondents were represented by Friday, Eldredge & Clark, LLP, Mr. Guy Wade.

STATEMENT OF THE CASE

The parties participated in a prehearing conference on 13 June 2023. A Prehearing Order was entered the same day. That Order was entered into the hearing record without objection as Commission's Exhibit № 1. As outlined in the Prehearing Order, the parties agreed to the following:

STIPULATIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer/carrier relationship existed on 19 December 2019, when the claimant alleges that he sustained a compensable injury, and at all other relevant times.
3. The respondents have controverted this claim in its entirety.

ISSUES

1. Whether the claimant sustained a compensable injury to his shoulders by specific incident.
2. Whether the claimant is entitled to reasonable and necessary medical treatment.
3. Whether this claim is barred by the *Shippers* Defense.¹

All other issues are reserved.²

CONTENTIONS

According to their prehearing filings:

The claimant contends that he injured his bilateral shoulders on 19 December 2023 and that he is entitled to medical treatment.

The respondents contend that the claimant did not sustain a compensable injury. The claimant's complaints pre-existed the date of the alleged event. The claimant failed and/or refused to timely report a work injury. The respondents affirmatively plead the *Shippers* Defense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record as a whole, including the evidence summarized below, 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 (Repl. 2012):

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

¹ *Shippers Transport of GA v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979).

² The Prehearing Order indicated an additional issue of whether the claimant was entitled to temporary total disability (TTD) benefits. The parties agreed at the beginning of the hearing that that issue would not be presented for litigation. [TR at 9-10.] The Prehearing Order also indicated that attorney's fees were an issue. But with the claim for TTD benefits being reserved, the issue of whether the claimant is entitled to an attorney's fee associated with an award of those benefits is similarly reserved.

2. The stipulations as set forth above are accepted.
3. The claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury to his shoulders by specific incident.
4. The claimant failed to prove by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment of his alleged injuries.
5. Because the claimant failed to prove a compensable injury for which the respondents may be liable, as indicated in Finding and Conclusion № 3, above, their affirmatively-plead *Shippers* Defense is moot and will not be addressed in this opinion.

SUMMARY OF THE EVIDENCE

The record consists of the hearing transcript and two bound volumes of exhibits. The following witnesses appeared at the hearing: Claimant Earvin Davis, Mr. Dequiandrick Smith, Mr. David Jones, Ms. Denise Winarski, and Mr. Larry Hudson. In addition to the Prehearing Order discussed above, the following exhibits were entered into the record: Claimant's Exhibit № 1 (one index page and 22 pages of non-medical records); Claimant's Exhibit № 2 (three index pages and 115 pages of medical records); Respondents' Exhibit № 1 (seven index pages and 420 pages of medical records); Respondents' Exhibit № 2 (two index pages and 334 pages of non-medical records); Respondents' Exhibit № 3 (the transcript of the 22 August 2022 deposition of Wyatt Jones); Respondents' Exhibit № 4 (the transcript of the 22 August 2022 deposition of David Jones); and Respondents' Exhibit № 5 (the transcript of the 28 October 2021 deposition of the claimant).

ADJUDICATION

The stipulated facts are outlined above and accepted. It is settled that the Commission, with the benefit of being in the presence of a witness and observing their demeanor, determines a witness' credibility and the appropriate weight to accord their statements. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 448, 990 S.W.2d 522 (1999).

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' 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 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.*

A. The Claimant Failed to Prove by a Preponderance of the Evidence That He Suffered a Compensable Injury.

The claimant alleges that he suffered compensable injuries to both shoulders by specific incident. Ark. Code Ann. § 11-9-102(4) (Supp. 2024) provides in pertinent part:

(A) “Compensable injury” means: (i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is “accidental” only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must also be established by medical evidence supported by objective findings. *Id.* §11-9-102(4)(D). “Objective findings” are those findings which cannot come under the voluntary control of the patient. *Id.* §11-9-102(16)(A)(i). The requirement that a compensable injury must be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

The employee has the burden of proving by a preponderance of the evidence that he sustained a compensable injury. *Id.* §11-9-102(4)(E)(i). 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. 269, 101 S.W.3d 252 (2003). If a claimant fails to establish by

a preponderance of the evidence *any* of the requirements for establishing a compensable injury, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Testimony

The claimant was 64 years old at the time of the hearing. The evidence shows that he was working on installing a large storm drainpipe in a trench at a construction site on 19 December 2019. According to the claimant, he was down in the trench and sitting on a section of pipe when the walls of the trench fell in.

... the walls came in and they caught me above my waist and my chest. And I asked the guys to throw me a shovel and I tried digging myself out, initially, but after about three or four, you know, pulls—because I was frantic, trying to do it, you know, I got tired and my shoulders hurt. So I asked that – you know, because I was scared for anybody to get down there, when I first – when it first happened, that’s why I tried myself. But once I couldn’t, you know, David asked his son Wyatt and Dequiandrick, “DQ,” to jump in and dig me out.

[TR at 29.]

The claimant testified that everyone went back to work per usual after he was dug out and that his supervisor David Jones observed the incident. He stated that he did not attempt to report an injury until three days later when he asked Mr. Jones about seeking treatment. He also testified that he called Denise Winarski, a corporate HR representative, to notify her of his injury and/or the accident.

On cross-examination, the claimant acknowledged that employees were required to complete daily Job Safety Analysis (JSA) forms and that the JSA he signed on 19 December 2020 did not reflect any accident or injury. He explained that he did not report an injury that day because he did not yet know that he was hurt and that he did report an accident because Mr. Jones was present when the trench collapsed on him. The claimant also

recalled being at the 22 August 2022 deposition of Mr. Jones, when the deponent denied that the trench collapse incident ever occurred.

The claimant called Dequiandrick “DQ” Smith as a witness. Mr. Smith testified that he worked at the construction site alongside the claimant. According to his testimony, the trench that the claimant was working in was seven or eight feet deep. He recalled bad weather on 19 December 2019, “and like the holes was already caving in; so Earvin must have jumped in the hole and it collapsed on him and we all was rushing to get him out of there.” [TR at 120.] He said that Mr. Jones was present and that five or six people worked to dig the claimant out of the hole. Afterwards, according to Mr. Smith, everyone sat around chatting, the “big bosses” were there, and a meeting was held either that day or the next morning to discuss the accident and appropriate safety precautions.

On cross-examination, Mr. Smith denied that the claimant was sitting on the pipe when the trench fell in, because “[y]ou can’t sit on the job.” [TR at 124.] When asked about the extent of the material collapsing on and around the claimant, he testified:

Q: Now when you testified that this hole collapsed on him, how deep was the sand on his body, in your mind?

A: [No response.]

Q: Was it up to his knees? Was it up to his waist, over his head, where was it?

A: He was kind of buried, buried in there.

Q: Well, I’m asking you. How far did the collapse go to his body?

A: Over his head, probably. Probably.

Q: Over his head?

A: Yes.

[TR at 126.]

Q: Now, you said when you turned around, you saw his hand. Is that the only part of his body you could see sticking out?

A: From my point of view, yes, sir.

Q: Okay. And you said the dirt was either up to or over his head at the time, is that right?

A: Yes, sir.

Q: Okay. That's what you recall?

A: Yes, sir.

[TR at 134.]

He reiterated that Mr. Jones was present that day. Mr. Smith also stated that he knew that the claimant was injured that day because the claimant was complaining about his back hurting. Before concluding his testimony, Mr. Smith confirmed that he did not make a report of any accident or any injuries on the day in question.

Mr. Jones testified that he was the job site foreman on 19 December 2019. He denied any knowledge of a trench collapsing on the claimant that day. He further testified that the claimant never reported any incident or injury to him that day. He testified that JSAs are meant for reporting injuries (to oneself or to another), that they must be completed daily, and that the JSA for 19 December 2019 included no report of injury for anyone on his crew. Mr. Jones offered that *had* an incident occurred with a trench or hole collapsing on a crew member, emergency responders would have been contacted, and the job site likely would have been shut down. But none of those things actually occurred.

Ms. Denise Winarski testified that she has worked for the respondent-employer for nearly 25 years and that she was the corporate HR partner assigned to the claimant's job site. She confirmed that the claimant contacted her by phone with complaints about needing some safety glasses and about someone selling food on the job site without permission; but she denied that he ever made any report to her of an accident or injury. Job

site safety or accident and injury reports are outside of her scope of responsibility and normal reporting structure. If she had received such a report, she would have contacted someone in safety management and someone in job site management to ensure the normal reporting steps were in already progress.

Mr. Larry Hudson testified that he worked as the respondent-employer's safety manager on the claimant's job site and that any injuries or safety events were to be reported to him. He, too, denied any knowledge of an incident or injury occurring on 19 December 2019.

Discussion

A claim for compensation must be denied if a claimant fails to establish by a preponderance of the evidence any of the requirements for proving a compensable injury. *Mikel, supra*. One of those requirements is proving that the alleged specific incident actually occurred. I do not find that the claimant proved by a preponderance of the evidence that a trench collapsed and trapped him on 19 December 2019 as he has alleged. His claim for initial benefits must, therefore, fail.

As an initial matter, the claimant was not a credible witness. He was hostile towards many of the questions, especially to those around his past medical treatment. Several medical records in evidence do not reflect supposed reports of injuries or conversations that he claimed he made at visits with his providers. He acknowledged making conflicting reports of disability and being able and willing to work across claims for Social Security benefits, unemployment benefits, and Workers' Compensation benefits;³ and his testimony confirmed that he failed to disclose any disabling conditions (while receiving

³ I note this acknowledging that different adjudicative and statutory standards apply to different benefits that may relate to a disability. *See, e.g., Kirkendolph v. Dep't of Fin. & Admin.*, 2010 Ark. App. 786, 2010 Ark. App. LEXIS 831, citing *Martin v. Jensen Constr. Co.*, 2010 Ark. App. 294, 374 S.W.3d 774.

Social Security Disability benefits) or his then-current narcotic pain management regimen on his pre-employment paperwork. Taking into account the inconsistency of his past claims relating to his treatments and his claims about his ability to work and his overall demeanor on the witness stand, I found him to be antagonistic towards the proceeding. I do not find him to be a credible witness. *White v. Gregg Agricultural Ent., supra.*

The claimant's theory of how he came to be injured turns on accepting a dramatic episode of an earthen trench collapsing in on and around him, up to his chest, while he was down in the trench sitting on a pipe. He then injured both of his shoulders frantically trying to dig himself out of the entrapment. The claimant related that the entombment was such that his supervisor had to send two others to his aid to "jump in and dig [him] out." [TR at 29.] He acknowledged, however, that his daily accident and injury paperwork makes no mention of the event occurring. He offered as an explanation for the absence of contemporaneous accident or injury reports that it was just obvious to all that the incident occurred and that he was not aware of any injury until about three days later. Nonetheless, he claimed that he made a phone call to the regional HR representative that day to inform her of the accident, instead of utilizing any of the usual, on-site reporting mechanisms.

The claimant's then-coworker Mr. Smith lent his testimony towards the claimant's story. His version of the events, however, was even more dramatic, if not fanciful. He denied that the claimant would have been sitting in the trench and that the material collapsed up to the claimant's chest. Instead, he testified that the claimant had been standing in the trench and that he was suddenly buried up over his head, with only an arm and hand visible. The relative, spatial differences in those competing scenarios would necessarily account for several vertical feet worth of additional material collapsing around and on top of the claimant while down in the trench.

Mr. Smith also acknowledged that his daily paperwork made no mention of an accident or anyone being injured, despite testifying that the claimant complained afterwards of injuring his back. Mr. Smith's recollection of the supposed event also differed from the claimant's in that he recalled five or six crew members having to be involved in the claimant's extrication; the claimant said that it was only Mr. Smith and another. His testimony stands alone in recalling bad weather, other dangerous trenches, and a meeting with the "big bosses" being present. I do not find Mr. Smith's testimony credible.

Mr. Jones testified credibly that, consistent with the JSAs from that day, no workplace accident or injury to any person was reported on 19 December 2019. He had no recollection of anything akin to the claimant's story taking place and denied that the claimant ever reported something of the sort to him after the fact. Had such an episode occurred, he testified that emergency responders would have been called in to safely remove a trapped worker and that the job site would have been shut down in the aftermath of such an event.

Ms. Winarski testified credibly that while she did have some phone conversations with the claimant about unrelated complaints, he never made an accident or injury report to her. If he had, she would have directed him to appropriate contacts and made reports of her own. But she denied those things ever happened.

Mr. Hudson also testified credibly about his role as the project's safety manager. He had no recollection or record of any incident report or safety event or accident occurring as the claimant alleges.

The claimant failed to provide any credible evidence in support of his account of an incident actually occurring on 19 December 2019 that ultimately resulted in his claimed injuries. He offered only his unsupported testimony and the testimony of another former worker whose version of the supposed events, while equally unsupported, was inconsistent

even with the claimant's telling of the story. The credible evidence preponderates against a finding that the alleged specific incident, identifiable by time and place of occurrence, actually took place.

According to the claimant's testimony, he was not aware of an injury to either of his shoulders until about three days after the alleged events of 19 December 2019.⁴ He does not provide medical evidence in support of *any* sort of injury until a MedExpress doctor's work note dated 10 January 2020. That note does not specify any diagnosis or treatment information. It only provides some work restrictions. The claimant provided no associated or supporting records around his doctor's visit that day that resulted in the work note. The respondents, on the other hand, provided the additional records from that MedExpress visit. On that day the claimant complained of *elbow pain that had onset three days earlier*. (This claim is not related to a supposed elbow injury from around 7 January 2020.)

According to the notes provided by the respondents, the claimant reported no known injury at that time. He was diagnosed that day with tennis elbow. That work note does not help him establish a claim for a compensable injury to his shoulders.

The claimant also provided medical records from a 23 January 2020 doctor's visit. That record reflects (again) a complaint of left elbow pain, which he reported had been present for two to three weeks, and resolved right elbow pain. It makes no mention of a shoulder injury. His medical evidence next showed a visit on 30 July 2020 with complaints of a year-old mass on the right side of his neck, ear pain, and neck pain. That note indicates an assessment of some clavicle asymmetry likely due to arthritis, but it makes no reference to any work injury or shoulder injury.

⁴ Mr. Smith, conversely, testified that the claimant was complaining of a back injury after being dug out of the trench.

On 20 August 2020, the claimant made a complaint of right shoulder pain that had been present for six to eight months. There is no mention of a work injury. He was diagnosed with Sternoclavicular Arthritis. A subsequent MRI showed findings likely consistent with osteoarthritis. At a physical therapy exam on 13 October 2020, the claimant stated that there was no mechanism of injury associated with his right shoulder pain. His history of three right rotator cuff and labral repairs and left rotator cuff repair was noted at that time. A right shoulder MRI scan on 22 August 2021 revealed chronic degeneration of the superior labrum.

The claimant's medical records do not appear to reflect a complaint about left shoulder pain possibly related to a work incident until 8 June 2021, *nearly 18 months after his supposed injury*. At that visit he reported having to fill a ditch with dirt and quickly get out of it. Subsequent notes regard his shoulder condition as not traumatic.

An operative report from 16 September 2021 states that the claimant reported working in a hole and having to quickly get out, using both of his arms to push himself out of the hole. A clinic note from 15 October 2021 similarly relays that the claimant hurt his left shoulder pushing himself out of a hole and that the pain had been *onset for several months*. A subsequent operative report, dated 2 December 2021, identifies bilateral shoulder pain after the claimant pushed himself out of a ditch or hole.

The claimant's testimony about why his first doctor's note after a supposed shoulder injury made no mention of his claimed injury is suspect at best. The 10 January 2020 note, which reports no known injury, speaks only to elbow pain. The claimant, however, explained that "if my elbows are hurting real bad, obviously, I can't lift anything to see if my shoulder hurts any worse." [TR at 69.] He went on to suggest that physicians will only address one patient complaint or injury per visit, or at least that they will only chart complaints about one condition per visit. These are not credible excuses for the lack of

contemporaneous medical evidence linking any sudden onset shoulder pain and his work for the respondent-employer as it relates to this claim.

The shoulder-related complaints and diagnoses that do eventually appear in evidence, long after the supposed incident of 19 December 2019, are related to chronic, degenerative conditions, which is not surprising given the claimant's age and his multiple previous shoulder surgeries. Finding that the shoulder conditions the claimant eventually reported are related to his employment would require engaging in speculation and conjecture, which cannot serve as a substitute for proof. *Dena Constr. Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979). The claimant has, thus, failed to establish by a preponderance of the medical evidence that he suffered a compensable injury. His claim for initial benefits associated with a compensable injury by specific incident must fail.

B. THE CLAIMANT IS NOT ENTITLED TO MEDICAL BENEFITS.

Because the claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury, his claim for medical benefits associated with a compensable injury must likewise fail.

C. THE RESPONDENTS' ASSERTION OF THE *SHIPPERS* DEFENSE IS MOOT.

Because the claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury, the respondents' affirmative assertion of the *Shippers* Defense is moot and will not be addressed.

CONCLUSION

Consistent with the Findings of Fact and Conclusions of Law set forth above, this claim for initial benefits is denied and dismissed.

IT IS SO ORDERED.

JayO. Howe
Administrative Law Judge