

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H303578

BRANDON G. SHACKELFORD, CLAIMANT
EMPLOYEE

ALLEN FAMILY ENTERPRISES, LLC, RESPONDENT
EMPLOYER

NATIONAL AMERICAN INSURANCE COMPANY, RESPONDENT
SEDGWICK CLAIMS MANAGEMENT
SERVICES, INC., INSURANCE CARRIER/TPA

OPINION FILED SEPTEMBER 26, 2024

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE JASON M. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as Modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed May 3, 2024. The administrative law judge found that the claimant proved he sustained a compensable injury. The administrative law judge found that the claimant proved he was entitled to reasonably necessary medical treatment and temporary total disability benefits. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion as modified.

I. HISTORY

The record indicates that Brandon George Shackelford, now age 38, became employed with the respondents, Allen Family Enterprises, LLC on or about July 15, 2022. The parties stipulated that the employee-employer-carrier relationship existed on or about May 5, 2023. The claimant testified on direct examination:

Q. Tell us about May the 5th of 2023. Do you remember where you were?

A. Yes.

Q. Where was that?

A. It's in Benton, Arkansas....In a residential neighborhood. I showed up. Jackson Chandler, the guy that was just in here, he was already working. And so, I hopped out and I was assisting him. I had tools, he had tools too, shovels, and they just wasn't doing the job. They wasn't getting us nowhere for us to get any deeper. So I went back and got a rock bar to where we could get deeper....The rock bar, I went and got, it's roughly about six foot tall, probably, around 35, fortyish pounds maybe.

Q. Okay. This is just a steel bar?

A. Yes identical looking like a blown up nail is that it looks like....And so I'm using it. I grabbed it, stabbed it in the ground, instantly knew – I felt something in my elbow. Something was not right....

Q. Now, you're rubbing here on your right elbow?

A. Yes.

Q. Is that where you felt the pain?

A. Yes....A sharp, ripping pain....

Q. And did you finish out the work day?

A. I did finish out the work day.

The claimant's testimony indicated that he notified the respondent-employer on May 14, 2023 that an accidental injury had occurred, and that the respondents directed the claimant to treat at Saline Memorial Hospital.

According to the record, the claimant treated at Saline Memorial on May 15, 2023:

37-year-old male presents emergency room for complaints of pain in his right elbow extending distally down his right forearm. Patient states that he is a line worker and was using a heavy metal bar to break up the ground and the bar twisted and got out of balance causing him to twist his elbow. Onset x2 weeks. States it is just gradually getting worse and he is having difficulty using his arm....Swelling of the elbow noted, Right elbow.

A Nursing Assessment also indicated, "Pt arrives to the ED for eval of R elbow injury caused by manual labor. Pt had his R elbow twisted in an awkward fashion....Injury occurred May 5th." The diagnosis was "Lateral Epicondylitis" and the claimant was treated conservatively.

The claimant's testimony indicated that the respondent-employer directed him to treat at Concentra Occupational Health. The record indicates that Clint Bearden, PA-C treated the claimant at Concentra on May 19, 2023 and diagnosed "Right elbow tendonitis." The Work Status was, "The claimant can return to work with the following restrictions on: May 19, 2023." The restrictions were "No lifting more than 10 lbs right arm lbs. May not grip/squeeze/pinch with right upper extremity." Clint Bearden referred the claimant for physical therapy.

The claimant testified that light duty with the respondent-employer was not made available, and that the respondents eventually terminated his

employment. The claimant agreed on cross-examination that the respondents paid him through May 26, 2023.

The claimant filed an APPLICATION FOR UNEMPLOYMENT INSURANCE BENEFITS on July 27, 2023. The claimant reported on the APPLICATION that he had been discharged on May 29, 2023. The claimant reported that the “final incident that caused the discharge” was “INJURY ON THE JOB” which occurred on May 5, 2023.

A pre-hearing order was filed on September 19, 2023. According to the pre-hearing order, the claimant contended, “The claimant contends he sustained compensable injuries on or about May 5, 2023, to his right arm and elbow; that he is entitled to temporary total disability benefits continuing through a date yet to be determined. Claimant further contends he is entitled to payment of medical expenses, as well as attorney’s fees.” The respondents contended that the claimant “did not sustain a compensable injury.”

The parties agreed to litigate the following issues:

1. Compensability.
2. Temporary total disability benefits.
3. Medical benefits.
4. Controversion.

An MRI of the claimant’s right elbow was taken on September 28, 2023 with the following impression:

1. Lateral epicondylitis, manifested by high grade intrasubstance tearing of the common extensor tendon, on a background of severe tendinosis.
2. Low-grade lateral ulnar collateral ligament sprain.
3. Mild common flexor tendinosis.
4. Low-grade sprain anterior band ulnar collateral ligament.
5. Mild distal biceps tendinosis. Mild reactive bicipitoradial edema and/or bursitis is noted.
6. Mild elbow osteoarthritis.

Dr. Brian Norton performed surgery on October 9, 2023: "1. Right lateral epicondylectomy with common extensor tendon repair." The pre- and post-operative diagnosis was "1. Right lateral epicondylitis. 2. Right common extensor tendon tear."

Dr. Norton signed a Return to Work/School form on January 22, 2024: "Please excuse Brandon for 01/22/2024. Activity is restricted as follows: Brandon must remain off work for 4 weeks." The claimant testified that he was undergoing physical therapy visits recommended by Dr. Norton.

A hearing was held on February 7, 2024. The respondents' attorney examined Chandler Jackson Brinkman:

Q. Were you employed with the respondents in May of last year?

A. Yes, sir.

Q. And did you work along side the claimant, Mr. Shackelford, who is here today?

A. Yes, sir....

Q. What were you and the claimant doing on that day?

A. Most of the general labor stuff, digging holes, locating utilities....

Q. Do you recall a time when you and Mr. Shackelford were – or borrowed a rock bar from another contractor?

A. Yes, sir....

Q. And do you recall which day that was?

A. That was on Monday, May the 1st.

Q. Okay. And you, specifically, recall that being a Monday?

A. Yes, sir.

Q. Okay. And can you just tell me what happened at that time?

A. So we got there the previous day, the previous work day. Our supervisor had looked, like, indicated with spray paint where he wanted us to find certain utilities. So we got to work and the ground was a little harder than we expected, so we went a borrowed a rock bar, which was crooked. We got to working on it, me and Brandon together and we used the rock bar for – well, I used it a little less than he did, but for a considerable period of time.

Q. Okay. And did Mr. Shackelford strike the ground with the rock bar more than once?

A. Yes, sir.

Q. Did he indicate at any time to you that he had injured any part of his body?

A. Yes, sir.

Q. At what time?

A. I'd say probably 20 minutes, 30 minutes in to using the equipment.

Q. What exactly did he tell you?

A. Just that he didn't think the rock bar was working right, that it wasn't good to use.

Q. Did he, specifically, say, "I have injured my arm"?

A. Yeah, I guess, you could say that.

Q. Did he indicate which arm?

A. Not to me in particular.

Q. Okay. Do you recall what he said?

A. Yeah, just – you know, just, you know, "My arm's hurting."

Q. Okay.

A. Nothing sudden or –

Q. And was that after multiple strikes with the rock bar by the claimant?

A. Yes, sir.

Q. Okay. And it's your testimony that that occurred on the 1st?

A. Yes, sir....

An administrative law judge filed an opinion on May 3, 2024. The administrative law judge found that the claimant proved he sustained a compensable injury. The administrative law judge awarded medical treatment and temporary total disability benefits. The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Compensability

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4)(Repl. 2012), 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. Ark. Code Ann. §11-9-102(4)(D)(Repl. 2012). “Objective findings” are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A)(i)(Repl. 2012).

The employee 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)(Repl. 2012). 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).

An administrative law judge found in the present matter, “3. The claimant proved by a preponderance of the evidence that he suffered a compensable injury to his right arm/elbow by specific incident.” The Full Commission affirms this finding. The parties stipulated that the employment relationship existed on or about May 5, 2023. The claimant testified that, while performing employment services for the respondents, he manually “stabbed” a ground surface with a heavy steel bar. The claimant testified that he felt an instant “sharp, ripping pain” in his right elbow. A co-worker, Chandler Brinkman, testified that he was present at the work site in May 2023, and he corroborated the claimant’s testimony that a work-related incident occurred.

The claimant testified that the respondents directed him to seek treatment at Saline Memorial Hospital. The nursing notes at Saline Memorial on May 15, 2023 corroborated the claimant’s testimony that he injured his right elbow while “using a heavy metal bar to break up the ground.” The medical report indicated, “the bar twisted and got out of balance causing him to twist his elbow....Injury occurred May 5th.” Objective findings were noted on May 15, 2023, namely “Swelling of the right elbow[.]” Additional objective findings were reported in the MRI of the

claimant's right elbow taken September 28, 2023. These objective medical findings included "intrasubstance tearing of the common extensor tendon[.]"

The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a "compensable injury" in accordance with Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2012). The claimant proved that he sustained an accidental injury causing physical harm to the body. The claimant proved that the accidental injury arose out of and in the course of employment, required medical services, and resulted in disability. Whether the accident occurred on May 1, 2023 as alleged by Mr. Brinkman, or May 5, 2023, as contended by the claimant, the injury was caused by a specific incident and was identifiable by time and place of occurrence. The occurrence of the injury was "capable of being identified." *See Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001). In addition, the claimant established a compensable injury by medical evidence supported by objective findings. These objective medical findings included post-injury swelling in the claimant's right elbow and the "intrasubstance tearing" shown in the September 28, 2023 MRI. The claimant proved that these objective medical findings were causally related to the compensable injury and were not the result of a prior nonwork-related injury or pre-existing condition.

B. Temporary Disability

For scheduled injuries the injured employee is to receive temporary total disability benefits during the healing period or until the employee returns to work, whichever occurs first. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001); Ark. Code Ann. §11-9-521(a)(Repl. 2012). A loss in earnings is conclusively presumed under Ark. Code Ann. §11-9-521(a)(Repl. 2012). *Wheeler Constr. Co., supra*, citing *Minnesota Mining & Mfg. v Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.* Whether an employee's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

An administrative law judge found in the present matter, "4. The claimant proved by a preponderance of the evidence that he is entitled to TTD benefits from 15 May 2023 to a date yet to be determined, less the amount of credit the respondents may claim against any unemployment benefits received by the claimant." The Full Commission finds that the

claimant proved he was entitled to temporary total disability benefits beginning May 27, 2023 until a date yet to be determined.

The Full Commission has found that the claimant proved he sustained a compensable scheduled injury on or about May 5, 2023. The claimant was assigned work restrictions beginning May 19, 2023. However, the claimant testified that the respondent-employer did not make restricted work available, and that the respondents terminated his employment. The claimant agreed on cross-examination that the respondents paid his wages through May 26, 2023.

The Full Commission therefore finds that the claimant proved he has not returned to work after May 26, 2023 and that the claimant remains within his healing period. The claimant underwent a right lateral epicondylectomy on October 9, 2023. The Full Commission finds that Dr. Norton's treatment was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012). As we have noted, Dr. Norton signed a Return to Work/School form on January 22, 2024: "Please excuse Brandon for 01/22/2024. Activity is restricted as follows: Brandon must remain off work for 4 weeks." The claimant testified that he was receiving physical therapy as recommended by Dr. Norton. The evidence therefore demonstrates that the claimant remains within a healing period and has not returned to work. There are no reports from Dr. Norton or another qualified

physician indicating that the claimant has reached the end of his healing period with regard to the compensable scheduled injury.

After reviewing the entire record *de novo*, the Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. The claimant proved that he was entitled to temporary total disability benefits beginning May 27, 2023 until a date yet to be determined. The respondents are entitled to an appropriate credit for unemployment insurance benefits received by the claimant pursuant to Ark. Code Ann. §11-9-506(a)(Repl. 2012). The claimant proved that the medical treatment of record, including surgery performed by Dr. Norton, was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012). The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant met his burden of proving that he sustained a compensable specific incident injury on May 5, 2023, is entitled to reasonably necessary medical treatment and temporary total disability benefits from May 27, 2023, to a date to be determined as well as an attorney's fee.

The claimant contends that he was injured on May 5, 2023, while using a rock bar tool to help loosen solid ground while working for the respondent employer. The claimant testified that when he stabbed the thirty-five (35) pound bar into the ground, he "instantly knew -- I felt something in my elbow. Something was not right."

Ten days later, the claimant presented to the emergency room at Saline Memorial Hospital where he was diagnosed with lateral epicondylitis left elbow. The claimant was ultimately referred to Dr. Brian Norton, and on October 9, 2023, over 5 months after the alleged injury, Dr. Norton identified tearing at the right extensor tendon and performed surgery.

After the claimant's employment with the respondent employer ended, the claimant applied for and was awarded \$4,880.00 in unemployment benefits.

As of his January 22, 2024 post-op follow-up with Dr. Norton, the claimant was to remain off work for an additional four weeks.

Generally, a specific incident injury is an accidental injury arising out of the course and scope of employment caused by a specific incident identifiable by time and place of an occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i). This, therefore, requires that a claimant 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 physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury as defined in Ark. Code Ann. §11-9-102(16) and; (4) that the injury was caused by a specific incident identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i).

A compensable injury must be established by medical evidence supported by "objective findings." Ark. Code Ann. § 11-9-102(4)(D). Objective findings cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16).

It is within the Commission's province to weigh all the medical evidence, to determine what is most credible, and to determine its medical soundness and probative force. *Sheridan Sch. Dist. v. Wise*, 2021 Ark. App. 459, 637 S.W.3d 280 (2021). In weighing the evidence, the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. *Id.*

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.

White v. Gregg Agricultural Enterprises, 72 Ark. App. 309, 37 S.W.3d 649 (2001).

Here, the claimant alleges that he sustained a compensable specific incident injury on May 5, 2023; however, this contention is not supported by the medical evidence. The claimant's injury, lateral epicondylitis (or tennis elbow), is widely considered to be a repetitive use injury. This is reflected in the records from the claimant's initial visit to the emergency room at Saline Memorial, which state, "pt ambulatory to triage for eval of non-traumatic right forearm pain x 2 weeks; gradually worsening, full rom noted in triage". Another finding during the initial ER exam was, "Impression: overuse syndrome".

On the basis of the medical records alone, it is obvious that the claimant did not suffer a specific incident injury on May 5, 2023. There is simply no evidence that a specific incident on that date was mentioned in the days or weeks following his purported injury. The claimant's claim should be rejected on this basis alone. However, this matter ultimately comes down to a question of the claimant's credibility.

In workers' compensation cases, a decision often rests solely on the credibility of the claimant as a witness. A determination of the weight and credibility of a witness's testimony is exclusively within the province of the Commission. *Wade v. Mr. C. Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989). The Commission has the right to believe or disbelieve the testimony of any witness, and the Commission's decision is entitled to the weight we give a jury verdict. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988). Importantly, a claimant's testimony is never uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

The sole witness on behalf of the claimant to prove he sustained a specific incident was the claimant himself. Throughout the process from the time of the claimant's injury to the time of the hearing, the claimant misrepresented himself or the facts on multiple occasions. In fact, the claimant's testimony was directly controverted by Chandler Brinkman who was present at the time of the alleged injury.

Mr. Brinkman testified that the claimant's alleged injury occurred on May 1, 2023, rather than May 5, 2023, as alleged by the claimant. He further testified that he and the claimant dug a hole for more than an hour, not the short period of time described by the claimant.

The claimant had been using the rock bar for a considerable amount of time, approximately twenty to thirty minutes, before he told Mr. Brinkman that his arm was hurting. In fact, the claimant continued working at his regular job through the rest of that week, and Mr. Brinkman did not recall the claimant complaining about his arm.

Beyond his unreliability regarding his alleged on-the-job injury, the claimant has a history of misrepresenting the truth to further his own agenda.

When asked at his October 2023 deposition if he had ever been charged with a crime, the claimant testified that he had a DWI in 2009 and stated that he had no other criminal record. However, upon further questioning, the claimant finally admitted that he pled guilty to possession of drug paraphernalia in 2017. The claimant did not inform the respondent's attorney of this guilty plea because he believed his record had been sealed.

The claimant also misrepresented the truth to obtain unemployment benefits after his employment with the respondent employer ended. When he applied for benefits, the claimant stated that he could begin work immediately, could work full time, and had no disabilities which limited his ability to perform his normal job duties. However, at the hearing, the

claimant stated, “my doctor said for me to remain off of work and don’t even think about getting ready to go back.”

The claimant’s testimony in this matter is simply not credible and we are left to rely solely upon the medical evidence and testimony of uninterested parties to reach our judgment. The weight of the credible evidence fails to show the claimant sustained a compensable specific injury in May 2023. The claimant’s history of failing to be truthful when it suits him to protect himself or to obtain benefits cannot be disregarded here. Therefore, I find that the claimant has not proven by a preponderance of the credible evidence that he sustained a compensable injury, thus, all other issues are moot.

Accordingly, for the reasons set forth above, I must dissent.

MICHAEL R. MAYTON, Commissioner