



ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

FILED

DIVISION IV

OCT - 2 2023

JOAN S. OLEJUA,

Petitioner,

vs.

LOPEZ FOODS, INC. and
THE WORKERS' COMPENSATION
COMMISSION,

Respondents.

JOHN D. HADDEN
CLERK

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Case No. 120,703

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

AFFIRMED

W. Jeffrey Dasovich
Oklahoma City, Oklahoma

For Petitioner

Norman Lemonik
HILTGEN & BREWER, P.C.
Oklahoma City, Oklahoma

For Respondent

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

Joan S. Olejua appeals a decision of the Workers' Compensation Commission finding that a claimed cumulative trauma injury to his foot was not compensable. On review, we affirm the decision of the Commission.

BACKGROUND

In compiling the following facts, we borrow substantially from the administrative law judge's order denying compensation. Lopez Foods is in the business of manufacturing meat products. Lopez's primary customer is McDonald's. Mr.

Olejua had worked for Lopez Foods on two occasions. He was first employed with Lopez Foods from December 2016 to May 6, 2019, and had no foot injuries during the course of that employment. Mr. Olejua then worked as an Amazon delivery driver for five weeks.

Mr. Olejua was rehired by Lopez Foods on August 6, 2019, and first developed problems with his left foot approximately a month later, in September 2019. Mr. Olejua testified in a deposition that he first related his left foot pain to his work in September 2019. Mr. Olejua testified at the hearing that he did not report a work-related injury to his supervisor until September 2020, however.

Mr. Olejua had returned to work for Lopez Foods as a "batcher," which is a supervisory position. Olejua supervised six people and four production lines. He testified that he walked up and down the lines over the entirety of his nine-hour shift, standing and walking on concrete floors. Olejua worked approximately six days per week in an environment where the temperature was maintained at forty to fifty degrees Fahrenheit. He wore company issued thermal boots and clothing. He testified that he requested, and was given, different boots by his employer when his symptoms began.

Mr. Olejua testified that he first discussed his foot issues with his supervisor, Lance, in September 2020. At the hearing, Olejua estimated that after this, he had at least three conversations with management about his left foot problems being related to his work duties. At his deposition taken on April 22, 2021, Olejua testified that he spoke with his supervisor, Lance, about those issues just once, when he switched boots. He testified that he discussed his left foot

problems due to his work duties with another supervisor, Rudy Avellano, and was not offered any medical treatment. He asserted that he did not raise the issue of treatment or a compensable work-related injury for a year after he experienced symptoms because Lopez Foods has a “culture that frowns upon management sustaining work-related accidents or injuries.”

Mr. Olejua first sought medical treatment for his left foot with Dr. Victor Pascual-Chagman on May 27, 2020. On that date, Olejua related a nine-month history of worsening left foot pain. He reported trouble walking and that his symptoms were exacerbated by stress and work. Olejua periodically followed-up with that physician, was prescribed medications and therapy, and underwent X-rays of his left foot. No cause of Mr. Olejua’s complaints was identified in those records. A July 21, 2020, X-ray gave a history of left foot pain without trauma and found “hallux valgus deformity, dorsiflexion of the PIP joints, and minimal plantar flexion of the PIP joints.” On October 8, 2020, Dr. Chagman recommended referral to an orthopedic specialist.

In November 2020, Mr. Olejua saw Dr. John Hughes and reported left foot pain after working on his feet all day. Dr. Hughes discussed supportive footwear. He also ordered CT scans of Olejua’s left foot and ankle. Those diagnostics revealed some bone spurs, degenerative joint disease, and an “avulsion fracture on the lateral malleolar side.” Dr. Hughes opined that Mr. Olejua possibly had prior damage to the anterior talo-fibular ligament caused by this prior fracture. Mr. Olejua did not recall at the hearing ever being diagnosed with a fracture of his foot, however.

In December 2020, Dr. Hughes again reviewed Mr. Olejua's left foot MRI and found that there was no definitive diagnosis of plantar fasciitis. He opined that the fibrous condition present in Olejua's foot and ankle on the MRI was not the cause of Olejua's pain. He diagnosed Mr. Olejua with chronic left heel pain, etiology unknown, and referred him for a second opinion with Dr. Paul Kammerlocher.

Dr. Kammerlocher reviewed Mr. Olejua's MRI in January 2021 and concurred with Dr. Hughes that the MRI did not conclusively reveal plantar fasciitis. He found a possible "talocalcaneal coalition and peroneus tendinitis" per the MRI. Based on his examination, Dr. Kammerlocher diagnosed Mr. Olejua with plantar fasciitis and heel cord tightness. He placed Olejua's left foot into a cast for three weeks. He discussed further treatment to include extracorporeal shock-wave therapy (ECST) as well as a referral to another physician. On February 1, 2021, Olejua reported some improvement after he was taken out of the cast. Dr. Kammerlocher instructed him on stretching exercises and told him to wear a soft heel cup then follow up in three months or sooner if needed.

On February 25, 2021, Mr. Olejua returned to Dr. Kammerlocher after being placed into another cast. At that visit, Olejua indicated that he might have suffered a prior injury due to jumping off a scaffold some four years earlier. Dr. Kammerlocher again discussed referral to another physician and ECST therapy. On September 13, 2021, Dr. Kammerlocher issued a letter regarding the origin of Mr. Olejua's complaints. He noted that Olejua did not give a history of injury or incident at his first visit but, at his second visit gave a history of possible

injury after jumping off scaffolding. Dr. Kammerlocher noted that plantar fasciitis was rarely related to work. He opined that Olejua's injury was more degenerative in nature and not causally related to a work event.

Finally, Mr. Olejua saw Dr. Michael Kiehn on April 27, 2021, and discussed treatment options of wearing appropriate shoes, using a night splint, and taking Naproxen. Olejua did not recall any discussion with Dr. Kiehn regarding footwear for supination. Dr. Kiehn did not note any fractures or dislocation upon review of X-rays and found "loose body degeneration." He discussed a possible referral to a Dr. Joel Davis if Olejua did not improve with further conservative treatment.

At hearing, Mr. Olejua submitted the report of Dr. Lance Rosson who gave a history that Olejua worked for Lopez Foods as a batcher for a year and half and that his job required repetitive and continuous standing and walking on concrete and tile floors in a cold environment. Dr. Rosson gave a history of Mr. Olejua's medical treatment to date including that he had a 2016 left foot injury which required nominal treatment and that Mr. Olejua had a full resolution of symptoms. Dr. Rosson opined that Mr. Olejua sustained a cumulative trauma injury to the left foot, which was a significant and identifiable aggravation of any preexisting condition.

Lopez Foods submitted the report of Dr. C.B. Pettigrew that gave a history of Mr. Olejua's work duties with an onset of symptoms in September 2019, and the medical treatment he had received thus far. Dr. Pettigrew found no evidence of a work-related injury to the left foot or ankle and found that the major cause

of his current complaints was not his employment. He also opined that Mr. Olejua had not sustained a significant and identifiable aggravation of a preexisting condition.

The ALJ concluded:

Under the facts of this case and based on the record taken in its totality, I am not persuaded that standing and walking in employer mandated footwear resulted in a compensable cumulative trauma injury to Claimant's left foot. Claimant's onset of symptoms in his left foot occurred one month into his employment with Respondent. While the treating medical records sporadically note an onset of symptoms while walking at work, there is no clear opinion by a treating physician that Claimant's work activities were the direct and independent cause of his condition. In fact, Dr. Kammerlocher, the foot and ankle specialist, [noted] a history of a specific injury to the left foot after jumping off a scaffold years before. Dr. Kammerlocher also opined that Claimant's condition was not causally related to a work event. Therefore, I find his opinion and the opinion of Dr. Pettigrew most probative on causation of Claimant's complaints. Finally, Claimant's testimony, on the whole, is not considered to be credible on the issues of the origin, duration, and severity of his left foot, particularly when compared with the historical medical records for the reasons enumerated above.

After assigning weight and credibility to all evidence submitted, I find Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable cumulative trauma injury to the left foot. As Claimant has failed to prove the compensability of his claim, his request for medical treatment and temporary total disability are rendered moot.

Mr. Olejua appealed to the commission, which affirmed the ALJ in August 2022. Mr. Olejua timely appealed the commission's order, which we now review.

STANDARD OF REVIEW

"[T]he law in effect at the time of the injury controls both the award of benefits and the appellate standard of review." *Brown v. Claims Mgmt. Res. Inc.*, 2017 OK 13, ¶9, 391 P.3d 111. Claimant's first alleged date of injury was

September of 2019. “The Administrative Workers’ Compensation Act shall apply only to claims for injuries and death based on accidents which occur on or after February 1, 2014.” Title 85A O.S. § 3. The Administrative Workers’ Compensation Act provides at 85A O.S. Supp. 2019 § 78(C) that this Court may modify, reverse, remand for rehearing or set aside the judgment of the commission only if it was:

1. In violation of constitutional provisions;
2. In excess of the statutory authority or jurisdiction of the Commission;
3. Made on unlawful procedure;
4. Affected by other error of law;
5. Clearly erroneous in view of the reliable, material, probative and substantial competent evidence;
6. Arbitrary or capricious;
7. Procured by fraud; or
8. Missing findings of fact on issues essential to the decision.

Id. “[W]ith respect to issues of fact, the Commission’s order will be affirmed if the record contains substantial evidence in support of the facts upon which it is based and is otherwise free of error.” *Mullendore v. Mercy Hosp. Ardmore*, 2019 OK 11, ¶ 13, 438 P.3d 358.

ANALYSIS

Mr. Olejua argues that the decision of the ALJ and commission on causation was clearly erroneous in view of the evidence. His appellate brief states that he worked for Lopez Foods for nine years,¹ and that all treating doctors except

¹ We assume this is an error. The record indicates that Mr. Olejua worked for Lopez Foods between December of 2016 and May of 2019, was rehired by Lopez Foods in August 2019, and was terminated in April 2021. We find no record of any other period during which Mr. Olejua worked for Lopez Foods. Mr. Olejua testified that he had only been in the United States for six years and had worked for Lopez for approximately four years.

one—Dr. Kammerlocher—agreed that he had “sustained an injury.” *Brief-in-chief*, pg. 4. But this is not relevant question. In fact, *all* doctors had agreed that Mr. Olejua had an injury. The question was whether that injury was “caused by the combined effect of repetitive physical activities extending over a period of time in the course and scope of employment” and “resulted directly and independently of all other causes.” 85A O.S. § 2(14).

Mr. Olejua’s primary argument is that his treating physicians did not opine that his injury was work related simply because he failed to “relate [to his physicians] that his job is causing his foot to be disabled.” The physicians’ reports, however contained details of Olejua’s work duties and conditions, and were clearly responding to a complaint that his foot condition was making his work difficult. We find no indications that the reports were made without knowledge that Mr. Olejua’s work conditions could be causing or exacerbating his injury.

The commission evidently relied on the fact that Dr. Kammerlocher opined that the injury did not result directly and independently from Mr. Olejua’s work, separate and apart from all other causes. The reports of other physicians supported this position. Dr. Hughes noted a prior fracture and opined that Mr. Olejua possibly had prior damage to his anterior talo-fibular ligament (ATFL) caused by this prior fracture. Dr. Pettigrew also opined that the major cause of Mr. Olejua’s current complaints was not his employment and that he had not sustained a significant and identifiable aggravation of a preexisting condition although, contrarily Dr. Rosson, opined that Mr. Olejua sustained a cumulative

trauma injury to the left foot, which was a “significant and identifiable aggravation of any preexisting condition.”

The issue of whether disability results from an accidental injury, or from a preexisting disease or prior injury has always been a fact question for determination by the Workers’ Compensation Court. *Berg v. Parker Drilling Co.*, 2004 OK 72, ¶ 13, 98 P.3d 1099, 1101. In this case, the ALJ and commission resolved the question of causation based on disputed reports by qualified physicians and from the claimant’s own testimony, which the ALJ found “is not to be considered credible ... when compared with the historical medical records” The Commission’s order will be affirmed if the record contains substantial evidence in support of the facts upon which it is based and is otherwise free of error.” *Mullendore*, 2019 OK 11, ¶ 13. The evidence here pointed to more than one possible conclusion, and the ALJ chose between the physician’s opinions. We find the cited physicians’ reports to contain sufficient evidence to support the facts upon which the ALJ and commission made its decision.

AFFIRMED.

FISCHER, J., and HUBER, J., concur.

October 2, 2023