



ORIGINAL

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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

KEVIN LAROY POWER,)
)
Petitioner,)
)
vs.)
)
FLOW TESTING INC. and)
COMPSOURCE MUTUAL INS. CO.,)
)
Respondents.)

MAR - 3 2025

JOHN D. HADDEN
CLERK

Case No. 122,164

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Commission	yes <input type="checkbox"/> no <input checked="" type="checkbox"/>

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

AFFIRMED

J. Kord Hammert
Oklahoma City, Oklahoma

For Petitioner

David J. L. Frette
PERRINE, REDEMANN, BERRY,
TAYLOR & FRETTE, P.L.L.C.
Tulsa, Oklahoma

For Respondent

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Kevin L. Power appeals a decision of the Workers' Compensation Commission finding that Mr. Power failed to establish that he sustained a compensable injury to his neck in an accident that occurred while working for the respondent, Flow Testing Inc. Upon review, we find that the Commission's decision was not clearly erroneous and was supported by reliable, material, probative, and substantial competent evidence and thereby affirm.

BACKGROUND

Mr. Power injured his back while working for the respondent on March 10, 2019. He bent over to operate the leveling jacks of his travel trailer and suddenly felt pain as if he had been hit in the back with a baseball bat. He was seen at McAlester Regional Hospital's emergency room on the day of the accident. The hospital records from that visit reflect that Mr. Power "bent over at work and felt sudden pain in his low back around noon. Radiates down into his right hip." ROA, 41-47. He also reported in his employee statement that as he bent over, he felt "significant pain" in his lower back.

Ten days later, Mr. Power was seen by his primary care physician, and at that appointment he had thoracic¹ and lumbar² MRIs performed. He was found to have a disc bulge at T3-4, T10-11, and T11-12.³ Mr. Power saw neurologist Dr. Shihao Zhang on May 7, 2019. Dr. Zhang reported that Mr. Power complained of low thoracic pain that radiated to the top of his back. Dr. Zhang also noted "degenerative disc disease at multiple levels in the thoracic spine; however, nothing compressing the spinal canal." ROA, 120. Dr. Zhang did not recommend surgery. Epidural steroid injections were recommended by Dr. Zhang, and Mr. Power began receiving them shortly after.

¹ "Thoracic," is derived from "thorax," which in this context means "the part of the vertebrate body between the neck and the abdomen." Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/thorax> (last accessed January 30, 2025).

² "Lumbar" here means "the vertebrae between the thoracic vertebrae and sacrum." Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/lumbar> (last accessed January 30, 2025).

³ References to discs preceded by a "T" reference thoracic discs. Disc numerals prefaced with a "C" refer to cervical discs.

Later, on June 19, 2019, Mr. Power was seen by Dr. John Marouk, who would later be designated as the treating physician for Mr. Power's back. On this date, Mr. Power complained of "mid back pain, low back pain and right leg pain" and "tingling in his arms and hands on occasion." ROA, 138. Regarding Mr. Power's cervical⁴ spine at this time, Dr. Marouk noted that he had good range of motion, normal motor strength in his upper extremities, and minimal tenderness around his T10-11.

Mr. Power was terminated from his employment at Flow Testing in March 2020 and was no longer working. Mr. Power saw Dr. Marouk again on July 14, 2020, where similar findings were made regarding his chief complaints consisting of only back pain, with Mr. Power adding "interscapular pain" as an additional complaint. The same findings were made regarding his cervical spine as in the July 2019 report. Dr. Marouk treated Mr. Power until August 2020, when he was released at maximum medical improvement.

A CC Form-3 was filed on April 13, 2020. It listed Mr. Power's injuries as back/spine-related. Mr. Power began working for Dynamic Transport as a driver in June 2021; however, he stopped working there in August of 2021. He denied sustaining any injuries while working for Dynamic Transport. An amended CC Form-3 was filed on July 7, 2021, which added the neck as an injured body part.

⁴ "Cervical," in this context, means "of or relating to a neck." Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/cervical> (last accessed January 30, 2025).

Mr. Power then saw Dr. Marouk for a follow up visit on March 21, 2022, where Dr. Marouk acknowledged that “most of [Mr. Power’s] treatment has been focused on the thoracic and lumbar spine.” ROA, 56. However, Dr. Marouk added that he had also complained of neck pain “since the time of the injury” and that there was a disc protrusion at the C5-6 level which was present in a thoracic MRI, but he had not had any study dedicated to a cervical MRI. *Id.* At a visit the following month, Dr. Marouk reported that Mr. Power had a “fairly large disc osteophyte complex which is compressing the thecal sac and nerve root at the C5-6 level.” ROA, 55. Dr. Marouk opined that there were degenerative changes that were not caused by the work event and stated that the injury aggravated a pre-existing condition. *Id.* Dr. Marouk recommended physical therapy, steroid injection, and if those did not work, an “anterior cervical discectomy and fusion.” *Id.*

On September 12, 2022, Dr. R. Tyler Boone was appointed as the Commission’s Independent Medical Examiner at the request of both parties because of the difficulty of the legal and medical issues to be addressed.⁵ Dr. Boone’s role in this case was to determine the causation of Mr. Power’s neck or cervical-related complaints and if they were related to the reasonableness and necessity of treatment. Dr. Boone issued a report indicating that he believed the neck injury was work-related and also determined that Mr. Power had “multiple

⁵ Such appointment is proper according to 85A O.S. § 112. “Any administrative law judge may appoint an independent medical examiner to assist in determining any issue before the Commission.” *Id.*

level age-appropriate disc degenerative changes but some degree of central disc herniations protrusions more significant at C5 and C4.” ROA, 34.

After Dr. Boone’s report, Mr. Power requested a hearing and the request stated the issues to be tried were “Temporary Total Disability from as indicated to ____” and “Medical Treatment from 3/10/19 to present and continuing.” ROA, 38 (capitalization modified). The case went to trial on April 5, 2023. The ALJ issued an order on May 4, 2023, finding that Mr. Power failed to establish that he sustained a compensable injury to his cervical spine during the accident on March 10, 2019. The court thus found that his request for benefits for his cervical spine injury was denied.⁶

Fourteen days later, Mr. Power appealed the ALJ’s order to the Oklahoma Workers’ Compensation Commission, arguing that the denial of compensability as to his neck was contrary to law and against the clear weight of the evidence. The Commission affirmed the ALJ’s order, and Mr. Power now appeals that decision to this Court.

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 March 10, 2019. “The Administrative Workers’ Compensation Act shall apply only to claims for injuries and death based on accidents which occur on or after

⁶ Compensation for Mr. Power’s back injury was never in dispute. It appears that all payments, other compensation, and treatment related to his back injury stemming from the March 2019 accident have been paid by the employer.

February 1, 2014.” Title 85A O.S. § 3. The Administrative Workers’ Compensation Act provides at 85A O.S. Supp. § 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

On appeal, Mr. Power argues that this Court should reverse the decision of the Commission, and in turn, the ALJ’s order, finding that his neck injury was non-compensable because the decisions are clearly erroneous in light of reliable, material, probative, and substantial competent evidence.⁷ 85A O.S. Supp. § 78(C)(5).

⁷ Mr. Power does not use this exact phrasing in his statement of the issue on appeal. He argues that the Commission’s decision is clearly erroneous; however, he also states that the burden of proof on the injured worker is a preponderance of the evidence, not beyond a reasonable doubt, citing 85 O.S. § 2(27). The cited statute provides that the workplace incident must be the “major cause” of the injury. *Id.* Major cause is defined as “more than fifty percent of the resulting injury, disease, or illness. A finding of major cause shall be

Mr. Power first argues that this is a “simple case of missed and late diagnosis.” *Brief-in-Chief*, pg. 4. He notes that because an injured worker is not required to self-diagnose and because he put himself in the hands of professional doctors who were trained and educated to diagnose accurately, which he argues they failed to do for many months, he should bear no fault or blame for their failure to address his neck issues. Mr. Power also argues that he first complained of numbness in his hands as early as June 2019, that he mentioned having problems at the base of his neck in May 2019, and that he reported to Dr. Marouk on November 9, 2020, regarding neck problems, which occurred one year and eight months after the accident, not “two and a half years” as asserted by the ALJ. *Id.* Mr. Power contends that the court ignored the above-referenced evidence and that such evidence constitutes “overwhelmingly persuasive testimony” that supports a determination that the neck injury is compensable. *Id.* at 5. Upon careful review, we disagree.

Since the date of the injury in March 2019, Mr. Power’s chief complaint was lower back pain. For example, the treating records from the McAlester Regional Hospital, when Mr. Power was seen on the same day of his accident, indicate that Mr. Power reported bending over at work and “felt sudden pain in

established by a preponderance of the evidence.” *Id.* There is no evidence that the ALJ used or applied a beyond a reasonable doubt standard in this case as no such language is found in the order or transcript. Rather, it appears Mr. Power is arguing that he proved, by a preponderance of the evidence, that the incident on March 10, 2019, was a major cause of his neck problems and because the ALJ did not find in his favor it must have used a higher standard. Regardless, we review the Commission’s decision to affirm under 85A O.S. Supp. § 78(C)(5), which provides for reversal when the decision, in this case the decision determining Mr. Power’s neck injury was non-compensable, is clearly erroneous in light of reliable, material, probative, and substantial competent evidence.

his low back around noon. Radiates into his right hip.” ROA, 151. In a form he completed for Dr. Zhang’s office visit, Mr. Power wrote that the reason for the visit was “back pain.” ROA, 125. Dr. Zhang noted that Mr. Power reported having pain from the base of his neck to his lower thoracic/upper lumbar region. ROA, 122. Later, on June 10, 2019, Mr. Power visited with Dr. Marouk who noted that “patient complains of mid back pain, low back pain, and right leg pain.” ROA, 138. As Mr. Power asserts now on appeal, Dr. Marouk also acknowledged that Mr. Power was experiencing some numbness and tingling in the arms at this time. *Id.* However, in a section of his report dedicated solely to the “cervical spine,” Dr. Marouk stated that Mr. Power has good range of motion. He has normal motor strength in his upper extremities. He has minimal tenderness around T10-11.” ROA, 139.

Reports from Doctor Zhang dated July and August 2019 do not indicate that Mr. Power was experiencing any new or worsening symptoms. ROA 181-82. Further, in October 2019, Dr. Zhang reported that Mr. Power was experiencing more diffuse pain “from the middle of his shoulder blades down to his lower back.” ROA, 184. In December 2019, Dr. Zhang reported that Mr. Power was experiencing “popping in his back and diffuse pain in the upper thoracic, mid-thoracic, lower thoracic, and lumbar spine areas.” ROA, 186. Dr. Zhang also noted “radiculopathy” at this time. *Id.* While more numbness and tingling in the hands, radiculopathy, was reported to Dr. Zhang, Mr. Power does not make any neck or cervical spine specific complaints to his treating physician during this time period. If at any time during these months Mr. Power was experiencing

worsening or new pain in his neck, he could have reported it to Dr. Zhang and did not do so. Instead, the only reference to any neck-related pain was Mr. Power's report that the pain radiated *from* the base of the neck to the lower thoracic region.

Notably, in March 2020, Mr. Power stopped working at Flow Testing. In July 2020, Dr. Marouk reported that Mr. Power was experiencing "mid back pain and low back pain ... some intrascapular pain." His cervical spine was once again observed to have "good range of motion" and "minimal tenderness around the T10-11." ROA, 189. In September 2020, Dr. Marouk wrote that Mr. Power's chief complaint was only mid-back pain. Cervical spine analysis section of this report also indicated "some tenderness in the intrascapular region" but that he had normal range of motion and motor strength. ROA 191-192. Further, Dr. Marouk noted that Mr. Power was complaining of upper back, low back, and some leg/hip pain in October 2020. He maintained the same opinion on Mr. Power's cervical spine, but included that Mr. Power was experiencing tenderness around T5-6 level. ROA, 195. Finally, in November 2020, Dr. Marouk noted that Mr. Power is complaining of "some neck pain" in addition to his back problems. ROA 197. However, one month later in a December 2020 report, Dr. Marouk writes that Mr. Power reported that his pain was a "4/10 today mainly in his low back." ROA, 73.

Thus, the record reflects that Mr. Power does not explicitly complain of neck pain until November 2020, one year and eight months after his injury. Mr. Power did not report neck pain to Dr. Zhang when he was being treated in 2019,

aside from referencing the base of the neck to describe the range of pain he was experiencing. In fact, Mr. Power does not even mention any interscapular pain until July 2020, over a year after the initial incident. While we agree with Mr. Power that he is not a physician, we also agree with Dr. Marouk that a patient should know where they have pain. *Deposition of John S. Marouk*, pg. 14. Dr. Marouk acknowledged that after the incident occurred, Mr. Power's only complaint was his back pain. *Id.* Dr. Marouk also testified that he was unable to say that the sole cause of Mr. Power's neck issues is related to him bending over and having an injury at work. *Id.* at 21. Specifically, he observed that "there is preexisting spondylitic changes or preexisting arthritis in his cervical spine that's attributing. That is not work-related." *Id.*

Dr. Boone, the independent medical examiner brought in by the parties in this case for a separate evaluation on Mr. Power's cervical issues, originally opined in his report that the neck injury was work-related. However, he later clarified at trial that the only reason he opined that the neck injury was work-related is because Mr. Power's complaints to Dr. Zhang regarding his "interscapular and upper thoracic area to the base of the neck" were consistent. *Deposition of R. Tyler Boone*, pg. 25. Notably, Dr. Zhang did not see Mr. Power until two months after the incident. At that time, he reported experiencing pain up to the base of the neck; however, his chief complaint was still his back. It was not until nearly five months later, in October 2019, that Dr. Zhang reports that Mr. Power was experiencing pain in between his shoulder blades. Regardless, Dr. Boone also testified that this was not a clear-cut case and that he could not

say within a reasonable degree of medical certainty that the March 10, 2019, accident is what caused Mr. Power's present neck problems. *Id.* at 26-27, 29, 34-35. Dr. Boone also added that he felt as though Mr. Power's hand tingling and numbness were likely due to a carpal tunnel diagnosis from his driving job. *Id.* at 35-36. Finally, he opined that the surgery proposed to help Mr. Power's neck injury is to address a bone spur that is narrowing the spinal canal and impinging in the cervical area. *Id.* at 19. Dr. Boone agreed with Dr. Marouk's prior opinion that a bone spur is more of a degenerative condition or process. *Id.*

The issue of whether disability results from an accidental injury or from a preexisting disease or prior injury is a fact question for determination within our workers' compensation system. *See 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, their deposition testimony, and Mr. Power's own testimony, determining that Mr. Power did not injure his cervical spine while bending over to rig the trailer, and therefore, the injury was not the major cause of his neck condition. 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. We find the cited physicians' reports and their deposition testimony constitute reliable, material, probative, and substantial competent evidence to support the ALJ and the Commission's decision that Mr. Power's neck injury was non-compensable.

AFFIRMED.

WISEMAN, P.J., and FISCHER, J., concur.

March 3, 2024