

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by RAPAPORT
Commissioner

Jan. 6, 2020

CARLTON CARTER v. MONDELEZ INTERNATIONAL INC
INDEMNITY INS CO OF N AMERICA (INA INS), Insurance Carrier
ESIS, INC, Claim Administrator
Jurisdiction Claim No. VA00001275065
Claim Administrator File No. C877C3641418
Date of Injury: November 28, 2016

Douglas K.W. Landau, Esquire
For the Claimant.

D. Boyd Cook, Esquire
For the Defendants.

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

The defendants request review of the Deputy Commissioner's August 21, 2019 Opinion finding the claimant's post-traumatic stress syndrome ("PTSD") was causally related to his compensable injury by accident, and the claimant was entitled to temporary total disability benefits beginning December 12, 2016. We AFFIRM in part, REVERSE in part, and MODIFY the Award below.

I. Material Proceedings

On December 30, 2016 and October 25, 2018, the claimant filed Claims for Benefits alleging he suffered PTSD and compensable injuries to his neck, low back, spine, and legs as a result of a work-related motor vehicle accident on November 28, 2016.

The Deputy Commissioner held an evidentiary hearing on August 6, 2019. The claimant sought medical benefits, temporary total disability benefits for November 29, 2016 through November 30, 2016 and beginning December 12, 2016.¹ The defendant agreed the claim for the claimant's legs was related to the symptomatology into his legs from radiculopathy.

The parties stipulated the claimant earned a pre-injury average weekly wage of \$1,116.59, the claimant suffered compensable injuries to his cervical spine and lumbar spine with symptoms into his legs, the claimant did not attempt to market his residual capacity, and the defendants were entitled to a credit for benefits paid.

The defendants defended the claim on the grounds the claimant was not disabled to the extent alleged and the PTSD condition was not causally related to the work accident.

Upon reviewing the record, the Deputy Commissioner held the evidence established the claimant's diagnosis of PTSD was causally related to the November 28, 2016 work-related accident. He explained:

After review, we find the evidence sufficiently proves the claimant's diagnosis of PTSD is causally related to the accident of November 28, 2016. We have considered Dr. Spector's opinion that the claimant does not meet the criteria for the diagnosis. The claimant has seen a number of medical providers for his psychological symptoms, including three clinical psychologists and two clinical social workers. All, except Dr. Spector, have diagnosed the claimant with PTSD. Not one, except Dr. Spector, suspected the claimant was malingering, feigning or exaggerating. In fact, Dr. Shugarman, who has seen the claimant since 2017, has explicitly denied any indication of feigning on the part of the claimant. Notably, despite his high suspicion of feigning or exaggeration, Dr. Spector opined the claimant required psychiatric treatment, psychotherapeutic care and trauma-focused therapies, including prolonged exposure therapy which has been recommended both by a clinical social worker and Dr. Shugarman in connection with the claimant's PTSD diagnosis. Additionally, for the reasons summarized above and set forth by Dr. Shugarman on August 2, 2019, we find Dr. Spector's report is shaded by some doubt.

¹ The claimant requested the Commission retain jurisdiction over his permanency claim.

The medical evidence shows that after the claimant was discharged from the emergency room on the date of accident, he was advised to seek medical assistance for any “emotional needs.” On January 16, 2017, or less than two months after the accident, the claimant saw a clinical social worker for sleep disturbance, anxiety, depressed mood and panic attacks. The social worker identified the claimant’s work accident as the precipitating event causing his symptoms. She diagnosed PTSD. Both Dr. Shugarman and Dr. Romano, the psychologist who saw the claimant for an evaluation connected with his application for Social Security Disability Benefits, have opined the claimant suffers from PTSD. Dr. Shugarman has positively related the diagnosis to the work accident. Both the claimant and his wife testified the claimant was in good health before the accident. We closely observed their demeanor and appearance and find them to be credible. We therefore credit their testimony as truthful. Moreover, the other evidence does not show the claimant was experiencing any psychological or emotional symptoms before the accident. There are no medical records showing the claimant was actively seeking medical treatment for any psychological symptoms at the time of the accident. In light of this, we find Dr. Shugarman’s opinion connecting the PTSD to the work accident is persuasive and deserves great weight.

(Op. 13-14.) He denied the claimant’s request for temporary total disability benefits from November 29, 2016 through November 30, 2016. He awarded temporary total disability benefits beginning December 12, 2016.

The defendants requested review of the Deputy Commissioner’s decision. They assert the claimant did not meet his burden of proving his PTSD was causally related to his work accident, and the preponderance of the evidence reflects the claimant was not totally disabled as alleged.²

² The parties did not request review of the Deputy Commissioner’s denial of temporary total disability benefits from November 29, 2016 through November 30, 2016, and his decision that the claimant is entitled to workers’ compensation benefits related to his PTSD if the condition is causally related to his work accident, given the claimant’s physical injuries from the accident as well as the nature of the motor vehicle accident. These issues are final and will not be addressed further on review.

II. Findings of Fact and Rulings of Law³

A. Medical Causation

The claimant has the burden to prove that the medical treatment, for which payment is sought, is causally related to the work accident. *Watkins v. Halco Eng'g, Inc.*, 225 Va. 97, 101 (1983) (citing *Ins. Mgmt. Corp. v. Daniels*, 222 Va. 434, 438-39 (1981)). The factual determination regarding causation is usually proven by medical evidence. *Clinch Valley Med. Ctr. v. Hayes*, 34 Va. App. 183, 192 (2000). Medical evidence is not necessarily conclusive, but is subject to the Commission's consideration and weighing. *Hungerford Mech. Corp. v. Hobson*, 11 Va. App. 675, 677 (1991) (citing *Cnty. of Spotsylvania v. Hart*, 218 Va. 565, 569-70 (1977)).

We agree with the Deputy Commissioner's assessment of the hearing testimony and the remaining evidence to hold the claimant met his burden of proving he suffered PTSD as a result of his work accident. On November 28, 2016, the claimant, a truck driver, was involved in a motor vehicle accident, which resulted in the deaths of a father and a child in the other vehicle. Based upon their demeanor and appearance, the Deputy Commissioner found the hearing testimony of the claimant and his wife credible as to the claimant's health before the accident. The Deputy Commissioner, who was able to observe the witnesses as they testified, was in the best position to evaluate their testimony. We defer to his credibility determination, which is supported by the record. *See Goodyear Tire & Rubber Co. v. Pierce*, 5 Va. App. 374, 381 (1987). Moreover, we give greater weight to the opinion of the claimant's treating psychologist, Dr. Shugarman, than the opinion of Dr. Spector, the neuropsychologist, who performed the independent medical

³ We have reviewed the evidence in its entirety. We incorporate by reference and adopt the Deputy Commissioner's summary of the testimony, medical evidence, and surveillance evidence as if our own. We recite the evidence here only as necessary to explain our decision on review.

examination.⁴ The Commission grants significant weight to the treating physician's opinion when we review the medical evidence. *See Pilot Freight Carriers v. Reeves*, 1 Va. App. 435, 439, (1986). Dr. Romano's August 1, 2018 diagnosis of PTSD related to the motor vehicle accident supports Dr. Shugarman's opinion.

B. Disability

The claimant "bears the burden of proving his disability and the periods of that disability." *Hoffman v. Carter*, 50 Va. App. 199, 216 (2007) (quoting *Marshall Erdman & Assocs. v. Loehr*, 24 Va. App. 670, 679 (1997)).

In this particular case, the evidence in the record is sufficient to show the claimant was totally disabled as a result of his November 28, 2016 work accident from December 12, 2016 through July 13, 2017 and from February 26, 2019 and continuing. Dr. Aaron J. Greenberg treated the claimant and placed the claimant out of work as a result of his physical injuries beginning December 12, 2016. On July 14, 2017, Dr. Greenberg reviewed the claimant's July 7, 2017 Functional Capacity Evaluation to assess his ability to work with his physical injuries. Dr. Greenberg agreed with the FCE and found the claimant was capable of work in the medium physical demand category. He also recommended vocational training, work hardening, and ongoing psychiatric counseling. A July 14, 2017 handwritten note on the FCE report reflects, "I

⁴ We understand the claimant has been treating biweekly with Dr. Shugarman via telehealth since November 2018. At this time, we do not find this mode of therapy negatively affects the weight we give Dr. Shugarman's opinion as the claimant's long-standing treating psychologist. We also agree with the Deputy Commissioner's assessment of the surveillance evidence. The May 9, 2019 and May 14, 2019 footage fails to persuade us that the claimant does not suffer from work-related PTSD. The claimant and his wife explained Dr. Shugarman and his therapist have encouraged the claimant to do local driving and perform errands. The record reflects Kathryn Cray, MSW, instructed the claimant to get out of the house to walk or drive for short periods of time, Dianne Bachman, MSW, noted "a plan of gradually exposing himself to social situations that might create high levels of anxiety," and Dr. Shugarman has started prolonged exposure therapy.

agree with FCE at medium physical demand category. Rec voc training work hardening psych counseling at M.M.I.”

Although the claimant was unable to return to his pre-injury work, Dr. Greenberg clearly agreed the claimant was capable of work in the medium physical demand category. We further recognize the claimant had been diagnosed with PTSD; however, there are no medical opinions finding the claimant was totally disabled as a result of his PTSD at this time. The claimant was first placed out of work as a result of his PTSD by Dr. Shugarman on February 26, 2019. Significantly, on February 26, 2019, Dr. Shugarman wrote the claimant was “*currently* totally disabled” as a result of his PTSD symptoms. [Emphasis added.] Dr. Romano’s August 1, 2018 evaluation found “the claimant would not have difficulty following simple and routine tasks demands with supervision and would not be able to complete some complex tasks even under supervision.” Dr. Romano further noted the claimant appeared “*moderately* compromised by his current emotional functioning.” [Emphasis added.] There is simply insufficient evidence in the record to infer the claimant was totally disabled as a result of his PTSD condition for a year and half before Dr. Shugarman placed the claimant “*currently*” out of work.

A partially disabled claimant “must make a reasonable effort to market his remaining capacity to work in order to continue receiving workers’ compensation benefits.” *Va. Wayside Furniture v. Burnette*, 17 Va. App. 74, 78 (1993) (citation omitted). Given our finding that the claimant was capable of light duty work as of July 14, 2017, and the claimant’s agreement at the hearing that he conducted no marketing, we find the claimant failed to meet his burden of proving entitlement to temporary total disability benefits from July 14, 2017 through February 25, 2019.

Based upon Dr. Shugarman's opinion, we agree the claimant was totally disabled as a result of his work-related PTSD beginning February 26, 2019. The claimant is entitled to temporary total disability benefits for this time period.⁵

III. Conclusion

The Deputy Commissioner's August 21, 2019 Opinion is AFFIRMED in part and REVERSED in part, and the following MODIFIED Award shall enter:

AWARD

An award is hereby entered in favor of Carlton Carter, the claimant, against Mondelez International, Inc., employer, and Indemnity Insurance Company of North America (INA INS), insurer, for payment of compensation as follows, based on a pre-injury average weekly wage of \$1,116.59:

- (1) Temporary total disability benefits at the weekly rate of \$744.39 beginning December 12, 2016 through July 13, 2017, inclusive; and
- (2) Temporary total disability benefits at the weekly rate of \$744.39 beginning February 26, 2019 and continuing until conditions justify modification.

The defendants are entitled to a credit for benefits already paid.

The defendants shall provide causally related medical benefits for the cervical spine, lumbar spine (with symptoms into the legs), and PTSD for as long as necessary pursuant to Virginia Code § 65.2-603, consistent with this Opinion.

Given the reduced award of indemnity benefits, the attorney's fee is decreased to \$10,000 and shall be deducted from accrued compensation and paid directly to Douglas K.W. Landau,

⁵ We are not persuaded by the surveillance evidence that the claimant is capable of work.

Esquire, for legal services rendered to the claimant. Should there be insufficient funds from which to pay the awarded attorney's fee, counsel may collect the fee directly from the claimant.

Interest is payable on the Award pursuant to Virginia Code § 65.2-707.

This matter is removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within thirty (30) days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.