

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by KENNARD
Deputy Commissioner
Feb. 15, 2023

JEFFREY DRISKILL V. WARREN COUNTY
VIRGINIA ASSOCIATION OF COUNTIES GROUP S, INSURANCE CARRIER
VACO GROUPS SELF-INSURANCE RISK POOL, CLAIM ADMINISTRATOR
Jurisdiction Claim No. VA00001830195
Claim Administrator File No. WC091276751
Date of Injury: February 26, 2021

Michael L. Ritchie, Esquire
For the Claimant.

Esther King, Esquire
For the Defendants.

Hearing before Deputy Commissioner Kennard in Berryville, Virginia on January 13, 2023.

PRESENT PROCEEDING

This case is before the Commission upon the claimant's Claim for Benefits filed April 3, 2021. The claimant alleges injury by accident to the right shoulder and bicep occurring on February 16, 2021.¹ The claimant is seeking an award of lifetime causally related medical benefits.

STIPULATIONS

The parties stipulated to the following: None.

DEFENSES

The defendants defend this claim on the following grounds: That the claimant did not sustain an injury by accident arising out of, and during the course of his employment; that the claimant did not sustain an injury/structural or mechanical change causally related to his

¹ On January 6, 2023, the claimant amended the date of injury from a previously asserted injury date of February 26, 2021.

employment; that the claimant's injuries are the result of cumulative trauma; that the claimant is not injured to the extent alleged; that there is no causal connection between the claimant's medical treatment and an injury occurring on February 16, 2021; and that any medical opinions relating the claimant's injuries to the alleged work accident are based on an incomplete and/or inaccurate medical history provided by the claimant.

SUMMARY OF THE EVIDENCE

The following evidence was introduced, admitted, and considered in connection with the adjudication of disputed issues: (1) Claimant Exhibit 1, Designation of Medical Records, consisting of records and reports from Valley Health Employer Health, Front Royal Family Practice, Valley Health Warren Memorial Hospital Orthopedics; and Warren Memorial Hospital; (2) Claimant's Exhibit 2, Skyline Regional Criminal Justice Academy Injury Report; (3) Defendants' Exhibit 1, Designation of Medical Records, consisting of records and reports from Valley Health Outpatient Center, Front Royal Family Practice, Valley Health Employer Health of Front Royal, Warren Memorial Hospital, Front Royal Family Practice and Multispecialty Clinic, Dr. Erik Mitchell, and Valley Health Rehabilitation; (4) Defendants Exhibit 2, Skyline Regional Criminal Justice Academy Individual Injury Status; (5) Defendants' Exhibit 3, Claimant's Response to Employer's First Set of Interrogatories and Request for Production of Documents; (6) Defendants' Exhibit 4, Claimant's Supplemental Response to Employer's First Set of Interrogatories and Request for Production of Documents; (7) Defendants' Exhibit 5, Transcript from Claimant's November 30, 2022 deposition; (8) Defendants' Exhibit 6, 2021, RAW Single Lift Worlds results from October 28, 2021 in Virginia Beach; (9) Defendants' Exhibit 7, 2022

RAW Master's Nationals results from April 8, 2022 in York, Pennsylvania; and (10) Defendants' Exhibit 8, Skyline Regional Criminal Justice Academy Incident Report dated March 1, 2021.

The following witnesses testified on behalf of the claimant: Jeffrey Driskill, Dallas Neely

The following witnesses testified on behalf of the defendants: Tommie Bower, Jay Roy

The record in this matter closed on January 13, 2023.

Testimony

The claimant testified that he is employed as the major and chief deputy for the Warren County Sheriff's Office. He has held this position since January 1, 2020. His law enforcement career includes work as a patrol officer in Illinois beginning in 1987, and employment as a chief of police for a West Virginia agency from 2002 through 2010.

As the major and chief deputy, the claimant oversees all operational and administrative functions of the sheriff's office, including patrol, training, investigations, grants, budgeting, and accreditation. He is a sworn deputy and is therefore required to undergo the same training as all other deputies employed by the sheriff's office. The claimant testified that his training included defensive tactics training. He explained that defensive tactics are physical actions used to protect the individual deputy in dealing with a combative subject to minimize the risk of injury to the deputy or another person.

The claimant testified that he last participated in defensive tactics training in February of 2021. His training was required for certification as a law enforcement officer. During the training, instruction is provided regarding mental and physical preparedness for dealing with altercations that a deputy may encounter. The claimant testified that the training is both physically and mentally demanding and stated that there is an expectation that the trainee will be sore. The

claimant stated that he was told “up front” that he would get hurt, and that pain was part of the experience. The claimant testified that outside of work, he is a person who does a lot of physical training. He has done weightlifting and other workout activities that have caused pain and discomfort. This is something that he expects.

During his February 2021 training, he felt pain that he did not experience previously. On the first day of training at a martial arts studio, the training class was practicing defensive drills, including falling forward and backward with the assistance of a partner. Partners were rotated. The claimant testified that he was shoved forward during one of these exercises on February 16, 2021, and his partner fell onto his back. The claimant testified that he immediately felt pain in his right arm and shoulder. The claimant stated that he got up slowly and shook his right arm. He felt that his “central nervous system” was hurt and decided to sit out a rotation. He testified that others in his class asked if he was okay. He finished his day’s training and returned to class the following day. He testified that his pain would subside during portions of his defensive tactics training but would reoccur with certain activity.

The claimant confirmed that if injured during defensive tactics training, he and other students were required to file an injury report. He did not file a report on February 16, 2021, or the following day. The claimant explained that due to his age, he was only hurt and felt that it was a natural part of the training. He testified that he is not required to report every pain or hurt.

The claimant testified that he finally reported his injury on February 26, 2021. During the second week of training, he experienced another incident in which his shoulder was hurt. On February 25, 2021, he participated in a ground fighting drill in which each student was required to lie on their back and throw another student off who jumped on them. Dallas Neely, one of the

students in the class ran and jumped onto the claimant. Neely “head butted” the claimant and cracked two of the claimant’s teeth. The claimant was unable to push Neely off, and by Thursday night, he felt that his arm “was shot”. He testified that when he arrived for training the following morning, he told his assigned partner that his arm was hurt. He filled out a narrative report on what occurred. His report lists his date of injury as February 26, 2021. He stated that the report describes the incident in which someone fell on him as the “first incident.”

The claimant testified that he initially sought medical care at an urgent care in Front Royal. There, he told the staff there that he was injured on February 26, 2021. He spoke with a physician and was provided with restrictions. He returned for a follow up visit on March 12, 2021, and was later referred to a specialist, Dr. Erik Mitchell. Dr. Mitchell eventually performed surgery on April 28, 2022. The claimant testified that following surgery he underwent physical therapy. He did not progress as anticipated but has continued to work. He has not performed any patrol work and testified that he has greatly restricted his response to public incidents.

The claimant testified that he has done competitive weightlifting and physical training. He testified that after he was hurt, there was a long period of time when he did not do anything. His exercise was limited to walking. He stated that Dr. Mitchell told him it was okay to attend a gym and to perform exercise as tolerated. Asked if he lifted weights, he stated that there was no real lifting of weights using the gym equipment. He stated that his exercise consisted mostly of lower body training, mostly his legs, excluding the shoulders, arms and chest.

The claimant testified that he has never been the subject of a disciplinary action or any reprimand while employed with the County. He testified that as a law enforcement officer he is aware of the penalties of lying under oath. If found to have committed perjury, he would not be

able to continue working as a law enforcement officer. He stated that he has never been accused of lying under oath.

On cross-examination, the claimant testified that he was previously employed as an instructor at Skyline Criminal Justice Academy from 2005-2012. At that time, the academy was known as the Rappahannock Regional Criminal Justice Academy.

The claimant confirmed that he originally claimed an injury occurring on February 26, 2021, but later changed the date of injury to February 16, 2021. According to the claimant, he realized he was injured on the 26th of February, but changed the date of injury to February 16, 2021 because that was “when everything changed.” The claimant testified that February 16, 2021 is the date when he realized that his arm was not the same, but he did not think he was injured. February 26, 2021 was the date that his arm “gave out” and “I couldn’t do anything more.”

The claimant testified that when he came to the academy on February 26, he reported to his assigned partner, Wayne Alsbury, not to grab his arm, or throw him to the ground because his shoulder and arm were hurt. He also informed the instructor/evaluator, Sgt. Winter, that his shoulder was hurt and that he would participate as best he could. He does not recall the exact words he used.

The claimant confirmed that the first time he officially reported to the academy that he was injured was on Monday, March 1, 2021. February 26, 2021 was Friday of the previous week. The claimant testified that the pain he felt on February 16, 2021 was “just like everything else in my body that was hurting, except it was different.” He knew that if he had an injury, he was required to notify the academy.

The claimant testified that he believes that there is a difference between being hurt, and being injured. During the period of time that the academy class was practicing front falls, he just thought that he was hurt. According to the claimant, being hurt is an injury, but not one that is debilitating to the extent that he cannot move. He thought he could just shake off the pain at the time. The claimant testified that when he felt pain in his shoulder and a sharp pain radiating down his arm, he thought he was “hurt”, but not injured.

The claimant testified that, during the drill in which Dallas Neely jumped onto the claimant, he was unable to push Neely off. That night, he noted that his “arm was shot.” The following day, when scheduled for participation in the practical testing of his training, he told his instructors that he could not use his arm the same way.

The claimant testified that it is his recollection that in academy orientation, he was told that he was to report injuries. He recalls that an injury would be something serious that would cause impairment to the extent that you could not train. “Hurt” is a naturally occurring thing that is to be expected. He did not believe that his shoulder was injured until it went beyond “hurt.”

The claimant confirmed that he did not mention a “pop” in his shoulder at the time he reported the accident on March 1, 2021, and does not recall if he mentioned a partner falling on his back.

The claimant explained that on February 26, 2021, he expedited his departure from the day’s academy training due to an active shooter incident in neighboring Page County which required a response by a number of Warren County deputies and SWAT team members. He applied a bag of ice to his shoulder later that day at his office. Over the weekend, he worked on post-

incident reports, grants, and agency accreditation. He stated that he reported his injury to the people he needed to, and that he then reported it to the academy on Monday.

In regard to Individual Injury Status Reports, the claimant testified that the form is filled out each day, or the following day. He believes instructors ask each day if there are any injuries to report. Regarding February 19, 2021, he testified that he does not recall if he initially indicated no injury, but later changed it to yes. For February 26, 2021, asked if he initially wrote “no” but later changed it to “yes”, the claimant testified, “I can just tell you what it says, I don’t know, I don’t’ know when I filled this out.” He agreed that there is nothing in the notes for the weeks of February 19 and February 26. For the week of January 11 through January 15, he noted some back spasms occurring on January 14, 2021 despite not indicating an injury. “I don’t have any recollection of what that was.” Asked about the differing appearance of the blocks for entry of information on February 19, 2021 (white shading suggesting that the entry was changed), the claimant stated, “I can just tell you it says no and yes.” He agreed that there is a similar appearance for the block for February 26, 2021.

The claimant testified that he met with James Roy on March 1, 2021. Asked if he recalls that during their meeting the claimant agreed that he changed his individual injury reports, the claimant testified, “I believed we discussed it, yes, because at the time we had a lengthy discussion as to the report, in case he didn’t see it initially, so I explained everything to him.” Asked if he does remember changing the individual injury reports from no to yes on March 1, 2021, the claimant responded, “I remember talking to Mr. Roy about the reports, that I do recall.”

Asked directly by the Commission, if he changed the entry for February 26, 2021 subsequent to that date, the claimant testified,

“I believe it was afterwards, I believe when I talked with Mr. Roy, pointing out that this was inaccurate, that I actually was injured on the 26th, and that’s subsequently what’s the notes, cause that’s the purpose of the morning of the 1st was, was some degree of clarity and responsibilities to give the academy a report of what had happened, talk to the academy staff, so when I turned this into them, I turned it in to Ms. Sherfey who wasn’t, she wasn’t available at the time, she wasn’t there, I just remember her not being there, and I spoke to Mr. Roy and that’s when I went into grave detail about this.

Asked again by the Commission if it was changed subsequently, the claimant testified, “Yes, I did it to reflect the accuracy that it was an injury and not something else.” He did not change the entry for February 16, 2021.

The claimant testified that he reported his injury to Mr. Roy before going to the doctor. The claimant then confirmed that his added note on the Individual Injury Status Report for the week of March 1, 2021 states “injured right shoulder socket, possible labrum tear”. Asked by defense counsel how he knew of an injury to his right shoulder socket and possible labrum tear before consulting with a physician, the claimant stated, “well, I don’t know if this is before or after a doctor, but that’s the only thing I could assume it would be, the ball socket, which is a labrum tear.” He does not know if he added this additional information on, or after, March 1st. He does not recall if the doctor told him on March 1st that he had a possible labrum tear. The claimant testified that after Dr. Mitchell reviewed his June 11, 2021 MRI, he was told that it showed a labral tear.

The claimant testified that he had no prior injury to his shoulder. Asked if he received prior medical treatment for his right shoulder, the claimant responded, “I don’t think I have been medically treated for my shoulder.” The claimant indicated that he had prior complaints of generalized joint pain that included his right shoulder. Asked about medical treatment he received

on November 11, 2016, and whether he had been experiencing pain in his right shoulder for about six months, the claimant answered by stating that he spoke to his doctor about pain he was experiencing in his joints.

Questioned about a November 11, 2016 Front Royal Family Practice note indicating that the claimant had right shoulder pain and was evaluated and followed by an orthopedist, and the claimant's failure to indicate any prior treatment for his shoulder by an orthopedist in his discovery answers or deposition, the claimant testified, "no, I was never treated for any injuries." Asked if he had been seen by an orthopedic physician for his right shoulder, the claimant responded, "I'm not sure what you are saying, what's an orthopedic doctor?" The claimant stated that the only doctors he saw were general practitioners. Asked by the Commission if he had ever been seen by a specialist for his shoulder, the claimant stated, "not to my knowledge, everyone that I spoke with at family medicine, I believe were general practitioners."

The claimant testified that when he reported his injury to his employer, he reported it to Ms. Patty Baggarly. The claimant confirmed that he had previously been in a romantic relationship with Ms. Baggarly. The claimant denied referring to Ms. Baggarly as his spouse on prior occasions. However, when shown an application that he completed for a gym membership at Dominion Health and Fitness, he confirmed that on the application, he identified Ms. Baggarly as his spouse.

The claimant confirmed that he has been a competitive power lifter for years. He testified that he had done power lifting after his injury and before surgery. He has not done any power lifting after surgery. "I believe I had one meet prior to that." He testified that he was unsure if the

meet involved a single lift, or more than one. He confirmed the results of an April 8, 2022 powerlifting competition involving his participation in squat, bench and deadlift events.

The claimant was then asked about his deposition testimony in which he was asked about lifting following his accident. At his deposition he was asked if he was able to bench press following his accident, the claimant testified that he cannot bench, and that he had not done any bench pressing since the academy. Confronted with this deposition testimony, the claimant testified at the hearing, “[w]ell that’s a single lift, I thought you were referring had I been bench pressing, I hadn’t been bench pressing since the academy.” The claimant then offered the following explanation for this apparent inconsistency:

When you asked me, this is how I interpreted without you explaining it. To train for a typical power lifting meet, your honor, is over four hundred hours. So it’s a twelve week period, the time you train four days a week, is well over four hundred hours. Prior to going to the academy, I was benching 285, I benched 255, 265 in the academy prior to getting hurt. So I was actually able to train on the bench, push-ups, pull-ups, the whole regimen. When I got hurt, I could not bench. I had not benched and had not trained on the bench. When I went to Dr. Mitchell, I asked him, and actually the prior doctors, how do they foresee, should I be doing any type of physical training or physical therapy, and I was given basically the same regimen I’m doing now, which is preventative maintenance. You don’t do benching, you do arm movements using a band, and rotator cuff strengthening. So the training aspect of it, that day showing up to bench, if you’ll notice on that last bench, I had to have them take it off of me. I could not complete the bench. They literally took my last attempt off of me. So, I did not train for, but attempted to do the bench. It was talking to my doctor, and he said I could actually train and exercise to my tolerance, he says it wouldn’t hurt me, and it didn’t aggravate the situation, and on that particular day, that’s all I did, was the regimen of the lift.

When confronted with additional deposition testimony in which the claimant indicated that he had not competed in any weight-lifting competitions since February of 2021 (“since your injury”) and had not done any bench lifts or dead lifting, the claimant responded,

Well, I mean that, a point of clarification, I have issues hearing, especially on my right-hand side, big... big rooms like this, and there is at least several times I told you, like today, I had to turn to face you, I'm not being rude your honor, I just can't hear anything basically.

The claimant was then asked if his answer at page 69 of his deposition in which he stated in response whether he had done any bench lifts, "I can't bench. The last time I benched was in the academy prior to getting hurt", was indicative of an inability to hear the question asked. The claimant testified,

I interpreted that as training and working on my bench press, and that is correct, I hadn't been benching since the academy.

Asked why he did not mention then bench press lifting done at the April 2022 meet, the claimant stated that, as an athlete, he interpreted counsel's questions as asking if he had been "training on the bench and doing the actual lift, which I had not." "That's how I interpreted the question." The claimant testified, "if that's incorrect, I would be more than happy to clarify." He testified that he performed the lifts at the April 8, 2022 event, but did not train for them. The claimant was then shown the results of a Virginia Beach meet on October 28, 2021 in which he participated in a dead lift portion of the event. At his deposition, the claimant testified that he hadn't done any dead lifts "because of my shoulder."

In June of 2021, following his MRI, Dr. Mitchell gave the claimant the option of proceeding with shoulder surgery. The claimant testified that Dr. Mitchell suggested some alternative treatment methods prior to surgery. The claimant confirmed that he testified at his deposition that one of the variables was that he did not want to have surgery during inclement weather.

On re-direct examination, the claimant testified that in regard to the November 11, 2016 note from Front Royal Family Practice, he felt that his right shoulder pain was a minor complaint.

Dallas Neely testified that he is a deputy with the Warren County Sheriff's Office. He has been employed since October of 2017. He went through the academy with the claimant and stated that he has grown very fond of him. In January and February of 2021, he participated in defensive tactics training. He recalled that when participating in falls, another classmate from another agency fell onto the claimant. After that, Neely could see that the claimant was favoring one of his arms. After defensive tactics, he wouldn't do physical training as much as the rest of the class.

Neely testified that "without a doubt" it was anticipated that there would be pain associated with the defensive tactics training. He noticed that the claimant was not signed in at his agency's workout room after the academy.

On cross-examination, deputy Neely confirmed that the claimant is his boss. He first met the claimant when the claimant began at the department in 2020. He confirmed that during initial orientation at the academy, all students were informed that they needed to report all injuries, no matter how minor. He does not recall when it was that the claimant began to favor his shoulder, he just noticed it during defensive tactics. He suspects that the claimant was injured because "he missed a day of class the following week."² The claimant appeared to have arm pain during the class ground fighting training.

On re-direct examination, Neely testified that he believes that the break falls training took place during day one or two.

² On his Individual Injury Status report form, the claimant wrote that he missed class on March 3, 2021 after being seen at the hospital for abdominal pain.

Jay Roy testified that he is employed as a police officer with the Luray Police Department. In February of 2021, he was a deputy director and instructor at the Skyline Regional Criminal Justice Academy. He worked for the academy for about a year. During orientation, the students are told about the rules and policies of the academy. Recruits are told how to report injuries. They are instructed to report all injuries, regardless of their severity.

Officer Roy identified a copy of the Individual Injury Status reports, testifying that the reports are located in the classroom each day. Each day, when a student comes in during the morning, they are to indicate if they have any injury or issue with their physical health. At the end of the day, they again document whether they had any injury that day, or something that would affect their physical health and training. The reports are reviewed by the student's squad leader and reported back to the basic coordinator, "and up the chain from there if there are some issues."

Officer Roy identified an Incident Report that he prepared regarding the claimant's March 1, 2021 report of an injury. Had any reports of injury been received before March 1, 2021, Ms. Sherfey would have been notified along with Officer Roy. Prior to March 1, 2021, no one told Roy that the claimant had been injured during training. When Roy pulled the Individual Injury Status reports to see why he had not been notified of an injury, he discovered that they appeared to have been changed.

Roy testified that he asked the claimant if he had changed the entries, and the claimant admitted that he did, stating that he initially associated his pain and soreness with training versus actually being seriously injured. That morning, the claimant also wrote that his right shoulder was injured with a possible labrum tear. Once reported, the claimant was required to get medical clearance before continuing with training.

On cross-examination, Roy confirmed that bumps, sprains, etc. are to be expected during training. Roy testified that it is not left up to the student to differentiate between hurting and an injury. The academy wants the student to communicate what is going on, and whether they are “good to go.” If the student confirms that they are just sore, and they believe that they continue with the training, they are allowed to continue.

Roy stated that although students are to self-report injuries during defensive tactics training, inquiry as to whether there are any injuries is made with every recruit during lunch breaks, and at the end of the day, before the student signs their Individual Injury Status report. “It is a lot of discussion this week.”³

Tommie Bower testified that she is the Executive Director of the Skyline Regional Criminal Justice Academy. She has held this position since June of 2017. She oversees the daily operations of law enforcement training at the academy, as well as academy personnel.

Ms. Bower testified that the reporting of injuries is explained to recruits during orientation. Recruits are to report all injuries on their Individual Injury Status reports. She became aware of the claimant’s report of injury through Jay Roy. She stated that, once there is a report of injury, the recruit is required to get medical clearance before continuing. She testified that if a recruit was no longer able to raise their arm, the academy would consider this to be an injury requiring medical clearance. If not able to fully engage in training, the instructors would not allow the recruit’s training to continue.

³ J. Roy’s March 1, 2021 Incident Report (Defendants’ Exhibit 8) contains the following entry: “I lead this block of instruction Feb 16, 17, 19 and 22. SRCJA Instructor Funk led DT training on Feb 25 and 26. At a minimum, lead instructors check injury status of students at the beginning and end of class each day as well as students completing the individual injury reports each day. Often instructors check status before and after lunch breaks. Lead instructors received no reports of injury from Driskill prior to March 1, 2021.”

Ms. Bower reviewed the reports regarding the claimant's ability to continue with training. The claimant completed his weapons training. She testified that the weapons training cannot be modified to allow accommodation for an inability to fully use an arm.

On cross-examination, she confirmed an "injury" would require medical care. If the situation impedes training, the academy will require medical care before training continues. If an instructor feels someone is injured, they can pull the recruit from the training. She had no direct contact with the claimant.

On re-direct examination, Ms. Bower testified that she would expect a recruit to indicate "yes" on their Individual Injury Status report if they felt the previous day's training resulted in their arm "being shot" and requiring modification of the following day's participation. She testified that the failure to be honest on the status reports can be considered an honor violation. She would expect instructors to halt training if the student was unable to fully participate.

Claimant' Deposition Testimony

The claimant was deposed on November 30, 2022. The claimant testified that he was injured when participating in front and rear falls during defensive tactics training. According to the claimant, one of his classmates landed on his back, "and that's when I got hurt." The claimant testified that he felt his right shoulder pop and experienced immediate pain radiating down his right arm. He does not recall if he told an instructor that he was hurt. The following day, when training activities resumed, he noted that his arm was not responding as it should. He started altering his participation in training exercises.

The claimant testified that following his February 2021 injury, he had a significant change in his job-related performance such that he no longer would go out into the field under normal

operational conditions. The claimant stated, “[a]fter I was injured, I had to make that decision to reduce my exposure to being injured, and thus reducing the liability- for my employment.” He testified that his life changed dramatically once he was injured.

The claimant testified that he was given physical restrictions by his doctors before graduating the academy that have remained in place. These include no lifting overhead, no push-ups, pull-ups, or things that would hurt his shoulder, “so anything that would involve those types of movements.” The claimant explained,

Because my injury was not just to my shoulder. It was to my bicep. So it’s not only the act of pushing, but the act of pulling. So it was both, the full range of motion. So that very - - that limits a lot of things I can do.

He also testified:

Well, like I said, after I had the - - I got hurt in DT, including after graduation and at work, I have greatly limited my lifestyle, to what I do. I don’t even drive as much as I used to. I don’t - - there’s a lot of things I don’t do. I’m very sedentary.

Regarding questioning as to whether he received any medical treatment for his right shoulder prior to February of 2021, the following exchange took place.

Q. Okay. Have you ever had medical treatment for your right shoulder before this injury?

A. What do you mean, medical treatment?

Q. Have you seen any doctor with complaints of pain in your right shoulder?

A. I had, many years ago - - it wasn’t so much the shoulder, as my right shoulder and my left shoulder both were tight.

Q. Would what? Sorry.

A. Tight

- Q. Okay, all right. And which doctors did you see for that?
- A. I believe it was one of the doctors at the same facility I've been seen at, family practice. I'm not sure if they changed the name. They were at the Warren County Medical Center. It was co-located, before they moved.
- Q. Okay. And so what - - other than your shoulders being tight, was there any other complaint that you had at that time?
- A. No; I was never treated for any injuries or diagnosed with any injuries with it.

In response to questioning as to whether he engaged in any weightlifting after February of 2021, the claimant testified as follows:

- Q. Okay. Have you been able to do any of the weightlifting since your injury?
- A. No. We actually have an event that's called a heroes challenge, which is a - - not a charity thing. Citizens formed the event. It's basically a physical fitness challenge that they do. Actually, they do it at Dominion. I have not been able to participate in that, as well. Matter of fact, the last time I was a cheerleader. I just cheered our guys on to compete in it. It's just - - but little things like that, I can't even do that.
- Q. Okay. So have you competed in any weight-lifting competitions since February of 2021?
- A. I'm sorry, Since when?
- Q. Since your injury.
- A. No.

After stating that there is a difference between weightlifting and power lifting, the claimant then testified:

- Q. Okay. And since your accident, you haven't done any bench lifts?
- A. I can't bench. The last time I benched was in the academy prior to getting hurt.

Q. Okay. And since your accident, you haven't done dead-lifting?

A. I can't. I can't do those because of my shoulder.

Medical Evidence

The claimant was seen at the outpatient center of Warren Memorial Hospital on November 11, 2016 for complaints of right shoulder pain. The following history was noted:

Patient is a 55 y.o. male who presents with right shoulder pain. Patient cannot point to any specific injury but he does weight lift and there have been at least one traumatic event when he violently threw his right arm backwards to warn a driver of a cat in the area as well as one time another employee grabbed a table out of his hand. Controlled slow movement is okay but otherwise range of motion is painful and limited. Patient is training for a weightlifting competition in August 2017. Patient does relate a clicking in the right shoulder. Relates this has been ongoing for about 6 months now.

The claimant reported an inability to throw, lay on his arm, or do certain exercises. He also reported occasional right shoulder swelling after activity. X-rays of the claimant's right shoulder were obtained, and the claimant was diagnosed as suffering from right shoulder capsulitis. The claimant was instructed on home exercises.

The claimant was seen later the same day for a health maintenance examination at Front Royal Family Practice. The claimant reported feeling well with a minor complaint of right shoulder pain. The claimant's musculoskeletal review of systems was positive for right shoulder pain with the notation that the claimant was evaluated and followed by an orthopedist. When seen for a physical on October 19, 2017, the claimant reported feeling well with no complaints. During a review of systems, the claimant reported mild joint pain. It was noted that the claimant was a competitive weightlifter.

The claimant was seen at Valley Health Employer Health of Front Royal on March 1, 2021 for pain in his right shoulder. “Patient stated that when he was completing 2 weeks of very physical defensive tactics training that involved free falling, being handcuffed in prone position, and fighting techniques, his right shoulder was very painful after punching bag drill and push-ups.

The following history was obtained from the claimant:

Pt is completing defensive tactics training over the past 2 weeks. Pt was handcuffed with his arms behind and then had to perform push ups and a punching drill. Pt injured the right shoulder x 3 days ago. Patient states that shoulder really started to bother him after they had performed drills that morning and then rested only cooldown and he then had to stand and go to the punching bag when he started punching he had a pain to the front of the right shoulder. Patient states that at rest he has no pain but if he lifts the arm out to his side and then dips to him below the level of the shoulder he is able to cause a discomfort to that shoulder. Patient also noticed pain to the front of the shoulder if he lifts a stack of chairs. Patient denies previous injury to that right shoulder. Patient stated that he begin to tell that this feels more like a discomfort but does not believe that he had had any injury. Patient states that he knows his body and in 2 weeks he sure [sic] he will be healed. Patient states that starting tomorrow defensive tactics training is going to slow down and the one test that he has tomorrow he can perform left-handed and that will be a non-issue for him.

The context/mechanism of injury was noted as “struck an object.” On examination, the claimant reported discomfort to his anterior right shoulder with internal rotation and abduction above shoulder height. There was a full range of motion and 5/5 strength throughout. The claimant was diagnosed with an unspecified injury of the right shoulder and upper arm. The claimant was given restrictions of no overhead work, and instruction that the claimant should be allowed to stop an activity that worsens his right shoulder pain.

The claimant returned to Valley Health Employer Health on March 12, 2021, and reported that his pain had not resolved. The claimant added the following:

Patient states that he has pain with pressing off with the right arm such as getting out of bed in the morning or doing a push-up against the wall. Patient also notes

pain with internal or external rotation. Patient states that at rest he does not have pain but it is there with movement. Patient notes that he picked up his 20 pound grandson the other day and noticed that it was uncomfortable to do so. Patient states today that the initial injury occurred while he was in the dojo and fell in a plank position with his forearm in front of him and his opponent dropped on his back and he had a sudden pop to the right shoulder. Patient states that his pain has been there since then.

Physical therapy was prescribed, two times per week for six weeks. Lifting, pulling, and pushing restrictions of up to 15 pounds were added to the claimant's right shoulder restrictions.

The claimant was seen at Front Royal Family Practice on March 17, 2021, for right shoulder stiffness. The claimant reported a right shoulder injury occurring on February 26, 2021 and sought completion of employer paperwork for a return to work clearance. The claimant complained of tightness, but no immobility or range of motion issues. On examination, the claimant was found to have mild restriction of right shoulder abduction compared to the left. He was cleared for light duty.

The claimant returned to Front Royal Family Practice on April 9, 2021. He stated that he suffered a right shoulder injury in February of 2021 during training accompanied by significant pain. The claimant also reported that he had been following an exercise regimen and noticed decreased range of motion and strength in his right shoulder. He stated that he was unable to bench press over 100 pounds at that the time of his visit due to his shoulder injury. The claimant asked about getting an MRI. It was noted that the claimant's physical examination suggested the possibility of rotator cuff pathology and glenohumeral joint involvement. The claimant was referred to Dr. Erik Mitchell for further evaluation.

The claimant was seen by Dr. Mitchell on May 7, 2021. According to the office notes, the claimant reported injuring his shoulder on "April 26, 2021" followed by difficulty with performing

overhead activities. The claimant described aching and intermittent sharp pain. Following x-rays and an examination of the claimant's right shoulder, Dr. Mitchell diagnosed right shoulder pain of an unspecified chronicity and impingement syndrome. The claimant received a subacromial injection with 40mg of Medrol and was told to return in one month if symptoms persisted.

The claimant returned to see Dr. Mitchell on June 4, 2021, reporting continued difficulty with overhead activity. He stated that he had occasional pain radiating down the lateral portion of his arm. Dr. Mitchell recommended an MRI.

The claimant's June 11, 2021 MRI was interpreted as showing a high-grade partial thickness tear along the supraspinatus insertion, superimposed on moderately severe tendinosis. A nondisplaced posterior labral tear extending to the posterior margin on the biceps anchor was also noted along with bicipital tendinosis and tearing along the bicipital groove, and moderate degenerative changes at the acromioclavicular joint.

On June 14, 2021, Dr. Mitchell diagnosed tendinopathy of the right rotator cuff, a partial nontraumatic tear of the right rotator cuff, a superior glenoid labrum lesion, and tendinopathy of the right biceps tendon. After discussion of the MRI results with Dr. Mitchell, the claimant stated that he would like to consider surgery sometime after the summer and would follow up in the fall for further recommendations and clinical evaluation.

The claimant returned to see Dr. Mitchell on February 9, 2022. The claimant complained of pain and difficulty with overhead activities. Dr. Mitchell noted that the claimant had failed conservative treatment including activity modification, an exercise program, and injections. He recommended arthroscopic right rotator cuff repair, subacromial decompression, and biceps tenotomy.

The claimant was seen by Dr. Mitchell on April 6, 2022 for a preoperative visit. The claimant again complained of right shoulder pain. Dr. Mitchell wrote, “[t]he patient states his pain is affecting his activities of daily living and is affecting his vocation.” The claimant underwent surgery on April 28, 2022.

The claimant saw Dr. Mitchell for a wound check and suture removal on May 9, 2022. On June 10, 2022, the claimant complained of 1/10 pain and was noted to be compliant with his sling and physical therapy. On July 15, 2022, the claimant was found to be making slow gains in his range of motion.

The claimant was seen in follow up on August 15, 2022 and reported anterior shoulder pain. Dr. Mitchell felt that the claimant’s pain was coming from the biceps region and recommended dry needling at this area. On September 14, 2022, the claimant reported some relief with dry needling. The claimant was provided with a Medrol Dosepak. On October 12, 2022, it was noted that the claimant had improved strength and range of motion during physical therapy.

FINDINGS OF FACT AND RULINGS OF LAW

We have reviewed the entirety of the record evidence. We recite only those portions necessary to explain our decision.

In light of our reservations about the claimant’s credibility as detailed below, inconsistencies that we find within the record, and a lack of clear medical opinion on the issue of causation, we conclude that the claimant has failed to carry his burden of proving a compensable injury by accident on February 16, 2021, arising out of and in the course of his employment.

We begin by noting that the burden is on the claimant to prove by a preponderance of the evidence that he sustained a compensable injury.” *Va. Dep’t of Transp. v. Mosebrook*, 13 Va. App.

536, 537 (1992) (citing *Woody v. Mark Winkler Mgmt., Inc.*, 1 Va. App. 147, 150 (1985)). For an injury to be compensable under the Workers' Compensation Act, the claimant must prove by a preponderance of the evidence that: (1) he sustained an injury that was caused by an accident; (2) that the injury was sustained in the course of his employment; and (3) that the injury arose out of his employment. *The Southland Corp. v. Parson*, 1 Va. App. 281, 283-84, (1985). It is therefore the Commission's task to evaluate the credibility and weight of the presented evidence to determine whether it is sufficient for us to find that the claimant has met this burden. *Amelia Sand Co. v. Ellyson*, 43 Va. App. 406, 413 (2004).

Having carefully observed the claimant during the course of the January 13, 2023 hearing and having considered both his hearing testimony, and the testimony from his November 30, 2022 deposition, we find the claimant to be a less than candid and credible witness. We reach this conclusion for the following reasons.

At the heart of the claimant's claim is his contention that he suffered an acute injury to his right shoulder during defensive tactics training on February 16, 2021. The claimant contends that he felt a "pop" in his right shoulder when another academy student fell onto of his back, resulting in immediate pain within his right shoulder and radiating pain down his right arm. The claimant testified that after his injury, he got up slowly and shook his right arm. He felt that his "central nervous system" was hurt and decided to sit out a rotation of defensive tactics drills.

Despite the apparent significance of his right shoulder and arm pain, and his belief that his "central nervous system" was hurt during his training on February 16, 2021, the claimant failed to timely report his injury as required by the criminal justice academy. The academy where the claimant claims he was injured is the same academy where the claimant had previously worked as

an instructor. He was thus presumably aware of the academy's reporting requirements. Not only was the claimant aware of the academy's injury reporting requirements from his prior employment, we find that he also received specific instruction regarding the requirement for reporting injuries from academy staff, both verbally and in writing, upon commencing his academy training in January of 2021.⁴

In an attempt to explain the failure to timely report his alleged February 16, 2021 injury, the claimant testified that he felt that he was merely "hurt", and not "injured", stating that his pain was a natural part of his training. The claimant also testified that he is not required to report every pain or hurt, yet a review of the claimant's Individual Injury Status report from January 14, 2021, reveals that the claimant reported that he experienced some mid-back spasms during a training run, as well as a "popping" noise emanating from the lower right side of his ribcage. Similarly, on January 21, 2021, the claimant reported a severely sore right quadriceps from physical training conducted on January 20, 2021.

The claimant's testimony indicates that he continued to experience pain and discomfort in his right shoulder and arm from February 16, 2021 through February 26, 2021, requiring that he alter his participation in drills due to his pain and discomfort. During this eleven-day period, the claimant failed to verbally report his injury to academy staff, and failed to indicate on his Individual Injury Status report that he was injured.

On or about March 1, 2021, the claimant altered his Injury Status report entries for February 19, 2021, and February 26, 2021, changing his prior "no" entries for these dates to "yes". The

⁴ The Individual Injury Status report form that was provided to the claimant for his use states in part, "It is a student's responsibility to notify Program Coordinator, or other designated CIC, of any type of injury sustained ASAP."

claimant added additional information to the report form stating that he injured his “right shoulder socket (possible labrum tear)⁵ during DT practicals, afternoon drill hitting bags, and “up/down Sally” push-ups” on February 26, 2021. No mention was made of any injury occurring on February 16, 2021, as is now being alleged by the claimant, and no alteration was made to his “no” entry for February 16, 2021. The claimant also testified that, during his March 1, 2021 conversation with Jay Roy, in which he went into “grave detail” about his injury sustained during training, he told Roy, “that I actually was injured on the 26th.”

When seen at Valley Health Employer Health on March 1, 2021, the claimant again reported that he sustained injury while performing various drills on February 26, 2021. He denied any previous injury to his right shoulder. No mention was made of an injury occurring on February 16, 2021.

Also notably absent from the March 1, 2021 Valley Health Employer Health progress note, and all of the subsequent medical reports, is any mention of the claimant’s November 11, 2016 evaluation at Warren Memorial Outpatient Center in which the claimant was seen for reports of a six-month history of right shoulder pain and occasional swelling after activity. During the November 11, 2016 visit, the claimant reported a decreased range of motion, night pain, and locking and catching. He was prescribed home exercises for his shoulder. When asked directly about these November 2016 complaints of right shoulder pain, the claimant testified that he spoke to his doctor about pain he was experiencing “in his joints”. When asked if he was being followed by an orthopedist for his right shoulder pain as was documented in the November 11, 2016 progress

⁵ The record evidence indicates that the claimant had yet to be seen by a physician regarding his right shoulder and arm pain at the time he wrote that he had possibly suffered a labrum tear.

note of Front Royal Family Practice, the claimant testified, “I’m not sure what you are saying, what’s an orthopedic doctor?”

When the claimant was initially seen by Dr. Erik Mitchell on May 7, 2021 for evaluation of his right shoulder pain, Dr. Mitchell diagnosed the claimant as suffering from right shoulder pain of an unspecified chronicity and impingement syndrome. Following an MRI of the claimant’s right shoulder, Dr. Mitchell’s diagnoses included a “nontraumatic tear of the right rotator cuff.”

The claimant testified that following his February 2021 right shoulder injury, he was given restrictions that included no lifting overhead, no push-ups, pull-ups, or things that would hurt his shoulder, “so anything that would involve those types of movements.” The claimant testified at this deposition that he greatly limited his lifestyle following his injury, stating that his life changed dramatically, and that, “there’s a lot of things I don’t do”, adding, “I’m very sedentary.” The claimant also testified that he was relegated to being a “cheerleader” at a heroes challenge fitness event, stating “little things like that, I can’t even do that.”

Despite the claimant’s testimony that his physical activities were severely limited as the result of his right shoulder injury, the submitted evidence documents that the claimant participated in at least two weightlifting competitions after his February 2021 injury, the second competition taking place only two days after the claimant’s April 6, 2022 visit with Dr. Mitchell.⁶ During the April 6, 2022 visit, the claimant complained of ongoing right shoulder pain and Dr. Mitchell recommended arthroscopic surgery.

⁶ The claimant competed in squat, bench, and deadlift portions of the April 8, 2022 competition, finishing with a rank of 9th out of 48 competitors.

We find that the claimant's November 30, 2022 deposition testimony in which he denied of participation in any weightlifting events following his February 2021 work injury to be highly concerning. When asked at the evidentiary hearing about his documented participation in these events considering his prior deposition testimony, the claimant offered a lengthy response in what we find to be an unconvincing attempt to somehow differentiate his participation at these events, from the process of training for a competition. Ultimately, confronted with his specific deposition testimony denials, the claimant then stated that he experienced hearing difficulties at his deposition.

We find the questions presented at the claimant's deposition, and his responses to those questions, to be unequivocal. We find nothing to suggest that the claimant was confused by their content, or that he was unable to fully hear the questions presented. The claimant clearly denied any such participation in competitive events, and asserted an inability to perform the very same weightlifting exercises that we now know he performed in competition. Claimant's denials, and his unavailing attempt to explain these inconsistencies at the evidentiary hearing, lead us to further question the claimant's veracity as a witness.

At most, we find that the greater weight of the record evidence supports the conclusion that the claimant experienced an onset of right shoulder pain and discomfort over the course of his two weeks of engaging in defensive tactics training and that any condition of the claimant's right arm and shoulder was the result of the cumulative trauma associated with the varying drills and tasks the claimant was required to perform.⁷ It is well-settled that Injuries that are a result of repetitive

⁷ In response to a June 11, 2021 MRI Symptoms Questionnaire, the claimant wrote that his condition was due to "repeated falling and twisting movements" associated with his defensive tactics training.

motion or cumulative trauma are not compensable under the Virginia Workers' Compensation Act even if the problem occurred at work. *See Stenrich Grp. v. Jemmott*, 251 Va. 186, (1996).

Given our reservations concerning the claimant's credibility, inconsistencies in the reported dates of alleged injury, Dr. Mitchell's diagnosis of a nontraumatic rotator cuff tear, the lack of any opinion from Dr. Mitchell that the claimant's right shoulder condition is causally related to the February 16, 2021 incident described by the claimant, the claimant's failure to mention his prior history of right shoulder pain during the course of his medical treatment, and the claimant's failure to timely report his alleged injury, we conclude that the claimant has failed to carry his burden of providing a compensable injury by accident on February 16, 2021, arising out of and in the course of his employment.

The claimant's April 3, 2021 claim, as amended, is therefore DENIED.

This case is ORDERED removed from the hearing docket.

REVIEW

Any party may appeal this decision to the Full Commission by filing a Request for Review with the Commission within thirty (30) days of the date of this Opinion.