

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H203317**

MARK AUSBROOKS, EMPLOYEE

CLAIMANT

LEXICON, INC., EMPLOYER

RESPONDENT

**TRISTAR CLAIMS MANAGEMENT SERVICES, INC.,
CARRIER/ TPA**

RESPONDENT

OPINION FILED JUNE 6, 2023

Hearing before Administrative Law Judge Steven Porch on May 4, 2023, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Melissa Wood, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on Wednesday, March 1, 2023. The claimant was represented by Mr. Gary Davis, Attorney-at-Law of Little Rock, Arkansas, respondents were represented by Ms. Melissa Wood, Attorney-at-Law of Little Rock, Arkansas. The parties submitted prehearing information filings prior to this conference.

STIPULATIONS

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. An employer/employee relationship existed on March 24, 2022, when the claimant sustained a compensable injury.

ISSUES

By agreement of the parties, the issue to be presented at the hearing is as follows:

1. Temporary total disability (TTD)

CONTENTIONS

The claimant's and respondents' contentions are set out in their respective response to the Prehearing Questionnaire. Said contentions are as follows:

Claimant: Claimant contends that he sustained compensable injuries to his right leg, ankle, and foot on March 24, 2022. Claimant further contends that he is entitled to payment of temporary total disability (TTD) benefits for the period of March 24, 2022, through a date yet to be determined. That payment of these benefits has been controverted for purposes of attorney's fees. Claimant also contends that he is entitled to payment of medical treatment for December 6, 2022, surgery.

Respondent: Respondents contend that all appropriate benefits are being paid regarding this matter. The claim has been accepted at this time as medical only. Respondents provided light duty for claimant and would have continued to do so but for his termination on April 8, 2022, for cause. Respondents further contend that the surgery performed by Dr. Head was not reasonable and necessary associated with the March 24, 2022, injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits for the following periods: April 7, 2022, to a date to be determined.
4. Claimant's December 6, 2022, ankle surgery is directly related to his March 24, 2022, injury and shall be paid by the Respondents.
5. Claimant has proven by a preponderance of the evidence that his attorney is entitled to a controverted attorney fee on his temporary total disability benefits that have been awarded herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012).

CASE IN CHIEF

Summary of Evidence

The witnesses were Mark Ausbrooks (Claimant), Joe Minton, Kember Farnam, Steve Bineen, and Renay Bonds. Along with the Prehearing Order discussed above, the

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exhibits admitted into evidence in this case were a compilation of Claimant's medical records, non-medical documents, and all other documents admitted properly before the Commission. I have blue-backed to the record the post-hearing briefs of Claimant and Respondents, filed on May 12, 2023, and May 15, 2023, respectively.

Adjudication

A. Temporary Total Disability

Introduction. Claimant, who was employed by Lexicon Holding Company as a construction worker, sustained a compensable injury to his right ankle (diagnosed achilles rupture) on March 24, 2022. Respondents accepted this injury as compensable and paid workers' compensation benefits pursuant thereto, including medical benefits. In this proceeding, Claimant is seeking, among other things, temporary total disability benefits. Respondents dispute his entitlement to them.

Standards. An employee who suffers a compensable scheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Also, a claimant must demonstrate that the disability lasted more than seven days. *Id.* § 11-9-501(a)(1). Claimant must also prove his entitlement to temporary total disability benefits by a preponderance of the evidence. Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012). This standard means the evidence

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having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

Evidence. Claimant, who is a 51-year-old mechanic, came down off a ladder and stepped wrong causing injury to the right ankle. The Respondents treated this claim as a compensable injury. The Respondents placed Claimant on light duty. The nurse for the Respondents' company later allowed Claimant to return to his HVAC construction site work. Claimant was fired 3 days later. Respondents testified that Claimant was terminated for cause due to tardiness and job performance. However, according to Joe Minton, Claimant's direct supervisor, Respondent did not follow its own policies and procedures when terminating Claimant's employment. Claimant's employment should have been terminated only after a verbal warning followed by a written warning then termination. The respondents did not engage in any of these pre-termination procedures

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when dealing with Claimant. Rather Claimant asked his direct supervisor, Joe Minton, about his future with the company and in return Claimant was immediately terminated.

The Respondents' reasonings for the quick termination of Claimant was that Claimant had poor job performance and tardiness. The Respondents made clear that job performance and tardiness had always been a problem with Claimant pre-accident. This is a concerning fact that Respondents retained a poor performing employee where others had to constantly correct his work to firing the employee approximately two weeks later.¹

Discussion. Claimant has argued that he is entitled to temporary total disability benefits from March 24, 2022, to a date to be determined. Respondents argue in the negative due to Claimant's termination for cause from his employment. I disagree with Respondents' logic.

In *Tyson Poultry Co. v. Narvaiz*, 2012 Ark. 118, 388 S.W.3d 16, which controls here, the claimant suffered a compensable left shoulder injury—which is an unscheduled injury. He returned to work at light duty. After doing so, he was suspended and ultimately terminated for calling his supervisor “an insulting, derogatory, and vulgar name.” The respondent argued that their liability for temporary total disability benefits ended following his firing. The Arkansas Supreme Court described its argument as follows:

Appellant [the respondent] asserts that there is not substantial evidence to support the Commission's finding that Appellee [the claimant] proved he was entitled to temporary-total-disability benefits. Because Appellee was

¹ Claimant has not asked the Commission to address whether this claim involved retaliation by Respondent and subject to penalties pursuant to Ark. Code Ann. § 11-9-107.

performing light-duty work at the time his employment was terminated, and because Appellant offered testimony that Appellant would have continued to make the light-duty work available to Appellee absent his misconduct, Appellant contends that Appellee did not meet his burden of proving that he was totally incapacitated from earning gainful wages due to his compensable injury. Any incapacity from earning wages, argues Appellant, stemmed from Appellee's misconduct and not from his injury.

Narvaiz, supra.

The appellant in *Narvaiz* used this position to argue further that the appellee's termination for misconduct amounted to an abridgement of Ark. Code Ann. § 11-9-526 (Repl. 2012), which provides:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

While Respondents here have not raised § 11-9-526, that is a "distinction without a difference." They are asserting, as was done in *Narvaiz*, that (1) Claimant was released to light duty; (2) they had work available for Claimant; and (3) but for Claimant's termination, he would have been working there in that capacity during the period for which he is seeking temporary total disability benefits.

But the Arkansas Supreme Court expressly rejected this argument, reasoning:

[T]he misconduct and insubordination [by the appellant/claimant] are just that, misconduct and insubordination, and nothing more. After committing the misconduct and suffering the suspension, Appellee returned to work. **It was then Appellant's option to terminate his employment or allow him to continue working light duty.** Regardless of Appellant's choice, Appellee was still within his healing period.

Narvaiz, supra. (Emphasis added) See also *Packers Sanitation Svcs. v. Quintanilla*, 2017 Ark. App. 213, 518 S.W.3d 701; *Superior Indus. v. Thomaston*, 72 Ark. App. 7, 32

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S.W.3d 52 (2000). Claimant in this case, as Joe Minton testified, engaged in conduct that led to his termination, such as poor job performance and tardiness. Mr. Minton also testified that if Claimant had not approached him that day asking about his future, he would still be working. Respondents cite the *Roark* case as controlling in this matter. However, the issue here is different than the situation in *Roark v. Pocahontas Nursing & Rehab.*, 95 Ark. App. 176, 235 S.W.3d 527 (2006), where the firing was for violation of the employer's attendance policy, which provided for immediate termination. There, the Arkansas Court of Appeals found that the claimant could not establish entitlement to temporary total disability benefits following the termination. In this matter, Claimant's direct supervisor, Joe Minton, clearly had the discretion concerning whether to terminate Claimant; nothing in evidence shows that he engaged in conduct that made termination automatic or virtually so.

B. Additional Medical Treatment

Introduction. The Claimant was terminated from his job on April 8, 2022. Respondents stopped paying benefits to the Claimant after his termination. The Respondents view Claimant's surgery as additional medical treatment for a pre-existing condition. Respondents tried to piece together Claimant's medical history on his ankle injury by reviewing MRIs from April 21, 2022, and August 1, 2022. The Respondents put forward the opinion of Dr. Justin Long, Radiologist, for the proposition that the MRI exams suggest that the surgery would be treating the continued tendinopathy and reducing the risk for recurrent tear. The purpose of Dr. Long's opinion is to show a pre-existing injury on the part of the claimant.

Standards. A pre-existing infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the infirmity to produce the disability for which compensation is sought. *St. Vincent Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). “An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury.” *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000); *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). This includes the prerequisite that the alleged injury be shown by medical evidence supported by objective findings. *See Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). These standards are not applicable here.

Discussion. A claimant may be entitled to additional treatment after the healing period has ended if it is geared toward management of the compensable injury. *Santillan v. Tyson Sales & Distribution*, 2011 Ark. App. 634 (2011). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Johnson v. Pat Salmon & Sons, Inc.* 2011 Ark. App. 48 (2011). The question of when the healing period has ended is a factual determination for the Commission. *Id.* No healing period has been established nor a maximum medical improvement rate has been assigned to the Claimant. I do find by the preponderance of the evidence that Claimant’s injury was continuous and without interruption from the date of the compensable injury until his surgery and beyond, to a date to be determined. I further find that Claimant’s compensable injury was a prime factor in Claimant’s need for surgery.

With that expressed, and out of thoroughness, I do find the change of physician rules do not apply in this matter. No evidence has been presented showing that Claimant received the required notice that would trigger these rules. *Arkansas Code Annotated* §11-9-514.

Attorney Fees. Claimant has asserted that he is entitled to a controverted attorney's fee in this matter. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). In this case, the fee would be 25 percent (25%) of any indemnity benefits awarded herein, one-half of which would be paid by Claimant and one-half to be paid by Respondents in accordance with *See Ark. Code Ann. § 11-9-715* (Repl. 2012). *See Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

Discussion. The evidence before me shows that Respondents have controverted Claimant's entitlement to temporary total disability benefits that were awarded herein. Thus, the evidence preponderates that his counsel is entitled to the fee as set out above.

CONCLUSION AND AWARD

Respondents are hereby directed to pay/furnish benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to *Ark. Code Ann. § 11-9-809* (Repl. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

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Claimant's attorney is entitled to a 25 percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012).

IT IS SO ORDERED.

Hon. Steven Porch
Administrative Law Judge