BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
AWCC FILE № G501118

LETTIE I. CURTIS, EMPLOYEE	**CLAIMANT**
DILLARDS, INC., EMPLOYER	**RESPONDENT**
SAFETY NATIONAL CASUALTY CORP./ GALLAGHER BASSETT SERVICES, INC., CARRIER/TPA	**RESPONDENT**

OPINION FILED 3 JULY 2024

Heard before Arkansas Workers' Compensation Commission (AWCC) Administrative Law Judge JayO. Howe on 3 April 2024 in Little Rock, Arkansas.

The claimant appeared *pro se*.

Mr. Rick Behring, of Newkirk & Jones Law Firm, appeared for the respondents.

I. STATEMENT OF THE CASE

The above-captioned case was heard on 3 April 2024 in Little Rock, Arkansas, after the parties participated in a pre-hearing telephone conference on 30 January 2023. A Prehearing Order, admitted to the record without objection as Commission's Exhibit № 1, was entered on the same day as the conference. The Order stated that the ISSUE TO BE LITIGATED was whether the claimant was entitled to additional benefits for her accepted foot injury of 13 February 2015. Namely, she sought temporary total disability (TTD) benefits for three different time periods:[1] from April to October in 2023; from 20 November 2023 to 31 January 2024; and from 31 January 2024 to a date yet to be determined.

The parties' CONTENTIONS, as set forth in their Prehearing Questionnaire Responses, were incorporated into the Prehearing Order.

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[1] See TR at 14 to 15 for the claimant's clarification on the timeframes during which she seeks TTD benefits.

Per the claimants CONTENTIONS, she is entitled to time loss reimbursement for a lack of reasonable accommodations at different times during her employment. She contends that she should be reimbursed via an award of TTD benefits for those times.

Per the respondents' CONTENTIONS, the claimant has been paid all benefits to which she is entitled. Her claim was accepted as compensable, and whether they provided reasonable and necessary medical treatment is not at issue. Permanent partial disability (PPD) benefits and TTD benefits have been paid. Specific to her contention that she is entitled to additional TTD benefits, they further contend that the claimant was released at maximum medical improvement (MMI) on 20 January 2016. She was, thereafter, offered work within her permanent work restrictions. They contend that even if she was within a healing period during the time she seeks benefits, they are not liable for the same under ACA § 11-9-526. Finally, the respondents reserve the right to seek a credit or offset for any benefits sought by the claimant in an Equal Employment Opportunity Commission (EEOC).

That Order also set forth the following STIPULATIONS:

1. The AWCC has jurisdiction over this claim.

2. An employee/employer/carrier relationship existed on or about 13 February 2015 when the claimant sustained injuries to her right shoulder and right foot as the result of a specific incident.

3. The respondents accepted the claim as compensable and began paying benefits associated with her accepted injuries.

4. The respondents accepted and paid permanent anatomical impairment ratings assigned to the claimant's right shoulder at seven percent (7%) of the body as a whole and the right foot at seventy-four percent (74%).

5. The claimant earned an average weekly wage of $524.17, entitling her to a TTD rate of $350 and a PPD rate of $263.

6. The claimant continued her employment with the respondent up to the date of her 31 January 2024 resignation.[2]

The following WITNESSES testified at the hearing:

The claimant testified on her own behalf and called Ms. Rachel Angelica Curtis; while the respondents called Mr. Marty Martin.

The EVIDENCE presented consisted of the testimony along with Commission's Exhibit № 1 (the 5 December 2023 Prehearing Order), Claimant's Exhibit №s 1 (38 pages of medical and non-medical records), 2 (one page form for work restrictions), 3 (six pages of medical records), 4 (seven pages of medical records), 5 (one page of printed photos), 6 (six pages of medical records), and 7 (ten pages of FMLA forms); and Respondents' Exhibit №s 1 (one index page and a subsequent thirty-two pages of medical records) and 2 (one index page and a subsequent twenty pages of non-medical records).

Post-hearing briefs were submitted by both parties and have been blue-backed to this Opinion.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record as a whole and having heard testimony from the witnesses, observing their demeanor, I make the following findings of fact and conclusions of law under ACA § 11-9-704:

1. The AWCC has jurisdiction over this claim.
2. The previously noted stipulations are accepted as fact.
3. The claimant failed to prove by a preponderance of the evidence that she is entitled to any additional TTD benefits.

III. HEARING TESTIMONY & MEDICAL EVIDENCE

Claimant Lettie Curtis

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[2] See TR at 13 to 14.

The claimant began working for Dillard's in 2012 as a picker in their fulfillment center for online orders. She suffered a workplace injury on 13 February 2015 when she accidentally stepped from an elevated cherry picker platform and briefly caught herself before dropping down to the floor. As a result of that fall, the claimant suffered injuries to her right foot and right shoulder, and the respondents provided medical treatment accordingly. Her claims in this litigation are only related to the compensable injury to her foot.

After undergoing surgery and other treatments, the claimant was returned to work with restrictions on 18 June 2015; and "from 2015 to 2022, everything was fine." [TR at 47.] Dr. Ruth Thomas placed the claimant at MMI related to her foot injury on 20 January 2016, with permanent light duty restrictions and a permanent impairment rating. [Resp. Ex. № 1.] The claimant testified that after her return to work, she was given a permanent job in the returns department, and that, "our department sometimes run out of work or the truck don't bring much, and it don't show up. When that happens, we're sent out to other departments to do work, so we won't have to go home and [can] still get paid." [TR at 47.] After her regular work was completed, she would often put together boxes or clean up.

The claimant testified that at some point she was assigned to do "recon" after her primary work assignments were completed. She described recon as inventory work, scanning barcodes on merchandise. She testified that she did not have a problem using a rolling chair to scoot along and scan the merchandise, but eventually had some trouble with production after a quota of scans per hour was raised. The claimant discussed this with Dr. Robert Martin, who wrote a letter stating, among other things, that she remained at MMI, that her work should be "mostly sedentary duty," and that he recommended her scan quota to be no more than "150 per hour when sent to an alternate area." [Cl. Ex. № 4.]

In August of 2023, the claimant developed an open wound on her foot that she described as making the recon work more difficult. She said that if she could not make boxes or do cleaning for alternate work, she would go home instead. [TR at 83.] The claimant stated that after 20 November 2023, she started calling in sick rather than going into work and possibly being assigned to recon if she finished her primary work. [TR at 94.] She said that she was given the option to change shifts to a time with more primary work, but that she was not being helped by an advocate, so "[she] was just going to sit at home. And so – and just let [her] foot heal." [TR at 95.] She also testified that she was offered a wheelchair to use at work, but said that she could not roll it on her own and that she would need an electric wheelchair instead. [TR at 96.] She acknowledged, however, that no physician had ordered a wheelchair and that, instead, it was offered to her by Marty Martin, one of her managers. [TR at 98.]

After the claimant began missing more work towards the end of 2023, she had her primary care physician Dr. Brian Mason fill out some paperwork to support a change from intermittent Family Medical Leave Act (FMLA) leave to continuous FMLA leave. [TR at 101.] She explained that she is seeking TTD between 20 November 2023 and 31 January 2024 because of the dates provided by Dr. Mason on those forms. [Cl. Ex. № 7.] The claimant stated that she saw her supervisor Marty Martin when she was turning in her FMLA papers on 21 December 2023 and that he asked when she planned to return to work. She responded that she would be back on January 31st. [TR at 104.]

At some point after submitting her FMLA papers, the claimant ran into some coworkers out at lunch and spoke with one of them on the phone afterwards. [TR at 104-105.] After that encounter, she "decided that I'm – I'm not going to return to Dillard's, because of a hostile work environment." [TR at 106.]

On cross examination, the claimant acknowledged that the respondents continued to pay for her medical treatment after she returned to work in 2015. [TR at 114.] She also acknowledged that the respondents paid for the permanent impairment ratings for her shoulder and foot injuries and that she received no permanent restrictions associated with her shoulder injury. [TR at 116 to 117.] The claimant agreed that her job working in returns for Dillard's was within her restrictions and that she was offered a change in her shift time. [TR at 119 to 120.] When her work handling returns was complete, she felt like putting together boxes or putting labels on boxes was within her restrictions.

The claimant confirmed that, at least by November of 2023, she knew that she would not be responsible for any scanning quotas when working recon after her return work was completed. She also confirmed that she was allowed to use a rolling chair and stool in the recon area and that she liked being able to do cleaning work from her chair and stool. [TR at 122.]

Discussing the wound that she developed in August of 2023, the claimant stated that she was diagnosed with a bacterial infection and did not know whether it happened at work. [TR at 127 to 128.] The claimant acknowledged that Dr. Mason completed her FMLA papers because of the wound on her foot.

> Q: This was a period of time where you were having even an extra bit of trouble, because of the wound you were having on your foot, is that correct?
> A: Yes. Yes.
> Q: And that's what you told Dr. Mason, is that correct?
> A: Yeah, yes.
> Q: At least that's what is reflected in the reports, is that correct?
> A: Yes.
> Q: And that's the reason that you had gotten the FMLA reports from Dr. Mason. It was this wound that you had on your foot, is that correct?
> A: Yes.
> Q: All right. Thank you. And you had mentioned something and I just want to show you Respondents' Exhibit 1 at page 29 is from November of 2023, and at least according to his report, Dr. Martin says the wound is completely healed?
> A: Yes. I explained in my –

Q: Okay.

[TR at 132.]

The claimant took issue with the medical records stating that she was at MMI and had not reentered a healing period since she was placed at MMI. “They put me at maximum medical improvement, because I – I didn’t want to do surgery at the time.” But she acknowledged that while some surgical intervention(s) might have remained an option for her foot, she remained at MMI and outside of a healing period until such a time as she chose to pursue a surgical course. [TR at 138 to 139.] She pointed to Dr. Thomas’ statement that, “If she elects a change in medical or surgical management, this MMI would likely change.” as support for her opinion that her care was ongoing. [TR at 141.] “I’ve been going to the doctor for the past nine years, because I need orthotic inserts every single year; so that’s why I didn’t want to close—close my claim, because I need them to pay for it.” [TR at 142.]

Claimant’s Witness Ms. Rachel Curtis

The witness began her testimony be acknowledging that she was the claimant’s daughter, but also that she worked at the respondent-employer’s fulfillment center between 2017 and 2021. [TR at 146.] She also worked in the returns department and testified that the department had box preparation machines that could not always “keep up” with the workflow of boxes. The witness further testified that returns department employees could be sent into other areas when their assigned work was complete. She did not see the claimant working in recon after her shift work. [TR at 147 to 149.] She further testified that she witnessed the claimant in pain at times following her workplace accident and that at times the claimant had trouble with her mobility.

On a brief cross examination, the witness acknowledged that she had no personal knowledge about the workplace after leaving the respondent’s employ in 2021. [TR at 156.]

Respondents' Witness Mr. Marty Martin

Mr. Martin testified that he had worked for Dillard's for thirty-two years and that he was the general manager of the fulfillment center where the claimant had worked during the entire course of her employment. [TR at 158.] He stated that after the claimant's return to work, the respondents made accommodations to comply with her restrictions, including providing a desk, rolling chair, and a stool to help elevate her foot. [TR at 159.] Mr. Martin explained that when the claimant first complained about working in recon after her primary job duties, she was offered a change in her shift time to better align her working hours with the times that the returns usually arrived. She refused the shift reassignment.

Regarding the boxes the claimant preferred to work with, the witness testified that in 2021 the facility installed more box machines and streamlined the manual work input for box sizes that did not work with the machines. He agreed with Rachel Curtis' testimony that there were times prior to 2021 that the older machines had trouble managing the number of boxes needing to be processed. But he stated that since the machinery changes and additions in 2021, that was no longer accurate. [TR at 161.]

Mr. Martin testified that the claimant's restrictions were accommodated both in her primary job duties and when she was occasioned to work in recon, stating that recon is not ordinarily a sit-down job, but that she was allowed to work from her chair. He further explained that when the claimant complained about the scanning quotas changing in recon, he had a discussion with her and advised that she would not be held to the higher production standards. [TR at 163.] He confirmed that when work loads were low, employees could go home without penalty or use vacation time.

Had the claimant not voluntarily resigned from her position, her job would still be available to her and her accommodations would still be in place, he said. [TR at 164.] Mr.

Martin also said that he ordered a wheelchair with an attachment to elevate her leg, without the claimant requesting it, simply because he thought that it might be helpful to her. [TR at 165.] He testified that the clerical positions in the facility were not "just a desk job" and that those jobs would also require accommodation for someone with the claimant's restrictions. [TR at 167.]

Medical Records

On 20 January 2016, Dr. Ruth Thomas found the following:

> Based on examination and interview today Mrs. Curtis has reached Maximum Medical Improvement in reference to her right calcaneus fracture. If she elects a change in medical or surgical management this MMI would likely change.

[Resp. Ex. № 1 at 3.]

On 30 March 2023, the claimant saw Dr. Martin for a follow-up appointment, and he noted that her status remained unchanged and that she still did not have any interest in surgical intervention. [Resp. Ex. № 1 at 11.]

A 21 April 2023 note reflects her report of trouble with quotas at work and suggests limiting her quota to 150 per hour. It also stated that she remained at maximum medical improvement. [Resp. Ex. № 1 at 19.]

She saw Dr. Martin again on 17 August 2023 for a wound on her ankle. She denied any recent injury or causal event. He made no changes to her work restrictions because of the wound. [Resp. Ex. № 1 at 20, 23.]

Dr. Martin checked the wound again on 24 August 2023 and made no change to her work restrictions. [Resp. Ex. № 1 at 26.]

A follow-up in October noted significant healing, made no change to her work status, and set her for another appointment in one month. [Resp. Ex. № 1 at 28.]

The claimant saw Dr. Martin again on 9 November 2023, when he noted the "recent wound now resolved." He also stated that her "permanent work restrictions remain unchanged…." [Resp. Ex. № 1 at 29.]

On 7 March 2024, the claimant saw Dr. Martin again, and he, again, found that "she remains at maximum medical improvement" and stated no change to her permanent impairment rating or work restrictions. [Resp. Ex. № 1 at 32.]

IV. ADJUDICATION

The stipulated facts are outlined above and accepted as fact. It is settled that the Commission, with the benefit of being in the presence of the witnesses and observing their demeanor, determines a witness' credibility and the appropriate weight to accord their statements. See *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 448, 990 S.W.2d 522 (1999).

A. THE CLAIMANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SHE IS ENTITLED TO ANY ADDITIONAL TTD BENEFITS.

The claimant suffered a workplace accident in February of 2015 and sustained compensable injuries that were accepted by the respondents, who began paying benefits accordingly. She was provided treatment for her injuries and eventually returned to work with restrictions in June of 2015. At issue in this litigation is whether the claimant is entitled to additional TTD benefits associated with her foot injury, which is a scheduled injury. See ACA § 11-9-521(a)(11). She received a permanent disability rating for her foot injury in 2016, which was paid, and she was placed at MMI with permanent restrictions at the same time. By her own testimony, she worked with appropriate accommodations and without issue through 2023. She has failed to provide a preponderance of evidence to support her claim that she is entitled to any additional TTD benefits since her placement at MMI in 2016.

For a scheduled injury, a claimant is entitled to TTD benefits during her healing period or until she returns to work, whichever happens first. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become stable and if nothing by way of treatment will improve the condition, the healing period has ended. *Id.* Whether an employee's healing period has ended is a factual determination for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

A claimant must prove her entitlement to TTD benefits by a preponderance of the evidence. Ark. Code Ann. § 11-9-705(a)(3). Preponderance of the evidence means the evidence having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003).

Here, the claimant argues that she is entitled to TTD benefits for three separate, though consecutive, periods. She fails to prove by a preponderance of the evidence that she is entitled to TTD benefits for any of those periods of time.

As a threshold matter, I find that the healing period for her scheduled foot injury ended on 20 January 2016, when she was placed at MMI by Dr. Thomas. The Commission may accept or reject a medical opinion and determine its probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). I accept Dr. Thomas' opinion as accurate, and by the claimant's own testimony, she experienced no problems at work for years afterwards.

The claimant seems to urge that her healing period never ended because Dr. Thomas left open the possibility that, at some point, she could elect for a surgical

intervention for her, otherwise, already stable foot injury. She argued the same at the close of her hearing, stating, "I have continuously, consecutively for the past nine years received treatment for my workers' comp claim injury and is still under physician's care." [TR at 178.] While such an election, as noted by Dr. Thomas, may have resulted in the claimant reentering a healing period post-surgically, absent some surgical intervention, she remained at MMI and outside of a healing period. Indeed, the medical records from Dr. Martin make clear that she remained at MMI in March and April of 2023 and in March of 2024. [Resp. Ex. № 1 at 14, 19, and 32.] She cannot not prevail on her claim simply because the respondents continued to provide some medical benefits in the years after her placement at MMI. A claimant may be entitled to ongoing management treatment, such as in this claim, after the healing period has ended. *S. Tire Mart v. Perez*, 2022 Ark. App. 179, 644 S.W.3d 439 (2022).

The claimant attempts to argue that the wound she experienced on her foot caused her to be unable to work; and that wound appears to be the basis for her claim for benefits between November 2023 and January of 2024. She submitted her FMLA papers from her PCP in support of that notion. [Cl. Ex. № 7.] I find those forms to be of very limited evidentiary weight. See *Poulan, supra.* The forms are provided with no supporting records or clinic notes. Also, they are clearly inconsistent in that they reference Dr. Martin's 9 November 2023 appointment while claiming continuous impairment from 20 November 2023 to 31 January 2024. Dr. Martin's November note, however, states, "the area of previous wound formation has completely resolved, healed. There is no drainage, no open wound today." And it goes on to state, "Her permanent work restrictions remain unchanged, sedentary duty only, she will follow-up with me as needed." [Resp. Ex. № 1 at 29.] I find Dr. Marten's opinion and notes to be more credible and supportive of the notion that her work status was unchanged by the wound. See *Poulan*, *supra.* The claimant did

not argue that the wound was a compensable consequence, and she acknowledged that she did not know the source or cause of the wound. Even if she did, the evidence would not support such a finding.

As for her claim for TTD benefits from 31 January 2024 to a date yet to be determined, the claimant's voluntary resignation from employment is not evidence of her inability to work. She even testified that she intended to return at the end of January until an encounter outside of work with some coworkers.

In sum, the claimant failed to prove by a preponderance of the evidence that she entered a new healing period at any time after her the healing period for her foot injury ended in early 2016. Her claim for additional TTD benefits fails accordingly.

V. ORDER

Consistent with the Findings of Fact and Conclusions of Law stated above, this claim is denied and dismissed.

SO ORDERED.

JAYO. HOWE
ADMINISTRATIVE LAW JUDGE