

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G904652

NELA JIKATAKE, Employee	CLAIMANT
CARGILL MEAT PRODUCTS, Employer	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT, Carrier/TPA	RESPONDENT

OPINION FILED SEPTEMBER 13, 2023

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by R. SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On August 23, 2023, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 21, 2023, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The prior Opinion of November 30, 2022 is final.
3. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$333.00 for total disability benefits and \$250.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Temporary total disability benefits from June 21, 2022 through a date yet to be determined.
2. Attorney fee.

The claimant contends she is entitled to temporary total disability from June 21, 2022 to a date yet to be determined. Claimant reserves all other issues.

The respondents contend that all appropriate benefits have been paid. Respondents further contend that light duty would have been available but for the fact that claimant voluntarily terminated her employment with respondent employer resulting in claimant not being entitled to additional temporary total disability benefits.

From a review of the record as a whole, to include 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, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on June 21, 2023 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from June 21, 2022 through a date yet to be determined. Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from April 13, 2023,

through April 19, 2023.

3. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

### FACTUAL BACKGROUND

Claimant is a 53-year-old woman who began working for respondent in October 2015 deboning chicken. She suffered an admittedly compensable injury to her left shoulder when she tripped on a pallet on June 11, 2019.

Claimant was treated for her left shoulder injury by Dr. Heim who diagnosed claimant's condition as adhesive capsulitis and he performed surgery on claimant's left shoulder on September 23, 2019. On October 30, 2019, Dr. Heim stated that claimant had reached maximum medical improvement and he assigned her an impairment rating in an amount equal to 4% to the body as a whole.

Claimant filed for and received a change of physician to Dr. Arnold who diagnosed claimant with a probable rotator cuff tear and adhesive capsulitis. Dr. Arnold recommended a second surgical procedure and in response Dr. Heim opined that claimant was not in need of any further treatment or diagnostic studies. Accordingly, respondent denied liability for additional medical treatment and claimant filed a claim requesting approval for the surgery that had been recommended by Dr. Arnold. In an Opinion filed May 26, 2021, this Administrative Law Judge found that claimant had failed to meet her burden of proving by a preponderance of the evidence that she was entitled to the additional medical treatment recommended by Dr. Arnold. Claimant appealed that decision to the Full Commission, which in an Opinion filed October 14, 2021 reversed and

found that claimant had proven by a preponderance of the evidence that she was entitled to additional medical treatment, including the surgery as recommended by Dr. Arnold.

Following the Full Commission Opinion of October 14, 2021, Dr. Arnold chose not to treat the claimant in the workers' compensation system. As a result, claimant sought additional medical treatment from Dr. Dougherty, who also recommended an arthroscopic procedure; albeit, a different procedure than the one recommended by Dr. Arnold and previously approved. Because a different procedure was being recommended by Dr. Dougherty, respondent denied liability for the new procedure and a second hearing was conducted on November 9, 2022. In an Opinion filed November 30, 2022, this Administrative Law Judge found that claimant had met her burden of proving by a preponderance that she was entitled to the surgery as recommended by Dr. Dougherty. This Opinion was not appealed, and the parties have stipulated that it is final.

Following the November 30, 2022 Opinion, claimant underwent surgery by Dr. Dougherty on April 13, 2023. She has filed this current claim contending that she is entitled to temporary total disability benefits beginning June 21, 2022 and continuing through a date yet to be determined.

### ADJUDICATION

Claimant contends that she is entitled to temporary total disability benefits beginning June 21, 2022 and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that she remained within her healing period and that she suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation*

*Dept. v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

After reviewing the evidence impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from June 21, 2022 through a date yet to be determined. However, I do find that claimant has met her burden of proving that she is entitled to temporary total disability benefits from April 13, 2023 through April 19, 2023.

As previously noted, the claimant worked on the respondent's deboning line washing chicken at the time of her left shoulder injury on June 11, 2019. Following that injury, the claimant continued to work for the respondent for a short period of time until she voluntarily terminated her employment due to complaints of pain. Claimant testified at her deposition as follows:

Q Your termination date at Cargill is July 19<sup>th</sup> of 2019. Do you know why you were terminated on July 19<sup>th</sup> of 2019?

A They did not stop me. I stopped myself because I couldn't tolerate the pain.

Q And my question to you is when you got terminated, you just quit going to work because of the pain; correct?

A Yes.

Q And when you stopped going, did you call them and tell them you were not going?

A I didn't call them. I told them that I wanted to resign, so they gave me two weeks to resign. I was the one that approached them because I couldn't handle the pain. I wanted to resign.

Thereafter, claimant came under the care of Dr. Heim and he performed surgery on the claimant's left shoulder before giving her a full release. Claimant has testified that some time in 2021 she went to work for George's for two weeks, but again quit her employment due to pain. Claimant acknowledged at her deposition that she did not have any restrictions at the time she went to work for George's.

Q When you went to work for the two weeks at George's, did you have any restrictions.

A None.

As previously noted, claimant filed for and received a change of physician to Dr. Arnold who recommended a second surgical procedure on the claimant's left shoulder. Even though Dr. Arnold had recommended a surgical procedure, Dr. Arnold nevertheless indicated that claimant could continue working with restrictions. This is reflected in Dr. Arnold's reports of January 21, 2020; a work note dated February 4, 2020; a work note dated March 3, 2020; and Dr. Arnold's report dated April 7, 2020.

As also previously noted, after the surgery recommended by Dr. Arnold was awarded by the Full Commission, Dr. Arnold chose not to continue his treatment of the claimant. As a result, claimant came under the care of Dr. Dougherty and her initial visit with Dr. Dougherty occurred on June 20, 2022. Claimant is requesting temporary total disability benefits beginning the day after that initial visit with Dr. Dougherty. In his report of June 20, 2022, Dr. Dougherty discussed surgery on the claimant's left shoulder and indicated that claimant's MRI scan showed a split tear in her biceps tendon. He indicated that her examination was consistent with left biceps tendinitis and adhesive capsulitis. Significantly, Dr. Dougherty did not indicate that claimant was incapable of working, either

with or without restrictions. Claimant acknowledged that Dr. Dougherty did not give her any restrictions during the November 9, 2022 hearing.

Q How about when you saw Dr. Dougherty, did he give you any restrictions?

A No. He didn't tell me anything about that. He just said we should do a surgery to make it better.

In her deposition of August 10, 2023, claimant confirmed that Dr. Dougherty indicated that she could work with restrictions.

Q Up until you saw Dr. Dougherty, did any doctor have you on any kind of restrictions?

A What kind of restrictions?

Q Don't work or do certain things at work.

A No, no one said that. Only he said that I could work.

Q Did Dr. Dougherty tell you you should work?

A Yes, he said that I could work, but I shouldn't carry anything more than five pounds and that I should use my right hand more than my injured hand.

Q After he told you that, did you look for any work?

A No, I didn't. (Emphasis added.)

In order to be entitled to temporary total disability benefits, claimant must not only prove that she remained within her healing period but also that she suffered a total incapacity to earn wages. Here, claimant may have remained within her healing period but I do not find that claimant has proven by a preponderance of the evidence that she suffered a total incapacity to earn wages beginning June 21, 2022, the day after her initial

visit with Dr. Dougherty, and continuing through a date yet to be determined. Dr. Dougherty in his report of June 20, 2022 did not mention any restrictions placed upon the claimant's ability to work. Furthermore, according to claimant's deposition testimony, Dr. Dougherty specifically told claimant that she could work with restrictions of no carrying more than five pounds and using her right hand more than her injured hand. Claimant acknowledged that despite Dr. Dougherty's indication that she could work, she did not look for any employment.

Based upon this evidence, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a total incapacity to earn wages beginning June 21, 2022 and continuing through a date yet to be determined. Therefore, she is not entitled to temporary total disability benefits for that period of time.

However, I do find that claimant is entitled to temporary total disability benefits beginning April 13, 2023 and continuing through April 19, 2023. I find that claimant suffered a total incapacity to earn wages beginning on the date she underwent surgery by Dr. Dougherty which was April 13, 2023. In a return to work note dated April 17, 2023, Dr. Dougherty indicated that claimant could return to work as of April 20, 2023, with a work limitation of a ten-pound lifting restriction. Dr. Dougherty again indicated that claimant could return to work with restrictions in reports dated April 26, 2023; May 24, 2023; and July 12, 2023. Based upon this evidence, I find that claimant remained within her healing period and that she suffered a total incapacity to earn wages beginning April 13, 2023, the date of her surgery, and continuing until April 19, 2023.

Accordingly, I find that claimant is entitled to temporary total disability benefits beginning April 13, 2023 and continuing through April 19, 2023.



AWARD

Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning June 21, 2022 and continuing through a date yet to be determined. Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning April 13, 2023 and continuing through April 19, 2023. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

The respondent is responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$414.50.

All sums herein accrued are payable in a lump sum and without discount.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE