

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H106661**

CHARLES A. LAWLESS, Employee	CLAIMANT
AT&T TECHNICAL SERVICES COMPANY INC., Employer	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES INC., Carrier	RESPONDENT

OPINION FILED **AUGUST 16, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by DAVID C. JONES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 23, 2023, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 16, 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 this claim.
2. The employee/employer/carrier relationship existed on May 28, 2021.
3. Claimant sustained a compensable injury on May 28, 2021.

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

1. Whether claimant is entitled to additional temporary total disability benefits and/or temporary partial disability benefits, and medical benefits.
2. Attorney's fees.

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All other issues are reserved by the parties.

The claimant contends that “He has never reached maximum medical improvement regarding his May 28, 2021, injury, and that although his then authorized treating physician opined that the claimant could return to work in April 2022, the respondent/employer did not allow the claimant to return to work and the claimant was unable to find work elsewhere. Accordingly, the claimant contends that he is entitled to temporary disability benefits from when they were last paid in 2022 through a date yet to be determined. Claimant acknowledges that during the period that he received unemployment benefits he would only be entitled to temporary partial disability benefits. The claimant contends that he is entitled to additional medical benefits including a vocal cord evaluation and motion x-rays recommended by the now authorized treating physician, Dr. Mangels. The claimant contends that his attorney is entitled to an appropriate attorney’s fee. The claimant contends that at some point in the future he will be entitled to permanent disability benefits; however, that issue is not ripe for adjudication at this time.”

The respondents contend that:

“1. The respondents contend that all appropriate benefits have been paid to date in regard to the claimant’s neck injury. In that regard, the respondents accepted the claimant’s neck injury of May 28, 2021, and initiated temporary total disability benefits when the claimant entered his healing period. The respondents contend that all appropriate temporary total disability benefits have been paid to date. In that regard, the respondents paid the claimant temporary total disability benefits while he remained within his healing period and suspended temporary total disability benefits when the claimant was released to return to work in a regular duty capacity as of April 5, 2022.

2. The respondents contend that all appropriate medical benefits have been paid to date. It appears that there were some delays in approval of the new cervical MRI, which has subsequently

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taken place since the prior hearing request. It also appears that there was a delay in scheduling the vocal cord testing, which is also being addressed with the authorized provider at this point. Dr. Mangels previously made the referral, the TPA has approved the testing, but the provider to perform the testing has not scheduled the same as of yet.

3. The respondents contend that as the claimant was previously placed at maximum improvement on April 5, 2022, this claim should be ripe for litigation on any type of wage loss claim. In that regard, it does not appear that an anatomical impairment rating has been assigned as of yet. However, once the anatomical impairment rating is assigned, it appears that the parties should be litigating the wage loss dispute based upon the claimant's prior release to return to work in a full-duty capacity, he would not be entitled to wage loss benefits.

4. The respondents contend that they would be entitled to an offset for any group health carrier, group disability carrier, and/or unemployment benefits paid to or on behalf of the claimant. It appears that the claimant did indeed receive both short-term disability benefits and possibly long-term disability benefits, as well as unemployment benefits, for which the respondents would be entitled to an offset. The claimant applied for unemployment benefits on or about May 17, 2022, and was receiving \$406.00 per week. The respondents are seeking updated unemployment records at this point.

5. The respondents would reserve the right to amend and supplement their contentions after the supplemental discovery has been completed.”

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 March 16, 2023, and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability and/or temporary partial disability from May 1, 2022, through May 23, 2023.

FACTUAL BACKGROUND

Prior to taking any testimony, claimant withdrew his claim for medical benefits, as the parties had reached an agreement as to this portion of his claim. As such, this matter proceeded solely on the question of claimant's entitlement to temporary total disability benefits (TTD) or temporary partial disability benefits (TPD) from May 1, 2022, to the date of the hearing, and to an award of attorney's fees on any such indemnity benefits awarded. All other issues were reserved.

Also, before the testimony began, respondents objected to several letters written by claimant's attorney that related solely to claimant's request for medical treatment prior to the hearing. As that issue was reserved by the claimant, I found certain documents offered by claimant had no relevance to this hearing and granted respondents' objection. Claimant then proffered his non-medical exhibits #7, #14 and #15. These were included in the record after Claimant's Exhibit 3, and before respondents' exhibits, but were not considered in rendering this opinion.

HEARING TESTIMONY

Claimant testified that he was injured on May 28, 2021, when he was trying to hold a door open with his right arm and carry eight laptops into a building. He said he felt something like an electric shock that went down his shoulder into his arm. He finished the task he had been assigned

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and then went home trying to fix the problem himself. He eventually saw Dr. Gannon Randolph, an orthopedic doctor, who performed surgery on his neck on January 5, 2022. Amanda Hawes, PA-C, who is in Dr. Randolph's office, released claimant on February 28, 2022, to return to light duty work and then on April 5, 2022, released him to full duty. However, claimant did not see PA-C Hawes in Dr. Randolph's office on either of those days. He next saw Dr. Randolph on April 25, 2022, and following that visit, claimant was scheduled to return to Dr. Randolph in three months. When he was aware that he was released to return to work, he contacted his employer and was told that he had been removed from the contract. Claimant was instructed to go to the AT&T job search site, but there were no jobs listed on that site for which claimant was qualified. Claimant testified he drew unemployment for three months and conceded that there might be a week that he did not check with as many possible employment opportunities as he was supposed to. Claimant believes he is limited in what he can do because his voice was affected by the surgery. His job with AT&T required him to talk frequently with customers, other contract companies, and with team members.

On July 21, 2022, Dr. Randolph issued a report that claimant would be at maximum medical improvement (MMI) in six months; however, claimant did not return to be examined by Dr. Randolph after six months because he had requested a change of physicians. He first saw Dr. Kyle Mangels on November 21, 2022. During this visit, Dr. Mangels placed a 40-pound lifting restriction on claimant and had not released claimant from treatment as of the date of the hearing.

Claimant received short-term and long-term disability benefits, and he paid extra on the insurance that the company provided to receive a higher benefit.

Claimant stated that as of the date of the hearing, the effects that he is having as a result of injury and/or the surgery included a diminished range of motion in looking up or turning side to side. His voice had changed, and he was experiencing pain and discomfort at night to the point that he was

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not sleeping. He did not believe that he could perform the job that he had at the time of the accident in his current physical condition, because it involved watching computer screens, talking, and sitting at a keyboard, all of which was either painful or difficult. Claimant testified that he had not had problems with his neck before the accident happened, although the medical records show that he had some injections in his neck in 2016. Claimant believes those injections were for a headache rather than for a neck injury. He noted that the injections were at the base of the skull, at C1, whereas his current problem is at C5-6.

On cross-examination, claimant was unaware that he had a disc protrusion at C6-7 in 2016. Claimant conceded that he received \$736.00 from respondent Sedgwick in addition to receiving \$506.52 from his disability plan at the same time. Claimant was unaware of what he received by way of long-term disability benefits but did not dispute what the records that were introduced showed.

Claimant agreed that the numbness and radicular symptoms in his arm resolved after the surgery. During his July 21, 2022, visit with Dr. Randolph, claimant inquired about his restrictions and understood that he was free to return to work at that time. Claimant disputed an entry in Dr. Mangels' records that said he was retired and asserted that he was still looking for a job.

Claimant clarified that while working for AT&T, it was part of a sub-contract for the federal government. The company that had the contract was Inserso. Claimant was not aware that the contract was renewed every five years or so but did understand that his job had moved to a Little Rock location. He assumed he was the only person that had this job in the state of Arkansas. Claimant spoke with Mr. Carlos Colon about going back to work in August 2021, but he had not been released from care at that point. After Dr. Randolph said he could return to work in April 2022, claimant testified that he contacted Mr. Colon after learning that the contract was being sent to Little Rock. Claimant was a Systems Engineer II; he ran network security, migrated the entire system onto the cloud, worked for

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Homeland Security with a DOD top-secret clearance, worked with computers, printers, and scanners. While some of that did not require claimant to talk, he said there were times when he was doing remote work when he was on someone else's computer and speaking with them at the same time. He said he was pretty much on the phone all day. His job did not require heavy lifting except when he had to move a printer or computer to a work bench.

While claimant had testified at the hearing that he could not do the job he had with AT&T, in his deposition he said that he could do his job at that point. He had located some jobs out of state and thought at the time of his deposition that he had several prospects for jobs. He did not remember saying in his deposition that there were positions available in Cincinnati and Washington D.C., but conceded he didn't want to move to D.C.

Claimant said that he applied for unemployment on May 17, 2022, and received \$406.00 a week of unemployment. When he filed for unemployment, he said that he had been let go from AT&T. He conceded that at the time he filed for unemployment that he had VA disabilities but as far as his physical abilities to work, he had no disabilities, and could start work immediately. There was then this exchange:

Question by Mr. Jones: So needless to say, you weren't totally incapacitated from earning wages since last year; is that correct?

Answer by claimant: What was that?

Q: You weren't totally incapacitated from earning wages; you were—you had job prospects, you were drawing unemployment benefits?

A: Sure.

On redirect-examination, claimant reaffirmed that he was released to go back to work by Dr. Randolph but had not been released from care. He said that it was not a routine requirement in his job that he did heavy lifting, but there were times that he had to lift servers, uninterruptable power supplies, and printers.

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On recross-examination, claimant agreed that he was not required to lift heavy servers or printers by himself, as help was available. Typically, a laptop was the heaviest item he had to lift.

After claimant rested his case, respondents called Mr. Carlos Colon who was claimant's direct supervisor at AT&T. He explained how AT&T was a sub-contractor with Inerso, as it was Inerso that had a contract with the federal government. He said claimant's position was moved from Fort Smith to Little Rock toward the end of the summer of 2021. While claimant was unable to work due to his medical treatment, the position in Little Rock had to be filled. Mr. Colon did not recall having contact with claimant in 2022 about him returning to work. He said that while claimant had to talk on the telephone some of his working day, it was not something he expected claimant to do constantly. Claimant was required to travel a lot and was not expected to be talking on the phone while he was driving.

On cross-examination, Mr. Colon said that claimant had not been offered employment in a particular position since he was released to return to work. He did not know if anyone had notified him that claimant had been released to return to work. He said during his last conversation with claimant, it was his impression that claimant was not interested in continuing to work but recognized that conversation took place in the summer of 2021 when claimant was still under active medical treatment. He agreed that AT&T had not offered claimant any employment opportunities since he was released to return to work in April 2022. Mr. Colon said the lifting requirements of the job claimant performed was up to fifty pounds and that it was an essential function of the job.

On re-direct examination Mr. Colon said that there were thousands of job openings with AT&T but as far as he knew, claimant did not contact him or AT&T about going back to work. Mr. Colon said that claimant was aware that the contract had moved to Little Rock months before he had been released to full duty in April 2022.

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Following Mr. Colon's testimony, claimant was called in rebuttal and stated that in July 2022 he contacted AT&T and indicated he had been released to go back to work but was not offered a position.

REVIEW OF THE MEDICAL EXHIBITS

Most of the pertinent information in the medical records were brought out during claimant's testimony. Respondents did not controvert that claimant had a compensable injury on or about May 28, 2021, nor did it dispute the surgery performed by Dr. Randolph on June 5, 2022, was reasonable and necessary. As the issue in this case centers on claimant's entitlement to temporary total disability or temporary partial disability benefits from May 1, 2022, until the date of the hearing, the records from April 2022 until April 2023 are the most relevant.

On April 21, 2022, claimant returned to see Dr. Randolph, which was three months since he had undergone cervical surgery. At that time, claimant reported that his radicular symptoms had completely resolved but he was still having some pain on the left side of his neck and was having dysphagia. That report did not mention any restrictions on claimant's physical activity. Although claimant testified that he did not see Dr. Randolph on July 21, 2022, the records submitted by the parties showed there was a visit in which claimant received a trigger point injection. Dr. Randolph anticipated that claimant would be at maximum medical improvement in six months and mentioned at that time a functional capacity evaluation and an impairment rating would be considered. Dr. Randolph also included this sentence:

"I did discuss with the patient that with a level one ACDF I would let him go back to play in the NFL, so I really do not have any restrictions for him."

Claimant exercised his right to have a change of physician and next saw Dr. Kyle Mangels on November 21, 2022. At that time, claimant was reporting that he had pain on the left side of his neck.

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Dr. Mangels wanted a new cervical MRI and at that time imposed a forty-pound lifting restriction. He did not opine on claimant's ability to work, perhaps because he was under the impression claimant was not going to be employed: "He is retired now and not working." Even so, Dr. Mangels completed a Physician's Recommendation Report at that time, stating that claimant had not reached maximum medical improvement but was not temporarily totally disabled.

Claimant returned to see Dr. Mangels on March 8, and at that time, Dr. Mangels said:

"I think the patient is going to need another neck surgery interiorly, but we need to see what the ear, nose, and throat doctor thinks about a vocal cord check later next month. This is scheduled for April 25, 2023."

Dr. Mangels also recorded:

"He can lift up to 40 pounds and alternate sitting and standing as required by the patient, and these restrictions are temporary, still effective today and these are the same as before."

On April 25, 2023, claimant underwent a laryngoscopy, which was performed by Dr. Michael Gwartney. Dr. Gwartney's impression was "dysphonia post interior approach for cervical fusion on the right side. The right cord appears to be moving well. He could have some superior laryngeal nerve issues which would go along with his history of occasionally choking."

REVIEW OF NON-MEDICAL EXHIBITS

Claimant submitted two letters from his attorney to respondents' counsel, both dated July 2022 asking that claimant either be provided employment or that temporary total disability benefits be reinstated.

Respondents' exhibits included an e-mail from Edwin Anderson of Inerso Corporation dated May 4, 2021, which stated that there was going to be a move from Fort Smith, Arkansas to Little Rock. I note that claimant was not included on that email. There were also documents regarding claimant's job description with AT&T to fill the Inerso position, a letter to claimant regarding

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claimant's application for short-term disability benefits, an e-mail regarding short-term disability and long-term disability benefits, records of what was paid to claimant pursuant to his short-term disability and long-term disability insurance and several pages from the Arkansas Division of Workforce Services regarding claimant's application for unemployment benefits. Of most interest regarding the claim for temporary total disability benefits is the application for unemployment insurance benefits in which claimant stated on May 18, 2022, that he could begin work immediately, could work full time, and had no disabilities that would limit his ability to perform his normal job duties. Claimant drew 16 weeks of unemployment benefits between May 28, 2022, and September 12, 2022.

ADJUDICATION

As set out above, the only issue that was adjudicated at the hearing was claimant's entitlement to TTD or TPD benefits from May 1, 2022, until a date to be determined. Respondents accepted claimant's cervical spine injury and paid TTD benefits until May 1, 2022. As a cervical spine injury is an unscheduled injury, claimant must prove by a preponderance of the evidence that he remains within his healing period and suffers a total incapacity to earn wages in order to receive TTD or TPD benefits, *Allen Canning Co. v. Woodruff*, 92 Ark. App. 237, 212 S.W.3d 25 (2005). As set out above, claimant's contention is that he had not reached MMI when he was released to return to full duty, and because AT&T did not allow him to return to work, he is entitled to TTD or TPD benefits.¹ After reviewing all the documentary evidence and considering the testimony, I agree with claimant that he had not reached MMI when he was released to full duty, but I disagree that he is entitled to TTD or TPD from May 1, 2022, through May 23, 2023.

Taking the second part of claimant's argument first, the job claimant had in Fort Smith with

¹ While claimant did not specifically plead that he was entitled to additional TTD/TPD benefits pursuant to A.C.A. §11-9-505(a)(1), that is the essence of his argument on this point.

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AT&T no longer exists. I found Mr. Colon to be a credible witness on this point; claimant did not dispute that the position he held in Fort Smith had moved to Little Rock. As both witnesses explained, AT&T was a subcontractor with Inerser, who in turn had a contract with the United States Department of Homeland Security. On May 4, 2021, 24 days before claimant's injury, there was already a plan in place to shift claimant's position to Little Rock. That move was done in August 2021, before claimant had been released to return to work in any capacity. Because of the contract with Inerser, AT&T hired another Systems Engineer while claimant was under doctor's restrictions. I cannot find that AT&T lacked reasonable cause in refusing to return claimant to his previous position, as that position had been filled as per the requirements of its contract with Inerser.

As for the failure to reach MMI, from the period of May 1, 2022, until he saw Dr. Mangels on November 21, 2022, there are no medical records to support claimant's contention that he was unable to work. On the contrary, Dr. Randolph explained in his July 21, 2022, report that claimant was under no restrictions, and tacitly adopted the release forms completed by PA-C Hawes for light duty on February 28, 2022, and full duty on April 5, 2022, as being consistent with his normal protocol. Claimant testified on direct examination that he didn't think he could do the job he had at the time of the accident and on cross-examination, said that he did not believe he was totally incapacitated. Additionally, claimant was actively seeking employment as required by the Arkansas Division of Workplace Services to draw unemployment benefits, demonstrating that he believed he was able to return to work in some capacity.

At claimant's first visit with him, Dr. Mangels imposed a 40-pound lifting restriction on claimant on November 21, 2022, and stated in his March 8, 2023, report that claimant would need to alternate sitting and standing as required. Perhaps because claimant wasn't working or maybe because he thought claimant was retired, Dr. Mangels did not complete a recommendation report after the

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March 2023 visit as he did in November 2022; however, he stated that claimant's restrictions "are the same as before." At that time, Dr. Mangels still believed claimant had not yet reached MMI but was not temporarily totally disabled.

Because TTD benefits do not, in all cases, correspond to the healing period, *Cnty. Mkt. v. Thornton*, 27 Ark. App. 235, 770 S.W.2d 156 (1989), claimant cannot solely rely on the statement by Dr. Randolph in July 2022 that he would be at MMI in six months to support his TTD claim. "Temporary-total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages," *Arkansas State Highway Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). I see nothing in the medical records that supports a conclusion that claimant had a total incapacity to earn wages after he was released to full duty in April 2022, especially when I consider not only the medical evidence but also "his age, education, experience, and other matters reasonably expected to affect the claimant's earning power." *Breshears, Id.* Further, claimant himself denied he had a total incapacity to earn wages (TR. 45); he only testified he could not do his position with AT&T (TR.21)

Because I do not believe AT&T acted unreasonably in filling claimant's position and because the evidence does not support claimant's contention that he was totally incapacitated due to his unscheduled injury from May 1, 2022, until the date of the hearing of this matter, I find that claimant has failed to meet his burden of proving entitlement to TTD or TPD during the period from May 1, 2022, through May 23, 2023.

ORDER

Claimant has failed to meet his burden of proving by a preponderance of the evidence that he was temporarily totally disabled and/or temporarily partially disabled between May 1, 2022, and May 23, 2023, as a result of his compensable injury. Therefore, his claim for those indemnity benefits is

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hereby denied and dismissed.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE