

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO.: G803817**

JACQUELINE D. FREEMAN, Employee

CLAIMANT

ARKANSAS DEPARTMENT OF CORRECTION,
Self-Insured Employer

RESPONDENT NO. 1

PUBLIC EMPLOYEE CLAIMS DIVISION, Carrier/TPA

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION AND ORDER FILED SEPTEMBER 7, 2022

Hearing conducted before ADMINISTRATIVE LAW JUDGE TERRY DON LUCY, in Craighead County, Arkansas.

Counsel for the Claimant: HONORABLE JIM R. BURTON, Attorney at Law, Little Rock, Arkansas.

Counsel for Respondents No. 1: HONORABLE CHARLES H. MCLEMORE, Attorney at Law, Little Rock, Arkansas.

Counsel for Respondent No. 2: HONORABLE CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas.

Statement of the Case

The above-captioned matter came on for a hearing on June 10, 2022, before the undersigned Administrative Law Judge. A pre-hearing Order was entered in this matter on March 23, 2022, which reflected the following stipulations:

- (1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
- (2) The employee/employer/carrier relationship existed at all relevant times, including May 29, 2018, on which date the Claimant sustained a compensable lumbar injury for which certain benefits have been paid through at least November 26, 2018;
- (3) The Claimant's average weekly wage on the date of her compensable injury was sufficient to entitle her to compensation rates of \$299.00/\$224.00 for temporary total and permanent partial disability benefits, respectively; and,

(4) Respondents No. 1 have controverted additional benefits beyond November 26, 2018.

The pre-hearing Order also reflected the issues to be adjudicated, as set forth below:

(1) Whether the Claimant is entitled to additional reasonably necessary medical care and related expenses beyond November 26, 2018, in relation to her compensable lumbar injury of May 29, 2018, as well as additional temporary total disability benefits for as yet unspecified dates, and attorney's fees in relation to controverted indemnity benefits.

All other issues were reserved. During preliminary discussions and following clarification that the Claimant sought temporary total disability benefits from December 1, 2018, through a date yet to be determined, the Commission's pre-hearing Order of March 23, 2022, was introduced into the record as Commission's Exhibit No. 1 without objection. (TR 6; 9) The appearing parties' respective exhibits were likewise introduced into the record without objection, as was Respondent No. 2's exhibit which confirmed its waiver of appearance at the hearing and its deference to the outcome of litigation. (TR 9-12; 46-47; R2 Ex.1 at 1-2) Accordingly, references hereinafter to the "Respondents" will pertain to Respondents No. 1 unless otherwise differentiated.

Findings of Fact and Conclusions of Law

(1) The parties' stipulations are accepted as findings of fact herein, inclusive of the Commission's jurisdiction over this claim; and,

(2) The Claimant has failed to prove, by a preponderance of the evidence, that she is entitled to additional reasonably necessary medical care in relation to her compensable injury of May 29, 2018, and has consequently failed to prove that she is entitled to additional temporary total disability benefits from December 1, 2018, through a date yet to be determined.

Applicable Law

The party bearing the burden of proof in a workers' compensation matter must establish such by a preponderance of the evidence. See Ark. Code Ann. §§11-9-704(c)(2) and 11-9-705(a)(3). In addition, Ark. Code Ann. §11-9-508(a)(1) states that:

The employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee.

With respect to temporary total disability benefits, such are payable for unscheduled injuries (such as involved in the present matter) when an injured employee remains within his or her healing period and suffers a total incapacity to earn wages. *Arkansas State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244 (Ark. 1981)

Finally, it is long settled that the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. (See, for instance, *Yates v. Boar's Head Provisions Co.*, 2017 Ark. App. 133 (2017)). It is further well-settled that determinations of compensability may turn solely upon matters of weight and credibility, particularly when such matters relate to a given claimant's credibility. (See *Yates, supra*. In addition, see *Daniel v. Wal-Mart Stores, Inc.*, 2014 Ark. App. 671 (2014); *Kanu-Polk v. Conway Human Dev. Ctr.*, 2011 Ark. App. 779 (2011); and *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43 (Ark. App. 2011)). Finally, a claimant's testimony is never considered to be uncontroverted. *Gentry v. Ark. Oil Field Servs.*, 2011 Ark. App. 786 (2011) (citing *Nix v. Wilson World Hotel*, 46 Ark. App. 303 (1994)).

Testimony

Jacqueline D. Freeman

During direct examination, *inter alia*, the Claimant acknowledged that she had undergone back surgeries in 2010 and 2015, performed by Dr. Shahim, prior to beginning her employment with Respondent Employer in 2018. (TR 16-17) According to her testimony and following her compensable injury, the Claimant received a surgical recommendation from Dr. Seale given that conservative treatment in the form of injections provided by Dr. Roman had been unsuccessful. However, the Claimant declined additional surgery but desired to proceed with additional treatment. (TR 32-35)

During cross-examination, *inter alia*, the Claimant testified as follows when asked whether she wanted to have surgery in relation to her compensable injury:

I didn't wanna have surgery. I wanted invasive. I wanted to go to the invasive doctor at Baptist, which they made an appointment. Do you remember Miss Christy, when she said, "You didn't get to go to the appointment?" And I said "No. They said they don't take Workmans' Comp." They have a robot where you don't have to be operated on or anything. I wanted to go see him for his opinion. And so I didn't get to do that because my medical was cut off. (TR 78)

At a subsequent point during cross-examination, the Claimant testified that she had not applied for unemployment benefits subsequent to the end of her employment with Respondent Employer. (TR 85-87) However, when made aware that her unemployment benefits payment history was included in the Respondents' exhibits, the Claimant conceded that she had indeed applied for such benefits but could not recall collecting them "at this moment. If I did, I didn't get much. I didn't collect long. That's what I'm sayin'. I don't know." (TR 87)

Upon re-direct examination, *inter alia*, the Claimant testified as follows with respect to her declination of further back surgery:

Q: Okay. Is that why you wanted some other kind of conservative treatment?

A: Yes, sir. (TR 93)

And,

Q: Is the pain such, as we sit here today, if you could see a different neurosurgeon, that you would want to consider surgery?

A: I don't want surgery. I want somethin' what I just told you that Dr. Rosenzweig wife put [in] a big report and sent it to Baptist, and I didn't get a (sic) appointment to see the neurologist with this robot, where this man didn't have to get cut on or anything. He walked out with a Band-Aid. (TR 94)

Discussion of the remainder of the Claimant's testimony is not necessary with respect to the findings of fact herein made.

Medical and Documentary Evidence

I have reviewed the entirety of the documentary evidence submitted by the parties, the most relevant and salient of which are discussed below in further detail. Medical or documentary evidence duplicated by the parties will only be cited to one party's exhibit.

Following her compensable injury and initial conservative care, the Claimant presented to Dr. Justin Seale on July 16, 2018. The history provided by the Claimant to Dr. Seale on such date is rather instructive:

Past medical history includes substantial history of lumbar issues. She has a history of 2 prior surgeries 1 and (sic) 2010 and in 2016 by Dr. Shaheem (sic). I reviewed clinic notes back till 2016 and found no evidence of right buttock and leg pain ongoing over the last 2 years. She does report having a history of this right buttock and leg pain but it had resolved *until the last 2 years*. I could find no evidence to contradict this in her medical history. (CX 1 at 16; emphasis added)

The Claimant subsequently came under the care of Dr. Kenneth Rosenzweig, who provided right-side epidural steroid injections to her beginning October 1, 2019. (CX 1 at 30)

Oddly, on February 27, 2019, Dr. Rosenzweig had written that the Claimant “declined to be considered for an injection since they have not helped.” (CX1 at 37) On March 28, 2019, Dr. Rosenzweig wrote, in part, that the Claimant “declares injections do not help. She would like to visit with another surgeon regarding treatment options...expressed anger regarding having to work on her day off and then hurting her back.” (CX 1 at 40) Eventually, on August 21, 2020, Dr. Rosenzweig noted once again the Claimant’s reported lack of improvement with respect to epidural steroid injections, and took care to write on December 15, 2021, that, to his knowledge, he had not violated the Claimant’s pain-management contract that pre-existed her compensable injury sustained in 2018. (CX 1 at 50-52)

As noted above, the Claimant had undergone lumbar spine surgery performed by Dr. Reza Shahim on December 23, 2010, and again on October 20, 2015. (R1 Ex. 1 at 1 and 11) The Claimant remained symptomatic thereafter, inclusive of right lower extremity pain. (See, for instance, R1 Ex. 1 at 34) Indeed, Dr. Shahim recommended a third lumbar surgery on November 10, 2016, which the Claimant declined. (*Id.*) Approximately twelve days prior to her compensable injury, the Claimant presented to the Arkansas Spine and Pain clinic, with complaints of lower back pain that was “on an average about 7/10.” (R1 Ex. 1 at 75)

Also as noted above, the Claimant came under the care of Dr. Justin Seale following her compensable injury, who commented on August 20, 2018, that:

I spent another 25 minutes with the patient today discussing her options. I do believe the surgical intervention may be the only way to give her long-term relief of the pain but I am concerned that her outcome may not be satisfactory. Her thought processing behind surgical decision-making seems a little off to me. I discussed this with her today. She seems to still hold a lot of his admit (sic) towards her previous job. (R1 Ex. 1 at 112)

Eventually, on November 26, 2018, Dr. Seale placed the Claimant at maximum medical improvement with no permanent anatomic impairment rating given his opinion that “The prior disc protrusion was calcified and pre-existing.” (R1 Ex. 1 at 123) Dr. Seale essentially reiterated the foregoing with his comments of January 28, 2019, in which he stated that his “current recommendation would be for any surgical intervention to be outside Workers’ Comp on her regular insurance to remove any possible secondary gain issues.” (R1 Ex. 1 at 152)

Following her compensable injury, the Claimant received temporary total disability benefits from June 7, 2018, through November 30, 2018, followed by unemployment insurance benefits received from January 19, 2019, through May 12, 2019. (R1 Ex. 2 at 43-45) The Claimant’s employment with Respondent Employer was terminated effective June 12, 2018; however, no allegation of retaliatory discharge has been made in this matter. (R1 Ex. 2 at 27)

Adjudication

Although the Claimant presented as a polite and courteous witness during a lengthy hearing, I can afford no credibility to her testimony. In this respect, I am particularly persuaded by the Claimant’s denial during the hearing of having applied for or received unemployment insurance benefits following her compensable injury, and her contradictory admission that she “didn’t get much. I didn’t collect long” in relation to such benefits. However, Respondent No. 1’s Exhibit No. 2 clearly reflects that the Claimant had, in fact, received unemployment insurance benefits for an approximate period of four months during the period for which she is presently claiming temporary total disability benefits.

In addition, the Claimant’s testimony and the medical/documentary evidence submitted herein obviously demonstrate that the Claimant has reported insufficient relief from epidural steroid injections, does not wish to have further lumbar surgery, yet would like to have an

“invasive” procedure performed by a robot that no physician in the record has recommended. – there is simply no way to reconcile the Claimant’s obviously contradictory testimony in this respect. In sum, I specifically find that the Claimant’s testimony is not worthy of belief.

Further, there is no medical evidence to contradict Dr. Seale’s pronouncement of the Claimant’s maximum medical improvement date of November 26, 2018, with no impairment rating, which clearly indicates that her healing period ended on such date.

Accordingly, and given that I can afford no weight to the Claimant’s testimony as noted above, I specifically find that the Claimant has failed to prove, by a preponderance of the evidence, that she is entitled to additional reasonably necessary medical care in relation to her compensable injury of May 29, 2018, and has likewise failed to prove that she is entitled to additional temporary total disability benefits from December 1, 2018, through a date yet to be determined.

ORDER

Based on the foregoing discussion, including my observation of the witness and her testimony, review of the documentary and video evidence supplied by the parties, and application of the statutory and case law cited above, I specifically find that the Claimant has failed to prove, by a preponderance of the evidence, that she is entitled to additional reasonably necessary medical care in relation to her compensable injury of May 29, 2018, and has also failed to prove that she is entitled to additional temporary total disability benefits from December 1, 2018, through a date yet to be determined.

This claim is respectfully denied and dismissed. If they have not already done so, Respondents No. 1 are ordered and directed to pay the Court Reporter’s fee within 30 days of billing for such pursuant to Commission Rule 099.20.

IT IS SO ORDERED.

TERRY DON LUCY
Administrative Law Judge