

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. H301714**

SASHA JUSTICE, Employee	CLAIMANT
O'REILLY AUTOMOTIVE, INC., Employer	RESPONDENT
GALLAGHER BASSETT SERVICES, INC., Carrier	RESPONDENT

**OPINION FILED JANUARY 29, 2024**

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL L. ELLIG, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by MICHAEL C. STILES, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On November 2, 2023, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on August 30, 2023, and a Pre-hearing Order was filed on September 6, 2023. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 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 relationship of employee-employer-carrier existed between the parties on January 23, 2023.
3. The claimant sustained a compensable injury to her right wrist and hand on or about January 23, 2023.

4. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$247.00 for temporary total disability benefits and \$185.00 for permanent partial disability benefits.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether Claimant is entitled to temporary partial disability benefits from January 24, 2023, to July 15, 2023, and temporary total disability benefits from July 16, 2023, to a date yet to be determined.

2. Whether Claimant’s attorney is entitled to an attorney fee.

The claimant's contentions are as follows:

“The claimant contends that she has been rendered temporary total disability, or partially disabled from January 24, 2023 through a date yet to be determined and that her attorney is entitled to the statutory fee on these benefits.”

The respondents’ contentions are as follows:

“1. All benefits to which the Claimant is entitled have been paid and have not been controverted.

2. The Respondents have paid (and are continuing to pay) the related medical expenses on the Claimant’s behalf.

3. Following the January 23, 2023 incident, the Claimant continued working for the respondent employer.

4. The Claimant eventually received light duty work restrictions, which the respondent employer could accommodate. Accordingly, the respondent employer offered light duty work within the Claimant’s restrictions; however, the Claimant declined such offer by refusing to appear for work.

5. Given the Claimant’s refusal of employment suitable to her capacity and within her capabilities, she is not entitled to any indemnity benefits herein. See Arkansas Code Annotated §11-9-526.

6. If it is determined the Claimant is entitled to additional benefits, the Respondents hereby request a setoff for all benefits paid by the Claimant's group health carrier, all short term disability benefits received by the Claimant, all long term disability benefits received by the Claimant, and all unemployment benefits received by the Claimant.

7. The Respondents reserve the right to amend and supplement their contentions and position after additional discovery has been completed.”

The claimant in this matter is a 48-year-old female who sustained a compensable injury to her right wrist and hand on January 23, 2023. The claimant was employed by the respondent, who is primarily in the business of selling auto parts, tools, and supplies. On direct examination, the claimant described how her injury occurred as follows:

Q Okay. Now, would you briefly describe your accident for the judge.

A I was delivering a part and it was a leaf spring for a truck. I went to – and they had me delivering in a car and in order for the leaf spring to fit in the car, the seat had to be leaned down. And when I opened the back hatch, I reached down with my right hand to pull up the part to get it out and it hung on something in the front of the seat and it slammed down and twisted my wrist.

Q Which wrist was that?

A My right wrist.

Q Okay. What symptoms did you experience immediately after the accident?

A Pain and swelling.

The claimant reported her injury to the respondent and was seen at Conservation Care Occupational Health in Van Buren, Arkansas, on January 26, 2023, by APRN Jessica Minton.

Following is a portion of that medical report:

Employer Description of Accident: Sasha dropped a leaf spring on her wrist. The injury occurred on 1/23/23. She has not been treated at any other facility for this injury.

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#### CHIEF COMPLAINT

Right wrist pain.

#### HISTORY OF PRESENT ILLNESS

Sasha's primary problem is pain located in the right wrist. She describes it as aching, throbbing, sharp. She considers it to be moderate. The problem began on 1/23/2023. Sasha says that it seems to be constant. She has noticed that it is made worse by certain positioning of right wrist. It is improved with letting right wrist dangle. She feels it is stable.

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#### DIAGNOSIS

1. Pain in right wrist (M25.531).
2. Pain in right forearm (M79.631)
3. Unspecified sprain of right wrist, initial encounter (S63.501A)

#### ASSESSMENT

Sasha presents with right hand swelling, right wrist pain and swelling and right forearm pain and swelling. Unable to perform special tests for the wrist due to pain, decreased range of motion, and decreased strength. Pulses are two plus, sensation is normal, and capillary refill is less than two seconds. The hand is weak and extremely tender with movement or palpation. She was advised to RICE her injury and use over the counter Tylenol, ibuprofen, and topical pain modalities. She was placed in a thumb spica splint with the metal removed. She will be placed on restrictions for use of her right hand and return in two weeks.

Number and Complexity of Problems Addressed: 1 acute complicated injury.

Rationale: The injury is extensive.

#### TREATMENT PLAN

Rest, ice, soft wrist support, elevation, Tylenol, NSAIDs and topical pain modalities were discussed.

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#### RECOMMENDED WORK STATUS

Sasha's recommended work status is Restricted Duty.

### RECOMMENDED ACTIVITY RESTRICTIONS

Avoid right handed work, Continuous use of soft wrist support.

The claimant was again seen by APRN Minton on February 9, 2023, with continued and increasing pain. Following is a portion of that medical record:

#### ASSESSMENT

Sasha presents with right hand swelling, right wrist pain and swelling, and right forearm pain. Unable to perform all special tests for the wrist due to pain, decreased range of motion, and decreased strength. Tinnels and phalens test are positive. Pulses are two plus, sensation is normal, and capillary refill is less than two seconds. The hand is weak and extremely tender with movement or palpation, particularly the lateral aspect of the thumb and along the distal radius. She also reports pain along the distal ulna with movement and palpation, grip strength and pincar grasp are significantly decrease. She was advised to continuing RICEing her injury and use over the counter Tylenol and topical pain modalities. She was started on Meloxicam and the rigid support for her thumb spica splint was replaced. She will be placed on restrictions for use of her right hand and be referred for an MRI.

Number and Complexity of Problems Addressed: 1 acute complicated injury.

Rationale: The injury is extensive.

#### TREATMENT PLAN

Rest, ice, compression/support, elevation, prescription anti-inflammatory, OC Tylenol, and topical pain relief was discussed. She will be referred for an MRI of the right wrist and hand for the worsening pain, strength, ROM, and sensation changes.

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#### CONSULTATION/REFERRAL REQUEST

Referral for MRI Elevate the need for further diagnostic testing. Elevate the proper diagnosis. Elevate the lack of progress.

The claimant was continued on one-handed duty with use of “thumb spica splint.”

On February 21, 2023, the claimant underwent an MRI of her right wrist at Prime Medical Imaging. Following are findings and impressions from that diagnostic report:

#### FINDINGS:

There is a tear of the triangular fibrocartilage, Joint effusion in the distal radioulnar joint compatible with there being arthrosis in the distal radial ulnar joint. No significant abnormal signal intensity of the marrow spaces of the carpal bones or the distal radius and ulna other than a tiny area of marrow edema of the ulnar styloid tip. The extensor and flexor tendons sheaths appear unremarkable. No ganglion cyst or soft tissue mass about the wrist.

**IMPRESSION:**

Tear of the triangular fibrocartilage and arthrosis in the distal radioulnar joint.

On February 22, 2023, the claimant was again seen by APRN Minton. The claimant's work and activity restrictions were continued, and she was referred to a hand surgeon for further evaluation and treatment.

On March 8, 2023, the claimant was seen by Dr. James Kelly, a hand surgeon. Following is a letter authored by Dr. Kelly regarding his assessment, treatment, and restrictions for the claimant:

Thank you very much for referring Sasha Justice for consultation. As you are aware, she is a 47-year-old O'Reilly Auto Parts employee who on 01/23/2023 was injured on the job. She had a leaf spring fall on her wrist. Since that time, she has had severe swelling and pain in the right wrist. Her pain is centered over the ulnar border. She had an MRI which showed a TFCC tear. She has only been immobilized. She has not had any therapy or injections. After examining her and looking at her MRI, I have decided to inject her wrist with steroid and start her on ultrasound and range of motion therapy. We also will place her in a compression glove to help deal with the swelling in the fingers. Once we do this, if successful, then obviously nothing else would need to be done. If this were to fail, then we may need to do surgical intervention for the TFCC injury. I am hopeful however that we will not have to do this. I will make arrangements for her to get the therapy and compression glove. I injected her wrist today. I want her to stay on strictly one hand duties at work. She will be attending therapy 3 times a week. I will be seeing her back in 2 weeks to reassess her to see her progress. I will of course intervene as needed in the interim.

On March 23, 2023, the claimant was again seen by Dr. Kelly. Following is a progress note from that visit:

Ms. Justice presents to the office today after having had her right TFCC injected and having therapy. Swelling is less but she is not having decrease in pain. With that being said, I do not think there is any benefit in waiting. I think we need to take her to the OR and complete a TFCC repair. She will need splinting for about 6 weeks and then she will require therapy and range of motion. I will make arrangements to get this done and I will of course be following her throughout the care.

On May 5, 2023, the claimant underwent surgical intervention on her right wrist at the hands of Dr. Kelly. Following is a portion of that operative report:

PREOPERATIVE DIAGNOSIS: Right triangular fibrocartilage complex tear with unstable distal radial ulnar joint.

POSTOPERATIVE DIAGNOSIS: Right triangular fibrocartilage complex tear with unstable distal radial ulnar joint.

PROCEDURES:

1. TFCC repair of the right wrist.
2. Stabilization of the right DRUJ.

Dr. Kelly returned the claimant to work on alternative duty on May 6, 2023, with the following restrictions, “no use of right arm (strictly one-handed duty).”

On May 18, 2023, Dr. Kelly continued the claimant’s restriction of no right arm use and required the claimant to use a splint. At the claimant’s June 7, 2023, visit with Dr. Kelly, he changed her restrictions from no use of right arm to “primarily one-handed work using the unaffected extremity” and indicated that the claimant “may use injured hand/arm to assist occasionally.” He also placed a five-pound lifting restriction on the claimant’s right arm. Following is a portion of the medical record from that visit:

Ms. Justice presents to the office today in follow-up of her right TFCC repair. We completed the repair of May 5, 2023. She

presents today. She stated she hit the back of her hand on a buggy at work and states she had pain that radiated up to the elbow. She has some swelling in her fingers. I do not think the swelling is actually related to the blow to the back of the hand. I think the swelling is just from the fact she has been immobilized after having wrist surgery for over a month. This is very typical. She is to the point that we can get her out of the splint altogether and get her in a compression glove and start on range of motion and strengthening exercises. We will keep her on light-duty restrictions at work. I want to see her back here in the office in 4 weeks to note her progress.

Dr. Kelly again saw the claimant on July 10, 2023. Following is a portion of that progress

note:

Ms. Justice has not been progressing well in therapy at all. She complains of hypersensitivity and discomfort in the forearm. I think that in order to rule out the possibility of this being a sympathetic dystrophy picture we want to do a three-phase bone scan on her. I also feel that if the three-phase bone scan comes back negative there is really nothing else that I am going to be able to do for this lady and we will want to get a rating completed. I will order the three-phase bone scan and I will see her back here in the office once this has been completed.

No changes or comments regarding the claimant's work or activity restrictions are present in the medical records submitted into evidence after the claimant's June 7, 2023, restrictions.

After the claimant's injury, she continued to work for the respondent and was provided with one-handed duty as was ordered by APRN Minton on the claimant's January 26, 2023, visit to Conservative Care Occupational Health in Van Buren. The claimant testified that she continued to have pain and swelling but continued to work with restrictions. The claimant had a right wrist MRI on March 3, 2023, and first saw Dr. Kelly on March 8, 2023. The claimant gave direct testimony about her continuing to work and symptoms after initially seeing Dr. Kelly as follows:

Q Did he continue to release you to work?



A Yes, sir. Just –

Q And what were the restrictions?

A Not to use my right hand at all.

Q Now, after this treatment, initial treatment by Dr. Kelly, did your symptoms improve?

A No, sir.

Q Did they get worse?

A Yes, sir.

Q And again, you tried to continue working; is that correct?

A Yes, sir.

Q And what problems did this cause?

A By this time the pain and swelling was so bad and I kept – they were supposed to be getting me this glove and they never did to try to help with the swelling, but I continued to go to work, even though when my arm is down at work, it's just – it swells and the pain.

On May 5, 2023, Dr. Kelly performed surgical intervention on the claimant's right wrist.

On direct examination, the claimant was asked about her work restrictions after her May 5, 2023, surgery and the difficulties she alleges due to her continued work as follows:

Q And after the surgery, did Dr. Kelly return you to work?

A The day after the surgery, yes, sir.

Q With the same restrictions?

A Yes, sir.

Q Do you recall what those were?

A They were to not use my right hand and to ice and elevate it.

Q Did you continue to try to work?

A Yes, sir.

Q And what problems did this cause?

A The day after surgery, I went in like he told me, I had to, and I was on heavy narcotic medicine for pain and they told me to go home.

Q And did Dr. Kelly prescribe physical therapy.

A Yes, sir.

Q Did you get that?

A Some of it.

Q Did that help any?

A I didn't do it long enough to see any improvement.

Q Did any of that treatment by Dr. Kelly improve or lessen your symptoms?

A No.

Q Did you continue to try to work?

A Yes, sir.

Q And what problems did this cause?

A It is continuous swelling and after the surgery, I started having really bad muscle spasms and sharp pains all through my hand and arm all the way up to my shoulder and the swelling made it worse.

Q Now, at some point in time, did you stop going into work?

A Yes, sir.

Q Do you recall when that was?

A July 15<sup>th</sup>.

Q And why did you stop going into work?

A Because they were supposed to accommodate me with ice and time to elevate my arm at least twice a day for 20 minutes and they never accommodated that.

Q Did the fact that your arm, hand and wrist hadn't gotten any better play a role in that, in your deciding to just not go in and not try to work?

A Right. After I tried and tried.

Q After you quit working, did your symptoms change any?

A Yes. My hand does not swell as much and I can keep it controlled with pain medication and the ice and elevation.

The claimant has asked the Commission to determine if she is entitled to temporary partial disability benefits from January 24, 2023, to July 15, 2023. The claimant submitted an hours and wage summary produced by the respondent for the claimant into evidence, which is found at Claimant's Exhibit 2. There appears to be a reduction in hours and corresponding reduction in wages after the claimant's January 23, 2023, compensable injury, up until the claimant quit working for the respondent on July 15, 2023. The claimant was asked on direct examination about her reduction in work after her compensable injury as follows:

Q Now, during the period of time you tried to work, did you work significantly less hours per week?

A Yes, sir.

Q Why was this?

A I couldn't handle the pain.

On cross examination, the claimant was asked about her work with restrictions that the respondent had agreed to accommodate as follows:

Q In evidence, Respondents' Documentary Exhibit Pages 1 and 2, is an offer of temporary modified duty dated February 22<sup>nd</sup> of this year. Did you receive that offer of modified duty from O'Reilly in late February?

A Is that the one that's telling me I needed to go back to work?

Q It is asking if you can return to work based on the restrictions assigned to you.

A Yes, I did.

MR. STILES: Judge, may I approach?

THE COURT: You may.

Q [BY MR. STILES]: Ms. Justice, I am going to show to you that Respondents' page, Exhibit 1, and it is the February 22, 2023 letter. Does this letter look familiar?

A Yes, sir.

Q And is this your signature there at the bottom?

A Yes.

Q Dated February 23<sup>rd</sup>?

A Yes, sir.

Q Okay. And so you are aware that O'Reilly was offering you work within your restrictions; correct?

A Yes, they were.

Q And through this letter, were you aware that they could even accommodate such restrictions as avoiding right-hand work?

A Yes, sir.

Q So is that essentially a different way of saying one-handed duty, that avoid right-hand work you are left to only work with your left hand?

A Yes, sir.

Q Okay. And are you right-hand dominant?

A Yes, sir.

Q So O'Reilly was still willing to work with you when you could only use your nondominant hand for work while on light duty? Is that a fair statement?

A Without accommodations from a doctor's recommendations, yes, sir.

Q What do you mean without accommodations from your doctor?

A My doctor asked for me to be able to have – to ice and elevate for 20 minutes twice a day.

Q Are you aware that there is no report in evidence today that makes reference to this ice and elevate?

A It was given to Mr. Jody.

Q But are you aware that from the exhibits you submitted and my client submitted, there is no report in there about icing and elevating?

MR. ELLIG: Judge, I don't believe that is a fair characterization.

THE COURT: Are you objecting to the line of question?

MR. ELLIG: I am.

THE COURT: Okay.

MR. STILES: Based on what?

MR. ELLIG: I think you are misstating what the record shows.

MR. STILES: Well, Your Honor, I have gone through and I have got some examples.

MR. ELLIG: Start with the Occupational Medicine records.

MR. STILES: Well, she first mentioned that she went on March – was it March 8<sup>th</sup> to Dr. Kelly.

Q [BY MR. STILES]: Was Dr. Kelly the one that said you need to ice and elevate?

A Not at that time.

Q But you just testified when you first saw him on March 8<sup>th</sup> he said to ice and elevate. I have got your testimony right here.

A Continue to ice and elevate is what he told me the first time I saw him.

I note that after a review of the medical records submitted into evidence, I find no requirement placed by any medical provider to ice and elevate the claimant's right wrist and hand for 20 minutes. APRN Minton's records do mention ice and elevation in the "treatment plan" portion of her medical records, typically saying "rest, ice, soft wrist support, elevation, Tylenol, NSAIDs, and topical pain medications were discussed." There is no scheduling, or a time frame mentioned as to when or how long the claimant should ice and elevate her arm, and Dr. Kelly made no mention of ice or elevation in his medical records.

The claimant was asked about help she received from fellow employees while she was working on restricted duty after her compensable injury as follows:

Q Okay. And while you were working modified duty for O'Reilly before your surgery, did you receive assistance in lifting items from, say, co-workers or other employees?

A Before I hurt my hand?

Q No. Before surgery while you were on modified light duty.

A When they could. When they had time. If not, I had to do it.

Q Well, in your deposition you told me something a little different. Do you recall in your deposition me asking, “Were you receiving any kind of assistance as far as lifting items? Would other co-workers help you lift or do anything while working light duty?”

Do you recall that question?

A I recall the question.

Q And do you recall what you told me?

A No.

Q For the record on Page 32 of your deposition, there is my question. And what is your answer about co-workers helping you lift items? What is that word?

A “Yes.”

Q And while you would work light duty or modified duty, your job expectation or job duties changed; correct?

A Yes, sir.

Q You were expected to work the front counter. Is that a fair description?

A Yes, sir.

Q And when you are working at the front counter, would you work alone or by yourself up there?

A Sometimes.

Q Okay. How often would you be up there alone working the front counter during light duty?

A Depending on how busy the other associates were with customers.

Q But there were others around, though, in the store? You have told me it was a small store.

A Some were in the store. Some were outside checking codes for cars. Some were putting up stock.

Q And prior to surgery, again, while you are on modified duty, did you ever tell your superiors there at O'Reilly that you were in too much pain to work and that you wanted off work?

A Yes.

Q And did you tell the same thing to Dr. Kelly before surgery?

A Yes.

The claimant was asked on cross examination about a period of roughly two weeks that she did not work despite being released to return to work by Dr. Kelly with restrictions as follows:

Q We discussed that you had the surgery on May 5<sup>th</sup> and then Dr. Kelly issued that May 5<sup>th</sup> note that we already looked at on Page 31 of the Claimant's Exhibits.

And, again, it says no use of right arm. Is that your recollection as far as that May 5<sup>th</sup> return-to-work note?

A Yes, sir.

Q And despite having previously worked on one-handed duty before surgery and then receiving this May 5<sup>th</sup> note, you chose to take yourself off work for about two weeks after surgery; is that correct?

A No, sir.

MR. STILES: Okay. That's not what you told me in your deposition. Let's go to Page 24 of your deposition transcript. And Judge, I apologize, do I have a continuing –

THE COURT: You may approach.



MR. STILES: -- approach request, please?

THE COURT: You may.

Q [BY MR. STILES]: I am asking you here at the bottom of Page 32 about having surgery and Dr. Kelly performs the surgery. And I said, “How much time did you miss from work following the surgery?”

You said, “I took two weeks off because he released me to go back to work the day after surgery.”

Did I read that correctly?

A Uh-huh.

Q Is that a “yes”?

A Yes.

Q And then I said, “So you took two weeks off yourself despite Dr. Kelly’s release?”

And then you said, “Dr. Kelly didn’t give me a release. He just released me to regular – or this here.”

And I said, “To light duty work?”

And then you said, “Not using my right hand.”

And I said, “But he was releasing you saying you can go back to work in some form or fashion?”

And you said, “Yes.”

And then I asked you ultimately, “But you decided to take the two weeks off?”

And what is your answer?

A “Yes. There was no way I could work. And they took me off.”

Q Right. So you took of –

A Greg, the supervisor, took me off work. Told me to go home. I took off the two weeks.

Q But it wasn't per Dr. Kelly's orders; correct?

A Well, I couldn't work under a heavy narcotic around the money that I had to work around is what the supervisor told me.

Q So you did receive TTD. My clients did oblige and pay you temporary total disability benefits from May 5<sup>th</sup> until May 21<sup>st</sup>; correct?

A Yes.

The claimant also testified on cross examination about returning to work with restrictions following the two weeks that she was off work after surgery as follows:

Q Okay. So a little over two weeks while you were off work and then you decided to return to work at that time; correct?

A Yes, sir.

Q And when you returned to work after those two weeks or approximately two weeks, did you return to the same front counter light-duty job?

A Yes, sir.

Q And upon your return to work after surgery, you would receive these return-to-work notes from your treating physician and then you would forward them to your manager or supervisor at work; correct?

A Yes, sir.

Q Okay. And when you hand these notes to your superior at O'Reilly, did any manager or supervisor ever look at the note and say, "Hey, there is no way O'Reilly can accommodate these restrictions?"

A No, sir.

On cross examination, the claimant was asked about icing and elevating her arm and her ability to do so at work as follows:

Q All right. And you keep mentioning this ice and elevate. In your deposition we talked about the elevating requirement or recommendation. Can you at least demonstrate for us today what you did for me in your deposition? What is your understanding as far as this elevation of your wrist?

A Above my heart (indicating).

Q Okay. And at any point in time, did anyone associated with O'Reilly say, "Hey, don't do that. Don't elevate your hand above your heart or your head"?

A They never gave me the time to do it. I was working.

Q My question is did anyone ever reprimand you or say you cannot do that?

A No.

Q Were you allowed – at O'Reilly after surgery while on modified duty, were you allowed to take breaks as needed or as necessary?

A Yes.

Q And you were also given a lunch hour as part of your regular workday; correct?

A Yes, sir.

Q Now, while on post-surgery modified duty, did you ever work long enough during the day to make it to take that lunch hour?

A No, sir.

Q Did you ever even ask anyone at O'Reilly to bump up your lunch hour to an earlier time during your shift?

A No, sir.

Q And is it true that you typically while on post-surgery modified duty, that you typically worked only 90 minutes to two hours before you left for the day?

A Yes, sir.

Q And I know in your deposition we also talked about that you are a smoker; correct?

A Yes.

Q And tell me if this remains true. In your deposition you told me, "We could go smoke if we wanted to." Is that correct?

A We could go smoke if we had the opportunity to and no one was in the store and we had someone to cover the front desk. We couldn't just walk out and smoke, no.

Q That is not what you told me in your deposition; correct?

A Yes, it was.

Q Are you changing your testimony?

A I'm just saying I did not say we could whenever we wanted to because there is stipulations on when you can go smoke and when you cannot.

Q And you did say you didn't go every five minutes smoking, but you did say you took about three to five smoke breaks throughout the day; correct?

A On a full day of working, yes.

Q How many were you taking on a modified day?

A One, two.

Q One to two in a 90-minute span?

A Yes.

Q And during those smoke breaks, would you elevate or ice your hand?

A I wasn't out there but two minutes. It wasn't long enough for me to elevate or ice a hand.

Q So even in those few minutes, you weren't icing or elevating.

A I probably had my hand up while I was sitting there smoking like this (indicating).

Q Probably.

A Yes.

The claimant has asked the Commission to determine if she is entitled to temporary total disability benefits from July 16, 2023, to a date yet to be determined. On direct examination, the claimant was asked about quitting her employment with the respondent when she simply stopped going to work as follows:

Q Now, at some point in time, did you stop going into work?

A Yes, sir.

Q Do you recall when that was?

A July 15<sup>th</sup>.

Q And why did you stop going into work?

A Because they were supposed to accommodate me with ice and time to elevate my arm at least twice a day for 20 minutes and they never accommodated that.

Q Did the fact that your arm, hand and wrist hadn't gotten any better play a role in that, in your deciding to just not go in and not try to work?

A Right. After I tried and tried.

Q After you quit working, did your symptoms change any?

A Yes. My hand does not swell as much and I can keep it controlled with pain medication and the ice and elevation.

On cross examination, the claimant was asked about quitting work for the respondent and receiving a second offer of restricted duty sent to the claimant as follows:

Q And since your deposition, it looks like your last day of work for O'Reilly was actually June 29, 2023, right before the Fourth of July holiday. Does that sound correct?

A As I told Mr. Mike, I couldn't remember if it was the end of June or July.

Q And the reason that that was your last day of work, in your deposition you told me that you took yourself off of work. Is that still a true and correct statement; that there was no physician actually taking you off work?

A That was my true statement, yes.

Q And again, was there a physician taking you completely off work around the end of June?

A No, sir.

Q All right. So we discussed how that June 7, 2023 return-to-work note, which was Claimant's Exhibit Page 38 as well as the last page of Respondents' Exhibit, is the last return-to-work note. And then you last worked for O'Reilly there around the end of June.

And when we discussed those in your deposition I asked you, "Have you had any communication with O'Reilly since then?" And you said, no, other than a letter that you had received. Do you recall telling me that?

A Yes, sir.

Q And was the letter that you referred to in your deposition and then ultimately read to us, was it the offer to return to work from O'Reilly dated September 6<sup>th</sup> of this year?

A Yes, sir.

MR. STILES: Judge, may I approach?

THE COURT: You may.

Q [BY MR. STILES]: I am going to show this September 6, 2023 letter and ask you if this was the letter that you – or a copy of the letter that you received from O’Reilly asking you to return to work?

A Yes, sir.

Q Okay.

A That is the wrong hand, but, yes, sir.

Q A typo, but you understand that they were offering to return you to work in compliance with the restrictions assigned to you on June 7<sup>th</sup>. And that is what they reference there is the June 7<sup>th</sup> restrictions.

A Yes, sir.

Q Okay. And did you return this communication to or contact O’Reily after receiving this?

A No, sir. I contacted my lawyer.

Q And did you make any attempt to return to work after receiving that?

A Not that one, no, sir.

The respondent in this matter called Jody Brownfield as a witness. Mr. Brownfield is employed by the respondent as a store manager and had managed the claimant since he began in her store in late March of 2023. Mr. Brownfield was questioned on direct examination about the claimant’s ability to take breaks due to her injury. His direct examination testimony follows:

Q Okay. And while working alongside Ms. Justice while she was working modified duty, would you allow her to take breaks as needed due to her injury?

A Yes, sir. When I first took over and I was briefed on the situation, I am a simple person. I am not a, you know, in-depth person. I pulled her aside and I said, “I was told you need breaks.

Whenever you need a break, just let me know and you can go take a break.”

I mean not flowery or lawyer-like but that is how I said it.

Later in direct examination, Mr. Brownfield was asked specifically about the claimant being able to take breaks to ice and elevate her right arm as follows:

Q And there was a discussion about this icing and elevating of Ms. Justice’s hand as a result of her injury. Were you here present for that testimony?

A Yes, sir.

Q And I know that there was no reference in the medical reports about the icing and elevating, but is that something like O’Reilly could accommodate?

A If she needed to elevate, obviously, she needed to take a break over to the side, but that is not a big deal. I mean usually the way it works is if someone needs to do something like a comfort break or go to the restroom or something like that, it’s just let me know. If you need a break, tell me.

Q And are those types of either comfort breaks, are they limited as far as number per day?

A No, sir. You can’t limit nature.

Q What’s that?

A You can’t limit nature.

Q Okay. So would you have any objection to Ms. Justice taking a 20-minute break to ice or elevate her hand?

A I will go back to what I said the first time and that is what I told her after I got briefed, “If you need a break, come tell me and we will get you a break.”



The claimant was again called as a witness for rebuttal testimony. On direct rebuttal, the claimant was asked about requesting to take a 20-minute break to ice and elevate her right arm as follows:

Q Now, on these 20-minute breaks to ice and elevate your hands, did you ever try to take one of these breaks?

A No.

Q You never even tried to take one?

A No, because I didn't have time to take them because I was only working two or three hours a day.

Q So you couldn't take one in the first two or three hours?

A Not as busy as we were. There wasn't enough people there a lot of times. And I wouldn't have been able to take a lunch with just the very few people that were there.

As to the claimant's request for temporary partial disability benefits from January 24, 2023, to July 15, 2023, the claimant was clearly in her healing period and on restricted duty during that time frame. However, the respondent offered work within the claimant's restrictions and the claimant chose to only do some of the restricted duty work offered. The respondent offered more work than the claimant believed she could do because of her pain. However, the work was clearly inside her restrictions and medical providers who placed those restrictions were well aware of the claimant's pain complaints. The claimant made a decision not to work even though medical providers approved her restricted duty work and the respondent offered that work, respecting those restrictions. The claimant's reduced work hours and corresponding reduced wages are a function of her choice, not of medical restrictions or the respondent's ability and willingness to provide restricted work ordered by medical providers. The claimant is unable

to prove her entitlement to temporary partial disability benefits from January 24, 2023, to July 15, 2023.

I will now consider the claimant's request for temporary total disability benefits from July 16, 2023, to a date yet to be determined. A.C.A. §11-9-526 states:

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.

Again, in July of 2023, at least up until the hearing in this matter, the claimant remained in her healing period. The claimant had been placed on restricted duty, and the respondents agreed, I find in good faith, to provide the claimant with work inside her restrictions. As late as September 6, 2023, the claimant acknowledges receipt of an offer for work within her restrictions. That offer of work within her restrictions is found at Respondents' Exhibit 2. It was the claimant's choice to stop working due to her pain which was understood by medical providers when issuing her restrictions.

The claimant, throughout testimony, discusses and answers questions about elevating and icing her right wrist and hand. She was specifically asked on direct examination, "And why did you stop going to work?" The claimant responded:

A Because they were supposed to accommodate me with ice and time to elevate my arm at least twice a day for 20 minutes and they never accommodated that.

It is clear throughout the claimant's own direct rebuttal testimony that she never tried or even asked to ice or elevate her right arm.

Q Now, on these 20-minute breaks to ice and elevate your hands, did you ever try to take one of these breaks?

A No.

Q You never even tried to take one?

A No, because I didn't have time to take them because I was only working two or three hours a day.

Mr. Brownfield testified that he would have allowed the claimant to take a break to elevate and ice her right arm. The claimant never even tried to do so according to her own direct rebuttal testimony. The claimant stopped working because she chose to do so, not because of medical restrictions or an unwillingness or ability of the respondent to provide the restricted work she required. In fact, the claimant refused the work she was offered and did so for no justifiable reason. The claimant has failed to prove by a preponderance of the evidence her entitlement to temporary total disability benefits from July 16, 2023, to a date yet to be determined.

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 the pre-hearing conference conducted on August 30, 2023, and contained in a Pre-hearing Order filed September 6, 2023, are hereby accepted as fact.

2. The claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary partial disability benefits from January 24, 2023, to July 15, 2023.

3. The claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability from July 16, 2023, to a date to be determined.

4. The claimant has failed to prove that her attorney is entitled to an attorney fee in this matter.

**ORDER**

Pursuant to the above findings and conclusions, I have no alternative but to deny this claim in its entirety.

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

**IT IS SO ORDERED.**

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**HONORABLE ERIC PAUL WELLS  
ADMINISTRATIVE LAW JUDGE**