BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H401589

BECKY L. KEETER, EMPLOYEE	**CLAIMANT**
CLAY MAXEY CHEVROLTET, CADILLAC EMPLOYER	**RESPONDENT**
CENTRAL ARKANSAS AUTO DEALERS, CARRIER/ RISK MANAGEMENT RESOURCES, TPA	**RESPONDENT**

OPINION FILED FEBRUARY 5, 2025

Hearing before Administrative Law Judge, James D. Kennedy, on the 18th day of December 2024, in Mountain Home, Arkansas.

Claimant is represented by Daniel Wren, Attorney at Law, Little Rock, Arkansas.

Respondents are represented by Melissa Wood, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on the 18th day of December 2024, to determine the issue of temporary total disability from January 19th, 2024, the date when the claimant was terminated from her employment to a date to be determined, which will be on or around the currently approved date for the surgery and recovery thereafter, plus attorney fees. Prior to the hearing, but after the prehearing telephone conference, the issue of additional medical was resolved, and the requested surgery was in the process of being scheduled at the time of the hearing. A copy of the Pre-hearing Order dated July 22, 2024, was marked "Commission Exhibit 1" and made part of the record without objection. The Order provided the parties stipulated as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. An employer/employee relationship existed at all pertinent times.
3. Claimant suffered a compensable injury to her back.

4. The claimant earned an average weekly wage of $1322.91, sufficient for a TTD/PPD rate of $835.00/$626.00 respectively.
5. The claimant's and respondent's contentions were set out in their respective responses to the Pre-hearing questionnaire and made a part of the record along with the Pre-hearing Order, without objection.

Prior to the hearing, but after the Prehearing Order, the claimant raised the issue of collateral estoppel in regard to the remaining issue of TTD and the defense of termination of employment for cause. After a phone conference prior to the hearing, the claimant was allowed to make a record to raise the issue of collateral estoppel at the time of the hearing. The claimant was aware at the time of the phone conference, that the defense of termination of employment for cause was not collaterally estopped.

In regard to the issue of termination of employment, the respondents and the claimant agreed that the claimant suffered a compensable work-related injury on September 1, 2023, and was later terminated from employment on January 19, 2024, with the respondents contending that the employment termination was due to cause. Had she not been terminated; the respondents contend that the claimant would have continued to be provided light duty. As such, they contend that she would not be entitled to temporary total disability benefits during the time frame and if temporary total disability is awarded, the respondents are entitled to an offset for the unemployment benefits she received.

The claimant objected to the issue of termination for cause being raised by the respondents ten days prior to the hearing. They argued that the hearing had been continued once for the specific purpose of the claimant returning and being reevaluated by Dr. Bruffett. The claimant contended at the time of the hearing that raising the issue of termination for cause approximately ten days prior to the actual hearing date left her the

choice “between the devil and her brother.” The claimant admitted a continuance was offered, but that it was not fair to allow the respondents to raise the issue so close to the actual hearing date and then leave the claimant the option of going ahead with the hearing or in the alternative suffering through another continuance. The claimant contended the issue raised by the respondents should be prevented by collateral estoppel.

In regard to the assertions concerning timeliness and the issue of termination for cause, the respondents responded that at the time of the pre-hearing filing, discovery was still on going. The focus of the main issue prior to today was whether or not respondents would be authorizing surgery with Dr. Bruffett. The continuance was granted because Dr. Bruffett, whom claimant now wants to have the surgery with, asked to see her again and this was out of the respondent’s control. Dr. Bruffett wanted her back before responding to some questions asked by the respondents. Once Dr. Bruffett again saw the claimant, it was confirmed “that we would be paying for the surgery.” The respondents acknowledged the offer of a continuance in regard to the hearing and argued that collateral estoppel would not apply, due to the fact that the unemployment hearing took place before the Department of Workforce Services which was a different entity, a different jurisdiction, a different finder of fact, with different issues. The Respondent’s requested that the court move forward.

At this point, the Commission confirmed that there had been a phone conference in regard to the issue of collateral estoppel and it was determined at the time that the Motion by the claimant to prevent the raising of termination for cause by the respondents was not prevented by collateral estoppel.

The witnesses consisted of the claimant, Ms. Kirkland Thompson and the testimony of Ms. Cindi Lindenmeyer for the respondents. Claimant's and respondent's exhibits were admitted into the record without objection. From a review of the record as a whole, to include medical reports and other matters properly before the Commission and having had an opportunity to observe the testimony and demeanor of the witnesses, the following findings of fact and conclusions of law are made in accordance with Arkansas Code Annotated 11-9-704.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That the Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. An employer/employee relationship existed at all pertinent times.
3. Claimant suffered a compensable injury to her back.
4. The claimant earned an average weekly wage of $1322.91, sufficient for a TTD/PPD rate of $835.00/$626.00 respectively.
5. That the issue of "termination for cause" was not barred by collateral estoppel.
6. That the claimant has failed to satisfy the required burden of proof to prove by a preponderance of the evidence that she is entitled to temporary total disability.
7. That all remaining issues are moot.
8. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

REVIEW OF TESTIMONY AND EVIDENCE

The Prehearing Order, along with the prehearing questionnaires of the parties were admitted into the record without objection. Additionally, the claimant's and respondent's exhibits were admitted into the record without objection. The first witness to testify was the claimant Becky Keeter, who testified that she had worked as a service advisor for Clay Maxey Chevrolet and the job consisted of meeting people in the lobby of

the dealership who came in with an issue regarding their automobile, and then checking their vehicle in. She would go out and hook up the scan tool to the car with the connection under the dash. She had worked for the Respondent for almost three and a half years. She was injured in September of 2023, and prior to that date, had never been written up for any disciplinary reason. She continued working after the accident. After her injury, some things in regard to her work were modified, but she was still required to bend over and connect the scanner under the dash. In regard to coupons for customers, she testified the Respondent distributed them for discounted services and she thought the coupons came from General Motors. (Tr. 13 – 15)

In regard to the coupons, there were different coupons, some for an oil change, some for battery maintenance, some for brakes, and some for varied services. She went on to state that she would receive the coupons through an email, or sometimes through the mail, and that the other service advisor also received the coupons. Her direct supervisor, George Stallings, was aware of the coupons. "Some people would go home and get and bring them back and some people would email them to me or text them to me to where I could just print them off for them." The coupons had never been an issue before. "In November, George talked to me about it, yes, he did." "He told me that from then on I needed to have authorization from him on every coupon." She was not required to sign a disciplinary note. (Tr. 16 – 18) She went on to state that she only used the coupons with her supervisor's approval, and she was terminated by Eric Stewart, the general manager on January 19th. At that time, a new managing partner had been brought on board who made "tremendous changes." She was told by Eric Stewart that they were going to start with a clean state in the service department. At the time of her termination,

she contacted someone about her workers' compensation claim and her benefits which had failed to arrive, and she then applied for unemployment benefits. She originally was denied but won an appeal for the unemployment benefits. During the time period after she got hurt, she worked a second job at Beer Belly's as a bartender and continued to work there. She also admitted to cleaning houses for income during this time-period, with her best month earning between $250 to $300, and her worst month being $66, with these figures prior to her paying for transportation or cleaning supplies. (Tr. 19 – 22)

Under cross examination, the Claimant admitted her job duties for the respondent consisted of checking the customer in, doing the paperwork on the computer, and scanning the vehicle by hooking up the scan tool under the dash, and then getting the vehicle back to the technician. She would sometimes contact an insurance provider. She reported her injury to Cyndi Lindenmeyer after checking in a vehicle, and Cyndi had set her up an appointment at Lincoln Paden Clinic. She admitted being terminated on January 19th. (Tr. 23-24)

The claimant was then questioned about being written up on the date of November of 2023, and she responded that she was not written up but warned after a discussion with her supervisor. She also admitted working at Beer Belly's while employed by Clay Maxey, and still currently working there on Friday and Saturday nights, from five to nine o'clock and being paid the same as prior to the injury. She additionally admitted that she had received one unemployment check for the sum of $5412.00 or something like that. In regard to seeing Dr. Bruffett, she admitted seeing him in February, and being placed on light duty. She went on to state "I made my job easier because I went and found what

I needed to make my job easier." A co-worker would check in the cars for her. In regard to cleaning houses, she admitted cleaning up to eight houses. (Tr. 25 – 27)

At this point, the claimant rested, and the respondents called their only witness, Cyndi Lindenmeyer, the HR manager for all four of the Clay Maxy dealerships. She had worked in that capacity since October, performing payroll and handling human resource issues. Prior to that, she had worked as the office manager and controller at a single Clay Maxy Chevrolet dealership. She was familiar with the claimant and had worked with her since probably in 2019. She testified that in regard to the coupons, General Motors mailed them out, but she did not know about emails, and the coupons offered discounts on various services. There was no policy in the employee handbook in regard to coupons, but there were policies in regard to discounts in general. The discounts had to be authorized and could not be just given out. (Tr. 28 -30)

In regard to the claimant's unemployment, Ms. Lindenmeyer testified that she personally filled out the response for the state of Arkansas in regard to the claimant's unemployment claim. The coupons were mailed to certain customers and if the coupons were used by someone who was not issued a coupon, it was possible that General Motors could decide not to reimburse the cost. In regard to light duty, Ms. Lindenmeyer was not aware of a request for light duty. She went on to state that if the claimant had not been terminated for cause on January 19th, she would have continued to do the same work. Light duty would have been continued. (Tr. 31 – 34)

The following questioning then occurred:

Q: Have you had issues with honesty or dishonesty with Ms. Keeter, aside from the coupon?

A: There have been some instances where on some of her personal service tickets, there were discounts that had been put on there that she had written, and they were applied to her repair orders.

Q. Is that something that would have been authorized?

A: No. We changed it to where - - what - - service advisors were not supposed to write their own tickets and that had been addressed on more than one occasion for that reason. And also they could not cashier their own tickets for that reason.

Q. Did you talk to her about that issue?

A. I sent emails about it to - - there have been - - there was - - there were a couple of different times that emails were sent out that Becky would have been there for both of those. It was previous service advisors and then she and Garrett too, I believe.

She went on to testify that they then changed the system. (Tr. 34)

Under cross examination, Ms. Lindenmeyer admitted that her office was down the hill adjacent to the dealership and she did not work in the service department but that she did go to the dealership on occasion. She also admitted that the information that she testified about today in regard to the claimant's specific performance would have been received from others, but in regard to the tickets, she had questioned the claimant about how a discount got on there. Ms. Lindenmeyer was not at the dealership on November 13th, to know whether the claimant received a written or verbal admonishment. She went on to testify that the claimant did in fact come to her, turn her clothing in, and tell her that Eric had informed her that they were making a clean slate in the service department, and she was fired, and Ms. Lindenmeyer agreed they were cleaning house. She also agreed that the decision by the appeals committee provided that the handbook called for progressive writeups. (Tr. 35 – 39)

On redirect, Ms. Lindenmeyer testified that the employment handbook was provided to the employees and the claimant had in fact signed that she had received it. The appeals committee wanted to know if there was anything that pertained to the use of unauthorized use of the coupons and Ms. Lindenmeyer provided the handbook. She also testified that she was not consulted in regard to the claimant's termination. (Tr. 40)

On further redirect, Ms. Lindenmeyer was asked about page 5 of respondents exhibits and the employees warning notice that stated that the employee would not sign the warning notice and that the document was initialed by G-S which would be Georges initials. (Tr. 43)

In regard to the documentary evidence, the Claimant's Exhibit one consisted of medical and as discussed above, the respondents agreeing to surgery by Dr. Bruffett, prior to the scheduled hearing. Consequently, additional medical was not an issue at the time of the hearing. The claimant's Exhibit 2, which consisted of eight pages of non-medical exhibits, was admitted without objection. The Form AR-2 provided that the claimant was injured on September 1, 2023. (Cl. Ex. 2, P. 1) The First Report of Injury also provided that the claimant was injured on September 1, 2023, and this document appeared to be filed on or about March 4, 2024. (Cl. Ex. 2, P. 2) A decision by the Arkansas Appeal Tribunal provided that a hearing was held on May 3, 2024. The decision provided that the employer has the burden of proving misconduct by a preponderance of the evidence and referred to Grigsby v. Everett, 8 Ark. App. 188, 649 S.W.2d 404 (1983), and that the employer has not shown by a preponderance of the evidence that the claimant willfully disregarded the employers interest and therefore the claimant was

discharged from her last work for reasons other than misconduct in connection with the work. (Cl. Ex. 2, P. 6 – 8)

The respondents exhibit one which consisted of 14 pages of non-medical records, was admitted without objection. The records from the Department of Workforce Services provided that the claimant was discharged by her general manager due to violating company policy by providing discounts to customers with no proof of mailers. The documents provided that the claimant would make photocopies of the coupons and give them to the customers to discount work. The document also provided that the claimant would not sign the warning notice. (Resp. Ex. 1 P. 1-5)

Respondents Exhibit 1 also included a surveillance report in regard to a video from Meridian Investigative Group. The documents provided there were three days of surveillance, Saturday, February 17, 2024, from 6:58 a.m. to 11:18 a.m.; Saturday March 2, 2024, from 7:00 a.m. to 3:03 p.m.; and Saturday April 6, 2024, from 7:06a.m. – 3:07 p.m. (Resp. Ex. 1, P. 6 – 14)

Respondents Exhibit 2 consisted of the actual video observation of the claimant totaling 21 minutes and 37 seconds. The video was in fact reviewed and the most pertinent part of the video was taken primarily at a Dollar General which provided that the claimant was walking and moving in a normal manner and gait without any ambulatory aids. The video showed the claimant bending, twisting, and lifting, in a normal manner, with no observable or apparent physical limitations. (Resp. Ex. 2)

DISCUSSION AND ADJUDICATION OF ISSUES

In the present matter, the parties stipulated that the claimant sustained a compensable work-related injury to her back. In determining whether the claimant has sustained her required burden of proof for her claimed benefits, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann 11-9-704. Wade v. Mr. Cavananugh's, 298 Ark. 364, 768 S.W. 2d 521 (1989). Further, the Commission has the duty to translate evidence on all issues before it into findings of fact. Weldon v. Pierce Brothers Construction Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

The claimant bears the burden of proof in establishing entitlement to benefits under the Arkansas Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. Dalton v. Allen Engineering Co., 66 Ark. App. 201, 635 S.W. 2d 823 (1982). Preponderance of the evidence means the evidence having greater weight or convincing force. Metropolitan Nat'l Bank v. La Sher Oil Co., 81 Ark App. 263, 101 S.W.3d 252 (2003). Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. Powers v. City of Fayetteville, 97 Ark. App. 251, 248 S.W.3d 516 (2007). Where there are contradictions in the evidence, it is within the Commissions' province to reconcile conflicting evidence and to determine the true facts. Cedar Chem. Co. v. Knight, 99 Ark. App. 162, 258 S.W.3d 394 (2007).

The claimant raised collateral estoppel in regard to the issue involving termination for cause, contending the issue had already been resolved by the Arkansas Appeals Tribunal in a matter involving unemployment benefits which the claimant contended she

was entitled to receive. In its decision, the Appeals Tribunal relied on Grigsby v. Escort, 8 Ark. App. 188, 649 S.W.2d 404 (1983), for the premise that the employer (respondent) has the burden of proving misconduct by a preponderance of the evidence, and held the employee (claimant) was entitled to unemployment benefits.

Collateral Estoppel or issue preclusion, bars litigation of issues that were previously litigated. Four requirements must be satisfied for collateral estoppel to apply, with the first being the issue sought to be litigated must be the same as that involved in the prior litigation. See Pine Bluff Warehouse v. Berry, 51 Ark. App. 139, 912 S.W.2d 11 (1995). In the unemployment hearing before the Tribunal, the claimant and respondents were litigating the issue of unemployment benefits. In the current matter before the Commission, which has sole jurisdiction over workers' compensation claims and benefits, the claimant and respondents are litigating the issue of temporary total disability, clearly a separate and different issue. It is also noted that the burden of proof in regard to showing misconduct lies on the employer (respondent) in a hearing involving an unemployment claim before the Tribunal, while the burden of proof regarding temporary total disability lies on the employee (claimant) in a hearing before the Commission. Based upon the above differences, there is no alternative but to find that collateral estoppel does not apply in regard to the hearing before the Commission.

In regard to the claimant's claimed temporary total disability, the claimant suffered a compensable injury to her back on September 1, 2023, and was not terminated until January 19, 2024. The claimant made the statement that they were cleaning house in the service department, the area where she worked, and Ms. Lindenmeyer, whose testimony was believable, and who testified that she was not involved with the termination

of the claimant, agreed with the claimant about the house cleaning. Ms. Lindenmeyer also testified that she recognized the initials on a document being of a supervisor, and the document provided that the claimant would not sign a warning notice in regard to her work.

A video of the claimant was entered into evidence that showed the claimant shopping in a Dollar General Store where she was able to squat, reach out for items, and ambulate. It is also noted that the claimant was receiving unemployment benefits during at least part of the time period for the requested temporary total disability benefits and that to draw unemployment in the state of Arkansas, A.C.A. 11-10-507 (3) (A) requires that the claimant be unemployed but mentally and physically able to perform suitable work.

Additionally, it is noted that the claimant admitted working as a bar tender at the time of her injury and still currently working the same job, two evenings a week. The claimant also admitted cleaning houses for a while during this period.

Temporary total disability under the Arkansas Workers' Compensation Act is the period within the healing period in which an employee suffers a total incapacity to earn wages. Arkansas State Highway and Transportation Department v. Brashears, 272 Ark. App 244, 613 S.W.2d (1981) The Commission may consider the claimant's physical capabilities and evaluate her ability to engage in any gainful employment. It is the claimant who bears the burden of proving she remains in her healing period and additionally suffered a total incapacity to earn pre-injury wages in the same or other employment. Palazzolo v. Nelms, 46 Ark. App. 130, 877 S.W.2d 938 (1994). Temporary total disability is not only based on the claimant's healing period, but is awarded where

the claimant's injury-caused incapacity prevents her from earning the wages that she was receiving at the time of the injury. County Mkt. v. Thorton, 27 Ark. App. 235, 770 S.W.2d 156 (1989).

The claimant failed to show that an injury-caused incapacity prevented her from earning the wages she was receiving at the time of her work-related injuries. Based upon the above evidence and the applicable law, and after weighing the evidence impartially, without giving the benefit of the doubt to either party, there is no alternative but to find that the claimant has failed to satisfy the required burden of proof to prove by a preponderance of the evidence that she is entitled to temporary total disability for the period of time requested.

IT IS SO ORDERED.

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JAMES D. KENNEDY
Administrative Law Judge