

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H302489

DANE MONGER, Employee	CLAIMANT
HORSESHOE CANYON RANCH, Employer	RESPONDENT
BRIDGEFIELD CASUALTY/SUMMIT CONSULTING, Carrier/TPA	RESPONDENT

OPINION FILED OCTOBER 21, 2024

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

Claimant represented by DANIEL E. WREN, Attorney, Little Rock, Arkansas.

Respondents represented by ZACHARY F. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 18, 2024, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 5, 2024 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The claimant sustained a compensable injury to her left shoulder and head on June 14, 2022.

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

1. Additional temporary total disability benefits from October 27, 2022 until April

18, 2023, and again from August 24, 2023 through October 11, 2023.

2. Average weekly wage.
3. Permanent partial disability benefits based on a 4% rating and wage loss.
4. Attorney's fee.

The claimant contends she sustained a compensable injury when she was thrown from a horse on June 14, 2022, suffering a head injury and a right shoulder injury, which was later diagnosed as a torn labrum. The torn labrum was surgically repaired on April 18, 2023. From June 14, 2022, the respondent employer provided light duty employment for the claimant until she was terminated on October 27, 2022. The respondents paid for all reasonable and necessary medical treatment until claimant was released at maximum medical improvement on October 11, 2023. Respondents stopped paying temporary total disability on August 24, 2023. When claimant was released at maximum medical improvement the doctor did a passive range of motion test, which would entitle the claimant to a 4% impairment rating to the body as a whole. In addition to claimant's salary, she was provided room and board by the respondent employer valued at \$1000 per week. The claimant's average weekly wage was \$1329.21. After being released at maximum medical improvement, the claimant was not rehired by the respondent employer, and has not been able to find suitable employment at the level of pay she was receiving at the time of the injury, thus suffering wage loss.

The respondents contend claimant was paid properly for the amount of time she was off work. The claimant is a seasonal worker, working at a horse ranch. The time claimed for temporary total disability is off season time.

From a review of the record as a whole, to include medical reports, documents,

and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on June 5, 2024 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant earned an average weekly wage of \$479.00 which would entitle her to compensation at the rates of \$319.00 per week for total disability benefits and \$239.00 per week for permanent partial disability benefits.

3. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from August 27, 2022 through April 18, 2023 or from August 24, 2023 through October 11, 2023.

4. Claimant has failed to prove by a preponderance of the evidence that she is entitled to any permanent partial disability benefits, either in the form of permanent impairment or wage loss, as a result of her compensable injury.

5. To the extent that respondent paid claimant compensation benefits at a rate less than the average weekly wage of \$479.00, respondent has controverted claimant's entitlement to that difference and is liable for payment of an attorney fee.

FACTUAL BACKGROUND

Respondent is a ranch in Newton County that has thirteen guest cabins for rent.

During the “all-inclusive” season guests are charged approximately \$1245.00 - \$1325.00 per adult for a cabin. In addition to the accommodations, all meals and activities were included. The all-inclusive season begins the first Monday in March and concludes the last Saturday in October. The “off-season” begins after the last Saturday in October. During the off-season, the cabins were rented to guests at the rate of \$115.00 per night for a small cabin and \$135.00 per night for a larger cabin. During the off-season, meals and activities were not included for the guests.

Claimant is a 23-year-old woman who began working for respondent in July 2021. She was employed as a “wrangler” who was responsible for catching, saddling, preparing, and feeding horses. She also led guests on trail rides. She was paid \$12.00 an hour and was also provided meals and lodging.

The parties have stipulated that claimant suffered a compensable injury to her right shoulder and head on June 14, 2022 when she was thrown from her horse. She received medical treatment from Dr. Christopher Gilbert who diagnosed claimant with a closed head injury (concussion) and a right shoulder strain. She was given a sling to wear; medication; and instructed to receive follow-up orthopedic care from Dr. Justin Cutler. She was also released to return to work with restrictions.

Claimant was evaluated by Dr. Cutler on June 29, 2022, and assessed with right shoulder contusion bursitis. Dr. Cutler gave claimant a steroid injection and released her to return to work with restrictions. When claimant’s condition did not improve, he ordered physical therapy and continued the work restrictions.

At some point claimant came under the care of Dr. Saunders, orthopedic surgeon, who ordered an MRI arthrogram of the right shoulder. Although the MRI of February 8,

2023 was interpreted as unremarkable, Dr. Saunders indicated in his report of February 20, 2023, that in his opinion “there is an irregularity along the anterior inferior capsular labral junction.” As a result, he recommended a diagnostic arthroscopic procedure which was performed by him on April 7, 2023. The Post-Op Diagnosis states:

1. R shoulder posterior-superior labral tear without evidence of capsular avulsion with associated synovitis.
2. R shoulder posttraumatic bursitis with rotator cuff tendinosis.

The operative report indicates that Dr. Saunders performed a debridement and subacromial bursectomy. Following this surgery, Dr. Saunders took claimant work and ordered physical therapy. His reports indicate that claimant was pleased with the results of the surgery and in a report dated October 11, 2023, he stated that claimant had reached maximum medical improvement and could return to work.

Respondent paid claimant some compensation benefits for her compensable injury. Claimant has filed this claim contending that she is entitled to payment of additional temporary total disability benefits from October 27, 2022 through April 18, 2023, and from August 24, 2023 through October 11, 2023. She also requests payment of permanent partial disability benefits based on a 4% rating to the body as a whole; benefits for wage loss; and computation of her compensation rate.

ADJUDICATION

The first issue for consideration involves claimant’s average weekly wage and compensation rates. The parties agree that claimant’s average weekly should consist of

the wages paid to her as well as the value of the housing and meals provided. However, the parties are not in agreement as to any of the calculations. A.C.A. §11-9-518(c) states that in exceptional circumstances the Commission may determine the average weekly wage that is just and fair to all parties concerned. Furthermore, A.C.A. §11-9-102(19) defines “wages” as:

The money rate at which the service rendered is recompensed under the contract of hire enforced at the time of the accident, including the reasonable value of board, rent, housing, lodging, or other similar advantage received from the employer.

Prior to discussing the calculation of the claimant’s average weekly wage, it is first necessary to discuss the working relationship between employees such as claimant and the respondent. As previously noted, respondent’s operation included an all-inclusive season and an off-season. Testifying at the hearing was Barry Johnson who was the owner/operator of respondent during the period of time claimant worked there. Johnson testified that employees such as claimant generally did not work during the off-season. However, if the employee was going to be invited back to work the next all-inclusive season, they were given the opportunity to remain in their lodging and live at the ranch during the off-season. While they were not required to perform any job duties during this period of time, they would sometimes be offered an odd job for which they would be paid an agreed upon amount. Johnson stated that he would consider them to be “inactive” employees.

Q Let me clarify again. The people that you invited and allowed to stay at the ranch in the off-season, you did not consider employees?

A Sometimes they were. Sometimes they worked but they were off-season employees. If they weren't employees, they wouldn't be staying there because they wouldn't be starting anew when a new season started. I would probably consider them as inactive employees. I'm not sure how to describe that. I know it's a little unique to our industry.

Q So they were inactive, and you didn't make them do any work, but you gave them opportunities to make a little spot work here and there?

A Sure.

During the all-inclusive season claimant and other employees were permitted to eat the same meals provided to the paying guests at the ranch. Johnson testified that the meals were served buffet style and breakfast typically included bacon, eggs, pancakes, fruit, yogurt, etc. Lunch would consist of burgers, fries, soups, salads, and pizza. Dinner was generally nicer with food including barbeque, pork tenderloin, and steak on Saturday night. During the off-season meals were not provided, but the ranch's kitchen was stocked and the "inactive" employees were free to fix food for themselves.

Claimant and other employees were also allowed to stay rent free in selected cabins. As previously noted, employees who were invited back to work the next all-inclusive season were permitted to stay in their cabins during the off-season. During the off-season of 2021-2022, claimant chose to stay in her cabin at the ranch.

The initial portion of the average weekly wage to be calculated is claimant's actual money wages earned while employed by respondent. Claimant submitted into evidence as Claimant's Exhibit 3 a wage statement setting out the money wages paid from July 25, 2021 through June 11, 2022. Claimant contends that since she was considered an

inactive employee by respondent during the offseason period from November 2021 through March 2022 her average weekly wage should be calculated using only the wages earned beginning in March 2022.

I do not agree with this contention. The wage statement indicates that during the offseason claimant was paid for odd jobs she performed between November 2021 and March 2022. In fact, the wage statement shows that claimant earned wages twelve different weeks during the offseason. I see no reason to ignore these wages during this period of time. The fact that claimant did not perform her regular job duties during the offseason does not change the fact that she still performed work for wages during this period of time.

The wage statement reflects a period of 47 weeks between July 25, 2021 and June 11, 2022. I find that claimant's money wages should include the 39 weeks during that period of time she was paid money wages by respondent. During this period claimant was paid a total of \$12,810.92. Dividing these total wages by 39 weeks results in an average weekly money wage of \$329.00.

Turning now to the value of the lodging and food portion of claimant's wages, I note that claimant relies on her testimony and the testimony from Johnson that the cabin provided to claimant is better than a dorm room. Claimant then cites the cost of dorm rooms at the University of Arkansas – Fayetteville as evidence that the value of her cabin is greater than a dorm room at the University. I do not find a dorm room at the University of Arkansas to be comparable in value to a room located on a ranch in Newton County.

Claimant also testified that she considered her cabin to be similar to the guest cabins. Therefore, she contends that the value of her cabin would be similar to the value

charged to a guest. Claimant introduced into evidence photos of two cabins; however, both of those cabins are guest cabins, not the cabin in which claimant lived. According to the testimony of Johnson, claimant stayed in two different areas. He testified that the cabin she stayed in was smaller than the smallest guest cabin and that it was originally a portable building that had 2 x 4 walls and had been covered with cedar siding. He also testified that the guest cabins had much nicer levels of finish.

Q Did they have different levels of finishes?

A They did. The cabins were furnished well for guests, Western motifs, fully furnished, linens, towels, and things like that.

Q What about countertop levels and the quality of the bathroom; any difference there?

A Yes, the cabins had, you know, granite countertops and Dane's was just a formica, Home Depot countertop, if I remember.

Johnson also testified that the first cabin claimant lived in was in the lower level of a barn.

It was built for staff housing. It's in a lower level of the barn, and there's a girls' side and a boys' side, and they share a common kitchen area. So there was bunkbeds in each side for staff, and then they had their bathroom and then shared a kitchen area.

Finally, Johnson testified that he placed the value of the cabin provided to claimant at \$300.00 per month.

Q How did you come to that number?

A We never claimed it as an expense, so we were estimating what shared accommodations, or the level of

trim, or quality of the combinations would be in our area.

Q Did you in your mind compare it to a dorm room?

A No.

Q Did you tell me yesterday that you kind of thought of it as a dorm room?

A Oh, it is. It's a bunkhouse in Newton County, Arkansas, but it's not a dorm room in Fayetteville, Arkansas.

Claimant submitted into evidence a video of her cabin. After my review of that video as well as the pictures from the guest cabins, I do not find that the cabin provided to claimant was compatible with the guest cabins. The video and pictures clearly indicate that the cabins provided to the guests have significantly better finishes and are much nicer than the cabin shown on the video. Accordingly, I do not find that the cabin provided to claimant was the equivalent of or comparable to the guest cabins on the ranch.

Based upon the evidence presented, I do not find the cabin provided to claimant on a ranch in Newton County to be comparable to the value of a dorm room on the campus of the University of Arkansas. I also do not find it to be comparable in value to the amount charged for guest cabins. According to Johnson the first place that claimant was provided was in the lower level of a barn. As for the second cabin, it was originally a portable shed that had been covered with cedar siding. The finish of claimant's cabin was not equivalent to the finish and furnishings of the guest cabins. I find that the value of the cabin was equal to \$300.00 as testified to by Johnson. He testified that he arrived at that value based upon various factors such as shared accommodations, the level of trim, and the quality of other housing available in their area.

I also find the value of the food provided to claimant to be \$300.00 per month based on the testimony of Johnson. Johnson testified as follows:

Q And how did you calculate, or estimate, or come to that number?

A Strictly on a cost basis. So, a lot of the employees, though they were offered, did not participate in meals. A lot of times they would skip meals or not take advantage of that benefit. They were guested out and then would just disappear during meal times. So we figured it on a cost basis because the cook was already there, the kitchen was already there, we were already providing food for the guests, so the only cost we were incurring was the flour, eggs, and whatever it took to cook the meal.

I find his testimony to be credible and entitled to great weight. It might be argued that the value of the lodging and meals provided to claimant is greater than the \$600.00 per month testified to by Johnson. However, for reasons previously discussed, I do not find comparisons to dorm rooms at the University of Arkansas to be comparable. Nor do I find the lower level of a barn or a former portable building to be equivalent to the guest cabins located on the ranch. Any determination in the value of the lodging and meals provided to claimant must be based upon the evidence presented at the hearing. A finding that the value of lodging or food is actually \$800.00 per month for example would require speculation and conjecture since there is no evidence offered to that effect at the hearing. Speculation and conjecture are not to be substituted for credible evidence by the Commission. *Dena Construction Company v. Herndon*, 264 Ark. 791, 575 S.W. 2d 155 (1979).

Based on a finding that the value of lodging (\$300.00) and food (\$300.00) equals \$600.00 per month or \$150.00 per week combined with her money wages of \$329.00 per

week, I find that claimant's average weekly wage equals \$479.00. This results in compensation rates of \$319.00 for total disability and \$239.00 for permanent partial disability benefits.

The next issue for consideration involves claimant's request for payment of temporary total disability benefits from October 27, 2022 through April 18, 2023, and from August 24, 2023 through October 11, 2023. Claimant's injury is an unscheduled injury. In order to be entitled to temporary total disability benefits for an unscheduled injury, claimant has the burden of proving by a preponderance of the evidence that she remained within her healing period and that she suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

Even assuming that claimant remained within her healing period during the requested periods, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a total incapacity to earn wages. When claimant initially sought medical treatment after her compensable injury, she was returned to work with work restrictions. Claimant acknowledged that after her injury she returned to work for respondent and continued to work there until October 27, 2022, at which time the all-inclusive season ended and claimant was informed that she would not be invited back to work during the all-inclusive season in 2023.

On direct examination claimant testified that after she was let go by the respondent at the end of October she did not receive any workers' compensation benefits until after her surgery in April. In fact, claimant testified that she did not receive any type of compensation from October 27, 2022 until the date of the surgery on April 18, 2023. [The

actual date of the surgery was April 8, not April 18.] In reality, while claimant did not receive workers' compensation benefits during this period of time, she returned to work for other employers and made more in average weekly wage than she was earning for the respondent.

Q So you went without any type of compensation from October 27th until – and I think we've got it here exactly in the pleadings – April the 18th of 2023?

A Yeah, so I made nothing then.

Q During this period of time, did you try being a Door Dash deliverer?

A Yes.

Q Did that work out?

A Not really, no.

Q The cost of the car and gasoline, was it worth it?

A No.

Q Did you have a friend of the family who needed a sitter?

A Yes.

Q Did you do that?

A Yes.

Q And how much were you paid per month?

A I was paid 2,000 per month, so it was \$500 a week.

Q After leaving in October 27th, 2022, did you move back to Kansas?

A Yes.

Q And then you started working for the Richard Laptad; is that correct?

A Correct.

Q He is an elderly man, I think you described as being in his 90s; is that correct?

A Yes.

Q And so you took care of him, offered him services to live and get around the house; is that correct?

A Right, yeah.

Q And then you were paid \$500 per week by Richard Laptad; is that correct?

A Correct.

Q And that was for the period of time you worked for him all the way up until your surgery on April 18th of 2023; is that correct?

A Correct.

Thus, in the period from October 7, 2022 until her surgery on April 8, 2023, the claimant earned \$500.00 per week as a sitter for an elderly gentleman. This is more than she was earning as an average weekly wage for the respondent. Based upon this evidence as well as the remaining evidence presented in this case, I do not find that claimant suffered a total incapacity to earn wages between October 27, 2022 and the date of her surgery on April 8, 2023.

Payment records submitted into evidence by the respondent show that respondent paid claimant temporary total disability benefits beginning April 10, 2023 and continuing

through August 27, 2023. The medical evidence also indicates that Dr. Saunders opined that claimant had reached maximum medical improvement as of October 11, 2023. Claimant contends that she is entitled to temporary total disability benefits beginning August 24, 2023, and continuing through October 11, 2023.

Again, even assuming that the claimant remained within her healing period during that period of time, I do not find that claimant suffered a total incapacity to earn wages. Again, claimant returned to work for other employers making an average weekly wage in excess of the average weekly wage she was earning for respondent. On cross examination, she testified that she returned to work as a sitter for Richard Laptad some two to three weeks after her surgery:

Q You took about two to three weeks off after surgery; is that correct?

A Yes, roughly.

Q And then you began working for Richard Laptad, again in the same capacity; is that correct?

A Yes.

Q Did you get paid the same, \$500 per week?

A Yes.

Q You worked for him all the way up until February of 2024; is that correct?

A Yes.

Accordingly, I find that claimant has failed to prove by a preponderance of the evidence that she suffered a total incapacity to earn wages from August 24, 2023 through October 11, 2023.

The next issue for consideration involves claimant's contention that she is entitled to permanent partial disability benefits based on a 4% impairment rating and wage loss. With respect to the impairment rating, I note that Dr. Saunders did not assign the claimant a permanent physical impairment rating. However, in his report of October 11, 2023, finding that claimant had reached maximum medical improvement, Dr. Saunders did note various measurements regarding claimant's right shoulder. Page 59 of Claimant's Exhibit 1 is an effort by claimant to convert those measurements into an impairment rating pursuant to the *AMA Guides, Fourth Edition*. The parties agree that the handwritten portion of Page 59 is not from Dr. Saunders or anyone in his office, but rather was calculated by Attorney Wren's brother. Apparently, claimant contends that the figures listed under "PROM" constitute passive range of motion findings which result in permanent impairment. With respect to this issue, I find after reviewing the appropriate AMA Guides that it is impossible to translate these figures into an accurate impairment rating, assuming that one is applicable. The measurement categories set out by Dr. Saunders in his report of October 11, 2023, do not match the measurement categories set forth in the AMA Guides at Figures 38 and 41, which are cited by claimant. In fact, I note that even claimant questions whether Figure 41 is appropriate in response to one of the measurements. In short, claimant has the burden of proving by a preponderance of the evidence that she has a permanent physical impairment as a result of her compensable injury. I simply find based upon the evidence presented that claimant has failed to meet that burden of proof.

Having failed to prove by a preponderance of the evidence that she suffered any permanent physical impairment as a result of her compensable injury, claimant is not

entitled to benefits for wage loss. However, even if one were to find that claimant had suffered a permanent physical impairment as a result of her compensable injury, I would nevertheless find that she has failed to prove that she has suffered a loss in wage earning capacity as a result of her compensable injury. As previously noted, claimant earned an average weekly wage of \$479.00. Following her surgery, claimant returned to work as a sitter and earned \$500.00 per week, which is more than her average weekly wage with the respondent. After performing that job for a period of time following her surgery the claimant then began working as a waitress in Oklahoma. According to her testimony, she made approximately \$2000.00 per month or \$500.00 per week, again more than the average weekly wage she was earning with the respondent. At the time of the hearing the claimant was employed at a feed yard in Oklahoma and was making \$14.00 an hour. Claimant testified that she made \$560.00 per week which again is in excess of the average weekly wage she was earning for the respondent.

Furthermore, with respect to this issue, I note that Dr. Saunders placed no physical restrictions on the claimant's ability to return to work.

Accordingly, for the foregoing reasons, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to any permanent partial disability benefits as a result of her compensable injury.

ORDER

Claimant earned an average weekly wage of \$479.00 which would entitle her to compensation at the rates of \$319.00 for total disability benefits and \$239.00 for permanent partial disability benefits. Claimant has failed to prove by a preponderance of

the evidence that she is entitled to temporary total disability benefits from October 27, 2022 through April 18, 2023, or from August 24, 2023 through October 11, 2023. Claimant has also failed to prove by a preponderance of the evidence that she is entitled to payment of any permanent partial disability benefits as a result of her compensable injury. To the extent that respondent paid claimant temporary total disability benefits at a rate less than the average weekly wage of \$479.00, I find that respondent has controverted claimant's entitlement to those benefits and is liable for an appropriate attorney's fee.

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

Respondent is responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$608.00.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE