

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H108821**

**WANDA S. MULDROW,
EMPLOYEE**

CLAIMANT

**DEP'T OF WORKFORCE SERVICES,
EMPLOYER**

RESPONDENT

**STATE OF ARKANSAS/PUBLIC EMPLOYEE CLAIMS
DIVISION,
INSURANCE CARRIER/TPA**

RESPONDENT

OPINION FILED JANUARY 19, 2024

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on October 23, 2023, in Texarkana, Miller County, Arkansas.

The claimant was represented by the Honorable Gregory R. Giles, Moore, Giles & Matteson, LLP, Texarkana, Miller County, Arkansas.

The respondents were represented by the Honorable Charles H. McLemore, State of Arkansas, Public Employee Claims Division (PECD), Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the prehearing order filed September 20, 2023, the parties agreed to the following stipulations, which they clarified and affirmed on the record at the hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed at all relevant times including October 4, 2021, when the claimant sustained a compensable injury to her left index finger/hand. The respondents paid medical and indemnity benefits.
3. The claimant's average weekly wage (AWW) was \$796.21, which is sufficient to entitle her to weekly compensation rates of \$531.00 for temporary total disability (TTD), and \$398.00 for permanent partial disability (PPD) benefits.

4. The claimant requested, and the commission granted, her one (1)-time-only request for a change of physician (COP) to Dr. D'Orsay Bryant by order dated November 17, 2021.
5. The respondents accepted and paid [or are in the process of paying] Dr. Jeanine Andersson's 13% to the left hand [63% to the left index finger] permanent anatomical impairment rating.
6. The respondents have controverted only the claimant's subject request for TTD benefits.
7. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Commission Exhibit 1 at 1-2; Reporter's Transcript at 4-5; Respondents' Ex. 3 at 9) (Bracketed material added). Pursuant to the parties' mutual agreement the sole issue litigated at the hearing was:

1. Whether the claimant is entitled to additional TTD benefits from March 8, 2022, through the date Dr. Andersson determined she reached maximum medical impairment (MMI), which is August 14, 2023.
2. Whether the claimant's attorney is entitled to a controverted fee on these facts.
3. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. at 4-5).

The claimant contends she is entitled to TTD benefits from on or about March 8, 2023, through the date Dr. Andersson determined she reached MMI, which is August 14, 2023. She further contends her attorney is entitled to an attorney's fee based on any and all additional TTD benefits the Commission may award her. The claimant specifically reserves the right to amend her prehearing questionnaire response upon the completion of appropriate and necessary investigation and discovery. In addition, she specifically reserves any and all other issues for future determination and/or litigation.

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(Comms'n Ex. 1 at 1-2; T. 4-5).

The respondents contend they accepted the claimant's injury and as compensable and have paid all appropriate medical and indemnity benefits to date. They contend the claimant cannot meet her burden of proof pursuant to the Act in demonstrating she is entitled to additional TTD benefits since she voluntarily retired and is not entitled to TTD benefits after the date she retired. The respondents reserve the right to file an amended response to the prehearing questionnaire and/or any and all other appropriate pleading(s), and to plead any further affirmative defense(s) that may be available to them upon the completion of necessary and appropriate discovery, which discovery is ongoing at this time. The respondents specifically reserve any and all other issues for future determination and/or litigation. (Comms'n Ex. 1 at 3; T. 4-5).

The record herein consists of the reporter's hearing transcript and any and all exhibits contained therein or attached thereto, as well as the parties' blue-backed post-hearing briefs.

STATEMENT OF THE CASE

The claimant, Ms. Wanda Muldrow (the claimant) was 72 years old at the time of the compensable injury to her left index finger on October 4, 2021, and 74 years old as of the hearing date. On October 4, 2021, the date of her compensable left index finger injury, the claimant was working with the Arkansas Department of Workforce Services (Workforce Services) as a case manager. Before she worked as a case manager for Workforce Services, she had worked in another state program, the Workforce Investment Act (WIA) for about ten (10) years, first in a temporary, then later in a permanent, capacity. While she was working with the WIA the claimant took some college courses in business, but never actually received her associate degree as she was a few hours short. (T. 7-8; 34-37).

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When she was 62 years old, and while she was working at the WIA and going to college some, the claimant filed for and began drawing Social Security retirement benefits. She started to work with Workforce Services in 2007, and continued to work with them as a case manager until she voluntarily resigned and fully retired effective December 31, 2021, at the age of 72 years. After she retired the claimant began drawing her full state retirement benefits, and she was drawing those benefits at the time of the subject hearing. (T. 37-38; 48-50; RX3 at 6).

On October 4, 2021, the claimant was working as a case manager with Workforce Services and was walking out of her office on the way to a co-worker's office when the door closed on her left index finger, "smashing" the top part of the finger. The claimant went back into her own office/work area and told her supervisor, Ms. Beverly McEntire, she had caught her finger in the door and injured it. The incident occurred at the end of the day, so the claimant did not go to see a doctor at that time, but went home where her finger began hurting worse over the course of the evening. (T. 9-13).

The next day the claimant went back to work and told her supervisor she needed to see a doctor, and she went to see her own primary care physician, Dr. Dale Goins, at the Wadley Regional Health Clinic. (T. 12-13; Claimant's Exhibit 2 at 1-6). Dr. Goins's clinic note of 10/5/2021 reveals that, among a number of other medications, the claimant had been prescribed and taken Gabapentin in the past, and that she had a history of, "Hand pain and gout." (CX2 at 1; 2). Dr. Goins assessed the claimant as having a, "Contusion of left hand", and ordered an X-ray of her left hand, which included all the fingers of her left hand, including her left index finger. (CX2 at 3-6).

The X-ray report of 10/5/2021 notes the claimant's reported, "History of crush injury to the left index finger...The left fingers demonstrate an erosive process involving the distal interphalangeal

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joints. Rounded densities are seen adjacent to the distal interphalangeal joints of the left index and middle fingers, with marginal erosions in the joint. There is a joint space narrowing with mild osteophytosis noted. No foreign body is noted. No additional injury is identified.” (CX2 at 5). This X-ray report concludes under the, “Impression” section of the report, and states as follows:

Impression: There appears to be an arthropathy involving the distal interphalangeal joints. The presence of periarticular rounded densities are suggestive of tophi, with regions of well-corticated erosions. This could indicate underlying gout. The presence of joint space narrowing and osteophytosis, with the distribution in the interphalangeal joints is more suggestive of erosive osteoarthritis. No old films are available for comparison. Correlation with the patient’s history and blood work is necessary. There is a history of a crush injury to the claimant’s left index finger. No definite superimposed fracture is noted. Soft tissue swelling in the distal left index finger could indicate soft tissue injury. Correlation with physical exam is recommended.

(CX2 at 5).

Dr. Goins splinted the claimant’s left index finger and immediately released her to return to her job, which already was essentially light duty work. Likewise, on October 15, 2021, after his review of the 10/5/2021 X-ray and examination of the claimant, Dr. Thomas Fox assessed the claimant with pain in her left index finger, and an abrasion of her left hand. He opined she likely had gout, and concluded she could work light duty. (CX2, 19-21; 19-23). Dr. Fox also recommended the claimant return to see her family physician, Dr. Goins. (CX2 at 24-28).

The claimant testified her job at Workforce Services required her to meet with job applicants, interview them, and perform some typing duties related to documenting the meetings. (T. 18-21; 45-46). The claimant is right, not left-hand, dominant. She admitted under oath that Workforce Services accommodated her and provided her light duty work, which she initially performed; that none of her treating physicians ever opined she was unable to work; and further that although her left index finger

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was hurting especially when she tried to type, she continued to work until she voluntarily retired effective December 31, 2021. The claimant submitted her resignation/retirement letter on November 3, 2021, and her official retirement date was December 31, 2021. Again, the claimant's treating physicians, including her own personal family physician, Dr. Goins, never opined she was disabled from engaging in gainful employment; and both Drs. Goins and Fox released her to light duty work which the respondents made available to her until she retired and voluntarily left their employ. (CX2 at 1-33; T. 21-22; 48-50).

The claimant requested and the Commission granted her one (1)-time-only COP to Dr. D'Orsay Bryant via an order dated November 17, 2021. (CX2 at 30-31). Dr. Bryant first examined the claimant on 12/2/2021, which was almost one (1) entire month before the effective date of her voluntary retirement, 12/31/2021. Again, Dr. Bryant did not take the claimant off work, nor did he place any additional physical limitations or restrictions on her ability to perform light duty work. (CX2 32-33).

Dr. Bryant ordered an MRI without contrast which was performed on 2/11/2022, after the date the claimant retired on 12/31/2021. (CX2 at 32-33; 34). Dr. Bryant diagnosed the claimant with a mallet finger avulsion injury of the second DIP joint of her left index finger. (CX2 at 34). This diagnosis is consistent with both Dr. Goins's and Dr. Fox's findings, *supra*. In a clinic/progress note dated 4/28/2022 Dr. Bryant noted the claimant told him, "...that she retired on 12-31-21 to help take care of her husband who was on renal dialysis. She stated she wants to go back to work part time in six months." (CX2 at 35-36). Dr. Bryant followed and monitored the claimant until 11/1/2022, and during this time period prescribed only conservative treatment such as splinting her left index finger,

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and physical therapy (PT). (CX2 at 35-50). Like Drs. Goins and Fox before him, Dr. Bryant splinted the claimant's left index finger, treated her conservatively, and never recommended any surgery, nor did he opine she was totally incapacitated from engaging in gainful employment. (CX2 at 1-68).

Finally, on May 22, 2023, the claimant was examined by and came under the care and treatment of Dr. Jeanine Anderson of OrthoArkansas in Little Rock. Dr. Andersson is an orthopedic surgeon specializing in hand treatment and surgery. Dr. Andersson removed the claimant's splint as she (*i.e.*, Dr. Andersson) wanted, "her to discontinue full-time immobilization of the [left] index finger", and recommended range of motion and similar exercises. (CX2 at 69-72; 69-73) (Bracketed material added). Dr. Andersson opined the claimant reached MMI as of August 14, 2023, and – like Drs. Goins, Fox, and Bryant before her – she did not recommend any surgery on the claimant's left index finger. (CX2 at 74-77; 78). Finally, Dr. Andersson assigned the claimant a 63% permanent anatomical impairment rating to the claimant's left index finger, which the respondents accepted and have paid, or are paying. (CX2 at 79; RX3 at 9).

DISCUSSION

The Burden of Proof

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2023 Lexis Replacement). The claimant has the burden of proving by a preponderance of the evidence she is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). *Ark. Code Ann.* Section 11-9-704(c)(3) (2023 Lexis Repl.) states that the ALJ, the Commission, and the courts "shall strictly construe" the Act, which also

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requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). In determining whether the claimant has met her burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party. *Ark. Code Ann.* § 11-9-704(c)(4) (2023 Lexis Repl.); *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep't of Corrections v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Deana Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission's exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees*, 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles, supra*.

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission's province to weigh the totality of the medical evidence and to determine what evidence is most credible given the totality of all the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

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In this case both attorneys did an excellent job litigating this claim at the subject hearing, and in writing their post-trial briefs. As always, they both made excellent, knowledgeable, articulate arguments and represented their respective clients well. However, based on the applicable statutory and case law – which are directly on point on these facts – I am compelled to find the claimant is not entitled to any TTD benefits for the reasons set forth below.

The claimant has failed to meet her burden of proof in demonstrating she is entitled to TTD benefits from March 8, 2022, through the date Dr. Andersson opined she reached MMI, August 14, 2023.

Pursuant to *Ark. Code Ann.* § 11-9-521(a) (2023 Lexis Replacement) a claimant who has sustained a permanent scheduled injury is entitled to TTD or temporary partial disability (TPD) benefits *only during the healing period or until the employee returns to work, whichever occurs first.* (Emphasis added). Moreover, *Ark. Code Ann.* § 11-9-526 (2023 Lexis Repl.) prohibits a claimant from receiving either TTD or TPD benefits *if they refused* “employment suitable to his or her capacity offered to or procured for him or her during the continuance of the refusal, unless in the opinion of the Workers’ Compensation Commission, the refusal is justifiable.”

The claimant herein primarily and cleverly relies on *Walker v. Cooper Standard Automotive, Inc.*, 104 Ark. App. 175, 289 S.W.3d 184 (Ark. App. 2008), a case her attorney had previously tried and in which he had ultimately prevailed. In *Walker* the claimant, who was still within his healing period, was working light duty, but the employer terminated the claimant of its own initiative, apparently due to a desired or necessary workforce reduction. Since the employer terminated the claimant of its own accord while the claimant was capable of light duty work but thereafter failed and/or refused to offer the claimant another suitable light duty job, the *Walker* court deemed the

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provisions of *Ark. Code Ann.* Section 11-9-526 had not been triggered and, thus, were inapplicable. *See also, Walker v. Cooper Standard Automotive, Inc.*, 2009 AWCC 96 (AWCC No. F604949, May 18, 2009), in the same claim on remand from the court of appeals, the Full Commission awarded the claimant TTD benefits consistent with the court's holding.

Although not on point in the case at bar, it is interesting and instructive to consider the case of *Tyson Poultry, Inc. v. Narvaiz*, 2012 Ark. 118, 388 S.W.3d 16 (2012). Narvaiz was a claimant who had sustained a work-related injury, and had returned to his employment performing the light duty work his employer had made available to him, "when he called his female supervisor an insulting, derogatory, and vulgar name ('mother-f- - king bitch')." *Narvaiz*, 2012 Ark at 2. Not surprisingly, the employer suspended the claimant, then terminated his employment for subordination and gross misconduct. The ALJ found the claimant's misconduct amounted to the claimant's refusal to accept and perform suitable employment. The Full Commission reversed the ALJ, finding to the contrary. On appeal to the court of appeals, the court reversed the Full Commission. Thereafter, on appeal to our supreme court, the court noted that pursuant to a specific provision of Act 796 the Act is to be "strictly construed." Consequently, in applying the legislative mandate of strict construction, the Arkansas Supreme Court held that termination of employment for misconduct is *not* tantamount to refusing suitable employment and, therefore, since the claimant was still within his healing period, and was able and willing to work when the employer fired him, he was entitled to TTD benefits until he reached MMI.

In the case at bar, the facts are clearly and obviously distinguishable from both *Walker*, and *Narvaiz*, *supra*. In the instant case the employer did not of its own initiative and choice terminate the

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claimant for any reason whatsoever, and certainly not for purposes of workforce reduction or misconduct. The controlling precedent on the facts in the instant claim are set forth in *Lybyer v. Springdale School District*, 2019 Ark. App. 77, 568 S.W.3d 805 (Ark. App. 2019), and *Turcios v. Tyson Foods, Inc.*, 2016 Ark. App. 471, 504 S.W.3d 622 (Ark. App. 2016).

In *Lybyer*, the ALJ, Full Commission, and court of appeals unanimously agreed the claimant had *voluntarily resigned her position* and, therefore, *was not entitled to a period of TTD benefits after she voluntarily left her employment*. While the court of appeals noted the claimant *may* have been entitled to benefits *if* she had been terminated, the court reasoned:

By holding that appellant was not entitled to TTD benefits, the Commission determined as a matter of law that *a voluntary resignation is a refusal of employment*, which does not entitle her to TTD benefits under the Act. We agree and affirm the Commission's denial of TTD benefits under these facts.

Lybyer, 2019 Ark. App. at 76. (Emphasis added).

Similarly, in *Turcios* the claimant had sustained a scheduled injury and had in fact returned to work; however, his employer terminated him *after he refused to perform the light duty work his employer offered him*. The *Turcios* court held *the claimant was not entitled to additional TTD benefits because*, although he had returned to work, he then *refused an offer of suitable employment that fit within his physical limitations and restrictions*. Therefore, **Ark. Code Ann.** § 11-9-526 barred the claimant from receiving TTD benefits. *Turcios*, 504 S.W.3d at 624.

In so holding, the *Turcios* court explained:

We hold that under the same analysis utilized in *Robertson*, *Roark*, and the other previously cited cases, *Turcios's* entitlement to TTD ended when he was returned to work with his work restrictions accommodated with light-duty tasks. Pursuant to section 11-9-521, entitlement to TTD is ended upon a claimant's return to work or the end of his healing period, whichever comes first. Simply not having reached maximum-

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medical improvement, in and of itself, is insufficient to entitle Turcios to TTD. He had been returned to work, which ended his entitlement to TTD. Further, Turcios's failure to report to work and to call in as required by the company policy was a refusal of suitable employment within his capacities, and he is not entitled to additional TTD pursuant to section 11-9-526.

Turcios, 504 S.W.3d at 624.

Finally, it is significant to note our court of appeals has followed similar reasoning concerning whether a claimant is entitled to wage loss disability benefits. In *Redd v. Blytheville School District*, 2014 Ark. App. 575, 446 S.W.3d 643 (Ark. App. 2014), the court of appeals affirmed the Full Commission's decision finding *the claimant was not entitled to wage loss disability benefits after he chose to retire even though he admittedly could have returned to work as his employer was ready, willing, and able to accommodate him* by providing a suitable job that fit within his physical limitations and restrictions. Both the Commission and court referred to *Ark. Code Ann.* § 11-9-522 (b)(2) (2023 Lexis Repl.) and found the claimant's employer had in fact made a *bona fide* offer of employment to him.

Significantly – and in fact, dispositively – in this case the overwhelming preponderance of the evidence demonstrates the claimant admittedly had a light duty job where Workforce Services was accommodating her with suitable employment duties she had been performing and clearly was capable of performing, *but she – the claimant herself, of her own initiative and for her own personal reasons – chose to retire and end her employment.* In this regard, it must be noted the claimant was 72 years old, and already had filed for and had been receiving Social Security retirement benefits for some ten (10) years.

Moreover, after closing her left hand/index finger in the door, the claimant's injury did not

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require surgery, only required her to wear a splint, and to undergo conservative treatment such as some PT and at-home exercises. It is also important to note the claimant's treating physicians – including her own family physician, Dr. Goins – never took her off work or opined she was temporarily totally disabled from performing her already light work duties between 10/4/2021 (the date of her injury) and 12/31/21 (the date of her voluntary retirement).

Consequently, based on the facts of this case, the *Lybyer* and *Turcios* appellate precedents require me to deny the claimant's request for TTD benefits. Indeed, the claimant never requested TTD benefits before *she voluntarily retired from her light duty job for her own personal reasons*; and her claim for TTD benefits did not even begin until some three (3) months after *she voluntarily chose to retire* from a job the clear preponderance of the evidence reveals she was fully capable of performing. Or, put another way, there exists no credible – or at least grossly insufficient – evidence the claimant was incapable of performing her job duties – *i.e.*, that she was temporarily totally disabled from performing the light duty job duties with which Workforce Services accommodated her in accordance and compliance with the applicable law.

Therefore, for all the aforementioned reasons I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations contained in the prehearing order filed September 20, 2023, which the parties modified and affirmed on the record at the hearing, hereby are accepted as facts.
2. The claimant has failed to meet her burden of proof in demonstrating she is entitled to TTD benefits from March 8, 2022, through August 14, 2023.
3. The claimant's attorney is not entitled to a fee on these facts.

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For all the aforementioned reasons, this claim hereby is denied and dismissed, subject to the parties' appeal rights.

If they have not already done so the respondents shall pay the court reporter's invoice within ten (10) days of their receipt of this opinion.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp