BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H207643**

DARAPHONE SAEGSATHEUANE, Employee	CLAIMANT
TRANE COMMERCIAL SYSTEMS, Employer	RESPONDENT
TRAVELERS INDEMNITY COMPANY, Carrier	RESPONDENT

OPINION FILED **JUNE 15, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 21, 2023, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on January 5, 2023, 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 hearing, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on November 3, 2021.
3. Claimant sustained a compensable injury to her left shoulder and neck on or about November 3, 2021.

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

1. Compensation rate.
2. Whether claimant is entitled to temporary total disability benefits.

3. Whether claimant is entitled to medical benefits.

4. Attorney's fee.

The claimant contends that:

"a. The claimant contends that on July 3, 2022, she was terminated because of the effects of medication that was prescribed because of the effects of her admittedly compensable job-related injury; therefore, she is entitled to temporary total disability benefits from July 4, 2022 until a date yet to be determined since she has remained under active medical treatment during that time and the respondents have not made suitable work available.

b. The claimant contends that she is entitled to injections that have been recommended by her authorized physician.

c. The claimant contends that her attorney is entitled to an appropriate attorney's fee."

The respondents contend that "the ESI injections are not reasonable, necessary, or related to the work injury. Claimant returned to work following the injury and was subsequently terminated for reasons unrelated to the work injury and as a result is not entitled to additional temporary total disability benefits."

From a review of the entire record, including 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 January 5, 2023, and contained in a pre-hearing order filed that same date, as well as those made at the hearing, are hereby accepted as fact.

2. Claimant has met her burden of proof by a preponderance of evidence that she is entitled to temporary total disability benefits beginning July 13, 2022, to a date yet to be determined.

3. Claimant has met her burden of proof by a preponderance of the evidence that she is entitled to additional medical benefits from Dr. Brent Whatcott for her neck and left shoulder injury.

4. Claimant's average weekly wage at the time of her injury was $897.00, making her temporary total disability rate $598.00 per week.

5. Claimant has proven by a preponderance of the evidence that her counsel is entitled to a controverted attorney's fee on the indemnity benefits awarded herein pursuant to Ark. Code Ann. § 11-9-715.

FACTUAL BACKGROUND

The parties were unable to agree upon an average weekly wage for calculating indemnity benefits if such were awarded. Respondents provided the payment records from the year before the date of injury (see discussion of these records below). Claimant's attorney submitted a letter after the hearing, both stating his position and calculating the average weekly overtime earnings for claimant. This letter is blue-backed and made a part of the record.

HEARING TESTIMONY

Claimant testified she was injured while she was working because she was in an area where she did not have sufficient room to stand without hitting a roof. She said she injured her neck and went to the doctor the next day. Claimant testified she was placed on some physical restrictions but continued to work. She was referred to physical therapy.

Claimant said she was no longer working at Trane because while performing her duties, she heard something pop. She became lightheaded so she sat in a chair. Claimant testified that she was dizzy and closed her eyes but denied she had fallen asleep. She said that in her fifteen years of working

at Trane, it was the first time she had been accused of sleeping on the job. Before she was terminated, claimant said she was working fifty-eight hours a week. In reviewing her wage records, claimant stated that she used a lot of sick leave in the fifty-two weeks before her injury because she had a blood clot in her feet.

Claimant said after the injury, she was placed on some working restrictions and continued to work. Claimant testified that she also did a course of physical therapy. However, the injury hurt her to the point where she could not sleep, stating "I have to keep on turning the whole time because it is burning. It is like on fire." Claimant said she was sent to a pain management doctor after she had been hurting for five or six months, first seeing someone at the pain management clinic on June 27, 2022. She received an injection in her neck and shoulder. Claimant was also prescribed pain medication, which doesn't really help and she is still not sleeping well. However, the medicine does make her sleepy.

Claimant testified that her condition was worse now than the day she got fired. She said while working, she took vacation days and personal days when her injury caused her to miss work, but she did not know how many such days that she used.

Claimant testified that she is currently seeing the pain management doctor monthly. No one at Trane had told claimant that if she took medication that caused her to go to sleep at work that she would be fired. Claimant said that after her injury that she worked at the same place for a short time and was then put to work at light duty. However, she said that it was the same job and that she still had to lift heavy stuff and had to bend down.

On cross-examination, claimant affirmed that she was able to communicate in English and that she helped train new employees and completed paperwork as part of her duties. Claimant said she was not working at the time of the hearing and did not know why a doctor's record from

September 22, 2022, said that she was working full time. Claimant denied that she had seen a neurosurgeon but agreed that she had been sent to Fayetteville, "but I don't know why they send me to Fayetteville, but they never say anything about surgery." She denied that she had told her doctor on July 25, 2022, that the medication caused no fatigue and no drowsiness. She said that she had never been asked if the medicine made her drowsy.

Claimant said that she had had two injections into her shoulder, and she believed that there was a little improvement, although for the first couple of hours after the injection was painful. When asked to specify what her current physical ailments were, she said it was her left shoulder, arm, and neck. Claimant testified that she had a modified job two months before she was fired based on some paperwork that she received from the first doctor. She said she didn't provide any other paperwork or restrictions or limitations after that.

After claimant rested, respondents called Marcus Philips, the Human Resources Specialist at Trane. He did not have that position on July 13, 2022, when claimant was terminated, as he took that position in August of 2022. However, as the current HR director, he has access to the files with respect to the employees at Trane. He was aware that claimant had a work-related injury for which she was receiving treatment before he became HR director. Mr. Philips said that one task that claimant performed while on light duty was observing production times and reporting back to the supervisor how long it took to complete a task. That job involved counting and documentation, as well as moving paperwork to different sections. He denied that claimant was doing any kind of rigorous work while on light duty.

Mr. Philips testified that claimant's termination was due to sleeping on the job. Claimant had other discipline issues with Trane prior to being terminated regarding her attendance, including failure to report to work. Mr. Philips was unaware that claimant was on medication that might affect her

ability to perform her job, and he had not discussed with claimant whether she was asleep because of the medication she was taking. Mr. Philips confirmed what claimant had said about training new employees and that she did so in English.

On cross examination, Mr. Philips affirmed that Trane could have continued to provide accommodations for claimant's limitations had she not been terminated. When asked about how much the paper weighed that claimant would have to carry, Mr. Philips was unsure. At that point, he was shown Respondent's Exhibit #1, which consisted of one hundred twenty-one pages, and he said that it was less paper than that. He did concede that the job involved reaching away from the body, bending, and moving the head and neck.

When asked about Trane's disciplinary policy, Mr. Philips said that it was progressive in that the steps were verbal, written, and final termination. He also stated that suspension could be applicable, depending on the situation. The cross-examination concluded with this exchange:

> Question (By Mr. Walker) So do you know whether the person who terminated her knew what level of discipline she was at when she got terminated? Do you know that from firsthand knowledge?
> Answer (By Mr. Philips) No, sir.
>
> Q. Now you indicated you were not aware of anything from medical provider talking about how medication may have a sedative effect on Daraphone, but you are an HR person now; right?
> A. Yes, sir.
>
> Q. If one of Trane's employees had a job-related injury and you receive something from their medical provider saying they are required to take prescription medication that was medically necessary in order for them to be able to continue working and that the medication might have a sedative effect or adjustment period, how would you interpret that?
> A. That would have been the amount of time the sedative effect would be reduced.
>
> Q. Would you interpret that as a medical provider indicating there were some transition periods that needed to be allowed in order for that person to adjust to that medication?
> A. Yes.

> Q. Would you think that would be reasonable?
> A. Yes.

On redirect-examination Mr. Philips said he did not receive anything regarding a transition period, nor seen anything to that effect in claimant's file.

Mr. Philips was then questioned by the Court. He stated that he received some medical records from the workers' compensation insurance carrier. There was then this exchange:

> Q (from the Court) You mentioned progressive discipline. Are there circumstances where someone doesn't get a verbal warning first?
> Witness. No.
>
> Q. OK.
> Witness. Typically, everyone should.
>
> Q. I just wondered if an employee slugged another one unprovoked slugged another one, if they would be warned or would they be terminated?
> Witness. That would be termination.
>
> Q. So there are provisions that you can skip the verbal warning, written warning, suspension if you were going to do a suspension-
> Witness. Yes.

REVIEW OF THE MEDICAL EXHIBITS

The records submitted by the parties were largely duplicative and will be reviewed in chronological order. Claimant first saw APRN Cynthia Johnson at Arkansas Occupational Health Clinic on November 4, 2021. The treatment plan following the examination was over-the-counter pain relievers, heat, ice, and an over-the-counter lidocaine patch/topical muscle ointment to the left shoulder. The recommended activity restrictions were "no work over chest level, limit lifting, pushing, pulling with less than ten pounds of force with the left shoulder." While that visit concluded with a recommendation that claimant return in two weeks, she was back on November 12, 2021, and Ms. Johnson made a referral for an MRI to evaluate the lack of progress. An MRI of claimant's left

shoulder was performed on December 1, 2021, with no evidence of internal derangement of the left shoulder; a second MRI was performed on December 7, 2021, examining the left brachial plexus, which revealed a small disc herniation at C5-C6, but otherwise an unremarkable non contrast MR appearance of the left brachial plexus.

On December 9, 2021, Ms. Johnson reviewed the MRI and determined that six sessions of physical therapy would be appropriate. The final progress notes from January 5, 2022, recommended "Patient to follow up with MD as scheduled, continued daily home exercises. She would benefit from continued physical therapy, MRI spine maybe indicated, she may also benefit from home TENS unit for home pain management." Claimant completed this course of physical therapy on January 5, 2022.

On January 7, 2022, claimant returned to Arkansas Occupational Medicine Services but did not see an MD; she continued to be followed by APRN Johnson. The treatment plan was to return for more physical therapy and continue with over-the-counter Ibuprofen or Aleve twice daily for inflammation, alternating with Acetaminophen for pain. Claimant's recommended work status remained at restricted duty.

On January 24, 2022, claimant began a second set of six visits with physical therapy. After the last visit on February 7, 2022, the therapist recorded in the assessment and diagnosis section that claimant still had pain in her cervical and left shoulder area. Physical Therapist Lesli France said that claimant presented "with a positive Spurling's and positive Empty Can left shoulder." Ms. France believed that claimant might "benefit from imaging of the cervical spine to rule out cervical radiculopathy as the cause for her headaches, and neck and periscapular pain complaints."

Returning to see Ms. Johnson at Arkansas Occupational Medicine Services on February 10, 2022, claimant was referred for a CT scan but nothing other than the previous over-the-counter medication, ice/heat treatments and a lidocaine patch were offered to relieve her pain.

A cervical spine CT was performed on February 15, 2022, with the following abnormal findings at C5-6 "There is retrolisthesis and disc space narrowing. Retrolisthesis is almost three millimeters. Mild bilateral uncovertebral/foraminal spurring at this level. Mild broad posterior disc bulge, likely also a small right posterolateral disc protrusion. Mild central canal stenosis suspected at this level."

Claimant returned to see Ms. Johnson on February 22, 2022, and a referral to neurosurgery was recommended. Claimant went to NWA Neuroscience Institute in Fayetteville on April 12, 2022, and was seen by Candace Harper, P.A.

In the discussion summary, Ms. Harper recorded the following:

> "Patient presents for evaluation of neck pain radiating to the lute of the C6-7 distributions. She has had brachial plexus MRI and CT cervical spine. I do not have the radiology report on the brachial plexus MRI. I have reviewed the CT cervical spine showing kyphosis at C5-6 and slight retrolisthesis at C5 on 6. Patient needs MRI for further evaluations as CT is not sufficient to evaluate her canal or foramen. We will request this at our facility, will call with results and further plan. I explained potential pathology on a spine model with patient today, she agrees with the plan."

Under the section titled "patient instructions," Ms. Harper noted:

> "I have reviewed patient's cervical MRI this is negative for any high-grade canal or foraminal stenosis. Thus, we do not have a surgical solution for her pain. Recommended conservative care which may include physical therapy or pain management."

The MRI ordered by Ms. Harper was performed on April 28, 2022, and found the following:

> "C3-4 posterior disc osteophyte complex causes mild canal stenosis and partially flattens the spinal cord. No foraminal stenosis.
> C4-5 posterior disc osteophyte complex causes mild canal stenosis and partially flattens the ventral surface of the spinal cord. No foraminal stenosis
> C5-6 a posterior disc osteophyte complex is present with mild canal stenosis and partial flattening of the spinal cord. No foraminal stenosis.

> C6- 7 no canal or foraminal stenosis. There are small bilateral nerve lute sleeve cysts.
> C7-T1. no canal or foraminal stenosis. There are small bilateral nerve lute sleeve cysts.

The impression was:

> "Posterior disc osteophyte complex with mild canal stenosis and cord impingement at the C3-4, C4-5, and C5-6 level.

On May 13, 2022, claimant returned to see APRN Johnson once again who determined that the treatment plan would be to refer claimant to pain management for this issue.

On June 27, 2022, claimant had her first visit with DNP Brandon Faulkner for pain management, receiving an injection of Bupivacaine and Kenalog. DNP Faulkner also prescribed Tramadol for her pain. Claimant received another injection on July 25, 2022, of Bupivacaine and Decadron and the prescription for Tramadol was renewed.

When Claimant returned to DNP Faulkner on August 22, 2022, she reported that she was not satisfied with her current treatment. Despite mentioning in his June 27, 2022, notes that he needed to see the recent imaging from Prime Medical, DNP Faulkner had not seen the shoulder imaging that was done on December 1, 2021, nor did he have it during the September 26, 2022, visit. On the latter visit, claimant also saw Dr. Brett Whatcott for a left suprascapular nerve block. On October 17, 2022, claimant returned to see Dr. Whatcott. While the assessment/plan from that visit contains information from previous visits, there was this new entry:

> "I do not need to see imaging of left shoulder any longer due to pain not coming from the shoulder. Patient had SSNB done on 9/26 and reports a 0% pain relief. Working is not recommended to do any lifting, only light duty at this time. We will re-evaluate at the next visit. Epidural recommended from this time for better pain control, will get that scheduled. Patient had a C5/6 left side herniated disc with left radiculopathy."

The final submissions were notes from the claims adjuster and a review by Dr. Glenn Babus,

whose specialties are anesthesiology and pain medicine. Dr. Babus reviewed the records submitted to him and determined the additional treatment recommended by Dr. Whatcott was not reasonable or necessary; he did not personally examine claimant.

REVIEW OF NON-MEDICAL EXHIBITS

Respondent submitted an email from Chris Saunders with an attached printout of the wages earned by claimant from July 10, 2020, through November 5, 2021, along with a calculation that claimant had earned $42,641.92 over the previous 51 weeks; the week of April 4, 2021, was blank for an unexplained reason. In reviewing the printout, I noted there were also weeks in September through December 2020 that were not included, again without explanation. However, the missing weeks are not critical to my determination of claimant's average weekly wage.

ADJUDICATION

There are three distinct issues presented in this case. First, is claimant entitled to additional medical treatment for her compensable injury? Second, is she entitled to temporary total disability payments (TTD) from the time she was fired from her job while being treated for her injury? Third, if claimant is entitled to TTD, what is the appropriate compensation rate for those benefits?

1. Claimant's entitlement to additional medical treatment.

It was stipulated that claimant had a compensable injury on November 3, 2021. Once it has been established that a claimant has sustained a compensable injury, she is not required to offer objective medical evidence to prove entitlement to additional benefits, *Ark. Health Ctr. v. Burnett*, 2018 Ark. App. 427, at 9, 558 S.W.3d 408, 414.

The evidence on this point boils down to whether the testimony of the claimant and the opinion of her treating physician is more persuasive than the report of a doctor who only reviewed records provided to him. I find Dr. Whatcott's recommendation is more credible in light of the

conservative care claimant has received to this point in her course of treatment, and therefore claimant's proof is sufficient to support her request for continued medical treatment for her compensable injury.[1]

2. Claimant's entitlement of temporary total disability benefits.

To be entitled to TTD benefits for an unscheduled injury, a claimant must prove by a preponderance of the evidence that she remains within her healing period and suffers a total incapacity to earn wages. *Allen Canning Co. v. Woodruff*, 92 Ark. App. 237, 212 S.W.3d 25 (2005). In the previous section, I found claimant was still in her healing period, thus satisfying the first part of the two-part test. As for the second part of that test, she had returned to work under light duty, which could be seen as a capacity to earn some wages. However, in *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002), the Arkansas Court of Appeals wrote: "If, during the period while the body is healing, the employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, his temporary disability is deemed total." Based on my finding above that additional medical treatment is appropriate for claimant's injury, and that I found her to be a credible witness as to the pain she suffers on a near-constant basis, I find she qualifies for total temporary disability from July 13, 2022 until a date to be determined.[2]

Before leaving this issue, I note that respondent raised as a defense to this portion of the claim that claimant was "terminated for reasons unrelated to the work injury and as a result is not entitled to additional temporary total disability benefits." I find the claimant's termination was irrelevant to

[1] In reviewing the medical records, it is striking how few licensed physicians claimant has seen as of the day of the hearing. Her course of treatment has been directed by APRN Johnson, who referred her to a physical therapist, then a neurosurgeon where she was seen by a physician's assistant, and then to pain management where she was first treated by a DNP before finally seeing Dr. Whatcott. This observation does not cast aspersions on those that have treated claimant; all may be quite competent at what they do. Still, those assistants are not medical doctors.

[2] In her contentions, claimant maintained she was terminated on July 3, 2022. I find Mr. Philip's testimony to be more persuasive that it was July 13, 2022.

her entitlement to temporary total disability benefits. Respondent did not prove claimant was terminated for good cause, as its only witness was not a witness to the alleged sleeping incident. Further, even if he had witnessed it, *Tyson Poultry, Inc. v. Narvaiz*, 2012 Ark. 118, would dictate that claimant would not be disqualified from receiving TTD benefits.

3. Claimant's average weekly wage at the time of the injury.

Arkansas Code Annotated §11-9-518 is the applicable statute for calculating claimant's average weekly wage. This statute reads, in pertinent part:

> (a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.
>
> (2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.
>
> (b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

Respondent's non-medical exhibit treated claimant as a piece worker as per §11-9-518 (a)(2), dividing the total earnings by 51 weeks (as noted above, there was a missing week in respondent's records). However, claimant was not a piece worker and therefore there was no reason to calculate her wages in such a fashion.

Respondent's records show that claimant received a base pay rate of $809.98 during the weeks leading up to the November 3, 2021, injury. Those same records show that during the 46 weeks prior

to the accident (again, respondents' records were missing the entire month of November 2020 and half of December 2020, so a 52-week calculation was not possible), claimant earned $4,002.77 for an average weekly overtime wage of $87.02. Claimant's average weekly wage is therefore $897.00, yielding a TTD rate of $598.00.

ORDER

Respondents are directed to pay benefits in accordance with the findings of fact set forth herein this Opinion.

All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809.

Pursuant to Ark. Code Ann. § 11-9-715, the claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein. This fee is to be paid one-half by the carrier and one-half by the claimant.

All issues not addressed herein are expressly reserved under the Act.

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of $631.95.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE