BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H109799**

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| GINA SALLEE, Employee | CLAIMANT |
| UNIVERSAL HEALTH SERVICES INC., Employer | RESPONDENT |
| SEDGWICK CLAIMS MANAGEMENT SERVICES INC., Carrier | RESPONDENT |

OPINION FILED OCTOBER 20, 2022

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

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by LAUREN A. SPENCER, Attorney, Little Rock, Arkansas.

## STATEMENT OF THE CASE

On September 14, 2022, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on July 14, 2022, 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 this claim.
2. The employee/employer/carrier relationship existed on December 7, 2021.
3. The claimant sustained a compensable injury on December 7, 2021.

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

1. Whether claimant is entitled to temporary total disability benefits from June 29, 2022,

to a date yet to be determined.

2. Whether claimant is entitled to additional medical treatment.

3. Attorney fees.

All other issues are reserved by the parties.

The claimant contends that "she is entitled to additional medical treatment in the form of testing and pain management. The claimant reserves all other issues."

The respondents contend that "claimant is not entitled to additional temporary total disability benefits pursuant to Ark. Code Ann. §11-9-521; Ark. Code Ann. §11-9-526; *Robertson v. Pork Group*, 2011 Ark. App 448; and *Tyson Foods v. Turcios*, 2015 Ark. App. 647."

From a review of the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant 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 July 14, 2022, and contained in an amended pre-hearing order filed August 11, 2022 are hereby accepted as fact.
2. The stipulation agreed to by the parties at the hearing that the claimant's average weekly wage of $1,172.50, giving claimant a weekly temporary total disability rate of $736.00, is hereby accepted.
3. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury on December 7, 2021.

## FACTUAL BACKGROUND

Prior to taking any testimony, claimant made an objection to respondent calling a witness that had not been identified by name before the parties assembled for this hearing. The pre-hearing order states "Lists of witnesses will be provided to this Commission and opposing counsel on or before seven (7) days prior to the hearing." Respondent's counsel was candid with this Court and admitted that she had stated in the answer to the prehearing questionnaire that she could potentially call someone from claimant's employer, but she did not identify anyone by name within the time allowed by the pre-hearing order. As the potential witness was in the courtroom, I allowed the testimony to be proffered, but cautioned the parties that I might not consider it in rendering a decision in this matter. After careful consideration, I have determined that it would be unfair to claimant for me to consider the testimony of a witness who was not named in a timely manner. Therefore, while the testimony of respondent's witness appears in the record, it was not considered in my decision.

Heartland Behavioral Health is apparently a subsidiary of respondent Universal Health Services, Inc. (UHS). Any references to Heartland in this opinion includes UHS.

## HEARING TESTIMONY

Claimant testified on her own behalf. She stated that she was a community liaison to provide information to providers about the hospital where she was employed. She traveled to various locations in Missouri and Arkansas to provide information about the services UHS provided. She said she was normally provided a daily list of places where she should visit throughout the day. Some visits were scheduled, but many were drop-ins.

On December 7, 2021, claimant testified that she was going to Little Rock, which was where she was scheduled to work that day. However, she hit a deer with her vehicle while on the interstate,

totaling it. Claimant had a passenger that morning, Ms. Mary Flores, and believed it was acceptable to have a passenger on days she was working. Claimant said she suffered a herniated disk in her neck with multiple sprains and a torn meniscus in her left knee. At the time of the hearing, she stated she was awaiting surgery on her left knee and was taking medication for the pain in her neck.

At the time of the hearing, claimant had been terminated from her employment with Heartland. The grounds for termination were for falsifying contacts that claimant reported making while working from home. When asked if she had engaged in that conduct, claimant said "not to my knowledge, I have never falsified any contacts." Claimant testified that she was still on physical restrictions from her physicians regarding the injury she suffered in the automobile crash. Claimant said after she began working from home, Heartland increased the number of contacts she was to have each day. She stated that she was not able to stand up as much as she needed to, move around, lie down, or take the showers that she was directed to take because she was constantly having to work to make all the assigned contacts. Claimant said it was not possible for her to stand while making the contacts because she had to enter certain information about the visit on her MS4. She thought that she was unable to stand and sit as needed as she understood her restrictions from her doctor.

On cross-examination, claimant said she may have misunderstood a question regarding the medical providers she saw when she didn't mention the emergency room visit the day after the accident. She did not recall if the State Trooper that investigated the accident asked if she was injured and did not know why he put there was no apparent injury on the police report.

Claimant was asked about falsifying contacts and said that she used LinkedIn to communicate with individuals directly through that site, using e-mail to communicate when they were not otherwise available. She testified her log said that she spoke to someone by telephone instead of via email because "the MS4 system that we use does not have a tab for email, so you have to identify it in another form,

which would have been phone." When asked how it could be that she logged in that she had spoken to someone at a certain facility that was no longer at the facility, she stated that if a person had been previously in the MS4 system that when their name was pulled up it automatically put their last known place of employment. She said she was never trained on modifying or changing or otherwise editing that information. She did not know how to document that a contact was no longer working where her entry in the MS4 system said they were.

Regarding her education, claimant was shown Respondent's Exhibit 13 which listed that she had a master's degree from Michigan State University. When asked why she put that on her resume she said "I shouldn't have. I thought it might be beneficial to say that to help me get the job, but then I realized later that the job never required any type of social work degree, and I had a bachelor's degree in psychology, and it was a mistake to put it on there. I completely regret it."

The questioning continued:

Question (by Ms. Spencer). How did you get Respondent's Number 7, this degree?

Answer (by Ms. Sallee). That was made by me. It was more of a display for my future achievements, so I had that in my paperwork, and it was submitted.

Q. Were you ever enrolled in Michigan State?

A. No, that is a future achievement that I hoped to achieve.

Q. Respondent's 10, printout from the Arkansas Social work licensing board of your provisional LMSW?

A. Yes.

Q. Did you take the Social Worker's exam?

A. I tried to, but I did not pass it.

Q. I would stipulate you cannot get a PLMSW without passing the Social Work exam.

How does your name appear on the registry as having it?

A. No, I don't have it. I don't have a provisional license.

Q. Or had it shows it is now expired?

A. No, I don't have it.

Q. Did you ever have it?

A. I took the test, but I did not pass it.

The Court. Her question is how did your name get on this piece of paper showing that you had it?

A. I registered for the test.

Question (by Ms. Spencer). I got an e-mail from you and your signature block is signed Gina Sallee LMSW. Is that accurate?

A. No, that is not accurate. I had performed Social Work for years, but I did not have a Social Work degree. I have a degree in psychology.

When asked why there was no record of her visiting Benton, Arkansas on December 6, 2021, the day before the accident, claimant stated that she did not recall where she was that day. She said that the contact logs were sometimes not logged in until the end of the week. Claimant did not know why there was no mileage log submitted for that trip to Benton.

Claimant testified that the physical restrictions placed on her by her physicians were accommodated by her employer and that she was not totally incapacitated that she could not earn wages. She expected that the accommodations would have continued if she had not been terminated.

On redirect-examination, claimant stated that she would have continued to work if she had not been terminated. Claimant said that she let her supervisor know the day after the accident that she had gone to the emergency room and that in her answers to interrogatories, she listed Mercy Medical

along with several other providers and she thought that the emergency room visit would be in their documentation.

On recross-examination, claimant was shown the answers to her interrogatories and recognized that nothing in those answers showed that she went to Mercy Medical in 2021.

REVIEW OF THE MEDICAL EXHIBITS

Claimant's records began eight days following the accident with several visits to Back in Action Spine and Sports Injury Clinic. She received chiropractic care for approximately three weeks, consisting of adjustments, electric stimulation, cryotherapy, and intersegmental traction.(CL.X.8-9) While being treated at Back in Action, claimant also had an appointment with Dr. Thomas Cheyne at Mercy Clinic Orthopedic Surgery. His impression after the first visit was:

"1. Cervical strain of possible cervical radiculitis
2. Left shoulder contusion
3. Left knee contusion."

Dr. Cheyne prescribed Celebrex and recommended hot showers twice a day along with a course of physical therapy. While there are no physical therapy notes included in the exhibits, claimant continued at Back in Action following her initial visit with Dr. Cheyne.(CL.X.14-19)

On January 28, 2022, claimant returned to see Dr. Cheyne. Claimant reported some improvements in her neck and shoulder but not with her knee. An MRI of the left knee was performed on February 10, 2022, and the impression was "tear of the posterior horn medial meniscus with small joint effusion. (CL.X.23)

On February 15, 2022, Dr. Cheyne had the results of the MRI and scheduled her to see a surgeon for her left knee. Because claimant continued to report problems with her neck, Dr. Cheyne ordered an MRI of the cervical spine. (CL.X.27)

Dr. Brian Smith assumed care of claimant's left knee and first examined her on March 1, 2022.

Dr. Smith discussed with her several options, including non-operative management which claimant chose. She was placed in a hinged knee brace, continue with anti-inflammatory medication, was instructed to ice her knee, and return in two weeks. At that follow up on March 15, 2022, claimant reported that she was not interested in any surgical intervention for her knee even though, according to her, the knee was not getting any better. Dr. Smith administered an injection with one milliliter of 40mg of Kenalog and two milliliters of 1% lidocaine. Following this visit, claimant was given work restrictions which included a five-pound weight limit, no lifting or reaching above shoulder level, and no sitting more than forty-five minute. (CL.X.34-37)

On May 30, 2022, Dr. Cheyne had a rather short entry:

> "Ms. Sallee returns for follow up for left cervical radiculitis which has gotten more intense. We had ordered an MRI scan of the cervical spine, but a workers' comp adjuster cancelled it, apparently wanting to schedule it at some other facility. They will need to be in control of that. From my standpoint, she has done medications and physical therapy. We will put her on Celebrex, have her stay at light activity, continue her work restrictions, use heat therapy, and I will see her back on a PRN basis hopefully after she has an MRI on the cervical spine."

On, April 26, 2022, claimant saw Physician's Assistant, Jeremy Weaver, at Sophie Meyer Family Medicine. This was to follow up on an existing fibromyalgia and ADHD. In the history of present illness, PA Weaver recorded: (CL.X.38)

> "Had a car wreck four months ago, hit a deer and injured neck and left knee. Having knee surgery, but orthro is trying to get MRI of her neck done and have trouble getting it scheduled. Has already done PT for this, and it didn't help the neck. Now has numbness and tingling in her hands daily and it is worsening. Savella still works fine for the fibro."

This is interesting because claimant had rejected the suggestion of surgery on May 15, 2022, when she saw Dr. Smith, but PA Weaver recorded that she was going to have knee surgery. (CL.X.40-42)

Dr. Cheyne next saw claimant on April 26, 2022, the day she had an MRI on her cervical spine. He reported that the primary finding was "a small disc osteophyte complex at C5-6 with moderate left

facet arthrosis with neuroforaminal narrowing." Dr. Cheyne did not think that claimant needed to see a surgeon regarding her neck. He recommended that she go to the pain clinic for a CESI to be done on the C5-6 level. (CL.X.43-44)

Claimant next saw Dr. Smith on April 28, 2022, regarding her left knee. Dr. Smith determined that claimant's neck injury needed to be treated first before considering knee surgery. (CL.X.50)

On May 7, 2022, claimant returned to Dr. Cheyne. She had not yet had an injection at the pain clinic but was scheduled to see Dr. Strickland there the next day. Dr. Cheyne recorded that he would see her back in two to three weeks for follow up. (CL.X.51) She did indeed see Dr. Strickland on June 8, 2022,[1] but it does not appear that Dr. Strickland did anything other than continue her medication as currently prescribed and recommend that claimant continue her home exercises. (CL.X.53-57). She saw Dr. Strickland again on August 1, 2022, and conservative care was continued.

Dr. Hsin Wei Huang, an audiologist at Mercy, saw claimant on July 22, 2022, and recommended that claimant follow-up with the ENT team for suspected conductive hearing loss. (CL.X.61)

Dr. Cheyne saw claimant on July 29, 2022. His report mentioned a nerve conduction test of claimant's upper extremities that was normal. He recommended that claimant continue taking Celebrex, maintain light activity and heat therapy, with another epidural injection as a possibility should claimant want one. He did not make another appointment for her but would see her on an as-needed basis. (CL.X.61).

[1] These records are somewhat hard to follow in that they are reported to be authored by Dr. Natalie Strickland, yet Dr. Strickland is called the referring physician and is thanked at the end of the notes for allowing for her participation in the care of Ms. Sallee.

SUMMARY OF CLAIMANT'S DEPOSITION

Claimant's deposition of September 8, 2022, was introduced as an exhibit. Claimant explained that on December 7, she left her house around 8:00 a.m. and was on the interstate when she hit a deer. She believed that she was going to be making "cold calls" at different clinics to provide information. Claimant did not believe any of the visits were scheduled. She said Mary Flores was with her at the time of the accident, and Ms. Flores had never gone with her on the cold calls before. Claimant said that Ms. Flores had asked if she could ride along on that day because she was off work. Claimant said they had no specific plans while in Little Rock. While she was going in to meet with the providers, Ms. Flores was going to sit in the vehicle and then ride back with claimant. Claimant discussed other ailments that she had which are not part of this claim for injuries to her neck and knee, and her testimony at the deposition was similar to what she said at the hearing regarding those injuries.

REVIEW OF CLAIMANT'S NON-MEDICAL EXHIBITS

In her non-medical exhibits, claimant included the crash report from the Arkansas State Police that was prepared after her collision with the deer on December 7, 2021. Claimant had several pictures of her vehicle and a copy of the text message that was sent to an unidentified recipient: "Not going to be in Little Rock today. On my way hit a deer. Car is totaled." She included her weekly schedule from September 27 through October 1, 2021, as an example of the number of contacts she was supposed to make in a week before the accident, as well as a schedule for March 14 through March 18 as an example of the contacts that she was supposed to make while working from home.

Respondent provided 133 pages from claimant's personnel file. Rather than summarizing each of those documents, those that are pertinent to the decision in this matter will be referred to in the adjudication portion of this Opinion.

ADJUDICATION

In its contentions as listed in the prehearing order, respondents maintained "claimant is not entitled to any benefits under the Arkansas Workers' Compensation law." To prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external harm to the body that required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16) (Repl. 2012), establishing the injury; and (4) that the injury was caused by a specific incident identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i). *Yates v. Boar's Head Provisions Co.*, 2017 Ark. App. 133, 514 S.W.3d 514. If a claimant fails to establish by a preponderance of the evidence any of the above elements, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). The "preponderance of the evidence" standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415.

I am satisfied claimant met her burden of proving a specific incident identifiable by time and place of occurrence because there is an accident report prepared by the Arkansas State Police. The photos of her vehicle make it believable that a person in that accident could have sustained internal harm such as is reflected in the medical records, which provide the necessary objective findings. However, claimant failed to prove by a preponderance of the evidence that the injury arose out of and in the course of her employment.

As claimant was the only witness called on the issue of whether she was working at the time of the collision, her credibility is crucial in providing proof by a preponderance of the evidence as to

this element of proof. After listening to her testimony and then reviewing the exhibits, I do not find she was a credible witness for the following reasons:

1. Claimant represented on her resume that she had a master's degree from Michigan State University, but she did not have such. (R.NMX.13) However, it wasn't simply a false entry on a resume; claimant went to the trouble of creating a diploma that she hadn't earned and providing it to her perspective employer. (R.NMX.9). Claimant testified that this was "more of a display for my future achievements, so I had that in my paperwork, and it was submitted." (TR.23) "Future achievements" is another way of saying "a bucket list," and do not belong on a resume; creating a fake diploma for a "future achievement" to provide to prospective employers is inexcusable.

2. On her resume (R.NMX.13), claimant stated she was a licensed social worker, and produced a document that represented that she was a provisional licensed master social worker (PLMSW). How she created this was not explained, but claimant testified that she had never been a licensed social worker, much less one with a master's degree.

3. While working for respondent, claimant continued the ruse that the State of Arkansas had granted her a PLMSW certificate by including those initials after her name in an email. (R.NMX.60)

4. Beyond false statements about her qualifications to get the job with respondent, claimant falsified her reports about contacts she made in the course of her employment. Before the accident, she was untruthful about meeting with someone at Creative Counseling Solutions; claimant put on her reports that she had met with Beth Stites at that facility and left brochures. It was discovered that there was no one working there by that name—it wasn't familiar to a co-owner named Beth Tellez—and that no literature had been left there. (R.NMX.96-100).

5. After the accident, claimant was working from home, and was expected to make calls

from there to various providers. Claimant was given a list of businesses to contact on June 20, 2022; she made entries into the computer system that she had done so. Ms. Betsy Curtis with Heartland followed up with those businesses and could not confirm that any of the contacts had been made, but rather learned that many of them had not occurred as reported, as the person claimant said she contacted either did not work there, was out for the summer or had not received a call from claimant the day before. When asked about how the contacts were made, claimant said that she had made phone calls to each. (R.NMX.101-103). However, in her testimony at the hearing, claimant said some were emails and the system used to log contacts did not have a tab for emails, so she had to identify it as a phone contact. (TR. 21). One of those statements is untrue.

6. During her testimony at the hearing, claimant was asked about being terminated for falsifying contacts. Instead of a simple "yes or no," her answer was "not to my knowledge, I have never falsified any contacts." Claimant would be in the best position to know if she had done it—falsification implies an intent to deceive, not a mere error in reporting--and her evasive answer was unimpressive.

Thus, as it is obvious that claimant will engage in deceptive behavior when she believes it helps her, I cannot find she is a credible witness on any matter. "The Commission is not required to believe the testimony of the claimant or any other witness but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief," *Marshall v. Ark. Dept. of Corr.*, 2020 Ark. App. 112, 594 S.W.3d 160. She therefore needed to provide some credible proof to support her version of what she was doing the morning of the accident for her to meet her burden of proof; her testimony alone that she was going to Little Rock to drop in on assigned businesses does not suffice.

Claimant testified in her deposition that her friend, Ms. Flores, was going to ride with her to

Little Rock, sit in the car while claimant went to several different locations, and then ride back. (CL.X.#3, 17-18). Ms. Flores may well enjoy riding in a car on the interstate for almost three hours, remaining in a vehicle while her friend made her calls, and afterward riding back on the same interstate, but that sounds implausible to me. I needed Ms. Flores to verify that was the plan for the day. "The unexplained failure of a party to produce a witness with special knowledge of a transaction raises a presumption (or inference) that the testimony would be unfavorable," *Arkansas Hwy. Comm'n v. Phillips*, 252 Ark. 206, 478 S.W.2d 27 (1972). Ms. Flores certainly had knowledge of what she and claimant were doing on December 7, 2021, before the collision with the deer. However, she was not called as a witness and no explanation was offered to explain why she was not so called; from that omission, I conclude that her testimony would not have been favorable to claimant.

ORDER

Claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury on December 7, 2021. Therefore, her claim for compensation benefits is hereby denied and dismissed.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of $701.45.

IT IS SO ORDERED

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE