

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H102563**

MIKALA J. SCHAEFFER, Employee	CLAIMANT
NORTHWEST MEDICAL CENTER, Employer	RESPONDENT
GALLAGHER BASSETT, CARRIER/TPA	RESPONDENT

OPINION FILED **JANUARY 5, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Springdale, Washington County, Arkansas.

Claimant represented by LAURA BETH YORK, Attorney, Little Rock, Arkansas.

Respondents represented by JAMES A. ARNOLD II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On October 20, 2022, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 1, 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 January 10, 2021.
3. The claimant sustained a compensable injury on January 10, 2021.
4. The compensation rates are \$500.00 for temporary total disability and \$375.00 for permanent partial disability.

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. The following were litigated:

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1. Whether claimant is entitled to additional medical treatment.
2. Whether claimant is entitled to additional temporary total disability benefits from August 5, 2021, through December 13, 2021.
3. Attorney fees.

All other issues were reserved.

The claimant contends that “on January 10, 2021, claimant sustained an admittedly compensable injury to her left shoulder when her shoulder popped as she was picking up a tray of surgical instruments. Respondents sent her to Dr. Heim at the Orthopedic Center of Northwest Arkansas. Dr. Heim noted that the MRI showed increased signal at the rotator cuff. He gave her an injection and prescribed physical therapy. Claimant reported back to the Orthopedic Center of Northwest Arkansas and was seen by Dr. Allard, as Dr. Heim was off work on medical leave. Dr. Allard ordered an MR arthrogram. Dr. Allard opined that her injury sounded like a labral tear, but the respondents denied her treatment with Dr. Allard and denied the MR arthrogram. Respondents then sent the claimant back to Dr. Heim, who agreed that it sounded like the claimant had a labrum tear and ordered a second MRI. On September 14, 2021, Dr. Heim reported that the EMG and MRI were normal and released her at maximum medical improvement with a 0% rating and no restrictions. Claimant then went to Dr. Dougherty who noted that he reviewed the MRI, and it showed an unstable bicep tendon due to rupture of the ligament. Dr. Dougherty noted that the tendon was perched on the spine, which explained her pain with movement. He believed there was a suprascapular nerve entrapment and recommended a diagnostic shoulder arthroscopy. This was denied by the respondents. Claimant went to Dr. Earl Brewley, who reviewed the MRI, and noted that it showed clear findings of a subluxed labrum and recommended surgery. Claimant contends she is entitled to medical treatment, temporary total disability, and that her attorney is entitled to an attorney fee. All other issues

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are reserved.”

The respondents contend that “claimant has received all medical treatment and indemnity benefits to which she is entitled.”

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 her 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 Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has met her burden of proof by a preponderance of evidence that she is entitled to temporary total disability benefits beginning August 5, 2021 and continuing through December 12, 2022.
4. Claimant has met her burden of proof by a preponderance of the evidence that she is entitled to additional medical benefits from Dr. Christopher Dougherty for her left upper extremity injury.
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

At the close of the hearing, the parties were asked to submit briefs in support of their position. Those are blue backed to the record of this matter as Commission's exhibits.

HEARING TESTIMONY

Claimant testified on January 10, 2021, that she was working for Northwest Medical Center as a certified surgical technologist¹. Claimant said that she reached to pick up a tray of surgical instruments. When she lifted it, she felt her shoulder pop. She immediately felt excruciating pain, which she reported to the charge nurse on call that day. Claimant saw Dr. Blake Hansen first and was then referred to Dr. John Heim. Both Dr. Hansen and Dr. Heim referred claimant to physical therapy, but claimant said neither course of physical therapy helped. Dr. Heim recommended an MRI arthrogram, and the insurance carrier initially denied it, but eventually it was approved. Claimant also underwent an EMG/MCV. Claimant was working using only her right arm, but believes the repeated use caused it to start hurting. When it was reported to Dr. Heim, he sent her for a functional capacity evaluation. Claimant said that she did not feel good after the FCE; she took Tylenol and iced her shoulders.

Claimant stated that on August 4, 2021, Dr. Heim released her at maximum medical improvement with a permanent light duty restriction. Claimant said that there was no light duty work in the operating room and respondent did not provide her with light duty work in another department. Claimant testified that her left shoulder was still not functioning properly as she did not have a lot of grip strength in her hand.

Claimant felt that she was not getting proper care from Dr. Heim, so she sought and received a change of physician from Dr. Heim to Dr. Christopher Dougherty. Claimant saw Dr. Dougherty on December 6, 2021. Dr. Dougherty had the results of her MRI and nerve conduction study when she saw him; additionally, Dr. Dougherty performed an ultrasound in his office. Claimant said after the

¹ The transcript records that claimant said “certified social technologist” but from the context of her testimony, I believe this was an error.

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examination, Dr. Dougherty recommended a bicep tendonesis; however, this was denied by the claims adjuster for respondent Gallagher Bassett. She testified that she was taken off work completely at that appointment. Despite that restriction from Dr. Dougherty, she began working around December 13, 2021, at an eye clinic, which she said was sedentary work. Because claimant was receiving no disability benefits, she was in financial distress, and had to move to North Dakota to be with her family. She currently works in a position that is a light duty job, which she is able to perform.

Claimant said that she went on her own to see Dr. Earl Brewley in North Dakota. After Dr. Brewley reviewed the diagnostic reports and examined claimant, he recommended the bicep tendonesis surgery.

Claimant testified that she believes that she has not gotten better since the injury, believing that her left shoulder has either stayed the same or has gotten worse. She requested that the surgery recommended by Dr. Dougherty, Dr. Brewley, and Dr. Aaron Humphreys with Genex be approved by the Workers' Compensation Commission.

On cross-examination, claimant confirmed that while the MRI arthrogram was initially denied, she did eventually have it. She said that while she would not term what she was doing "light duty work," Northwest gave her work within her restrictions, and she was paid while she was doing one-armed duty. She stated at the time that Dr. Heim released her, he had discussed surgery but had not ordered it or recommended it. Claimant did not agree with respondent's counsel that her MRI was normal and disagreed that the MRI arthrogram was normal but did agree that the EMG/MCV test did return a normal result. Claimant said the ultrasound test was done in Dr. Dougherty's office. She agreed that Dr. Heim released her at maximum medical improvement on August 4, with a permanent restriction. She stated that she wasn't healed but had been released from care; no doctor took her off work from August 4 through December 6, 2021. Claimant said when Dr. Dougherty's

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recommendation for surgery was denied, she didn't have any choice except to go to work on December 13, 2021. Claimant agreed that she had full and unrestricted passive range of motion in her arm, meaning that someone else could move her arm. Claimant stated that Dr. Brewley was an unauthorized physician that she had to pay for from her own pocket.

On redirect-examination, claimant said she had no income between August 5, 2021, and December 13, 2021. She contacted Northwest, asking to work anywhere in the hospital, and was repeatedly turned down.

REVIEW OF THE MEDICAL RECORDS

The parties did not duplicate many of the records, and this review will be done in chronological order, referring to both claimant's exhibits as well as respondent's.

Claimant began seeing Dr. Blake Hansen on January 11, 2021. At the initial visit, Dr. Hansen did an x-ray of claimant's left shoulder, finding no fracture or dislocation. While there are no physical therapy notes submitted, Dr. Hansen discusses claimant's course of treatment in physical therapy. On February 10, 2021, Dr. Hansen made an orthopedic referral but continued to follow claimant until she could see the orthopedist, Dr. John Heim. (CL.X.1-12)

Claimant had an MRI on February 25, 2021. Both claimant and respondent listed the MRI as being part of their exhibits, but neither included the entire report (CL.X.13) (R.X.1). However, Dr. Hansen included the MRI impression in his March 3, 2021, report:

1. Mild muscular edema in the infraspinatus muscle belly, this may represent a mild strain.
2. Mild tendinosis of the mid and distal supraspinatus tendon. Mild tendinosis of the distal infraspinatus tendon.
3. Otherwise, no source for shoulder pain, her shoulder is hurting much worse than before. (CL.X.16)

Claimant had her first appointment with Dr. Heim on March 10, 2021. Dr. Heim gave claimant a cortisone injection at that first visit. In his discussion notes, Dr. Heim said "her MRI shows some

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increased signal at the insertion of the rotator cuff. I recommend at this point that we inject the subacromial space and get her back into therapy to work on range of motion modalities and cuff strengthening exercises.” (CL.X.22)

For reasons that are not clear from the records, after her initial visit with Dr. Heim, claimant returned to Dr. Hansen on March 18. It appears Dr. Hansen first suggested the MR arthrogram but apparently did not offer any treatment on that date. (CL.X.23-27)

While Dr. Heim was recovering from surgery, Dr. Mark Allard saw claimant on March 23, 2021. He suspected that claimant had a labral injury and he too agreed that an MR arthrogram need to be done. (CL.X.28-31) Claimant had the MR arthrogram of her left shoulder on April 23, 2021. The impressions as recorded by Dr. Joseph Yancy are as follows:

1. Superior labium appears intact. There is mild degenerative frame along the labrum enterally. No discrete tear is seen.
2. Intact rotator cuff and long head of biceps tendon.
3. Minimal chondral thinning at the glenohumeral joint with normal subchondral bone. Normal AC joint. (R.X.6)

In his office notes of May 12, 2021, Dr. Heim recorded:

“This patient’s MRI does not reveal any labral or cuff pathology. I do not see a significant outlet obstruction but clinically she is not doing well. Passively she has good range of motion and actively she does not, so we are concerned about a neuromuscular problem. We are getting a nerve conduction study and an EMG, and I will see her back after these tests.” (CL.X.39)

Following her EMG/NCV, claimant again saw Dr. Heim on June 2, 2021. Dr. Heim noted evidence of disuse muscle atrophy. He wanted claimant to go back to therapy to maximize her strength and lifted some of her restrictions on her left arm to allow a five-pound weight limit. Dr. Heim did not think she was a surgical candidate at that time.

Claimant returned to Dr. Heim on July 7, 2021. His discussion notes mention that claimant was reporting right shoulder pain in addition to that in her left shoulder and was feeling very agitated.

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Dr. Heim asked her if she would like to see a therapist, but claimant declined. “I am concerned about the mental health of this patient, as I believe there is a psychosomatic component to her pathology.” He then referred claimant to Functional Testing Centers, Inc. for a functional capacity evaluation (FCE), which was performed on July 15, 2021. During the FCE, claimant continually complained of pain in her left shoulder, and was unable to perform many of the tasks she was asked to do with her left hand and arm. The examiner failed to notice the atrophy in claimant’s left upper extremity and determined that she put forth “an unreliable effort” with 32 of 55 consistency measures within expected limits. (R.X. 24-44)

On August 4, 2021, Dr. Heim saw claimant and based on the FCE, he believed claimant would be able to function at the light classification of work. He stated claimant had reached maximum medical improvement and released her to return to work within the activity level as defined by the results of the functional capacity evaluation. (CL.X.72), which was “in at least the light classification of work.” (R.X. 26). His record of that date concludes:

“Note to provider: Mikala was seen in office today, 08/04/21 to review FCE results. She has been released with the following restrictions: She is in the light category of work with occasional bi-manual lift/carry of up to 30 pounds. Lift/carrying of up to 10 pounds on a frequent basis. Occasional RUE lift of 25 pounds and a LUE lift of 5 pounds when lifting unilaterally from knuckle to shoulder level. We can provide an impairment rating if requested without another office visit.”

Dr. Heim was then requested by the claims adjuster to assess an impairment rating. He issued a report dated September 14, 2021, in which he concluded “claimant does not meet criteria for permanent partial impairment.” (R.X.50) Dr. Heim did not explain how claimant was limited to light duty without having an anatomical impairment.

After being discharged from Dr. Heim, claimant returned to Dr. Hansen and saw him on August 9, September 17, and September 22, 2021. It does not appear that Dr. Hansen offered any

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form of treatment to claimant. (R.X.14)

Claimant received a change of physician order (R.NM.1-4) and then saw Dr. Christopher Dougherty. After evaluating the existing records, Dr. Dougherty performed an ultrasound examination which showed an unstable bicep tendon which he attributed to the rupture of the transverse humoral ligament. Dr. Dougherty recommended surgery, as claimant had failed a conservative care for nine months and surgery was the only option to repair what Dr. Dougherty saw during the ultrasound procedure. (CL.X.82-90) Dr. Aaron Humphreys from Genex was asked by respondent to review the records and agreed with Dr. Dougherty's assessment; he advised the claims administrator that the surgery that Dr. Dougherty recommended was certified. (CL.X.91-93)

Following her move from Arkansas, claimant saw Dr. Earl Brewley in Minot, North Dakota on January 24, 2022. Dr. Brewley was not claimant's authorized treating physician; Dr. Dougherty was (and is) still in that role. On his first examination, Dr. Brewley did not have all her records but when she returned on June 13, 2022, Dr. Brewley saw clear findings of a subluxed labrum on the MRI and stated in his assessment and plan that claimant "likely has a symptomatic superior labrum tear, which likely would benefit from a proximal bicep tenodesis verses tenotomy. I did recommend, however, that this patient having additional symptoms could likely benefit from a referral to a neurology and assessment. We are still waiting for this as this was previously rejected from insurance coverage." (CL.X.94-95, 103)

Dr. Theodore Hronas, a board-certified radiologist, was asked to review the radiological reports and concluded "there is no objective finding of an acute injury of the rotator cuff, labrum, or long head of the biceps tendon. I agree there is mild chronic supraspinatus tendinosis without tear." Dr. Hronas did not mention Dr. Dougherty in his list of reviewed records. (R.X 51-52)

REVIEW OF THE NON-MEDICAL EXHIBITS

Respondent submitted the order allowing claimant to change physicians entered in November 2021, and the Form AR-N signed by claimant on January 11, 2021.

ADJUDICATION

As set forth above, the parties litigated whether claimant was entitled to additional medical treatment and a period of temporary total disability (TTD). While there is some overlapping of these issues, they will be addressed separately.

Is claimant entitled to additional medical treatment?

Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Goyne v. Crabtree Contracting Company*, 2009 Ark. App. 200, 301 S.W. 3d 16. It was stipulated that claimant had a compensable injury on January 10, 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.

As for the proof presented by the parties, I found claimant to be credible in her testimony. Although a claimant's testimony is never viewed as uncontroverted, the Commission need not reject the claimant's testimony if it finds that testimony worthy of belief. *Ringier America v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993). Having had the benefit of seeing claimant testify, I found her to be credible that her arm has not stopped hurting since the day of the compensable injury. It then becomes a matter of reconciling the doctor's records with that credible testimony.

Respondents rely on the records from Drs. Hansen, Heim, Allard and Hronas. While I don't believe any of these doctors were wrong in their assessment, I can dispense with three of them quickly. Dr. Hansen provided only conservative care, turning claimant's treatment over to Dr. Heim when

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claimant did not respond to what Dr. Hansen could provide. Dr. Allard saw claimant on one occasion in Dr. Heim's absence and did not change claimant's course of treatment. Dr. Hronas never saw claimant, but only reviewed records that were provided to him. As noted above, he did not have those from Dr. Dougherty.

That leaves Dr. Heim's records to consider, and those are confusing. He didn't find anything he would term a permanent impairment, yet he released claimant with permanent restrictions. Dr. Heim suggested to claimant that her problem might be psychosomatic, offering mental health services to claimant, but she declined. That indicates to me that Dr. Heim believed there was something causing claimant to have the pain and limitations with her arm that she reported but could not find the cause.

Claimant submitted records from Drs. Dougherty, Brewley and Humphreys. I agree with respondent that Dr. Humphreys' report is of little use because he utilizes the Official Disability Guidelines, which are irrelevant to determining if a course of treatment is reasonable in Arkansas.² I found Dr. Brewley's records to be more useful. Much of what he said was couched in the probable rather than the definite, but that is sufficient; a doctor need not be absolute in an opinion or use the magic words "within a reasonable degree of medical certainty" so long as his medical opinion be more than speculation, *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296 (2001). I do not see any reference in Dr. Brewley's records to the ultrasound performed by Dr. Dougherty, which will be discussed below. (I did note the disagreement between Dr. Brewley's reading of the MRI and the opinion rendered by Dr. Hronas. Without having any information presented about the qualifications of Dr. Brewley to read and interpret an MRI, I'd be inclined to accept the findings of Dr. Hronas over Dr. Brewley on

² I found a report by the same doctor in 2021 was "not particularly helpful" for that very reason, see *Duero v. Doubletree Hotel*, 2021 AR WRK. COMP. LEXIS 217. However, under whatever criteria he used, I find it interesting that the doctor selected by respondent to review claimant's records agreed with Dr. Dougherty's opinion, but his recommendation to certify the surgery was rejected by respondent.

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what the MRI revealed, were that the last word in the matter.)

I am most persuaded by Dr. Dougherty's findings following his examination of claimant on December 6, 2021. He used a different diagnostic tool than did Dr. Heim by utilizing an ultrasound as part of his examination and found "an unstable biceps tendon due to rupture of the transverse humeral ligament." As claimant had not responded well to conservative care for 9 months, Dr. Dougherty determined that claimant should be scheduled for "a diagnostic shoulder arthroscopy with bicep tenodesis," as it was the only option for her condition. In view of all the evidence, including claimant's credible testimony, I find claimant has met her burden of proof that she is entitled to additional medical treatment.

Respondent raised an issue in its brief about the absence of the ultrasound report in the exhibits that claimant submitted: "The report of that ultrasound is not in the record although claimant testified that the report is in her medical records." Claimant's testimony on direct testimony was indeed that she gathered all her diagnostic tests to take to Dr. Brewley (TR.22) but on cross-examination, she was asked if she said she had a report on the ultrasound, her answer was "it should be in my medical records." (TR 28). As mentioned above, the ultrasound was not mentioned by Dr. Brewley in his report of June 13, 2022. From that, I conclude that Dr. Brewley did not receive it. Claimant testified that the ultrasound was performed by Dr. Dougherty in his office; she watched it on the screen as he did it. What is recorded in his office notes of that day may be "the ultrasound report," as it sets forth what the doctor who performed the test saw on the screen. I would have to assume that Dr. Dougherty made a separate record that differed significantly from what he recorded in his office notes, and I see no reason to make that assumption. Therefore, I decline to make the inference that evidence that was not submitted on that issue would have been prejudicial to claimant's case.

Before moving to the issue of TTD, I asked of the parties at the end of the hearing: "If I find

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additional medical treatment is warranted, who does it?” Claimant used her one-time change of physicians to Dr. Dougherty before she moved to North Dakota due to her financial condition. Respondent was clear in its post-hearing brief: “If claimant is found to be entitled to the surgery, it should be done by the current authorized physician, Dr. Dougherty.” Claimant argued that respondent’s actions which caused claimant to have to leave Arkansas amounted to “bad faith” and set forth the expenses respondent would be expected to cover—such as travel, food, lodging—that would be incurred if claimant had to return to Arkansas. She concluded that “the only equitable and reasonable solution is to allow the claimant to treat with Dr. Brewley in North Dakota.

As much as I agree that an equitable solution would be for this treatment to take place in North Dakota, this court is not one of equity, but of law. Claimant failed to provide a case that would allow me to order that claimant can once again change to another authorized physician, and I did not find one in my research to permit me to order the change to Dr. Brewley as the authorized treating physician, and therefore decline to do so. Respondent will need to decide if it wants to promptly pay all the additional expenses that are statutorily authorized for claimant to return to Dr. Dougherty for treatment, or avoid those costs and authorize treatment in North Dakota.

Is claimant entitled to TTD from August 5, 201 through December 13, 2021?

In its post-hearing brief, respondent urges that claimant was released by Dr. Heim on August 4, 2021, at maximum medical improvement (MMI) and therefore would not be entitled to any additional TTD benefits until she saw Dr. Dougherty on December 7, 2021, who took her off work following that visit. Since claimant took a job on December 13, 2021, it is respondents’ position that the six-day period between December 7 and December 13, 2021, is not long enough for claimant to be entitled to any additional TTD benefit.

Claimant’s position is that while she had been released by Dr. Heim, it was for light duty work

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and therefore she is entitled to TTD because her employer refused to provide light duty work to her within the restrictions imposed by Dr. Heim, and further, there is insufficient evidence in the record that claimant had the capacity to earn the same or any part of the wages she was receiving at the time of the injury.

The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.* Whether an employee's healing period has ended is a factual determination to be made by the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

After reviewing all the evidence, I am convinced there was something further in the way of treatment that could improve her condition when she was released by Dr. Heim. I do not question that Dr. Heim made what he thought to be the correct decision in releasing claimant from his care at MMI, but I believe he did so at least in part based on the results of the FCE, which did not take into account the extent of claimant's shoulder injury. As I have the benefit of information Dr. Heim did not have on August 4, 2021—the report from Dr. Dougherty's examination of claimant—I find claimant's healing period had not ended on August 4, 2021. She is entitled to TTD benefits from August 5, 2021 through December 12, 2021.³

³ Claimant testified she accepted employment on or about December 13, 2021, making less money than what she was making while working for respondent. She reserved her claim for temporary partial disability benefits.

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.

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of \$502.00.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE