

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H001436**

RANDALL L. TERRY, EMPLOYEE	CLAIMANT
TIMBER PRODUCERS SELMA SAWMILL, EMPLOYER	RESPONDENT
SUMMIT CONSULTING, LLC, INS CARRIER/TPA	RESPONDENT

OPINION AND ORDER FILED JUNE 8, 2021

Hearing conducted on March 11, 2021, before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, in El Dorado, Union County, Arkansas.

The claimant was represented by the Honorable F. Mattison Thomas, III, Thomas Law Firm, El Dorado, Union County, Arkansas.

The respondents were represented by the Honorable Jason Ryburn, Ryburn Law Firm, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In light of additional facts adduced and circumstances that had changed since the Prehearing Order was filed on January 14, 2021, the parties substantially modified their stipulations, the issues to be litigated, and their respective contentions on the record at the hearing as follows:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed with the claimant at all relevant times including, December 5, 2019, when the claimant sustained a compensable injury to his left shoulder.
3. The claimant's average weekly wage (AWW) was \$517.27 which entitles him to weekly compensation rates of \$345.00 for temporary total disability (TTD), and \$259.00 for permanent partial disability (PPD) benefits.
4. The respondents accepted the claimant's injury as compensable and have paid all appropriate medical expenses, and some indemnity benefits.
5. All parties specifically reserve any and all other issues for future determination

and/or hearing.

(Commission Exhibit 1 at 1-2; Hearing Transcript at 5-8; 34-42). Pursuant to the parties' mutual agreement, the issues litigated at the hearing were (again, with modifications the parties affirmed on the record at the hearing):

1. Whether the claimant is entitled to TTD benefits from June 18, 2020, through September 27, 2020.
2. Whether the claimant's attorney is entitled to a controverted fee on the aforementioned TTD benefits since he had to file for and obtain a change of physician (COP) which ultimately led to claimant's entitlement to the additional TTD benefits mentioned in Paragraph 2 above.
3. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. 5-8; 34-42).

The claimant contends the respondents controverted the payment of TTD benefits from June 18, 2020, through September 27, 2020. The claimant's treating physician, Dr. Ethan Schock performed arthroscopic surgery on the claimant's left shoulder and, on June 19, 2020, released him to return to work with no permanent anatomical impairment and no restrictions. The claimant contends he had in fact not fully recovered as of the date Dr. Schock released him to return to work. The claimant hired an attorney, who filed a Form AR-C on his behalf with the Commission on June 26, 2020. The claimant's attorney also filed on his behalf the claimant's one (1)-time-only COP request, asking for a COP from Dr. Schock to Dr. Shahyar Ahmadi, an orthopedic surgeon at the University of Arkansas for Medical Sciences (UAMS). The Commission granted this COP

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request by order filed July 22, 2020. The claimant began to treat with Dr. Ahmadi on August 11, 2020; he underwent additional surgery on the left shoulder on September 28, 2020; and Dr. Ahmadi took him off work for an expected recovery period of six (6) weeks. The claimant contends he is entitled to additional TTD benefits from June 18, 2020, through September 27, 2020, and through a date yet to be determined. The claimant further contends the respondents should be ordered to pay his attorney a controverted fee since he hired an attorney who filed a Form AR-C and COP request, which ultimately resulted in his undergoing additional surgery and receiving additional TTD benefits. The claimant specifically reserves the issue of permanent anatomical impairment, and any and all other issues, for future litigation and/or hearing. (Comms'n Exs. 1 at 2-3; Commission Exhibit 2; T. 5-8; 34-42).

The respondents contend they accepted the claimant's left shoulder injury as compensable and have paid all appropriate medical and TTD benefits to date. They contend they paid both medical and TTD benefits through June 18, 2020, at which time the claimant's treating physician, Dr. Schock, released him to return to work with no permanent anatomical impairment and no restrictions. The respondents contend further, once the claimant was granted his one (1)-time-only COP request from Dr. Schock to Dr. Ahmadi, after Dr. Ahmadi first saw the claimant on August 11, 2020, they have paid all medical expenses associated with Dr. Ahmadi's medical treatment, and they reinstated TTD benefits effective June 19, 2020, which they paid through September 27, 2020, and continued to pay thereafter. The respondents further contend they have never controverted either medical or indemnity benefits at any time in this claim and, therefore, they do not owe the claimant's attorney a fee. The respondents reserve any and all other issues for future

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litigation and/or determination. (Comms'n Exs. 1 and 2; T. 5-8; 34-42).

The record consists of the hearing transcript and any and all exhibits contained therein or attached thereto.

STATEMENT OF THE CASE

The claimant, Mr. Randall L. Terry, was 24 years old at the time of the subject hearing, and 23 years old at the time of his compensable left shoulder injury. The parties stipulated he sustained a compensable injury to his left shoulder on December 5, 2019. The claimant first treated with Dr. Michael Fakouri at the Monticello Medical Clinic from December 5, 2019, through January 27, 2020. On January 27, 2020, he underwent an MRI of his left shoulder at Jefferson Regional Medical Center in Pine Bluff, Arkansas, that revealed he had a torn labrum in his left shoulder. Thereafter, he came under the care of Dr. Ethan Schock, an orthopedic surgeon associated with OrthoArkansas. (Claimant's Exhibit 1 at 1-8).

On January 30, 2020, Dr. Schock began treating the claimant at OrthoArkansas's clinic in Arkadelphia. Dr. Schock released the claimant to return to work with restrictions on January 30, 2020. After a period of conservative treatment, on October 28, 2020, Dr. Schock ultimately performed an arthroscopic labral debridement procedure on the claimant's left shoulder. The claimant continued to complain of pain after this procedure, but in a clinic note dated April 17, 2020, Dr. Schock stated, "He still has some pain but this has improved." During the period of his treatment, Dr. Schock released the claimant to return to work at various times with restrictions. On June 19, 2020, Dr. Schock released the claimant to return to work with no restrictions and no permanent anatomical impairment. (T. 9-34; CX1 at 8-31; Respondents' Exhibit 1 at 1-3). The

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respondents' adjuster's payment records show the respondents' paid all appropriate medical and TTD benefits from the date of the claimant's December 2019, compensable left shoulder injury through June 19, 2020, the date Dr. Schock released the claimant to return to work without restrictions, and with no/zero percent (0%) permanent anatomical impairment. (RX1 at 5-9).

Thereafter, the claimant hired his attorney, who filed a Form AR-C with the Commission on the claimant's behalf. The claimant's attorney also requested a COP from Dr. Schock to Dr. Ahmadi, which the Commission granted by order dated July 22, 2020. The claimant first saw Dr. Ahmadi on August 11, 2020. An X-ray Dr. Ahmadi took of the claimant's left shoulder at this first visit showed, "...no evidence for fracture, dislocation, inflammatory, or destructive change. No foreign bodies are identified." (RX1 at 4; CX1 at 32-41).

After examining and evaluating the claimant's condition, Dr. Ahmadi characterized the claimant's left shoulder as being painful and unstable, so he ordered another MRI. This new MRI revealed an anterior labroligamentous periosteal sleeve avulsion (ALPSA) lesion, and Dr. Ahmadi recommended surgery to correct this condition. He performed this surgery in September 2020, and, at least as of the date of the hearing Dr. Ahmadi had not yet released the claimant to return to work, either with or without restrictions. (CX1 at 47-52; T. 13-17).

The respondents' claim's adjuster's payment log shows the respondents paid TTD benefits through from the date of the claimant's compensable injury through June 2020, when Dr. Schock released the claimant to return to work without restrictions, and with no permanent anatomical impairment. They did not pay the claimant TTD benefits after Dr. Schock's release until after Dr. Ahmadi's surgery in September 2020. The respondents continued to pay the claimant TTD benefits

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through the date of the subject hearing. These records also show the respondents have paid all appropriate medical benefits to date, including all of Dr. Ahmadi's treatment and surgery. (RX1 at 5; 5-9).

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 on the issue has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2020 Lexis Replacement.). The claimant has the burden of proving, by a preponderance of the evidence, that he is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). In determining whether the claimant has met his 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.* § 119-704(c)(4) (2020 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); *Dena 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. Hardee's*, 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

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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*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002).

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. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

The parties agree the respondents have accepted the claimant's left shoulder injury as compensable and have paid all appropriate medical benefits to date. Consequently, the only issues to be decided herein are whether the respondents controverted the payment of TTD benefits from June 19, 2020, when Dr. Schock released the claimant to return to work with no restrictions and no permanent anatomical impairment, until the claimant's COP physician, Dr. Ahmadi, took him off work for a second surgical procedure on or about September 27, 2020; and whether the claimant's attorney is entitled to a controverted fee on these facts since he filed the COP request on the claimant's behalf. The preponderance of the evidence conclusively demonstrates the claimant has failed to meet his burden of proof in demonstrating the respondents have controverted the payment of TTD benefits from June 19, 2020, through September 27, 2020.

Ark. Code Ann. Section 11-9-803 (2020 Lexis Replacement) deals with the controversion of claims. This statute requires respondents to file a Form AR-2 stating their position on a claim, whether they have accepted or controverted the claim. The issue of controversion is a factual determination for the Commission to make based on the facts and circumstances of each particular

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case; and the Commission's findings in this regard will not be reversed unless there has been a gross abuse of discretion. *Aluminum Co. of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976); *see also, Horseshoe Bend Builders v. Sosa*, 259 Ark. 267, 532 S.W.2d 182 (1976); *Turner v. Trade Winds Inn*, 267 Ark. 861, 592 S.W.2d 454 (Ark. App. 1979). The mere fact that payments may be delayed does not amount to controversion per se. *Ridgeway Pulpwood v. Baker*, 7 Ark. App. 214, 646 S.W.2d 711 (Ark. App. 1983). In the instant case, there exists no evidence in the record the respondents controverted the payment of any TTD benefits. Therefore, the claimant's attorney is not entitled to a controverted attorney's fee.

In order to be entitled to TTD benefits, a claimant must be temporarily totally disabled. "Temporary Total Disability" is defined as the period of time within the healing period in which the claimant suffers a total incapacity to earn wages. *Mullen v. Duckwall ALCO*, 2016 Ark. App. 122, 484 S.W.3d 283 (Ark. App. 2016). *Ark. Code Ann.* Section 11-9-102(13) (2020 Lexis Repl.) defines the term "healing period". Our court of appeals has held that where a claimant is released to perform light duty work and, therefore, was not totally incapable of earning wages, substantial evidence supported the Commission's finding she was not entitled to TTD benefits. *Mullen, supra*.

In the case at bar, the claimant's first treating physician, Dr. Schock, released him to return to work with no restrictions and no/0% permanent anatomical impairment as of June 19, 2020. Consequently, he may not properly be deemed to be temporarily totally disabled at this time. (While the claimant alleges, he was "terminated" from his employment and arguably had no job to which to return, this fact is irrelevant to the determination of whether he was physically totally incapacitated from earning wages during this period of time based on medical evidence. In

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addition, the claimant did not argue the alleged “termination” – a factual issue that is greatly in dispute – was the/a basis for his alleged entitlement to TTD benefits between July 19, 2020, and September 27, 2020.).

Whether the claimant was totally incapacitated from earning wages between July 19, 2020, and September 27, 2020, is primarily a medical question, and there exists no medical evidence he was TTD during this time period. Indeed, again, the claimant’s treating physician, Dr. Schock, released him to return to work with no restrictions and no/0% percent impairment effective June 19, 2020. The respondents were entitled to rely on Dr. Schock’s release and opinion (indeed, it was the only medical evidence they had at the time) until they were presented with additional evidence the claimant had entered a second healing period and was temporarily totally disabled. When Dr. Ahmadi presented them evidence to this effect after he performed a second surgical procedure on the claimant’s left arm in September 2020, the respondents appropriately, promptly, and timely reinstated the payment of TTD benefits. There exists no evidence the respondents controverted the payment of *any* benefits to date in this claim, including the payment of TTD benefits.

The claimant argues his attorney is entitled to a fee on the TTD benefits reinstated since he filed a COP request from Dr. Schock to Dr. Ahmadi, which the Commission granted on July 11, 2020; and it was Dr. Ahmadi who opined the claimant required a second surgery, which he performed in September 2020, and which resulted in the claimant’s being deemed to have entered a second healing period and resulted in the reinstatement of his TTD benefits. This argument is without merit. The claimant himself could have filed for a COP; no attorney is required for this

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purpose. And, more significantly, there exists no evidence the respondents controverted the payment of any TTD benefits owed to the claimant as a result of Dr. Ahmadi's treatment.

After the COP, should they have chosen to do so the respondents had the right to simply pay for the claimant's first visit to Dr. Ahmadi and, if they disagreed with Dr. Ahmadi's assessment, to refuse to pay for any additional medical treatment or TTD benefits; however, significantly, they did not do so. The claims adjuster's payment records conclusively prove the respondents paid for not only the claimant's initial visit with Dr. Ahmadi, but for all his visits thereafter including, but not limited to, Dr. Ahmadi's surgery. They also timely reinstated the payment of TTD benefits based on Dr. Ahmadi's surgery. (RX1 at 5-9). At no time did the respondents ever controvert the payment of any benefits relating to Dr. Ahmadi's treatment, although it was within their rights to do so. This is especially true since the claimant's first treating physician, Dr. Schock, released him to return to work with no restrictions and no impairment as of July 19, 2020; as well as the fact Dr. Ahmadi's initial X-ray of the claimant's left shoulder on the date of the claimant's first visit, August 11, 2020, was normal and showed no evidence of a continuing injury.

Consequently, based on the applicable law as applied to the facts of this case, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this claim.
2. The stipulations contained in the Prehearing Order filed January 14, 2021, which the parties modified and affirmed on the record at the hearing, hereby are accepted as facts.

3. The claimant has failed to prove the respondents controverted the payment of any TTD benefits between June 19, 2020, through September 27, 2020. The respondents' claims adjuster's payment records show the respondents paid the claimant TTD benefits from the date of his compensable left shoulder injury until his then-treating physician, Dr. Schock, released him to return to work with no restrictions and no permanent anatomical impairment on June 19, 2020. Thereafter, the respondents had no obligation to pay the claimant TTD benefits until they were presented with additional medical evidence the claimant was temporarily totally disabled. When they received such evidence from Dr. Ahmadi, they promptly and timely reinstated the payment of TTD benefits. There exists no medical evidence the claimant was temporarily totally disabled after June 19, 2020, until Dr. Ahmadi took him off work following his surgery in September 2020, at which time the respondents reinstated the payment of TTD benefits to the claimant.
4. The parties stipulated the respondents accepted this claim as compensable. There exists no evidence in the record the respondents ever filed a Form AR-2 controverting the payment of *any* benefits – including TTD benefits – in this claim. Moreover, the respondents' claims adjuster's records conclusively demonstrate the respondents have paid all appropriate TTD benefits to date. The fact the claimant's attorney filed a COP request, which the Commission ultimately granted in July 2020, does not entitle him to an attorney's fee. Indeed, the claimant himself could have filed a COP request. Therefore, there exists no evidence of controversion in the record and, therefore, the claimant's attorney is not entitled to a fee on these facts.

Therefore, for all the aforementioned reasons, this claim is hereby denied and dismissed.

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

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp