

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H001766

LISA M. TIGUE, EMPLOYEE

CLAIMANT

**CITY OF CABOT,
SELF-INSURED EMPLOYER**

RESPONDENT

**ARK. MUN. LEAGUE,
THIRD-PARTY ADMINISTRATOR**

RESPONDENT

OPINION FILED AUGUST 3, 2022

Hearing before Administrative Law Judge O. Milton Fine II on June 9, 2022, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gene D. Adams, Jr., Attorney at Law, Jacksonville, Arkansas.

Respondents represented by Ms. Mary K. Edwards, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 9, 2022, the above-captioned claim was heard in Little Rock, Arkansas. A prehearing conference took place on April 11, 2022. The Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

The parties discussed the stipulations set forth in Commission Exhibit 1. They are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The employee/self-insured employer/third-party administrator relationship existed at all relevant times, including March 22, 2020, when Claimant sustained a compensable injury to her right shoulder.
3. Respondents accepted the above injury as compensable and paid medical and indemnity benefits pursuant thereto, including \$5,720.58 in temporary total disability benefits and \$1,492.29 in permanent partial disability benefits. The latter benefits¹ were paid pursuant to an assigned impairment rating of three percent (3%) to the body as a whole that Respondents accepted
4. Claimant's average weekly wage entitles her to compensation rates of \$282.00/\$212.00.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit

1. The following were litigated:

1. Whether and when did Claimant reach the end of her healing period.
2. Whether Claimant is entitled to additional temporary total disability benefits.
3. Whether Claimant is entitled to additional permanent partial disability benefits.

¹This is not the full value of this rating. Respondents took a credit against temporary total disability benefits they felt were incorrectly paid. *See infra*.

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4. Whether Claimant was terminated in violation of Ark. Code Ann. § 11-9-107 (Repl. 2012); and what penalties and fees, if any, should be levied/awarded in such event.
5. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved.

Contentions

The respective contentions of the parties, following an amendment at the hearing, are as follows:

Claimant:

1. Claimant is owed additional temporary total disability benefits from July 12, 2020, through September 2, 2020; and from October 1, 2020, through March 19, 2021.
2. Claimant is also owed additional permanent partial disability benefits of at least \$1,369.71 due to Respondents' incorrect assertion that it is entitled to a credit for that amount for overpayment of temporary total disability benefits to her.
3. Claimant was fired in retaliation for filing a workers' compensation claim.
4. Claimant's attorney is entitled to a statutory attorney's fee due to Respondents' controversion of benefits due Claimant.
5. All other issues are reserved.

Respondents:

1. Respondents contend that Claimant is not entitled to any additional temporary total disability benefits. Specifically, she cannot prove that she suffered a total incapacity to earn wages for the time period that she was not paid such benefits.
2. Claimant sustained an injury to her right shoulder on March 22, 2020. Respondents accepted the injury as compensable and started paying medical and indemnity benefits. She treated with Dr. Michael Hussey for a right shoulder problem on June 24, 2020. The doctor released her to return to work at light duty beginning on June 25, 2020. Although Claimant had already been terminated at the time of release to return to work with restrictions by Dr. Hussey, Respondent City of Cabot had light duty available and would have been able to accommodate those restrictions. Therefore, Respondents contend, Claimant did not suffer a total incapacity to earn wages until she was taken off work by Hussey again on September 3, 2020, following her surgery.
3. Dr. Hussey continued Claimant's restrictions of work up until September 3, 2020, when she underwent an arthroscopic capsular release, manipulation and debridement of her right shoulder. On September 16, 2020, Hussey released her to return to work again beginning on September 17, 2020, with the following restrictions: no lifting, pushing or pulling greater than two pounds with the right upper extremity, and no overhead motion.

Respondent City of Cabot also had light duty available at this time and would have been able to accommodate those restrictions. Therefore, Respondents contend that Claimant did not suffer a total incapacity to earn wages after September 16, 2020.

4. Regarding permanent partial disability, Respondents agree that Claimant was assigned an impairment rating of three percent (3%) to the whole person. Respondents accepted and paid part of this rating. However, they overpaid temporary total disability benefits, so they took a credit on the amount of the rating, resulting in \$1,492.29 paid to Claimant.
5. Respondents deny Claimant's claim of retaliatory termination. Specifically, Claimant had prior disciplinary issues; and following a meeting discussing her performance, she received a Probationary Progress Review Form. She was terminated on March 25, 2020. Respondents contend that Respondent City of Cabot terminated Claimant due to her poor performance issues, and that it was not related to her workers' compensation claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

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1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. The preponderance of the evidence establishes that Claimant reached the end of her healing period on March 19, 2021.
4. Claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability benefits for the following periods: July 11, 2020, to September 3, 2020; and October 1, 2020, to March 19, 2021.
5. Based on Finding/Conclusion No. 4 *supra*, the preponderance of the evidence establishes that Claimant was not overpaid temporary total disability benefits. Thus, Respondents incorrectly took a credit for this against the permanent partial disability benefits that were owed Claimant in accordance with the three percent (3%) impairment rating to the body as a whole that she was assigned. Claimant is owed these monies, amounting to \$1,369.71.
6. The preponderance of the evidence does not establish that Claimant's termination was in violation of Ark. Code Ann. § 11-9-107 (Repl. 2012).
7. Claimant has proven by a preponderance of the evidence that her attorney is entitled to a controverted fee on all additional temporary total and permanent partial disability benefits that have been awarded herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012).

CASE IN CHIEF

Summary of Evidence

The witnesses were Claimant and Jonathan Michael Wheeler.

Along with the Prehearing Order discussed above, the exhibits admitted into evidence in this case were Joint Exhibit 1, a compilation of Claimant’s medical records, consisting of two index pages and 53 numbered pages thereafter; Joint Exhibit 2, non-medical documents, consisting of one index page and nine numbered pages thereafter; and Joint Exhibit 3, a report from Baptist Health dated March 23, 2020, concerning Claimant, consisting of one page.

In addition, I have blue-backed to the record the post-hearing briefs of Claimant and Respondents, filed on June 27, 2022, and June 23, 2022, respectively, and totaling six pages.

Adjudication

A. Temporary Total Disability

Introduction. Claimant, who was employed by Respondent City of Cabot as a worker in its Animal Shelter, sustained a compensable injury to her right shoulder on March 22, 2020. Respondents accepted this injury as compensable and paid workers’ compensation benefits pursuant thereto, including medical benefits, temporary total disability benefits, and permanent partial disability benefits. In this proceeding, Claimant is seeking, among other things, additional temporary total disability benefits. Respondents dispute her entitlement to them.

Standards. Claimant's compensable shoulder injury is unscheduled. See Ark. Code Ann. § 11-9-521 (Repl. 2012). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Also, a claimant must demonstrate that the disability lasted more than seven days. *Id.* § 11-9-501(a)(1). Claimant must prove her entitlement to temporary total disability benefits by a preponderance of the evidence. Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012). This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, 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. *Id.*

Evidence. Claimant, who is 59 years old, began work at the Animal Shelter on January 25, 2022. Per her testimony, her duties there were as follows:

I was, I worked the front desk and I entered all the adoptions and all, any dog that came into—an animal that came into the shelter, I had to enter into their computer program called PetPoint, and I answered the phones and I swept and mopped the floors and I cleaned the bathrooms and I helped with, they had a spay and neuter clinic every week and twice every other week, and I helped with that as far as carrying the animals in and out and checking them in and that sort of thing.

The accident in question happened on Sunday, March 22, 2020. Because of the COVID-19 outbreak, volunteers could not come to the shelter. Claimant offered to help on that date to help the short-handed staff by “[c]leaning the kennels and moving the animals around and that sort of thing.” In relating how she got hurt, Claimant testified:

I was walking a dog from the inside-the-door kennel to the outdoor kennel so that she could clean the indoor kennel, and when I, it was raining and I had rubber boots on, and when I walked out the back door, the dog lunged for the grass to the left of me, and it caught me off balance. And I would have probably been okay, but it lunged again before I could get my footing and it knocked me off my feet. And I swung my arm up in the air, just reaction, and there was a kennel next to me, a chain link kennel, and my arm went up against the kennel in a very unnatural position and it went pop, pop, and I fell down.

Claimant went to MedExpress in Cabot that same day. From there, she was sent to Baptist Health. She was given a note that reflected that she could return to work on March 25, 2020. In the meantime, on March 23-34, 2020, she came to work and simply filled out workers’ compensation paperwork. Then, on March 25, 2020, after her initial appointment with Dr. Hussey at OrthoArkansas, she was terminated by Wheeler, the

Director of Community Services for the City of Cabot. He furnished her with a letter² that reads in pertinent part:

Lisa,

This letter is to officially notify you that your employment with the City of Cabot will end effective this moment. You will be paid through the end of the day.

Your employment started on January 29th and your performance and skills have not progressed as they should after nearly two months. After 30 days here, your performance was so poor I had to produce a review form listing the deficiencies. The hope was that pointing these issues out would help, and get you to a level where someone at your stage of employment should be producing. This was signed on March 9th.

In the past two weeks, the issues we spoke about have not improved and in fact, have progressively worsened. You have even shown greater disrespect to your supervisor Brittney. The other employees have come forward sharing that you reached out [to] them and told them “Brittney has it out to get you” and the other employees feel uncomfortable. I have repeatedly told you this is not the case, she is frustrated due to your attitude and performance level.

Then, last Sunday, you were helping clean the facility and walk some of the dogs outside. You were not paying attention and let a dog get away from you, causing you to fall and injure yourself creating a Workers’ Compensation claim. Accidents can happen but your accident could have been prevented.

Because of the many reasons listed above and the fact you are in your probationary period per the handbook, it has been decided your employment will end effective today. Any claims or bills in relation to your Workers’ Compensation claim will obviously be covered.

The Probationary Progress Review Form referenced in Wheeler’s letter, dated March 9, 2020 (16 days before Claimant’s termination), reads in pertinent part:

²The letter is incorrectly dated March 26, 2020; the evidence shows that it was given to Claimant on March 25, 2020.

Lisa is very cooperative with all employees and gets along with everyone. She does do her best to complete task[s] given to her in any circumstance, and is always on time and ready to work. Lisa is always happy and willing to please others.

As part of the Animal Shelter the citizens should view you as a helpful and caring individual who only wants what is best for the animals and citizens of the City of Cabot. It is important to answer the phone with a happy positive voice instead of flat and monotone. Lisa appears to lack focus when she has more than one thing going on at a time. This has created a lower than expected standard of completing paperwork and tasks. As a shelter technician and [s]helter employee it is imperative that attention to detail be of the utmost importance. She must be able to go from entering information on PetPoint, to helping a citizen, and back to where she left off without needing assistance. She is the first person people coming in have contact with, which can play a big part in whether their experience at the shelter is classified as good or bad. While mistakes can be irritating to the person making them it does happen. However, Lisa becomes very defensive at times instead of listening to what is being said on how to do or handle situations correctly. She should be listening to the constructive criticism and explanation in order to improve her work performance. The Shelter Technician position should be one of self-reliance, dependability, and efficiency to maintain the large volume of work required daily. After 5 weeks on the job Lisa should be further along in the quality and quantity of work and is currently tracking at where she should be after week #2.

Lisa's goal is to work on self-dependability, time management and workflow to become more efficient in her tasks and less dependent upon others. It is also imperative to focus on her own work rather than continually watching her supervisor doing her work, unless directed to do so during training.

Despite the numerous shortcomings outlined in the review, Claimant testified that she did not believe that she was in danger of being fired. The following exchange took place:

Q. Why do you think Mr. Wheeler fired you on March 25th?

A. I think he fired me because I got hurt.

Q. Okay. And he said you were careless.

A. Yes, sir.

Q. Could you have been more careful?

A. I don't believe so.

In regard to her treatment, Claimant stated that Dr. Hussey sent her to physical therapy. On June 24, 2020, he gave her work restrictions. However, on July 29, 2020, Hussey recommended that she undergo surgery to alleviate her frozen shoulder syndrome. The procedure took place on September 3, 2020. Thereafter, he took her off work, and she again underwent therapy. On September 16, 2020, he gave her a two-pound lifting restriction and an instruction not to perform any overhead motion. He did not release her to return to full duty until March 19, 2021, which coincided with the end of her therapy sessions.

According to Claimant, from the date of her termination until March 19, 2021, she did not apply for work elsewhere. She explained: "I didn't really think it was feasible, because my arm was in a bad condition and I had physical therapy three times a week and exercises three or four times a day." In spite of obtaining a full release on the above date, Claimant did not apply anywhere for work until January 2022.

Claimant's testimony was that Respondents paid her temporary total disability benefits until May 2020. At the time, payment of these benefits ceased without prior notice. As a consequence, Claimant filed online for unemployment benefits. She acknowledged that in her application, she represented that she was ready, willing, and able to work—notwithstanding the fact that she was still under Dr. Hussey's care. She

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did disclose the work restrictions that she was under at that point. Thereafter, she was approved to receive unemployment benefits, and was issued a debit card. But she returned the card, unredeemed, after she received a check for four weeks' back pay. Later, she formally withdrew her unemployment benefits application. Her temporary total benefits ended again in July 2020. However, she did not reapply for unemployment benefits until after she had obtained a full release from Dr. Hussey in March 2021.

Called by Respondents, Wheeler testified that as part of his job for the City of Cabot, he is over the Animal Shelter. Brittany Mahoney (the "Brittany" referenced in the termination letter) is the supervisor there. All city employees have a six-month probationary period. Shown the Probationary Progress Review Form quoted *supra*, he stated that it has only been used twice in his 13-year tenure with the city. Mahoney drafted the substance of the document—since she was the one with personal knowledge of its contents—but he edited it. In describing what led to its creation, Wheeler stated that "it was the inability of [Claimant] to do the job that was given to her, and always having to re-explain it and re-go over it, re-show her over and over and over again, which is not typical in our job." Instead of simply terminating Claimant at that point, Mahoney wanted to employ the "form to hopefully put her back on the right track."

Shown the termination letter in evidence that is quoted above, Wheeler testified that he authored it. It bears an incorrect date; it was actually issued on March 25, 2020. The following exchange took place:

Q. So the letter states that since the review form that we just discussed, the issues have not improved but worsened. Please explain what that means.

A. Well, before the review, all the employees, you know, they liked [Claimant], they liked the employee. It was everybody got along, there was no issues of that nature. Once the review was given, then it become a more hostile environment. I had employees coming to me explaining to me that [Claimant] was going to them and talking about the supervisor and trying to pull them over to her side, that she was telling them that [Mahoney] was out to get her fired, and she stopped listening to what my supervisor³ said and started going into being, just not doing the work, started being argumentative about everything. It wasn't, none of this was her fault that she couldn't get this, it was all [Mahoney's] fault that she was not able to do her job.

...

Q. So ultimately why was [Claimant] terminated?

A. She was terminated for the inability to do the work assigned.

Q. So there is a paragraph of the termination letter that references the workers' compensation claim. Why is that there?

A. Well, it's there, well, for transparency. I mean, realistically the only part that is valid on that work comp portion is that her first week she is trained to handle dogs, okay? So that goes back to her not understanding, doing her job the way she was supposed to be doing it . . . [i]t was just one, one more thing that she was taught but couldn't comprehend or couldn't get right.

Q. Have you ever terminated anybody other than [Claimant] that was out on workers' compensation?

A. No, never.

Q. In your opinion, was the termination related to the workers' compensation claim?

³During his testimony, Wheeler explained that his use of the term "my supervisor" referred to Mahoney, who actually works under him but has supervisory authority.

A. No, it was not.

Q. Why not?

A. It was related to poor work performance. We've had lots of people who get bit or have some type of work comp incident. If they're doing the job as required and their ability to do the job is there, then there's no reason for termination.

Wheeler denied that Claimant's getting hurt was the "final straw." Asked where he got the information concerning her "not paying attention and let[ting] a dog get away from [her]," he stated that he based this conclusion on a statement in an email that Claimant sent him as part of her workers' compensation paperwork. He elaborated:

She told me the dog jerked her. However, if you're paying attention, my education is if you're paying attention, you're holding the leas[h] ta[ut], there is no jerking. They can pull but not jerk.

Wheeler's testimony was that even if Claimant had not been injured, she still would have been terminated.

Per Wheeler, the Animal Shelter always has light duty work available. He added: "This position [that Claimant held] itself is 98% light duty. It's sitting at a desk, answering the phones, doing paperwork, entering in a computer." This light duty was available for the relevant periods in this action: June 25, 2020, through September 3, 2020; and September 16, 2020, through March 19, 2021. The following exchange took place:

Q. And specifically what did that light duty look like?

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A. Light duty is sitting at the front desk, it's answering phones, it's entering paperwork into the computer, it's hand writing out adoption contracts, which are also on the computer if you need to use the computer, but we have a desk right there up front that never has to be left, we're that busy.

Q. So if [Claimant] had still been employed and released on light duty, would you have that available for her?

A. Yes.

The medical records in evidence reflect that on March 22, 2020, Claimant presented to MedExpress with right shoulder pain after she fell while "walking a dog at work." X-rays showed that she suffered, inter alia, a displaced fracture of the proximal humerus. Baptist Health x-rays reflected that she had a non-displaced fracture of the right humeral head and neck. She was released to return to work as of March 25, 2020. When she saw Dr. Hussey on March 25, 2020, he took her off work for two weeks. X-rays on April 6, 2020, revealed increased displacement of the fracture. Hussey recommended a CT scan of the right shoulder. While he allowed her to return to work, he gave her the following restrictions: "No lifting, pushing, pulling with the right arm and no overhead motion." The CT scan, which took place on April 13, 2020, reflected relatively good alignment of the glenohumeral joint and mild displacement of the fracture. For those reasons, Hussey ordered continued conservative treatment, along with physical therapy. He added: "I recommend that [Claimant] remain off of work for the next 4 weeks to allow for healing and rehabilitation."

Dr. Hussey on May 11, 2020, wrote that Claimant was "doing satisfactorily." His report includes this statement:

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Work restrictions include no pushing pulling lifting with the right upper extremity and no overhead shoulder movement . . . I was asked to address today why I took her off of work duty on 4/13/20. My reason behind that was because CT scan showed a comminuted fracture and I did not want any external or extrinsic factors that could possibly further displace the fracture which may then result in surgery. Now that her fracture has shown good healing she may be allowed to return back to work but with light duty.

He added that the light-duty work could begin May 12, 2020.

Claimant told Hussey on June 24, 2020, that she was slowly improving. He wrote: “57-year-old right-hand dominant female status post fall on 3/22/20 due to an occupation-related injury, with right shoulder pain and dysfunction secondary to a proximal humerus fracture. She is doing satisfactorily.” He recommended a right glenohumeral Toradol injection for pain and inflammation. The doctor modified her restrictions to read: “no lifting, pushing, pulling greater than 5 lbs and no overhead motion.”

On July 29, 2020, Dr. Hussey found that Claimant had “significant posttraumatic joint contracture [that] appear[ed] related to posttraumatic adhesive capsulitis.” He recommended an MRI of the right shoulder. The MRI, which took place that same day, showed, inter alia, soft tissue edema in the inferior glenohumeral ligaments and soft tissues of the rotator interval that Dr. Samuel Edwards wrote “may represent adhesive capsulitis.” On July 31, 2020, Dr. Hussey determined that Claimant was suffering from adhesive capsulitis and recommended surgery to address it. She agreed. He continued her on light duty, but modified her restrictions to “no lifting, pushing, pulling greater than 5 lbs with the right arm. No repetitive overhead motion.”

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The doctor operated on September 3, 2020, performing an arthroscopic capsular release/manipulation and debridement of the right shoulder. He assigned her the diagnosis of, inter alia, posttraumatic adhesive capsulitis. On September 16, 2020, Hussey gave her the following restrictions as of September 17, 2020: “no lifting, pushing, pulling greater than 2 lbs with the right upper extremity [and] [n]o overhead motion.” When Claimant returned to him on October 21, 2020, these were changed to “no lifting, pushing, pulling greater than 10 lbs with the right upper extremity [and] [n]o repetitive overhead motion.” He continued her on these restrictions on December 7, 2020, and ordered additional therapy. On January 18, 2021, Claimant reported improvement with range of motion but residual lightness and weakness in the shoulder. Dr. Hussey ordered more physical therapy, plus a Toradol injection. He raised her weight restriction to 15 pounds.

Hussey saw Claimant for the last time on March 19, 2021. He released her to full duty and wrote:

58-year old female with occupation related injury, 6 months status post right shoulder arthroscopic capsular release lysis of adhesions with manipulation under anesthesia and extensive debridement. I am overall quite pleased with her improvement in outcome. She still has some permanent restriction with her range of motion but I believe she can return back to work full duty at this point.

. . .

Patient is now at MMI as of today's date on 3/19/2021 with a 5% rating to the right upper extremity which corresponds to a 3% whole person impairment rating according to the 4th Edition AMA Guides to the Evaluation of Permanent Impairment . . . [a]ll statements given above are within a reasonable degree of medical certainty.

Discussion. I credit Dr. Hussey’s opinion as quoted above and find that Claimant reached the end of her healing period on March 19, 2021. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). Claimant has argued that she is entitled to temporary total disability benefits for the entire period between her injury this end date. She was paid these benefits through July 11, 2020, and they resumed following her surgery in September 2020. The question is whether she is entitled to temporary total disability benefits from July 12, 2020, through September 2, 2020; and from October 1, 2020, to the end of her healing period.

Respondents argue in the negative. In so doing, they cite *Robertson v. Pork Group*, 2011 Ark. App. 448, 384 S.W.3d 639 (2011). The instant case involves an unscheduled injury; *Robertson* is thus inapposite because it concerned a scheduled injury. There, the claimant returned to work before he was terminated, which would have ended the period of his eligibility for temporary total disability benefits. An employee who suffers a compensable scheduled injury is entitled to temporary total disability compensation “during the healing period or until the employee returns to work, whichever occurs first” Ark. Code Ann. § 11-9-521(a) (Repl. 2012). See *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The case at bar instead concerns the period(s) prior to March 19, 2021, that Claimant suffered a total incapacity to earn wages.

In *Tyson Poultry Co. v. Narvaiz*, 2012 Ark. 118, 388 S.W.3d 16, which controls here, the claimant suffered a compensable left shoulder injury—which is an unscheduled injury. He returned to work at light duty. After doing so, he was suspended and ultimately terminated for calling his supervisor “an insulting, derogatory, and vulgar name.” The respondent argued that their liability for temporary total disability benefits ended following his firing. The Arkansas Supreme Court described its argument (which bears a strong resemblance to Respondents’ position here) as follows:

Appellant [the respondent] asserts that there is not substantial evidence to support the Commission’s finding that Appellee [the claimant] proved he was entitled to temporary-total-disability benefits. Because Appellee was performing light-duty work at the time his employment was terminated, and because Appellant offered testimony that Appellant would have continued to make the light-duty work available to Appellee absent his misconduct, Appellant contends that Appellee did not meet his burden of proving that he was totally incapacitated from earning gainful wages due to his compensable injury. Any incapacity from earning wages, argues Appellant, stemmed from Appellee’s misconduct and not from his injury.

Narvaiz, supra.

The appellant in *Narvaiz* used this position to argue further that the appellee’s termination for misconduct amounted to an abridgement of Ark. Code Ann. § 11-9-526 (Repl. 2012), which provides:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers’ Compensation Commission, the refusal is justifiable.

While Respondents here have not raised § 11-9-526, that is a “distinction without a difference.” They are asserting, as was done in *Narvaiz*, that (1) Claimant was released to light duty; (2) they had work available within those restrictions; and (3) but for

Claimant's termination, she would have been working there in that capacity during the period for which she is seeking temporary total disability benefits.

But the Arkansas Supreme Court expressly rejected this argument, reasoning:

[T]he misconduct and insubordination [by the appellant/claimant] are just that, misconduct and insubordination, and nothing more. After committing the misconduct and suffering the suspension, Appellee returned to work. **It was then Appellant's option to terminate his employment or allow him to continue working light duty.** Regardless of Appellant's choice, Appellee was still within his healing period.

Narvaiz, supra. (Emphasis added) *See also Packers Sanitation Svcs. v. Quintanilla*, 2017 Ark. App. 213, 518 S.W.3d 701; *Superior Indus. v. Thomaston*, 72 Ark. App. 7, 32 S.W.3d 52 (2000). Similarly, Claimant in this case, as Wheeler testified, engaged in conduct that led to her termination. This conduct can be characterized, based upon the termination letter, primarily as (a) showing disrespect to her supervisor, Mahoney, and (b) inattention to her duties (including failing to handle a dog properly). This was different than the situation in *Roark v. Pocahontas Nursing & Rehab.*, 95 Ark. App. 176, 235 S.W.3d 527 (2006), where the firing was for violation of the employer's attendance policy, which provided for immediate termination. There, the Arkansas Court of Appeals found that the claimant could not establish entitlement to temporary total disability benefits following the termination. In this claim, on the other hand, Wheeler clearly had the discretion concerning whether to terminate Claimant; nothing in evidence shows that she engaged in conduct that made termination automatic or virtually so.

A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where insufficient evidence exists

that the claimant has the capacity to earn the same or any part of the wages he was receiving at the time of the injury. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). Such is the case here. 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.” The medical evidence recounted above shows that this was this was the situation here. During the time periods at issue, Claimant suffered from a total incapacity to earn wages. Consequently, she has proven by a preponderance of the evidence that she is entitled to additional temporary total disability benefits for the following periods: July 11, 2020, to September 3, 2020; and October 1, 2020, to March 19, 2021.

B. Permanent Partial Disability

Claimant has asserted that she is entitled to additional permanent partial disability benefits. She was assigned an impairment rating of three percent (3%) to the body as a whole. While Respondent accepted this rating, worth \$2,862.00, and began paying benefits pursuant thereto, they took a credit of \$1,369.71 in order to recover temporary total disability benefits they believed they had overpaid to Claimant. They have argued that while they continued to pay her temporary total disability benefits through July 11, 2020, those should have ended as of June 25, 2020; and although they

later paid her benefits through September 30, 2020, they should have stopped doing so on September 17, 2020.

As discussed above, Claimant has proven her entitlement to temporary total disability benefits for these disputed periods. Consequently, Respondents incorrectly took a credit. She has proven that she is entitled to additional permanent partial disability benefits in the amount of \$1,369.71.

C. Termination

Introduction. As discussed previously, Claimant was terminated on March 25, 2020—three days after she suffered her stipulated compensable right shoulder injury. She has asserted that this termination violates Ark. Code Ann. § 11-9-107 (Repl. 2012). Respondents disagree.

Standard. The above-cited provision reads in pertinent part:

(a)(1) Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of the individual's claim for benefits under this chapter, or who in any manner obstructs or impedes the filing of claims for benefits under this chapter, shall be subject to a fine of up to ten thousand dollars (\$10,000) as determined by the Workers' Compensation Commission.

Discussion. The evidence adduced at the hearing shows that on March 9, 2020, which was just 16 days before her termination and 13 days before she hurt her shoulder at work, Claimant received a review of her progress during her probationary period. That review was largely negative, reflecting that, inter alia, she “appear[ed] t lack focus when she has more than one thing going on at a time.” The reviewer concluded: “This has created lower than expected standard of completing paperwork and tasks.”

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Wheeler’s testimony was that, as reflected in the termination letter, Claimant’s poor performance was the impetus for the probation review. He testified that her actions at work following the evaluation did not improve. Those were documented in the letter as well. That correspondence included the following statement, which bears repeating:

Then, last Sunday, you were helping clean the facility and walk some of the dogs outside. **You were not paying attention and let a dog get away from you, causing you to fall and injure yourself creating a Workers’ Compensation claim.** Accidents can happen but your accident could have been prevented.

(Emphasis added) A review of this matter, along with the testimony, shows that Claimant was terminated in part because of her actions on March 22, 2020, that led to her injury: purportedly “not paying attention” while walking a dog. This relates, as discussed above, to a deficiency that was found during her probationary review.

In passing Act 796 of 1993, the General Assembly made it plain that the provisions of the Arkansas Workers’ Compensation Act are to be strictly construed by the Commission and the courts. See Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2012); *Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996). “Strict construction means narrow construction and requires that nothing be taken as intended that is not clearly expressed.” *Hapney v. Rheem Mfg. Co.*, 341 Ark. 548, 26 S.W.3d 771 (2000). The “plain meaning of the statutory language” must be used. *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006) (citing *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002)). Terms have to be defined in such a way that the scope of Act 796 of 1993 is neither broadened nor narrowed. *Id.*

Section 11-9-107 penalizes employers for retaliating against employees for seeking workers' compensation benefits. *See Davis v. Dillmeier Ents., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997). The evidence does not establish that happened in this situation. Instead, it shows only that one of the bases for Claimant's firing was her supposed lack of attention—which happened to lead to the shoulder injury. I credit Wheeler's testimony regarding this, and note that the Probationary Progress Review Form and the termination letter corroborate him. A strict reading of this provision of the Act does not show that Respondents' actions in ending her employment constitute a violation of that provision.

D. Attorney's Fee

Introduction. Claimant has asserted that she is entitled to a controverted attorney's fee in this matter.

Standard. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). In this case, the fee would be 25 percent (25%) of any indemnity benefits awarded herein, one-half of which would be paid by Claimant and one-half to be paid by Respondents in accordance with *See Ark. Code Ann. § 11-9-715* (Repl. 2012). *See Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

Discussion. The evidence before me shows that Respondents have controverted Claimant's entitlement to the additional temporary total and permanent partial disability

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benefits that were awarded herein. Thus, the evidence preponderates that her counsel is entitled to the fee as set out above.

CONCLUSION AND AWARD

Respondents are hereby directed to pay/furnish benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809 (Repl. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a 25 percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012).

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge