

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H001436

RANDALL TERRY,  
EMPLOYEE

CLAIMANT

TIMBER PRODUCERS SELMA SAWMILL,  
EMPLOYER

RESPONDENT

SUMMIT CONSULTING, LLC,  
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED OCTOBER 19, 2021

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE F. MATTISON THOMAS, III, Attorney at Law, El Dorado, Arkansas.

Respondents represented by the HONORABLE JASON M. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as Modified.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed June 8, 2021. The administrative law judge found, among other things, that the claimant was not "temporarily totally disabled" after June 19, 2020. Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove he was entitled to temporary total disability benefits from June 18, 2020 through September 27, 2020. The Full Commission finds that the claimant's attorney did not prove he was entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(2)(B)(ii)(Repl. 2012).

I. HISTORY

The parties stipulated that Randall Terry, now age 25, “sustained a compensable injury to his left shoulder” on December 5, 2019. According to the record, the claimant treated with Dr. Michael Fakouri on December 5, 2019: “PT IS A 23 YO MALE, YESTERDAY AT WORK AND SHOULDER STARTED HURTING. HE PULLS AND PUSHES WOOD AT WORK. NO KNOWN INJURY.” Dr. Fakouri’s assessment included “2. Pain in left shoulder.”

The parties stipulated that the respondents “accepted the claimant’s injury as compensable and have paid both medical and indemnity benefits.” The claimant’s testimony indicated that he did not return to work for the respondents following the compensable injury, and that the respondents paid temporary total disability benefits.

The claimant continued to follow up with Dr. Fakouri, who noted on January 27, 2020, “HE CO SHOULDER CONTINUES TO HURT. BEEN WORKING BUT PAIN SEEMS LIKE IT IS GETTING WORSE. HE HAD MRI AT JRMC AND TOLD TEAR.” Dr. Fakouri’s assessment included “1. Superior glenoid labrum lesion of left shoulder, initial encounter. 2. Pain in left shoulder.”

The claimant began treating with Dr. Ethan Schock on January 30, 2020:

Mr. Terry is here today for consideration of his left shoulder. He is a 23-year-old right-hand dominant employee at a sawmill who has a fairly vigorous job in which he stacks lumbar (sic) off a conveyor. He noted progressive pain developing in early December of this year and on December 5 he went and saw his primary care physician due to pain not responding to anti-inflammatory medicines. He describes pain in the posterior aspect of his shoulder especially with reaching and overhead motion....

He has had an MRI. This accompanies him. This shows a detachment of the posterior labrum between the 6 and 9 o'clock position. There is some associated cystic change....

Dr. Schock assessed "Left shoulder posterior labral tear....He has continued at work with what is described as a no use of left upper extremity position however he frequently is required to use his left arm to help lift and brace the load he is manipulating....We discussed arthroscopic evaluation of the left shoulder with anticipated decompression of the associated cyst and repair of the posterior and inferior labrum versus debridement, as necessary....He has not reached maximal medical improvement. I think he can return to work provided there is absolutely no lifting, pushing, pulling, reaching, climbing or any position that might necessitate the use of his left upper extremity as this could further exacerbate his labral tear....We will arrange the procedure a time convenient for him."

Dr. Schock performed surgery on February 28, 2020: "Left shoulder arthroscopy with glenohumeral joint debridement/debridement of anterior and posterior labral tears." The pre-operative diagnosis was "1. Left

shoulder pain. 2. Posterior labral tear.” The post-operative diagnosis was “Same with increased capsular volume/mild multidirectional instability.”

The claimant was provided follow-up treatment after surgery.

Dr. Schock reported on or about April 1, 2020, “He has not reached maximal medical improvement. He can return to work in a capacity that does not require lifting, pushing, or pulling with his left upper extremity. I will see him back in the clinic in about 4 weeks for routine check. I anticipate full release at that time.”

The record indicates that the respondents stopped paying temporary total disability benefits for the period ending June 18, 2020. The claimant testified on direct examination:

Q. What types of problems were you having during that interim after June 18, 2020?

A. I was still having dislocations and a lot of pain.

Q. Okay. You say like your shoulder would pop out of joint?

A. Yes, sir.

Q. All right. And you were still having pain?

A. Yes, sir

Dr. Schock reported on June 19, 2020:

Mr. Terry is back today in follow-up for his left shoulder arthroscopic labral debridement. Date of surgery was February 28, 2020. He was noted to have significantly increased capsular volume, bucket-handle type tear of the superior labrum but intact biceps anchor, and fraying and tearing of the posterior inferior labrum. All of these were debrided. He was discharged from his physical therapy a week or 2 ago.

He has not yet returned to work.

He states he still has some pain in his left shoulder. He has not had any mechanical type symptoms described or any suggestion of an instability episode.

Examination today shows full active range of motion. There is no atrophy, incisions are healed. There is no neuroma formation. There is no dyskinesia or significant apprehension with range of motion testing. Cuff is clearly intact in all planes. Deltoid is intact without atrophy. Elbow and wrist are within normal limits. There is no peripheral edema.

We reviewed his progress to date. He is now almost 4 months out from the left shoulder debridement of a labral tear. Structurally he is intact.

Based on his restoration of range of motion, stability, strength, and function in his left shoulder and, referencing the guides to the evaluation of permanent impairment, fourth edition, from the American Medical Association, I believe there is no/0% permanent partial impairment related to Mr. Terry's left shoulder labral tear and subsequent debridement.

He has reached maximal medical improvement as of today's date.

Mr. Terry has stated that he is interested in pursuing a career in the military. I see no contraindication for him returning to full and unlimited activity involving his left upper extremity. I did recommend an ongoing home strengthening program.

Dr. Schock signed a Return to Work Status document on June 19,

2020:

I saw Randall Terry in the office today, 06/19/2020.

Please excuse Randall for 06/19/2020.

Randall may return to work with the following restrictions:

none.

If you require additional information, please contact our office.

The record contains a Change of Physician Order dated July 22,

2020: "A change of physician is hereby approved by the Arkansas

Workers' Compensation Commission for Randall Terry to change from Dr.

Ethan Schock to Dr. Shahryar Ahmadi[.]"

Dr. Ahmadi arranged for an x-ray of the claimant's left shoulder, which was taken on August 11, 2020 with the impression, "There is no evidence for fracture, dislocation, inflammatory, or destructive change. No foreign bodies are identified."

Dr. Ahmadi gave the following impression on August 11, 2020: "In summary this is a 24-year-old gentleman with left shoulder pain after arthroscopic labral repair that was done in February 29, 2020 by an outside surgeon. The pain is not responding to conservative management physical therapy and for this reason we are going to proceed with the MRI arthrogram of the shoulder and see the patient back in clinic after the MRI arthrogram for reassessment."

Dr. Ahmadi reported on September 15, 2020:

MRI shows evidence of ALPSA lesion.  
Impression/Plan: In summary this is a 24-year-old gentleman with left shoulder pain and instability is with a failed arthroscopic procedure in the past and new MRI shows ALPSA lesion. I had a long discussion with the patient regarding operative versus non operative management at this point patient would like to proceed with the operative option considering the fact that he has not responded to conservative management his shoulder is very unstable. Operative option at this point operative the patient is a Latarjet procedure considering the fact the patient had a failed arthroscopic procedure and has out the ALPSA Lesion that does not have a good outcome with arthroscopic procedure....Patient is to this and want to proceed with procedures over the paperwork today and we are going to put him on surgical schedule.

The claimant testified that Dr. Ahmadi performed surgery on September 28, 2020. The record does not contain a surgical report from Dr. Ahmadi. The claimant's testimony indicated that the respondents reinstated temporary total disability benefits beginning September 29, 2020.

A pre-hearing order was filed on January 14, 2021. According to the text of the pre-hearing order, the claimant contended, "The claimant contends that at all times relevant to this matter he was employed at Timber Producers Selma Sawmill and injured his shoulder on December 5, 2019. He was treated and surgery was performed on the claimant's shoulder. After the surgery was completed, the claimant was terminated in March 2020. No impairment rating was given, and the claimant had not fully recovered from his injuries at the time of the termination. After the claimant filed a Form AR-C with the Commission on June 26, 2020, he requested a change of physician (COP) which was granted. The claimant began to treat with Dr. Ahmadi on August 11, 2020. Thereafter, he underwent additional surgery on September 28, 2020 and was placed on recovery for six (6) weeks thereafter. Specifically, the claimant contends he is entitled to TTD benefits from the date of his termination in March 2020 through a date yet to be determined based on any indemnity benefits the claimant may be awarded. The claimant contends that he is entitled to temporary total disability benefits from March 2020 to a date yet to be determined; mileage,

which has been requested and not reimbursed; attorney's fees; and reserves the right for further hearing once MMI is reached and a rating is applied. The claimant reserves any and all other issues for future litigation and/or determination."

The parties stipulated, "The respondents controvert the payment of any additional medical and indemnity benefits." The text of the pre-hearing order indicated, "Specifically, the respondents contend the claimant's injury, if any, is a gradual onset injury, and that he cannot meet his burden of proof pursuant to the Act to prove a gradual onset injury. The respondents contend they have paid all appropriate medical and indemnity benefits to date. The respondents reserve any and all other issues for future litigation and/or determination."

The parties agreed to litigate the following issues:

1. Whether the claimant sustained either a specific incident or a gradual onset "compensable injury" to his left shoulder within the meaning of the Arkansas Workers' Compensation Act (the Act) on December 5, 2019.
2. Whether the claimant is entitled to medical benefits, and both past and future TTD benefits from March 2020 through a date yet to be determined.
3. Whether the claimant's attorney is entitled to a controverted fee on these facts.
4. The parties specifically reserve any and all other issues for future litigation and/or determination.

A hearing was held on March 11, 2021. The following colloquy occurred at that time:



THE COURT: Gentlemen, before we went on the record, we discussed a little bit the contents of this Pre-hearing Order that was filed on January 14, 2021. I know, Mr. Ryburn, you had changed some of your issues because the respondents now have accepted the injury as compensable, is that correct?

MR. RYBURN: Your Honor, they had accepted it the entire time. I confused the record on the pre-hearing conference, so they had accepted it the whole time. I misstated that, and I corrected it.

THE COURT: Okay. I apologize for that. Mr. Thomas, is that your understanding, as well?

MR. THOMAS: It's my understanding with the caveat that we have a question about a time frame from June 18, 2020, to September 27, 2020, when there was a gap in benefits after Dr. Schock had released Mr. Terry with a zero percent rating, so there's a question about whether they controvert the claim during that time, but I do agree that they had accepted it as a compensable claim.

THE COURT: Okay. As I understand it now, the only issues to be litigated are whether or not the claimant is entitled to TTD from June 18, 2020, through September 27, 2020, and then, Mr. Thomas, as you alluded to, whether or not they have controverted those benefits because you had to ask for a change of physician in order to get him to the doctor that made that determination, I guess, is that correct?

MR. THOMAS: That's correct, Your Honor.

THE COURT: Okay. All right. Well, if the parties don't have any objection then, I'll just make those changes on the Pre-Hearing Order that we have and ...

Yes, sir?

MR. RYBURN: As far as specifying, could we get contentions....

THE COURT: Oh, sure.

MR. RYBURN: I guess, I should specify my client's contention that they do not controvert any benefits, all appropriate benefits. I suppose, that's really probably contained in my contention already.

THE COURT: Okay. You know, actually, as I look at it, number four in the stipulations says the respondents accepted the claimant's injury as compensable and that you've paid some medical and indemnity benefits so....

MR. RYBURN: We would contend....

THE COURT: It was a little confusing from the start, wasn't it?

MR. RYBURN: It was and we would contend that we paid all of the benefits. I don't know, but I don't think that's an issue.

THE COURT: Okay.

MR. RYBURN: We paid all medical benefits and have paid all appropriate indemnity benefits which, I think, we reflected in the ...

THE COURT: Okay. Well, I will change the Pre-Hearing Order accordingly initially and, actually, before we give it to the court reporter, I'll let both of you take a look at it and make sure you agree with what I've got in the record if that's okay.

MR. RYBURN: Thank you, Your Honor.

MR. THOMAS: Yes, sir.

The administrative law judge filed an opinion on June 8, 2021. The administrative law judge found, among other things, "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." The administrative law judge therefore denied and dismissed the claim. The claimant appeals to the Full Commission.

## II. ADJUDICATION

### A. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing

period” means “that period for healing of an injury resulting from an accident.” Ark. Code Ann. §11-9-102(12)(Repl. 2012). The healing period continues until the employee is as far restored as the permanent character of the injury will permit, and if the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition, the healing period has ended. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). The determination of when the healing period has ended is a question of fact for the Commission. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996).

In the present matter, the claimant contends that he is entitled to temporary total disability benefits from June 18, 2020 through September 27, 2020. An administrative law judge found, “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.” The Full Commission finds that the claimant did not prove he was entitled to temporary total disability benefits from June 18, 2020 through September 27, 2020.

The parties stipulated that the claimant sustained a compensable injury to his left shoulder on December 5, 2019. The respondents provided medical treatment and temporary total disability benefits. Dr. Schock

performed a left shoulder arthroscopy on February 28, 2020. The record indicates that the respondents paid temporary total disability benefits through June 18, 2020. Dr. Schock reported on June 19, 2020 that the claimant's left shoulder was structurally intact. Dr. Schock opined that the claimant had sustained 0% permanent anatomical impairment, and that the claimant had reached maximum medical improvement. Dr. Schock returned the claimant to unrestricted work. The Full Commission therefore finds, based on the probative evidence of record, that the claimant reached the end of a healing period no later than June 19, 2020, the date Dr. Schock assigned maximum medical improvement. Temporary total disability cannot be awarded after the healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). We recognize the claimant's testimony that he continued to suffer from pain. Nevertheless, persistent pain does not extend a claimant's healing period, provided that the underlying condition has stabilized. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The Full Commission finds in the present matter that the claimant's condition stabilized no later than June 19, 2020, the date Dr. Schock determined that the claimant had reached maximum medical improvement.

B. Fees for Legal Services

Ark. Code Ann. §11-9-715(Repl. 2012) provides, in pertinent part:

(a)(1)(A) Fees for legal services rendered in respect of a claim shall not be valid unless approved by the Workers' Compensation Commission.

(B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee. Attorney's fees shall not be awarded on medical benefits or services except as provided in subdivision (a)(4) of this section...

(2)(B)(i) In all other cases, whenever the commission finds that a claim has been controverted, in whole or in part, the commission shall direct that fees for legal services be paid to the attorney for the claimant as follows: One-half (1/2) by the employer or carrier in addition to compensation awarded; and one-half (1/2) by the injured employee or dependents of a deceased employee out of compensation payable to them.

(ii) The fees shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded.

The question of whether a claim is controverted is one of fact to be determined from the circumstances of the particular case. *Climer v.*

*Drake's Backhoe*, 7 Ark. App. 148, 644 S.W.2d 637 (1983), citing *Aluminum Company of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976).

The mere failure of an employer to pay compensation benefits does not amount to controversion, especially in instances where the carrier accepts the injury as compensable and is attempting to determine the extent of the disability. *Hamrick v. The Colson Company*, 271 Ark. 740, 610 S.W.2d 281 (Ark. App. 1981).

The claimant in the present matter contends that he is entitled to temporary total disability benefits from June 18, 2020 through September 27, 2020. The Full Commission has found *supra* that the claimant did not

prove he was entitled to temporary total disability benefits after June 19, 2020. We therefore found that the claimant did not prove he was entitled to temporary total disability benefits from June 18, 2020 through September 27, 2020. The respondents state on appeal that they voluntarily reinstated temporary total disability benefits beginning September 27, 2020. The claimant testified that he underwent surgery from Dr. Ahmadi on September 28, 2020. The Full Commission has not awarded any period of temporary total disability benefits in the present matter. Without an award of temporary total disability benefits by the Commission, the claimant's attorney is not entitled to fees for legal services. See Ark. Code Ann. §11-9-715(a)(2)(B)(ii), *supra*: "The fees shall be allowed only on the amount of compensation for indemnity benefits *controverted and awarded* [emphasis supplied]."

After reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove he was entitled to temporary total disability benefits from June 18, 2020 through September 27, 2020. The Full Commission has not awarded the claimant any period of temporary total disability benefits. Therefore, the claimant's attorney is not entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(2)(B)(ii)(Repl. 2012). The claimant's claim for an award of temporary total disability benefits is hereby dismissed.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

CHRISTOPHER L. PALMER, Commissioner

Commissioner Willhite concurs.

CONCURRING OPINION

After my *de novo* review of the entire record, I concur with the majority opinion finding that the claimant did not prove he was entitled to temporary total disability benefits from June 18, 2020 through September 27, 2020. I write separately to clarify, for the benefit of the claimant.

I find that the claimant was a credible witness. I also find that the claimant's request for additional temporary total disability benefits from June 18, 2020 through September 27, 2020 appears to be reasonable. However, there are no statutory provisions nor any case law that would allow for a finding that the claimant suffered a total incapacity to earn wages during that time period. Therefore, I am constrained to agree with the majority.

For the foregoing reason, I concur with the majority opinion.

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M. SCOTT WILLHITE, Commissioner