BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H202345**

JOHN W. SEARS, Employee	CLAIMANT
DUKE MANUFACTURING COMPANY, Employer	RESPONDENT
CNA INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED **MARCH 9, 2023**

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

Claimant represented by JARID M. KINDER, Attorney, Fayetteville, Arkansas.

Respondents represented by TODD WOOTEN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 13, 2022, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on August 4, 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 hearing, 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 October 25, 2021.
3. The respondents have controverted the claim in its entirety from November 1, 2021.
4. Claimant's compensation rate for temporary total disability benefits is $736 per week.

At the hearing, the parties agreed to litigate the following issues:

1. Whether claimant sustained a compensable injury on October 25, 2021.

2. Whether claimant is entitled to medical benefits.

3. Whether claimant is entitled to temporary total disability benefits.

4. Attorney fees.

The claimant contends that:

"1. The claimant, John Sears, sustained a compensable lower extremity injury on October 25, 2021 while working for Duke Manufacturing in Illinois.

2. Despite objective evidence of injury, the respondents denied compensability of the claimant's injury.

3. The claimant contends that he is owed medical benefits and temporary total disability benefits from October 25, 2021 to a date yet to be determined.

4. Due to the controversion of entitled benefits, the respondents are obligated to pay one half of the claimant's attorney's fees.

The respondents contend that:

"a. Respondents contend that additional medical treatment is not reasonable or necessary and should be denied.

b. Respondents contend that all appropriate benefits have been paid.

c. Claimant initially refused medical treatment for the alleged injury in Illinois. Upon return to Arkansas, claimant presented for one visit to the doctor at the urgent care clinic on November 1, 2021. An x-ray of his right ankle revealed no fractures or dislocations. Talar dome preserved. Hindfoot degenerative changes. Calcaneal enthesophyte at the insertion of the Achilles tendon. The impression of Dr. Urban was no ankle fracture or dislocation. Respondent Duke paid for the one authorized visit and put claimant on light duty after the doctor determined that nothing was broken or torn, and that claimant was fit to continue work. Claimant did not call, return to work, and subsequently abandoned his job. Accordingly, claimant's employment was terminated on November

15, 2021."

From a review of the entire record, including medical reports, depositions and documents properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on August 4, 2022 and contained in a pre-hearing order filed that same date, as well as the stipulations made at the hearing, are hereby accepted as fact.
2. Claimant has met his burden of proof by a preponderance of the evidence that he suffered a compensable injury on October 25, 2021, to his right lower extremity.
3. Claimant has met his burden of proof by a preponderance of the evidence that he is entitled to medical benefits for his right lower extremity injury that occurred on October 25, 2021.
4. Claimant has met his burden of proof by a preponderance of evidence that he is entitled to temporary total disability benefits for two periods: November 16, 2021, through December 31, 2021, and again from May 18, 2022, through July 27, 2022.
5. Claimant failed to meet his burden of proof by a preponderance of the evidence that he is entitled to temporary total disability benefits from September 15, 2022, to a date to be determined.
6. Respondent has controverted claimant's entitlement to all benefits after November 1, 2021.

FACTUAL BACKGROUND

Prior to the hearing, claimant specified the periods of temporary total disability payments he was seeking was from November 15, 2021 through December 1, 2021; then May 1, 2022 through August 18, 2022; and from September 13, 2022 to a date to be determined. The evidence revealed that the second of those dates should have ended on December 1, 2021, and claimant amended his claim during the hearing without objection.

Claimant made a motion to exclude portions of the background check performed by PublicDataCheck as unduly prejudicial because it contained a criminal background check. After hearing the testimony at the hearing, I overruled that motion, and those records were admitted as part of the basis for Duke terminating claimant's employment.

HEARING TESTIMONY

Claimant said that he had worked for respondent Duke Manufacturing (hereinafter "Duke") for about 90 days when he was injured on October 25, 2021. He testified that he injured his ankle while working for Duke in the state of Illinois but did not seek medical attention until he returned to Arkansas the next week. Duke sent him to Baptist Urgent Care in Fort Smith. The doctor or nurse practitioner at that clinic took an x-ray, and according to claimant, he was put on light duty with no heavy lifting over twenty-five pounds, and was told to keep the ankle elevated. Claimant believed that the doctor saw a fracture on the x-ray. Claimant was told by the doctor to follow up with his primary care physician, which he did after he was terminated from Duke.

Claimant recounted his course of treatment which included physical therapy and eventually surgery on his ankle. Claimant said the surgery helped a little bit but did not completely remedy his ankle issues. Claimant developed an infection at the surgical site and was hospitalized to treat the infection. At the time of the hearing, claimant said his ankle was still giving him problems and that he

was still under the doctor's treatment for that injury.

Claimant was terminated from Duke and his understanding of why he was terminated was because he had a criminal history and because of an issue regarding not calling or showing up for work.[1]

Claimant testified that he went back to work on December 1, 2021 (later corrected to January 1, 2022) at Booneville Housing Authority doing light maintenance. He was mostly sitting in a chair painting in apartments and doing general maintenance. His employer accommodated him having to take off frequently because his ankle was swollen. Claimant stopped working at Booneville Housing Authority on April 28, 2022 and was off work through August 18, 2022. At that time, he testified his doctor gave him permission to try to go back to work. Claimant worked for Hudson Excavation from August 19, 2022 through September 13, 2022, but that work was extremely hard on his ankle. Claimant testified that other than when he attempted to work, he was under doctor's restrictions (the doctor's restrictions will be discussed below). Claimant said that as of the day of the hearing, additional surgery was an option. He had undergone one round of steroid shots and the doctor wanted to try another. He said his ankle on the date of the hearing was "sore, very, and it swells". Claimant said he had some medications for the pain but took them only when he really had to have them.

On cross-examination, claimant was shown the x-ray report from his initial visit to a physician after returning to Arkansas and saw the portion of the report that said he had no fracture. Claimant testified that he had a motorcycle accident a week after the surgery on his foot when he lost control in gravel and cow manure. He said he laid the bike over on the left side and did not have any injuries to his right ankle in that accident. Claimant was asked about filing a Form N and said he didn't know

[1] While there was much testimony about the reason for claimant's termination, it is not relevant to the issues before me. As this claim involves a scheduled injury, a claimant who is terminated by the employer is not precluded from disability benefits under A.C.A. § 11-9-526; *Packers Sanitation Service* v. *Quintanilla* 2017 Ark. App. 213.

what that was. He said he had never been given such a form.

Respondent called Russell Swint, who is the executive director of the Booneville Housing Authority. Mr. Swint is responsible for the supervision of the employees of the Housing Authority. His records show that claimant started working for the Housing Authority on January 1, 2022 and worked until April 28, 2022. Claimant was making $12.00 an hour until the pay period of April 14, 2022, at which time his rate of pay was $14.00 per hour. Claimant averaged thirty-two hours a week while employed with the housing authority.

On cross-examination, Mr. Swint said claimant did miss work periodically, but claimant was part-time and worked when he could. His duties included cleaning apartments, painting, and the like. Mr. Swint was aware that claimant had a foot injury but had no knowledge of claimant struggling while working for the Booneville Housing Authority.

On questions from the court, Mr. Swint said claimant was able to come and go as he needed to, and some weeks he was able to work more hours than others based on what needed to be done to maintain a unit or ready an apartment for a new occupant.

Respondents next called Kyle Spoon, who was the project coordinator for Duke Manufacturing. Mr. Spoon was present at the job site when Mr. Sears was injured but did not see the injury happen. He testified that claimant was offered medical care on the day of the injury, but claimant believed he could "walk it off". He testified claimant had again refused medical treatment the next day. The following day, the crew working in Illinois started back to Fort Smith. Upon the return to Arkansas, claimant was sent to an urgent care facility to have x-rays done on his ankle. It was Mr. Spoon's understanding that claimant was diagnosed with an ankle sprain, placed in a walking boot, and placed on light duty for two weeks. According to Mr. Spoon, Duke accepted and paid the expenses for that November 1, 2021 visit to the doctor's office. He said claimant was placed on light

duty starting November 2, 2021.

On cross-examination, Mr. Spoon stated that he was working the same shift with the claimant but did not see the injury. He did not have any evidence either way as to whether claimant had fallen at work as he said.

Respondent submitted the deposition of Dr. Derek Urban who was the radiologist that read the x-ray that was taken of claimant's ankle on November 1. Dr. Urban verified that his report showed no acute fractures or dislocation. He saw that the talar dome was preserved.

On cross-examination, Dr. Urban agreed that two radiologists can look at the same x-ray and come up with two different conclusions. Dr. Urban agreed that he did not treat patients and that it was up to the clinician to determine the proper course of treatment based on the information that Dr. Urban gave them. He agreed an MRI was generally a better diagnostic tool than an x-ray. He stated it was true that a patient can have issues that don't show up in an x-ray but do later show up in an MRI. He said that ligament tears don't show up on x-rays.

Overall, the testimony of the witnesses at the hearing and appearing through deposition were credible. Claimant maintained that he had been told he had fractures in his ankle, and while such are not recorded in the medical records, I did not feel claimant was trying to deceive me; rather, I think he was simply wrong about the nature of his injury. There was no testimony on the main issues in this case which required me to determine which party was truthful or better informed.

REVIEW OF THE EXHIBITS

According to his testimony, claimant was first seen at an urgent care facility in Fort Smith. While there is no record from the attending physician or nurse, a radiology report was submitted from the examination on November 1, 2021. The report from Dr. Derek Urban reads as follows:

> Findings: ankle: AP, oblique, lateral views of the right ankle. No prior studies. No fracture or dislocation. Talar dome preserved. Hind foot

> degenerative changes. Calcaneal enthesophyte at the insertion of the Achilles Tendon.
>
> Impression: No ankle fracture or dislocation.

The next reports were from River Valley Primary Care Services where claimant was seen by Dr. Michael Patrick Fitzgerald on December 7, 2021. Dr. Fitzgerald had an initial assessment of "ankle impingement syndrome, right." Dr. Fitzgerald referred claimant to an orthopedic doctor, but claimant was next seen by a podiatrist, Dr. Spencer Mortensen. Dr. Mortensen ordered an MRI which was performed on January 20, 2022. The impression of the MRI was "no acute osseous abnormality. Chronic tear of the interior talofibular ligament."

Following the MRI, Dr. Mortensen ordered a course of physical therapy for claimant which was unsuccessful. On May 18, 2022, Dr. Mortensen performed surgery, with this post-operative diagnosis:

1. Chronic lateral ankle instability with torn ATFL right ankle.
2. Longitudinal tear of the peroneus longus tendon right ankle.
3. Tenosynovitis of the peroneus brevis tendon right ankle.
4. Plantar fasciitis right foot.

Claimant developed an infection at the surgical wound site which was treated by a course of antibiotics. Dr. Mortensen released claimant to return to work with full activities without restrictions on July 26, 2022.

Respondents submitted several non-medical exhibits, including its responses to claimant's interrogatories, the deposition of claimant, as well as the deposition of Dr. Derek Urban. Respondent's Exhibit #9 was Duke's employment file for claimant. Page twenty-five of that exhibit has a hand-written note that indicates claimant was terminated for "No cause/no show and an unsatisfactory back-ground check showing multiple felonies which goes against company policy."

ADJUDICATION

The issues in this case as set out above require a determination as to whether claimant proved he suffered a compensable injury on or about October 25, 2021, and if so, is he entitled to medical benefits and temporary total disability.

1. Did claimant suffer a compensable injury on or about October 25, 2021?

In order for a claimant to meet his burden of proof to receive benefits, he must show that: (1) an injury occurred that arose out of and in the course of his employment; (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death; (3) the injury is established by medical evidence supported by objective findings, which are those findings which cannot come under the voluntary control of the patient; and (4) the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997)

I find claimant sufficiently proved all four elements, as claimant provided credible testimony about when and where the injury took place to his right lower extremity, and such occurred while he was working out of state for Duke. He refrained from seeking medical attention until he returned to Arkansas a few days later. While the x-rays taken on November 1, 2021 didn't show any broken bones, the radiologist that read the films said an x-ray would not detect ligament damage. The MRI taken on January 20, 2022, revealed what I believe had been there all along--a torn ATFL—thus providing the objective findings of harm that required medical services. While nothing was submitted from the Urgent Care visit of November 1, 2021 beyond the radiologist report, both claimant and Mr. Spoon testified that he was put on light duty after that visit. While claimant believed he had a bone fracture, Mr. Spoon was under the impression that claimant had an ankle sprain; either way, the parties agreed that the ankle injury would affect claimant's ability to work. When considering all the evidence,

I am satisfied that claimant suffered a compensable injury to his right lower extremity on October 25, 2021.

2. Is claimant entitled to medical benefits?

A 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. The treatment by Dr. Fitzgerald and Dr. Mortensen appears to be both reasonable and necessary for the injury to claimant's right lower extremity.

At the conclusion of the hearing, respondent raised a lack of notice for all treatment after the initial visit to Urgent Care on November 1, 2021. After I pointed out lack of notice was not raised in the prehearing order, respondent moved to amend its pleadings to include that defense. I denied the motion at the time as untimely. Upon further reflection and review, I reaffirm that ruling, but believe it was correct on the merits of the motion as well as on its timing.[2] Mr. Spoon testified that claimant reported the injury to his employer, and the employer paid for a doctor's visit. "The employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission," and the employer is not responsible for benefits related to the injury "prior to receipt of the employee's report of injury." Ark. Code Ann. § 11-9-701(a)(1). "Failure to give the notice shall not bar a claim, however, if the employer had knowledge of the injury." Ark. Code Ann. § 11-9-701(b)(1)(A). It is notice to the employer, not the insurance carrier, that is required, *Baxter v. Baxter*, 2012 Ark. App. 251, 413 S.W.3d 561. Under the facts of this case, the employer was notified not later than November 1, 2021, when Duke sent claimant to Urgent Care. The way Duke handled this by

[2] Ark. Code Ann. §11-9-701 (b)(2) states "Objection to failure to give notice must be made at or before the first hearing on the claim." A motion regarding the lack of notice made while the parties were giving closing arguments is may technically be "at the first hearing." I found no cases decided by the Full Commission or the appellate courts on this point, but I believe fundamental fairness dictates that a claimant needs to be made aware that lack of notice is being raised as a defense before the testimony has closed.

paying the doctor's visit itself seems to have had the effect of not informing its carrier about this claim; that, however, is a matter between the two respondents and does not defeat claimant's request for payment of his medical bills.

Claimant submitted records that mentioned many physical and mental conditions that have nothing to do with his ankle injury, and respondent are not responsible for any medical services rendered to claimant that do not relate to the compensable ankle injury.

3. Is claimant entitled to temporary total disability benefits?

Claimant requested three separate periods of temporary total disability benefits (TTD). As he had a scheduled injury to his right lower extremity, claimant is entitled to TTD until he reaches the end of his healing period or until he returned to work, whichever occurs first. *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). I will discuss these three periods in chronological order.

A: From November 15th, 2021, when claimant was terminated by Duke to January 1st, 2022, when claimant began working for the Booneville Housing Authority. As claimant was not receiving indemnity benefits, I cannot fault him for trying to find work he was physically capable of performing. He had not yet been released from care by Dr. Mortensen, and given his subsequent surgery, I find his healing period had not ended; however, he had returned to work. Claimant is entitled to TTD from November 16, 2021, through December 31, 2021.

B: From May 1, 2022 until August 18, 2022. Mr. Swint testified that claimant's last day at Booneville Housing Authority was April 28, 2022. Claimant next saw Dr. Mortensen on May 5, 2022 for a surgical consultation. On that date, claimant had already quit working, and it may be that claimant didn't think to ask about being taken off work before surgery. Still, there is no objective medical evidence that claimant would have been unable to work at Booneville Housing Authority up to the date of

surgery, which was May 18, 2022. Claimant was released to full duty on July 26, 2022. I therefore find he has proven a period of TTD from May 18, 2022 through July 26, 2022.

C. From September 13, 2022, to a date yet determined. Claimant testified that he went to work for Hudson Excavation, but he was unable to do the work because of the pain in his right ankle. He said he had not worked since September 13, 2022, and was under doctor's restrictions, but presented no documentation to that effect. The last medical report in the record released claimant to full duty with no restrictions. Claimant failed to meet his burden of proof on this portion of his TTD claim.

ORDER

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right lower extremity on October 25, 2021.

Respondent is liable for payment of all reasonable and necessary medical services provided in connection with claimant's compensable injury.

Claimant is entitled to temporary total disability from November 16, 2021 through December 31, 2021, and again from May 18, 2022 through July 26, 2022.

Claimant failed to prove he was entitled to temporary total disability from September 13, 2022 to a date to be determined.

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.

All issues not addressed herein are expressly reserved under the Act.

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of $1,259.45.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE