

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
WESTERN DIVISION

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SARA ELIZABETH ADAMS,

Claimant,

CLAIM NO. 20080922966
Workers' Compensation

STATE OF TENNESSEE,

Defendant

JUDGMENT

This matter came to be heard on January 7, 2014, before Nancy C. Miller-Herron, Commissioner, Tennessee Claims Commission, Western Division, at the Madison County Courthouse, Jackson, Tennessee. Mr. Jeffrey A. Garrety, Esq., represented Claimant. Mr. Eric A. Fuller, Esq., represented Defendant, State of Tennessee.

Claimant, Sara Elizabeth Adams, brings this action against the State of Tennessee, hereinafter referred to as Defendant, to recover under Tennessee Code Annotated § 9-8-307 (a)(1)(K), relating to workers' compensation claims by a state employee for injuries

received as a corrections officer when she injured her right shoulder while attending a self-defense training class on September 22, 2008.

I.

ISSUES FOR TRIAL

The parties are in agreement: 1) that proper notice of the injury was given; 2) that Claimant's workers' compensation rate was three hundred thirteen dollars and fifty-four cents (\$313.54); 3) that Claimant did not have a meaningful return to work so the one and one half percent (1.5%) cap does not apply and 4) that Claimant has sustained some permanent disability as a result of the work-related accident.

The only remaining contested issue is the degree of permanent disability to the body as a whole suffered by the Claimant as a result of the September 28, 2008 injury.

II.

FACT/VOCATIONAL TESTIMONY

Sara Adams testified in this cause on her own behalf. Thirty-six year old Adams is a high school graduate. (Tr., p. 11, lines 13-16) She also earned a combined 46 hours of credit at two community colleges in Missouri. (Tr., p. 22, line 23- p. 23, line 4) After high

school, Adams worked as general office assistant for her mother's company. She also assisted with marketing for the company. (Tr., p. 12, lines 5-9) Her job duties included typing, filing, faxing, copying and using the telephone system. (Tr., p. 12, lines 13-15) Adams testified that her injury would greatly affect her ability to do this type of job now because it involved a great deal of keyboard work, which causes her pain. (Tr., p. 12, line 23-p. 13, line 11)

Claimant testified that after working at her mother's company, she was on active duty with the military for two years; her MOS was military police. (Tr., p. 13, lines 12-24) Claimant stated that she stayed in the army reserve until 2005. (Tr., p. 14, lines 4-7) She testified she was able to accomplish all of the physical requirements of the job, which included physically restraining servicemen and women. She would not be able to do that now. (Tr., p. 14, lines 11-24)

Claimant testified that after her military service, she spent about one year in the Missouri National Guard; she was given a medical release after she was diagnosed with diabetes. (Tr., p. 15, lines 1-13) She has been an insulin dependent diabetic for approximately four (4) years. (Tr., p. 15, lines 17-21)

Claimant testified that she also worked in corrections in Jefferson County, Missouri in 2005 and 2006; she also worked part-time in her mother's company during that time. (Tr., p. 16, lines 3-18) She left that job in corrections to work for her mother's company full-time for about two years. (Tr., p. 16, lines 21-24)

Claimant stated she then went to work for Securitas, a security company hired by the Tyson Plant in Obion County, Tennessee. She was paid \$7.20 an hour to do security patrol rounds there.

Claimant left Securitas when she was offered a job with the Tennessee Department of Corrections, hereinafter referred to as TDOC, as a corrections officer. (Tr., p. 17, lines 12-15)

Claimant testified that she was injured about four or five weeks into training as a TDOC officer, in a self-defense class at the academy. (Tr., p. 18, lines 5-10) She said her instructor was illustrating a take-down technique and explained: "There was excessive force used. I felt a popping, grinding pain in my shoulder." (Tr., p. 18, lines 10-11)

Claimant testified that Dr. Blake Chandler subsequently performed three surgeries on her shoulder, in January and May, 2009 and in January, 2010. (Tr., p. 19, line 7- p. 20, line 5) In the third

surgery, Dr. Chandler did a full rotator cuff repair, did further sub acromion decompression and did a bicep tenotomy, where he cut the tendon to the bicep. (Tr., p. 20, lines 7-11) Claimant also went to physical therapy prescribed by Chandler. (Tr., p. 20, lines 12-14)

Claimant testified that her symptoms returned over time, including “the pain, the lack of strength, less function, and the lack of range of motion.” (Tr., p. 20, lines 22-23)

After she was released by Chandler, Claimant stated she went to Dr. Dalal for an Independent Medical Examination. Claimant, who saw Dalal on two occasions, described Dalal’s physical examination of her as “quite extensive” (Tr., p. 21, line 16) and said that it was more extensive than the final examination performed by her treating physician, Dr. Adam Smith. (Tr., p. 21, lines 17-22)

Claimant testified that after she was released from her job with TDOC, she enrolled in an LPN program at the technology center in Newbern, Tennessee. (Tr., p. 22, lines 5-9) She stated that during the clinical part of her LPN training, she was not able to do all the things physically required of an LPN. (Tr., p. 23, lines 9-17)

Eventually, she contacted the state about further treatment. (Tr., p. 23, lines 18-20) In January, 2012, Dr. Smith performed very

rare and extensive surgery on her shoulder. (Tr., p. 24, line 24-p. 25, line 13) Dr. Smith also sent her for additional physical therapy and for a functional capacity examination, hereinafter referred to as an FCE. (Tr., p. 26, lines 8-10) Adams testified she learned during the FCE that her fine motor skills in her right hand are “dramatically decreased” (Tr., p. 27, lines 5-6) and the strength and grip of her right hand decreased. (Tr., p.27, line 7)

Claimant testified she first found work as an LPN at OmniVision in Martin, Tennessee, where she provided private care to a homebound client. (Tr., p. 27, lines 19-24) Claimant said it was a challenge to attempt to assist the client with bathing, grooming and transportation because of her shoulder injury. She eventually got another job—at Union City Nursing and Rehab. (Tr., p. 28, lines 8-17)

Claimant testified that the folks in Union City made accommodations so she could work at the facility. For example, she could not bathe residents or transfer them from a chair to a bed and back. (Tr., p. 30, line 24- p. 31, line 6) Even so, her pain would go from a 1 or 2 at the beginning of her shift to as high as 6 at the end of it. (Tr., p. 28, line 21- p. 29, line 22) She said the repetitive motion

required to get medication ready for multiple residents caused her difficulty as her shift wore on. (Tr., p. 31, lines 9-12) Claimant had a flare up in July, 2013, and ended up going back to the doctor where she was prescribed additional physical therapy. (Tr., p. 32, lines 5-15) She was off work or on light duty for about a month and a half. (Tr., p. 32, line 24- p.33, line 3)

Claimant stated that in September, 2013, she was fired for cause at Union City Nursing Home for not giving a patient her medication for a particular shift. (Tr., p. 30, lines 3-18)

In October, 2013, Claimant began working with Alzheimer's/dementia patients at a skilled nursing home in Dyersburg called the Highlands. The Highlands also have made accommodations for her injury, but she continues to have problems grooming, bathing and transferring residents and with linen changes. (Tr., p. 34, lines 4-15) She also noted that when the patients become violent or aggressive with staff or other residents, she cannot intervene without assistance. (Tr., p. 34, lines 18-20)

Claimant testified that she is paying a high price for her continued work as an LPN, noting that her pain is sometimes as high as a 7 on a 10 point scale. (Tr., p. 34, line 21- p. 35, line 2) She

further testified that she did not believe this type of work would be a “viable option long term.” (Tr., p. 35, line 9) Claimant emphasized, “I don’t have the strength, the functional capacity, the range of motion to defend myself.” (Tr., p. 43, lines 8-9)

Claimant testified she would continue to do whatever her shoulder will allow as long as she can find employers who will accommodate her.

On cross examination, Claimant conceded that she had gone from making \$2200 a month at the TDOC, or \$470 per week (Tr., p. 48, lines 7-13) to earning \$13 an hour at Omnivision, which is more than she made at TDOC (Tr., p. 52, line 19- p. 53, line 3), to \$15.25 per hour at Union City (Tr., p. 54, lines 1-2), to \$16/hour at her current job, where she also is eligible for overtime. (Tr., p. 54, lines 14-22)

Claimant testified that with regard to the activities of daily living, she has difficulty bathing, dressing, driving, opening doors, eating, cleaning her home, doing laundry and putting away her clothes. (Tr., p. 36, lines 7-12) All of these tasks “cause me loss of function, pain, the popping, grinding, slipping in my shoulder.” (Tr., p. 36, lines 13-14)

Claimant further testified she is no longer able to play sports, swim, work in her yard, or take her dogs for a walk or play ball or Frisbee with them. (Tr., p. 36, line 24- p. 37, line 3) Adams said she had to get a wireless pet fence so she could keep her dogs. (Tr., p. 37, lines 20-23)

Claimant testified that, without special accommodations, she did not think she would be physically able to carry out the duties of a registered nurse. (Tr., p. 38, lines 17-22) She said she had experienced physical problems responding to codes or in a CPR situation. (Tr., p. 39, lines 19-22) She did not think she would be of much help evacuating patients in an emergency. (Tr., p. 39, line 22- p. 40, line 1)

Claimant testified that she takes 150 milligrams of Seroquel daily and 150 milligrams of Effexor daily for bipolar disorder. (Tr., p. 40, lines 16-20)

III.

MEDICAL EVIDENCE

Claimant proffered the May 29, 2013 deposition of Adam. M. Smith, M.D. (Tr. Ex. 1)

Dr. Smith, an orthopedic surgeon, practices with West Tennessee Bone & Joint Clinic in Jackson, Tennessee. (Tr. Ex. 1, p. 4, lines 1-3) Smith testified that he first treated Claimant for her shoulder injury in December 2011, after she already had had three surgeries on her shoulder. (Tr. Ex. 1, p. 5, lines 6-10)

Smith stated that Claimant reported she was injured when “an instructor used excessive force illustrating a takedown technique in class. . .” (Tr. Ex. 1, p. 5, lines 18-20)

Smith testified that in December, 2011, Claimant was having pain as well as “grinding in her shoulder with crepitance.” (Tr. Ex. 1, p. 6, lines 6-7) She also showed signs of impingement and weakness. (Tr. Ex. 1, p. 6, lines 8-18) Dr. Smith further testified that a recent MRI demonstrated a “re-tear of her right shoulder rotator cuff.” (Tr. Ex. 1, p. 6, lines 23-24)

Smith stated that he told Claimant her options were very limited “and basically they included tendon transfer or tendon augmentation.” (Tr. Ex. 1, p. 7, lines 8-9) He said he discussed the graft jacket procedure with her. (Tr. Ex. 1, p. 7, lines 10-11)

Smith said Claimant decided to proceed with this very significant surgery, which took place on January 16, 2012. (Tr. Ex. 1,

p. 8, lines 15-23) Dr. Smith did the rotator cuff release arthroscopically, then did “an open repair with a graft jacket augmentation.” (Tr. Ex. 1, p. 9, lines 1-3) He found chondromalacia, or early arthritic changes, during the surgery. (Tr. Ex. 1, p. 9, lines 24-25) He said when he looked at the joint it was evident she was going to have posttraumatic arthritis in the future. (Tr. Ex. 1, p. 10, lines 4-7) Smith also said there was extensive tearing in the labrum. (Tr. Ex. 1, p. 10, lines 13-15)

Dr. Smith explained that a graft jacket in this case was used “like a scaffold, so that cells can go in there and grow new rotator cuff or tendon tissue.” (Tr. Ex. 1, p. 11, lines 8-10) He agreed that this procedure is a “last-resort-type procedure.” (Tr. Ex. 1, p. 11, lines 16-17)

Dr. Smith further testified that Claimant’s options if this procedure fails are very limited. (Tr. Ex. 1, p. 11, line 22)

Dr. Smith stated that he got an FCE on Claimant in August, 2012. (Tr. Ex. 1, p. 13, line 2) He said he gave her an overhead lifting limitation of 20 pounds before releasing her. (Tr. Ex. 1, p. 13, line 3) Smith conceded the FCE recommended only occasional reaching above the shoulder or even reaching below the shoulder.

(Tr. Ex. 1, p. 15, lines 8-12) Dr. Smith said he was not surprised that the FCE indicated she'll have trouble even at bench level with pushing, pulling or lifting. (Tr. Ex. 1, p. 15, lines 17-20) Smith agreed that Claimant is going to have limitations in all planes of motion going forward. (Tr. Ex. 1, p. 15, lines 22-24)

Dr. Smith indicated he thought Claimant had been honest with him regarding what her injury would let her do. (Tr. Ex. 1, p. 16, lines 2-5) He said she had indicated recently that her pain was increasing, that the increase was significant, and that activities aggravate her pain. (Tr. Ex. 1, p. 16, lines 12-21)

Dr. Smith noted that a March 29, 2013 MRI showed "chronic moderate atrophy and irregularity" (Tr. Ex. 1, p. 17, line 18) of the deltoid muscle and "[m]ild chondromalacia of the glenohumeral joint." (Tr. Ex. 1, p. 17, line 23) It also showed "slight irregularity of the labrum superiorly." (Tr. Ex. 1, p. 18, lines 1-2)

Dr. Smith testified that in addition to the limitation of twenty pounds overhead, he would "recommend that she do as little physical activity as possible." (Tr. Ex. 1, p. 19, lines 18-19) He implied that he did not place further specific restrictions on her to avoid restricting her options to make a living. (Tr. Ex. 1, p. 19, lines 19-25) He explained,

“I try to limit them less and then let them make the decisions on the types of jobs they want to pick.” (Tr. Ex. 1, p. 20, lines 2-4)

Dr. Smith agreed that Ms. Adams will have significant physical challenges with her shoulder no matter what she tries to do. (Tr. Ex. 1, p. 20, lines 10-16)

Dr. Smith further opined that Adams had a ten percent (10%) anatomical impairment of the upper extremity or six percent (6%) impairment to the whole body from his surgery. (Tr. Ex. 1, p. 20, line 20- p. 21, line 18)

Apurva R. Dalal, M.D., testified for proof in this cause by deposition on June 26, 2013. (Tr. Ex. 2) Dr. Dalal is board certified in orthopedic surgery and has been a member of the State’s Medical Impairment Rating Registry since 2006. (Tr. Ex. 2, p. 7, lines 7-15) He has also been board certified by the American Board of Independent Medical Evaluators. (Tr. Ex. 2, p. 8, lines 8-10) Dr. Dalal noted that he is “certified to correctly interpret the fifth and sixth edition of the AMA Guide by ABIME.” (Tr. Ex. 2, p. 8, lines 15-17)

Dr. Dalal is on the panels of Sedgwick, Hartford and others to see worker’s compensation cases. He estimates that approximately

two or three percent of his practice involves independent medical examinations. (Tr. Ex. 2, p. 8, line 18- p. 9, line 9)

Dr. Dalal testified that he first examined Sara Adams in October, 2010. (Tr. Ex. 2, p. 9, lines 19-20) He opined that, according to the 6th edition of the AMA Guides, she sustained an eleven percent permanent partial impairment to the whole body. (Tr. Ex. 2, p. 12, lines 8-13) He recommended that she avoid lifting more than 25 pounds as well as “avoid overhead work, work away from the body, pulling, pushing, lifting with her right arm.” (Tr. Ex. 2, p. 12, lines 19-22)

Dr. Dalal testified that he saw Claimant again on October, 2012, which was after Dr. Smith performed the open shoulder rotator cuff repair with graft jacket in January, 2012. (Tr. Ex. 2, p. 12, lines 1-12) Dalal stated that Sara Adams reported that “her strength and functionality keeps going down with every surgery she has.” (Tr. Ex. 2, p. 13, lines 13-15)

Dr. Dalal testified that the 2012 examination showed “significant deltoid atrophy on her shoulder” (Tr. Ex. 2, p. 15, line 19) and “tenderness over the biceps tendon and over the lesser tuberosity.” (Tr. Ex. 2, p. 15, lines 22-23) She also had problems

with both active and passive range of motion. (Tr. Ex. 2, p. 15, line 24- p. 16, line 17)

Dr. Dalal opined that her anatomical impairment remained the same as it had in her previous examination two years earlier. (Tr. Ex. 2, p. 16, lines 22-24) Dalal explained that Table 15-34, page 475 of the AMA Guides gives Claimant a 13% impairment to the right upper extremity for the loss of range of motion. (Tr. Ex. 2, p. 17, lines 5-7) He testified that because of the biceps tenotomy in her second surgery, she qualifies for an additional 5%, which comes to an 18% to the upper extremity. (Tr. Ex. 2, p. 17, lines 13-17) He further testified that 18% to the upper extremity “converts to eleven percent to the body as a whole.” (Tr. Ex. 2, p. 17, lines 16-18)

Dr. Dalal testified that her functional loss and her loss of ability to work far exceeds this anatomical impairment rating. (Tr. Ex. 2, p. 17, lines 19-22) He further noted that page 479 of the Guide allows the examiner to combine the impairment for loss of motion and the biceps tenotomy. (Tr., Ex. 2, p. 18, lines 1-9)

Dr. Dalal further opined that, based on her four surgeries and the results of her postoperative MRIs, which show significant scarring and other irregularities, Ms. Adams is at increased risk of developing

additional degenerative changes in her joint. (Tr. Ex. 2, p. 19, lines 8-24) Dalal explained: “She will have chondromalacia, and it’s just going to get worse.” (Tr. Ex. 2, p. 20, lines 7-8)

Dr. Dalal also opined that Claimant should significantly and permanently restrict future activities:

Well, in the future patient should avoid lifting any weights more than five pounds. She should avoid overhead work, work away from the body, pulling, pushing and lifting. (Tr. Ex. 2, p. 21, lines 1-4)

Dalal explained that he would put these weight restrictions to protect Claimant’s rotator cuff after four surgeries, including a graft jacket. (Tr. Ex. 2, p. 29, lines 7-10) “She tries to lift it up, she’ll just tear up the whole thing.” (Tr. Ex. 2, p. 29, lines 10-12)

On cross examination, Dalal emphasized that in his medical opinion, the cutting of the tendon has directly added to Claimant’s permanent impairment. (Tr. Ex. 2, p. 25, lines 17-21) He stated he did not know why Dr. Smith did not include the tenotomy in his impairment rating. (Tr. Ex. 2, p. 26, lines 1-5)

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commissioner has thoroughly reviewed the record in this case and carefully weighed the credibility of the witness.

Consideration was given to the extent of Claimant's injury, her age, her education, her work history as a military police officer, general office assistant, corrections officer and LPN, Claimant's own testimony about her physical condition and resulting disability, and the medical evidence summarized above.

The testimony of the treating physician and the IME were remarkably consistent. The difference in their anatomical ratings is clear: Dr. Smith did not give Claimant an additional impairment rating for the tenotomy, which the IME opined was a significant issue in Claimant's condition and clearly allowed by the AMA Guides, 6th Edition. It should also be noted that Dr. Smith, the treating physician, seemed to suggest that his anatomical rating was related to his surgery and not necessarily to the previous three surgeries. (The tenotomy occurred in surgery numbered two.) (Tr. Ex. 1, p. 20, line 17- p. 21, line 18) (Tr. Ex. 2, p. 25, line 17- p. 26, line 5)

Claimant is an enormously industrious woman and has managed to both get herself retrained and hold down a job in addition to having four shoulder surgeries. However, it is painfully clear from the testimony of both physicians and Claimant herself that she cannot work as an LPN without accommodations from her employer and

that, even with accommodations, her work causes her significant pain. (Tr. Ex. 1, p. 19, line 18- p. 20, line 16) (Tr. Ex. 2, p. 17, lines 19-22) It is also clear that she can expect further arthritic changes in the future. (Tr. Ex. 1, p. 10, lines 4-7) (Tr. Ex. 2, p. 20, lines 7-8)

Given that she suffers from bipolar disorder (Tr., p. 40, lines 16-20) and is an insulin dependent diabetic as well (Tr., p. 15, lines 13-23), Claimant will have significant challenges in the job market going forward. Claimant has established by a preponderance of the evidence that she has suffered a significant permanent partial disability as a result of her work-related accident on September 28, 2008.

Based on the foregoing, the Commission makes the following findings of fact and conclusions of law:

1. The Commission **FINDS** that, as a result of her employment-related injury in September, 2008, Claimant has received a fifty-five percent (55%) permanent partial disability to the body as a whole, entitling her to an award of sixty-eight thousand nine hundred seventy-eight dollars and eighty cents (\$68,978.80), which shall be paid in a lump sum.

2. The Commission **FURTHER FINDS** that Ms. Adams is entitled to reasonable and necessary medical benefits for her causally connected injuries for the rest of her life by medical providers assigned to her pursuant to § 50-6-204, Tenn. Code Ann.

3. The Commission **FINDS** that Ms. Adams' counsel, Jeffrey A. Garrety, Esq. is entitled to attorney's fees in the amount of twenty percent (20%) of the award, or thirteen thousand seven hundred ninety-five dollars and seventy-six cents (\$13,795.76).

4. The Commission **FINDS** that Claimant is entitled to an award for discretionary costs in the amount of seven hundred dollars (\$700) for the deposition fee of her treating physician, Dr. Adam Smith.

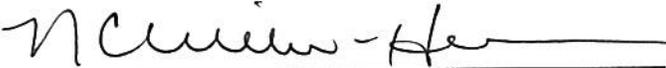
5. The Commission **FINDS** that after the payment of attorney's fees and expenses, Claimant will receive fifty thousand one hundred twenty-three dollars and thirty-five cents (\$50,123.35)¹ awarded for permanent partial disability

¹ Claimant incurred trial expenses of \$5,759.69, of which \$700 were awarded in discretionary costs. \$68,978.80 (permanent partial disability award)-\$13,795.76 (attorney's fee)-\$5,059.69 (unreimbursed expenses)=\$50,123.35.

benefits. The Claimant, born on March 16, 1977, was thirty-five (35) years old on the date of maximum medical improvement, has a probable life expectancy of 45.7 years or 548.4 months according to the mortality tables set forth in Table 1 (Total Population) of the most recently published Centers for Disease Control Life Expectancy Tables. Accordingly, the amortized monthly benefit received by the Claimant is \$50,123.35 divided by 548.4 months or \$91.40 per month and represents a future income replacement. This paragraph does not describe the manner of calculation for disability retirement benefits from the Tennessee Consolidated Retirement System.

6. Cost of this cause are taxed pursuant to § 9-8-307 (d), Tenn. Code Ann.

IT IS SO ORDERED.



NANCY C. MILLER-HERRON
COMMISSIONER

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Order has been mailed, electronically transmitted or hand delivered to:

Mr. Jeffrey A. Garrety, Esq.
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on this 20th day of February, 2014.



PAULA SWANSON, Clerk
Tennessee Claims Commission