

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F204575

DAN ALLEN, EMPLOYEE

CLAIMANT

INTERNATIONAL PAPER COMPANY, EMPLOYER

RESPONDENT

SEDGWICK CLAIMS SERVICES, CARRIER

RESPONDENT

OPINION FILED JULY 17, 2003

The hearing was conducted on May 8, 2003, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Pine Bluff, Jefferson County, Arkansas.

The claimant was represented by Neal L. Hart, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by Michael J. Dennis, Attorney at Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was held on May 8, 2003, in Pine Bluff, Arkansas. It was stipulated as follows:

1. The employee-employer-carrier relationship existed at all relevant times.

2. The claimant sustained a compensable right shoulder injury on February 28, 2001.

3. Medical benefits were paid.

4. The claimant is entitled to the maximum compensation rates.

The issues to be litigated at the hearing were limited to the following:

1. Is claimant entitled to benefits under A.C.A. § 11-9-505 for a period of

time from November 8, 2002 through February 4, 2003?

2. Is claimant entitled to an attorney's fee?

All other issues are reserved.

The claimant testified that he is 58 years old and has worked for respondent/employer for 39 ½ years. At the time of the hearing the claimant was working for respondent/employer. The claimant testified concerning his job duties: at the time of the injury:

“A. Well, tearing down motors, cutting the coils out of it, stripping the coils out of it. We burn it first, and then making coils, putting them back in, dipping it and drying it, putting it back together.

Q. What kind of physical labor does that require?

A. It requires use of both arms and legs, walking and handling equipment, using hoists.

Q. Lifting, bending - -

A. Right.”
(T-9)

The claimant testified that he was injured on February 28, 2001. He testified concerning his injury:

“A. I was setting up to make coils for a motor and there was a bucket of wire behind me, and I stepped back and it was close. I knew it was there, but it was closer than I realized, and when I had committed, I just lost my balance and I turned to catch myself, and it didn't really hurt it that bad at that time, but it just kept getting worse.

Q. Right shoulder?

A. Right shoulder.”
(T-10)

The claimant was referred to Dr. Robert Gullett, who performed some

shoulder manipulations and gave the claimant cortisone injections. The claimant kept doing his regular job, but had problems. A later MRI showed a torn rotator cuff. He was referred to Dr. David Collins, who confirmed the torn rotator cuff injury. The claimant had surgery on April 22, 2002. He received temporary total disability for one month. In May, 2002, Dr. Collins gave the claimant a light duty release with the restrictions to wear his right arm in a sling and only use his right hand for the purpose of writing. The respondent/employer gave claimant a light duty job. He testified that he performed multiple jobs within those restrictions given by Dr. Collins. The claimant testified that the respondent cooperated with him as far as giving him a job within those restrictions. The claimant was making labels on a keypad that prints out labels to be affixed to motor starters, and cleaning up the shop (as well as he could). The claimant was paid his regular wage (\$1,040.00 per week) while he was performing that light duty work.

The claimant testified that he saw other employees performing light duty work and doing the same type of work he was doing.

In November, 2002, he was told, according to the claimant, that he could no longer perform the light duty work and was sent home. He testified as follows:

“A. It was on Thursday afternoon and I was getting ready to go home from the job, and one of the supervisors come by and said he needed to talk to me. We went out to the office where my foreman was and said that I needed to go up to personnel and talk to Tom John, something about they were going to put me back on workman’s comp. So, we went up there and Tom John and another man that I don’t remember who it was, what his name was, was present and they gave me a copy of this policy, like you’re supposed to have 90 days of restrictive duty and then, if you’re not healed up, they send you home, and I said, “Well, I’ve been here more than 90 days. What’s the deal on this? Is somebody not doing their job or what? You should have sent me home a long time ago.” But they

didn't. And I asked, I said, "Well, can I go ahead and finish out the week and work Friday?" "No." I had to go home then. So, that was it and I went home.

Q. Did they tell you when you could come back?

A. No. When I was released from the doctor.

Q. When you were released from the doctor?

A. Right, yeah.

Q. Did you go home?

A. Yes."

(T-19)

Subsequently, the claimant received temporary total disability benefits, in an amount which was less than he would have received had he continued to work in light duty. During the first part of 2003, the claimant was given an impairment rating, and his treating physician stated that he was at maximum medical improvement. He was able to take his arm out of the sling and lift up to fifteen pounds with his right arm. After his release at the first part of 2003, he was allowed to return to work in April, 2003. He is working, as stated earlier, currently with respondent/employer with no restrictions.

The safety supervisor for International Paper Company, Mr. Eric Roberts, testified at the hearing. He assesses and regulates safety functions at the Pine Bluff plant. He is aware of the human resource policy pertaining to light duty and the durations thereof. He testified as follows:

"A. The light duty policy is based on a 90-day time frame extendable to 30 days beyond that, and the extension period is based on if there is closure potential, such as the employee has a release to come to work within that 30 days, the employee will reach MMI or have an MMI or an FCE to indicate MMI within that 30 days.

Q. Are you the guy that would make that call, or is that somebody else?

A. What call?

Q. The flexibility call.

A. Oh, no, that has to be done as I read in the first paragraph, by the EHS Manager or Human Resources Manager.

Q. I understand. And it seems to me, Mr. Roberts, that this is kind of a flexible policy, isn't it, depending on the situation?

A. You can answer that yes or no. It's flexible to the point that you can work up to 90 days and 30 days beyond, but beyond that time frame, it doesn't appear to be flexible."

(T-29)

Mr. Roberts testified that he and the human resource personnel thought that the claimant might have worked past the 90 to 120 day allowance for light duty and performed an audit on the time that he had worked light duty. It was determined that there had been a mistake made, and the claimant was allowed to work past the time limitations for light duty, so he was sent home, pursuant to company policy. Mr. Roberts testified that this oversight was the first time he can recall it happening while with International Paper Co. The Pine Bluff Mills Restrictive Duty Policy was introduced as an Exhibit as page 16 to Claimant's Exhibit #1. Mr. Roberts testified as follows:

"JUDGE CURDIE: In other words, all jobs that are at International Paper - - I guess I'm asking more than I am stating... are all jobs at International Paper the type of job that you would have light duty for, or does it depend on the job?

THE WITNESS: I think it depends on the job, and there are other things that come into play, such as the bargaining group language. There are certain cases where employees are not eligible to set up to particular jobs until they've been there a certain duration of time, or been through a certain series of training and tests. There is a lot of nuances to all of this. It's not just cut and dry.

JUDGE CURDIE: Okay.

MR. HART: (Continuing)

Q. Let me go back, Mr. Roberts, and ask specifically about Mr. Allen, okay?

A. Okay.

In his particular situation back last year. He was issued a light duty slip and you all provided him with modified duty employment within his restrictions, correct?

A. (No Response.)

Q. He testified that he was working a job that was provided to him, a light duty job.

A. When was the light duty, what slip?

Q. The light duty slip that was issued on May 2, '02. He testified where he had one arm duties, he testified that the folks at International Paper provided him with a light duty job and that's true, is it not?

A. Let me see this. What page is that on?

Q. It should be on page six.

A. Yes, I believe Mr. Allen did have light duty at that time.

Q. And is it true that he worked at a light duty job provided by the folks at IP all the way up until he was sent home in November of 2002?

A. I believe that to be true.

Q. And is it not true - -

JUDGE CURDIE: Let me ask you this. Just for chronology sake, why was he sent home?

THE WITNESS: He was sent home because his time frame extended beyond the policy period.

.....

Q. What do you think the objective of it is, the purpose of the 90-day

restricted duty policy, if you know, Eric?

A. I'm glad you asked me that. Statistics throughout the safety realm indicate that employees heal better when they come back to work, are in a normal setting, aren't sent home, maintain the same wages, have medical staff on site to look at them, and basically, their lives go a lot better. Hence, a restricted or light duty policy. Now, on the other hand, there is a time frame in which if an employee is not healing, not being able to work through the elements that they have, there has to be a point where the employee is given an opportunity to go home, to not do physical work and to rest and heal their bodies. That, in my opinion, is what this is about." (T-33 thru 35, T-39, 40)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer-carrier relationship existed at all relevant times.
2. The claimant sustained a compensable right shoulder injury on February 28, 2001.
3. Medical benefits were paid.
4. The claimant is entitled to the maximum compensation rates.
5. The preponderance of the evidence reflects that the claimant is not entitled to benefits pursuant to A.C.A. 11-9-505 (Repl. 2002.)

DISCUSSION

The claimant contends that he is entitled to benefits pursuant to A.C.A. § 11-9-505(a)(1) which provides:

Any employer who **without reasonable cause** refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Commission, to pay the employee the difference between benefits received and the average weekly wage lost during the period of such refusal, or for a period not exceeding one year.

In order to establish his claim for additional benefits under this section, claimant has the burden of proving that the following four requirements are met:

- (1) That he sustained a compensable injury;
- (2) That suitable employment within the claimant's physical and mental limitations was available with his employer;
- (3) That the employer refused to return him to work;
- (4) That the employer's refusal to return the claimant to work was without reasonable cause.

See: Edward Torrey v. City of Ft. Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996). In

Torrey, *supra* the Courts stated that:

At a minimum A.C.A. § 11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entrance into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary.

The claimant's argument appears to be that once the respondent/employer creates a light duty position for the claimant, that it must be permanent simply because the employer creates such light duty position for an employee who is under temporary restrictions. In Maria Jacobo v. Simmons Ind., Full Commission Opinion, August 19, 1997 (E410386) it was stated:

"In reaching our decision, we note that respondent did create a light duty, one-arm job for claimant (picking chickens up off the floor) on two occasions to find something for the claimant to do . To the extent that the claimant asserts on appeal that respondent should be liable for not returning her to the job of picking chickens up off the floor when she requested a return to work, **we do not understand the provisions of Section 505 (a) as interpreted by the Court in Torrey, supra, as placing the liability on the respondent that claimant suggests. While the Court indicated an employers potential duty to re-classify a position for the injured employee's benefit, the Court in Torrey did**

not indicate that an employer was legally obligated to create an otherwise non-existent job classification when the claimant desires to return to work as claimant somewhat suggests.”

In Ball v. American Standard Oil, 1998 AWCC 1996 (E502375) Opinion filed June 1, 1998, the claimant made a claim similar to what Mr. Allen is claimant. After sustaining a compensable injury, the claimant in the Ball was released to return to light duty work on numerous occasions. A light duty job was created specifically for the claimant, which he performed for approximately three and one-half months. After it began to appear as if this light duty job, created specifically for claimant, was becoming more of a permanent job, complaints were lodged by Union Members that this job was in violation of the Union agreement due to claimant’s lack of seniority. Consequently, the claimant was removed from that job and his position was eliminated. In Ball, supra, the claimant suggested that the respondent was obligated to return her to work in a permanent position in an otherwise non-existent job classification, merely because respondent created such light duty work for the injured employees during their healing period. Section 505 (a) does not require an employer to create a permanent position for a claimant, merely because claimant wants to continue working. If there are no jobs available within the permanent restrictions, respondent is not obligated to create a permanent light duty position, merely because it creates temporary light duty position for injured employees who are under temporary restrictions. Creating a permanent light duty position in this case would have run afoul of the stated 90 day policy. There was testimony in the case which alluded to a “bargaining group”, which is common language used in bargaining agreements between the respondent and the employee Union. It

appears that the policy was one which was known by the claimant and was not a surprise to him. The respondent/employer should not be punished with Section 505 (a) liability when the respondent made every effort to work with the claimant with temporary restrictions in an effort to facilitate re-entry into the work force, but is simply unable to create a permanent position due to the 90-day policy and agreement which was obviously in force at the time.

The preponderance of the evidence reflects that the claimant has failed to prove that he is entitled to Section 505 (a) benefits. The claimant has simply failed to prove by a preponderance of the evidence that suitable employment within his physical and mental limitations was available and that respondent's refusal to return claimant to work, as requested, was "**without reasonable cause.**" The claimant's claim is respectfully denied and dismissed.

IT IS SO ORDERED.

DON N. CURDIE,
Administrative Law Judge

DC