

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F212615

MICHAEL D. KING, EMPLOYEE CLAIMANT

TREE HOUSE DEVELOPERS, LLC,
EMPLOYER RESPONDENT

CINCINNATI CASUALTY COMPANY,
INSURANCE CARRIER RESPONDENT

OPINION FILED JULY 24, 2003

Hearing conducted before Administrative Law Judge C. MICHAEL WHITE in Little Rock, Pulaski County, Arkansas.

The claimant was represented by Mark Peoples, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by Andy L. Caldwell, Attorney at Law, Little Rock, Arkansas.

OPINION AND ORDER

A hearing was held in this matter on May 8, 2003. A prehearing conference was conducted on February 11, 2003, and a prehearing order was filed on February 12, 2003. A copy of the prehearing order has been marked as Commission Exhibit No. 1 and made a part of the record without objection. Subsequent to the hearing conducted in this matter, also marked and included as a part of the record as Commission exhibits are the briefs of counsel.

During the prehearing conference, the parties agreed to the following stipulations:

1. The employee, employer, carrier relationship existed on July 30, 2002;

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2. The claimant sustained a compensable injury to his eye on July 30, 2002.

At the time of the hearing, the parties stipulated that the claimant was earning sufficient wages to entitle him to the maximum rate of compensation.

During the prehearing conference, the parties also agreed that the issues to be litigated at the hearing were limited to the following:

1. Whether the claimant is entitled to additional temporary total disability compensation for the period extending from September 19, 2002, through a date yet to be determined;
2. Whether the claimant is entitled to enhanced benefits under Ark. Code Ann. §11-9-505(a)(Repl. 2002).

At the hearing, it was agreed that the issue pertaining to the respondent's liability for depositions taken at the request of the claimant would also be considered.

The claimant contends that he is entitled to temporary total disability benefits for the period extending from September 19, 2002, through a date yet to be determined. Alternatively, the claimant contends that the respondents refused to return him to work at suitable employment, although such employment was available. The respondents contend that the claimant was still on medical leave in August of 2002. The respondents also contend that the claimant became belligerent at his doctor's office and also with the job site security and that his employment was terminated as a result of this behavior.

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Consequently, the respondents contend that the claimant is not entitled to any additional benefits.

From a review of the record as a whole, to include the testimony of the claimant, Doris George, Robert Edders, Brad Edders, witnesses, as well as the medical records and other documentary evidence, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704 (Cumm. Supp. 1997):

FINDINGS AND CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim;
2. The stipulations agreed to by the parties and set forth above are hereby accepted as fact;
3. The claimant failed to meet his burden of proving by a preponderance of the evidence that he is entitled to any additional temporary disability compensation;
4. The claimant failed to prove by a preponderance of the evidence that the respondents failed to return him to work without reasonable cause.
5. The claimant failed to establish by a preponderance of the evidence the elements necessary to establish his entitlement to benefits under Ark. Code Ann. § 11-9-505(a);
6. The costs of reporting and transcribing the depositions of Doris George and Kim Patterman shall be the liability of the respondents;
7. The respondents controverted liability for additional

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temporary disability compensation, liability for benefits under Ark. Code Ann. § 11-9-505(a), and liability for expenses related to depositions requested by the claimant.

DISCUSSION

The respondent employer constructs apartments, and the claimant was employed by the respondent employer as a framer. He sustained a compensable injury on July 30, 2002, when he got a piece of wood in his eye. Although the claimant initially declined medical treatment, he was ultimately taken to the emergency room. He was then seen by Dr. Robert Berry, an optometrist, and Dr. Berry then referred him to Dr. David Murphy, an ophthalmologist.

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during the period of time that he is within his healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). An injured employee is entitled to temporary partial disability compensation during the period that he is within his healing period and suffers only a decrease in his capacity to earn the wages that he was receiving at the time of the injury. Id. The "healing period" is defined as the period necessary for the healing of an injury resulting

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from an accident. Ark. Code Ann. § 11-9-102(6) (Cumm. Supp. 1997). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of his physical capabilities.

In the present claim, I initially note that only two medical records were submitted into the record of this hearing. In the first document, Dr. Murphy released the claimant to return to normal activities at least by September 24, 2002. Then, in a narrative report dated January 26, 2003, Dr. Berry made the following comments:

First, I doubt if he's reached maximum medical improvement since he still has slight anterior stromal haze noted in the right eye on his last visit at the end of December. That is a very small defect. Second, I do not happen to have a copy of the AMA guidelines fourth edition to assign an appropriate anatomical impairment but if you have a copy then if you'll fax me the relevant section I'll be happy to work on it. Third, I would not impose any permanent work restriction on him. Fourth, the course of treatment for him has been noted in his chart and basically is anterior stromal puncture or chronic use of topical lubricants at night. Fifth, Mr. King has probably recurring erosion syndrome and that can give occasional difficulty for months interspersed with long periods of completely normal sensation.

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Consequently, we have conflicting medical opinions regarding the end of the claimant's healing period. However, the Commission's ability to access the claimant's medical condition is impeded by the lack of medical evidence. Consequently, I find that the claimant failed to meet his burden of proving by a preponderance of the evidence that he is entitled to any additional temporary disability compensation.

Ark. Code Ann. § 11-9-505(a) provides the following:

(1) 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 and in addition to other benefits, such employer shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of such refusal, for a period not exceeding one year.

(2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

Thus, to establish a claim under this statute, the claimant must establish by a preponderance of the evidence the following elements:

- (1) that she sustained a compensable injury;
- (2) that suitable employment which is within the employee's physical and mental limitations is available with the employer;
- (3) that the employer has refused to return the claimant to work;

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(4) that the employer's refusal to return the employee to work is without reasonable cause.

The failure of the claimant to satisfy any of these elements defeats a claim for benefits under this section.

In the present claim, on August 21, 2002, Dr. Murphy determined that the claimant was not responding properly to treatments, and he attempted to obtain a blood test. However, there was confusion over where the claimant was to obtain these tests, and this confusion resulted in the claimant being sent to multiple facilities and in multiple calls to the respondent employer for authorization. In addition, because the claimant was being treated as a "work-in," a substantial wait was apparently involved. The claimant's employment was terminated that day, in substantial part, because of allegations regarding his behavior in Dr. Murphy's office that day.

However, there is conflicting testimony in this regard about the claimant's behavior. Ms. Doris George, the office manager for the respondent employer, testified that she talked to Ms. Kim Patterman in Dr. Murphy's office that day, and she testified that Ms. Patterman advised her that the claimant became loud and disruptive because of his frustration over the confusion that had occurred. Ms. George also testified that Ms. Patterman indicated to her that she was concerned that the claimant might disrupt other patients. Ms.

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George further testified that she had talked to the claimant in her office that day, and she testified that he was loud and disruptive at that time. In fact, she testified that she felt threatened by the claimant's behavior. In this regard, Ms. George provided the following testimony:

Yes, I felt threatened, in fact, before the day was over, I was scared to death of him. I would back off from him and he would get up close to me. At one time, I told him, you need to cool it, and I would back up. I had a chair that had rollers and I would back up and at some point I would stand up and he would come close to me and I would back up and I was scared. He had come to the office a couple of times that day, and I was scared.

Mr. Brad Edders, a manager for the respondent employer, testified that Ms. George advised him of her conversation with Ms. Patterman and of the claimant's behavior in Ms. George's office that day, and Mr. Edders testified that he contacted Ms. Patterman. He testified that he thought the claimant was initially in the room with Ms. Patterman because she seemed reluctant to talk. He further testified that Ms. Patterman ultimately became more talkative in describing the claimant's behavior and he testified that she indicated that the claimant had become impatient and belligerent in the waiting room. He also testified that he told her she was frightened of the claimant.

The deposition testimony of Ms. Patterman was also presented, and she testified that the claimant was "agitated" that day in Dr. Murphy's office. She also testified that the claimant "raised" his voice. However, she testified

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that people tend to get scared and confused in doctors' offices, and she testified that the claimant was just scared and confused because of the situation. She also testified that the claimant was "always a demanding individual," but she testified that this was "just his personality." According to her testimony, she was never frightened of the claimant. The claimant denied any improper behavior at the doctors office or at the office of the respondent employer.

After carefully and impartially considering all of the evidence in the record, I find that the claimant failed to prove by a preponderance of the evidence that the respondents failed to return him to work without reasonable cause. Instead, I find that the preponderance of the evidence establishes that the respondents did not return the claimant because of the behavior he demonstrated on August 21, 2002, and I find that they had reasonable cause for their actions. As discussed above, the evidence establishes that the claimant became very agitated at Dr. Murphy's office, that he became loud, and that he became demanding. Brad Edder testified that the claimant was terminated because he was a representative of their company and because the claimant's behavior was an embarrassment to the company. Clearly, the behavior described by all of the witnesses was improper under the circumstances. Moreover, while there may have been some difference

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between the way this behavior affected Ms. George and the way it affected Ms. Patterman, clearly the behavior could be deemed to be threatening, and it was reasonable for the respondent not to return the claimant to work to protect its employees from such threatening and improper behavior. In this regard, I note that claimant has been terminated for two previous jobs for aggressive and violent behavior. The behavior that resulted in his termination in this claim is obviously consistent with the behavior that resulted in the other terminations. Accordingly, I find that the claimant failed to establish by a preponderance of the evidence the elements necessary to establish his entitlement to benefits under Ark. Code Ann. § 11-9-505(a).

With regard to the respondents' liability for deposition, Rule 20 of the Rules of the Arkansas Workers' Compensation Commission provides the following, in pertinent part:

- II. Depositions.
 - A. The expense or cost of reporting and transcribing depositions, including expenses incurred as a result of providing a non-English language interpreter where necessary, shall be borne by the respondents, except as indicated herein below.
 - B. The expense or cost of reporting and transcribing depositions, including expenses incurred as a result of providing a non-English language interpreter where necessary, taken prior to the time a case is controverted shall be borne by the party requesting authorization to take said deposition.

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- C. The cost of reporting and transcribing depositions, including expenses incurred as a result of providing a non-English language interpreter where necessary, taken after a case has been controverted, and where said depositions are to be made a part of the record, shall be borne by the respondents.

Consequently, although subsection A imposes liability for deposition costs on respondents, that general rule is limited by subsection C. Thus, where depositions are taken after the claim has been controverted, the costs of reporting and transcribing depositions are borne by the respondents only where the depositions are to be made a part of the record. In the present claim, the depositions of Ms. George and Ms. Patterman were introduced at the hearing. Consequently, although these depositions were requested by the claimant, liability for those depositions shall be borne by the respondents.

ORDER

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein, along with their proportionate share of attorney's fees. 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. 2002).

IT IS SO ORDERED.

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C. Michael White
Administrative Law Judge