

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F302406

**LOWELL M. GARRETSON,
EMPLOYEE**

CLAIMANT

**CENTRAL MASONRY, INC.,
EMPLOYER**

RESPONDENT NO. 1

**MID-CENTURY INS. CO.,
INSURANCE CARRIER**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED MARCH 3, 2004

Hearing conducted February 26, 2003, before Administrative Law Judge Richard B. Calaway in Russellville, Pope County, Arkansas, with

Mr. Laura J. McKinnon, Attorney at Law, Fayetteville, Arkansas, appearing for the claimant;

Mr. Melissa Ross, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 1; and

Ms. Judy W. Rudd, Attorney at Law, Little Rock, Arkansas, representing Respondent No. 2, appearance excused.

STATEMENT OF THE CASE

This is a dispute over the claimant's request for benefits under Ark. Code Ann. §11-9-505(a), based on the alleged refusal of the employer to return him to work following his admittedly compensable right hip and low back injury.

The claimant contended that he should be awarded benefits under Ark. Code Ann. §11-9-505(a) for a period of one year beginning the date his employment was terminated, October 19, 2001.

An attorney's fee for controversion was also requested. Other possible issues were reserved.

Respondents No. 1 contended that the claimant's employment was terminated as part of a valid layoff and that no job was available for him within his limitations and restrictions so that there is no liability under Ark. Code Ann. §11-9-505(a).

Given the limited nature of the issue in dispute, participation by the Second Injury Fund was excused, although the Fund participated in the telephone prehearing conference and was given notice of the proceedings.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained compensable injuries to his right hip and low back July 6, 2001; and his average weekly wage on the date of injury was \$786.00.
3. The preponderance of the evidence shows that under Ark. Code Ann. §11-9-505(a) and the circumstances of this case, the claimant is entitled to benefits based upon the difference between his average weekly wage and benefits received during the period beginning with his layoff on or about October 19, 2001, and continuing until the project ended, just before Christmas, 2001.
4. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

On July 6, 2001, the claimant, a bricklayer, injured his right hip and low back while helping a co-worker lift a heavy stone into place. He received prompt medical care, initially from Dr. Terrald J. Smith, whose note of July 13, 2001, permitted the claimant to work with limitations against pulling, pushing, or lifting more than ten pounds. Thereafter, Dr. Smith gave the claimant a full and complete release effective August 3, 2001.

The claimant testified that during this time he was pretty much able to do the same work as before although he was still in pain and, about a week before he was laid off in October, he asked the respondents about seeing a different doctor. He testified that when he was laid off he was told it was only for about two days, because the employer was waiting on additional material. The claimant testified that there was still work to be done on that job which he could have done and that the employer had two or three other jobs going. He testified that he approached the foreman on one other job in the Fort Smith area but was not offered employment. The claimant testified that his condition varied from day to day but that he tried his best. After he was laid off, he did some work for neighbors for which he was compensated but otherwise has not worked. A co-worker testifying for the claimant stated that he had been the union steward on that job, but was laid off before the claimant. He stated that there was additional work to be done and that the claimant could have done at least some of it which would have lasted three or four days.

Under Ark. Code Ann. §11-9-505(a) an employer who, without reasonable cause, refuses to return an employee following a compensable injury, where suitable employment is available within his physical and mental limitations, shall be liable to pay the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, not to exceed

one year. In Torrey v. City of Fort Smith, 55 Ark. App. 226 (1996), it was held that this requires the injured employee to prove that suitable employment within his limitations is available with the employer and that the employer has refused to return him to work without reasonable cause.

Here, the owner of the respondent employer testified that he had about nine permanent employees, of which six were bricklayers. He stated that for this job he hired extra bricklayers, including the claimant, and at one point had probably 25 bricklayers for the project which lasted from January until just before Christmas, 2001. He also stated that as a job begins to wind down, it is necessary to start laying off the additional employees added for that job and that the claimant was laid off because they had got “caught up, out of work.” He further stated that the claimant was a good worker and that he would have let him stay if he had needed him. He stated that after a layoff, he usually called the union hall to have employees brought back when he needed them, but that he could not pay everybody merely to stand around. He testified that during the next 52 week period, he never again hired the same number of extra bricklayers. His testimony indicated that he did not think it was reasonable to expect the claimant to work jobs he had that were east of Little Rock and would have required the claimant to drive 100 miles or more.

In Torrey, the Court considered the question of reasonable cause for not returning an injured employee and found the Commission’s view to be too narrow to allow the true intent of the legislature to be realized. With that in mind, the preponderance of the evidence shows that the claimant is entitled to benefits under Ark. Code Ann. §11-9-505 (a) from the time he was laid off until the project ended just before Christmas, 2001. This affords the claimant benefits during the longest term of service possible under his contract of hire with this employer which was for this project, consistent with the testimony of all witnesses. In Torrey, the Court required the employer

to attempt to facilitate re-entry into the workforce by offering additional training to the employee, if needed, and reclassification of positions, if necessary. In this case, this likely would require the employer to alter the order of layoffs, permitting the claimant a longer term of employment, but would not necessarily require the employer to add the claimant as a permanent employee, rather than a temporary hire for the project in question.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge