

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F203259

**TOM C. ELLIS,
EMPLOYEE**

CLAIMANT

**FLEET SERVICES, INC.
EMPLOYER**

RESPONDENT

**WESTPORT INS. CORP.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED MAY 11, 2005,

Pursuant to a hearing conducted February 17, 2005, before Administrative Law Judge Richard B. Calaway in Hot Springs, Garland County, Arkansas, with

Mr. Howard J. Goode, Attorney at Law, Texarkana, Texas, appearing for the claimant, and

Ms. Melissa Ross Criner, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over the claimant's contention that he should be awarded additional benefits, pursuant to Ark. Code Ann. §11-9-505(a), from the time he had been released to return to work in January, 2003, until the company went out of business March 27, 2003. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents denied that the claimant was entitled to 505(a) benefits because, during that period, little, if any, work was contracted for or contracted to them and, further, during that period, the claimant was on probation according to the liability insurance carrier and was not permitted to drive because of this. The respondents agreed that trucking operation ceased as of March 27, 2003.

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 February 14, 2002; the claimant suffered a compensable injury to his cervical spine on that date; and his average weekly wage was \$780.00.

3. The preponderance of the evidence shows that the claimant is entitled to benefits pursuant to Ark. Code Ann. §11-9-505(a) from January 6, 2003, until March 27, 2003.

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

The claimant, almost 53 years of age at the time of the hearing, a truck driver, suffered compensable injuries primarily to his cervical spine during an incident arising out of his employment February 14, 2002. The respondents accepted the claimant's condition as compensable, offered medical care, and initiated payment of temporary total disability benefits as of March 18, 2002.

The claimant came under the care of orthopedic surgeon Dr. John L. Wilson who, after initial conservative care, performed surgery. After the surgery, Dr. Wilson continued to follow the patient, eventually releasing him to return to work full duty with no restrictions as of January 6, 2003. The parties agree that on June 30, 2003, Dr. Wilson opined that the claimant's impairment was 7% to the body, the healing period had ended, and the claimant was considering vocational rehabilitation training which Dr. Wilson thought was appropriate.

At the time of the hearing, the claimant's request for benefits was limited to 505(a) benefits from the time he was released to return to work, January 6, 2003, until the cessation of trucking services by the respondent employer, March 27, 2003.

Ark. Code Ann. §11-9-505(a)(1) provides that any employer who, without reasonable cause, refuses to return an injured employee to work, where suitable employment is available within the employee's limitations, shall be liable to the employee for the difference between benefits received and the average weekly wage lost during the period of the refusal, for a period not to exceed one year.

It has been held that, at a minimum, this requires the employer to attempt to facilitate re-entry into the workforce by offering the employee additional training, if needed, and reclassification of positions if necessary. The period of the unreasonable refusal lasts as long as the employer is doing business not to exceed the one-year limitation, even where a more qualified person has been hired instead of the claimant to fill a position. Torrey v. City of Fort Smith, 55 Ark. App. 226 (1996).

The claimant testified that because of his driving record he was on probation which meant that if he got another ticket he would not be able to drive. However, he stated that he did, in fact, drive for the respondent for about a week in November, 2002, after the beginning of the probationary period. He stated that he stopped driving because he was getting headaches and his neck would get stiff so that he could not turn it while driving. He stated that when he was again released to return to work as of January 6, 2003, he asked a supervisor, Darren, about work and Darren told him he was not going to let him back to work and he should just sign up for his unemployment. He testified that he received unemployment without controversy by the respondents. The claimant also testified that Mr. Stewart, one of the owners of the company, told him that to stay in business he was going

to have to put everybody under contract carrier, as opposed to working for him as an employee, because his workers' compensation had gone up. The claimant was not put back to work by the employer during the time in question, even though he had been released by Dr. Wilson to return to full duty work with no restriction. No effort was made by the employer to provide additional training or reclassification of positions, even though mandated by Torrey.

Mr. Stewart testified that he did not put the claimant back to work because he was having problems keeping the business alive as it was; he did not need the liability of the claimant's driving record; and he was concerned that the claimant might go out there and maim or kill somebody and he did not need the added liability. Tr. at 26. He explained that right after the terrorist attacks of September 11, all his insurance rates went up 36% across the board and he got to where he could no longer stand it. He stated that a combination of that and the economy just forced him out of business. Tr. at 23.

He also stated that the claimant's probation did not immediately affect his insurance but he did not want the liability of his insurance going any higher. He assumed that the claimant was high risk from all the tickets he had. Tr. at 24. The claimant had a speeding ticket and another ticket for following too closely while in the employer's vehicle and a second speeding ticket for driving home from work too fast in his own vehicle.

Mr. Stewart also explained that two of his consistent sources of income were substantially diminished during this time period. First, he lost a General Motors' contract to return to Oklahoma City leased cars and similar vehicles from several states. A second financial blow occurred when the business of hauling vehicles to the Kansas City Auto Auction slowed because of the condition of the economy.

During this time, in spite of the condition of the economy and the loss of this business, the employer ran a continuous advertisement in a local newspaper indicating that drivers were needed. Mr. Stewart testified that the ad was left in the newspaper on a continuous basis because drivers in the automobile industry are like migratory birds and can get a job anywhere in the United States after being trained. He kept the ad in the paper to keep hiring people to keep the operation going and it just got overlooked. He also stated that he did not know if any new truck drivers were hired during the period of January through March, 2003.

Under the Torrey case, the refusal by this employer is not a sufficient basis to deny benefits to the claimant. There is no indication that the claimant was offered additional training or reclassification of positions during the period that the employer was doing business. Indeed, testimony by Mr. Stewart did not rule out the possibility that other drivers may have been hired, even for this short time. The claimant's testimony, uncontradicted by other matters in evidence, was that even on probation he had been permitted to return to work for a short period but had to quit because of the condition of his neck. Moreover, the claimant later received a full duty release, with no restrictions, and could have tried other positions with this employer, had they been offered. In short, a review of the record shows that the preponderance of the evidence supports the claimant's request for benefits.

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