

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409570

MICHAEL L. WORTHINGTON, EMPLOYEE	CLAIMANT
CAVENAUGH AUTO GROUP, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED SEPTEMBER 20 , 2005

Hearing before Chief Administrative Law Judge David Greenbaum on August 11, 2005, at Osceola, Mississippi County, Arkansas.

Claimant represented by Mr. Johnny Dunigan, Attorney-at-Law, Monette, Arkansas.

Respondents represented by Ms. Melissa Ross Criner, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted August 11, 2005, to determine the claimant's entitlement to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on June 29, 2005, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. At the hearing, the parties also stipulated to the applicable compensation rates.

It was stipulated that the employment relationship existed at all relevant times, including July 3, 2004; that the claimant sustained a compensable injury to his right knee on said date; that respondents paid temporary total disability through on or about July 12, 2004, at which time the claimant was released to restricted

work duty; that respondents have continued to pay related medical, to date; and that the respondents have controverted claimant's entitlement to additional indemnity benefits. At the hearing, the parties agreed that the claimant's average weekly wage was \$366.00, entitling him to compensation rates of \$244.00 per week for temporary total disability and \$183.00 per week for permanent partial disability.

By agreement of the parties, the primary issue presented for determination was whether the claimant was entitled to additional temporary total and/or temporary partial disability. A corollary issue was whether the claimant refused to accept suitable employment pursuant to A.C.A. §11-9-526.

Claimant contended, in summary, that his healing period had not ended; that he was entitled to temporary total disability beginning July 13, 2004, and continuing through the present, while maintaining that although light-duty work may have been available, his refusal was justified because he was not able to drive the necessary twenty-six (26) miles to work because of his compensable injury; that he remained under the care and treatment of Dr. Bud Dickson and was entitled to appropriate disability benefits; together with a controverted attorney's fee on any temporary total disability awarded.

The respondents contended that it had paid all appropriate benefits to which the claimant was entitled, to date, and that it continued to pay appropriate medical treatment. Respondents contended that the claimant was released to light-duty work and that light-duty was made available for him by the employer, and that his

failure and/or refusal to attend light-duty work disqualified him from disability benefits pursuant to A.C.A. §11-9-526.

The claimant testified in his own behalf. Bobby Long was called as a witness by the respondents. The record is composed solely of the transcript of the August 11, 2005, hearing containing numerous exhibits. Subsequent to the hearing, both parties submitted legal briefs addressing whether the claimant was offered suitable employment and/or whether his refusal to return to work was justifiable under the facts of this case.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant's healing period has not ended.
4. The claimant has proven, by a preponderance of the evidence, that he is entitled to additional temporary total disability beginning July 13, 2004, and

continuing until such time that his healing period is determined to have ended.

5. A preponderance of the credible evidence reflects that the employer did not offer the claimant suitable employment within his physical restrictions following the July 3, 2004, admitted injury. Further, a preponderance of the credible evidence reflects that even if employment was offered, which is not conceded herein, the claimant's refusal and/or failure to report to work was justifiable.
6. Respondents remain responsible for additional and continued medical treatment, including, but not limited to knee surgery recommended by Dr. D. Bud Dickson.
7. Respondents have controverted claimant's entitlement to additional temporary total disability. Respondents have not controverted continued medical treatment, to date.
8. All additional issues are specifically reserved.

#### DISCUSSION

The claimant, Michael L. Worthington, age sixty-two (62), testified in his own behalf. Mr. Worthington has worked primarily in automobile sales during his adult life. On and before July 3, 2004, the claimant was employed as a car salesman for the Cavanaugh Automobile Group which owns several dealerships. The claimant was paid commission only based upon car sales. The claimant's duties are typical

of an automobile salesperson, basically, walking out on the lot to meet new customers, discuss and demonstrate vehicles in an effort to make sales, and then take offers and other applications necessary to conclude a contract. The claimant sustained an admitted, compensable injury on July 3, 2004, when he stepped in some oil or water and slipped, falling on his right knee. The injury was observed by Jerry Jones, the dealership manager. Mr. Jones advised the claimant to take the weekend off and call him the following Monday. The claimant was initially examined and treated at the St. Bernard's Regional Medical Center emergency room on July 5, 2004. The claimant underwent plain x-rays and was initially diagnosed as having sustained a dislocation of the right knee with internal derangement. The claimant was instructed to rest, apply ice, take prescription medications, Nalfon for swelling and Lorcet for pain, at which time he was discharged on crutches, to follow-up with Dr. John Ball, an orthopedic surgeon in Jonesboro, Arkansas. (Cl. Ex. A, pp.1-4)

The claimant stated that he went to Dr. Ball's office, but was not permitted to be evaluated by Dr. Ball, but, rather, referred by Bobby Long, the human resource manager, to the company doctor, Dr. Arnold E. Gilliam at the NEA Clinic in Jonesboro, Arkansas. The claimant saw Dr. Gilliam one-time only on July 8, 2004. The claimant maintained that Dr. Gilliam did not even examine his knee, but, rather, permitted him to return to work on July 12, 2004, with the restriction that he use a knee immobilizer and crutches. It appears that Dr. Gilliam may have attempted to refer the claimant to an orthopedic the following week. The claimant

was upset because Dr. Gilliam told him to go back to work when he was unable to walk. Rather than return to Dr. Gilliam or wait for a referral by Dr. Gilliam to a specialist, the claimant next went to the VA hospital for an evaluation. The VA hospital in Memphis, Tennessee, recommended an MRI of the knee which the claimant maintained could not be scheduled for many months. Respondents failed and/or refused to authorize the MRI which necessitated the claimant's seeking the services of an attorney. It is unclear from the record exactly why the claimant's efforts at receiving reasonably necessary, follow-up medical care was frustrated. Eventually, the claimant petitioned the Commission for a change of treating physicians, and, in fact, obtained a change of physicians Order through the Commission to Dr. Bud Dickson, an orthopedic surgeon in North Little Rock, Arkansas. Even after obtaining an Order authorizing a change of physician, further delays followed. In fact, it appears that the respondent-carrier did not authorize an orthopedic evaluation of the claimant's right knee until June, 2005. The record reflects that the claimant was first evaluated by Dr. Dickson on June 22, 2005. Rather than conduct an exhaustive analysis of Dr. Dickson's medical reports, suffice it to say that based upon Dr. Dickson's evaluation, together with additional diagnostic studies, specifically, the MRI of the right knee, which had been recommended almost one year earlier, Dr. Dickson concluded that the claimant required arthroscopic surgery to correct the damage to the knee. The recommended surgery had not been performed as of the date of the within hearing.

However, as reflected by the stipulations, respondents apparently accept responsibility for the recommended surgery. (Cl. Ex. A, pp.27-32)

I feel compelled to point out that despite unconscionable delays which preceded the claimant's ability to be evaluated by an orthopedic surgeon, respondents then forwarded the available medical records and the MRI to yet another orthopedic surgeon, Dr. James Mullhollan, to confirm the necessity of knee surgery. Although the letter from the medical case coordinator, Ann Wilson, R.N., asking Dr. Mullhollan to clarify various questions contains historical inaccuracies, suffice it to say that Dr. Mullhollan's response is of little probative value; however, he appears to agree that the MRI reflects a medial meniscus tear which Dr. Dickson hopes to correct with arthroscopic surgery. Clearly, the record reflects that the claimant's healing period has not yet ended and that further treatment, including surgery, is appropriate in this claim. (Resp. Ex. A, pp.5-8)

It is undisputed that the claimant sustained a compensable injury to his right lower extremity, specifically, the right knee, which is a scheduled injury under our workers' compensation laws. An employee who suffers a scheduled injury is entitled to temporary total disability compensation during the time they remain within their healing period or until they have returned to work, whichever occurs first. *Wheeler Construction Co. vs. Armstrong*, 73 Ark. App. 164, 41 S.W.3d 822 (2002).

The claimant has not returned to gainful employment. Further, the record reflects that the claimant's healing period has been delayed in whole or in part

because respondents have frustrated efforts at receiving follow-up medical care. This has been further compromised by a failure to communicate between the parties. Apparently, the claimant's entitlement to continued medical treatment is not an issue at this time. Rather, the sole issue presented for determination is whether the employer offered the claimant suitable employment within his physical restrictions and/or whether the claimant refused suitable employment.

Ark. Code Ann. §11-9-525 (Supp. 2005) provides:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless, in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

The company doctor, Dr. Arnold E. Gilliam, released the claimant to return to work on July 12, 2004, with specific restrictions that the claimant use a knee immobilizer and crutches while, at the same time, requesting that the claimant be evaluated by an orthopedic surgeon. (Resp. Ex. A, p.3)

Based upon Dr. Gilliam's report, Bobby Long, the employer's H.R. Director, wrote the claimant a letter which is set out below:

"Monday, July 12, 2004

Dear Mr. Worthington,

**ITEM 1**

Information has been provided from Dr. Gilliam of the NEA Medical Clinic that you have been released to return to work effective July 12, 2004 with restrictions of using knee immobilizer and crutches. You have been advised by our Workers Compensation Carrier that Cavanaugh Auto Group can provide you with work that will accommodate these restrictions.

You have been supplied with the proper immobilizer and crutches per the physician's orders and have been instructed on your responsibilities pertaining to this incident. In order to continue your benefits under workers compensation, you should abide by the requests of our workers compensation carrier.

Please see the enclosed release stating the return to work date of 7/12/2004.

**ITEM 2**

It has also been verified that you did not call or report to work Monday, July 12, 2004. Per our company policy on page 8 under General Policies, it states that if you are unable to come to work, you must notify your immediate supervisor as far in advance as possible but no later than one hour prior to your scheduled reporting time.

Please see your signed acknowledgement [sic] of your receipt of the handbook that outlines this policy.

**SUMMARY:**

Due to the above stated facts, we request that you produce a work excuse for every day that you cannot be at work after July 11, 2004. If we do not have the excuses in the Human Resource Office by July 19, 2004, we will assume you have willfully and voluntarily resigned your position with Cavanaugh Auto Group.

If you have any questions, please contact Bobby Long at 870-802-3121 between the hours of 8am and 5pm Monday through Friday." (Resp. Ex. B, p.1)

There is no credible evidence that the respondents ever offered the claimant suitable employment. In fact, on July 12, 2004, no employment would have been suitable because the claimant was unable to drive a car. The record reflects that the claimant lived twenty-six (26) miles from his place of employment. The claimant's right knee was placed in an immobilizer and he was instructed not to walk without the aid of crutches. In my opinion, requiring the claimant to drive himself to work would have been a health risk to himself, as well as the public. Further, the record reflects that respondents failed to offer the claimant any suitable

employment, but, rather, felt that he was capable of performing his job duties as a sales person despite the restrictions imposed upon him by the company physician. In my opinion, the expectations of the employer were unreasonable. Bobby Long, the employer's H.R. Manager, was called as a witness. I did not find Mr. Long's testimony to be persuasive. It is apparent that Mr. Long expected the claimant to return to work as a sales person. There is no credible evidence that any suitable employment was ever offered. It was only after it was apparent that no suitable employment was identified that Mr. Long attempted to amend his testimony to satisfy the requirements of A.C.A. §11-9-526 as reflected below:

EXAMINATION BY

MS. CRINER:

Q. Can I get you to state your full name, please?

A. Bobby Edward Long.

Q. Mr. Long, what do you do for a living?

A. I do human resource manager training, policies and procedures, risk management for Cavanaugh Auto Group.

Q. And how big of a company is that?

A. Right now we have approximately 220 part time and full time employees.

Q. How long have you been in that position?

A. Three and a half years.

Q. Are you familiar with Mr. Worthington?

A. Yes, I am.

Q. And you've been in the court room and you've heard his testimony today. Is that right?

A. Yes, ma'am.

Q. Earlier I showed Mr. Worthington the certified letter that we've got, page one of Exhibit B. What was the purpose of sending that letter?

A. To inform Mr. Worthington, first of all, that we were aware of his medical treatment, to send him a copy of the release from Dr. Gilliam to return to work on July 12<sup>th</sup>, to give him a copy of the employee handbook page where it shows what he needs to do as far as return to work and punctuality policies, and to also send him a letter, or send him a notice showing where he had signed to receive that handbook and also to let him know that we were able to fulfill the restrictions on the release and that we were able to help him comply with the restrictions and give him an opportunity to return to work. And if he did not respond by a reasonable time, that we would deem that he has willfully and voluntarily resigned his position with the company.

Q. What is your understanding of the restrictions put on him of Dr. Gilliam?

A. To wear an immobilizer brace and to use crutches.

Q. What job did you have at Cavanaugh for him within those restrictions?

A. He could have returned back to sales with those restrictions.

Q. Tell me why?

A. The sales people there, they each have a desk. Of course, they answer the phone. The walking is minimal during the day. I mean, when you have a customer, you know, the maximum time you would probably be out on the lot would be minimum five ten minutes, maximum probably thirty minutes, just depending on the business of the lot at that day. There being no manual restrictions, no lifting, no bending, and besides sitting down in the chair. So he would return back to sales. But we were going to comply with any restrictions, limitations, that the doctor put on him to get him back to light duty work, to get him back to work.

Q. He was testifying earlier about taking calls. Is that something he could have done?

A. He could have taken calls. Everyone takes sales calls.

Q. After you sent that letter out, did Mr. Worthington contact you?

A. No, ma'am.

Q. Did he ever call and tell you that he couldn't drive to work?

A. No, ma'am.

Q. Did he ever call and tell you he wasn't coming in?

A. No, ma'am.

BY MS. CRINER: That's all I've got, Your Honor. Thank you.

RE-DIRECT EXAMINATION BY

MR. DUNIGAN:

Q. Were you aware that, you were aware that Mr. Worthington had a knee immobilizer on his right leg, right? Correct?

A. Yes, sir.

Q. And you were also aware that you can't bend your knee when you have a knee immobilizer on your leg? Is that correct?

A. That's really not my concern. I'm not a physician. I can't, I can't attest or attest to anything that is just, what we go by is what is on the physician's release.

Q. And if the physician's release said that there, he was to have no weight bearing activity on his leg, would you agree with that?

A. It's on crutches.

Q. Okay, and –

BY MR. DUNIGAN: I have no further questions.

RE-CROSS EXAMINATION BY

MS. CRINER:

Q. Did you ever receive any physician's release from Mr. Worthington or anyone else saying that he could not drive?

A. A physician's release that we received? The only physician release that I received was on the July 12<sup>th</sup>. That was the latest one and that's what the letter states there. So, no, we had not received any other release or any other thing from any physician other than that right there as far as, pertaining to release.

BY MS. CRINER: Thank you.

BY THE COURT: Okay, Mr. Long, you were, your accommodations were basically going to be that he could resume his regular job duties with crutches and a knee immobilizer. Is that right?

BY THE WITNESS: Yes, sir.

BY THE COURT: I mean, so what are the accommodations? I mean, as you read them, he could do his normal job duty, right?

BY THE WITNESS: Yes. We gave a description of sales job, and those were the restrictions that came by. We've had several, like other work comp injuries with lot attendants putting weight restrictions. We make sure that we meet those weight restrictions. There was no walking limitation on there. There is no lifting limitation and the job duties of a sales person fit well within the requirements of the immobilizer and the crutches.

BY THE COURT: Have you all had salesmen in the past that have sold cars on crutches?

BY THE WITNESS: No, I haven't. I haven't had that experience.

BY THE COURT: I mean, you know, typically my vision of it is, you know, you have to walk out and greet customers and walk the lot to where the cars are and attempt to sell them. I take it the Claimant's testimony was correct. It's basically minimum wage versus commission. If he doesn't earn commissions, it would be minimum wage. Is that correct?

BY THE WITNESS: We pay them a minimum wage draw for commissions earned. However, we would have met any other, we would have met any restrictions and would have found him light duty work if he couldn't, if the doctor said that he couldn't perform sales duties, we would have found light duty work. That's our policy, whether it been answering the phone or

whatever. We would have complied.

BY THE COURT: At his regular salary?

BY THE WITNESS: Well, he was a commissioned sales person.

BY THE COURT: Well, that's my point. Is how do you earn commissions if you're unable to sell?

BY THE WITNESS: We would have given him a job that would have met his salary requirements, the average weekly wage. We would have done that.

BY THE COURT: Thank you. (Tr.43-47)

Subsequent to the hearing, both parties submitted letter briefs applying the facts of this case to the law. Suffice it to say that when considering the nature of claimant's injury and the restrictions imposed upon the claimant, I found claimant's arguments to be more persuasive than those advanced by the respondents. Further, I found the claimant to be a more credible witness than Mr. Long. The claimant testified that he contacted the employer and advised that he was unable to drive. The claimant opined that he could not resume his regular job duties, which, in my opinion, was the work the employer expected the claimant to perform. Clearly, the claimant could not sell cars following his restricted release. Accordingly, I find that a preponderance of the credible evidence reflects that the claimant did not refuse any suitable employment and that he is entitled to temporary total disability so long as he remains in his healing period and is unemployed. Accordingly, I hereby make the following:

AWARD

Respondent, Central Arkansas Auto Dealers, Self-Insured Fund, TPA, Risk Management Resources, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$244.00 per week, beginning July 13, 2004, and continuing through the present and until a date yet to be determined.

All accrued benefits shall be paid in lump sum and without discount.

Additionally, claimant's attorney, Mr. Johnny Dunigan, is hereby awarded the maximum statutory attorney's fee on this entire Award, to be paid pursuant to Ark. Code Ann. §11-9-715.

Additional issues are specifically reserved.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge