

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513738

BENJAMIN REYNOLDS

CLAIMANT

OK FOODS, INC.
SELF INSURED

RESPONDENT

OPINION FILED NOVEMBER 9, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by DAVID BORLAND, Attorney, Fort Smith, Arkansas.

Respondent represented by SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on August 22, 2006, in Fort Smith, Arkansas. The deposition of the claimant was taken on February 20, 2006, and has been admitted as Respondent's Exhibit No. 2.

A pre-hearing order was entered in the case on March 28, 2006. This pre-hearing order purported to set out the stipulations offered by the parties and to outline the issues to be litigated and resolved at the present time. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing. At the commencement of the hearing, the parties submitted additional stipulations (see pages 3 and 4 of the hearing transcript).

The following stipulations were offered by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On December 6, 2005, the relationship of employee-self insured employer existed between the parties.

3. The appropriate weekly compensation benefits are \$429.00 for total disability and \$322.00 for permanent partial disability.
4. On December 6, 2005, the claimant sustained compensable injuries to his cervical spine, thoracic spine, and left shoulder.
5. There is no dispute over accrued medical expenses and all such expenses have and are being paid.
6. The claimant remained within his healing period from the effects of his compensable injury through February 5, 2006.
7. The claimant was under restrictions of no lifting over ten pounds, alternate sit, stand, and walk as tolerated and limit bending, stooping and twisting, with no overhead work and no driving from December 7, 2005, until January 12, 2006.
8. The claimant was restricted to no lifting over 20 pounds, limit bending, stooping and twisting with repetitive motions of the left shoulder and limit overhead work from January 12, 2006 until February 5, 2006.
9. The respondent-employer had light duty work available that met these various restrictions during the healing time period.
10. The respondent-employer has in the claimant's personnel file his correct phone number during the month of

December, 2005. The respondent-employer, while attempting to contact the claimant, called the wrong phone number.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to temporary total disability benefits from December 7, 2005 through February 5, 2006.
2. Appropriate attorney's fees.

In regard to these issues, the claimant contends that he should be entitled to temporary total disability benefits from December 7, 2005 through February 5, 2006. Claimant was placed on limited duty by the respondent's physician and was not released to full duty until February 6, 2006, for a total of nine weeks. At no time was light duty work or was work ever offered to the claimant by the respondent.

In regard to these issues, the respondent contends that the claimant is not entitled to temporary total disability benefits.

DISCUSSION

_____The central issue in this claim is the claimant's entitlement to temporary total disability benefits from December 7, 2005 through February 5, 2006. The burden rests upon the claimant to prove his entitlement to these benefits.

The admitted compensable injuries of December 6, 2005 are to portions of the claimant's body which are "unscheduled" under the Act. Thus, in order to prove his entitlement to temporary total disability benefits the claimant must establish two facts. First, he must show that he continued within his healing period from the

effects of one or more of his compensable injuries during the period of December 7, 2005 through February 5, 2006. Secondly, he must prove that, during this same period, he was rendered totally disabled from performing all forms of regular gainful employment as the result of the effects of one or more of his compensable injuries.

The fact of whether the claimant continued within his healing period from the effects of one or more of his compensable injuries from December 7, 2005 through February 5, 2006, has been resolved by the additional stipulations offered by the parties. In these additional stipulations, the parties agreed that the claimant did remain within his healing period from the effects of one or more of his compensable injuries during this time. Thus, the only real dispute is whether the claimant was also rendered totally disabled (as the result of the effects of one or more of his compensable injuries) during this same period.

In determining actual disability, this Commission must consider a multitude of factors. In Ark. Code Ann. §11-9-522(b)(1), the legislature expressly identified some of the matters it felt relevant in determining the existence of actual disability. Although the legislature set out these considerations in the context of determinations of permanent disability, they would be equally relevant in determining the existence of total disability that was only on a temporary basis.

Thus, the claimant's age, education, and previous work experience are clearly relevant matters to be considered in

determining if he has been rendered totally disabled either permanently or temporarily. In regard to these matters, the record shows that the claimant is 30 years old and has a high school education. He has also completed truck driving school and has a commercial driving license (CDL). His prior work history consists almost entirely of employment positions requiring the driving of vehicles from light trucks to tractor trailer rigs and even including large buses.

The stipulations reflect that the claimant was medically restricted from engaging in any employment activities that required lifting over 10 pounds, no overhead work, and no driving. He was also restricted to employment positions that would allow him to ultimately sit, stand, and walk as necessary and substantially limit his bending, stooping, or twisting. These medical restrictions were imposed upon the claimant by his treating physicians during the period of December 7, 2005 through January 12, 2006.

The stipulations further reveal that the claimant was subsequently medically restricted from any employments requiring lifting in excess of 20 pounds. He was also directed by his treating physician to limit his bending, stooping, and twisting. He was also directed to limit repetitive motions of the shoulder and any overhead work or work at or above shoulder level. These medical restrictions were imposed upon the claimant's activities, including his employment activities, for the period of January 12, 2006 through February 5, 2006.

It must also be noted that during the entire period of December 7, 2005 through February 5, 2006, the claimant was under active medical treatment. For a portion of this time, his treatment involved periodic physical therapy visits and narcotic pain medication. This continuing treatment would clearly interfere with his potential employment activities and make him a less attractive applicant in the open job market.

During a substantial portion of this period, the claimant was under the reasonable belief that he would be returned to his prior employment with the respondent, when restrictions allowed. It was not until some time after January 3, 2006, that the claimant was advised by the respondent that his employment position with the respondent had been previously terminated. The claimant's failure to seek employment elsewhere, during the period he was waiting to be returned to employment by the respondent, would certainly be reasonable.

Finally, the claimant testified that on February 1, 2006, he began working in a restaurant business owed by his family, as a cook. (Deposition pages 48-50). It was his further testimony that, at the time of his deposition, he had not been compensated for any of the work he had performed for this family business.

After consideration of all the evidence presented, I find that the claimant has proven by the greater weight of the credible evidence that his compensable injuries rendered him totally disabled from performing regular gainful employment from December 7, 2005 through January 31, 2006. when the claimant's age,

education, and previous work experience is considered in light of his physical restrictions, the fact that he was undergoing ongoing medical treatment (including the use of narcotic pain medication), and was reasonable awaiting a return to work by the respondent, there was no reasonable expectation of his obtaining suitable employment in the open job market.

However, the greater weight of the credible evidence does show that the claimant did return to employment on February 1, 2006, at a business owned and operated by his family. Clearly, he cannot be considered "totally disabled" once this employment commenced. The fact that there may have been a delay in his receipt of compensation for this work, does not in any way appear to be due to the effects of his compensable injury, but merely the financial stability of the family owned business. This would still constitute a regular gainful employment.

Therefore, it is my opinion that the claimant has proven the facts required by the Act to establish temporary total disability for the period of December 7, 2005 through January 31, 2006. However, there still remains the underlying dispute in this case, that being whether the claimant is actually entitled to receive benefits for this period of temporary total disability.

Under the legislature's mandate of strict construction, this Commission is expressly directed to neither expand nor restrict the Act. Thus, there must be a statutory basis to deny the claimant benefits, which have been otherwise granted by the Act, Ark. Code Ann. §§11-9-519 and 11-9-520.

The respondent contends that the claimant is prevented from receiving benefits for temporary total disability (during the period of December 7, 2005 through February 1, 2006), because the respondent had light or limited duty employment available that was within the claimant's physical restrictions and limitations during this entire period. Although the respondent admits that it never actually offered or provided the claimant with such limited or light duty employment, it argues that it was excused from doing so because it had already terminated the claimant for good cause and in line with established company policy. In support of its argument, it cites Roark v. Pocahontas Nursing and Rehabilitation, ___ Ark. ___, ___ S.W. 3rd ___ (May 10, 2006).

Clearly, one way that a respondent can escape liability for temporary total disability benefits, even though the claimant had established that he would be totally incapacitated from earning wages in the open job market, is to provide the claimant with suitable limited or light duty employment that would be within the physical restrictions and limitations imposed by the compensable injury, Ark. Code Ann. §11-9-526. If such a claimant accepted such suitable employment, he could not be considered totally incapacitated from earning wages. If such a claimant unjustifiably refused such employment, he would expressly be barred from receiving temporary total disability benefits by the provisions of Ark. Code Ann. §11-9-526.

In Roark, the respondent not only offered, by actually provided, suitable employment to that claimant. The record in

Roark shows that the claimant accepted actually worked in this limited or light duty capacity for several days. Her subsequent termination was for a violation of established company policy (absenteeism/failure to call in) that occurred after she had actually returned to employment. Thus, the claimant in Roark in effect unjustifiably refused suitable employment by her failure to comply with reasonable established company policy.

More importantly, in Roark, the Court noted that, under the evidence presented in that case, the claimant had simply failed to show that she was rendered totally disabled or incapacitated from earning wages, during the period in question. Thus, she failed to prove one of the essential elements for her entitlement to temporary total disability benefits. Obviously, the Court felt that even though she may have been excluded from performing limited or light duty employment provided by the respondent, she had failed to show that no other suitable employments existed in sufficient number in the open job market to provide her with a reasonable expectation of employment. In the present case, this respondent has neither offered nor procured a suitable employment position for the claimant and the claimant has proven that he had no reasonable expectation of obtaining suitable employment elsewhere during the period of December 7, 2005 through January 31, 2006.

The respondent argues that Roark excuses them from making this offer, because the claimant had already been terminated pursuant to company policy for good cause. Essentially, this good cause was a determination by the respondent that the motor vehicle accident in

which the claimant was injured, could have been avoided by the claimant with the proper exercise of judgement and skill. Clearly, the express provisions of Ark. Code Ann. §11-9-526 does not provide any such excuse.

Workers' Compensation Acts in general and the Arkansas Workers' Compensation Act in particular were specifically created to remove the fault or negligence of either an employer or an employee from consideration in providing compensation for employment related injuries. To accept the respondent's argument would be contrary to this basic premise and would be patently unfair to injured employees. It would allow a respondent to maintain the benefit of the limited recovery provided, by workers' compensation even if the employer was negligent, but limit the injured worker's recovery, should the worker's carelessness or negligence have played a role in the injury.

In summary, this claimant has proven by the greater weight of the credible evidence that he continued within his healing period from the effects of his compensable injuries from December 7, 2005 through January 31, 2006. Unlike the claimant in Roark, this claimant has also proved by the greater weight of the credible evidence that the disabling effects of his compensable injuries have rendered him totally incapacitated from earning wages during the period of December 7, 2005 through January 31, 2006. The evidence presented shows that during this period, the limitations and effects of the compensable injury were sufficient to prevent

him from having a reasonable expectation of obtaining any regular employment position for which he was otherwise qualified.

Although the respondent was not required by the Act to do so, it could have escaped actual liability for temporary total disability benefits by providing the claimant with an employment position that was suitable to his capacity, Ark. Code Ann. §11-9-526. This subsection provides no excuse for a failure to make such an offer, without such an offer. Without an offer, no unjustifiable refusal can occur and this subsection would not act to bar any benefits to which the claimant would otherwise be entitled, Barnette v. Allen Canning Company, 49 Ark. App. 61, 896 S.W. 2nd 444(1995). Therefore, the claimant has proven his entitlement to temporary total disability benefits for the period of December 7, 2005 through January 31, 2006.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On December 6, 2005, the relationship of employee-self insured employer existed between the parties.

3. On December 6, 2005, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$429.00 for total disability and \$322.00 for permanent partial disability.

4. On December 6, 2005, the claimant sustained compensable injuries to his cervical spine, thoracic spine, and left shoulder.

5. There is no dispute over medical expenses, at the present time, and all such expenses have or are being paid.

6. The claimant has been rendered temporarily totally disabled as a result of the effects of his compensable injury for the period beginning December 7, 2005 and continuing through January 31, 2006. He has specifically proven by the greater weight of the credible evidence that during this period he continued within his healing period from the effects of his compensable injuries and was also rendered totally incapacitated from performing regular gainful employment as a result of these compensable injuries. The claimant is not barred from receiving temporary total disability benefits, during this period by the provisions of Ark. Code Ann. §11-9-526 or by any other provision of the Act.

7. The respondent has controverted the claimant's entitlement to any temporary total disability benefits.

8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the temporary total disability benefits herein awarded.

ORDER

The respondent shall pay to the claimant temporary total disability benefits for the period of December 7, 2005 through January 31, 2006.

The respondent remains liable for all reasonable necessary medical services required by the claimant for his compensable injuries.

The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary

total disability benefits herein awarded. One-half of this fee is the obligation of the respondent in addition to these benefits. The remaining one-half of this fee is to be withheld by the respondent from these benefits.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE