BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408417

ROBERT BRYANT CLAIMANT

SARA LEE COFFEE & TEA RESPONDENT

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
INSURANCE CARRIER RESPONDENT

OPINION FILED AUGUST 10, 2007

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

Claimant represented by GARY UDOUJ, Attorney, Fort Smith, Arkansas.

Respondents represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 19, 2007, in Fort Smith, Arkansas.

A pre-hearing order was entered in this case on March 20, 2007. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the claimant withdrew the issue of his entitlement to additional temporary total disability benefits for the period of October 29, 2006 through November 8, 2006. The claimant also withdrew the issue of his entitlement to permanent total disability benefits. Finally, the claimant requested that the issue of his entitlement to rehabilitation benefits be amended to reflect that rehabilitation benefits, per se, were no longer an issue, but that he should be entitled to some type of benefits from the date of his release from medical treatment until the date the respondent

offered the claimant re-employment assistance. A copy of the pre-hearing order with these amendments noted therein has been made Commission's Exhibit No. 1 to the hearing.

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

1. The prior Opinion of February 24, 2006, has become final and is res judicata of all issues raised and addressed therein.
2. The respondents have accepted liability and have paid permanent partial disability benefits for a permanent physical impairment of 17% to the right leg and 5% to the left leg.

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 benefits under Ark. Code Ann. §11-9-505(a).
2. The claimant's entitlement to benefits from the date of the claimant's release from medical treatment until the date the respondent offered the claimant re-employment assistance.
3. Appropriate attorney's fee.

In regard to these issues, the claimant contends that he is entitled to benefits under Ark. Code Ann. §11-9-505(a) for a period not to exceed one year and that he is entitled to some type of benefit or compensation from the date of his release from medical

treatment until the date the respondent offered the claimant re-employment assistance.

In regard to these issues, the respondents deny that the claimant is entitled to any benefits under Ark. Code Ann. §11-9-505(a) or that he is entitled to any other compensation or benefits, except those previously provided or paid by the respondent.

## DISCUSSION

### I. ARK. CODE ANN. §11-90-505(a)

The first issue to be addressed concerns the claimant's entitlement to the benefits provided by Ark. Code Ann. §11-9-505(a). The burden rests upon the claimant to prove his entitlement to benefits under this subsection. In order to meet this burden, the claimant must prove by a preponderance of the evidence:

(1) That he sustained a compensable injury,

(2) That suitable employment which is within his physical and mental limitations was available with the employer,

(3) That the employer refused to return the claimant to work, and

(4) That the employer's refusal to return the claimant to work is without reasonable cause. Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S. W. 2nd 237 (1996).

The record reveals that the claimant was hired by the respondent in March of 2003, in a route sales/delivery position. This position required him to travel his assigned route through Oklahoma and Texas, on a weekly basis. He would load his truck with the various products to be delivered once a week at the

respondent's Fort Smith warehouse. Over the course of the next week, he would make approximately 100 to 120 stops at his various customers. At these stops, he would obtain orders, make the appropriate deliveries, and service or maintain the dispensing equipment belonging to the respondent.

To perform these duties, the claimant would climb in and out of his delivery truck on a frequent basis. He would drive the truck for extended periods of time. He would have to climb in and out of the trailer or bed of the truck to unload the products. He would actually unload cases or boxes of the various products from the truck and carry or transport them to their assigned areas in his customers businesses. The boxes weighed from 5 to 50 pounds apiece.

At the last hearing, the claimant testified that he believed his wages for this position were $39,000.00 per year or $750.00 per week. However, at the initial hearing, the claimant stipulated to weekly compensation benefits of $377.00 for total disability and $283.00 for permanent partial disability. These compensation rates would yield an average weekly wage of only $565.50. The prior Opinion, on February 24, 2006, held that the appropriate weekly compensation rates were $377.00 for total disability and $283.00 for permanent partial disability. This finding is tantamount to a finding that the average weekly wage was $565.50. Prior to his testimony, the claimant did not question or place in dispute this prior finding. It is my opinion that he remains bound by his prior stipulation and the prior holding.

On June 7, 2004, the claimant experienced an employment related fall from his delivery truck and sustained compensable injuries to both of his knees. However, the injury to his right knee appears to have been far more significant. As a result of the compensable right knee injury, the claimant has undergone three separate surgical procedures. He was under continued active medical treatment for his injuries through November 8, 2006. At that time, his treating physician opined that he was at maximum medical improvement, and he was assessed a permanent physical impairment of 17 percent to the right leg and 5 percent to the left leg. This physician, Dr. Greg Jones, also placed permanent restrictions prohibiting lifting weights in excess of 50 pounds, repetitive climbing or lifting activities, and "heavy" squatting, lifting, or climbing. In a subsequent report, dated December 7, 2005, Dr. Jones concluded that the claimant actually needed a sedentary or non weight bearing job and could only return to his sales/delivery position, if he had some type of lift device to assist him in getting in and out of the bed of his delivery truck, was allowed to use a dolly or other mechanical device to move the product to and from the truck, and did not have to transport the product up and down any steps or stairs,( i.e. use handicap ramps). Dr. Jones specifically stated that without these specific accommodations, he would consider the claimant to be permanently totally disabled from his prior sales/delivery job.

The claimant testified that it was his personal opinion that he could have returned to and performed his prior sales/delivery

position, when released by Dr. Jones on November 8, 2006. Interestingly, the functional capacity evaluation (FCE), which was performed on April 9, 2007, would somewhat support the claimant's opinion. These tests showed that the claimant was physically capable of lifting and carrying up to 90 pounds on an occasional basis with frequent lifting and carrying up to 50 pounds and carrying up and down stairs on a frequent basis. However, there would still remain the climbing in and out of the bed or trailer of the truck. Further, the respondent would be reasonable in relying more on the treating physician's express restrictions and limitations than the claimant's opinion or even the FCE.

Prior to his final release from treatment, the claimant had been repeatedly released to return to work on a limited or light duty basis. Apparently, on most of these occasions, he was provided limited or light duty employment by the respondent. For limited periods, the respondent previously made extensive accommodations for the claimant's restrictions. This included providing a "rider" or "helper" to assist the claimant in making his deliveries by unloading the product at the various client locations and allowing the claimant to simply "ride" with another sales/delivery driver. However, even with these accommodations the prior periods of employment were brief. The record even shows that the respondent investigated the feasability of installing an automatic lift device on the back of the claimant's delivery truck. However, the available lift devices could not be used to achieve the desired purpose of assisting the claimant in getting in and out

of the bed or the trailer of his truck and would obviously be of no benefit in climbing in and out of the cab of the truck.

The record shows that for financial or business reasons, unrelated to this claim, the respondent closed its office in Fort Smith, on March 1, 2007. At that time, some of the employees of the Fort Smith operation were able to transfer to open positions in other cities. Others were simply laid off or terminated.

The evidence presented proves that the only position that was actually "available" or open, during the relevant time period involved in this claim, was the claimant's route sales/delivery position. While the respondent had other types of positions in its business operations, there was no proof that any of these other positions were vacant or "available", at any relevant time.

In Torrey and subsequent cases, the Court has indicated that some degree of "accommodation" might be expected of a respondent employer, even though there is no requirement for reasonable accommodation in the express wording of Ark. Code Ann. §11-9-505(a). However, I do not believe that the term "reasonable accommodations" should be extended to require an employer to effectively create an entirely new position substantially modifying an existing position to the point that would place excessive and unreasonable financial burden on the employer.

Based upon the physical limitations and restrictions that were placed upon his employment activities by his treating physician, the claimant would not have been reasonably expected to be physically able to perform the necessary activities required by the

position of a sales/route driver. There would appear only two ways this position could have been modified to accommodate the claimant's physical limitations. The respondent had provided some unidentified mechanical device to assist the claimant in getting in and out of the back of the truck and to limit his delivery locations to only those locations where he had a ramp available to transport the product into the location. The respondent could have created a new employment position by hiring someone to assist the claimant in unloading his truck by climbing into the bed and moving the product to the back of the truck for unloading and to transport the product in to any customer locations that were not accessible by handicap ramp. Both of these alternatives would represent an unreasonable and excessive financial burden on the respondent and would not represent a reasonable accommodation.

In summary, I find that the claimant has failed to prove by the greater weight of the credible evidence that the respondent had a position that was within his physical and mental limitations and that was "available" or open. I further find that he has failed to prove that the respondent employer's refusal to return the claimant to work was without reasonable cause. Therefore, the claimant has failed to prove the elements necessary for his entitlement to benefits under the provisions of Ark. Code Ann. §11-9-505(a).

## II. BENEFITS OR COMPENSATION FROM THE DATE OF THE CLAIMANT'S RELEASE FROM MEDICAL TREATMENT UNTIL THE DATE THE RESPONDENT OFFERED THE CLAIMANT RE-EMPLOYMENT ASSISTANCE

The remaining issue is the claimant’s entitlement to some type of benefits or compensation during the period between his release from active medical treatment (i.e. the end of his healing period) and the date upon which the respondent offered him re-employment assistance. Clearly, this Commission’s authority to award benefits is limited to only those benefits expressly provided by the Arkansas Workers’ Compensation Act. In determining what benefits are actually available under the Act, the rule of strict interpretation, mandated by Ark. Code Ann. §11-9-1001, must be applied. I can find no particular provision in the Act that would automatically entitle the claimant to benefits or compensation during any interval between the end of the healing period and the first date the respondent offered re-employment assistance, simply because re-employment assistance was not offered on or before the end of the healing period.

On November 8, 2006, the claimant was released from further active medical treatment by his primary treating physician, Dr. Greg Jones. Dr. Jones further assessed a permanent physical impairment of 17 percent to the right leg and 5 percent to the left leg, as a result of the claimant’s compensable injury. This would clearly support the conclusion that, on that date, the claimant became entitled to benefits for permanent disability, under Ark. Code Ann. §11-9-521. The respondents do not dispute this fact and have voluntarily instituted the payment of permanent partial disability benefits, based upon this rating. However, the evidence shows that the respondent did not, at that time, either offer the

claimant the opportunity to return to work or re-employment assistance.

In his initial claim for additional benefits, the claimant requested benefits under Ark. Code Ann. §11-9-505(a) for the respondent's failure to offer him an opportunity to return to work and benefits under Ark. Code Ann. §11-9-505(b), for rehabilitation. This was recognized in the original pre-hearing order.

Clearly, the respondent never offered the claimant an opportunity to return to their employ, and the matter of Ark. Code Ann. §11-9-505(a) has been addressed in this Opinion. However, there is some indication of an attempt to develop a program of vocational rehabilitation by negotiation. Apparently, when these negotiations were unsuccessful, the respondent offered the claimant re-employment assistance. This appears to have occurred on or about April 23, 2007. In May of 2007, the claimant obtained employment in route sales for another company, earning approximately $650.00 per week. Thus, the claimant's current weekly wage would be greater than his average weekly wage for the respondent prior to the compensable injury, as based upon the stipulated compensation rates. As a result of all this, the claimant withdrew his request for rehabilitation benefits, under Ark. Code Ann. §11-9-505(b).

Ark. Code Ann. §11-9-505(b)(1) states:

"(1) In addition to benefits otherwise provided for by this chapter, an employee who is entitled to receive compensation benefits for permanent disability and who has not been offered an opportunity to return to work or re-employment assistance, shall be paid reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation <u>if the Commission finds that the program of</u>

rehabilitation is reasonable in relation to the disability sustained by the employee." (Emphasis mine)

In the present case, no program of rehabilitation was found by this Commission to be reasonable, in relation to the disability sustained by the claimant. For this reason alone, no compensation or benefits could be awarded to the claimant under the authority of Ark. Code Ann. §11-9-505(b)(1).

I would further note that the benefits provided by the foregoing subdivisions are limited to those actually necessitated by an approved program of vocational rehabilitation. In the present case, the claimant has not actually pursued a program of vocational rehabilitation upon which to base these benefits or compensation.

There is no doubt that one of the avowed purposes of Ark. Code Ann. §11-9-505 and one of the avowed purposes of the Act, is to return injured workers to employment as soon as practical and appropriate. The provisions of §11-9-505 and the Act in general offers incentives, including negative incentives and penalties, to aid in accomplishing this goal. However, neither Ark. Code Ann. §11-9-505 or the Act in general provides for any type of benefits or compensation to be payable to a claimant based solely on the respondent's failure to expeditiously offer re-employment assistance. This Commission unquestionably lacks the authority to create such an obligation.

I would note that in the past the portion of the Act that is now §11-9-505 did provide for the payment of compensation to a claimant during the time the potential of rehabilitation was being

explored. This period of compensation was extremely limited in duration and had been abolished by the legislature long before the present claimant's compensable injury.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On June 7, 2004, the relationship of employee-employer-carrier existed between the parties.

3. On June 7, 2004, the claimant earned an average weekly wage sufficient to entitle him to weekly compensation benefits of $377.00 for total disability and $283.00 for permanent partial disability.

4. On June 7,2004, the claimant sustained various compensable injuries, including compensable injuries to both his knees.

5. There is no dispute at the present time over the claimant's entitlement to the medical services at the respondents' expenses.

6. There is no dispute, at the present time, over the claimant's entitlement to temporary total disability benefits.

7. The respondents have accepted liability for and have paid permanent partial disability benefits for a permanent physical impairment of 17 percent to the right leg and 5 percent to the left leg.

8. The claimant has failed to prove that he is entitled to benefits under Ark. Code Ann. §11-9-505(a). Specifically, he has failed to prove by the greater weight of the credible evidence that the respondent had available an employment position that was within

his physical limitations and refused without reasonable cause to return him to work.

9. The claimant has failed to prove that he is entitled to any type of benefits or compensation between the date of his final release from medical treatment and the date upon which the respondent first offered him re-employment assistance. The Act does not provide for the payment of any benefits or compensation during this period, which would be based solely on a delay by the respondent in providing re-employment assistance.

10. The respondents have controverted the claimant's entitlement to any benefits or compensation under the provisions of Ark. Code Ann. §11-9-505(a) and his entitlement to the benefits or compensation during the period between his final release from medical treatment and the date upon which he was offered re-employment assistance based solely upon the respondent's delay in providing such re-employment assistance.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss the present claims for additional benefits made under Ark. Code Ann. §11-9-505(a) and for benefits based upon any delay by the respondent in providing re-employment assistance.

IT IS SO ORDERED.

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MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE