

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F704267

LAWRENCE CALVERT, Employee	CLAIMANT
TACO BUENO, Employer	RESPONDENT
GALLAGHER BASSETT SERVICES, Carrier	RESPONDENT

OPINION FILED OCTOBER 23, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 3, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on July 5, 2007, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed among the parties on April 1, 2007.

At the time of the hearing the parties agreed to stipulate that claimant did suffer a compensable injury to his left foot on April 1, 2007, and that the medical treatment provided by Dr. Wilson on April 9, 2007 was paid by the respondent. The parties also agreed to stipulate that claimant earned sufficient wages to entitle him to compensation at the rate of \$417.00 per week for temporary total disability benefits.

The parties agreed to litigate the following issues:

1. Temporary total disability benefits from April 4, 2007 through a date yet to be determined.

2. Medical.

3. A.C.A. §11-9-505(a) benefits.

4. Attorney fee.

The claimant clarified that his requested period of temporary total disability benefits would include April 7, 2007 through April 22, 2007.

The claimant contends that as a result of his compensable injury he is entitled to temporary total disability benefits beginning April 7, 2007 and continuing through April 22, 2007. Alternatively, claimant contends that he is entitled to benefits pursuant to A.C.A. §11-9-505(a).

Respondent contends that claimant is not entitled to any temporary total disability benefits or benefits pursuant to A.C.A. §11-9-505(a) as a result of his compensable injury.

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 A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 5, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant suffered a compensable injury to his left foot on April 1, 2007 is also hereby accepted as fact.

3. The parties' stipulation that respondent paid medical treatment from Dr. Wilson on April 9, 2007 is also hereby accepted as fact.

4. The parties' stipulation that claimant earned sufficient wages to entitle him to compensation at the rate of \$417.00 per week for temporary total disability benefits is also hereby accepted as fact.

5. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning April 7, 2007 and continuing through April 22, 2007.

6. Claimant is not entitled to benefits pursuant to A.C.A. §11-9-505(a).

7. Respondent has controverted claimant's entitlement to unpaid temporary total disability benefits.

#### FACTUAL BACKGROUND

The claimant is a 37-year-old man who began working for U.S. Beef in July 2005. U.S. Beef is the owner of Arby's and Taco Bueno. Claimant initially worked in an Arby's restaurant before he was transferred by respondent to a Taco Bueno restaurant in Rogers.

The parties have stipulated that claimant suffered a compensable injury to his left foot on April 1, 2007. On that date, the claimant was in the process of cleaning a kettle by dumping out hot water when some of the water "hit the floor drain wrong, and it went down my shoe, burned my foot." Following this incident the claimant continued to work for the respondent for an additional day or two before he was terminated on April 6, 2007. Claimant sought medical treatment from Dr. Wilson on April 9, 2007, and was diagnosed as suffering from a second degree burn of the left foot. Claimant was given a creme and oral medication. In addition, Dr. Wilson was of the opinion that claimant could return to work with restrictions of staying off his foot and keeping it propped up for two days and then returning to work with standing limited as much as possible. Following claimant's termination on April 6, 2007, he returned to work for Wendy's on April 23, 2007.

Claimant has filed this claim contending that he is entitled to temporary total

disability benefits and/or benefits pursuant to A.C.A. §11-9-505(a).

### ADJUDICATION

The first issue for consideration involves claimant's request for temporary total disability benefits beginning April 7, 2007, and continuing through April 22, 2007. The injury to claimant's left foot is a scheduled injury. An employee who suffers a scheduled injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant is entitled to temporary total disability benefits beginning April 7, 2007 and continuing through April 22, 2007.

As previously noted, claimant suffered a compensable second degree burn to his left foot on April 1, 2007. According to claimant's testimony he initially attempted to treat his injury with over-the-counter medication, but his condition worsened. Claimant testified that he attempted to seek medical treatment on April 7, but was unable to do so because of a problem with paperwork. As a result, claimant did not seek medical treatment until he was evaluated by Dr. Wilson on April 9, 2007. Dr. Wilson in his report of that date estimated that claimant's condition would take some two to three weeks to heal. He also indicated that claimant could return to work with restrictions of staying off his foot and keeping it propped up for two days and then he could return to work, but should limit standing as much as possible. As previously noted, claimant was terminated by the respondent on April 6, 2007, three days before this visit with Dr. Wilson. Claimant did not return to work until April 23, 2007, when he went to work for Wendy's.

Based upon Dr. Wilson's medical report indicating that claimant's condition would take two to three weeks to heal, I find that claimant remained within his healing period

between April 7, 2007 and April 22, 2007. I also find that claimant had not returned to work for any employer during this period of time. While claimant had been terminated by the respondent three days earlier, claimant also testified that his job with the respondent involved sitting only approximately 10 percent of the day. Thus, even if claimant had not been terminated by the respondent, it would not have been possible for claimant to perform his job while staying off his foot or limiting his standing.

In short, based upon the evidence presented, I find that claimant remained within his healing period and that he had not returned to work for the respondent or any other employer between April 7, 2007 and April 22, 2007. Therefore, he is entitled to temporary total disability benefits for this period of time.

Claimant has also alleged that he is entitled to benefits pursuant to A.C.A. §11-9-505(a). That subsection provides:

(1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

In order to prove entitlement to benefits pursuant to A.C.A. §11-9-505(a)(1), an employee must establish (1) that he sustained a compensable injury; (2) that suitable employment within his physical and mental limitations was available with the employer; (3) that the employer refused to return the employee to work; and (4) that the employer's refusal to return the employee to work was without reasonable cause. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W. 2d 237 (1996).

In this particular case, even assuming that the remaining elements have been proven, I find that claimant has failed to prove that the respondent's refusal to return him

to work was without reasonable cause.

As previously noted, the claimant was terminated by the respondent on April 6, 2007. The reasons for claimant's termination are contained in the documentary evidence and in the testimony of Ron Underwood, the vice-president of operations for the respondent. The claimant was terminated by the respondent for various reasons, including failure to follow payroll procedures by allowing underage employees to work later than allowed by law and changing time records. In addition, respondent also found that claimant had taken home a bank deposit for overnight keeping instead of depositing it in the bank. While claimant disagreed with many of the facts and circumstances regarding his various reprimands and the respondent's decision to terminate him, a review of the documentary evidence indicates that claimant acknowledged that problems existed at the restaurant at which he was the manager. In fact, shortly before his termination on March 25, 2007 the claimant voluntarily chose to accept a demotion to assistant manager in an effort to rectify the respondent's concerns.

In short, in order to prove entitlement to benefits pursuant to A.C.A. §11-9-505(a)(1), claimant has the burden of proving various elements. One of these elements is that the employer's refusal to return the employee to work was without reasonable cause. Based upon the testimony of Underwood, the claimant, and the documentary evidence submitted into evidence, I find that claimant has failed to meet this element of proof; therefore, claimant is not entitled to benefits pursuant to A.C.A. §11-9-505(a)(1).

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by

the claimant.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning April 7, 2007, and continuing through April 22, 2007. Claimant has failed to prove by a preponderance of the evidence that he is entitled to benefits pursuant to A.C.A. §11-9-505(a)(1). Respondent has controverted claimant's entitlement to unpaid temporary total disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$590.25.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE