

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F706688

ZANCOURTLAND KIRBY, EMPLOYEE	CLAIMANT
SIMOS INSOURCING SOLUTIONS, INC., EMPLOYER	RESPONDENT
SENTRY INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED DECEMBER 13, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on November 2, 2007, at Marion, Crittenden County, Arkansas.

Claimant represented by Mr. Marc I. Baretz, Attorney-at-Law, West Memphis, Arkansas.

Respondents represented by Mr. Jarrod S. Parrish, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted November 2, 2007, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing telephone conference was conducted in this claim on October 10, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties stated that the stipulations, the issue, as well as their respective contentions were properly set out in the Prehearing Order, subject to an additional stipulation concerning the applicable compensation rate. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the employee/employer/carrier relationship existed at all relevant times, including May 16, 2007; that the claimant sustained a compensable

back injury on said date; that respondents paid all medical and related expenses, to date, and that respondents controverted claimant's entitlement to temporary total disability. It was further agreed that the claimant's healing period ended on or before August 2, 2007. At the hearing, the parties stipulated that the claimant's average weekly wage on May 16, 2007, was \$279.28, entitling him to a compensation rate of \$186.00 per week for temporary total disability and \$139.00 per week for permanent partial disability. Based upon the proposed stipulation, the applicable compensation rate for permanent partial disability would be \$154.00 per week. However, permanent disability is not at issue.

By agreement of the parties, the primary issue presented for determination concerned claimant's entitlement to temporary total disability. A corollary issue is whether the claimant refused suitable employment which would disqualify him from receiving compensation.

Claimant contended, in summary, that he was entitled to temporary total disability benefits for the period beginning May 17, 2007, and continuing through August 2, 2007, at which time he was released to return to work without restrictions. The claimant requested a controverted attorney's fee on any temporary total disability awarded. Claimant reserved the issue of permanent disability, if applicable.

The respondents contended that it had paid all appropriate benefits; that the claimant's treating physicians released him to modified employment duty on May 24, 2007; that respondents made light duty available which was refused; that the

claimant was subsequently released on August 2, 2007, with no restrictions and that the claimant had failed and/or refused to return to work and was, therefore, not entitled to temporary total disability benefits.

The claimant testified in his own behalf. Teresa Ball was called as a witness by the respondents. The record is composed solely of the transcript of the November 2, 2007, hearing containing various medical records.

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 hereby accepted as fact.
3. The claimant's healing period ended on or before August 2, 2007.
4. The claimant has failed to prove, by a preponderance of the credible evidence, that he is entitled to temporary total disability benefits.
5. The claimant was offered light-duty employment by the employer herein on or about May 24, 2007. The claimant failed and/or refused to return to gainful employment and was, therefore, not entitled to disability benefits.

DISCUSSION

_____This claim turns almost entirely upon the claimant's credibility. The record in this claim is replete with inconsistencies and contradictions. The claimant's testimony concerning his attempt to return to work, as well as any offer by the employer to prove light-duty employment was specifically refuted by Teresa L. Ball, his immediate supervisor. I did not find the claimant to be a credible witness. The claimant's testimony was inconsistent and appeared, at times, to be self-contradicting. In addition, the claimant appeared hesitant and cautious in some of his responses and, at times, was unresponsive to direct questions.

The claimant, Zancourtland Kirby, age twenty-seven (27), has an eleventh grade education. The claimant has worked for Simos Insourcing Solutions, Inc., at various times. The employer is a temporary employment agency. The claimant returned to work for the employer approximately two (2) weeks prior to his injury. The employer placed him in a temporary position at Bosch Tool Company where he was working at the time of his injury. The claimant's testimony concerning how the injury occurred, its reporting, as well as his subsequent course of conduct is set out, in part, below:

Q And how did that happen?

A A pallet of bits came out of one of the bins and forced me against the conveyor belt.

Q Okay. And did you report that injury?

A Yes, sir.

Q And did you work any since that time?

A No, sir.

Q All right. When you reported the injury, were you provided a physician to go see?

A Not right away.

Q Okay. How soon afterwards?

A I'm going to say about a week or two after.

Q Okay. And what physician did you go to?

A I had went to Concentra. They – I had recently went to Crittenden Memorial. They was trying –

Q Who was that?

A I had went to Crittenden Memorial Hospital. They was trying to figure out – they was trying to get some ID number before they could even see me, and they was steady calling trying to get the workers' comp ID number, and wouldn't no one give it to them. And then I'll say around about a week or two later, they finally sent me to Concentra.

Q All right. And you said they finally sent you to Concentra. Who was they?

A Some lady who one of the nurses at the hospital talked to. I don't know who she talked to or who she got the number from, but they said for me to go to Crittenden – I mean, Concentra. So I called Concentra. I had went in the next day after I left Crittenden Memorial.

Q And were you given a return to work with restrictions effective May 24th, '07?

A Yes, sir.

Q Now your duties at Simos, what did that consist of?

A It consists of lifting and bending.

Q What sort of things did you lift and bend?

A It was different drill bits on the line. Some was real low we had to bend over and pick up, and the boxes, most of them was heavy that we had to put the bits in, and seal up and send down the line.

Q How much does those boxes weigh?

A I really can't say. I know it was over more than 10 pounds.

Q Okay. And would you be bending more than 12 times an hour?

A Mostly likely. It all depends on if the product was on the bottom shelf or not.

Q And would you be squatting and kneeling?

A Yes, if some was to fall or – yes, sir.

Q Okay. Did you report to Concentra in an effort to see if they had any light duty work for you?

A Well, Concentra, when they give me the paper telling me to take back to where I was working, it said that – and when I took it to Bosch, I talked to them.

Q Okay. Well, let's explain that for a second. Is Simos a temporary agency?

A Yes, sir.

Q And were you actually physically working at a plant called Bosch, B-o-s-h?

A B-o-s-c-h.

Q B-o-s-c-h?

A Yes, sir.

Q Yes, and that's when you were just telling us where you went – the duties you were performing, is that right?

A Yes, sir.

Q Okay. Well, when you got that note from Concentra, did you bring it to Bosch?

A Yes, sir.

Q And what were you informed at that place?

A What was I informed? I was told there was no light duty work there for me to do.

Q Okay.

MR. PARRISH: Your Honor, I'm going to object to hearsay unless he identifies who he spoke with.

THE CLAIMANT: Who did I speak with? It was Teresa and some other guy. I don't know the guy's name, but I know him when I see him.

BY MR. BARETZ:

Q Okay. Teresa, is that the woman who is sitting here today?

A It looks like her. I know her with glasses on. It's been a while since I seen her.

Q Okay. Well, was Teresa an employee at Bosch or was she an employee of Simos?

A Simos.

Q Pardon?

A Simos.

Q Simos.

A Yeah, they was saying she was a new person.

Q Okay. So you are not for sure it was this woman here?

A Like I said, if she had some glasses on, I probably could know here. Like I said, it's been a while since I seen her. I haven't been back out there and seen her since then.

Q Okay. Well, was she the person you were supposed to report to, whoever was –

A Yes, I was supposed to report back to the supervisor that was over me.

Q Okay. And the supervisor that was over you at Simos or the supervisor that was over you at Bosch?

A She was – is the supervisor over the Simos section that I was working at at Bosch.

Q Okay. So, actually, as I understand it, even though you are a temporary employee, your supervisor is also a Simos employee?

A Correct.

Q Okay. So you reported to her and you showed her the slip?

A Yes, sir, the guards at the front, they had called up front, her and some guy –

Q Okay.

A – and I showed them the paper, and they just told me that there was no temporary work there for me to do.

Q Okay. And did you continue to be followed up by Concentra?

A Yes, sir.

Q All right. Did you make any other – on 5/31 you were given basically the same restrictions, is that right?

A 5/31?

Q Well, it may not have been – it was on the fact of 5/31 there was a – in your medical reports it showed returned to work with the same restrictions?

A Correct.

Q Did you follow up with that at all?

A Yes, sir, I took – every time I had a doctor appointment or whatever, I got the slips and took it back to them.

Q All right. In this case who did you take it back to?

A A couple of times at the security desk they would try to call in the back and try to see if they could find her at her desk, or find someone there who could be able to take the slips, but no one ever came up. And the lady or the guy that was up there would just say that they will make sure she get it, or someone at Simos get the paper.

Q Okay. Let me ask you this, can you walk into the plant or do you have to go through security?

A If you work there, you can just walk to the back, but since I wasn't working and was just a visitor, then I didn't even walk to the back. I just stopped at the guard shack and let the guards handle it.

Q Would the guards ever invite you in?

A Not to the back.

Q Okay. So did you ever – and I think that same procedure followed up, and it looks like you had a return to work on 06/04 with the same restrictions, and those restrictions seem to have stayed in place until you were released to return to full duty on August the 2nd. Does that sound right?

A Yes, sir.

Q All right. All the while when you were going back and forth to Concentra, on each occasion you got a restriction, did you bring it to Simos?

A I took it to Bosch.

Q To Bosch?

A Yes, sir.

Q But in an effort to get it to your Simos supervisor at Bosch, is that right?

A Yes, sir.

Q Were you ever told that there was work available for you within your restrictions, and by that, I mean like light duty work?

A Not there.

Q Not there, or anywhere else? Did they tell you to report anywhere else?

A Well, like I said, they told me to find somewhere else to work. So I had called –

Q No, you never said that. Let's go over that. Who told you and when did they tell you to find somewhere else to work?

A That same day when I had first got hurt. Well, the first day I had went to go see them. I had took the paperwork, the little paper that they had give me back there, and they said there was no work there for me to do.

Q Who was that that told you that?

A Teresa and some guy. I don't know the guy's name.

Q Okay. And you said something else. You said that they told you to find somewhere else to work?

A Yeah, that's basically what they were saying.

Q When they said find somewhere else to work, were they talking about another job with the temporary agency?

A Well, really, I don't know. But that's basically how they put it off, to find somewhere else to work. They don't have anything there for me to do because there was too many people there on light duty. That's what I was told.

Q All right. So they didn't offer you any light duty?

A Correct, not there.

Q Now, are you positive about that?

A Yes, sir.

Q Okay. Now, at any time after that that you came there and brought the restrictions, did they ever say they had something for you?

A No, sir, because I never talked to Teresa. No one couldn't never find her at her desk, and no would answer.

Q Okay. Did she ever call you at home?

A After they released me to work back full, someone said – my aunt or my cousin said that she had called. So when I –

Q To be sure that we've got this straight, this is after you were released to full duty?

A Correct. (Tr.8-15)(emphasis supplied)

Based upon my observations, the claimant was extremely cautious and evasive in his responses. Even when asked a direct question concerning whether medical treatment was either requested or offered at the time of the injury, the claimant was unresponsive and even argumentative. (Tr.52-56)

Teresa L. Ball was called as a witness by the respondent. Ms. Ball was the claimant's immediate supervisor. Although Ms. Ball worked for Simos, she supervised temporary employees working at the Bosch plant. Ms. Ball acknowledged that a Bosch team leader reported that the claimant had been injured when a pallet came off the roller and knocked him against a conveyor belt. Ms. Ball stated that she examined the claimant's back and did not observe any visible signs of injury. She stated that she specifically asked the claimant if he wanted to go to the doctor, and that he refused medical treatment. Ms. Ball also specifically disputed the claimant's testimony that light-duty was never made available. A portion of her testimony follows:

Q Okay. You heard Mr. Kirby testify that he was never offered the opportunity to pursue modified duty work with Simos or Bosch. Is that accurate?

A No, sir.

Q Okay. Explain to the Judge why that's not accurate, please.

A When Kirby come back in – like I said, he went to the doctor on his own. He went to come back in after he had been to Concentra and told me that he was on light duty. I explained to him we did not have light duty at Bosch, but he could go to the Memphis office and they would place him somewhere else for light duty or let him work in the office. And the person that he was talking about with me was the vice president of the company.

Q Okay. Is that Simos' policy to provide light duty, be it either in the office or at some other job for a –

A Yes, sir.

Q – person with restrictions?

A Yes, sir.

Q Are you aware of employees being able to actually work in a Simos office doing filing or light duty work?

A Yes, sir.

Q In the Memphis office?

A Yes, sir.

Q And he testified that's actually where he applied, is that your understanding?

A Yes, the Memphis office.

Q Was it made clear to Mr. Kirby that day that if he went to the Memphis office, he would be supplied with modified duty work?

A Gary and myself explained to him, "You need to go to the Memphis office and they will put you on light duty."

Q Okay. And that was – that statement was made to him, "They will put you on light duty"?

A Yes, it was.

Q He's testified he was just told, "There is no work for you here," but you're saying it wasn't left in the open?

A We said, "There's no work for you here at Bosch, but go to Memphis and they will put you on light duty." (Tr.27-29)

I feel compelled to point out that the record is replete with other inconsistencies and contradictions. It is apparent that Ms. Ball sincerely questioned whether or not the claimant, in fact, sustained an injury as reported. In fact, arguments could be raised that the claimant could not prove all the elements necessary to establish a compensable injury. Nevertheless, respondents exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with prompt, reasonably necessary medical treatment. The claim was treated as a medical only claim until the claimant eventually secured the services of an attorney and requested temporary total disability. The sole issue presented for determination concerns claimant's entitlement to temporary total disability.

As previously pointed out, the claimant attempted to evade the question of whether light-duty work was made available. Rather, he cautiously stated that work was not made available at the Bosch facility. The employer does not dispute that light-duty jobs were not available at the claimant's temporary position. Rather, I believe the claimant was told to go to the home office in Memphis and that suitable employment would be made available. The claimant failed to follow the instructions of his supervisor.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392 (1981); *Johnson v. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate her ability to engage in any gainful employment. The claimant bears the burden of proving both that he remains within the healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *see, Palazolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

Ark. Code Ann. §11-9-526 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 claimant was employed through a temporary employment agency. I am persuaded that the claimant was advised that the Agency had work available within his physical restrictions and that the claimant failed and/or refused to return to gainful employment. An employee who voluntarily chooses not to return to work is not entitled to compensation benefits. Furthermore, the claimant was only earning slightly more than minimum wages. I do not find that he was totally disabled within the meaning of the Arkansas workers' compensation laws.

The claimant has the burden of proving his entitlement to temporary total disability. The claimant has failed to meet his burden of proof. The claimant's contention that he was totally disabled at all times before August 2, 2007, is a mere conclusion, not supported by the record as a whole. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge