

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F503956

DONALD MINER

CLAIMANT

YELLOW TRANSPORTATION, INC.

RESPONDENT

GALLAGHER BASSETT SERVICES, INC.
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 16, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by AARON MARTIN, Attorney, Fayetteville, Arkansas.

Respondent represented by ERIC NEWKIRK, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on February 15, 2007, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on September 6, 2006. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

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

2. On April 13, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his right foot on April 13, 2005.

4. The claimant is entitled to a weekly compensation rate of \$466.00 for temporary total disability and \$350.00 for permanent partial disability.

5. Medical expenses have been paid.

6. Respondents have accepted and paid in full a 7 percent impairment rating to the right foot.

By agreement of the parties the issues to litigate are limited to the following:

1. Claimant's entitlement to 505(a) benefits.

2. Attorney's fees.

In regard to the foregoing issues the claimant contends that the respondent refused to return the claimant to available employment, in violation of §11-9-505. The claimant suffered a compensable injury to his right leg on April 13, 2005. He was released by his physician on January 3, 2006, with 100 pound lifting, pushing and pulling restrictions through February 3, 2006. The claimant called and requested employment, and his attorney sent a letter dated March 13, 2006, requesting suitable employment. The respondent has not responded to these multiple requests. Finally, the claimant contends that he is entitled to his full wage of \$955.08 a week from March 13, 2006, through a date yet to be determined and a controverted attorney's fee to pursue these benefits.

In regard to the foregoing issues the respondents contend that the claimant sustained a compensable right foot injury for which all related benefits have been or are being furnished. The

respondents have not controverted anything with regard to this claim, and there is a pending third party claim for which the respondents are asserting their third-party subrogation rights pursuant to Ark. Code Ann. §11-9-410. Furthermore, the respondents contend that no benefits are owed to the claimant pursuant to Ark. Code Ann. §11-9-505 because the employer never unreasonably refused to return the claimant to work or otherwise failed to furnish properly owed benefits. Respondents contend all permanent benefits owed to claimant have been paid in connection with the 7 percent impairment rating to the foot. The respondents reserve the right to amend their contentions and position in all respects after additional discovery has been completed.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The parties submitted documentation marked Joint Exhibit No. 1 and the deposition of Robert J. Wade marked Joint Exhibit No. 2. The respondents submitted the deposition of the claimant marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he considered himself an employee of the respondent and that he was still on the seniority list for the respondents' terminal in Van Buren. The claimant testified that he has been a member of the Teamster's Union for over eleven years and is familiar with the collective bargaining agreement as well as its supplements. The claimant testified that he began

working for the respondent in 1997 as a casual or part time employee and became full time as of October 1, 2000. The claimant testified that at the time he sustained the compensable injury to his leg he was a combination driver. The claimant explained that this job involved picking up and delivery, drive a truck, dock work, forklift operator, checker, and hostler.

The claimant testified and it has been stipulated that he sustained a compensable injury to his right leg. The claimant explained that he sustained a crushing injury to his lower right extremity which resulted in extensive tissue damage as well as nerve and bone damage. The claimant testified that after some bit of treatment he was released by Dr. Park and given restrictions of no loading and unloading and to avoid inclines. The claimant explained that because his foot will not bend it is difficult for him to negotiate an incline particularly going up the incline. The claimant testified that he does not have trouble with stairs.

The claimant was asked about the different types of collective bargaining agreements with the Teamster's Union. The claimant testified that there is a national portion of these agreements that covers everyone and then there is a local cartage which would cover local city pick up and delivery, one for over the road, one for garage that covers mechanics, and another agreement for clerical which covers office help. The claimant agreed that at the time of his accident he was working as a city driver. The claimant testified that the bargain agreement for over the road truck drivers prohibits loading and unloading. The claimant explained

that this would take work away from the local or city drivers. The claimant testified that city drivers are allowed to do loading and unloading of freight. The claimant testified that road drivers were not allowed to drop and hook their freight. The claimant testified that as a road driver he strictly drove and filled out his paperwork and log books. The claimant testified that there is also a pre-trip inspection. The claimant testified that understanding the requirements of a road driver as well as his physical limitations and restrictions, he feels he could do this job easily. The claimant testified that the respondent has been given his restrictions and was told that there was nothing available for him.

The claimant testified that he has checked on line for job positions with the respondent nationwide. The claimant testified that he saw numerous road driving jobs all over the country specifically one in Oklahoma City which he was interest in. The claimant identified pages 7 through 14 of the parties joint exhibit as the job postings on the respondents' web site. The claimant testified that he was most interest in the Oklahoma City job because it was close to his home but he would be willing to go anywhere to work. The claimant testified that he has not applied for any of these jobs because it seemed odd to him to apply to work for a company that he was already working for. The claimant testified that he would assume that if he applied for one of these jobs it would be viewed as he had quit his job and that he was reapplying for a new job. The claimant testified that this would

cause problems with his seniority which would ultimately cause him to lose his health care, insurance, wages, and pension. The claimant testified that he wrote a letter to the respondent requesting road driving work. The claimant testified that he specifically sent this letter to David Davis, the respondent's terminal manager. The claimant testified that he got no response to his letter. The claimant testified that he attended Mr. Davis' deposition and nothing that Mr. Davis said indicated that they were offering him a job at another terminal as a road driver. The claimant testified that Article 5, Section 5, of the National Master Freight Agreement sets forth that a road driver can transfer from one terminal to another if he requests his transfer in writing to his terminal manager. The claimant testified that if a transfer is made to another terminal, an employee does not lose his company seniority although he would lose his terminal seniority. The claimant explained that if one requests a transfer he goes to the bottom of the work list as to the seniority roster but he keeps his company seniority so he would have fringe benefits such as health insurance and vacation. The claimant testified that if he had ever been offered a road driving job anywhere he would have gladly gone through the process as listed in Article 5, Section 5.

On cross examination, the claimant testified that he was a combination driver and that there is a collective bargaining agreement controlling this position. The claimant testified that he is not an over the road driver and that they have an entirely different collective bargaining agreement. The claimant was asked

to read Article 40, Section 6, of the Collective Bargaining Agreement which covers over the road drivers. The claimant read, "Under no circumstances will out of classification employees be utilized in over the road operations." The claimant was asked if he was an out of classification employee and the claimant responded, "If I was to do road driving duties, yes. While I am actually a city driver and I was doing road driving duties, yes, exactly." The claimant agreed that he is not covered by the over the road agreement. The claimant agreed that the specific agreement that covers over the road drivers specifically excludes him. The claimant testified that he was not asking the respondent to violate their agreement but was only asking to be classified as a road driver. The claimant was reminded that the agreement specifically says that out of classification employees cannot be considered. The claimant replied, "At the same time. It means at the same time. It means that I can't do it as a city driver." The claimant testified that he does not want to have to resign his employment in order to reapply to be a road driver, he just wants a transfer.

The claimant agreed that he drew unemployment benefits in the amount of \$362.00 per week and held himself out as able and willing to work. The claimant testified that he felt like he could be transferred to a road driving job because these jobs did not require any pushing, pulling, loading, or unloading, just simply driving. The claimant testified that he was requesting a job out of his classification. The claimant testified that he feels like

his restrictions keep him from doing his city work but would not prevent him from doing road driving work.

David Davis testified on behalf of the respondent stating that he is the manager of the respondent's facility in Van Buren as well as Springdale. Mr. Davis testified that he has seven employees including the claimant at the Van Buren facility. This witness testified that he recalls the claimant giving him a note with his physical limitations listed. Mr. Davis testified that he did tell the claimant that there was nothing available for him because he did not have a full release to return to his job. Mr. Davis testified that in light of the restrictions which the claimant had, his job as a combo/city driver would have been in violation of those restrictions. Mr. Davis testified that to his knowledge, it is not possible for an employee to transfer from being a combo driver to that of an over the road position. Mr. Davis agreed that the claimant is covered by the local cartage agreement and in order for him to become an over the road driver, he would have to resign his position and be rehired at another facility just like any other employee. Mr. Davis testified that there are no over the road positions at the Van Buren facility. This witness indicated that his facility has only one classification of employees and that is a city driver/dock worker combination. Mr. Davis testified that this classification of employee is governed by a collective bargaining agreement separate and apart from the over the road driver agreement. Mr. Davis was told that the claimant was wanting to be reclassified and this witness testified that in his twenty-

three years with the respondent, he has never been aware of a reclassification. Mr. Davis testified that there is still a position available for the claimant and he is still considered an employee with the respondent. Mr. Davis agreed that but for the claimant's restrictions he would be back at work.

On cross examination, Mr. Davis testified that at both of his terminals he only has combination employees. Mr. Davis testified that when a road driver comes into their terminal, the city drivers/dock workers/combo employees would load and unload the freight. Mr. Davis testified that he was pretty familiar with the National Master Freight Agreement but not as familiar with the Road Driver's Supplement because he does not have road driver jobs at his terminal. This witness testified that he was very familiar with the city local/dock worker supplement to this agreement. Mr. Davis was asked if there was anything in the agreements that would preclude a city driver from dropping classification and transferring to a road driver position at another terminal. Mr. Davis testified that a union employee cannot leave one classification and change to another one without resigning and being rehired. Mr. Davis testified that there is no transferring from one classification to another. Mr. Davis explained that an employee would have to quit his job and reapply for another classification somewhere else because there was no transferring. Mr. Davis testified that after he received the letter from the claimant asking for a road driver position he forwarded this letter on to the corporate office. Mr. Davis testified that he talked to

Bob Wade about the claimant's request and that he was told that the claimant could not change classification. Mr. Davis stated again that the claimant would have to quit his position and apply for a different position in another location and even then his employment would depend on his qualifications for rehire.

On redirect examination, Mr. Davis testified that when he checked with Bob Sisk he learned that the respondent could not do anything for the claimant in regard to his request because he was not an over the road driver. Mr. Davis testified that with his years with the respondent, to his knowledge, there is no such animal as a transfer.

Matt Brazeal testified for the respondent stating that he has been with the company ten years as the employee relations manager. Mr. Brazeal was asked if there was any such thing as reclassification of an employee from a combo driver to be reclassified to an over the road driver and this witness stated, "No." Mr. Brazeal explained that there is a collective bargaining agreement which would prevent the respondent from reclassifying a combo driver to that of an over the road driver. Mr. Brazeal testified that the collective bargaining agreement does not provide for a reclassification such as the claimant is requesting. This witness testified that if they made a change such as the claimant is suggesting, it would result in grievances being filed by all the employees at the facility where the claimant would have been reassigned. Mr. Brazeal testified that such a move would be considered an unfair labor practice because they would be

essentially unilaterally changing the collective bargaining agreement without going through the bargaining process which is required by law. Mr. Brazeal referred to the parties joint exhibit dealing with the section on rehiring former employees. Mr. Brazeal then read from the third numbered paragraph of the exhibit stating that this is to address the notion of transfers;

“The policy of being off the seniority list for at least six months also applies if a union employee wishes to transfer to another location for reasons other than a change of operations. The employee may resign at the present location, then wait six months to be eligible for rehire at the desired location.”

Mr. Brazeal testified that this policy puts to bed the issue that employees can transfer because it is not provided for by the collective bargaining agreement. Mr. Brazeal testified that the policy specifically addresses transfers and what it is saying is that there really is no transfer. Mr. Brazeal stated that if the collective bargaining agreement allowed for the type of transfer or reclassification that the claimant was advocating, he would be able to file a grievance that the collective bargaining agreement was not being followed and the grievance committee could then order that the contract be complied with. Mr. Brazeal testified that in the claimant's case this has not happened because a transfer or reclassification is not covered under the collective bargaining agreement.

On cross examination, Mr. Brazeal was asked if the collective bargaining agreement specifically addresses the transfer of a city driver to a road driver position at a different terminal. This

witness responded, "The contract doesn't allow---there is no language in the contract that addresses that." Mr. Brazeal explained that the policy which he previously read that described the fact that there really is no transfer that one has to resign and be off for a period of time is in fact an interpretation of a fifty-year-old collective bargaining agreement with the Teamsters. Mr. Brazeal testified that one should look at a collective bargaining agreement as to what it is providing for the employees that they can enforce through a grievance procedure. This witness testified that the collective bargaining agreement provides what the rights for the employees are that they can enforce through the grievance procedure and if the right is not in the agreement, it does not exist. Mr. Brazeal agreed that a company can produce policy outside of the bargaining agreement but they cannot determine or set policy that is in violation of the collective bargaining agreement. Mr. Brazeal testified that if the claimant wants to be a road driver he would need to resign his employment, wait six months, then apply for an open position with the respondent, and then he would be considered along with any other applicants and if he is qualified and can pass the preemployment process, he would be hired.

On redirect examination, Mr. Brazeal was asked again if it was correct that Article 40, Section 6, of the over the road Collective Bargaining Agreement sets forth that, "Out of classification employees will not be considered." This witness responded, "That's correct."

On recross examination, Mr. Brazeal testified that if a city driver wants to be a road driver they need to resign, wait six months, and reapply.

Robert Wade testified by way of deposition stating that he was director of labor relations for the respondent. Mr. Wade testified that according to the respondent's policy there is no such thing as a transfer to another location that in order for an employee to change locations they must resign and then be rehired at another location. Mr. Wade was asked if the contract says anything about a city driver at one terminal wanting to transfer to another terminal to fill an available road driver position? This witness responded, "It does not necessarily speak to that issue although that's not done without, again, a resignation at one location and being rehired at another." Mr. Wade testified that the collective bargaining agreement addresses the rights of the employees that are covered by the agreement and if that right is not particularly or expressly addressed under the contract, they are not entitled to that right. Mr. Wade testified again that there is no transfer from one terminal to another other than under Article 5 and under the southern region and that only applies to over the road employees. Mr. Wade testified that this does not apply to garage, office or local pick up and delivery supplemental agreements. Mr. Wade testified that if an employee is going to transfer there is no such thing unless it is an over the road employee who is currently on letter of layoff and has been under letter of layoff for less than thirty days. Mr. Wade testified that transfers of road

drivers from one terminal to the other only applies to drivers who have been laid off from one location. Mr. Wade was asked if he has seen a road driver not on layoff that just simply wanted to go to a different part of the country would that be allowed? Mr. Wade responded, "That can't happen." This witness further explained that there is no provision that allows them to do that within the bargaining agreement. Mr. Wade read from Article 40 of the Collective Bargaining Agreement for over the road drivers and stated that this particular contract sets forth that no employee from any other classification may be used as a road driver. Specifically, Mr. Wade stated, "Under no circumstances will out of classification employees be utilized in the over the road operations in accordance with Article 40." Mr. Wade testified that the union's interpretation of that language is that no employees who are currently employed in any other classification other than over the road may perform over the road duties.

On cross examination, Mr. Wade testified that an over the road driver is a completely different classification from a combination driver such as the claimant. Mr. Wade was asked if a combo driver could transfer to another facility? Mr. Wade responded, "He can't." Mr. Wade testified again that there is no transfer available. Mr. Wade agreed that if the claimant was not an over the road driver he could not get to be an over the road driver and transfer and that the only way he could become an over the road driver is by resigning and starting all over again as a casual employee and work his way up.

Ark. Code Ann. §11-0-505(a)(2) sets forth;

In determining the availability of employment, the continuation in business of the employer shall be considered, and any written rules propagated by the employer with respect to seniority are the provisions of any collective bargaining agreement with respect to seniority shall control.

I find that based on Arkansas law that the claimant has failed to prove by a preponderance of the evidence that he is entitled to 505(a) benefits. It is not questioned that the respondent is a large corporation and has many different job opportunities, however, this respondent is covered by several different collective bargaining agreements, one in particular dealing with over the road truck drivers as well as the bargaining agreement covering combination drivers. These bargaining agreements make no provision for a transfer from one classification to another or even a transfer from one terminal or facility to another without the loss of seniority. The collective bargaining agreement for over the road truck drivers as well as the testimony of the respondents' witness and even the testimony of the claimant has indicated that if he wished to become an over the road driver he would need to resign his position as a combination driver, wait for six months and apply as an over the road driver at a terminal where there is a position available. Then, if he is qualified and can pass the preemployment test he is subject to rehire but loses any seniority which he might have acquired as a combination driver. The claimant has made it quite clear that it is his desire not to lose his seniority which he has acquired with the respondent as his reason

for not following the company's policy as to resignation, waiting period, and then reapplication for a new position. The claimant has testified that his permanent restrictions would prevent him from being able to perform the duties of a combination driver and the collective bargaining agreement covering over the road drivers prevents the claimant from transferring or being reclassified from a combination driver to an over the road driver. Based on the testimony and the documentary evidence submitted in this matter as well as Arkansas law, I find that the claimant has failed to prove that he is entitled to 505(a) benefits.

FINDINGS & CONCLUSIONS

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

2. On April 13, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his right foot on April 13, 2005.

4. The claimant is entitled to a weekly compensation rate of \$466.00 for temporary total disability and \$350.00 for permanent partial disability.

5. Medical expenses have been paid.

6. Respondents have accepted and paid in full a 7 percent impairment rating to the right foot.

7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to 505(a) benefits. The respondent has not unreasonably refused to return the claimant to work because

there is no suitable employment for him due to his permanent restrictions at his terminal where he was employed as a combination driver. The collective bargaining agreement covering over the road drivers specifically forbids a reclassification by an employee of the company who is currently under a different classification. Arkansas law clearly sets forth that provisions of any collective bargaining agreement shall control. See Ark. Code Ann. §11-9-505(a)(2).

ORDER

The claimant has failed to prove by a preponderance of the evidence that he is entitled to 505(a) benefits. Therefore, this claim for 505(a) benefits shall be denied in its entirety.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE