

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F611777

LARRY R. CAMPBELL,
EMPLOYEE

CLAIMANT

FAMILY DOLLAR STORES, INC.,
EMPLOYER

RESPONDENT

ACE AMERICAN INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 24, 2008

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by HONORABLE MARK A. PEOPLES, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on October 30, 2007, in Little Rock, Arkansas. A Prehearing Order was entered in this case on September 11, 2007. This Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the Prehearing Order or at the start of the hearing and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer/insurance carrier relationship existed on or about September 28, 2006, at which time the claimant sustained compensable injuries to his left knee and ankle, right elbow and wrist, back and neck.
3. The claimant last worked for the respondent approximately one week after September 28, 2006.
4. The claimant's appropriate compensation rates for Workers' Compensation are the maximum rates in effect for an injury sustained in 2006.

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

1. Temporary disability (temporary total and temporary partial).
2. A controverted attorney's fee.
3. Whether the claimant refused an offer of a return to work barring benefits under Ark. Code Ann. § 11-9-526.

The record consists of the October 30, 2007, hearing transcript and the exhibits contained therein.

DISCUSSION

The claimant sustained admittedly compensable injuries to his right elbow and wrist, back and neck, and left knee and ankle on September 28, 2006, while employed as "acting manager" at a Family Dollar Store. The claimant sustained these injuries during a physical confrontation with a customer suspected of shoplifting.

The claimant continued to work at Family Dollar Stores until Tuesday, October 3, 2006, when he turned in his keys to District Manager Ed Gray. Six days later, the claimant went to work as a night manager for Save-U-More, a large grocery store at the corner of Chicot and Baseline Roads in Little Rock. The claimant worked at Save-U-More for approximately two months, and then he drew 26 weeks of unemployment benefits.

The claimant treated in the emergency room at Baptist Health Medical Center at the end of his shift on September 28, 2006. He thereafter treated for a period with Doctors William Warren and Scott Carle at Concentra Health Centers beginning on October 3, 2006, and continuing until his

release from further care on November 13, 2006, by Dr. Warren.

The claimant thereafter received a change of physician to Dr. Harold Chakales and began treating with Dr. Chakales on March 28, 2007. The claimant remained under the care of Dr. Chakales at the time of the hearing held on October 30, 2007. Dr. Chakales opined in a letter dated September 3, 2007, that the claimant remains temporarily disabled. Dr. Chakales also proposed that the claimant undergo an MRI scan to the cervical and lumbar spine to rule out cervical and lumbar disc protrusions.

The claimant contends that he is entitled to temporary disability benefits from the date of his injury on September 28, 2006, and continuing through a date yet to be determined. The respondents contend that the claimant's healing period for his admittedly compensable injuries ended on or before November 13, 2006. The respondents also contend that the claimant was not taken off work by any physician and that although some restrictions were imposed on the claimant, the respondent employer offered the claimant work within those restrictions which the claimant declined. The claimant testified that this back and neck continue to give him problems.

Temporary total disability for unscheduled injuries, including a back injury, is that period within the healing period in which a claimant suffers a total incapacity to earn wages. An injured employee is entitled to temporary partial disability compensation during the period that he is within his healing period and suffers a partial decrease in his capacity to earn the wages that he was receiving at the time of the injury. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

To the extent that the claimant contends that his wrist injury renders him disabled from working, I note that a wrist injury is considered a scheduled injury. For a scheduled injury, the claimant is entitled to temporary disability benefits until the healing period ends or until the claimant returns to work, whichever occurs first. Wheeler Constructions Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2002).

An unsuccessful attempt to return to the workplace because of the effects of a work-related injury will not bar an award of additional temporary disability benefits.

Farmers Cooperative v. Biles, 77 Ark. App. 1, 69 S.W.3d 899 (2002); Roberson v. Waste Management, 58 Ark. App. 11 944 S.W.2d 858 (1997). On the other hand, pursuant to the provisions of Ark. Code Ann. § 11-9-526, "If an 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."

1. END OF HEALING PERIOD

After considering all of the evidence in the record, I find that a preponderance of the evidence establishes that the claimant's healing period for his compensable injuries ended on November 13, 2006, as the respondents contend. In reaching this conclusion, I have considered Dr. Chakales' subsequent progress notes and Dr. Chakales' September 3, 2007, opinion that the claimant remains unable to return to work, is temporarily disabled, and should undergo additional MRI scans of the cervical and lumbar spine and right knee. In assessing the weight to accord Dr. Chakales' opinions,

however, I note with interest that on May 2, 2007, Dr. Chakales received or reported an inaccurate history that the claimant had not worked since September of 2006. On April 18, 2007, Dr. Chakales took a history or reported inaccurately that the claimant had not had any diagnostic studies performed.

In fact, based on the claimant's complaints while being treated by physicians at Concentra, the claimant underwent an MRI of the lumbar spine and an MRI of the right wrist on November 9, 2006. In addition to diagnostic testing, the claimant also underwent a period of physical therapy while being treated at Concentra. The claimant has therefore already undergone the MRI to the lumbar spine which Dr. Chakales proposes. Since the physicians at Concentra had available to them the results of that MRI prior to rendering their opinion on November 13, 2006, and in light of the misstatements contained in Dr. Chakales' subsequent reports regarding no return to work after September and no diagnostic studies, I accord greater weight to Dr. Warren's release to return to regular duty and release from care on November 13, 2006, than the weight I accord Dr. Chakales' subsequent opinion regarding additional testing and disability on September 3, 2007.

2. INABILITY TO RETURN TO WORK/REFUSAL TO RETURN TO WORK

On the record before me, I also find that the claimant was not justified in quitting his job with Family Dollar Stores on October 3, 2006, and the claimant has also failed to establish by a preponderance of the evidence that he sustained any inability to work between September 28, 2006, and the end of his healing period on November 13, 2006.

At the hearing held on October 30, 2007, the claimant testified that he advised District Manager Ed Gray on numerous occasions that he was having problems with his "back and things, and he was always going to get something done and he never did it." The claimant testified that Mr. Gray finally told the claimant that if the claimant could not perform the job duties, then he (Mr. Gray) could do it himself and didn't need the claimant. The claimant testified that at that point he handed Mr. Gray the keys and said that he could not perform his duties. The claimant testified that he could not lift boxes, he could not bend down and pick up, and he could not unload trucks because his back and neck hurt. (T. 14-15)

Notably however, in his July 25, 2007, deposition, the claimant described the events surrounding his turning in his keys as follows:

I asked Ed Gray, after this incident happened, I said, Move me out of this store. I said, Move me to the one out there by my house, because they were needing a manager, and he flat refused to do it. He flat told me that he was not going to move me out of that store, and that's when me and him kind of had a few words about it. And I told him, Well, I said, you need to bring somebody else in here to train. Well, he kind of got smart with me and told me that he could run that store if he had to. So when he said that, I just took the keys off the ring and threw them to him and gave them to him, and that was on a Tuesday morning.

Q. How long after you got hurt was that?

A. That was -- I'm not for sure, but that was like -- I come in -- that was on a Thursday. I got hurt on a Thursday, I think it was. Friday morning, the truck come in. Saturday, Sunday. No stocking got done at all because my help was off. Monday. That was Tuesday morning at 9:30 when I told him, There's the keys. I said, I'm not going to -- I'm not dealing with these people down here no more because -- and it wasn't the people in the neighborhood. That guy didn't even live in the neighborhood. The whole time I was down there, I sent six people back -- I sent three people that just got out of jail for stealing, and there was six people total that I sent to jail in the little time that I was there. (R. Exh. 2 p. 11-12)

This testimony from the claimant's deposition indicates to me, by a preponderance of the evidence, that the claimant quit his employment with the respondent because Ed Gray refused to transfer him to a store in a different

neighborhood closer to his home and not because the work was incompatible with the claimant's physical restrictions following his work-related injury. I find that the claimant was not justified in refusing to return to work after October 3, 2006. I therefore find that the claimant's claim for temporary total disability benefits after October 3, 2006, is barred by the provision of Ark. Code Ann. § 11-9-526.

In reaching this conclusion, I recognize that the claimant was expected to work an extraordinary number of hours per week (from 6:00 a.m. to 9:00 p.m., seven days per week) both before and after the injury and accident on September 28, 2006. However, I also note that neither the emergency room physicians nor the physicians at Concentra placed any limitation on the number of hours that the claimant could work after September 28, 2006, but instead they placed their physical limitations on his stooping, pushing, pulling and lifting. In light of the claimant's testimony quoted above which indicates to me that the claimant threw his keys to Ed Gray when Ed Gray refused to transfer the claimant to another store, I do not find credible the claimant's testimony that he was in fact required to stop working at Family Dollar Stores and at

Save-U-More because each management position ultimately required him to lift and stock shelves in a manner which violated the physical limitations imposed by his physicians at Concentra. Moreover, I note that while the claimant was still working at Save-U-More, he had already been released to regular work with no restrictions on November 13, 2006, by his treating physicians at Concentra.

Because the claimant has failed to persuade me that the physical nature of his job duties and the physical limitations imposed by his physicians required him to terminate his employment at either Family Dollar Stores or Save-U-More, the claimant has failed to persuade me by a preponderance of the credible evidence that he sustained any incapacity to earn as a result of his compensable injury while in his healing period from September 28, 2006, until November 13, 2006.

For all of the reasons discussed herein, I find the claimant has failed to establish by a preponderance of the evidence that he is entitled to either temporary total or temporary partial disability benefits for any period at issue in this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer/insurance carrier relationship existed on or about September 28, 2006, at which time the claimant sustained compensable injuries to his left knee and ankle, right elbow and wrist, back and neck.
3. The claimant last worked for the respondent approximately one week after September 28, 2006.
4. The claimant's appropriate compensation rates for Workers' Compensation are the maximum rates in effect for an injury sustained in 2006.
5. A preponderance of the evidence establishes that the healing period for the claimant's admittedly compensable injuries ended on November 13, 2006.
6. The claimant unjustifiably refused to return to work within his capacity as manager for Family Dollar Stores beginning on October 3, 2006.
7. The claimant has failed to establish by a preponderance of the evidence that he sustained any incapacity to earn as a result of his

admittedly compensable injuries between September 28, 2006, and November 13, 2006.

8. The claimant has therefore failed to establish by a preponderance of the evidence that he is entitled to any period of temporary total disability compensation or temporary partial disability compensation for any period currently at issue in this claim.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge