

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F701227

DOROTHY JANE DURDEN, EMPLOYEE

CLAIMANT

**SOUTHEAST ARKANSAS HUMAN
DEVELOPMENT CENTER, EMPLOYER**

RESPONDENT

**PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED APRIL 30, 2008

Hearing before Administrative Law Judge Barbara Webb on January 31, 2008, Monticello, Drew County, Arkansas.

Claimant represented by Mr. F. Mattison Thomas, III, Attorney at Law, El Dorado, Arkansas.

Respondents represented by Mr. Richard Smith, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on January 31, 2008. A Pre-hearing Order was entered in this case on December 4, 2007. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as stated on the record are hereby accepted:

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

2. The employer/employee/carrier relationship existed at all relevant times, including August 10, 2006, when claimant sustained a compensable injury.
3. The claimant's earnings were sufficient to entitle her to a compensation rate of \$366.00 for temporary total disability and \$275.00 for permanent partial disability benefits.
4. Respondents have paid medical benefits, some temporary total disability benefits and a 5% anatomical impairment rating.

By agreement of the parties, the issues to be determined are as follows:

1. Claimant's entitlement to temporary total disability benefits for the period of February 1, 2007, to February 25, 2007.
2. Claimant's entitlement to benefits under § 11-9-505(a)(1) for respondents' refusal to return claimant to work.
3. Controversion and attorney's fees.

_____The record consists of a one volume transcript of the January 31, 2008 hearing, consisting of the testimony of Dorothy Jane Durden, Linda Adams, and Linda Amaden and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Claimant's Exhibit No. 1 (Memo dated 1/11/07); Claimant's Exhibit No. 2 (Return to Work Slip); Claimant's Exhibit No. 3 (Vocational Progress Report); Respondents' Exhibit No. 1 (Medical records with index).

DISCUSSION

The claimant contends that respondents failed to return the claimant to work after she was released by her doctor on February 1, 2007. The claimant was not returned to her previous employment until February 25, 2007, and was forced by her employer to take FMLA unpaid leave during this time.

The respondents contend that they have paid all benefits due in a timely fashion. Dr. Schlesinger ended claimant's healing period on January 26, 2007, with a 5% anatomical rating. Thereafter, respondents terminated temporary total disability benefits and began payment of the rating. The employer returned claimant to work as soon as they could identify a position within her restrictions. In the interim, she was allowed to take FMLA leave.

FACTUAL BACKGROUND

The claimant is forty-five years old. She has worked for the Department of Human Services since June 11, 2007. She was previously employed with the Southeast Arkansas Human Development Center, a division of the State of Arkansas. She worked as an instructor's assistant and a job coach in Pinewood Village in Warren, Arkansas, beginning in November of 1999. Durden testified that she was injured on August 11, 2006, while putting cardboard boxes in a bailer with some clients. As they were attempting to tie the boxes down, she fell backwards and hit the floor. She injured her back and ultimately sought treatment with Dr. Schlesinger. She continued to work under lifting restrictions while under the care of Dr. Schlesinger until January 26, 2007, when Dr. Schlesinger released her. She

explained that after the incident she continued doing the same job other than heavy lifting.

On January 11, 2007, the claimant was handed a letter by her immediate supervisor advising her, as follows:

Due to your Worker's Comp injury and being on light duty since 10/11/06, effective February 1, 2007, I am requesting that you submit a statement from your Doctor authorizing you to return to full duty. If you are not able to provide this, you will be placed off duty on Family Medical Leave Act. (LWOP if you have no accrued time). You are eligible for 12 weeks of FMLA from 01/01/07 - 12/31/07.

Durden was told that she would be placed on Family Medical Leave on February 1, 2007, when her leave time was exhausted. On February 1, 2007, she went home. She called about light duty work and was told that no light duty work was available. She hired an attorney. She explained that she was subsequently contacted by phone call and told that everything would remain the same despite a letter written from her attorney. Durden was next contacted by a vocational rehabilitation counselor but was called back to work before she could meet with her. In late February, she was contacted by her employer to return to work. She was placed in a job with the same description as the one she had prior to when she was told to go home. She was not reimbursed the leave time she had previously used for therapy and did not get credit for her FMLA time used from February 1 through February 26, 2007. She was making \$13.79 per hour and worked a forty hour week. She ultimately received a 5% rating and was paid at the rate of \$275.00 per week.

On cross-examination, Durden testified that she underwent a functional capacity evaluation on January 26, 2007. On January 29, 2007, Dr. Schlesinger found that the claimant had reached the end of her healing period and issued an impairment rating of 5%. She explained that she had used sick leave and annual leave for the times she went to therapy.

Judy Adams testified for the claimant. She was a registered nurse and served as superintendent for the Human Development Center for four years. She testified that she knew of the claimant's injury when the initial paperwork was filled out in August. She testified that in January it came to her attention that the claimant had been working light duty since August 10 but that proper procedure had not been followed. She explained that the supervisor did not have a light duty slip signed by a doctor or a doctor's excuse from the workers' compensation doctor. She explained that they handled the problem administratively by reassigning her to another light duty job. She testified that she thought, "Well, she's been working since August with a back injury, then maybe she needs some time off to let her back rest." She explained that based on her review of all the records, she told the supervisor to send the January 11 memo since they had not gotten anything from Dr. Schlesinger or Dr. Wharton until they could get something to put her back to work on full duty. She admitted that they did some things wrong. She explained that the first documentation she received was a letter from a lawyer with doctor's statements attached on February 7, 2007. She conferred with counsel and was advised not to do anything until he reviewed the records. She spoke with counsel

on February 21, 2007, and tried to reach the claimant. The claimant returned her call on February 23, 2007. She advised her to come back to work on February 26, 2007.

On cross-examination, Adams testified that the personnel officer may have had the proper documentation, but that she did not have it. She testified that the claimant's supervisor was aware that the claimant was on restrictions and taking time off for therapy and continued medical care. She explained that the claimant had been paid until February 2, 2007, when her leave ran out. She testified that it was the employee's responsibility to provide the records and that they did not receive any records until February 7, 2007. She agreed that the job that claimant was returned to on February 26, 2007, was similar to the job she had in August with the lifting modification. She explained that the claimant left work voluntarily in June of 2007 to work for another state agency.

She testified that proper procedures would have required personnel to follow up and get the report from Doctor Wharton and to get the doctor to sign a light duty job description before the employee is out the eighth day. In addition, the light duty slip should be re-signed by the doctor every two weeks. She explained that the claimant would have been provided continued light duty if the paperwork had been in place and that light duty was available.

Linda Amaden also testified. She is a claims manager for the Public Employees Claims Division of the Arkansas Insurance Department. She testified that Durden's claim was originally handled as a medical only claim since the

claimant had missed less than seven work days to her injury. She explained that the file was transferred to her on January 16, 2007, since the claimant was asking for lost time benefits. She testified at the time of the transfer, the file contained some medical records. She received the FCE report on February 5, 2007, and Dr. Schlesinger's letter dated January 26 on February 5, 2007. She testified that she sent the claimant a letter accepting the impairment rating and starting benefits from January 26, 2007. She explained that she did not pay TTD for the time missed prior to that time since she had not received any doctor's statements that she could not work. She testified that since the claimant was receiving permanent partial disability and was not working, she offered vocational rehabilitation. She explained that the claimant denied the vocational rehabilitation offer since she had been offered another job. She testified that the employers require the employee to furnish the off work documentation from the doctor and that it is sent to her by the employer, the doctor, of the claimant.

On cross-examination, she agreed that the records reflected that the claimant had missed twenty-one days for medical treatment due to her injury. She testified that she did not know how an employee recovered for the lost time in attending doctors, but did not consider time off to go to a doctor as temporary total. She also agreed that the claimant missed an additional twenty-six days while off work between February 1 and February 26. She explained that the claimant was receiving permanent partial disability benefits but was not paid for the lost time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed at all relevant times, including August 10, 2006, when claimant sustained a compensable injury.
3. The claimant's earnings were sufficient to entitle her to a compensation rate of \$366.00 for temporary total disability and \$275.00 for permanent partial disability benefits.
4. Respondents have paid medical benefits, some temporary total disability benefits and a 5% anatomical impairment rating.
5. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits for the period of February 1, 2007, to February 25, 2007.
6. Claimant's has proven by a preponderance of the evidence that she is entitled to benefits under § 11-9-505(a)(1) for respondents' refusal to return claimant to work from January 26, 2007 until February 25, 2007.
7. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

DISCUSSION

Temporary Total Disability Benefits

The claimant is entitled to temporary total benefits if she can satisfy a two-prong test: (1) claimant must be within her healing period; and (2) completely incapacitated from earning wages. Ark. Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing the injury, which continues until claimant is as far restored as the permanent nature of the injury will allow. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 459 (1994). The evidence demonstrates that the claimant reached the end of her hearing period on January 26, 2007, and was released to return to work with some limitations. Prior to that time the claimant had been released by her doctors to return to light duty work. Based on the preponderance of the evidence, I find that claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits.

At the hearing, claimant contended that she was entitled to benefits and/or restoration of leave time for twenty-six days that was used by the claimant for medical treatment in connection with her compensable injury. Respondents argue that claimant was on paid leave during all of this time. The claimant contends that she was wrongfully required to use accrued paid leave time to seek medical attention in connection with her compensable injury which would otherwise be available to her. Ark. Code Ann. § 11-9-807 provides:

(b) If the injured employee receives full wages during disability, he shall not be entitled to compensation during the period.

The evidence in this cases demonstrates that the claimant received her full salary from the date of her injury until January 26, 2007, and therefore would not be entitled to temporary total disability benefits during the same period of time. However, the question of whether Respondent could lawfully require the claimant to use her accrued vacation and sick leave while paying her full salary is addressed by the workers' compensation laws. The law is clear that this Commission does not have jurisdiction to restore leave time. Johnson v. Little Rock School District, 2002 AWCC 79 (April 4, 2002). Therefore, I find that any dispute the claimant has with the Respondent over the alleged inappropriate charging of claimant's vacation and sick leave must be under administrative remedies or other legal remedies available to public employees to enforce their statutory rights.

The claimant further contends that she is entitled to benefits as a result of the Respondent's refusal to return her to work from January 26, 2007 until February 26, 2007. Ark. Code Ann. §11-9-505(a) 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 to 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.

(2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

In order to establish her claim for additional benefits under this section, the claimant has the burden of proving that the following four requirements are met:

- (1) That she sustained a compensable injury;
- (2) That suitable employment within the claimant's physical and mental limitations was available with her employer;
- (3) That the employer refused to return her to work;
- (4) That the employer's refusal to return the claimant to work was without reasonable cause.

See Torrey v. City of Ft. Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

In Torrey, supra the Courts stated that:

At a minimum Ark. Code Ann. § 11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary.

The period of refusal lasts as long as the employer is doing business not to exceed the one-year limit for payment of additional benefits. *Id.*

In the instant case, it is undisputed that the claimant sustained a compensable injury, that suitable work was available, and that claimant was not allowed to work from January 26, 2007 until February 26, 2007. The respondents argue that their refusal to provide the claimant work for the relevant period of time was with reasonable cause. The respondents contend that claimant failed to provide medical documentation of her ability to return to light duty work.

At a minimum, Ark. Code Ann. §11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the

employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary. Torrey, supra. While the record in the present matter demonstrates that the respondents did allow the claimant to remain in the work force, the evidence establishes that the claimant was forced to go on FMLA unpaid leave for a period of twenty-six (26) days when work was available within the claimant's restrictions. Notwithstanding claimant's failure to provide medical documentation of her work restrictions, the evidence demonstrates that the employer was either in fact aware of the claimant's medical status or awareness should be imputed to the employer through its agents. Rickenbacker v. Congo Stove, Fireplace & Patio, Inc. 2001 AWCC 212 (September 26, 2001). Since the respondents did not comply with the announced guidelines of Torrey v. City of Fort Smith, supra, I find that the employer's refusal to provide available work to the claimant was without reasonable cause. Therefore, I find that the respondent-employer shall be liable to pay to the claimant the difference between benefits received and average weekly wages lost beginning January 26, 2007, until February 25, 2007, in accordance with Ark. Code Ann. §11-9-505(a)(1).

Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits for the period of February 1, 2007 through February 25, 2007. I further find that claimant has proven by a preponderance of the evidence that she is entitled to benefits pursuant to Ark. Code Ann. §11-9-505.

Controversion and Attorney's Fees

Based on my review of the evidence in this case, I find that the claimant's attorney is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded to the claimant as a result of the findings herein, one-half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

AWARD

Respondents are hereby directed and ordered to pay benefits and attorney's fees in accordance with the findings of fact and conclusions of law set forth herein. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809. *See, Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge
