

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F201197

WAYNE MACK,  
EMPLOYEE

CLAIMANT

USA TRUCK, INC.,  
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED NOVEMBER 18, 2003

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by HONORABLE STEPHEN SHARUM, Attorney  
at Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE RODNEY MILLS, Attorney  
at Law, Fort Smith, Arkansas.

Decision of the Administrative Law Judge: Affirmed and  
adopted.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal  
from a decision of the Administrative Law Judge filed May  
22, 2003. The Administrative Law Judge entered the  
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 25, 2002, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury to his neck and back on January 25, 2002.
4. Medical expenses have been paid.

5. Temporary total disability has been paid to March 8, 2002.
6. The claimant is entitled to the maximum compensation rate for the year 2002.
7. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment as recommended by his treating physicians for his compensable injury. Both Dr. Cheyne and Dr. Bernardo have recommended conservative treatment for this claimant's compensable injury and although the respondent has indicated that they would authorize treatment by Dr. Cheyne, the claimant has chosen to live in Mississippi, [sic] therefore, to transport the claimant back and forth for treatment with Dr. Cheyne would seem to be expensive and perhaps non productive, [sic] it is found that the treatment recommended by Dr. Bernardo in Mississippi, since it is much the same as what Dr. Cheyne had recommended, should be carried out under his direction.
8. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from March 23, 2002, to a date to be determined. The claimant as well as the respondents have testified that light duty work was offered to the claimant within his restrictions and he refused it without trying.
9. The respondents have controverted the claimant's entitlement to additional benefits.
10. Since no indemnity benefits have been awarded, no attorney's fee, by law, can be awarded.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing in part on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional

attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

\_\_\_\_\_ I concur in the majority's decision to affirm the Administrative Law Judge's award of additional medical benefits to the claimant. However, I respectfully dissent from the decision to deny the claimant any temporary total disability benefits.

The claimant was employed by the respondent as a long haul truck driver. During all times relevant to this decision, the claimant lived in Seminary, Mississippi. He suffered an admittedly compensable injury on January 25, 2002, while unloading his truck. The respondent initially accepted the claim as compensable and provided the claimant some medical treatment for the injury. However, the respondent later refused to pay the claimant any further benefits.

The dispute in this case revolves almost entirely around the respondent's insistence that the claimant relocate from his home in Mississippi to its terminal in Van Buren, Arkansas, where he could be employed in a light duty capacity and receive treatment from the physician chosen by the respondent. In this regard, the respondent notes that it has living quarters on site at the Van Buren terminal and would provide transportation to the claimant so that he could see its doctor and engage in light duty employment.

In March of 2002, the claimant traveled to the Van Buren/Fort Smith area to see the doctor designated by the respondent in Fort Smith. As a result of that visit, the claimant was released to light duty work with some restrictions. While in the Van Buren vicinity, the claimant met with a representative of the respondent. A considerable amount of conflicting testimony was offered at the hearing as to whether the respondent offered the claimant a light duty job within his restrictions. However, what is not in dispute is that whatever job the respondent might have had available for the claimant would have been at its Van Buren terminal.

In affirming the Administrative Law Judge, the majority has essentially adopted the respondent's contention

that since work is available within the claimant's physical restrictions at its terminal in Van Buren, Arkansas, the claimant is not entitled to receive any temporary total disability benefits since he has chosen not to relocate to the Van Buren area and accept the offered employment. The respondent justified its position on the theory that it has living facilities at the Van Buren terminal and is willing to allow the claimant to stay there while he is recovering from his injury.

The claimant asserts that he is justified in refusing any alleged offer of employment because accepting it would require him to leave his home, travel several hundred miles, and live at the respondent's truck terminal for a period of several weeks to a few months. The claimant testified that the living facilities referred to by the respondent are, in fact, dormitories which are intended for truck drivers who are making short layovers while their truck is being serviced or loaded. The claimant, who stayed in the facility while employed by the respondent, stated that the sleeping accommodations consist of bunk beds with group showers and a common lounge area. In the claimant's opinion, the facility is not adequate for long term living and is intended only for short layovers. The claimant also

objected to being required to relocate several hundred miles from his home in order to obtain medical treatment when comparable treatment was available near his place of residence.

The respondent contends that because it offered the claimant a job within his restrictions as provided for in Ark. Code Ann. § 11-9-526 (Repl. 2002), he is not entitled to receive temporary disability benefits during the period of his refusal.

Ark. Code Ann. § 11-9-526 provides as follows:

If any injured employee refuses employment suitable for his capacity offered to or procured for him, he 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.

While there was conflicting testimony as to what type of light duty job, if any, was offered to the claimant, correspondence contained in the record never specifies what type of employment the respondent was offering to the claimant. Further, the letters make it clear that any offer was contingent upon the claimant relocating to live at the terminal dormitory in Van Buren.

In a letter dated March 20, 2002 from Eugene Duncan, the respondent's Risk Management Supervisor, the following statements were made regarding the claimant's receipt of disability benefits:

We can appreciate the fact that you are in pain and recognize that there is no place like home. However, the workers' compensation system is a government program. Just like all government programs, there are strict rules and regulations that we must follow.

We will agree to direct you to a neurologist for further evaluation. To comply with the rules of the work comp program and enjoy the full benefits, you will need to return to Arkansas to see a neurologist here. If you chose to remain in Mississippi, we will still arrange for you to see a neurologist, but (sic) you will not enjoy the full benefits of the workers' compensation system. We will continue to pay the medical expenses, but we will not be able to continue with existing payments.

In a second letter dated April 23, 2002, directed to Mr. Daniel D. Ware, an attorney in Mississippi who was representing the claimant at that time, Mr. Duncan reiterates an offer of light duty in the respondent's Van Buren terminal. However, Mr. Duncan did not specify any particular job, but did remind Mr. Ware that the respondent would provide a sleeping facility and one free meal at its terminal.

In my opinion, the letters written by Mr. Duncan corroborate the testimony of the claimant, his son, and wife that no specific job was ever offered to him. Other than the vague statement that the job would be in "maintenance," no real job offer was ever made to the claimant. As close as the respondent came to a specific job offer was the statement from Mr. Duncan that, "we will find something for him to do." Of course, this offer was contingent upon the claimant relocating to Van Buren.

In a similar case, the Arkansas Court of Appeals held that such vague offers were not sufficient to constitute an offer of re-employment as that term is used in Ark. Code Ann. § 11-9-526. In Barnette v. Allen Canning Company, 49 Ark. App. 61, 896 S.W.2d 444 (1995), the Commission denied the claimant temporary disability benefits because of a supposed offer of re-employment which the claimant had unjustifiably refused. At the hearing, a representative from the respondent testified, "I have always been willing to put Debbie back to work on the trim line if she would come in and inquire about it." Testifying further, the witness also said, "I could still use her today if she wanted to do that type of work." The Court of Appeals reversed the Commission and held that this was not a

sufficient offer of re-employment to justify the termination of temporary total disability benefits.

Nonetheless, I do not believe the real issue in this case is whether the respondent offered the claimant a job within his restrictions. I find that even if the respondent did communicate a specific job offer to the claimant, conditioning the offer on him relocating several hundred miles from his home and requiring him to live in short-term dormitory housing is not a reasonable offer of re-employment as contemplated by the statute.

The respondent seems to be under the impression that it can condition the claimant's right to benefits on his living in or near its corporate headquarters. As Mr. Duncan stated in his March 20, 2002 letter to the claimant, "To comply with the rules of the work comp program and enjoy the full benefits, you will need to return to Arkansas to see a neurologist here."

No portion of the Workers' Compensation Act requires a claimant to live in Arkansas in order to receive appropriate benefits. If the respondent wanted to limit its workers' compensation liability to persons living in and around Van Buren, Arkansas, then it should only hire people that reside in that area. However, since it has chosen to

hire employees in other parts of the country, it should not be surprised that those employees want to live at their homes and not in a dormitory at a truck terminal.

In finding that the claimant was not entitled to temporary total disability benefits, the Administrative Law Judge stated that the living arrangements at the terminal were one of the deciding factors in the claimant's decision to not undertake the light duty work. She then commented that the claimant made no effort to try and live at the terminal to see if any offered light duty job would be within his capacity. However, the claimant testified that during his time of employment with the respondent, he had stayed in the terminal dormitory and, while it was suitable for a brief layover, it was not appropriate for long term residency.

In my opinion, the Administrative Law Judge's determination that the claimant is not entitled to temporary total disability benefits should be reversed. The respondent has made an untenable argument that a nebulous offer of re-employment at a job site located hundreds of miles from the claimant's residence is a reasonable offer of employment. I do not believe that the respondent is any more justified in conditioning the claimant's receipt of temporary total

disability benefits upon his relocation to Van Buren than its assertion that the only place that he could obtain medical treatment is from its doctor in Fort Smith. For that reason, I believe that the claimant should be awarded temporary total disability benefits from March 9, 2002 to a date yet to be determined.

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SHELBY W. TURNER, Commissioner