

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F107108

REGINALD L. PICKNEY,
EMPLOYEE

CLAIMANT

L A DARLING,
EMPLOYER

RESPONDENT

CONSTITUTION STATE SERVICES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 16, 2003

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

Claimant represented by HONORABLE ROY E. MEEKS, Attorney at
Law, Pocahontas, Arkansas.

Respondents represented by HONORABLE RICHARD A. LUSBY,
Attorney at Law, Jonesboro, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

This case comes on appeal by the claimant of an opinion filed June 6, 2003 by the Administrative Law Judge finding that the claimant had failed to prove by a preponderance of the evidence that he was entitled to benefits pursuant to Ark. Code Ann. § 11-9-505(a), and that in the event that the claimant was entitled to additional benefits under that section, that the respondents would be entitled to a credit for any temporary total disability benefits already paid as well as for any unemployment compensation hereby received by the claimant. In denying the claimant's claim for Section

505 benefits, the Administrative Law Judge found, inter alia, that the claimant's reliance on the seminal case of Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996), was not applicable to the instant case; and that the claimant was not entitled to benefits under Section 505 because, in construing the Arkansas Supreme Court's language in Davis v. Dillmeier Enterprises, Inc., 330 Ark. 545, 956 S.W.2d 155 (1997), he was not receiving temporary total disability benefits at the time.

After a de novo review of the entire record, we agree with the Administrative Law Judge that the claimant is not entitled to Section 505 benefits but for different reasons. Specifically, we find that the judge should have applied the four-part test set down in Torrey, supra, and that the claimant cannot meet his burden under the test, namely that his termination from employment, as part of a general layoff scheme where length of continuous service with the company was the controlling factor, was not unreasonable.

The claimant was a production line supervisor at the respondent's plant in Corning, Arkansas. He was a salaried employee and exempt from federal and state laws regarding overtime pay, meaning that he was able to work 50 hours per week before drawing overtime pay.

On June 11, 2001, claimant was involved in an automobile accident while driving from the respondent's plant in Corning to its plant in Paragould to pick up some parts. As a result of the accident, the claimant suffered injuries to his spinal column. The injury required him to seek medical care, which was paid for by the respondent. Following this injury, the claimant was told by his treating physician not to work during the period June 14 through June 18, 2001. After that time, the claimant returned to work with no restrictions.

On August 3, 2001, the claimant's physician restricted the claimant to 40 hours of work per week for the period of August 3 through August 23, 2001. The claimant produced a work slip with his 40-hour per week work restriction, and the respondent honored that restriction.

On August 17, 2001, the respondent terminated claimant's employment because of a company-wide general layoff. This was the second round of layoffs that had occurred at the plant, the first round of layoffs occurring on June 8, 2001. Five days after the second-round of layoffs, the claimant was released from his 40-hour per week work restriction.

Following his termination, the claimant submitted a claim to the Arkansas Workers' Compensation Commission contending that the respondent had violated provisions of Ark. Code Ann. § 11-9-505(a) (Repl. 2002). A hearing was conducted on March 28, 2003 on the issue of whether the claimant was entitled to additional workers' compensation benefits. During that hearing, it was stipulated that the respondents paid the claimant \$4,920 in temporary total disability. The respondents claim that this payment entitled them to a credit in the event that the claimant prevailed on his claim for additional benefits. In addition, the respondents claim a credit in the amount of \$2,664 for unemployment compensation the claimant received following his termination.

At the prehearing conference, the parties agreed to limit litigation to the following issues:

1. Whether the claimant was entitled to additional compensation pursuant to Ark. Code Ann. § 11-9-505(a).
2. Whether the respondents were responsible for penalties as a result of retaliatory discharge pursuant to Ark. Code Ann. § 11-9-107.

At the hearing however, the claimant dismissed his retaliatory discharge claim. Thus, the sole issue presented

for determination at the hearing before the Administrative Law Judge concerned the claim for compensation. Following the hearing and after the parties had submitted legal briefs, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over the claim.
2. The stipulations agreed to by the parties and contained in the prehearing order filed January 30, 2003, as well as the stipulations announced at the hearing are hereby accepted as fact.
3. The claimant did not have any physical or mental limitations after August 23, 2001.
4. The claimant has failed to prove by a preponderance of the evidence that he is entitled to any lost wages pursuant to the provisions of Ark. Code Ann. § 11-9-505.
5. The claimant withdrew his claim for penalties for retaliatory discharge pursuant to Ark. Code Ann. § 11-9-107.
6. In the event that the claimant is entitled to additional benefits which is hereby specifically denied, respondents would be entitled to a credit for any temporary total disability paid as well as for any unemployment compensation received by the claimant.
7. The respondents have controverted all benefits beyond those previously paid.

In his appeal brief, the claimant asserts three major issues: (1) The denial and dismissal of the claimant's Section 505 claim should be reversed because the Administrative Law Judge failed to properly analyze whether the claimant had met his burden of proof for entitlement to benefits under Section 505; (2) The denial and dismissal of the claimant's Section 505 claim should be reversed because the Administrative Law Judge erred in concluding that the receipt of temporary total disability benefits at the time of termination is a pre-requisite to entitlement to Section 505 benefits; and (3) The denial and dismissal of claimant's Section 505 claim should be reversed because the Administrative Law Judge erred in broadly construing the statute so as to require temporary total disability benefits as a pre-requisite to entitlement to Section 505 benefits.

The central issue in this appeal is whether the claimant has met his burden so as to entitle him to Section 505 wage-loss benefits. Section 505(a)(1) states:

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 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 such refusal, for a period not exceeding one (1) year.

Section 505(d) states for the purpose of this litigation that "the purpose and intent of this section is to place an emphasis on returning the injured worker to work. . . ."

The claimant asserts that the Administrative Law Judge failed to properly analyze whether the claimant had met his burden of proof for entitlement to benefits. The Full Commission agrees.

The polestar case in analyzing Section 505 claims is Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996). In that case, the Court of Appeals announced a four-part test that has to be met before Section 505 applies. The test is that: (1) the employee must prove by a preponderance of the evidence that he sustained a compensable injury; (2) suitable employment which is within the claimant's physical and mental limitations is available with the employer; (3) the employer has refused to return the claimant to work; and (4) the employer's refusal to return the claimant to work is without reasonable cause. Torrey, 55 Ark. App. at 230.

The Administrative Law Judge, however, did not rely on the test stated in Torrey, claiming that it was inapplicable. The Administrative Law Judge found that Torrey was distinguishable from the instant case in a number of significant ways. The Administrative Law Judge noted first that in the Torrey case, the City of Fort Smith did refuse to return the claimant to work, unlike the respondents in the present claim. Moreover, the City of Fort Smith in Torrey had work available within the former employee's physical limitations, but gave that work to an applicant who was not then an employee of the respondent. The Administrative Law Judge determined that because of the contrast in circumstances, that Torrey mandated a finding in favor of the claimant in this case.

While the Administrative Law Judge's ultimate conclusion is correct, which will be discussed below, we find that his opinion does not seem to have employed the four-part test in Torrey at all and that it should have. This is not a significant enough error to demand a remand since under our de novo review of the case, we can apply the test and arrive at a resolution.

With that in mind, the Torrey test as applied to the instant case would be as follows: (1) Did the employee prove

by a preponderance of the evidence that he sustained a compensable injury? Yes, as this was stipulated by the parties. (2) Was there suitable employment within the claimant's physical and mental limitations that was available with the employer? Yes. It was uncontested that the claimant returned to work as a production supervisor for the respondent after June 18 when the claimant's physician mandated time-off period had ended and that the claimant worked for the respondent following his injury for approximately two months before the second round of general layoffs.

The next two prongs of the Torrey test require more analysis: (3) Did the employer refuse to return the claimant to work, and (4) was that refusal without reasonable cause? In the Torrey case, the claimant had been a sanitation worker with the City of Fort Smith. He sustained an admittedly compensable injury to his back, and when he attempted to return to work, the respondent had advised him that there were no positions available that would meet his job restrictions, which included avoiding repetitive bending and lifting over 25 or 30 pounds. The claimant applied for different positions within city government and was not hired to fill any of those positions. The Commission in that case

reversed the Administrative Law Judge's ruling that the claimant was entitled to additional benefits under Section 505 because the city had refused to return the claimant to work without a reasonable cause for doing so. The Commission accepted the City's explanation. However, the Court of Appeals found that the Commission's interpretation of what was reasonable to be too narrow to allow for the true intent of the legislation, which was to allow injured workers to re-enter the workforce, to be realized.

Similarly, in Clayton Kidd Logging Co. v. McGee, 77 Ark. App. 226, 72 S.W.3d 557 (2002), the Court of Appeals held that the respondent had not returned the claimant to work when the employee had returned to his employer for a few days after his injury and was subsequently terminated. There, the Court affirmed the Commission's ruling that the respondent had refused to return the claimant to work, and that the refusal was without reasonable cause. In that case, the claimant sustained a lower back injury while employed as a log truck driver with the respondent. He took a few days off after his injury and then went back to work driving log trucks. However, one week after his injury the respondent advised the claimant that they "didn't need him any longer." The respondent claimed that the claimant was

terminated for allowing his wife to ride with him in the truck after he had been advised several times not to do so. The Commission found that the claimant had established that he returned to work and was capable of performing his work, and was doing his pre-injury job at the time that he was fired, and that there was work available within his restrictions at the time of his termination. The Commission found that the claimant's termination was unreasonable, holding that the claimant had met all of the elements of the Torrey test. In affirming the Commission's decision, the Court of Appeals found that the respondents' refusal to return him to work was unreasonable.

Finally, in Karen J. Cox v. Baptist Health, Arkansas Workers' Compensation Commission, Opinion filed April 25, 2002 (E709351), the Full Commission affirmed the opinion of the Administrative Law Judge finding that the respondent in that case was entitled to Section 505 benefits. There, the claimant was a licensed practical nurse and contracted a staph infection, which precluded her from working around patients. The respondent had terminated the claimant because she had been on medical leave of absence for more than a year, which was longer than the respondent allowed any employee to be on leave of absence. The respondent did

not re-hire the claimant for any positions that it had open. In its opinion, the Commission stated that an employer does not fulfill its obligation of assisting an employee's re-entry into the workplace (1) by simply making the employee aware of job openings that pay substantially less money, and (2) where the employer makes no attempt to return the employee to work in other job openings within the employee's physical and mental limitations that do pay a comparable salary.

These cases, however, can be factually distinguished from the instant case. In Torrey, the city refused to return the injured employee to work because of the employee's physical inability to perform his job duties. There was no attempt to return the employee to a job that was within his physical limitations, and the city admitted that it hired another employee because the other employee was more qualified. Similarly, there was available work within the employees' limitations in both Clayton Kidd Logging and Cox. In the present case, the respondent had returned the employee to work but terminated him because of prevailing economic conditions based on a continuous length of service criterion that would apply to other employees as much as it would the claimant.

On the other side of this is a 1997 Full Commission case of Pamela Haynes Yandell v. Darling Store Fixtures, Workers' Compensation Commission, Opinion filed November 10, 1997 (E507897). In this case, the claimant suffered an admittedly compensable injury to her lower extremity. She underwent arthroscopic surgery on her knee and was assigned a 7% anatomical impairment rating, which the respondents accepted and paid. The claimant had been released to regular duty work by her treating physician and worked regular duty for approximately one month before returning to her physician with complaints of continued problems with her knee. The physician placed the claimant on permanent restriction against any "prolonged standing." Shortly thereafter, the claimant was placed on mandatory layoff due to a slow down in work. The claimant contended that the respondent had refused to return her to work without reasonable cause, and conversely the respondent contended that the claimant was offered a permanent position within her physical limitations, but that following the layoff, there were no permanent jobs within the claimant's physical limitations. The Full Commission, in affirming in part and reversing in part the decision of the Administrative Law Judge, agreed with the respondents.

However, this case, too, can be distinguished from the instant case because in Yandell, the respondent asserted, and the Commission agreed, that the respondent had no jobs following the mandatory layoff that fit within the claimant's physical limitations. In the present case, the only limitation placed on the claimant was a restriction to a 40-hour work week. That limitation was lifted a week after the claimant was laid off. The respondent in the instant case does not assert that there was no job within the claimant's limitations. Instead, it argues that there was an overall business slow-down and that the claimant was merely one of the ones laid off based on a continuous-length-of-service seniority system.

While the purpose of Section 505 is for employers to try to return an injured employee to work, see Ark. Code Ann. § 11-9-505(d) (Repl. 2002), we do not see that section as mandating that injured employees receive preferential treatment over non-injured employees in the face of generally applicable staffing decisions in response to prevailing economic conditions over which the employer has no control. Indeed, subsection (c) of the statute states that the section is not to be construed as an exception to

the common law doctrine of employment at will. Ark. Code Ann. § 11-9-505(c) (Repl. 2002).

In light of the foregoing, we hold that the Administrative Law Judge should have applied the four-part test laid out in Torrey, supra. In the application of the test, however, we also hold that the claimant cannot meet his burden of proof. We find that his termination as a result of a general layoff based on continuous length of service with the company was not unreasonable. We see nothing in the record that would indicate that the general layoff or the basis used to determine who would be laid off was a pretext for terminating the claimant based on his compensable injury and subsequent work restrictions.

Because of our holding above, the remainder of the claimant's arguments are moot, and as such, we will not address their validity. The appeal is dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.