

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F112473

JERRY CANADA,
EMPLOYEE

CLAIMANT

TANKERSLEY FOOD SERVICE,
EMPLOYER

RESPONDENT

RISK MANAGEMENT,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 5, 2004

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

Claimant represented by HONORABLE GARY UDOUJ, Attorney at
Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE CAROL WORLEY, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed January 31, 2003 denying his
claim for benefits under Ark. Code Ann. § 11-9-505(a). The
only issue presented on appeal is whether claimant is entitled
to benefits pursuant to Section 505(a). After reviewing the
entire record de novo, the Full Commission reverses the
opinion of the Administrative Law Judge with respect to the
issue of claimant's entitlement to Section 505(a) benefits and
awards benefits to claimant pursuant to Section 505(a) for the
period of April 19, 2002 to May 30, 2002.

I. BACKGROUND

Claimant sustained an admittedly compensable injury to his foot on October 24, 2001 when he fell 20 feet onto a concrete floor. The facts relevant to claimant's claim for benefits under Section 505(a) are as follows. On March 20, 2002, claimant's treating physician issued a note restricting claimant from returning to work until May 2, 2002. Claimant was instructed by respondent's case manager to contact her every two weeks regarding the status of his claim and medical care. Claimant followed these instructions and contacted respondent's case manager on April 1, 2002 and April 19, 2002. On April 19, 2002, the case manager told claimant to contact respondent, which he did immediately. Respondent's Human Resource Manager, Lisa Morgan, instructed claimant to come to the company because the doctor had released him to return to light duty on April 8, 2002. Claimant explained that he was not aware of a release and had a doctor's note issued on March 20th releasing him from work until May 2nd. Later that day, claimant went to the company and met with Ms. Morgan and two other managers. The testimonies conflict as to whether claimant submitted the March 20th doctor's note to respondent on Friday, April 19th or on the following Monday. In either event, Ms. Morgan testified that she was unaware of the March

20th release until informed by claimant on April 19th, despite the fact that the case manager was aware of the March 20th release, and she further admitted that she did not have a copy of the doctor's note releasing claimant to light duty on April 8, 2002 until April 29, 2002. The doctor's note releasing claimant to light duty effective April 8, 2002, was dated April 29, 2002.

During the April 19, 2002, meeting between claimant, Ms. Morgan, and two other managers, claimant was told that respondent had sent him a letter via certified mail informing him of his release to light duty work and requiring him to respond by April 17, 2002. Claimant denied receiving the letter from respondent and the record reflects that claimant did not sign for the letter nor did he refuse the letter. Claimant's mail was sent to his step-father's address because claimant did not have a permanent home and lived with various family members and friends.

Also during the April 19, 2002 meeting, Ms. Morgan informed claimant of a light duty office job. Ms. Morgan testified that claimant was willing to take the job, even though it paid less than his former warehouse position, and that claimant told her that he was ready to come back to work. Ms. Morgan instructed claimant to call her the following week

regarding whether the light duty position was ready. Claimant contacted respondent as instructed on or about April 26, 2002 regarding the light duty position, but was informed that respondent was not willing to place him in the temporary, light-duty office position. Ms. Morgan told claimant that respondent was standing by the certified letter, which claimant did not receive, and relying on the doctor's release dated April 29, 2002 that released claimant to return to light duty on April 8, 2002. Respondent then terminated claimant. Ms. Morgan testified that she delayed in offering the light duty job to claimant in order to verify the status of delivery of the certified letter. Ms. Morgan testified at the hearing that she relied only on the doctor's light duty release when making the decision not to allow claimant to return to work:

Q: What did you rely upon in making the decision not to allow Mr. Canada to return to work?

A: The April 8th doctor's release to return to a sit-down job only.

Judge: You mean the April 29th doctor's release.

The Witness: Well, yeah. Yes, sir.

Claimant testified that he was able and willing to do the light duty job on April 19, 2002 because he needed the

money and respondent told him that he would be fired if he did not return to work. Ms. Morgan testified that respondent was willing to put claimant back to work in a light duty capacity because he was limited to a "sit-down only" job. She also testified that claimant was willing to work the light duty job.

The record also contains a letter from claimant's doctor explaining the origin of the two seemingly conflicting releases:

I did give him a work slip, dated 3/20/02 to 5/2/02. Shannon Moore, Mr. Canada's case worker, contacted my office and asked if Mr. Canada could do a sedentary job. I agreed. This was arranged through my assistant, Donna Miller. Donna actually filled out the work slip. Ms. Moore conveyed to us over the phone, that she would contact Mr. Canada and arrange for him to return back to work, if light duty was available.

Claimant reached maximum medical improvement on May 30, 2002 and was released to return to work with the following restrictions: no standing or walking for one and a half hours, no climbing, and no lifting over 50 pounds continuously. At the hearing, respondent's witnesses testified that respondent does not, and did not on May 30, 2002, have any positions available that met these permanent restrictions. The record reflects that respondent regularly makes a temporary, light

duty office position available to employees with restrictions and that it bumps the employee employed in that office position into another position in order to accommodate employees with temporary restrictions. Respondent's witness testified that the light duty office job is not available on a permanent basis.

In the Prehearing Order, the parties stipulated that claimant sustained a compensable injury to his right foot on October 24, 2001, claimant's average weekly wage was \$239.90 and that his weekly rates for temporary total disability benefits and permanent partial disability benefits are \$160.00 and \$154.00 respectively. The parties also stipulated that there was no dispute over the payment of related medical expenses, that claimant is entitled to temporary total disability benefits accruing through April 16, 2002, and that respondent is liable for permanent partial disability benefits for a permanent physical impairment of 19% to the foot commencing on May 30, 2002. Pursuant to the Prehearing Order, the issues litigated at the hearing were claimant's entitlement to additional temporary total disability from April 17, 2002 through a date yet to be determined; claimant's entitlement to benefits under Ark. Code. Ann. § 11-9-505(a) commencing on April 19, 2002; respondent's entitlement to a

credit for unemployment benefits received by claimant; and attorney's fees.

In an order entered on January 31, 2003, the Administrative Law Judge awarded claimant temporary total disability benefits from April 17, 2002 to May 30, 2002; held that Ark. Code. Ann. §§ 11-9-526 and 11-9-506 are not applicable to this case; and awarded claimant a reasonable attorney's fee on the additional TTD award. These issues were not raised on appeal. The Full Commission, therefore, affirms the Administrative Law Judges findings on these issues.

The Administrative Law Judge, however, denied claimant's request for benefits pursuant to Ark. Code Ann. § 11-9-505(a). This case is before the Full Commission on claimant's appeal of the denial of Section 505(a) benefits.

II. ADJUDICATION

Ark. Code Ann. § 11-9-505(a)(1)(2) provides:

(a)(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 such 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 the seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

"Before Ark. Code Ann. § 11-9-505(a) applies several requirements must be met. The employee must prove by a preponderance of the evidence that he sustained a compensable injury; that suitable employment which is within his physical and mental limitations is available with the employer; that the employer has refused to return him to work; and, that the employer's refusal to return him to work is without reasonable cause." See Edward Torrey v. City of Fort Smith, 55 Ark. App. 226, 230, 934 S.W.2d 237 (1996).

Respondent has argued only that claimant is not entitled to Section 505(a) benefits because claimant has not shown that suitable employment within his physical and mental limitations was available. The Full Commission finds that claimant has met his burden of proof and is entitled to Section 505(a) benefits.

As for the first factor, the parties have stipulated that claimant sustained a compensable injury.

With respect to the second factor, we find that claimant has also shown that suitable employment within claimant's physical and mental limitations was available with respondent from April 19, 2002 to May 30, 2002. The record reflects that respondent regularly makes a temporary light duty office position available to employees with restrictions and that it bumps the employee who normally holds that office position into another position in order to accommodate employees with temporary restrictions. In fact, on April 19, 2002, respondent's Human Resource Manager discussed that light duty office position with claimant. Respondent further admits that claimant readily agreed to accept the position and was eager to return to work. The record reflects that claimant followed the Human Resource Manager's instructions to contact respondent about the light duty position the following week. Ms. Morgan testified, however, that respondent did not permit claimant to return to work in this light duty position because it was "standing by" the doctor's release, dated April 29, 2002 which released claimant to work a light duty position effective April 8, 2002. Respondent does not dispute that the

temporary office position was available on April 19, 2002. Instead, Ms. Morgan testified that claimant was not permitted to return to work on April 19, 2002 because respondent was waiting to determine the status of the certified letter mailed to claimant. We find, therefore, that suitable temporary employment within respondent's light duty work restrictions was available from April 19, 2002 to May 30, 2002.

We find that the third factor is likewise satisfied because respondent does not dispute that it did not return claimant to work.

As for the fourth factor, we find that it is evident from the record that respondent acted unreasonably in terminating claimant and refusing to return him to work. In Congo Stove v. Edward Rickenbacker, 77 Ark. App. 346, 74 S.W.3d 238 (2002), the court affirmed the Commission's holding that the employer terminated the claimant without reasonable cause and that the respondent was liable to claimant for Section 505(a) benefits. In that case, the respondent terminated the claimant upon the claimant's attempt to return to work because the claimant allegedly failed to maintain contact with his employer. The Commission found that the employer's refusal to return the

claimant to work was without reasonable cause because the claimant was off work pursuant to a doctor's orders and an independent nurse, who was hired by the respondent, was aware that the claimant was off work pursuant to the doctor's orders. The court, therefore, affirmed the Commission's award of Section 505(a) benefits.

We find that respondent here likewise acted unreasonably. Respondent's case manager was aware that claimant's treating physician had released claimant from work until May 2, 2002. The case manager, however, unbeknownst to claimant, contacted claimant's treating physician to request that claimant be released to work a sedentary job. The record reflects that the doctor's office informed the case manager that claimant was released to work a sedentary position on April 8, 2002 and that the case manager was responsible for informing claimant of the release to light duty. Respondent's case manager also knew that claimant was only contacting her on a bi-weekly basis, as he was instructed. Further, both respondent and its agent, the case manager, were aware that claimant did not know that his doctor had released him to work a light duty position until April 19, 2002, as evidenced by the fact that claimant did not receive or refuse respondent's certified

letter and the case manager, who assumed responsibility of informing claimant of the April 8, 2002 release, did not speak with claimant until April 19, 2002. Respondent also terminated claimant with knowledge that claimant had not previously reported to work because he was relying on the March 20, 2002 doctor's note, which released him from work until May 2, 2002, and with knowledge that claimant was unaware of the April 8th light duty release, dated April 29th, until respondent notified him on April 19, 2002. Ms. Morgan testified that she relied on the April 29, 2002 light duty release when refusing to permit claimant to return to work. In light of these events, we, therefore, find that respondent's reliance on the April 29, 2002 release as a justification for terminating claimant was not reasonable.

Based on our de novo review of the entire record, the Full Commission finds that the respondents are liable to claimant for benefits under Section 505(a) for the period of April 19, 2002 to May 30, 2002.

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 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.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant was entitled to benefits under Ark. Code Ann. § 11-9-505(a). Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

In my opinion, the claimant presented little evidence to show that there were any actual employment

positions available that were within his physical and mental limitation. The respondents are not required to create a light duty position for the claimant in order to avoid liability under Ark. Code Ann. § 11-9-505(a).

Therefore, I must respectfully dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner