NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204575

DAN ALLEN, EMPLOYEE CLAIMANT

INTERNATIONAL PAPER COMPANY, EMPLOYER RESPONDENT

SEDGWICK CLAIMS SERVICES,
INSURANCE CARRIER RESPONDENT

OPINION FILED MARCH 29, 2004

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

Claimant represented by HONORABLE NEAL L. HART, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE MICHAEL J. DENNIS, Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed July 17, 2003.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The employee-employer-carrier relationship existed at all relevant times.

2. The claimant sustained a compensable right shoulder injury on February 28, 2001.

3. Medical benefits were paid.

4. The claimant is entitled to the maximum compensation rates.

5. The preponderance of the evidence reflects that the claimant is not entitled to benefits pursuant to A.C.A. 11-9-505(Repl. 2002.)

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.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's affirmance of the Administrative Law Judge's finding that Claimant's claim was not compensable under Ark. Code Ann. § 11-9-505(a). I find that Respondents are liable to Claimant for benefits pursuant to Section 505(a) because Claimant sustained an admittedly compensable injury, suitable employment within Claimant's limitations was available, Respondent refused to return Claimant to work and Respondent's human resource policy, which limits the period that an employee can work in a light duty position, is not "reasonable cause" and is contrary to legislative intent.

It is undisputed that Claimant sustained a compensable injury. Following his injury, Claimant worked for Respondent International Paper in a light duty position from May, 2002, to November 8, 2002, when the Respondent, pursuant to its "Restrictive Duty Policy," sent Claimant home and instructed him not to return until he was released to return to work without restrictions. On January 12, 2003, Claimant's physician issued a modified light duty release, which Claimant submitted to International Paper. Respondent International Paper, however, again refused to return Claimant to work until Claimant was fully released to return to work. On January 22, 2003, Claimant's physician

determined that he had reached MMI and gave him a 30% impairment rating. Claimant returned to work on February 4, 2003.

International Paper's "Restrictive Duty Policy" states as follows:

> Employees who suffer a work related illness or injury will be provided alternate work in the mill should the illness or injury prevent them from be able to perform the duties and functions of their job. The employee may be required to get a Functional Capacity Evaluation in order to determine the extent and validity of the restrictions so that potential alternate work may be suitably matched with the restrictions.
>
> Restricted duty will be provided for a maximum period of 90 calendar days. If by then the employee has not improved to where they can perform their regular job without restrictions they will be sent home until such time as they reach maximum medical improvement. Exceptions to the 90 calendar day period may be made with the approval of the EHS Manager or Human Resources Leader in cases where the employee is due to return to work shortly after the 90 calendar day period is up. In any case the exception may not exceed an additional 30 calendar days.
>
> Employees currently on work restrictions for either work related or non-work related medical conditions will be required to be evaluated by their physician and a provide documentation on their current medical status. If the restrictions still remain in effect the employee will then be given the 90 calendar day period to reach maximum medical improvement and have the restrictions lifted. If after the 90 calendar day period the restrictions are

> still in effect the employee will be sent home until they have a full release from their treating physician to return to work without any work restrictions.

Eric Roberts, International Paper Company's safety manager, testified that it was an oversight that Claimant was permitted stay on light duty beyond the 90 day period and that he discovered, through an audit, that Claimant had been working with restrictions in excess of the 90 day period. Mr. Roberts testified that he, therefore, informed Human Resources of that finding. Mr. Roberts interpreted the policy as follows:

> The light duty policy is based on a 90-day time frame extendable to 30 days beyond that, and the extension period is based on if there is closure potential, such as the employee has a release to come to work within that 30 days, the employee will reach MMI or have an MMI or an FCE to indicate MMI within that 30 days.

Mr. Roberts also stated that International Paper's objective is to not have light duty jobs at all:

> Q: You would admit, I would suppose, that International Paper has a rather broad range of light duty jobs available for employees who have been injured at work, would you not?
>
> A: Our objective is not to have light duty jobs at all.

The Majority, however, focuses on the rationale for the policy that Mr. Roberts gave in response to questioning regarding the purpose of the Policy:

> Statistics throughout the safety realm indicate that employees heal better when they come back to work, maintain the same wages, have medical staff on site to look at them, and basically, their lives go a lot better. Hence, a restricted or light duty policy. Now, on the other hand, there is a time frame in which if an employee is not healing, not being able to work through the elements that they have, there has to be a point where the employee is given an opportunity to go home, to not do physical work and to reset and heal their bodies. That, in my opinion, is what this is about.

It is undisputed that this policy is <u>not</u> part of a collective bargaining agreement and does not relate to seniority. Instead, Mr. Roberts described the policy as a "Human Resource policy" and Respondent, through its brief, similarly referred to the policy as being adopted by International Paper's Human Resource Department.

To establish a claim for benefits under Ark. Code Ann. § 11-9-505(a), Claimant must show:

> (1) That he sustained a compensable injury;
>
> (2) That suitable employment within claimant's physical and mental limitations was available with the employer;
>
> (3) That the employer refused to return Claimant to work;

> (4) That the employer's refusal to return Claimant to work was without reasonable cause.

See Edward Torrey v. City of Fort Smith, 55 Ark. App. 226 (1996).

As for the first element, the parties have stipulated that Claimant sustained a compensable injury.

Claimant has also clearly met his burden of proof with respect to the second element of Section 505(a). As in Kevin McGee v. Clayton Kidd Logging Co., Full Commission Opinion filed August 28, 2001 (E904834) (aff'd 77 Ark. App. 226 (2002)), Claimant was working in a light duty position within his physical and mental limitations, and had been for approximately six months, at the time the Respondent sent Claimant home. In McGee, the Commission found that this element was met where the claimant was fired while working: "the only rational conclusion that can be drawn is that the claimant has established that work was available with the respondent within his physical and mental restrictions at the point in time that he was fired, since the claimant was in fact actually performing said work at the time he was fired." (emphasis in original). Likewise, here, Claimant was working in his light duty assignment at the time that Respondent sent him home in November, 2002. Further, Claimant testified that, during a visit to the plant after he was sent home in November, 2002, he saw other employees

working in light duty positions. While the Majority appropriately recognized that an employer is not required to create a light duty position, they have failed to distinguish that a light duty position was available to Claimant here and that Claimant was working in that position at the time he was sent home in November, 2002.

As for the third element, Claimant has also met his burden of proof because on November 8, 2002, the Respondent employer refused to permit Claimant to continue to work the job that was within his physical and mental limitations until Claimant reached MMI and was released by his physician to return to work. Additionally, Claimant obtained a modified light duty release from his physician on January 12, 2003, and submitted it to Respondent, but Respondent still refused to return him to work until he was completely released by his physician.

As for the fourth element, I find that the Majority has erred in holding that Respondent was not liable under Section 505(a) because their reasoning is premised on a conclusion that Respondent's "human resource policy" is reasonable cause.

The Majority's errs in relying on the analysis of Carol Ball v. American Standard Oil/Trane, Full Commission Opinion filed June 1, 1998 (E502375) in reasoning the instant policy is "reasonable cause." In Ball, the

Commission found that an employer’s compliance with the seniority provision of a collective bargaining agreement is “reasonable cause,” pursuant to the elevated protection that Section 505 affords to seniority provisions within collective bargaining agreements. There, the human resource manager testified that under the terms of the seniority provision of the collective bargaining agreement, the employer/respondent was only able to temporarily place an employee in a position for which she was less senior and the procedure was such that “after a period of weeks if we are still unable to correct that [the seniority issue], then we usually have to back off of it and do a more permanent placement,” which required the employer to follow the seniority steps of the labor agreement to re-assign the employee to a seniority appropriate position. The claimant was eventually removed from her temporary assignment because the union objected to her extended placement in a more senior position. The Commission, therefore, held in favor of the respondent because the union viewed the claimant’s extended placement in the more senior position as a permanent placement.

Here, unlike Ball, it is undisputed that International Paper’s policy is not part of a collective bargaining agreement and is not a seniority provision. This distinction is crucial because the policy at issue here is

not a seniority provision and, therefore, does not get the benefit of elevated protection under Section 505(a)(2). It is evident that the terms of the labor agreement in Ball turned an employee's temporary restriction into a permanent placement. Nevertheless, the Majority has relied on Ball and reasoned that the employer was not required to create a permanent position and that such a permanent position would run afoul of the 90 day policy. However, there is no evidence that Claimant Allen required permanent placement in a restricted position. In fact, a few months after being sent home in November, 2002, Claimant returned to work in February, 2003. Further, all of the doctor's notes in the record establish the Claimant was under temporary work restrictions and received temporary disability benefits.

I further find that International Paper Company's light duty policy is contrary to legislative intent as recognized by the courts: "'In reviewing the pertinent sections of the Act, we find that the legislative intent that the injured worker be allowed to reenter the work force permeates the language of the sections of the Act.'"Clayton Kidd Logging Co. v. Kevin McGee, 77 Ark App.226, 231, 72 S.W.3d 557 (2002) (quoting Edward Torrey v. City of Fort Smith, 55 Ark. App. 226, 230, 934 S.W.2d 237 (1996)). Moreover, in Torrey, supra, the court, in construing what constitutes "reasonable cause" under Section 505(a),

recognized that Section 505(4)(d) provided that "The purpose and intent of this section is to place an emphasis on returning the injured worker to work, while still allowing and providing for vocational rehabilitation programs when determined appropriate by the Commission."

In Torrey, the court rejected the respondent's argument that it had reasonable cause for not returning the claimant to work. There, the respondent argued that there were no positions available that would accommodate the claimant's work restrictions. While the respondent encouraged the claimant to apply for open positions, it ultimately did not hire the claimant for any of those open positions and hired a "more qualified" applicant hired instead. While the Commission "accepted this explanation and found that [the respondent] had demonstrated that reasonable cause existed for not rehiring [the claimant]," the court rejected this explanation and found that such an explanation "allows the employer to nullify the stated legislative purpose while exercising minimal effort to return the employee to work. Likewise the Commission's interpretation allows subjective reasoning to factor into what constitutes reasonable cause, whereas an objective standard is more compatible with the legislative intent and purpose." The court also held that 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." Torrey, 55 Ark. App. at 231.

Respondent's policy similarly circumvents the injured workers' right to return to work pursuant to Section 505(a). Further, enforcement of such a policy would encourage other employers to implement similar policies that impair an employee's ability to return to work despite the fact that those employers, as did Respondent here, may have light duty work within an employee's physical and mental limitations available.

For these reasons, I find that Respondents are liable Claimant for benefits pursuant to Section 505(a) and the Administrative Law Judge's opinion should be reversed.

SHELBY W. TURNER, Commissioner