

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212615

MICHAEL D. KING,
EMPLOYEE

CLAIMANT

TREE HOUSE DEVELOPERS, LLC,
EMPLOYER

RESPONDENT

CINCINNATI CASUALTY COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 27, 2004

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

Claimant represented by HONORABLE MARK PEOPLES, Attorney at
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE ANDY L. CALDWELL,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed July 24, 2003. The administrative law judge
found that the claimant failed to prove he was entitled to
additional temporary total disability compensation. The
administrative law judge also found that the claimant failed
to prove he was entitled to benefits pursuant to Ark. Code
Ann. §11-9-505(a). After reviewing the entire record *de*
novo, the Full Commission reverses the opinion of the
administrative law judge. The Full Commission finds that
the claimant proved he was entitled to temporary total

disability from August 21, 2002 through January 31, 2003. The claimant proved he was entitled to benefits pursuant to Ark. Code Ann. §11-9-505(a) from February 1, 2003 through August 21, 2003.

I. HISTORY

The claimant, Michael King, agreed on cross-examination that he left a previous job in about 1991 after he shoved his employer in the chest. Mr. King agreed that in 1998, he punched a co-employee after the other employee "threatened me." The claimant testified that he began working for Tree House Developers in about July 2001. The parties stipulated that the claimant sustained a compensable injury to his eye on July 30, 2002. Doris Ann George testified that she was a secretary and "expediter" for the respondent-employer. Ms. George testified that the claimant reported the work-related injury to her, and that she subsequently accompanied the claimant for emergency medical treatment. Ms. George testified that after the claimant received medical treatment, "He did try to come back to work. He did come back to work at periods of time. It was hot summertime. He was sweating, of course, and the sweat was running in his eyes, and it would bother him and irritate him, so he would

go home." The claimant's attorney examined Ms. George at deposition:

Q. At some point, were you contacted by Dr. Murphy's office?

A. Yes, I was....

Q. What were you told?

A. They told me that Mike had been in the clinic that morning and been disruptive, that he had a 1:00 o'clock appointment, and he came in that morning and demanded to see the doctor that morning. And because he raised such a big stink and was loud and disruptive, they took him in and put him in another room and called me....

Q. What was discussed in any subsequent telephone call?

A. At some point, they - he had come back over there. They called and told me he had come back over there and was again loud and disruptive, that - and at some point and time of the day, I called them.

Q. Why did you call them?

A. To ask them again exactly what had happened, so that I could call my boss and tell him....After our first conversation with the doctor's office, he came in and told me that he had been over there. He had just come from there....They had told him to go to another clinic to have a test done. And he wanted me to call over there to the next office and give them the information that he was a workers' comp, to get it set up, because in a day or so, the next day or so, he was supposed to go over to the other office, the third doctor's office and have a test. And he wanted me right then to give - call them and give them the information....

I had somebody sitting this close to me at the time. When he came in, he walked between us, walked up close to me, interrupted our conversation, demanded that I call them right then, and I told him I would - in a few minutes, I would call, tell me the doctor's office. He would not have it. He wanted me to call right then....There were other people in the office. There was the office manager, there were tenant people, prospective people coming in and out, construction workers coming in and out....

Q. When Mr. King came in and got right between you and Mr. Robinson and demanded that you tend to his business right now, tell me what transpired next. How did you respond? What happened?

A. I took the card that he gave me, or the person's name at the clinic that he had told me, made my apologies to the person sitting with me, wrote down the information, called the office and told them....

Doris George testified that the claimant later "came in the office several times, was very mad, agitated, in my face. He went back and forth to that clinic a couple of times that day. I spoke with them. They told me that he had been over there, had been disruptive again, had told them that I had spoke - that his employer had talked to them, and he was mad about it....At some point in time, I felt threatened by him in that I was afraid of him." The claimant denied on cross-examination that he had been "confrontational" or "loud" with Ms. George.

The claimant testified:

A. I was scheduled for a work-in to have my blood examined. On this particular day, the medical doctor's office was full and they couldn't get me in, so I went back to Dr. Murphy's office where his assistant Kim sent me to Saint Mary's to have the blood work done. While I was at Saint Mary's, I called Doris at the job site and I told her that they -

Q. Doris is an employee of Tree House?

A. Yes, she's the job site secretary....And I told Doris that they may possibly be calling to confirm that I had insurance and Doris said, -

Q. You can say what Doris said.

A. Okay, and so Doris said, Mike, you're not following procedure, you need to go back to the medical doctor's office and I told her that it was doctor, that I was following procedure, that it was Dr. Murphy's office that sent me to the hospital. And so, I went back to the medical doctor's office and when I got there, they said that we don't do blood work here. Go back to Dr. Murphy's, so I went back to Dr. Murphy's, again, and they told me, gave me a form and said go ahead and go to the hospital, which was next door. I went ahead and went there, had the blood work done, and then they gave me a form with all the work that was done and I left and went back to the job site and I gave that sheet of paper to Doris and at that time, she told me that Brad had, Brad Edders had said that if I wasn't going to follow procedure, that I was going to lose my job. So, I told her that I would go home and I would call Brad. So, I went ahead and made the phone call to Brad and he said Mike, we received a phone call from Dr. Murphy's office that you had pitched a fit, you were belligerent, you had the staff half scared to death and that dad and I have talked it over and we no longer need your services, you're fired and he hung up....

Q. Okay, did he tell you why you were being fired?

A. Yes, he said that I had pitched a fit at the doctor's office.

Q. Did you pitch a fit at the doctor's office?

A. No.

Q. Did you raise a ruckus at the doctor's office?

A. I - never.

Q. Were you disruptive at the doctor's office?

A. No.

Ms. George testified at hearing that the claimant was fired on August 21, 2002. Brad Edders agreed in testifying for the respondents that the claimant's employment was terminated on August 21, 2002. Mr. Edders testified that he had spoken with Kim Patterman in Dr. Murphy's office, and that Ms. Patterman "had told me she was frightened." Mr. Edders testified:

Q. At some point that day, did you talk to Mr. King?

A. Yes.

Q. And, was that by phone or in person?

A. That was by phone.

Q. And, what was the nature of the conversation?

A. Prior to that conversation, I had spoken with my dad concerning these events and we were in

agreement and I informed Mike that he was no longer, his services were no longer needed.

Q. And the reason for that was?

A. His behavior at the doctor's office and the frustration that we had had concerning the doctors visits and the procedure not being followed.

Q. When you spoke that, during the course of that day, did she articulate any reasons for being scared or that he had caused a ruckus when he had come in to see her?

A. Not in the initial conversations, I informed Doris of our decision to let Mike go. She told me she was frightened of him and I informed her that if he came back, to call the police.

Dr. David S. Murphy, of Russellville Eye Clinic, wrote on September 24, 2002, "Patient has been off work for medical reasons related to his eye problem....To our knowledge, the patient has followed care instructions appropriately at and between visits. This letter is written at the patient's request and at no time did anyone call from our office to the patient's employer....The patient is now cleared to return to normal activities."

Dr. Robert L. Berry wrote to the claimant's attorney on January 26, 2003:

First, I doubt if he's reached maximum medical improvement since he still has slight anterior stromal haze noted in the right eye on his last visit at the end of December. That is a very small defect. Second, I do not happen to have a copy of the AMA guidelines fourth edition to

assign an appropriate anatomical impairment but if you have a copy then if you'll fax the relevant section I'll be happy to work on it. Third, I would not impose any permanent work restriction on him. Fourth, the course of treatment for him has been noted in his chart and basically is anterior stromal puncture or chronic use of topical lubricants at night. Fifth, Mr. King has probable recurring erosion syndrome and that can give occasional difficulty for months interspersed with long periods of completely normal sensation....

Mr. King claimed entitlement to additional worker's compensation. The claimant contended that he was entitled to temporary total disability compensation from September 19, 2002 through a date yet to be determined.

Alternatively, the claimant contended that the respondents refused to return him to work at suitable employment, although such employment was available. The respondents contended that the claimant was still on medical leave in August 2002. The respondents contended that the claimant "became belligerent at his doctor's office and also with the job site security, and that his employment was terminated as a result of this behavior." The respondents contended that the claimant was not entitled to additional benefits.

The parties deposed Kim Patterman, a medical assistant with Dr. Murphy, on March 27, 2003. The claimant's attorney examined Ms. Patterman:

Q. Do you remember in August of 2002 a Mr. Michael King coming into the clinic?

A. Yes, sir....He had gotten a foreign body in his eye.

Q. And he was seeking treatment with Dr. Murphy?

A. Yes.

Q. Now, at any point, did an altercation occur at your office?

A. No....

Q. Did Mr. King raise a ruckus in the eye clinic?

A. No, he didn't raise a ruckus.

Q. As I understand it, it became necessary at some point for you to call his employer, and you talked with a woman. Is that - tell me what you remember about that.

A. Okay. What I remember is Dr. Murphy needed some lab work done because we could not get his eye healed. Now, this had been going on for a while, and the eye is looking worse, and Mr. King is getting concerned. He's getting scared, "Am I going to lose my eye?" he's asking. His vision is going down, and we can't figure out why - what is the deal, and so Dr. Murphy says - you know, we put a contact lens in, which is a bandage lens that we put to help heal, which didn't help much. The next step would be, "Let's do some testing. Something else might be going on that we're just not aware of that may be prohibiting the healing process." So I said, "All right." We're right next door to St. Mary's, and we got the St. Mary's lab for him. Mr. King is not from this area. He has no doctor, we don't know who to send him to. Generally when that happens, we always send them to Dr. Mann, because he can get them in the quickest, and it's easier to work them in....

Then I get a phone call from this lady. I didn't know who in the heck she was, you know....The next thing I'm hearing, he comes back, and he's really upset then and confused.

Q. Now, you say he's upset and confused?

A. Well, he was agitated, and he was concerned. He felt like he was given the runaround, because he was having to go here, having to go there, didn't understand why. I guess I didn't make it clear enough to him, "You're going to be a work-in. It's going to take some time." ...

Q. But at that time did he - was there any altercation, did he raise a ruckus, did he raise his voice?

A. No, you know, when a person gets scared, well, yeah, they're going to raise their voice a little. I mean, I get that all the time, all the time here, because when people come in, they're concerned, they're confused. They don't know why they're having to do half this stuff, because they don't hear what we're saying.

Q. Was he belligerent and loud?

A. Oh, no.

Q. Did you have to take him back into the examination room for fear that he was going to -

A. Oh, no.

Q. - cause a problem in the waiting area?

A. No, no. No, I brought him back here with me, because that is what I do for a person to person contact. I mean, things out in the lobby that's medical and that's personal, you don't talk out there.

Hearing before the Commission was held on May 8, 2003. The claimant testified that he had returned to work for another employer "around the last of January, this year." The administrative law judge found that the claimant failed to prove he was entitled to any additional temporary total disability compensation. The administrative law judge also found, "The claimant failed to establish by a preponderance of the evidence that the respondents failed to return him to work without reasonable cause." The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Temporary disability

The parties stipulated that the claimant sustained a compensable injury to his eye on July 30, 2002. The claimant's compensable injury was a scheduled injury. See, Ark. Code Ann. §11-9-521(a); Federal Compress & Whse. v. Risper, 55 Ark. App. 300, 935 S.W.2d 279 (1996). An employee with a scheduled injury is entitled to temporary total disability compensation during the time that he remains within his healing period and has not returned to work. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). In the present matter, the Full Commission finds that the claimant proved he was entitled to

temporary total disability from August 21, 2002 through January 31, 2003. The record indicates that the claimant remained within his healing period for the compensable injury as of August 21, 2002. The respondents' termination of his employment did not cut off the claimant's right to temporary total disability compensation. See, Hetland v. Con Agra Frozen Foods, Workers' Compensation Commission E402217 (June 11, 1998). Dr. Murphy doubted as of January 2003 that the claimant had reached maximum medical improvement for his compensable injury. However, the claimant testified that he had returned to work for another employer "around the last of January" in 2003. The Full Commission therefore finds that the claimant proved he was entitled to temporary total disability compensation from August 21, 2002 until January 31, 2003.

B. Return to work

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.

The administrative law judge found that the claimant failed to prove he was entitled to benefits pursuant to Ark. Code Ann. §11-9-505(a)(1). The Full Commission reverses this finding. In order to prove entitlement to benefits pursuant to Ark. Code Ann. §11-9-505(a)(1), the employee must establish (1) that he sustained a compensable injury; (2) that suitable employment within his physical and mental limitations was available with the employer; (3) that the employer refused to return the employee to work; and (4) that the employer's refusal to return the employee to work was without reasonable cause. Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

In the present matter, the claimant (1) sustained a compensable injury. The record indicates that (2) suitable employment within the claimant's physical and mental limitations was available with the employer. We find that the respondent-employer's termination of the claimant constituted a (3) refusal to return the employee to work. Finally, the Full Commission finds that (4) the employer's refusal to return the claimant to work was without reasonable cause. The preponderance of evidence before the Commission does not show that the claimant's behavior was in any way threatening, improper, violent, or aggressive toward

anyone. The respondents point out the claimant's admissions of shoving his boss in 1991 and striking a co-worker in 1998, both incidents occurring with previous employers. Nevertheless, the claimant did not shove or strike anyone in the present matter, nor does the evidence indicate that the claimant threatened to do so. The parties stipulated that the claimant sustained a compensable injury to his eye in July 2002. We note that the claimant had been working for the respondent-employer for about one year. The respondents initially provided medical treatment for the claimant's compensable injury, but some confusion arose with regard to who the claimant would treat with and/or where the claimant would treat for what his doctors thought was a serious injury. This confusion had nothing to do with any action on the claimant's part, nor does the record show that this circumstance resulted from a "failure to follow proper procedure" by the claimant.

The Full Commission does not find the testimony of Doris George to be credible. Ms. George testified that Dr. Murphy's office contacted her because the claimant was "raising a big stink" and was "loud and disruptive." Yet Dr. Murphy wrote in September 2002, "To our knowledge, the patient had followed care instructions appropriately at and

between visits....at no time did anyone call from our office to the patient's employer." Kim Patterman with Dr. Murphy's office emphatically and repeatedly denied that the claimant's behavior was in any way disruptive, violent, or threatening. Brad Edders terminated the claimant's employment purportedly because of "His behavior at the doctor's office and the frustration that we had had concerning the doctor's visits and the procedure not being followed." The respondents state on appeal, "the termination of the Claimant was based upon his misbehavior at Dr. Murphy's office." Nevertheless, neither Dr. Murphy nor his assistant could identify any such misbehavior. In addition, as we have determined *supra*, the record does not show that the claimant improperly failed to "follow procedure."

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he was entitled to temporary total disability compensation from August 21, 2002 through January 31, 2003. We find that the claimant proved he was entitled to benefits pursuant to Ark. Code Ann. §11-9-505(a)(1) from February 1, 2003 until August 21, 2003. The Full Commission therefore reverses the opinion of the administrative law judge. The claimant's

attorney is entitled to a fee on the claimant's controverted indemnity benefits, pursuant to Ark. Code Ann. §11-9-715(a)(2)(B)(Repl. 2002). For prevailing on appeal, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(2).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding that the claimant was entitled to additional temporary total disability benefits and a finding that claimant was entitled to benefits under §11-9-505. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

I would affirm the decision of the Administrative Law Judge finding that the claimant failed to prove that he was entitled to additional temporary total disability benefits. The record contains only two medical records with respect to the claimant's compensable injury and his release to return to work. One document indicates that Dr. Murphy

released the claimant to return to normal activities by at least September 24, 2002. A narrative report dated January 26, 2003, by Dr. Berry made the following comments:

First, I doubt if he's reached maximum medical improvement since he still has slight anterior stromal haze noted in the right eye on his last visit at the end of December. That is a very small defect. Second, I do not happen to have a copy of the AMA guidelines forth edition to assign an appropriate anatomical impairment but if you have a copy then if you'll fax me the relevant section I'll be happy to work on it. Third, I would not impose any permanent work restriction on him. Fourth, the course of treatment for him has been noted in his chart and basically is anterior stromal puncture or chronic use of topical lubricants at night. Fifth, Mr. King has probably recurring erosion syndrome and that can give occasional difficulty for months interspersed with long periods of completely normal sensation.

Due to the lack of medical evidence contained within the record, to the contrary, I find that the claimant is not entitled to temporary total disability benefits.

I also find that the claimant has also failed to prove by a preponderance of the evidence that he is entitled to benefits under Ark. Code Ann. § 11-9-505. Although the record contains conflicting testimony with respect to whether or not the claimant was belligerent and/or agitated

or disruptive on August 21, 2002, the day he was terminated, I would note that the claimant was terminated by two previous employers for aggressive and violate behavior.

Additionally, the claimant was an at will employee and he was terminated based upon his actions at Dr. Murphy's office prior to his return to work. Doris George, an expediter and officer secretary of the respondent, testified that she was contacted by Dr. Murphy's office on August 21, 2002, and was advised that the claimant was loud and upset due to a mix up over appointments. Additionally, Ms. George testified that the claimant came to her office on that date and he was loud and intimidating. In fact, Ms. George stated that she felt threatened and she "was scared to death of him."

Brad Etters, a manager for the respondent-employer, testified that Ms. George had notified him on August 21, 2002, regarding the problems the claimant was causing at Dr. Murphy's office. Mr. Etters stated that he contacted Dr. Murphy's office and spoke with "Kim" regarding the incident. According to Mr. Etters's testimony, when he first began speaking with the young lady she was very short and illusive with her answers and he suspected that the claimant was in her presence. Shortly thereafter, he

indicated that "Kim" let out a sign of relief and then advised him the claimant had been impatient and belligerent in the waiting room. Moreover, according to Mr. Eppers's recollection of the telephone conversation, "Kim" had to take the claimant out of the waiting room to calm him down. She also advised Mr. Eppers that she was frightened of the claimant.

Kim Pattermann, Dr. Murphy's medical assistant, testified during her deposition, that the claimant was sent for a "work-in" appointment at another physicians office in order to have testing done. The claimant did not want to wait, so he returned to Dr. Murphy's office, without an appointment. The claimant was ultimately sent to St. Mary's Hospital for the testing. According to Ms. Pattermann, the claimant did not "raise a ruckus"; however, he was really upset after coming in from waiting in Dr. Mann's office (for a "work-in" visit). Additionally, she testified that he was agitated and thought he was getting "the runaround." Ms. Pattermann further admitted that the claimant raised his voice, however, she attributed it to him being "scared" Ms. Pattermann, testified that the claimant was taken out of the waiting area and back in to the examination room to calm down. However, she stated that is what she does for all

person to person contact. The claimant did not have an appointment yet he needed to be taken out of the waiting room in order to avoid a disruption. The testimony of Dr. Mann's assistant is clearly guarded in that the claimant is a patient; however, it is clear based upon her testimony that the claimant was causing problems at Dr. Murphy's office. In further confirmation, Ms. Pattermann testified that when she did bring him back he told her he had to wait a long time, and "he didn't want to wait any longer." Additionally, Ms. Pattermann went on to acknowledge speaking to Mr. Etters. She admitted that she told Mr. Etters that the claimant came in upset and that waiting is difficult for the claimant. According to Ms. Patterman, the claimant is "not a very-real patient person." Ms. Pattermann later admitted that the claimant "is always a demanding individual. I mean, he just is. That's just his personality." She also acknowledged that Mr. Etters informed her that his employees should not be acting in the manner that the claimant was.

Ms. Pattermann also spoke with Ms. George by telephone and indicated that the claimant was "being pushy" and that she was having a hard time dealing with him. In response, Ms. Pattermann testified, "well, yeah, he could be

that way." Ms. Pattermann went on to state that any impatient person can be difficult to deal with and someone who does not handle that type of personality on a day-to-day basis may consider that type of behavior improper.

In short, I find that the record is void of evidence that the respondent fabricated the claimant's misbehavior as a way to terminate him. Clearly, based upon the evidence presented, the respondent's termination of Mr. King was reasonable. In fact, the testimony of Mr. Etters, Ms. George, Ms. Pattermannn, and the claimant all corroborate the events as they unfolded. There is simply no evidence to find that the actions on the part of the respondent-employer were improper.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner