

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F110518

RONALD W. JACKSON, EMPLOYEE	CLAIMANT
WAL-MART STORES, SELF-INSURED EMPLOYER	RESPONDENT NO. 1
CLAIM MANAGEMENT SERVICES, TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED MAY 9, 2005

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

Claimant represented by HONORABLE JOHN BARTELT, Attorney at
Law, Jonesboro, Arkansas.

Respondents No. 1 represented by HONORABLE COLLEEN
McCULLOUGH, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

Respondent No. 1 appeals an administrative law judge's
opinion filed May 28, 2004. The administrative law judge
found that the claimant was temporarily partially disabled
"during the period of his continued employment by respondent
subsequent to his light duty release when his hours were
less than 39.5 per week through July 24, 2001." The
administrative law judge found that the claimant was
temporarily totally disabled from July 25, 2001 through
February 2, 2003. The administrative law judge found that

the claimant had suffered a loss of earning capacity in the amount of 40% in addition to the claimant's 15% anatomical impairment. The administrative law judge found that Respondent No. 2, Second Injury Fund, was not liable in the claim.

After reviewing the entire record *de novo*, the Full Commission affirms, as modified, the opinion of the administrative law judge. The Full Commission finds that the claimant did not prove he was entitled to temporary partial disability compensation. However, we find that the claimant proved he was entitled to temporary total disability compensation from July 30, 2001 through February 3, 2003. The Full Commission finds that the claimant sustained wage-loss disability in the amount of 40%, and that the Second Injury Fund is not liable.

I. HISTORY

Ronald Wayne Jackson, age 48, testified that he was educated through the 11th grade. Mr. Jackson testified that he performed primarily mechanical work after leaving school. The claimant testified that he smoked heavily and was exposed to "farm chemicals," and that he subsequently developed emphysema. The claimant testified that he did not work for eight years before becoming employed with Wal-Mart in 2001. The claimant described his job duties for the

respondent-employer as "changing tires, changing oil, changing batteries, wipers. That was basically it."

The parties stipulated that the claimant sustained a compensable injury to his right shoulder on May 8, 2001. The claimant testified, "I went to stack these 16-inch tires on the tire (inaudible) and when I went up with it, I messed my arm up." There are no medical records before the Commission contemporaneous with the compensable injury.

No radiographic abnormality was identified following x-rays of the claimant's right shoulder taken May 17, 2001 and May 29, 2001. Otherwise, the record shows no medical reports from that time detailing any sort of physical restrictions or treatment modalities.

The claimant testified:

Q. And tell the Court what basically happened to you starting in May 2001 after you got hurt.

A. Well, my hours went to diminishing. Instead of coming in at 10:30 in the morning like I was supposed to, they got to cutting me down and bringing me in at 4:00. And then I couldn't do it because it was just - I wasn't getting enough hours and it was hurting my arm pushing the broom and sweeping.

Q. Okay. So first let me - you were put on light duty at that time, is that correct?

A. Yes.

Q. Before the injury, how many hours a week had you been working?

A. 39 ½....

Q. And then what happened after you reported the injury and medical benefits were started?

A. My - my hours reduced.

Q. Tell us in detail, Ron, how they diminished and about how many hours a week you started getting?

A. About 15.

Q. When did that start?

A. In about May....

Q. Did it go down gradually or did they just all of a sudden go from 39 ½ hours a week to about 15 hours a week?

A. It went gradually....

Q. And were you ever given any explanation as to why your hours were reduced from 39 ½ down to 15.

A. No, sir.

Q. Did you ask?

A. No, sir.

Q. Did you talk to anybody about it?

A. No, sir.

Q. What was your belief in terms of why they did that?

A. Because I wasn't able to do my job.

Q. And you were on light duty?

A. Yes.

Q. Did they provide light duty for you?

A. Yes....When it first happened, I went out and was a door greeter. And then I came back and they

was having me to pull cars and stock the oil, and then that - that was it....

Q. And the question becomes, Ron, why did you quit?

A. Because I wasn't getting enough hours. They had cut them down.

Q. Okay. Well, then the next question is, if you weren't getting enough hours, you were at least getting some hours, more than you did when you quit. So the question becomes why did you quit? Was it financially feasible for you to continue working so few hours?

A. Well, I wasn't seeing anything out of it, and it was bothering my arm too.

Rosalyn Farley, a "risk control leader" for the respondent-employer, testified that she could not recall a reduction in the claimant's hours. Ms. Farley testified on cross-examination, "I do have documents with me today showing his schedule and what he had worked. I do know that the month of like May, June, July, August, September, October, into November, that is the busiest time of the year for the service." The claimant's attorney did not seek to introduce into evidence Ms. Farley's corroborating documents showing the claimant's working hours.

The respondents' attorney examined Rosalyn Farley:

Q. Tell me about July 25th. Did you have a conversation with Mr. Jackson?

A. Yes, we did.

Q. Can you tell us just a little bit about that conversation?

A. At the time, the shop area was thin due to whether somebody had went to lunch or on break or something. I was doing lower bay tech plus upper bay tech, and Mr. Jackson was in the service area. I did ask him if he could do the courtesy tech. That consists of vacuuming the inside of the floorboard of the vehicle and washing the window and airing the tires. At the time I felt like he could do that with your left arm. Mr. Jackson had stated that I was not going to make him use his arm. And I told him I wasn't asking him to, and at that time he left the service area going inside as where I go.

Q. And that's the last time you had a conversation?

A. No....The supervisor, Judy Everett, pulled me into the office at that time. Ronald was already in the office, and he did seem upset and angry and all. I - you know he told me once again you're not going to make me use my arm. And I said, you know, that I wasn't trying to, that I felt like that job could require a left-handed, you know, procedure. And he said I'm not going to put up with this, I quit....

Q. So Mr. Jackson never came to you and discussed his hours?

A. No, ma'am.

The claimant denied on further direct examination that he quit because of a confrontation with Rosalyn Farley. "I quit because of the hours cut," the claimant testified.

In any event, the document from an Exit Interview indicated that the last day worked by the claimant was actually on July 23, 2001. The claimant testified that he had not worked since July 2001, and that he was physically unable to work.

Dr. Tad C. Pruitt independently evaluated the claimant on July 30, 2001. Dr. Pruitt assessed: "1. Right shoulder impingement syndrome and AC joint DJD. 2. Possible ulnar neuropathy." Dr. Pruitt recommended "arthroscopic subacromial decompression surgery to more thoroughly evaluate the rotator cuff and perform a decompression and possibly decompress the AC joint as well for the distal clavicle resection."

Dr. Pruitt performed surgery on September 4, 2001. Dr. Pruitt's plan on September 12, 2001 included a sling with gentle passive range of motion exercises several times weekly, light-duty work, and physical therapy for passive range of motion exercises. Dr. Pruitt copied all of his correspondence to Wal-Mart Claims Management.

Dr. Pruitt took the claimant "off work for a week" on September 19, 2001.

On September 21, 2001, Dr. Pruitt planned continued sling and "light duty work with no significant use of the arm with no pushing or pulling."

Dr. Pruitt continued light-duty work restrictions on October 17, 2001 and stated, "He does not need the sling anymore, but he does not need to have any overhead use of his hand and no lifting, pushing, or pulling with the right arm for six weeks."

Dr. Pruitt reported on November 29, 2001:

Mr. Jackson returns now three months out from his surgery. He continues to improve. He still has some mild pain with overhead lifting and feels that he still has some weakness in his shoulder. He would like to try doing his regular job, and he feels that he is going to have some trouble with prolonged overhead lifting and mounting tires but thinks that would be good therapy for him.

Dr. Pruitt reported on January 16, 2002, "His work status is that he was on full duty, but he was assigned only 18 hours and so he quit his job." Dr. Pruitt stated, "While he did have a partial thickness tear of his rotator cuff and that raises concern for a subsequent conversion to a full thickness tear, at this point he clinically does not appear to have that in terms of his shoulder function. His pain would suggest that, but I also think he could be having pain just from the fact that he is 4.5 months out from his shoulder surgery and still has some recovery to go." Dr. Pruitt planned to "Continue his current work duties."

On April 23, 2002, Dr. Pruitt planned an arthrogram, preceded by an MRI scan of the right shoulder. The following impression therefore resulted from an MR of the right shoulder taken April 23, 2002:

1. High grade partial undersurface tear involving the distal supraspinatus tendon with no definite full thickness perforation.
2. Subacromial subdeltoid bursitis.
3. Mild degenerative changes in the acromioclavicular joint with a suggestion of previous acromioplasty.

4. Type III SLAP tear of the superior glenoid labrum.
5. Large iatrogenic effusion.
6. Small subcortical cyst in the humeral tear near the infraspinatus tendon insertion which can be associated with impingement. Please correlate clinically.

Dr. Pruitt stated on May 2, 2002, "Given the severity of the rotator cuff disease and the high grade tear and his ongoing symptoms, I think his prognosis is poor without further intervention. I think he is likely to go on to get a complete tear over time, which would be a large one, and then would probably result in rotator cuff arthropathy....I am recommending that he proceed with an open rotator cuff repair to try to reestablish a more normal cuff."

The respondent-carrier referred the claimant to Dr. David N. Collins for another opinion. Dr. Collins' impression on June 11, 2002 was "1. Rotator cuff fiber failure resulting from occupation related injury. 2. Biceps tendon lesion, labral attachment. 3. Significant cutaneous folliculitis in the region of the shoulder." Dr. Collins recommended rotator cuff repair and stated, "He will require 6-12 months before he is released to some type of work activity."

Dr. Collins reported on August 19, 2002:

Mr. Jackson has been unable to work in any capacity since the time of his surgery. He had a complex reconstruction requiring Restore Implant for failed rotator cuff repair. It has been

necessary for him to devote the entire postoperative period to physiotherapy. It is not appropriate for him to be working at the present time nor has it been since the time of his operation.

Dr. Collins indicated on August 26, 2002 that the claimant could return to one-arm duty only, with time out to do shoulder exercises. However, the claimant testified that since his last surgery, "I still can't use my arm and shoulder."

Dr. Collins reported on February 3, 2003:

He has reached maximum medical improvement relative to his work related injury and its treatment. He has sustained permanent partial impairment as it relates to his injury and its treatment....The impairment is equal to 25% to the upper extremity, equal to 15% to the body as a whole....

I would suggest that Mr. Jackson seek employment where the arm is utilized below shoulder level and forces greater than 15 pounds or less utilizing the right arm alone or (sic) encountered. The combined use of upper extremity lifting would be in the 50 pound range with predominant forces being taken by the left shoulder.

He may require vocational rehabilitation. He will be seen as needed. In the future he may require further evaluation and treatment for further deterioration in the cuff and possibly development of arthropathic changes.

The parties stipulated to "payment of permanent partial disability benefits to correspond with a permanent physical impairment in the amount of 15% to the body as a whole."

The claimant testified that he hurt, but that he believed he could perform work duties within the permanent restrictions assigned by Dr. Collins. The claimant also testified that he had sought employment after being released by Dr. Collins.

A pre-hearing order was filed on December 1, 2003. The parties agreed to litigate the issues of temporary partial disability compensation from May 8, 2001 through July 25, 2001; temporary total disability compensation from July 25, 2001 through February 3, 2003; wage loss/permanent total disability; and Second Injury Fund liability.

Heather Naylor, a Vocational Rehabilitation Consultant, provided an Initial Vocational Evaluation on January 20, 2004, reprinted in part below:

Based on my initial vocational evaluation, it appears that Mr. Jackson is motivated to return to work - as evidenced by his recent attempts to contact employers about employment. He has been released from his physician's care and has been given permanent restrictions. Although he has a singular work history, there are jobs within his physical restrictions that he could now pursue....

During my meeting with Mr. Jackson, I asked him if he had spoken with his employer to inquire as to whether or not a position may be available for him within his current physical limitations. He said that for a short period of time, he did go back to work after he was initially injured. He said his employer did offer him "light duty" but that his hours were cut down from 39 hours, to only 10-12 hours per week. He reported that he quit because

he needed to work on a full-time basis. He has not worked at Wal-Mart since his first surgery....

Mr. Jackson is a 47 year old gentleman who is still experiencing some residual pain and functional limitation from an injury to his right shoulder in April of 2001. Although his current lifestyle seems somewhat sedentary and home-based, it is noted that he is now able to do a fairly wide range of activities as long as he avoids significant physical exertion - particularly involving his right arm and shoulder. His attending physician gave specific restrictions in 2003, noting that he should do no lifting over 15 pounds with the right arm, no overhead lifting and no lifting over 50 pounds with the combined use of both upper extremities. These restrictions, combined with some probable pulmonary restrictions due to emphysema, would keep our vocational options, in my opinion, in the *sedentary to light* categories....

Obviously, Mr. Jackson cannot return to his regular auto mechanic work, but some of his mechanical aptitude may assist him in finding other related employment that would not be heavy in nature. I would agree with the job pursuit directions he has gone recently, and I would be available to assist him in some specific areas. There are a number of entry-level jobs in the *sedentary-light* ranges, that would pay from minimum wage up to around \$6.5/hr, which would be a little lower than his hourly rate with Wal-Mart.

With his mechanical skills and aptitudes, and what appears to be good motivation, I strongly recommend he begin immediately in adult education with the goal of obtaining his GED, which would expand his job opportunities. Given the local employment prospect that he mentioned to me, he also needs to be involved as soon as possible in a typing/word processing training class. Mr. Jackson should now be capable of engaging in full-time substantial gainful activity....

Hearing before the Commission was held on February 20, 2004. The claimant testified on re-cross examination by counsel for Respondent No. 1:

Q. If you were offered a job in say a smoky bar, would you be able to take that job with your emphysema condition?

A. At a what?

Q. Like in a smoke-filled bar or a shop where they smoke?

A. No, I probably could on account of the smoke, but I couldn't on account of my arm. I couldn't use it all the time.

Q. Okay. What about if you were around chemicals in a factory? Would that affect your emphysema?

A. No.

The administrative law judge found, in pertinent part:

5. The claimant was temporarily partially disabled during the period of his continued employment by respondent subsequent to his light duty release when his hours were less than 39.5 per week through July 24, 2001.

6. The claimant was temporarily totally disabled for the period beginning July 25, 2001, and continuing through February 2, 2003.

7. The claimant's healing period ended February 3, 2003.

8. The claimant has a permanent physical impairment in the amount of 15% to the body as a whole.

9. The claimant has suffered a loss of earning capacity in the amount of 40% in addition to his anatomical impairment as a result of the May 8, 2001, compensable injury.

10. The Second Injury Fund has no liability in his claim.

Respondent No. 1 appeals to the Full Commission.

II. ADJUDICATION

A. Temporary Disability

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood based on medical evidence, age, education, experience, and other matters reasonably expected to affect the claimant's earning power. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981), citing Rooney & Travelers Insurance Co. v. Charles, 262 Ark. 695, 560 S.W.2d 797 (1978). Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. See, Breshears, supra; Ark. Code Ann. §11-9-519(a). Temporary partial disability is that period within the healing period in which the employee suffers only a decrease in his capacity to earn the wages he was receiving at the time of the injury. Breshears, supra; Ark. Code Ann. §11-9-520.

In the present matter, the Full Commission finds that the claimant did not prove he was entitled to temporary partial disability compensation from May 8, 2001 through July 25, 2001. The parties stipulated that the claimant

sustained a compensable injury to his right shoulder on May 8, 2001. As we have noted, there are no medical reports before the Commission placing the claimant on light duty immediately after the injury. The claimant testified that the respondents immediately began reducing his hours. There is no probative evidence before the Commission indicating that the claimant's hours were in fact reduced. Moreover, the claimant explicitly testified that he terminated his employment with the respondents due to the claimed reduction in hours, not because of the claimant's compensable injury. The claimant testified that he quit "because I wasn't getting enough hours....I quit because of the hours cut." Dr. Pruitt noted in January 2002 that the claimant "was assigned only 18 hours and so he quit his job." Heather Naylor, the vocational counselor, wrote, "He reported that he quit because he needed to work on a full-time basis."

The preponderance of evidence shows that the claimant's termination from the respondent-employer in July 2001 was related to the claimant's desire for more full-time employment, rather than the compensable injury. The Full Commission therefore does not affirm the administrative law judge's finding that the claimant was entitled to temporary partial disability compensation "during the period of his continued employment by respondent subsequent to his light

duty release when his hours were less than 39.5 per week through July 24, 2001.”

The Full Commission finds that the claimant proved he was entitled to temporary total disability compensation from July 30, 2001 through February 3, 2003. The first medical treatment of record occurred on July 30, 2001. Dr. Pruitt assessed right shoulder impingement syndrome and AC joint DJD, and he recommended surgery for the claimant's condition. We find that the claimant entered a healing period for his compensable injury on July 30, 2001. Dr. Pruitt performed surgery in September 2001. We recognize that Dr. Pruitt assigned light-duty work for the claimant on September 12, 2001, with continued use of a sling for the claimant's arm. However, the evidence demonstrates that no light-duty work with the respondent-employer was available for the claimant. Further, termination of the claimant's employment in July 2001 did not end the claimant's entitlement to temporary total disability compensation.

King v. Tree House Developers, Workers' Compensation Commission F212615 (Feb. 27, 2004), citing Hetland v. Con Agra Frozen Foods, Workers' Compensation Commission E402217 (June 11, 1998).

The respondents cite Ark. Code Ann. §11-9-526:

If any injured employee refuses employment suitable to his or her capacity offered to or

procured for him or her, he or she 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.

The Full Commission finds in the present matter that the claimant did not refuse employment suitable to his capacity. An offer of suitable employment is a condition precedent for applying Ark. Code Ann. §11-9-526. Fluitt v. Arlington Hotel Co., Inc., Workers' Compensation Commission F011961 (April 1, 2003) citing Webb v. Webb, Workers' Compensation Commission E906144 (June 29, 2000). Work must be available within the injured employee's physical restrictions. McCuller v. Democrat Printing & Lithographic Co., Workers' Compensation Commission E608050 (April 29, 1998). The claimant must unjustifiably refuse employment which is suitable to his capacity. Barnette v. Allen Canning Co., 49 Ark. App. 61, 896 S.W.2d 444 (1995).

The instant claimant did not unjustifiably refuse employment which was suitable to his physical capacity. Instead, the preponderance of evidence demonstrates that use of the claimant's right arm was restricted because of his compensable shoulder injury. No appropriate work was available within the claimant's physical restrictions. Moreover, the Commission takes note of the Exit Interview included in the record by the respondents. This document

expressly provides that the "Detailed Statement Of Termination" section "Needs To Be Completed By The Associate for Voluntary Termination or By The Manager/Supervisor For Involuntary Termination." The associate (claimant) did not complete the relevant portion of the Exit Interview document. Rather, this section was completed by a Manager/Supervisor. Completion by a Manager/Supervisor was within the respondent-employer's written guidelines for an "Involuntary Termination." As the Commission has noted, termination of a claimant's employment does not end his entitlement to temporary total disability compensation. King, supra.

By January 2002, Dr. Pruitt was concerned that the claimant had developed a full thickness rotator cuff tear. An MRI scan in April 2002 confirmed Dr. Pruitt's concern that the claimant had developed several complications as a result of his compensable shoulder injury and subsequent surgery. The evidence therefore shows that the claimant remained within his healing period as of January 2002. Dr. Pruitt recommended additional surgery in May 2002. Dr. Collins examined the claimant in June 2002. Like Dr. Pruitt, Dr. Collins also recommended surgery for the claimant's post-injury shoulder condition. The record indicates that Dr. Collins performed the needed surgery in

June 2002. Dr. Collins reported in August 2002, "Mr. Jackson has been unable to work in any capacity since the time of his surgery. He had a complex reconstruction requiring Restore Implant for failed rotator cuff repair. It has been necessary for him to devote the entire postoperative period to physiotherapy. It is not appropriate for him to be working at the present time nor has it been since the time of his operation."

The Full Commission finds that the claimant remained within his healing period and was totally incapacitated to earn wages from July 30, 2001 through February 3, 2003. Dr. Collins pronounced maximum medical improvement on February 3, 2003, thus signaling the end of the claimant's healing period for his compensable injury. The claimant is not entitled to temporary total disability compensation after the end of his healing period. Breshears, supra. The claimant therefore proved that he was entitled to temporary total disability compensation from July 30, 2001 through February 3, 2003.

B. Wage Loss

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account, in addition to the percentage of permanent physical

impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. §11-9-522(b)(1).

In the present matter, the claimant is age 48 and has only an 11th grade education. The claimant's work history is almost exclusively manual labor, primarily mechanical work. The claimant was a mechanic for the respondents at the time of his compensable injury. The claimant underwent two right-shoulder surgeries following his compensable injury. The claimant, who the Commission finds was a credible witness, testified that following the second surgery, "I still can't use my arm and shoulder." Dr. Collins assigned a 15% permanent impairment rating on February 3, 2003. Dr. Collins suggested that the claimant seek employment "where the arm is utilized below shoulder level" with a 15-pound lifting restriction for the right shoulder. Dr. Collins assigned a 50-pound lifting restriction for "combined use" of the claimant's upper extremities. Dr. Collins added that the claimant could suffer further deterioration of his rotator cuff with arthropathic changes.

Heather Naylor, the vocational consultant, reported in January 2004 that the claimant was motivated and eager to

return to work. Ms. Naylor opined that the claimant would need sedentary to light work restrictions. She also concluded that the claimant could not return to his regular automobile mechanic employment. Ms. Naylor stated that potential jobs available for the claimant "would be a little lower than his hourly rate with Wal-Mart."

The Full Commission affirms the administrative law judge's finding that the claimant suffered a loss of earning capacity in the amount of 40%, which is in addition to the 15% anatomical impairment.

C. Second Injury Fund liability

The Full Commission affirms the administrative law judge's finding that Respondent No. 2, Second Injury Fund, is not liable in the claim. Liability of the Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. See, Mid-State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988).

The present claimant suffered a compensable injury at his present place of employment; however, the record does not indicate that the claimant had a prior disability or impairment, or that a prior disability or impairment combined with the compensable injury to produce the current disability status. The second and third hurdles to Second Injury Fund liability were therefore not overcome. The claimant testified that he had developed emphysema at a time in his past. Nevertheless, the record does not demonstrate that the claimant suffered a permanent disability or impairment as a result of his emphysema. But even if the claimant had suffered an emphysema-related disability or impairment, which we do not find, none of the claimant's treating physicians referred to this condition in assessing the claimant's current disability status. The only reference in the record to the claimant's emphysema, other than the claimant's credible testimony, was a brief mention by Heather Naylor of "probable pulmonary restrictions due to emphysema." Nevertheless, we again note the claimant's testimony pursuant to re-cross examination that his prior emphysema condition would not affect his employability.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove he was entitled to temporary partial disability compensation. The

Full Commission finds that the claimant proved he was entitled to temporary total disability compensation from July 30, 2001 through February 3, 2003. We find that the claimant sustained a loss of earning capacity in the amount of 40%, in addition to the claimant's 15% anatomical impairment. The Second Injury Fund is not liable in this claim. The Full Commission therefore affirms, as modified, the opinion of the administrative law judge. The claimant's attorney is entitled to a fee for legal services pursuant to Ark. Code Ann. §11-9-715(a) (Repl. 1996). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of two-hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commission Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____ I must respectfully dissent from the Majority's opinion finding that the claimant is not entitled to receive temporary total disability benefits from July 25 to July 29, 2001. I also dissent from the finding that the claimant is

not entitled to receive temporary partial disability benefits. However, I concur with the Majority's finding that the claimant is entitled to temporary total disability benefits from July 30, 2001 to February 3, 2003 and the Majority's finding that the claimant sustained a 40% decrease in wage-earning capacity.

The Majority finds that the claimant is not entitled to receive temporary partial disability benefits and is not entitled to receive temporary total disability benefits from July 25 to July 29, 2001. These findings were supported in part by the lack of a medical record restricting the claimant's ability to work prior to July 30, 2001. The Majority further supported its conclusions by finding that the claimant quit due to his dissatisfaction with having his hours reduced rather than due to his injury. The Majority further opined that the claimant did not establish that his hours had been reduced. I find that the evidence indicates the claimant entered his healing period on the date of the injury and was restricted to using one arm. I further find that as a result of injury, the respondent reduced the claimant's hours and that the claimant quit due to a combination of having his hours reduced and due to being dissatisfied with his assigned work duties. As the claimant's ability to work was hindered by

his admittedly compensable injury, his hours were reduced through no fault of his own, and he quit rather than violate his work restrictions, the Majority should award temporary partial benefits and temporary total disability benefits. For these reasons, I respectfully dissent.

In the present case, both parties agree that the claimant was injured on May 8, 2001. There is no dispute that the claimant was limited to working with one arm. While there is no medical record explicitly restricting the claimant from returning to work at that time, there are medical reports regarding the claimant seeking medical treatment after the time of injury. These records include x-rays from as early as May 17, 2001. Additionally, the doctor's report dated July 30, 2001 indicates that the claimant needed surgery and alludes to the fact that the claimant had previously seen an orthopedist, gone through 24 physical therapy sessions, and submitted to a MRI on June 11, 2001. The aforementioned records, combined with the fact that the respondent had the claimant on light duty and that he apparently quit due to being unable to do light-duty work, indicate that the claimant's ability to perform full-time, normal work was restricted as of the date of the injury in May, and that he remained unable to perform full-time, normal work from July 25 to July 29, 2001.

The Majority finds the claimant quit due to a reduction of hours but that his hours were not reduced. This finding fails to explain why the claimant quit if his hours were not being reduced. The only alternative explanation in the record is that the claimant quit in part, due to being required to perform tasks outside his restrictions.

I find that the claimant's hours were in fact reduced, and that he quit, in part, due to being required to violate his work restrictions. The claimant testified that his hours were reduced from around 39.5 hours per week to around 15 hours and that the reduction started in May of 2001. Farley, on the other hand, testified that she had access to the claimant's hours before the hearing and that she had them at the hearing. Despite this, she did not recall if his hours had been reduced. She also said that she did not believe the claimant's hours were reduced because that was the, "busy time" for business. It is not logical that the employer would have records at the hearing but fail to refer to them before or during the hearing if the claimant's hours were not reduced.

The claimant testified he quit due to his hours, but it is evident he also quit due to being instructed to violate his work restriction. When responding to a question

regarding why he quit the claimant indicated , "Well, I wasn't seeing anything out of it and it was bothering my arm, too." This testimony indicates that while the claimant quit due to a decrease in hours, he was also displeased about the effect his work was having on his arm and that displeasure did contribute in his decision to quit. The claimant's last assignment was to vacuum out cars, air tires, and wash windows. After being given those instructions, the claimant and Farley argued over the claimant's work duties and his belief that the work did not comport with his restrictions. During the argument, the claimant was instructed he was not expected to use both arms. Common sense would dictate it would not be possible to perform the requested tasks using one arm. The proximity of the disagreement in regards to the time the claimant quit, in conjunction with the fact that the claimant had worked for months after his hours being reduced, indicates that the assignment of duties was at least a factor in his decision to quit. Furthermore, it is indicative that the claimant was under a work restriction but was unable to work at the level required by the employer without violating the restrictions.

The claimant suffered from an admittedly compensable injury and both parties agree the claimant was

under a work restriction from the time of injury to the time of separation. The claimant gave credible testimony that his hours were reduced after the injury. As the claimant quit after a disagreement over being assigned duties not comporting with that restriction, one can only infer his hours were reduced due to his inability to work at his normal capacity. Additionally, the claimant separated, in part, due to being unable to work without violating his restrictions, indicating he was unable to work at the time of his separation. Therefore, the Majority should have awarded temporary partial disability benefits and temporary total disability benefits for the entire time period in question.

For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant is entitled to temporary total disability benefits from July 30, 2001, through February 3, 2003, and finding that the claimant sustained a

40% decrease in his wage earning capacity. Based upon my de novo review of the entire record, I find that the claimant has failed to meet his burden of proof on either of these issues. However, I must concur with the majority's finding that the claimant failed to prove entitlement to temporary partial disability benefits.

The majority finds that the claimant failed to prove entitlement to temporary partial disability benefits because the claimant failed to prove by a preponderance of evidence that he actually sustained a reduction in hours which would warrant temporary partial disability benefits. I agree with this finding. However, I must respectfully dissent from the majority's finding that the claimant is entitled to an award of temporary total disability benefits. I do not find the claimant to be a credible witness. The claimant testified that his hours were cut and he left his employment over this reduction in hours. However, the credible evidence of record reveals that the claimant never inquired into why his hours were cut; never asked for more hours; and did not cite a reduction in hours as his reason for leaving in his exit interview. As did the majority, I find that the claimant's reason for leaving his employment are not in any way related to his compensable injury.

Having found that the claimant's reason for terminating his employment is not related to his compensable injury, I cannot find that the claimant has proven entitlement to temporary total disability benefits. The period of temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. Ark. State Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation not simply because he has a compensable injury, but rather during the period of time that he is within his healing period for the compensable injury **and** while he is totally incapacitated to earn wages as a result of that injury. Arkansas State Highway & Transportation Dept. V. Breshears, 272 Ark. 244, 613 S.W.2d (1981). Accordingly, to be entitled to temporary total disability benefits, an injured employee must satisfy this two-pronged test.

The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(13) (Supp. 1997). The healing period continues until the employee is as far

restored as the permanent character of her injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of her physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In my opinion, the claimant has failed to prove by a preponderance of the evidence that he is totally incapacitated from earning wages as a result of his compensable injury. The record clearly reflects that the claimant was capable of earning wages until he unilaterally terminated his employment with respondents. But for the claimant walking off the job, I find that the claimant was capable of earning wages. Arkansas Code Annotated §11-9-526 provides that "if any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal..." In my opinion, the claimant refused suitable employment by walking

off the job. Therefore, I find that he shall not be entitled to any compensation. In reaching this finding, I am not persuaded by the majority's finding that since the claimant was later terminated, §11-9-526 does not apply.

Nevertheless, even if the majority is correct in this finding, the record still fails to show that the claimant was ever totally incapacitated from earning wages as he was released to light duty work. In Wells v. Wal-Mart, Full Commission Opinion filed May, 22, 2002, (Claim No. F100849), the Full Commission found that since the respondents made work available to the claimant within her physical restrictions and the claimant failed or refused to work in this light duty job, the claimant was not totally incapacitated from earning wages. Therefore, the claimant in Wells was denied temporary total disability benefits. In the present claim, I find that a preponderance of the evidence reveals that the claimant had light duty work made available to him within his restrictions, therefore, the claimant has failed to establish that he experienced an incapacity to earn during the period for which he seeks additional benefits. See also, Holderman v. Osco Drug, Inc., Full Commission opinion filed March 22, 2001, (Claim No. E801272).

With regard to the award of 40% wage loss disability, I cannot agree with the majority. In my opinion, the claimant did not establish by a preponderance of the credible evidence that he sustained a decrease in his wage earning capacity, let alone a 40% decrease. As noted above, I do not find the claimant to be a credible witness. He has not displayed a positive attitude in returning to work and he has not made a diligent effort in seeking further employment. The claimant has transferable skills, and he is capable of returning to work in a light or medium category of work. Accordingly, when I weigh all the elements for wage loss disability, I find that the claimant has failed to prove entitlement to any such benefits.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner