

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402092

CYNTHIA MCGOWAN,
EMPLOYEE

CLAIMANT

ARKANSAS SUPPORT NETWORK,
EMPLOYER

RESPONDENT

COMMERCE & INDUSTRY INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 1, 2005

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

Claimant represented by the HONORABLE JAY TOLLEY,
Attorney at Law, Fayetteville, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal and Claimant cross appeals an
opinion and order of the Administrative Law Judge filed
September 30, 2004. In said order, the Administrative
Law Judge made the following findings of fact and
conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction of this claim.
2. On February 19, 2004, the relationship
of employee-employer carrier-TPA existed
between the parties.
3. On February 19, 2004, the claimant

earned wages sufficient to entitle her to weekly compensation benefits of \$220.00 for total disability and a \$165.00 disability.

4. On February 19, 2004, the claimant sustained a compensable injury to her lower back.

5. The claimant has proven by the greater weight of the credible evidence that she has continued to be rendered temporarily totally disabled, as a result of the effects of this compensable injury, for the period of March 30, 2004 through a date yet to be determined. Specifically, she has proven by the greater weight of the credible evidence that she has continued within her healing period from the effects of her compensable injury and has continued to be rendered totally disabled by her compensable injury during this period.

6. The greater weight of the credible evidence shows that the claimant was justified in refusing the employment offered to or procured for her by the respondent and further shows that the employment positions offered to or procured for her by the respondent were not "Suitable to her capacity." Thus, the claimant is not barred from receiving benefits for temporary total disability by the provisions of Ark. Code Ann. § 11-9-526.

7. The respondents have controverted the claimant's entitlement to any temporary total disability benefits accruing on and after March 30, 2004.

8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

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.

Therefore we affirm and adopt the September 30, 2004 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

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 has proved by a preponderance of the evidence that she was justified in refusing the employment offered to or procured for her by the respondent and the finding that the claimant was entitled to temporary total disability benefits after March 30, 2004. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

Ark. Code Ann. §11-9-526 states that:

If any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled any compensation during the continuance of the refusal, unless in the Workers' Compensation Commission, the refusal is justifiable.

My review of the evidence in this case demonstrates that the claimant was offered two jobs by representatives of

the respondent employer and she declined to pursue these opportunities. Initially, the claimant was contacted and offered a position reading to an individual name Otto. The claimant expressed her disinterest in the job stating that the distance involved in driving and the amount of hours involved would make the job unprofitable for her. The mutual decision was made between the claimant and Linda Andrews not to place her on that particular assignment. Later when it looked like the claimant was going to return to work with Marcella Herrerra she called just before she was to start to work to say that her doctor did not want her working with children. The claimant was asked to provide documentation of the restriction involving children, but she never provided the respondent employer with anything. The claimant never re-contacted Ms. Hoffman or the staff at the respondent employer concerning any of the other positions that were available.

On or around July 23, 2004, the claimant drafted a letter stating that the offer concerning the Otto position had been "rescinded," which she intended to present to Ms. Andrews. In a time line prepared by the claimant, she indicated that the position with Otto was "rescinded" by Ms. Andrews and added that she "[had]

it in writing." The decision not to place the claimant on the Otto job was a mutual one fueled in large part by the claimant's complaints about the lack of hours and the length of the drive to Otto's house. The claimant admitted, however, that the letter did not address all of the positions that she had been offered. She also has not offered any explanation as to why she ceased communications with the respondent employer and declined to accept the other jobs.

The claimant testified that "Everybody who is mentally retarded...is very unpredictable." The claimant dwelled on the amount of physical activity that may have accompanied working with Ms. Herrerra. However the Herrerra position was not the only position available with the respondent employer. The Director of the respondent employer, Cathleen Hoffman, indicated that Ms. Herrerra was not representative of every client that was involved with the respondent employer. While the claimant's counsel made several references to individuals with mental handicaps "running amuck," the testimony from the hearing reveals that there were several positions with the respondent employer the claimant could have taken which did not involve individuals with behavioral problems. Ms. Hoffman was

specifically asked whether or not she would have had employment available that would have fallen within the boundaries established by Dr. Cyril Raben's report of 07/27/04. Ms. Hoffman testified:

Yes, we do have but we don't just have children at Arkansas Support Network; we have adults; we have individuals that do not need to be physically restrained at all; we have individuals who do not run away at all; we have individuals that, like Otto, their behavior plans do not look like that one.

Ms. Hoffman noted that there were several openings with clients who required nothing more than reminders. As an example, Ms. Hoffman described the duties that went along with a client named Willie Slesher. The following exchange took place at the hearing of this matter:

Q. Tell me something about the demographics of Willie Slesher as far as do you have a behavioral pattern profile on Willie Slesher, whether or not there would be any lifting at all?

A. There's no lifting. He is ambulatory.

Q. He's what?

A. He's ambulatory. He walks on his own, does all of his own - personal care and no hygiene. He's just reminders only.

Q. Okay. And is that a 40-hour job?

A. It is a 40-hour weekend.

Q. Do you want to put her to work in that job tomorrow?

A. She could.

In fact, this position with Willie Slesher is one of the positions that was included on the list of jobs available to the claimant when she opted out of the Otto job, refused the Herrerra job, and ceased communications with the respondent employer. By her own admission, the claimant never really gave any of the positions any serious consideration.

The respondent employer offered the claimant numerous positions that were within her medical limitations only to be met with excuses and total lack of cooperation. The respondent employer was aware of the claimant's limitations and attempted to work with her in order to get her back to work. Ms. Hoffman also indicated that the work that the claimant would have been doing would have resulted in compensation that was comparable to what the claimant was making pre-injury.

In summary, all clients of the respondent employer do not have the same behavior profile. They are not all mentally handicapped nor do they all require physical restraint as part of their care. There were positions available for the claimant that she would not

be required to have physical activity outside the boundaries of her light duty release. The claimant avoided the two positions that the respondent employer offered her and then ceased communications with them. Accordingly, I cannot find that the claimant justifiably refused employment pursuant to Ark. Code Ann. §11-9-526 and is not entitled to any benefits.

The evidence also demonstrates that the claimant's current problems are not the result of the incident which occurred on February 19, 2004. The medical evidence demonstrates that the claimant has degenerative disk disease and that was the reason why she was unable to work. An x-ray of the claimant's lumbar spine on February 25, 2004, revealed degenerative disk disease and osteoarthritis at L5-S1. An MRI performed two days later indicated no evidence of disk herniation, spinal stenosis, or neuralforaminal stenosis. The claimant was repeatedly diagnosed as having the same condition each time she went to the doctor until an MRI dated March 8, 2004, revealed a mild bulging disk and some degenerative arthritis. These degenerative problems are repeatedly noted in the medical records. Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence that her

initial lumbar strain was the cause of her continuing problems and that the claimant is not entitled to additional temporary total disability benefits or medical treatment.

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

KAREN H. McKINNEY, Commissioner