

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403869

SHERRY ROARK, EMPLOYEE	CLAIMANT
POCAHONTAS NURSING & REHABILITATION, EMPLOYER	RESPONDENT
AIG CLAIM SERVICE, CARRIER	RESPONDENT

OPINION FILED AUGUST 16, 2005

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

Claimant represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed January 6, 2005.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.

3. The claimant had not reached maximum medical improvement at the time of the within hearing.

4. The claimant has failed to prove that she was totally disabled within the meaning of the Arkansas Workers' Compensation Laws after May 14, 2004.

5. The provisions of Ark. Code Ann. §11-9-505(a)(1) do not apply in the instant claim.

6. Respondents have paid all appropriate benefits to which the claimant is entitled, to date, including, but not limited to appropriate, reasonably necessary medical treatment which was continuing at the time of the within hearing. Respondents have not controverted medical treatment, to date.

7. Issues not addressed herein, including, but not limited to claimant's entitlement to permanent disability benefits, if any, are specifically reserved.

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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority affirms and adopts the decision of the of the Administrative Law Judge, denying benefits pursuant to Ark. Code Ann. §11-9-505(a). Specifically, Majority affirms the decision of the Administrative Law Judge denying benefits and finding that the provisions of §11-9-505(a) do not apply, as the claimant had returned to work prior to being discharged and, therefore, the employer had allegedly not refused to return her to suitable work.

I find that the provisions of §11-9-505(a) do apply pursuant to the case of Allen v. International Paper Company, CA 04-670 (Ark. App. 2-2-2005). Furthermore, I find that the claimant was discharged for reasons other than misconduct in connection with the work and that the employer did not have good cause for failing to provide the claimant with suitable work.

I also find that the claimant remained in her healing period and, due to her injury, was unable substantially replace her income. Accordingly, she should be entitled to receive temporary total disability benefits after May 14, 2004. For these reasons, I respectfully dissent.

The claimant worked as a CNA for the listed respondent. The claimant suffered an admittedly compensable injury to her low back on April 9, 2004. The respondent paid temporary total disability benefits through April 28, 2004, at which time the claimant was provided with light duty work. At that time she was working under a working restriction of no lifting more than 15 pounds.

During her employment, the claimant received a copy of the employer's attendance policy, which provided

that employees were to report absences to their immediate supervisor at least two hours prior to their scheduled shift. The policy also provided that employees who fail to call in will be discharged after one incident and that if an employee has three unexcused absences within a six-month period, they could be subject to termination.

Prior to the claimant's compensable injury, she reported to Aneica Ball. Ball was responsible for scheduling the claimant. She posted schedules approximately one month in advance and the schedules were posted in the nurse's station. Prior to being injured, the claimant asked not to be scheduled on May 14 or May 15 so she could attend a family wedding. She was instructed she would be allowed to have the days off. Ball reflected the changes accordingly while making the schedule.

After the claimant was placed on light duty, she was placed under the supervision of Pamela Murphy, Administrator. Murphy instructed the claimant that she would answer directly to her. The two never discussed whether the claimant would still be allowed to have the dates of May 14 and May 15 off as Ball had previously indicated.

On May 11, Dr. Andrew J. Jansen extended the claimant's light duty. The claimant was absent on May 11 due to having mechanical difficulties with her car. The claimant attempted to contact Pam Murphy, Manager, but was unsuccessful. The claimant was subsequently absent on May 13, due to taking her son to Little Rock. The claimant reported the absence on May 12. The claimant was absent on May 14 and May 15; however, she did not notify management, as she believed that she had previously been granted the days off. The claimant reported to work on the next day she was scheduled to work and was discharged. She was informed that she was being discharged because of a, "no call/no show." The claimant indicated that she was supposed to have the day off. She was instructed that she did not have the day off and that she had been terminated.

On May 19, 2004, Dr. Terence Braden indicated the claimant would remain on "alternate duty". On September 7, 2004 Dr. Braden noted that the claimant, "is still tender to palpations in the lumbosacral spine, right and left paraspinals". He indicated that he would be referring her for treatment to Dr. Soeter or to Dr. Yuli at the Pain

Clinic in order to see if she needed a discogram or other treatment.

On November 29, 2004, the claimant's attorney sent a letter to Dr. Soeter requesting information regarding the claimant's ability to return to work. At the bottom of the letter are handwritten notations indicating, "12/1/04 release to work no lifting greater than 10 lbs until neurological work up".

The claimant filed for unemployment benefits in Missouri after being discharged. She was denied benefits due to a finding that she had committed misconduct. The claimant subsequently attempted to find work accommodating her restrictions, but was unsuccessful.

The claimant is requesting temporary total disability benefits for the time period of May 14, 2004 to a date yet to be determined and is requesting benefits pursuant to Ark. Code Ann. §11-9-505(a). The Majority, by adopting the decision of the Administrative Law Judge, ruled that the provisions of §11-9-505(a) are not applicable in the present case. They ruled that the claimant is not entitled to receive temporary total disability benefits because she testified she is, "ready, willing, and able to

work," because of her prior work experience and, "relatively low compensation rates."

I find that the provisions of §11-9-505(a) are applicable and that the employer has not shown good cause for failing to return the claimant to suitable work. I further find that the claimant should have been awarded temporary total disability benefits. While the claimant has been released to return to light duty work, she effectively remains unable to lift more than 10 pounds. When considering her work experience, her ability to replace her income is severely hindered.

The Administrative Law Judge issued his decision on January 6, 2005. In that decision, he reasoned that the provisions of §11-9-505(a) did not apply because the claimant returned to work temporarily. The Administrative Law Judge opined, "I feel compelled to point out that there is no allegation of retaliatory discharge in this claim as provided under A.C.A. §11-9-107. As will be set out further below, the provisions of A.C.A. §11-9-505 simply do not apply." He further states,

In the instant case, there is no credible evidence that the employer ever refused to return the claimant to work. In fact, suitable employment was made

available within the claimant's physical limitations until the date of claimant's termination for cause.

The Administrative Law Judge goes on to indicate, "The claimant has failed to prove that her termination is relevant to the issues presented for determination." These statements seem to indicate that the Administrative Law Judge's decision that §11-9-505(a) did not apply is contingent on the fact that the claimant returned to work for a brief period before being discharged. I find that the Court of Appeals has indicated that the provisions of §11-9-505(a) would in fact be applicable in the present case and that the Administrative Law Judge and now the Majority, should be reversed as a matter of law for failing to consider the provisions of §11-9-505(a).

The Court has previously indicated that a claimant's return to work does not preclude him from being able to recover benefits under §11-9-505(a). In Allen v. International Paper Company, the Court indicated that benefits under §11-9-505(a) are not barred simply because an employee is initially returned to work. See supra. In the aforementioned case, the claimant sustained an injury to his right shoulder. The employer subsequently provided him with

light duty work that accommodated his medical restrictions. However, the employer had a policy that workers were only allowed to work on light duty for a period of 90 days. The purpose of the policy was designed to allow injured employees to recuperate and heal. The Court found that the provisions of §11-9-505(a) did apply, opining that to not apply the statute would in effect allow employers to circumvent the statute. Id.

I find the facts of Allen similar to the case at hand in that in both instances the claimant returned to work, yet the employer ultimately disallowed them from working for another reason. Accordingly, I would find that even if one finds that the employer did have good cause for discharging the claimant, the provisions of §11-9-505(a) should still be considered and that the Administrative Law Judge erred as a matter of law in his failure to do so.

I find that in at least one other case other than Allen, the Court has ruled that the provisions of §11-9-505(a) apply. See Clayton Kidd Logging Company v. McGee, 77 Ark. App. 226 (2002) (finding for the claimant under §11-9-505(a) when the claimant had returned to light duty work but was later discharged for allowing his wife to ride in a

company vehicle with him despite his actions being in violation of company policy.) In other cases, where the claimant was denied benefits under §11-9-505(a) after being discharged after returning to work the Court has applied the criteria of §11-9-505(a), indicating that in this case the Majority errs in failing to consider the criteria of §11-9-505(a). See Hetland v. Con Agra Frozen Foods, 1998 AWCC 208 Claim NO. E402217, (Opinion filed June 11, 1998). See also Pickney v. LA Darling, 2003 AWCC 223, Claim No. F107108 (Opinion filed December 16, 2003) (Where the claimant was denied benefits pursuant to Ark. Code Ann. §11-9-505(a) but where the provisions were considered).

I find that pursuant to the provisions of Ark. Code Ann. §11-9-505(a) the claimant should be entitled to receive benefits. Ark. Code Ann. §11-9-505(a) states,

(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 commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of such refusal, for a period not exceeding one (1) year.

(2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

In Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996), the Arkansas Court of Appeals stated that in order to be entitled to an award of benefits under Ark. Code Ann. § 11-9-505(a) (Repl. 2002), 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.

In the present case, it is undisputed that the claimant suffered a compensable injury. Likewise the employer does not deny that it had suitable employment that accommodated the claimant's physical restrictions. Instead the two criteria that are at issue are whether the employer refused to return the claimant to work and whether, if there was such a refusal, it was without reasonable cause. For the

reasons aforementioned, I find that Allen is similar to the present case and that the rationale used by the Court is indicative that in the present case the employer did refuse to return the claimant to suitable work by discharging her.

With regards to whether that refusal was unreasonable, I find that the evidence supports a finding that the claimant's actions did not amount to misconduct and that the employer's refusal to allow the claimant to continue working was unreasonable.

While the respondents argue that the claimant attempted to file for unemployment benefits in Missouri and the appropriate agency determined her actions to be misconduct, I note that such rulings are not binding on the Commission. Furthermore, I would argue that to allow the employer to escape liability solely on the premise that she returned to work for a period of time would, in effect, allow the employer to circumvent the provisions of §11-9-505(a) by allowing the employer to discharge the claimant under what I find to be suspicious circumstances at best.

The respondent argues that because the Missouri Employment Security Department issued a decision that the claimant was being denied unemployment benefits, that

decision should be binding on the Commission in order to find that the employer had reasonable cause for failing to return the claimant to work. I note first that the determination of the Missouri Employment Security Department does not in any way indicate how that department concluded that the claimant had committed misconduct, nor does it indicate in any way that the standards used in Missouri are similar to those used by the Arkansas Employment Security Department. Additionally, I further note that this Commission has previously held that other agency's determinations are not binding on the Commission. See Dixon v. P.A. Management, 2004 AWCC 5, Claim No. E101546 (Opinion filed January 9, 2004). See also Flinn v. Central Maloney, File NO. E215967, Opinion filed July 30, 1996.

The Court of Appeals has previously indicated that in determinations regarding a claimant's entitlement to workers' compensation benefits, the law regarding misconduct and receipt of unemployment benefits is persuasive. See Southern Steel & Wire v. Kahler, 54 Ark. App. 376 (1996). Pursuant to Ark. Code Ann. §11-10-514(a) when determining if an employee has committed misconduct due to absenteeism, "the individual's attendance record for the twelve-month

period immediately preceding the discharge and the reasons for the absenteeism shall be taken into consideration for purposes of determining whether the absenteeism constitutes misconduct." However, in considering whether employees have been dismissed for misconduct as that term is used in the Employment Security Act, the Court has made the following comments:

To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion. There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design. Nibco, Inc. v. Metcalf & Daniels, 1 Ark. App. 114, 613 S.W.2d 612 (1981); see also, Perry v. Gaddy, 48 Ark. App. 128, 891 S.W.2d 281 (1995); Shipley Baking Co. v. Stiles, 17 Ark. App. 72, 703 S.W.2d 465 (1986). In Belcher v. Holiday Inn, 49 Ark. App. 64, ___ S.W.2d ___ (1995), the Court suggested that Nibco, Inc. v. Metcalf & Daniels, supra, might be instructive in determining the meaning of the term "misconduct" as used in Ark. Code Ann. § 11-9-522. Watkins v. Rockline Industries, 1995 AWCC 170 CLAIM NO. E302435.

In the present case, the evidence indicates that the claimant did not intentionally disregard the employer's best interests in any way. This is evidenced by the fact that the record is devoid of the claimant having any problems with her attendance prior to her compensable injury. Additionally, all parties agree that the claimant had already received permission to be absent on the dates in question. Furthermore, it is undisputed that the claimant's first supervisor, Ball, made the schedule and that the claimant's second supervisor, Murphy, would then have access to it, indicating that management was already aware the claimant intended to be absent. As such, any failure to approve the absences again with her new supervisor was an isolated instance of poor judgment rather than an intentional disregard of the employer's best interest.

It is undisputed that the claimant had previously received permission for the last two days she was absent and while the claimant's supervisor had changed, it is undisputed that the supervisor had access to the claimant's schedules. There is also no explanation as to why the claimant would fail to ask Murphy for the days off in advance if she believed that failing to take such action

would result in her discharge. Furthermore, the schedule for the month of May reflected that the claimant's hours had changed and that she was on light duty. It also indicated the claimant had requested May 14 and May 15 off. Accordingly, regardless of whether the claimant cleared the absences specifically with Murphy, since the schedules indicated her change in status, she had no reason to believe that such action would be necessary.

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 W.W. 2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W. 2d 582 (1982).

A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving

at the time of the injury. Breashers; supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274, 281-82 (1984).

In this instance, there appears to be no dispute that the claimant remained in her healing period after the date of May 15, 2004; therefore, I will not discuss whether the claimant remained in her healing period after that time. I note that while the claimant was released to return to light duty work, her restrictions were such that she was restricted from lifting more than 15 pounds. I find that this, in itself, would be enough to substantially limit the claimant's ability to replace her wages. Additionally, the claimant's last job was as a CNA, a job that has duties that require her to lift more than 15 pounds, indicating that her ability to replace her wages, was in fact, diminished.

Ultimately I find that the Majority erred in failing to consider the provisions of §11-9-505(a). They further erred in ruling that the employer had good cause for discharging the claimant. The claimant requested time off, it was granted, and there is no indication that she intentionally disregarded the best interest of the employer by failing to notify management of her absences on the dates

she had already been granted off. If anything, her behavior amounted to an isolated instance of poor judgment in failing to approve her absence with management, rather than an intentional disregard of the obligation owed to the employer. Furthermore, the claimant remained unable to substantially replace her income after May 15, 2004, indicating that she should have been awarded temporary total disability benefits. For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner