

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312019

LESLEY BOHANNAN,  
EMPLOYEE

CLAIMANT

UNITED PARCEL SERVICE,  
EMPLOYER

RESPONDENT

LIBERTY MUTUAL FIRE INS. CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 19, 2006

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

Claimant represented by the HONORABLE KENNETH OSBORNE,  
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE JAMES ARNOLD,  
II, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of  
the Administrative Law Judge filed September 16, 2005.

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 October 31, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on October 31, 2003.
4. Medical expenses have been paid.
5. The claimant is entitled to a weekly compensation rate of \$349.00 for temporary total disability and \$262.00 for permanent partial disability.
6. Temporary total disability has been paid through November 5, 2004, and from January 14, 2005, through February 28, 2005.
7. The respondents agree to pay temporary total disability from February 28, 2005, through March 2, 2005, with an appropriate attorney's fee.
8. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from December 30, 2004, to January 14, 2005, and then again from March 2, 2005, to a date to be determined.
9. The respondents have controverted this claimant's claim for additional benefits.
10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the September 16, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion 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.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to additional temporary total disability benefits from December 30, 2004, to January 14, 2005, and then again from March 2, 2005 to a date yet to be determined. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof. Accordingly, I would reverse the decision of the Administrative Law Judge.

In January of 2003, the claimant sustained an admittedly compensable injury. The claimant was placed on light duty by Dr. Gary Moffitt and was released to full duty one week later. On October 31, 2003, the claimant reinjured that same area of his back and he was placed on light duty again. The claimant returned to

full duty on December 18, 2003. For the period December 18, 2003, through November of 2004, the claimant did not require any medical treatment nor did he miss any work. On November 5, 2004, the claimant voluntarily quit his employment with the respondent employer.

Approximately two weeks after quitting, the claimant asked the respondent employer to make arrangements for him to see a doctor because of back complaints. The claimant was granted that request and the claimant presented to Dr. Moffitt. Dr. Moffitt referred the claimant to Dr. Luke Knox who released the claimant to work with some restrictions on December 30, 2004. The claimant underwent surgery on January 14, 2005 and was released to light duty work on March 2, 2005.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. Id. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as

far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra. The question of when the healing period has ended is a factual determination for the Commission.

The healing period is defined as that period for healing of the injury that continues until the employee is as far restored as the permanent character of the injury will permit. Arkansas Highway & Transp. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Id.; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The determination of when the healing period ends is a

factual determination to be made by the Commission. McWilliams, Parker, supra. In Pallazollo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remained within his healing period and that he suffered a total incapacity to earn wages (citing Arkansas State Highway & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981)).

The claimant contends that he is entitled to temporary total disability benefits for the period December 30, 2004, through January 14, 2005, and again from March 2, 2005, through a date yet to be determined. The respondent contends that it is not responsible for temporary total disability benefits for the period that the claimant was released to light duty work. The claimant refused light duty during the claimed periods of time by voluntarily quitting his job and he was not totally incapacitated during those periods. After conducting a de novo review of the record, I agree with the respondents.

The respondents should not be responsible for temporary total disability benefits during those periods of time because the claimant voluntarily quit his

employment with the respondent employer. Moreover, the claimant was physically able to work during those time periods he is requesting benefits. The respondent employer provided light duty work to the claimant before the claimant quit his employment with the respondent employer. Following the January 2003 injury, the claimant was given work restrictions and the respondent employer provided the claimant with work within those restrictions. After the October 31, 2003, injury, the claimant was assigned a ten pound lifting restriction. Again, the respondent employer provided the claimant work within those restrictions until he was released to full duty in December of 2003. The respondent employer had a policy to provide injured employees with temporary alternate work while they had been assigned restrictions by a physician. However, the claimant in this case voluntarily quit his employment on November 5, 2004, because he was mad because of the lack of help he was receiving on a new route. The claimant does not qualify to be rehired by the respondent employer.

Sam Kilpi, regional manager of the respondent employer's risk management department, testified that the respondent employer would have continued to provide light duty work if the claimant had not voluntarily terminated his employment several months earlier. The

claimant agreed that the respondent employer would have made light duty work available to him after he was released on December 30, 2004, and again on March 2, 2005. The claimant testified that the reason why he is not in position to take advantage of the respondent employer's alternate work policy is because he voluntarily quit his employment with the respondent employer.

The evidence demonstrates that the respondent employer did not have discretion to rehire the claimant after he quit. Mr. Kilpi stated that the policy that if the rehire status is marked "no", there is absolutely no way you can turn that around. It is the policy of the respondent employer not to rehire employees who voluntarily resign. It is clear that the claimant in this case voluntarily resigned and his rehire status would have been marked "No." Pursuant to the respondent employer's policy, he would not be rehired. The claimant, on his last day of work, did not complete his job, abandoned a half loaded truck and walked off the job without giving notice of his resignation.

Ark. Code Ann. §11-9-526 provides:

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.

An offer of suitable employment is a condition precedent to applying for benefits pursuant to Ark. Code Ann. §11-9-526. Webb v. Webb, Full Workers' Compensation Commission Opinion filed June 29, 2000 (Claim No. E906144). Work must be available within the employee's physical restrictions. McCuller v. Democrat Printing & Lithographic Co., Full Workers' Compensation Commission Opinion filed April 28, 1998 (Claim No. E608050). The claimant must also unjustifiably refuse employment which is suitable to his capacity. Barnette v. Allen Canning Company, 49 Ark. App. 61, 896 S.W.2d 444 (1995). This specific statute provides that an injured employee is prohibited from receiving compensation if the employee refuses or continues to refuse suitable employment. It is blatantly obvious that the claimant in this case quit his job. The purpose of this statute is to act as an incentive for employer's to provide suitable employment and to penalize employees for refusing to work when they are physically able to do so. The respondent employer in the case presently before us provided suitable employment to the claimant before and after his October 30, 2003, compensable injury. The claimant voluntarily

quit his employment with the respondent employer. He was not terminated. The claimant knew that light duty work would be available to him and he abruptly and voluntarily walked off the job after becoming upset. The fact that the claimant voluntarily quit his employment, in my opinion, is a direct refusal of the suitable employment that the respondent employer would have undisputably provided to him. The claimant acknowledged that the reason he cannot now take advantage of the respondent employer's light duty policy was his own decision to terminate his employment. Further, the respondent employer should not be forced to rehire the claimant when he voluntarily quit.

In a similar fact situation, the Commission recently addressed the issue of whether a claimant was entitled to temporary total disability benefits after he was terminated following an admittedly compensable injury. Although the claimant in this case was not terminated, he voluntarily quit and I think this fact situation can be applied to the findings in Benz v. Densy Film Group, Inc., Full Commission Opn. filed Feb. 9, 2005, Claim No. F102602. In the Benz case, the claimant sustained an injury to his low back on February 22, 2001. The respondent employer accepted the injury as compensable and provided benefits accordingly. The

claimant received temporary total disability benefits for the time he was unable. The claimant was terminated on May 14, 2001. The claimant asserted that he was entitled to temporary total disability benefits from March 14, 2001, through the date his primary physician released him from his care. The Full Commission found that the claimant failed to prove he was totally incapacitated from earning wages after his termination and denied the claim for additional temporary total disability benefits. The evidence in that case demonstrated that the claimant had been released to return to work albeit with restrictions.

In this case, the claimant was physically able to perform work from December 30, 2004, through the date of his surgery on January 14, 2005, and was physically able to perform work since being released to light duty on March 2, 2005. In my opinion, the claimant is not incapacitated for these periods of time. The claimant must be totally incapacitated from earning wages and he was not. The claimant was released to light duty. Because the claimant had voluntarily quit his employment with the respondent employer, it is obvious that he should not receive temporary total disability benefits. The claimant should not be rewarded for terminating his employment with the respondent employer when he was

fully aware that he would have received accommodations within his restrictions. In my opinion, requiring the respondent employer to pay temporary total disability benefits to the claimant during these time period is penalizes the employer for its policy of not rehiring people who voluntarily quit. It is not within our purview to force an employer to rehire an employee. The claimant acknowledged that he was capable of performing light duty work after he was released on December 30, 2004, and March 2, 2005.

Therefore, after conducting a de novo review of the evidence, I find that the claimant was physically able to work during the claimed periods and he has failed to prove that he was entitled to additional temporary total disability benefits. Accordingly, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner