

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409570

MICHAEL L. WORTHINGTON, EMPLOYEE	CLAIMANT
CAVENAUGH AUTO GROUP, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 27, 2006

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

Claimant represented by the HONORABLE JOHNNY DUNIGAN,  
Attorney at Law, Monette, Arkansas.

Respondents represented by the HONORABLE MELISSA ROSS  
CRINER, Attorney at Law, Little Rock, 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 20, 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 over this  
claim.

2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant's healing period has not ended.
4. The claimant has proven, by a preponderance of the evidence, that he is entitled to additional temporary total disability beginning July 13, 2004, and continuing until such time that his healing period is determined to have ended.
5. A preponderance of the credible evidence reflects that the employer did not offer the claimant suitable employment within his physical restrictions following the July 3, 2004, admitted injury. Further, a preponderance of the credible evidence reflects that even if employment was offered, which is not conceded herein, the claimant's refusal and/or failure to report to work was justifiable.
6. Respondents remain responsible for additional and continued medical treatment, including, but not limited to knee surgery recommended by Dr. D. Bud Dickson.
7. Respondents have controverted claimant's entitlement to additional temporary total disability. Respondents have not controverted continued medical treatment, to date.
8. All additional issues 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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the September 20, 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 opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to additional temporary total disability benefits beginning July 13, 2004, and continuing until the end of his healing period; the finding that the respondent employer did not offer the claimant suitable employment within his physical restrictions following the claimant's July 3, 2004, injury; and the finding that the preponderance of the evidence reflected that even if employment had been offered to the claimant, the claimant's refusal and his failure to report to work was justifiable. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed as a car salesman for the respondent employer which owns several

automobile dealerships. The claimant was paid commission only based upon car sales. The claimant's duties were typical of an automobile salesperson, basically, walking out on the lot to meet new customers, discuss and demonstrate vehicles in an effort to make sales, and then take offers and other applications necessary to conclude a contract. The claimant sustained an admitted, compensable injury on July 3, 2004, when he stepped in some oil or water and slipped, falling on his right knee. The injury was observed by Jerry Jones, the dealership manager. Mr. Jones advised the claimant to take the weekend off and call him the following Monday.

The claimant was initially examined and treated at the St. Bernard's Regional Medical Center emergency room on July 5, 2004. X-rays were performed and the claimant was initially diagnosed as having sustained a dislocation of the right knee with internal derangement. The claimant was instructed to rest, apply ice, and take prescription medications. The claimant was discharged on crutches and instructed to follow-up with Dr. John Ball, an orthopedic surgeon in Jonesboro, Arkansas.

The claimant was referred by Bobby Long, the human resource manager, to the company doctor, Dr. Arnold E. Gilliam at the NEA Clinic in Jonesboro,

Arkansas, who examined the claimant on July 8, 2004. The claimant maintained that Dr. Gilliam did not even examine his knee, but, rather, permitted him to return to work on July 12, 2004, with the restriction that he use a knee immobilizer and crutches. It appears that Dr. Gilliam may have attempted to refer the claimant to an orthopedic physician the following week. The claimant was upset because Dr. Gilliam told him to go back to work when he was unable to walk. Rather than return to Dr. Gilliam or wait for a referral by Dr. Gilliam to a specialist, the claimant next went to the VA hospital for an evaluation. The VA hospital in Memphis, Tennessee, recommended an MRI of the knee which the claimant maintained could not be scheduled for many months. Eventually, the claimant petitioned the Commission for a change of treating physicians, which was granted to Dr. Bud Dickson, an orthopedic surgeon in North Little Rock, Arkansas. The record reflects that the claimant was first evaluated by Dr. Dickson on June 22, 2005. The claimant underwent an MRI of the right knee and Dr. Dickson concluded that the claimant required arthroscopic surgery to correct the damage to the knee. The respondents accepted responsibility for the recommended surgery. Dr. James Mulhollan reviewed the claimant's medical records to confirm the necessity

of knee surgery. He agreed that the MRI reflected a medial meniscus tear which Dr. Dickson hoped to correct with arthroscopic surgery.

It is undisputed that the claimant sustained a compensable injury to his right knee, which is a scheduled injury under our workers' compensation laws. An employee who suffers a scheduled injury is entitled to temporary total disability compensation during the time they remain within their healing period or until they have returned to work, whichever occurs first. Wheeler Construction Co. vs. Armstrong, 73 Ark. App. 164, 41 S.W.3d 822 (2002). The claimant has not returned to gainful employment but the respondent employer offered to provide the claimant with work that accommodated the claimant's restrictions. The claimant failed to even call the respondent nor did he show up for work.

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/her capacity. Barnette v. Allen Canning Company, 49 Ark. App. 61, 896 S.W.2d 444 (1995).

The evidence demonstrates that the company doctor, Dr. Arnold E. Gilliam, released the claimant to return to work on July 12, 2004, with specific restrictions that the claimant use a knee immobilizer and crutches while, at the same time, requesting that the claimant be evaluated by an orthopedic surgeon. Based upon Dr. Gilliam's report, Mr. Long wrote the claimant a letter which is set out below:

"Monday, July 12, 2004

Dear Mr. Worthington,

**ITEM 1**

Information has been provided from Dr. Gilliam of the NEA Medical Clinic that you have been released to return to work effective July 12, 2004 with restrictions of using knee immobilizer and crutches. You have been advised by our Workers Compensation Carrier that Cavanaugh

Auto Group can provide you with work that will accommodate these restrictions. You have been supplied with the proper immobilizer and crutches per the physician's orders and have been instructed on your responsibilities pertaining to this incident. In order to continue your benefits under workers compensation, you should abide by the requests of our workers compensation carrier. Please see the enclosed release stating the return to work date of 7/12/2004.

**ITEM 2**

It has also been verified that you did not call or report to work Monday, July 12, 2004. Per our company policy on page 8 under General Policies, it states that if you are unable to come to work, you must notify your immediate supervisor as far in advance as possible but no later than one hour prior to your scheduled reporting time. Please see your signed acknowledgement [sic] of your receipt of the handbook that outlines this policy.

**SUMMARY:**

Due to the above stated facts, we request that you produce a work excuse for every day that you cannot be at work after July 11, 2004. If we do not have the excuses in the Human Resource Office by July 19, 2004, we will assume you have willfully and voluntarily resigned your position with Cavanaugh Auto Group. If you have any questions, please contact Bobby Long at 870-802-3121 between the hours of 8am and 5pm Monday through Friday."

The respondents contended that the claimant refused to return to work for the respondent employer although his position fit within the limitations that were given by the claimant's doctor. The only restrictions the claimant had were to use a knee immobilizer and crutches. In my opinion, the evidence demonstrates that the claimant made his own independent decision not to return to work for the respondent employer as a sales person.

The claimant was asked on direct examination why he was not able to work right after the injury to his knee and he responded:

A. Well, one thing, it was swollen up so bad I couldn't put any pressure at all on it, and it was definitely unsafe to drive a vehicle, that far especially to work.

Q. And did you have a knee immobilizer on your leg at that time?

A. Yes.

Q. Okay, how did you get back and forth to the doctor?

A. My landlord drove me.

Q. Okay. Are you still working at Cavanaugh?

A. No, I'm not.

Q. Why not?

A. I was terminated for not showing up. No, they put on there at first desertion.

Q. But you are not working there today?

A. No, I'm not.

Q. And what keeps you from working today?

A. Today?

Q. Yes?

A. I don't have another job.

Q. Are you able to work?

A. No, not at the time.

Q. Why not?

A. Pain in my right leg. If I stay up on it long, I start having pain in my leg and knee.

Q. Okay. Would you be able to do a job where you just sit down all day?

A. I believe so.

Q. Why haven't you applied for any of those jobs?

A. Because I'm not through with my treatments on the leg yet. And plus, around where I live, I'm thirty miles either way to any city to work in. Leachville is not a booming city.

In my opinion, the evidence demonstrates that the claimant had absolutely no desire to return to work

so he just did not go back. No doctor took the claimant off work after his release in July of 2004. The respondent employer had work within the claimant's restrictions. The only reason why the claimant did not return to his work was because he could not drive himself. However, the claimant had been driving at the time of the hearing for over a year. Because the claimant lived so far away from work, he stated that he could not drive. However, that fails to explain why the claimant did not even contact Mr. Long after he received the letter setting forth his accommodations. The claimant never even called Mr. Long and said, "I can't come back to work because I can't drive." Quite frankly, it is not the respondent's responsibility to pay the claimant temporary total disability benefits because the claimant cannot drive to and from his place of employment. In my opinion, this is not a justifiable refusal for the claimant to return to work.

Therefore, after considering all the evidence in the record, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits for the period July 13, 2004, through a date yet to be determined. Therefore, I must respectfully dissent from

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the majority opinion.

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KAREN H. MCKINNEY, Commissioner