

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502578

BRUCE BULLARD,
EMPLOYEE

CLAIMANT

WHITE'S SIGN COMPANY,
EMPLOYER

RESPONDENT

AIG CLAIMS SERVICE,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED JUNE 1, 2007

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

Claimant represented by the HONORABLE GREG GILES,
Attorney at Law, Texarkana, 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

Claimant appeals an opinion and order of the
Administrative Law Judge filed September 25, 2006. 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. The stipulations agreed to by the parties
are reasonable and are hereby accepted as
fact.
3. The claimant has failed to prove by a
preponderance of the evidence that additional

medical treatment remains reasonably necessary in connection with the compensable injury.

4. The claimant has failed to prove by a preponderance of the evidence that he remained within his healing period after September 23, 2005.

5. The claimant has therefore failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.

6. The claimant has failed to prove by a preponderance of the evidence that suitable employment within his limitations was available with the employer subsequent to the time he was released to return to work.

7. The claimant has therefore failed to prove by a preponderance of the evidence that he is entitled to benefits per Ark. Code Ann. § 11-9-505(a).

8. The respondents have controverted all benefits sought 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 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 25, 2006 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 Hood dissents.

DISSENTING OPINION

The Majority is affirming and adopting an Administrative Law Judge's decision which denied the claimant any additional benefits based upon his admittedly compensable injury. For the reasons set out below, I must respectfully dissent from that decision.

The claimant sustained an admittedly compensable injury on or about June 16, 2004. The injury occurred when the claimant slipped while climbing out of a truck and fell to the ground, injuring his lower back. The claimant had suffered an earlier injury to this part of his body in an employment-related accident from a different employer, which resulted in

the claimant undergoing a laminectomy or a discectomy at L4-L5 in 1998.

Following his fall, the claimant was provided medical and disability benefits. He returned to work under a light-duty release but, according to the testimony, he essentially returned to his former duties. Later, the respondent-employer stopped providing the claimant a job and the respondent-carrier stopped payment of temporary disability benefits.

A dispute in this case arose when the claimant was released to return to work at normal duty and the respondent-employer refused to provide the claimant any employment. Later, as a result of a change of physician granted by this Commission, the claimant came under the care of Dr. Christopher Mocek, a Little Rock anaesthesiologist who specializes in arthroscopic and percutaneous treatments of spinal injuries. Dr. Mocek's evaluation of the claimant suggested to him that the claimant had a small disc tear or protrusion which, along with some scar tissue, was symptomatic and causing the claimant to have nerve root irritation. In order to treat that problem, Dr. Mocek recommended the claimant undergo an arthroscopic procedure to remove some of the scar tissue and possibly repair the disc protrusion.

The claimant filed this claim, requesting that the respondent be ordered to provide him the medical treatment recommended by Dr. Mocek and that they provide him certain additional benefits based upon Ark. Code Ann. §11-9-505 (a). The latter argument was based upon the refusal of the respondent employer to provide him suitable employment even though, the claimant contended, such employment was available. The claimant also requested temporary disability benefits based upon the opinion of Dr. Mocek that the claimant was only able to work at a light or limited-duty job. The respondent controverted the claimant's entitlement to any of those requested benefits.

The first issue is the claimant's entitlement to benefits pursuant to Ark. Code Ann. §11-9-505 (a). That section provides as follows:

(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 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.

This statute was first applied by the Arkansas Court of Appeals in Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S. W. 2d 237 (1996). That case set out certain requirements which must be met in order for a claimant to establish entitlement to benefits under that section. Those requirements are:

- (1) That he has sustained a compensable injury;
- (2) That suitable employment which is within his physical and mental limitations is available with the employer;
- (3) That the employer refused to return him to work; and,
- (4) That the employer's refusal to return him to work is without reasonable cause.

In the present case, there is no dispute that the claimant sustained a compensable injury and that his employer had refused to return him to work. The two remaining questions are whether suitable employment was available and whether the employer's refusal to provide

such work was reasonable. I find that the record establishes that suitable employment was available to the claimant but that the respondent-employer simply declined to provide it to him.

The Majority's basis for denying this portion of the claim, is that there was no work available with the respondent-employer. That finding was based entirely upon the testimony of two witnesses, both of whom have questionable credibility.

The two witnesses were Todd and Deborah White, two members of the family which owned the respondent-employer. Both witnesses testified that the employer did not have any available employment for the claimant, but both acknowledged that the claimant contacted them in late September 2005, advising them that he was released from the doctor for employment. Both witnesses also testified that the claimant was told to return when he had a specific release from the doctor, which the claimant apparently did a few days later. However, it was not until mid December, almost three months later, that the claimant was advised that he would not be rehired. The White's also testified that another individual was hired in March 2005 to fill the claimant's position.

If the employer did not have any available positions for the claimant, I do not understand why it would have taken them three months to advise the claimant of his job status. In fact, Deborah White, after testifying under direct examination that there were no available jobs for the claimant, made the following statement in reply to a question from her attorney:

Q Do you have the ability to just create a job that he can do?

A Well, that's kind of dependent on our customers and what kind of work they require.

Q If the work became available, you might have?

A Right. It's just not - you know, there has not just been a job created.

Credibility question aside, it is apparent from the witness's testimony that a considerable amount of animus toward the claimant existed on the part of the employer. And, yet, in spite of that, when the claimant attempted to report to duty in late September 2005, it took the White family almost three months to advise the claimant he was terminated. Also, in light of Ms. White's statement that they could provide employment for individuals and the testimony of both of the Whites that

a replacement was hired, it seems to me that the employer could have provided the claimant suitable employment when his treating doctor released him on or about September 28, 2005.

Since I find that there was suitable employment available from his employer, the next question is whether the respondent's refusal to provide such employment to the claimant was reasonable. Since it appears from my review of the testimony that the respondent-employer's refusal to provide the claimant suitable employment was in retaliation for him having sought workers' compensation benefits and for having advised OSHA of certain unsafe conditions at his employment, I do not believe that the termination can be said to be reasonable.

Much of the testimony at the hearing dealt with an OSHA inspection of the respondent-employer. When the Whites learned of an imminent OSHA inspection, the business was temporarily closed and the OSHA inspectors were denied admittance. Later, when OSHA inspectors again attempted to enter the respondent's business, the doors were locked and the business was closed again for a period of time. Eventually, the OSHA

inspection was completed and the respondent-employer received some fines for various violations.

While testifying about this incident, both Todd and Deborah White made several statements which simply cannot be believed. According to Todd White, the business shut down because they were "cleaning up" and otherwise, "taking a look at what our situation was." However, another witness who testified in this matter was Roman Freeman, one of the employer's supervisors. According to Mr. Freeman, who at the time of the hearing was no longer employed by the respondent, he and the other supervisors, along with members of the White family, removed a large amount of tools and equipment from the business premises to the home of Bobby White, the company's owner (Bobby White is husband of Deborah White and the father of Todd White). Mr. Freeman also testified that the Whites had concluded that the claimant was the individual who had reported them to OSHA and was responsible for the inspection.

Mr. Freeman also testified that there were safety problems on the premises prior to those inspections, including shoddy equipment, frayed extension cords, and similar problems. Interestingly enough, prior to the aborted OSHA inspection, the

respondent had been providing the claimant employment. Immediately after the attempted OSHA inspection, the Whites stopped providing employment for the claimant and decided that they did not have any light-duty work available. Mr. Freeman also testified that the claimant was the target of derogatory comments made by the Whites.

During his testimony, Todd White asserted that the OSHA-related shut down was merely to reassess their situation. He did not make clear what was meant by this phrase. He also denied that any equipment was removed from the respondent's business, stating that only some "old paint" was removed to Bobby White's house. There is no clear explanation why it was necessary to remove only paint from the shop to the owner's house. Deborah White was also asked about the removal of items from the business to her home. She confirmed that there were several items removed but, she did not know what they were. This statement is somewhat surprising, since they were presumably removed to her home.

A video recording of the claimant was also offered into evidence. The recording itself is of no great significance, in that, it shows the claimant emptying some large metal drums and placing the empty

drums in the back of a truck. The video was recorded on September 23, 2005, the date on which the claimant's treating physician had indicated that he was at maximum medical improvement and released to full-duty work. However, on this recording, Todd White is heard making disparaging remarks about the claimant, calling him names and indicating that the White family was angry with him.

When the claimant attempted to return to work in late September 2005, it was obvious that the Whites were not going to provide him a job. According to Mr. White, the reason the claimant was not advised of his termination until December is because they had to "consult" with an attorney.

Obviously, the testimony of Todd and Deborah White is lacking in credibility. In spite of their protestations to the contrary, they obviously believed that the claimant had turned them in to OSHA and, based upon their conduct, it is clear that they had something to hide. While the testimony of the Whites is totally lacking in believability, their conduct clearly establishes that the reason they would not provide the claimant suitable employment following his release is because of retaliation for him filing a workers'

compensation claim and advising OSHA of numerous safety violations at the respondent's business. To allow the respondent to avoid any liability under Ark. Code Ann. §11-9-505 (a) (1) by asserting that there were no available jobs for the claimant is an abrogation of our duty to require employers to carry out one of the primary purposes of the Workers' Compensation Act, as amended by Act 796 of 1993. That is, to require employers to make a good faith effort to return injured workers to gainful employment. The respondent-employer in this case should not be allowed to use a retaliatory termination to avoid their clear obligation.

The remaining issue in this case involves the claimant's entitlement to additional medical treatment from Dr. Christopher Mocek and related disability. The claimant first saw Dr. Mocek on April 18, 2006. At that time, Dr. Mocek began evaluating the claimant's condition in an attempt to determine what was the cause of his continuing complaints of pain and radicular symptoms into his leg. Dr. Mocek's ultimate conclusion was that, based upon his evaluation of the claimant's MRI scan, that the disc protrusion in combination with the scar tissue from his earlier surgery was compressing the claimant's nerve roots in his spine. Dr. Mocek

believes that this condition could be corrected with a minimally invasive arthroscopic procedure. His specific steps in carrying this out are outlined in his deposition. In denying the claimant Dr. Mocek's recommended treatment, the Administrative Law Judge stated that the opinions of the claimant's other doctors were given more weight. However, it appears to me that the only physician who was willing to take any steps to improve the claimant's condition was Dr. Mocek and his treatment recommendations are clearly reasonable.

In evaluating this issue, I note that the standard is whether the requested medical treatment is reasonable and necessary and is the result of the claimant's compensable injury. In this case, the claimant had been performing his duties with the respondent-employer for approximately five (5) years at the time he sustained his admittedly compensable back injury. The claimant has consistently complained of the same symptoms and, until he came under the treatment of Dr. Mocek, had not been able to find any doctor to take any steps to actively treat his condition. Based upon my review of Dr. Mocek's medical report and his deposition, I believe that he is in a better situation to evaluate the claimant's condition than his other

physicians. Dr. Saer, who is a Little Rock neurosurgeon, opined that the claimant was not a surgical candidate, but it appears from his report that he did not actually review the claimant's MRI, relying instead upon a radiology report. It is also unclear whether Dr. Safman viewed the actual MRI films or simply looked at the radiologist report. Furthermore, I note that both of these physicians were "company doctors" that seemed determined to only provide conservative treatment.

I believe that Dr. Mocek's recommended course of treatment is reasonable and necessary and related to the claimant's condition. For that reason, I find the Administrative Law Judge's decision to deny this medical treatment to the claimant should be reversed and the claimant should be awarded further treatment at the direction of Dr. Mocek, and related temporary total disability benefits.

For the reasons set out above, I must respectfully dissent from the Majority's Opinion affirming and adopting the Administrative Law Judge's denial of this claim.

PHILIP A. HOOD, Commissioner