

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F604955

GERALD WARD,
EMPLOYEE

CLAIMANT

STRIBLING PACKAGING & DISPLAY,
EMPLOYER

RESPONDENT

WESTPORT INSURANCE CORPORATION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 8, 2007

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

Claimant represented by the HONORABLE EVELYN BROOKS,
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE MICHAEL R. MAYTON,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed January 19, 2007. The administrative law
judge found that the claimant failed to prove he was
entitled to any benefits under Ark. Code Ann. §11-9-505(a).
After reviewing the entire record *de novo*, the Full
Commission reverses the opinion of the administrative law
judge.

I. HISTORY

Gerald Dewayne Ward testified that he began working for Stribling Packaging and Display, Inc., in July 2000. Mr. Ward testified that he was hired to drive a truck. The claimant testified that he was involved in a motor vehicle accident while driving a company truck in June 2004. The claimant signed the following written statement given to him on June 24, 2004:

On 6/24/2004 you were involved in an accident. The accident was determined preventable due to following to (sic) closely.

Anytime you are following another vehicle you must maintain a safe distance behind the other vehicle.

If you have, any other preventable accidents will result in disciplinary action up to and including discharge.

The claimant testified that he was involved in another motor vehicle accident while driving a tractor-trailer for the respondents in September 2005. The record contains an Employee Warning dated October 3, 2005, alleging that the claimant had committed a safety violation while working for the company's Transportation Department on September 24, 2005. The Employee Warning included the following language: "Gerald is disqualified from driving for Stribling Packaging

and will be moved to production. Any further safety issues ... will result in termination."

The parties stipulated that the claimant sustained a compensable injury to his left ring finger on April 25, 2006. The claimant testified that his hand was caught in the rollers of a J&L folder-gluer. "It smashed the end of my left ring finger," the claimant testified. The claimant testified that he never received training in how to operate the folder-gluer.

Lee Richmond, a J&L operator for the respondents and a supervisor of the claimant, testified that the claimant was still within a two-year training period at the time of the accident. Mr. Richmond testified, however, that "I didn't see how he got hurt."

Dr. Scott S. Cooper examined the claimant on April 25, 2006: "Mr. Ward is a 51-year-old male who was at work today and got his finger caught between two rollers amputating the tip of his left ring finger and I was asked to see him." Dr. Cooper diagnosed "Tip amputation of the left ring finger." Dr. Cooper performed a "Shortening and closure," and the post-operative diagnosis was "Left ring fingertip amputation."

The claimant testified on direct examination:

Q. At first you were off work completely?

A. Yes.

Q. And did you take that note into Stribling?

A. Yes, ma'am.

Q. Who would you give it to?

A. I either took it over to Jennifer - there was a young lady named Jennifer. She was the safety girl there. She was at the hospital with me, so she might have got it then, but if I took it into Stribling, because I went straight from the hospital to Stribling, I probably would have gave it to Paul Piha....

Dr. Cooper noted on May 1, 2006, "I think we can let him go back to work with no use of his left hand. I made sure he understands that we've got to apply restrictions like that. Hopefully they'll find something for him to do....I'll see him back in 9 days. We'll plan to take his stitches out."

On a Certificate dated May 1, 2006, Dr. Cooper indicated that the claimant was able to return to work on May 2, 2006, "No use of left hand."

The claimant testified on direct:

Q. Now, did you get some notes after that first one?

A. Yes, ma'am. I got a note every time I talked to Cooper.

Q. And what was your practice after you would get the note?

A. Dr. Cooper's office was in Rogers and I would go straight from his office to Stribling and I gave the notes to Paul Piha except for one time. The lady that worked the front desk, she couldn't find him and she wasn't sure where he was, so I left the note with her and told her that the doctor said that I could come back and do light to medium work and if Paul had any questions for him to call me.

Q. Now, you said that at first you were kept completely off work, and after a while you were able to go back at light duty?

A. Yes. After the first - the first note said that I could come back for light duty, which would have been, he said, like paperwork or phone answering.

Q. And when you took that note in to Stribling, did you offer to come back to work?

A. Yes. I said, "I can" - I said, "I can come back and do" - and I would say whatever the note said, exactly what the note said.

Q. Now, did you want to come back to work during that time?

A. Yes.

Q. Were you returned to work? Did Stribling put you back to work?

A. No, ma'am.

Q. Did Stribling ever put you back to work after this injury?

A. No, ma'am.

The record contains an Employee Warning dated May 4, 2006:

Gerald Ward was hepling (sic) set up a machine to run first thing Tuesday morning. Attempting to pull out a box from the compression unit on the machine. Gerald put his hand into an area that he shouldn't have. In doing that, the belt on the machine grabbed his finger and pulled it between the roller and the belt, cutting the tip of his finger off....

Gerald is disqualified from working at Stribling Packaging this day forward due to the third accident that was his fault in less than one year. This is a step that must be taken for his safety and the others that worked with him.

Dr. Cooper noted on May 10, 2006:

The wound looks fine. There is a little fibrinous exudate but there is no sign of infection. We've taken his stitches out. I want him to keep washing with soap and water and applying Neosporin and a bandaid. They asked if they should cover it with something other than a bandaid. I really don't think so. He bumped it on the table the other day and that was very painful. He just needs to be careful. He can't quite make a good composite fist so I want him to work on that.

I've given him a work note saying he can use his left hand for light paperwork. They've not had anything for him to do so far. We'll see him back in 2-3 weeks. Maybe he'll be able to do more by then.

On May 15, 2006, the following was handwritten on the May 4, 2006 Employee Warning: "Associate did not return to

sign this warning. Supervisor informed Mr. Ward that he was terminated on the phone on 5/15/06."

The claimant followed up with Dr. Cooper on May 31, 2006:

He's doing a lot better. There's just a little bit more granulation tissue at the distal end of his nailbed now. He actively flexes the DIP joint about 25 degrees and extends fully. His PIP joint moves nicely. His grip strength is good.

I asked him what would happen if I stated "no restrictions" on a work note. I'm not sure he's ready for that. He says he's not sure he's going to have a job when I release him. He's a way from being released. I'm going to follow him for a few more months but he's probably getting close to being allowed to work without restrictions. We've given him a work note saying he can use his left hand with no more than 20 lbs. force - push/pull/lift. He'll take that to them and if they don't have anything for him, that's fine. We'll see him in 3 weeks. I should be able to release him to full duty....

Dr. Cooper noted on June 23, 2006:

He's doing really well. I asked him if he's having pain and he said not really. There's a little sensitivity like when he's tucking his shirt in for instance.

On exam today, the wound is well healed....

I think I can release him from my care. He's agreeable to that. The case manager is here and she's agreeable as well, but I made sure both of them understand that if he has problems I'm going to need to see him again and we might need to reopen it if he has significant pain, sensitivity or problems with the nail.

I explained to him how an impairment rating works. I drew outlines of both of his hands. I'm also going to get his original x-rays so that I can apply the appropriate impairment rating for this level of partial fingertip amputation. He says he doesn't know what's going to happen at work if they're going to keep him or what, but I think I can release him. His composite fist looks normal. He can flex his DIP joint. When making the fist equal to the adjoining fingers, he says he feels a little "tight" dorsally but that should loosen up over time.

On a Certificate dated June 23, 2006, Dr. Ward indicated that the claimant was able to return to work with no restrictions.

The parties stipulated that the claimant's healing period ended "on or about June 23, 2006."

Dr. Cooper assigned an Impairment Rating on July 7, 2006:

Due to Mr. Ward's partial amputation of his right ring finger, based on the Fourth Edition AMA Guides to the Evaluation of Permanent Impairment, he has a 20% impairment of the right ring finger that is from figure 17. Table I shows that equates to a 2% hand impairment. Table II shows that to equate to a 2% upper extremity impairment and Table III relates that to a 1% whole person impairment. Therefore the whole person impairment for Mr. Ward is 1%. As noted previously, if he has trouble with this in the future, the case may need to be reopened.

The parties stipulated that the respondents "have accepted liability for and have paid permanent partial

disability benefits for a permanent physical impairment of 20% to the finger."

A pre-hearing order was filed on August 29, 2006. The parties agreed to litigate the following issues: "1. The claimant's entitlement to benefits under Ark. Code Ann. §11-9-505(a). 2. Attorney's fee."

A hearing was held on October 23, 2006. Paul Piha, production manager for Stribling Packaging & Display, testified for the respondents:

Q. Were you involved in his termination?

A. Yes, I was....

Q. What kind of conversation did you have with him on May the 15th of '05?

A. I called him, asked him about his doctor's appointment, how that was going and what happened. I asked him to come in and bring me what he had. We discussed - he said, "Well, what do you need to see me all about?" and I basically at that point just said - well, his words were that I just told him I don't think they're going to let him come back. Well, my words to that is, "I've got some papers for you to sign because we're not going to let you come back," and that's just a difference in terminology, but the point was we were not going to allow him to come back.

Q. Did you advise him of it at that point?

A. Yeah, and that I had the piece of paper that I needed him to sign, the final paper, which is just as the one that he signed stating that if he had

another safety violation that he would be terminated. It's the same form....

Q. Why did you terminate him from that job, Mr. Piha?

A. Just too many safety violations. The danger to himself or to others. I mean, it's just - when you - you know, you just can't be doing things like that. I mean, as a company we have to protect you as well. If working around equipment is not your thing, then, you know, we have to look out for your protection as well as others....

The administrative law judge found, in pertinent part:

7. The claimant has failed to prove by the greater weight of the credible evidence that he is entitled to any benefits under Ark. Code Ann. §11-9-505(a). Specifically, he has failed to prove that the respondent refused without reasonable cause to return him to employment, or even that the respondent had suitable employment available. The respondent's refusal to return the claimant to suitable employment was based upon reasonable cause.

The administrative law judge therefore denied and dismissed the claim; claimant appeals to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-505(a) provides:

(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 Workers' Compensation 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 the 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.

Before Ark. Code Ann. §11-9-505(a) applies, several conditions must be met. The employee must prove by a preponderance of the evidence that he sustained a compensable injury; that suitable employment which is within his physical and mental limitations is available with the employer; that the employer has refused to return him to work; and, that the employer's refusal to return him to work is without reasonable cause. *See, Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996). The period of refusal lasts as long as the employer is doing business not to exceed the one-year limit for payment of additional benefits. *Id.*

The administrative law judge found in the present matter, "The claimant has failed to prove by the greater weight of the credible evidence that he is entitled to any benefits under Ark. Code Ann. §11-9-505(a)." The Full

Commission reverses this finding. The parties stipulated that the claimant sustained a compensable injury on April 25, 2006. The claimant underwent surgery and was released to restricted work duty on May 1, 2006. The claimant credibly testified that he took the work restrictions to his employer and attempted to return to work, but that the respondent-employer did not allow him to return to work. The respondents terminated the claimant's employment on May 15, 2006 while the claimant remained within a healing period for his compensable injury. On June 23, 2006, the treating surgeon released the claimant to return to work with no restrictions. The record demonstrates that the claimant was physically able to return to his employment position J&L folder-gluer, so that suitable employment was available within the claimant's physical limitations. However, the respondent-employer would not allow the claimant to return to work.

The respondents argue that their refusal to return the claimant to work was with reasonable cause. Noting that the claimant was involved in a motor vehicle accident in 2004 and another motor vehicle accident in 2005, the respondents point to an "Employee Warning" wherein the claimant was

advised that "any further safety issues" would result in termination of the claimant's employment. The respondents characterize the claimant's accidental injury on April 25 as a "safety violation" on the claimant's part. Mr. Piha testified that the claimant's employment was terminated because of "too many safety violations." The respondents assert that they terminated the claimant because he "was involved in three (3) avoidable employment-related accidents within a two (2) year span."

Nevertheless, the parties stipulated that the claimant sustained a compensable injury on April 25, 2006. At a minimum, Ark. Code Ann. §11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary. *Torrey, supra*. The record in the present matter demonstrates that the respondents did not attempt to facilitate the claimant's re-entry into the work force. Nor did the respondents attempt to reclassify positions following the claimant's compensable injury. Instead, the respondents terminated the claimant

for a purported safety violation. Since the respondents did not comply with the announced guidelines of *Torrey v. City of Fort Smith, supra*, the Full Commission finds in the present matter that the employer's refusal to return the claimant to work was without reasonable cause.

The Full Commission finds that the instant claimant sustained a compensable injury; that suitable employment which was within the claimant's physical and mental limitations was available with the employer; that the employer has refused to return the claimant to work; and that the employer's refusal to return the claimant to work was without reasonable cause.

Therefore, based on our *de novo* review of the entire record, the Full Commission reverses the finding of the administrative law judge. The Full Commission finds that the respondent-employer shall be liable to pay to the claimant the difference between benefits received and average weekly wages lost beginning May 15, 2006, the date of the claimant's termination, until May 15, 2007. Our finding is made in accordance with Ark. Code Ann. §11-9-505(a)(1). The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl.

2002). For prevailing on appeal, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Hood concurs.

CONCURRING OPINION

This claim comes before the Commission on the claimant's appeal of the January 19, 2007, opinion of the Administrative Law Judge, which denied the claimant benefits under Ark. Code Ann. §11-9-505(a). The Commission has reversed the decision of the Administrative Law Judge. I agree that the claimant is entitled to benefits pursuant to the provisions of §11-9-505(a). I also agree with the principle opinion's interpretation of Torrey. I now write separately to address the dissenting Commissioner's argument that the claimant committed misconduct and that, therefore, the

respondent-employer had reasonable cause to refuse to return the claimant to return to work.

_____The Dissent argues that the claimant committed misconduct and that, therefore, the Majority had good cause to refuse the claimant work. In the past, the Commission and the appellate courts have applied the language of Nibco v. Metcalf, 1 Ark. App. 114, 613 S.W.2d 612 (1981), in determining whether the claimant committed misconduct. In West v. Director, 94 Ark. App. 381, 129 S.W.3d 298 (2006), the Court indicated,

Pursuant to Ark. Code Ann. § 11-10-514(a) (Repl. 2002), an individual shall be disqualified for employment benefits if he is discharged from his last work for misconduct in connection with the work. "Misconduct" includes disregard of the employer's interests, violation of the employer's rules, disregard of the standards of behavior that the employer has the right to expect of his employees, and disregard of the employee's duties and obligations to his employer. Nibco, Inc. v. Metcalf, 1 Ark. App. 114, 613 S.W.2d 612 (1981). It requires 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. Id. 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. Id. The intentional or deliberate failure to furnish information in which an employer has a legitimate interest is a willful disregard of the employer's interest and of the standards of behavior that it has a right to expect of its employees. Id.

_____ Like the principle opinion, I find that the claimant was not terminated with reasonable cause. Though the Dissent has asserted that the claimant committed a violation of a safety policy, and, therefore, was justifiably discharged for misconduct, I do not find such to be the case. In my opinion, the employer has not established that they had a formal policy regarding shutting the machine down. While two witnesses testified to such and contend there was written policy to that effect, the written policy was not introduced into the record. I find this to be suspicious.

Furthermore, even if the employer had a formal policy indicating that one was to shut down the machine when it jammed, that was not the policy that was

actually enforced or encouraged by the respondent-employer. Rather, in my opinion, the credible weight of the evidence shows that workers were encouraged to ignore the technical policies of the company in order to increase production rates and efficiency. The claimant credibly testified that he was told to shut down the machine only when absolutely necessary. Accordingly, pursuant to the direct instructions of his supervisor, the claimant attempted to remove a box that was jammed in his machine, thus resulting in his injury. While in retrospect it is obvious that was not a wise decision, I find it is clear that the claimant was following the instructions of his supervisor, and, therefore, not committing misconduct.

The dissenting Commissioner argues that the claimant had been previously reprimanded on two prior incidents for safety violations and that the last occasion was an intentional violation of the safety policies. However, I do not find such a conclusion to be logical. The claimant testified that he was specifically told not to shut down the machine unless he had no choice. The claimant indicated that the purpose

of this instruction was to increase efficiency. The claimant indicated,

Q. Now, would there have been any other way to clear that machine to keep the others from getting caught up?

A. The only way would be to turn it off, but I didn't like to turn it off because when you turn it off it tends to - - when it starts back up, it tends not to run like it was when it was shut off. Because it's supposed to be bolted to the floor, but it wasn't bolted to the floor and it would tend to move. And when I would turn it off Lee would - - he would get pretty upset when I would turn it off because it messes the operation - - something about it messes the operation up.

Q. So when you were being instructed on how to use this machine, were you ever instructed to turn it off to clear that?

A. He said - -the only time he said to turn it off was when it just - - they just - - when I couldn't clear something in time to keep the line moving.

Q. Now, if you had had to turn off the machine, then what would it have taken to get it running again?

A. Like I said, sometimes it - - since it wasn't bolted to the floor like it should have been, the two sides move and they would get out of line sometimes, and when they get

out of line then, of course, that's going to cause your board to go down at an angle and it won't fold right. So that's the main he didn't like to - - plus, they had these quotas that they had to meet, and, of course, when you're shut down you're not making any progress, so he didn't like to shut it down because it just made his time look bad.

In contrast, the two witnesses from the respondent testified that employees were instructed to always shut down the machine if it was jammed. They both also testified that the efficiency of manufacturing would not be hindered by resetting the machines. However, I found the claimant's testimony to be more credible than the respondent's witnesses.

While the respondent's witnesses testified that resetting the machines did not cause delay, that simply makes no sense. Since the claimant had received two reprimands for violating safety policies and warned he would be discharged on the next offense, I do not find it would be logical for him to violate policy unless it was somehow beneficial. In particular, I do not understand why the claimant would ignore the safety policy and risk injury for no reason. However, if one accepts the claimant's testimony that such was done to

increase efficiency, then the claimant's failure to shut down the machine makes perfect sense. In my opinion, this shows the veracity of the claimant's testimony that he was instructed not to shut down the machine and establishes that the claimant did not violate the employer's policy or commit misconduct.

Furthermore, I find that even if one chooses not to believe the claimant's testimony, it is evident that his accident was due to lack of proper training and experience. The claimant credibly testified that he received very little training in using the machine that caused his injury. It is also undisputed that the claimant remained in his training period for operating this machine. As there is no dispute that the claimant was in his training period, I find that even if one does not believe the claimant's testimony that he was instructed to take objects out of the machine without shutting the machine down, his actions were not misconduct. Instead, his actions were tantamount to an isolated instance of good faith poor judgment rather than negligence to such a degree as to rise to the level of misconduct.

In short, I did not find the testimony of the two respondent's witnesses to be convincing. While they maintain there was a policy requiring the claimant to shut the machine down, the claimant testified that he was specifically instructed to only shut the machine down when he had no other choice. It appears that, in this instance, the claimant simply followed the instructions of his supervisor, and as a result, sustained a compensable injury. Following the instructions of one's supervisor is not misconduct. Therefore the respondent-employer did not have reasonable cause to discharge the claimant or prevent him from returning to work. Furthermore, the respondent should not be allowed to benefit for forcing employees to employ unsafe methods and then discharging them when things go awry.

For the aforementioned reasons, I concur.

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion finding that the claimant has proven entitlement to additional benefits pursuant to A.C.A. § 11-9-505(a). Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party I find that the respondents established reasonable cause in their refusal to return the claimant to work following his compensable injury. Therefore, I find that the decision of the Administrative Law Judge should be affirmed.

The claimant contends that he is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505(a)(1) which provides:

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 Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay the employee the difference between benefits received and the average weekly wage lost during the period of such

refusal, or for a period not exceeding one (1) year.

In order to establish his/her claim for additional benefits under this section, the claimant has the burden of proving that the following four requirements are met:

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

See Torrey v. City of Ft. Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996). In Torrey, supra the Courts stated that:

At a minimum Ark. Code Ann. § 11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and

reclassification of positions, if necessary.

The Majority finds that the respondents were not justified in terminating the claimant's employment simply because his last "avoidable accident" was a compensable injury. It is axiomatic that workers' compensation is a no fault system and that contributory negligence is of no matter when it comes to compensability. Despite the fact that the claimant's compensable injury was the result of a safety violation and was an avoidable accident, respondents accepted the injury as compensable and paid all medical and indemnity benefits to which the claimant is entitled. Thus, it cannot be found that the respondents controverted compensability because the claimant was at fault.

Presumably, the majority is afraid of setting bad precedent for finding reasonable cause for termination when a claimant is terminated after sustaining a compensable injury. However, in the case presently before us the claimant was not terminated for having or claiming a compensable injury. The claimant did not merely sustain a compensable injury, he sustained such an injury after violating company policy.

It was not the injury, per se, that resulted in the claimant's termination, but rather the claimant's violation of company policy in being involved in yet another avoidable accident. The claimant was placed on notice back in October of 2005, that should he be involved in any further safety issues he would be terminated. Clearly, the claimant's failure to follow safety regulations and turn off his machine prior to clearing out cardboard amounted to the claimant's involvement in yet another safety issue. The claimant had already been given a second chance when he was not fired after his second avoidable accident. Accordingly, I find that the respondents had ample reasonable cause to terminate the claimant and not return him to work following his involvement in a safety violation. This Commission should not be in the position of punishing employers for complying with company policy of enforcing safety regulations. It is not only reasonable, but also prudent to terminate an employee who poses a safety risk to himself and fellow workers. What next, will we be punishing employers who terminate an employee for violating the company drug and alcohol policy just

because they sustain a compensable injury while intoxicated? When it is clear that the termination involved something other than the compensable injury, even if a compensable injury resulted from the act, I cannot find that the respondents actions should be punished. Accordingly, I find that the respondents in the present case had reasonable cause to terminate the claimant. Therefore, I find that the claimant failed to prove entitlement to additional benefits under A.C.A. § 11-9-505(a).

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

KAREN H. McKINNEY, Commissioner