

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F503956

DONALD MINER, EMPLOYEE	CLAIMANT
YELLOW TRANSPORTATION, INC., EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, INC, CARRIER	RESPONDENT

OPINION FILED MAY 21, 2008

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

Claimant represented by HONORABLE AARON L. MARTIN, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE ERIC NEWKIRK, 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 April 16, 2007.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 13, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his right foot on April 13, 2005.

4. The claimant is entitled to a weekly compensation rate of \$466.00 for temporary total disability and \$350.00 for permanent partial disability.

5. Medical expenses have been paid.

6. Respondents have accepted and paid in full a 7 percent impairment rating to the right foot.

7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to 505(a) benefits. The respondent has not unreasonably refused to return the claimant to work because there is no suitable employment for him due to his permanent restrictions at his terminal where he was employed as a combination driver. The collective bargaining agreement covering over the road drivers specifically forbids a reclassification by an employee of the company who is currently under a different classification. Arkansas law clearly sets forth that provisions of any collective bargaining agreement shall control. See Ark. Code Ann. §11-9-505(a) (2).

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 Hood Dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant failed to prove by a preponderance of the evidence that he is entitled

to benefits under Ark. Code Ann. §11-9-505(a)(1), due to the provisions of Ark. Code Ann. §11-9-505 (a) (2). After a de novo review of the record, I find that the provisions of Ark. Code Ann. §11-9-505 (a)(2) do not control, as the preponderance of the evidence shows that the respondent did not comply with Ark. Code Ann. §11-9-505(a)(1), thereby entitling the claimant to benefits, and, therefore, I must respectfully dissent.

Ark. Code Ann. §11-9-505(a)(1) states:

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.

The claimant worked for the respondent as a city-driver. The claimant suffered a compensable injury to his right leg on April 13, 2005. The claimant was released by his physician on January 3, 2006, with 100 pound lifting,

pushing and pulling restrictions through February 3, 2006. The claimant testified that he repeatedly called the respondent and requested employment. Furthermore, the evidence of record shows that the claimant's attorney sent a letter dated March 13, 2006, requesting that the respondent provide the claimant with suitable employment. The record clearly indicates that during the time period in question, the respondent had suitable employment positions available, albeit not under the classification of city-driver, but under the classification of over-the-road driver. The respondent did not respond to the claimant's requests.

At the time of the hearing, the respondent raised Ark. Code Ann. §11-9-505(a)(2) as a defense, arguing that due to collective bargaining agreements in place, the claimant could not be re-classified from city-driver to over-the-road driver and that respondent could not hire the claimant as an over-the-road driver unless the claimant resigned his position as a city-driver (which he is still considered to be employed as, although he is no longer, in fact, working as, due to his physical restrictions), waited

six-months, and then applied for an over-the-road driver position.

Ark. Code Ann. §11-9-505(a)(2) states:

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.

While I agree with the respondent that the collective bargaining agreements would prevent the respondent from re-classifying the claimant from a city driver to an over-the-road driver, and I also agree with the respondent that due to the collective bargaining agreements, the claimant would have to resign as a city driver, wait six-months and re-apply as an over-the-road driver, I do not agree with the majority's finding that the respondent did not violate Ark. Code Ann. §11-9-505(a)(1).

The key to this case is the fact that the respondent never offered the claimant a position as an over-the-road driver, despite the claimant's numerous requests

for suitable employment. For the respondent to offer the claimant a suitable position as an over-the-road driver, albeit with the caveat that the procedures required by the collective bargaining agreements would have to be followed, was the reasonable course of action for the respondent, and, would not have violated the collective bargaining agreements or Ark. Code Ann. §11-9-505(a)(1). Despite numerous requests from the claimant, the respondent did not make the offer of suitable employment, which was available, and has therefore violated Ark. Code Ann. §11-9-505 (a)(1). The issue of whether or not the claimant would have chosen to accept or decline the respondent's offer, due to his concerns about losing seniority, benefits, etc., is clearly beside-the-point, as the respondent never made the offer.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner