

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F804396

KAREN BULLARD,  
EMPLOYEE

CLAIMANT

PILGRIM'S PRIDE CORPORATION,  
EMPLOYER

RESPONDENT

SEDGWICK CMS,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 4, 2009

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

Claimant represented by the HONORABLE VICKY BUSSEY  
COOPER, Attorney at Law, El Dorado, Arkansas.

Respondents represented by the HONORABLE MICHAEL C.  
STILES, 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 July 23, 2009. 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 and recited herein are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that she remained within her healing period from her compensable injury and

did not return to work for the period of April 23, 2008, through May 2, 2008. Therefore, the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits for her compensable injury for the ten (10) day period between April 23, 2008, and May 2, 2008, plus the maximum statutory attorney's fees.

4. The claimant has failed to prove by a preponderance of the evidence that she is entitled to any temporary total disability benefits related to her compensable injury for the requested period of November 4, 2008, to a date yet to be determined. Therefore, that request for additional temporary total disability benefits is denied.

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 July 23, 2009 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.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the Administrative Law Judge improperly limited the evidence presented at the hearing. As such, this claim needs to be remanded to the Administrative Law Judge for proper presentation. However, as the majority has declined to remand this claim and despite the Administrative Law Judge's error, I find that the claimant has proved by a preponderance of the evidence her entitlement to additional temporary total disability benefits, and therefore must dissent.

The claimant sustained an admittedly compensable injury to her left hand on April 23, 2008. As found by the Administrative Law Judge, the claimant missed the next several days of work but, in May 2008, the claimant was released to light-duty work and the

respondent provided her employment within her restrictions. The claimant continued in this capacity until September 2008, when, because of plant-wide layoffs, the claimant's light-duty position was eliminated. However, in order to provide the claimant continued employment, the respondent transferred her to security duty. This job entailed having the claimant remain in a guard station near the entrance to the plant. This job paid wages at least equal to her pre-injury salary.

The claimant's security guard job was within her restrictions and she was able to perform her duties in that capacity satisfactorily. The claimant, who was working the night shift, continued the employment as a security guard until November 4, 2008. On that night, she briefly left her duty station without clocking out because of an emergency involving her son.

The following day, the claimant was suspended because of this breach of company policy. She was advised in a Progressive Discipline Form dated November 5, 2008, of her suspension and was directed to call in on November 10, 2008, to inquire of her continued job status. The claimant did so, and was advised she was to return to work on November 13, 2008, but, prior to

resuming her duties, she needed to meet with certain supervisory personnel.

According to the testimony, the meeting took place at approximately 11:00 or 11:30 on November 13, 2008. Martin Crawford, the respondent's Human Resource Manager, briefly entered the meeting but then left. The claimant continued to meet with Debra Hargis, her immediate supervisor, and Cassandra Holliday, an Assistant Human Resource Manager.

After reviewing the claimant's transgression in leaving her duty station, Ms. Hargis tendered to the claimant a Return to Work agreement explaining her suspension would be considered a final warning and that further occurrences of any violation would result in her immediate discharge.

The claimant refused to sign this document and left the meeting. According to the claimant, she did not sign the return to work agreement because of the confusion over her status as a union member. The claimant wanted to have a union representative with her in the meeting with Ms. Hargis and Ms. Holliday. However, the security guard employees were apparently not part of the collective bargaining agreement which existed between the respondent and its other employees.

The claimant, on the other hand, was confused over her status since union dues were still be withheld from her paycheck during the time she was working as a security guard. It also should be noted the claimant was in the security guard position while on light duty for injury and her status as to whether she was permanently a security guard or still a production employee was not entirely clear.

In any event, the claimant did not want to sign the return to work agreement without consulting a union steward. She stated this is why she left the meeting without having signed the document. She further testified that she saw Mr. Crawford while leaving the facility and he told her if she had not signed the agreement she was terminated, and he took her company badge.

As indicated above, both Mr. Crawford and Ms. Hargis testified at the hearing. According to them, the claimant was not, in fact, terminated on the date of the meeting but was fired for not appearing at work on three consecutive days, specifically, November 13, 14, and 15. In fact, during Mr. Crawford's testimony, he denied having taken the claimant's badge or telling her she was terminated. He testified he advised the claimant she

was still employed and to "call him on Monday" (which would have been November 17), so the matter could be perhaps worked out.

The testimony of Mr. Crawford and Ms. Hargis is not supported by a document offered into evidence by the respondent. This document, titled "Progressive Discipline Form" was prepared by Ms. Hargis and is signed by her and Ms. Holliday. This document, most of which is handwritten, is dated November 13, 2008 and states, under the heading "*Problems*," "Quit." Under "*Facts*," the document states the claimant was returning to work after a warning but she refused to sign the return to work agreement. Then, Ms. Hargis wrote: "I stated to Karen that if she failed to sign, she was quitting. Karen walked out without signing saying she was going to call the union. While outside, she gave her badge to Martin Crawford (HR Manager)."

The written statement supports the claimant's testimony that she understood she was terminated when she left the meeting without signing the return to work agreement. Also, it seems apparent Mr. Crawford was inaccurate in his testimony about not having taken the claimant's badge after advising her she was terminated. I draw that conclusion because the progressive

discipline form prepared by Ms. Hargis specifically states the claimant gave her badge to Mr. Crawford. Since the claimant did not speak with Ms. Hargis after leaving the meeting, Ms. Hargis could have only gained the information about the badge from Mr. Crawford.

In denying this claim, it is not entirely clear what standard the Administrative Law Judge was using. After first expressing confusion over the evidence presented at the hearing, the Administrative Law Judge's Opinion states: "Failure to return to work must be for reasons related to the compensable injury." I am not sure what the majority means by adopting this language. In fact, this point seems to be entirely inapposite to the present case.

As has been held on numerous occasions, in scheduled injury cases (such as this one), claimants are entitled to receive TTD benefits while they are within their healing period. See Ark. Code Ann. §11-9-521; Wheeler Construction Company v. Armstrong, 73 Ark. App. 146, 41 S. W. 3d 822 (2001).

There seems to be no dispute that the claimant was within her healing period at all times relevant to this decision. In fact, just prior to the claimant's meeting with Ms. Hargis, she underwent one of a series

of ganglion blocks in an attempt to treat her hand problem. She also later underwent surgery to remove previously installed hardware in her hand, and as recently as April 15, 2009 (only a few days prior to the hearing), she was still under a light-duty restriction by her treating physician.

On that basis alone, the claimant would have appeared to have met her burden of establishing her entitlement to disability benefits, since she was clearly within her healing period, was disabled, and was not working. However, the respondent has asserted they are not obligated to pay benefits because the claimant refused to accept offered employment, as provided in Ark. Code Ann. §11-9-526. They argue the claimant's refusal to sign the return to work agreement proffered by her employer was equivalent of a voluntary resignation and constitutes an abandonment of her job, justifying the termination.

In considering this section, Courts have held a termination of employment amounts to a refusal to return an employee to work unless the employee was terminated for reasonable cause connected to the work. Roark v. Pocohontus Nursing and Rehab, 95 Ark. App. 176, 235 S. W. 3d 527 (2006). Therefore, the determination

which must be made here, is whether the employer's termination of the claimant was reasonable.

Inexplicably, the Administrative Law Judge repeatedly admonished the party's counsel about offering evidence regarding the claimant's termination. The Administrative Law Judge not only interrupted questioning of the claimant about her state of mind and what she understood about the meeting with Ms. Hargis, he also told claimant's counsel not to inquire any further as to her confusion over her entitlement to union representation at the meeting. He also stopped the examination of Mr. Crawford by respondent's counsel in regard to the conversation he had with the claimant after her meeting with Ms. Hargis.

The testimony the parties were attempting to offer was directly related to the issues being presented and should have been allowed. By limiting the scope of the hearing in this manner, the Administrative Law Judge made it extremely difficult to fully evaluate this case.

Another point overlooked by the Administrative Law Judge and the majority, is that the respondent is asserting an affirmative defense. That is, Ark. Code Ann. §11-9-526 allows respondents to avoid payment of temporary disability benefits if they can show a

claimant has refused to accept offered employment. In interpreting that statute, Courts have extended the doctrine to include cases where claimants, by their misconduct, provide respondents a reasonable cause to terminate them. As indicated above, the actions of this respondent in terminating the claimant would amount to a refusal to return the claimant to work unless the respondent can demonstrate their termination was for a reasonable cause connected to the work. In my opinion, the respondent has not met this burden.

I note there was considerable confusion over whether the claimant was a union member at the time of the meeting of herself, Ms. Hargis, and Ms. Holliday. Even if it is true the security guards were not part of the collective bargaining agreement, the claimant's status was uncertain. Not only were her union dues still being withheld from her check, but, since the claimant was on light duty, it was not entirely clear whether the security guard position was permanent or whether it was merely temporary during the time she was on light duty. If the claimant had been a union member, she would have been entitled to have a union representative present during the meeting and would have been able to rely on the union steward's advice and

consultation prior to signing the form. I find, before the respondent could terminate the claimant for cause, they should have clarified the claimant's status to her and resolve any such uncertainties, prior to, or during, the meeting.

Also, I believe the written document prepared by Ms. Hargis, contemporaneous with the meeting, supports the claimant's testimony as to what happened. Ms. Hargis wrote on the form the claimant had "quit" by not signing the form. Further, Ms. Hargis' handwritten statement to the effect the claimant had given her badge to Mr. Crawford, substantiates her testimony that she had given her badge to Mr. Crawford who had told her she was terminated, and discredits Mr. Crawford's testimony to the contrary. Further, the claimant testified she attempted to call Mr. Crawford back on Monday following the meeting, but he did not return her call. I realize Mr. Crawford testified he did not receive the message, but, given the questions about his credibility, I find the claimant's version of events to be more accurate and believable. I further find the respondent had terminated the claimant when she left the meeting, and the contrary testimony from Mr. Crawford and Ms. Hargis is not believable.

In short, I believe the respondent did not offer sufficient evidence to establish that their termination of the claimant was reasonable. The claimant's status as a union member should have been resolved at or before the meeting, and, if the claimant was no longer a member of the union bargaining group, as asserted by the respondent, they should have refunded her the union dues they had been withholding from her salary since the previous September. If she was still a member of the union and was entitled to representation, they should have allowed her a chance to confer with the union representative before taking the termination actions they did. In either event, it appears to me the respondent was unreasonable in not clarifying the situation to the claimant prior to terminating her. Also, Ms. Hargis' testimony and the form she filled out makes it clear the claimant was told that if she did not sign the form, the employer would consider her as having quit. In my opinion, the ambiguous situation the claimant was placed in creates a clear uncertainty. On that basis, I find the respondent's termination of the claimant amounts to a refusal to return the claimant to work and entitles her to benefits from November 13, 2008 to a date yet to be determined.

In conclusion, it is my opinion that the Administrative Law Judge improperly limited the evidence presented at the hearing. It is also my opinion that the majority has erred by affirming and adopting the Administrative Law Judge's decision. I believe this claim should have been remanded to the Administrative Law Judge for proper presentation. Despite these errors I find that the claimant has proved by a preponderance of the evidence her entitlement to additional temporary total disability benefits. For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner