

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F808952

CECILIA CARRENO,
EMPLOYEE

CLAIMANT

YOUR EMPLOYMENT SERVICES,
EMPLOYER

RESPONDENT

WAUSAU,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 19, 2009

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

Claimant represented by the HONORABLE STEVEN R. MCNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E.
RYBURN, 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 March 26, 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 of this claim.
2. On August 20, 2008, the relationship of employee-employer-carrier existed among the parties, when the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$201.00/\$154.00, for temporary total/permanent partial disability.

3. On August 20, 2008, the claimant sustained an injury to her right upper extremity arising out of an in the course of her employment, which rendered her temporarily totally disabled for the period August 21, 2008, through September 18, 2008.

4. The claimant has failed to sustain her burden of proof by a preponderance of the evidence that she remained totally disabled and correspondingly entitled to temporary total disability benefits subsequent to September 19, 2008, as a result of the August 20, 2008, compensable injury.

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.

The claimant alleges that she sustained compensable injuries that are governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injuries are, indeed, injuries that are covered by the Act; however, the claimant has failed to establish the elements necessary to prove these compensable injuries by a preponderance of the evidence.

Therefore we affirm and adopt the March 26, 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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

The majority is affirming and adopting an Administrative Law Judge's decision finding the claimant did not establish her entitlement to certain additional benefits. Since I believe the Administrative Law Judge incorrectly applied the relevant sections of the Workers' Compensation Act, I must respectfully dissent from that decision.

The claimant sustained an admittedly compensable injury on August 20, 2008. The respondent provided the claimant appropriate medical treatment and paid temporary total disability benefits from the date of the claimant's injury through September 18, 2008. The only dispute presently before us, is the claimant's entitlement to additional temporary total disability benefits from September 18, 2008 through March 5, 2009.

The respondent employer is a temporary employment agency. The claimant had worked through this employer at times in the past. When she was injured, she was working the night shift for Brent & Sam's, a cookie company located in Little Rock, Arkansas. The claimant testified she had been provided employment through the respondent's employer on previous occasions, including work at Brent and Sam's. According to the claimant, she had contacted the respondent employer seeking night shift employment and was assigned to Brent & Sam's in May 2008. Her reason for wanting the night shift employment was that she was a young mother with three children ages 10, 8, and 2. By working the night shift, she was able to watch the children during the day and the children's father would watch them at night.

After her injury, the claimant's treating physician directed she remain off work while recovering from her injury. In September 2008, the claimant was released to return to light duty work. On or about September 18, 2008, the claimant went to the respondent employer's office to inquire about returning to work in a light-duty capacity. While there, the claimant met with Catalina Lopez, the senior staffing counselor for

the claimant's employer. Ms. Lopez, who testified at the hearing, acknowledged the claimant had been originally assigned night duty at her request. She also stated she offered the claimant a return to work at the respondent's office beginning the following morning, September 19, 2008. The claimant admitted this offer was made to her. However, the claimant testified she declined this offer because of her need to provide care for her children during the day.

While Ms. Lopez stated she was not aware of the claimant's problem with children at the time of the September 18 meeting, she testified it would not have made any difference in her offer. The only light duty employment she had available to the claimant was at the respondent employer's office performing clerical and translation work during normal business hours of 7:00 AM to 5:00 PM.

The respondent's refusal to provide the claimant further temporary disability benefits is based on Ark. Code Ann. §11-9-526. That statute states, in relevant part, "If any injured employee refuses employment suitable to his or her capacity offered to or secured 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.***"

(Emphasis added). In my opinion, the claimant has clearly established her refusal to accept the offer of employment was justifiable.

Not only did the claimant have the three children mentioned above but, at the time of her injury, she was pregnant with a fourth child. This child was born approximately six weeks prior to the hearing. Since the children's father works during the day, she would have had to have found someone to take care of the children if she was employed on the day shift. She testified she had no relatives available to provide such care and would have had to pay for private day care in order to accept the employment offered by the respondent. The claimant testified if the offered light-duty employment had been at her pre-injury wage, she would have brought home approximately \$290.00 per week. However, she also testified the day care costs for her three children would have been in excess of \$220.00 per week. In my opinion, this testimony was more than sufficient to establish the claimant acted reasonably in not accepting the offered employment.

A parent's primary duty is to provide care and supervision of his or her children. The claimant sought employment at night so that she would be able to take care of her children during the time their father was working. The respondent acceded to this request in originally providing her a job on the night shift. However, after she was injured, the respondent was no longer willing to live up to their prior agreement, and insisted the claimant must work during the day hours.

The re-employment offer made to the claimant placed her in an impossible dilemma. If she refused the offered employment, she would no longer be receiving her workers' compensation disability benefits. On the other hand, if she accepted the employment she would not be able to take care of her children, and would be forced to pay for day care services. This expense would have then absorbed almost all of her salary, leaving her with little real earnings.

The purpose of the provision relied upon by the respondent was to prevent claimants from malingering and avoiding a return to work when possible. It was also intended to encourage employers to provide injured workers an opportunity to return to gainful employment at whatever capacity their injury allowed. I do not

believe the drafters of the Workers' Compensation Act intended this provision to be a tool which would allow employers to avoid their obligation under the Workers' Compensation Act. But, in this circumstance, that is exactly what is occurring. I doubt any rational person, in the claimant's position, would have accepted the offered employment. A net salary of less than \$70.00 per week for full time employment is simply not an acceptable alternative. However, this situation was exactly what the legislature intended to address when it provided the Commission the authority to excuse a refusal of offered light-duty employment when the refusal was justified. If declining what is effectively a weekly salary of less than \$10.00 per day is not a justifiable refusal, I cannot fathom what would be.

For the reasons set out above, I respectfully dissent from the majority's decision denying benefits in this case. I find the claimant's refusal of the offered employment was reasonable and justified, and I would reverse the Administrative Law Judge's decision and award the claimant temporary disability benefits during the period requested.

PHILIP A. HOOD, Commissioner