

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F803463

MELISSA BATT,
EMPLOYEE

CLAIMANT

ARKANSAS STATE HIGHWAY &
TRANSPORTATION DEPARTMENT,
EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 19, 2010

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE TERRY D. LUCY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and
reversed in part.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals
an administrative law judge's opinion filed November 13,
2009. The administrative law judge found that the claimant
proved she was entitled to additional temporary total
disability benefits from October 25, 2008 through January
18, 2009. The administrative law judge found that the

claimant was not entitled to an award of wage-loss disability. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion in part and reverses in part. The Full Commission finds that the claimant proved she was entitled to additional temporary total disability benefits from October 14, 2008 until January 19, 2009. We find that the claimant proved she was entitled to wage-loss disability in the amount of 9%.

I. HISTORY

Melissa Batt, age 27, testified that she was a high school graduate and that she had served in the Air Force Reserve. Ms. Batt's testimony indicated that she began working for the respondent-employer in about 2003. The parties stipulated that the claimant sustained a compensable injury to her right shoulder on January 4, 2008. The claimant testified, "I was installing a sign post and it twisted, so I had to use a cheater bar pipe wrench to straighten it back out and whenever I was pulling on the bar, my shoulder popped."

Dr. Steven O. Smith performed an operative procedure on March 24, 2008: "1. Right shoulder arthroscopy. 2.

Arthroscopic debridement of partial articular surface rotator cuff tear. 3. Arthroscopic bursectomy. 4. Arthroscopic acromioplasty. 5. Arthroscopic distal clavicle excision of AC joint meniscus." The post-operative diagnosis was "1. Partial articular surface rotator cuff tear. 2. Torn AC joint meniscus."

Patrick Walton, PA-C, noted on March 31, 2008, "Ms. Batt is a 25-year-old white female that Dr. Smith did a shoulder arthroscopy on 03/24/08....She wishes to return to work at the earliest convenience. She says she can even if it is on light duty....We wrote her a note today to be limited use of right arm with no lifting greater than five pounds at work." Patrick Walton's impression was "1. Partial rotator cuff tear. 2. Impingement syndrome right shoulder."

The record contains a Doctor's Release To Return To Work, with a doctor's signature dated April 2, 2008. The Doctor's Release indicated that the claimant was able to return to restricted work. The Release indicated that the claimant could perform "Flag Traffic" work, but that the claimant was restricted from duties such as lifting and picking up litter.

The claimant testified that she returned to work with the job of "Flagging, basically." The claimant described this job as "Setting out five cones behind the vehicle and standing out there to flag traffic, flagging traffic." The claimant testified that flagging involved holding a sign paddle and that she could perform the job with one hand. Dr. Smith noted on April 21, 2008, "She is having stiffness in the morning, but pretty good range of motion. I have asked her at this point to continue on light duty."

The record contains a Doctor's Release To Return To Work, with a doctor's signature dated April 21, 2008. The Doctor's Release indicated that the claimant was able to return to restricted work beginning April 22, 2008. The Release indicated that the claimant could perform "Flag Traffic" work, but that the claimant was restricted in duties such as lifting and picking up litter.

Dr. Smith noted on May 5, 2008, "Melissa is seen today for follow-up of her acromioclavicular joint resection. Overall, she is doing reasonably well. She still is having some pain. I would recommend at this point just continued observation and continuation of therapy. I will plan to see her back in about one month."

The claimant was given a Doctor's Release To Return To Work, signed by the physician, indicating that the claimant would perform Flag Traffic beginning June 5, 2008. The claimant was still restricted from duties such as lifting and picking up litter.

Dr. Smith noted on July 1, 2008, "She is still complaining of some popping and pain anteriorly in the shoulder....I am going to recommend that we repeat the MRI to evaluate her further." The claimant was given another Doctor's Release To Return To Work, identical to the previous Releases, dated July 1, 2008. Dr. Smith noted on July 1, 2008, "Melissa is seen today for follow-up of her shoulder. The MRI did not show any evidence of rotator cuff tear....I will see her in about another four to six weeks for repeat examination." The claimant was given a Doctor's Release To Return To Work, substantially identical to the previous Releases, dated August 20, 2008.

Dr. Smith performed an operative procedure on September 11, 2008: "1. Right shoulder arthroscopy. 2. Debridement of deep partial-thickness rotator cuff tear with conversion to full-thickness tear and arthroscopic repair." The post-

operative diagnosis was "Deep partial-thickness rotator cuff tear."

The claimant testified that she did not return to work following the September 11, 2008 surgery. The claimant followed up with Dr. Smith on October 8, 2008: "Today her shoulder pain is much improved....I am going to plan to have her start some strengthening in a couple of weeks. I will see her back in about one month. We will hold off of any use of the right arm until that point."

Respondents' Exhibit One, page 7, is a Doctor's Release To Return To Work, signed by a physician on October 13, 2008. The Doctor's Release indicated that the claimant could work in the areas of Flag Traffic and Pick up Litter beginning October 14, 2008. The Release indicated that the claimant still had lifting restrictions.

Respondents' Exhibit One, page 8, is a Doctor's Release To Return To Work, signed by a physician on October 13, 2008. This Doctor's Release indicated that the claimant could perform Flag Traffic work but was restricted from lifting, shoveling, or picking up litter. The Release also indicated that the claimant was "physically unable to report for work" until November 6, 2008.

The parties stipulated that there was "no dispute, at present, over temporary disability benefits accruing through October 13, 2008."

The claimant testified on direct examination:

Q. Now, did your employment with the highway department at some point get terminated?

A. Yes, sir.

Q. Did you voluntarily quit?

A. No, sir.

Q. There is a slip that has been introduced into evidence that appears to have been signed by you on October 13, 2008. Do you remember visiting with the highway department's attorney about that slip in a deposition?

A. Yes, sir.

Q. And where did you get that slip from?

A. The highway department. Well, actually, my supervisor at the highway department.

Q. And what were you supposed to do with it?

A. Take it to the doctor's office, have it completed and return it.

Q. Did you take it to the doctor's office?

A. My boyfriend did....He brought it back to me and I returned it to the highway department.

Q. Did you in any way alter anything that was on that slip?

A. No, sir.

Q. Who did you take it to when you took it to the highway department?

A. Joe Eyerman....

Q. What happened after you turned in the October 13 slip?

A. I didn't hear from anybody until - oh, it was a couple of weeks later.

Q. And who did you hear from then?

A. Mr. Keisling.

Q. Between when you turned in the October 13, 2008 job and January 19, 2009, did you do any work for money?

A. No, sir.

Q. Did the highway department offer you any kind of job within your restrictions during that period of time?

A. No, sir.

The claimant testified that she was earning \$34,000 annually at the time of her termination.

Thale Keisling testified that he was a district maintenance engineer for the respondent-employer. The respondent's attorney questioned Mr. Keisling with regard to Respondents' Exhibit One, page 8:

Q. What was your impression of that form when you saw it in your box and you looked at it?

A. I thought it looked odd. There were some smudges on it in some of the box areas and where a

date went that kind of made me curious of what exactly happened to the form.

Q. Was it your impression then that perhaps the document had been changed or altered?

A. It appeared that way....

Q. During your conversation with Ms. Batt, did she say anything about her own understanding of when she could come back to work?

A. She said that the doctor had restricted her from coming to work, period, until November 6th, which corresponded with what the doctor's release form, page number 8, showed.

Q. Okay. Did you have a second or subsequent occasion to speak with Ms. Batt on the phone about all this matter?

A. Yes, I did.

Q. Do you recall roughly when that would have been?

A. Actually, I think it was Friday. I think I spoke with her on Thursday and then she called back on Friday and said she was going to talk to the doctor's office, and then she called me back on Friday and said that she could come back to work at that point....

Q. Can you recall the substance of that conversation when Ms. Batt called you?

A. She said that she had talked with the doctor's office and that they told her that she could come back to work with those restrictions; she could flag traffic and pick up litter.

Q. So the day before, Ms. Batt tells you her understanding is she can't work until November 6th?

A. That's correct.

Q. And then when she called you on Friday, it's her understanding that now she can come back to work?

A. Yes.

Q. Under those restrictions?

A. Yes.

Q. Flagging traffic, picking up litter?

A. Yes.

Q. And did she, in fact, come back at that point?

A. No. At that point, I told her that we were investigating the discrepancies in these forms and until we completed that, you know, we were not going to allow her to come back to work.

Q. At some point then, was Ms. Batt's employment terminated?

A. Yes, it was....I think it was November 7th.

Dr. Smith noted on November 6, 2008, "Melissa is seen today for follow-up of the right shoulder. Overall, it is improved. She is two months out now and there is just some tightness. At this point, I am going to hold her off of work another month. I will see her back in one month. I hope that this will allow her to transition into working at that point."

Dr. Smith noted on December 22, 2008, "Melissa is seen today for follow-up of revision of the left shoulder arthroscopy and rotator cuff repair. Overall, she is improved. She reports just a little bit of soreness. She wants to try to return to work in three to four weeks. We have gone ahead and wrote her a note today with a release and we will see her back just on an as needed basis."

The record contains a Return to Work slip signed by Dr. Smith on December 22, 2008 indicating that the claimant could return to work with no restrictions on January 19, 2009.

Dr. Smith corresponded with the claimant's attorney on June 3, 2009:

This is an impairment rating regarding Melissa Batt. As you know, I have taken care of Ms. Batt. At this point I feel she has reached maximum medical improvement in accordance with the American Medical Association Guide in Evaluation of Permanent Impairment Fifth Edition. Ms. Batt has a 10% impairment to her right shoulder regarding her resection and arthroplasty of the distal clavicle. She also has a 4% impairment regarding her rotator cuff injury. This gives her a combined impairment of 14% to the right upper extremity. This correlates to a 9% whole person impairment regarding Ms. Batt's injuries. This concludes my evaluation on Melissa Batt.

The parties stipulated that the respondents accepted liability for permanent partial disability for a 9 percent permanent physical impairment.

A pre-hearing order was filed on June 16, 2009. The claimant contended that she was entitled to temporary total disability benefits from on or about October 27, 2008 until January 19, 2009. The claimant contended that she was entitled to permanent disability benefits because she had undergone two surgeries as a result of her compensable injury.

The respondents contended, among other things, that the claimant could not prove she was entitled to additional temporary total disability benefits beyond October 13, 2008. The respondents contended that the claimant "was cleared for light duty effective October 14, 2008, which could have been accommodated by respondent employer; however, the respondents have a reasonable basis to believe that the claimant presented an altered return to work form to respondent employer indicating that she could not perform work of any kind until November 6, 2008. These circumstances resulted in the termination of the claimant's employment with respondent employer on or about November 24,

2008....In the alternative, the respondents contend that the claimant effectively reached the end of her healing period on December 22, 2008, and is not entitled to additional temporary total disability benefits beyond that date....The respondents will also contend that the claimant is not entitled to wage-loss disability beyond her percentage of anatomic impairment. Specifically, the respondents contend that but for her termination for cause, the claimant could have been returned to suitable employment."

The parties agreed to litigate the following issues:

1. The claimant's entitlement to additional temporary total disability from October 14, 2008 through January 19, 2009.
2. The claimant's entitlement to permanent partial disability benefits for loss of wage-earning capacity.
3. Appropriate attorney's fees.

A hearing was held on August 18, 2009. The claimant testified that she had not been able to find another job. The claimant testified on cross-examination that she had applied for work in a new factory which was to open near the claimant's home.

An administrative law judge filed an opinion on November 13, 2009. The administrative law judge found that the claimant proved she was entitled to additional temporary

total disability benefits from October 25, 2008 through January 18, 2009. The administrative law judge found that the claimant was not entitled to wage-loss disability benefits. The respondents appeal to the Full Commission and the claimant cross-appeals.

II. ADJUDICATION

A. Temporary Disability

Temporary disability is that period within the healing period in which an employee suffers a total or partial incapacity to earn wages. *Thurman v. Clarke Indus., Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994). The healing period is defined as that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Arkansas Highway and Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The determination of when the healing period ends is a question of fact for the Commission. *Thurman, supra*.

In the present matter, the Full Commission finds that the claimant proved she was entitled to additional temporary total disability benefits from October 14, 2008 until January 19, 2009. The parties stipulated that the claimant sustained a compensable injury to her right shoulder on January 4, 2008. The claimant underwent surgery but informed a physician's assistant on March 31, 2008 that she wanted to return to work as soon as she could. The claimant was released to light duty work, and the claimant's testimony indicated that she returned to light duty for the respondents on or about April 2, 2008. The claimant underwent additional shoulder surgery on September 11, 2008. The claimant testified that she did not return to work for the respondents after the September 11, 2008 surgery. Dr. Smith instructed the claimant on October 8, 2008 to "hold off of any use of the right arm" until a follow-up appointment in one month. The instant claimant therefore proved she was within a healing period for her compensable injury and was totally incapacitated from earning wages as of September 11, 2008. The parties stipulated that the respondents paid temporary total disability benefits through October 13, 2008.

The record contains two copies of a Doctor's Release to Return To Work, signed by a physician on October 13, 2008. One copy of the Doctor's Release indicated that the claimant could return to restricted work duties beginning October 14, 2008. Another copy of the Doctor's Release also indicated that the claimant could perform restricted work duties, but indicated that the claimant was "physically unable to report for work" until November 6, 2008. The claimant's supervisor essentially determined that the claimant had changed or altered the second Doctor's Release to Return To Work. The respondents therefore terminated the claimant's employment on or about November 7, 2008.

An administrative law judge found that the claimant was "not entitled to temporary total disability benefits for the period of October 14, 2008 through October 24, 2008," because the claimant "unreasonably refused suitable employment offered her by the respondent." The administrative law judge relied on a statute not raised by either party, Ark. Code Ann. §11-9-526 (Repl. 2002), which statute provides, "If any injured employee refuses employment suitable to his or her capacity offered to or procured 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." The administrative law judge concluded that the claimant had altered the second Doctor's Release to Return To Work and had therefore "refused suitable employment." The administrative law judge nevertheless determined that the respondents "withdrew their offer of a suitable employment position" on the date the claimant's employment was terminated. The administrative law judge therefore found that the claimant was actually entitled to additional temporary total disability benefits "for the period beginning October 25, 2008 and continuing through January 18, 2009."

The Full Commission will not rely on the administrative law judge's *sua sponte* inclusion of Ark. Code Ann. §11-9-526 in determining the claimant's entitlement to temporary total disability benefits. Instead, we will adjudicate the claim in accordance with the proper and agreed legal standard in this case, that is, whether the claimant remained in her healing period and was totally incapacitated from earning wages during the requested period of temporary total disability. See *Ark. State Hwy. Dept. v. Breshears*, 272

Ark. 244, 613 S.W.2d 392 (1981); *Thurman v. Clarke Indus., Inc., supra.*

The parties agreed to litigate the issue of the claimant's entitlement to additional temporary total disability from October 14, 2008 through January 19, 2009. The Full Commission finds that the claimant proved she was entitled to additional temporary total disability benefits from October 14, 2008 until January 19, 2009. The Full Commission has determined that the claimant was within a healing period and was totally incapacitated from earning wages as of September 11, 2008. The respondents paid temporary total disability benefits through October 13, 2008. Although there is some discrepancy between the two work releases dated October 13, 2008, one of the releases expressly indicated that the claimant was "physically unable to report for work" until November 6, 2008. There is no probative or tangible evidence before the Commission demonstrating that the claimant or her boyfriend, Jeff Coker, altered or tampered with the claimant's work release. Dr. Smith's November 6, 2008 report in fact corroborated the substance of the disputed return to work slip, in that Dr.

Smith continued to keep the claimant off work as of November 6, 2008.

Thale Keisling's testimony indicated that the claimant attempted to return to restricted work for the respondent-employer on or about November 6, 2008. Mr. Keisling testified, however, "At that point, I told her that we were investigating the discrepancies in these forms and until we completed that, you know, we were not going to allow her to come back to work." Mr. Keisling testified that the claimant's employment was terminated on or about November 7, 2008. The record before the Commission shows that the claimant not only remained within a healing period as of November 7, 2008, but was also totally incapacitated to earn wages, because the respondent-employer would not allow the claimant to return to work. Dr. Smith indicated on December 22, 2008 that the claimant could return to work with no restrictions on January 19, 2009.

The evidence before the Commission demonstrates that the claimant remained within a healing period for her compensable injury and was totally incapacitated from earning wages from October 14, 2008 until January 19, 2009. The Full Commission therefore finds that the claimant proved

she was entitled to additional temporary total disability benefits from October 14, 2008 until January 19, 2009.

B. Permanent Partial Disability

Ark. Code Ann. §11-9-522 (Repl. 2002) provides:

(b) (1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

(2) However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

(c) (1) The employer or his or her workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his or her average weekly wage at the time of the accident.

(2) Included in the stated intent of this section is to enable an employer to reduce or diminish payments of benefits for a functional disability, disability in excess of permanent physical impairment, which in fact, no longer exists, or exists because of discharge for misconduct in connection with the work, or because the employee left his or her work voluntarily and without good cause connected with the work.

In the present matter, an administrative law judge found that the claimant was not entitled to wage-loss disability benefits. The administrative law judge found that the claimant "had returned to work for the respondent, at wages equal to or greater than those she was earning at the time of her accident, and was subsequently discharged for misconduct in connection with the work. Any actual permanent functional disability or loss of wage-earning capacity, that the claimant may be experiencing exists solely because of the claimant's discharge for misconduct in connection with the work." The Full Commission does not affirm this finding.

The claimant is only 27 years old and is a high school graduate. The claimant has served in the Air Force Reserve and began working for the respondent-employer in about 2003. The parties stipulated that the claimant sustained a compensable injury to her right shoulder on January 4, 2008. The claimant underwent surgery to her shoulder on March 24, 2008. The notes from a physician's assistant on March 31, 2008 indicated that the claimant was motivated to return to work, and the claimant in fact returned to restricted work for the respondents on or about April 2, 2008. The claimant

underwent another shoulder surgery on September 11, 2008. The claimant testified that she was physically unable to return to full work duties following the September 11, 2008 surgery. Dr. Smith's follow-up notes after surgery corroborated the claimant's testimony. The respondents terminated the claimant's employment on or about November 7, 2008. The claimant's employment was terminated because of an allegation that she had altered or tampered with a return-to-work document dated October 13, 2008. The Full Commission has determined that there was no probative evidence demonstrating that the claimant (or her boyfriend) altered a return-to-work document. The evidence does not support the administrative law judge's finding that the claimant was terminated for misconduct in connection with her work.

Thale Keisling, a supervisor for the respondent-employer, testified that the claimant contacted him and attempted to return to work within her physical restrictions. The respondents nevertheless terminated the claimant's employment. The claimant testified that she had tried to find another job following her termination but had not been hired by any other employer as of the date of

hearing. The record does not demonstrate that the instant claimant had returned to work, obtained other employment, or had a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than her average weekly wage at the time of the accident. The respondents did not prove the claimant's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than her average weekly wage at the time of the accident. Nor does the record demonstrate that the claimant's functional disability exists because of misconduct in connection with her work.

The claimant is young, only age 27, with a high school education and limited work experience. The record before the Commission demonstrates that the claimant is motivated to return to work. The respondents have accepted liability for a 9% permanent physical impairment as a result of the claimant's compensable injury. In assessing the claimant's young age, in addition to her limited education and work experience, the Full Commission finds that the claimant proved she sustained wage-loss disability in the amount of 9%.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she was entitled to additional temporary total disability benefits from October 14, 2008 until January 19, 2009. We find that the claimant proved she was entitled to wage-loss disability in the amount of 9%. The Full Commission therefore affirms the administrative law judge's opinion in part and we reverse in part. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's findings. After conducting a *de novo* review of the record,

I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits and she has also failed to prove she is entitled to any wage loss disability benefits in addition to her permanent anatomical impairment.

Ark. Code Ann. § 11-9-526 provides in pertinent part:

If any injured employee refuses employment suitable to his or her capacity offered to or procured 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.

An offer of suitable employment is a condition precedent to applying Ark. Code Ann. § 11-9-526. Webb v. Webb, Full Commission Opinion, June 29, 2000, (Claim No. E906155). Moreover, work must be available within the employee's physical restrictions. McCullor v. Democrat Printing & Lithographic Co., Full Commission Opinion, April 28, 1998, (Claim No. E608050). The claimant must unjustifiably refuse employment which is suitable to his capacity. Barnette v. Allen Canning Company, 49 Ark. App. 61, 896 S.W.2d 444 (1995).

The claimant sustained an admittedly compensable right shoulder injury while working as a crew leader for the respondent employer on January 4, 2008. The claimant continued working until March 24, 2008, when she underwent surgery and entered into a period of temporary total disability. As early as April 2, 2008, the claimant's treating physician, Dr. Steven Smith, allowed the claimant to return to traffic flag duties and the claimant did return in that light duty capacity. The claimant saw Dr. Smith on April 21, June 5, July 11, and August 20 and received additional return to work forms indicating light duty. The respondent employer was able to accommodate the claimant's restrictions. The claimant's supervisor, Mr. Joe Eyerman, testified that flagging traffic was a consistent need on his crew and that the claimant was able to perform that duty until her second surgery.

On September 11, 2008, the claimant underwent an additional surgery on her right shoulder. She re-entered a period of temporary total disability. In a post-operative follow up on October 8, 2008, the claimant apparently forgot the return to work form and she asked her boyfriend, Jeff Copher, to take it by Dr. Smith's office for completion.

The claimant testified that she did not look at the form when she signed it. She presented the form to Mr. Eyerman. The record contains two versions of this return to work form. The first one does not bear the claimant's signature and indicates that she can return to flagging traffic and picking up litter on October 13, 2008. The second form does contain the claimant's signature and contains no date that the claimant can return to light duty and appears to have portions of several lines blacked out. Of note, the boxes next to "flagging traffic" and "picking up litter" are checked "no" in this version of the form while the "yes" boxes bear no check marks and actually have portions of the boxes themselves blacked out. The line for a return to work date is empty and portions of the line itself appear to be blacked out as well. The claimant agreed that this version of the form appeared to have been altered. Again, she feigned any knowledge of how it came to appear that way. It is of further note that the claimant turned in a photocopy of the form to the respondent employer when every other time she turned in an original. The claimant denied altering the form in any way. She also testified that she did not remember telling her supervisor, when she turned in the

form, that the doctor had kept her off work until November 8, 2008.

Mr. Eyeran testified that, on October 13, 2008, the claimant came in to work and gave him a copy of the doctor's release to return to work form. He further testified that, when he saw that this was not the original form, he questioned the claimant concerning this fact. He testified that the claimant had informed him that this was the document that the doctor returned to her. He stated that he then took the form and put it in the in-box of his supervisor, Thale Keisling. Finally, Mr. Eyeran stated that the light duty flagging job continued to remain available and would have been provided to the claimant, if she had given him a light duty release.

Mr. Keisling, the respondent employer's district maintenance engineer, testified that, when he saw the form that had been returned by the claimant, it appeared strange. As a result, he contacted Dr. Smith's office and requested a copy of the form from their files. He testified that he also contacted the claimant on the same day, and she specifically advised him that the doctor had kept her off work until November 6, 2008.

Mr. Keisling then testified that after receiving a copy of the release from Dr. Smith's office, on October 14, 2008, he again contacted the claimant on October 23, 2008. At that time, the claimant advised him that Dr. Smith had kept her off work until November 6, 2008. Mr. Keisling described two more telephone conversations with the claimant on Friday, October 24, 2008. He stated that in the first conversation, the claimant called and advised him that she was going to call Dr. Smith. In the second conversation, the claimant called him and advised him that she had talked with Dr. Smith's office and that she would come back to work. At that point, Mr. Keisling advised the claimant that the discrepancies in the forms was being investigated and that she would not be allowed to return to work, at that time. The claimant was terminated from her employment with the respondent employer for presenting an altered medical release on November 4, 2008. However, she was later technically reinstated long enough to allow payment of her accumulated leave.

Ms. Debra Payne, Dr. Smith's nurse, testified on behalf of the respondent. Ms. Payne is Dr. Smith's clinical nurse and was involved in the maintenance of patient charts.

Ms. Payne testified, after reviewing both versions of the return to work form, that the one allowing the claimant to return to flagging work and picking up litter was an accurate version of the claimant's work status on October 13, 2008. Ms. Payne explained that a patient was given the original or "wet signature" version of a form.

The claimant was last seen by Dr. Smith on December 22, 2008. At that time, Dr. Smith noted that the claimant had substantially improved and was experiencing just a little bit of soreness in the shoulder joint. He indicated that the claimant wanted to return to work in 3 to 4 weeks and that he was giving her a written release to do so. He also released the claimant from further scheduled follow up and directed her to return only on an as needed basis. In the return to work release that accompanied the December 22, 2008 notation, Dr. Smith stated that the claimant was released to return to work, without any restrictions on her employment activities, effective January 19, 2009.

At the request of the claimant's attorney, Dr. Smith subsequently assessed a permanent anatomical impairment rating for the claimant's compensable right shoulder injury and the surgical reconstruction it required.

This assessment was set out in a report dated June 3, 2009, from Dr. Smith to the claimant's attorney. Dr. Smith indicated that the claimant had reached maximum medical improvement and assessed a 9% permanent anatomical impairment rating to the body as a whole for her compensable right shoulder injury and resulting surgery.

The evidence presented unequivocally demonstrates that the return to work release that was given to the respondent employer by the claimant on October 13, 2008, had been altered from the one prepared by Dr. Smith's office. It is clear that the form issued by Dr. Smith's office coincides with the physical limitations that he outlined in the October 8, 2008, report.

The evidence also demonstrates that the claimant was well aware that the respondent employer had and would make available light duty work. The claimant had previously been on light duty. The evidence shows that the claimant was to take the return to work form with her to be completed by the treating physician, on each follow up visit. However, she failed to take the required form to Dr. Smith's office on October 8, 2008. In fact, she did not get the form completed for almost a week. The only reasonable conclusion

is that the claimant wanted to remain off work entirely. When this form was ultimately completed by Dr. Smith's office, on October 13, 2008, the only way the claimant could remain off work, entirely, required this form to be altered. Therefore, after considering of all the evidence in the record, it is my opinion that the claimant altered or caused to be altered the return to work form, before returning the form to the respondent employer. Accordingly, I find that the claimant, by altering the return to work form was unjustifiably refusing suitable employment, within the meaning of Ark. Code Ann. §11-9-526.

I also find that this statutory provision applies to the facts of this case. Although the case of Superior Indus. v. Thomaston, 72 Ark. App. 7, 32 S.W.3d 52 (2000) stands for the proposition that this statute is not applicable to a claimant who accepted employment and was later terminated by his choice, but at the option of his employer, the case presently before us is clearly distinguishable. First and foremost the claimant in the case presently before us did not accept employment. The claimant's actions in presenting the altered form were volitional and intentional. Her intentional actions lead to

her firing and those intentional actions equate to a refusal of employment. But for the claimant's actions of presenting the employer with the altered document which led to her termination, she would still be employed. In my opinion, this volitional action is the same as refusing employment because she refused to comply with the terms of her employment. Therefore, under the statutory provisions of A.C.A. §11-9-526 the claimant is not entitled to temporary total disability benefits.

Further, the return to work slip was related to the claimant's work related injury and not to her job duties. This case is akin to the case of Ballesteros v. Tyson Poultry, Ark. App. , S.W.3d (4-29-2009) where the court found the falsification of the claimant's prescription in that case was directly related to the employer's legal duty to compensate the claimant for all reasonable and necessary medical treatment. The Court stated: "The employee's alteration destroyed the integrity of the record and directly affected the evaluation of the employer's fulfillment of its legal duty and business planning." As in the case presently before us, the alteration of the return to work slip destroyed the integrity of the respondent

employer's ability to fulfill its legal duties in providing the claimant suitable work or temporary total disability benefits.

Therefore, when I consider the fact that the claimant failed to take the return to work form with her to her appointment with Dr. Smith on October, 8, 2008, the fact that the claimant had in previous visits always had the form completed on the date of her visits and returned to the respondent employer, the fact that it was over one week before she had her boyfriend take the form to be completed by Dr. Smith's office, the fact that Dr. Smith's office has a copy of the form that allows for light duty, the fact that she had the form in her possession when she took it to the respondent employer, the fact she told her supervisor prior to returning the form that she was off work until November 8, 2008, the fact that she told the doctor in a visit in December of 2008 that she wanted to be off an additional three to four weeks, and the fact that the form returned by the claimant to the respondent employer was obviously altered to indicate that the claimant was to be off work, I cannot find that the claimant is entitled to temporary total

disability benefits for the period of October 25, 2008 through January 18, 2009.

The claimant has also requested wage loss disability benefits in addition to her permanent anatomical impairment. The majority has awarded the claimant 9% in wage loss disability in addition to her permanent anatomical impairment. I cannot agree. In my opinion, the claimant is not entitled to any wage loss.

The evidence demonstrates that the respondent employer had returned the claimant to work at wages equal to or greater than those she was earning at the time of her compensable injury. The fact that this initial return to work was in a light duty capacity has absolutely no bearing. The fact that the respondent employer was ready, willing and able to make suitable light duty employment available to the claimant allows for only one logical conclusion and that is that the respondent employer would have continued to employ the claimant after she was released to full duty and would have returned her to her pre-injury job. The claimant, but for her termination for submitting an altered return to work form, would have remained employed with the respondent employer making wages equal to or greater than the wages she

was receiving at the time of her work related injury. As such, the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss disability benefits in addition to her permanent anatomical impairment rating.

In my opinion, the majority has clearly erred in their interpretation of the facts. First, while there is no direct evidence that the claimant altered the return to work slip, all circumstantial evidence points in that direction. A copy of the return to work slip was made at the doctor's office before the original was handed over to the claimant's boyfriend. The original was not turned into the employer, but rather an altered copy. Only the claimant and her boyfriend had access to the original return to work slip. Thus, reasonable minds can only conclude that the altered form was altered by the claimant or her boyfriend. Second, the majority has erroneously relied upon this altered returned to work form to find that the claimant's doctor intended to keep her off work until November 6, 2008. The copy of the original form clearly states that the claimant could return to limited duty on October 14, 2008. The date for keeping the claimant completely off work was left blank.

However, on the altered form, the date to release for limited duty was altered with a portion of the line indicating that it had been "whited out" and the line for keeping the claimant completely off work was filled in with the November 6th date. November 6th was not on the form signed by the doctor. Admittedly, in claimant's subsequent office visits, Dr. Smith stated that he would keep the claimant off work, however, the claimant was not working, thus there was no work for her to be released to.

Previously, when presented with a light duty option, or no right arm duty, Dr. Smith had always released the claimant to such restricted work. Since the claimant was unemployed and no such options were available, Dr. Smith merely held her off work altogether.

Therefore, for all the reasons set forth herein, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER