

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. F700096

JENNIFER SMITH (ROWE), EMPLOYEE	CLAIMANT
AMERICA'S CAR MART, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED MAY 18, 2010

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

Claimant represented by the HONORABLE MARVIN "CHIP" LEIBOVICH, JR., Attorney at Law, Conway, Arkansas.

Respondent represented by the HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed September 25, 2009.

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. The employee-employer-carrier relationship existed at all other relevant times, including December 19, 2006.
3. The claimant sustained a compensable back injury on said date.

4. Her average weekly wage at the time of her injury was \$253.00. Her compensation rate is \$157.00 for both temporary total disability and permanent partial disability compensation.
5. Some benefits have been paid.
6. This claim for additional benefits has been controverted in its entirety.
7. The claimant failed to establish by a preponderance of the evidence her entitlement to any temporary total or temporary partial disability compensation.
8. All other issues are reserved under the Act.

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.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

After my de novo review of the entire record, I would reverse the Administrative Law Judge's findings. I would award the claimant the temporary disability benefits she sought.

The claimant sought temporary partial disability benefits from April 11, 2007 to November 7, 2007. The respondent-employer stopped paying temporary total disability benefits in April 2007, and the claimant worked part time from April until November 2007, for a total of 130.99 hours. Dr. Rafi placed the claimant under significant restrictions in December 2007. The claimant testified that she was not returned to her pre-injury position, because it was unavailable, although she wanted to

return to that job. The claimant received unemployment benefits from September 5, 2007 until September 13, 2008.

Temporary partial disability is that period within the healing period in which the employee suffers only a decrease in her capacity to earn the wages she was receiving at the time of the injury. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). I disagree with the majority's findings that the claimant was released to work and that the diminishment in capacity to earn was due to the availability of work, not her injury.

The only evidence that the claimant was released to work on April 11, 2007 was her own testimony of what the doctor said. There is no documentary evidence to support this testimony, and there is no indication of what her doctor advised her. It is strange that the respondents would not have presented a report from Dr. Rafi documenting the release. For whatever reason, the respondents ended her temporary total disability payments and placed the claimant in an employment position as an as-needed on-call employee with no guarantee of work. Prior to her injury, she was a regular employee, preparing cars for sale. Due to her

injury, she was not returned to her pre-injury position, and thus the claimant suffered a loss in earning capacity. But for her injury, she would not have suffered this loss in earning capacity. I find that the claimant is entitled to temporary partial disability benefits for this period.

Importantly, I find that the real issue in this claim is that the respondent-employer failed to return the claimant to work in violation of Ark. Code Ann. Section 11-9-505. This section requires that:

Any employer who without reasonable cause refuses to return an employee 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 the benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one year.

In Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996), the respondents' failure to return that claimant to a position was not reasonable, where a more qualified person was hired to that position. The Court noted that the Act requires the employer to facilitate the injured employee's re-entry into the workforce. This facilitation includes the offer of additional training to the employee, if needed, and the reclassification of

positions, if necessary. 55 Ark. App at 231. The respondents' failure to reinstate the claimant is in direct conflict with the purpose of the Act and the specific provisions of Section 11-9-505. The claimant had a valid claim for benefits from April 11, 2007 to April 11, 2008 under Section 11-9-505.

The claimant also sought temporary total disability benefits for several periods. Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The majority found that the claimant failed to prove that she was totally incapacitated from earning wages during the periods for which she sought benefits. I disagree.

The respondent-employer terminated the claimant on November 7, 2007, and she went to work for the furniture store in February 2008. On December 11, 2007, Dr. Rafi placed the claimant under significant restrictions due to her back pain, which failed to respond to treatment. The claimant's symptoms were increasing such that her

medications were not as effective as they had been. The claimant's restrictions in December 2007 were to avoid heavy lifting, carrying, excessive bending, prolonged sitting or standing. The claimant testified that she was unable to perform most of her previous activities, and Dr. Bruffett's notes reflected her declining quality of life. The record is also replete with evidence of the claimant's desire to return to work, which is not evidence of her capacity to return to work. The claimant's employment with the furniture store ended in June 2008, and she went to work, unsuccessfully, for Target for a few weeks in July 2008, before her symptoms forced her to quit. Since that time, she has been unable to work, and she is scheduled for back surgery to address her significant symptoms. I would award the claimant temporary total disability benefits for each of the periods requested.

I would award the claimant the temporary disability benefits she sought.

For the foregoing reasons, I respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner