

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F907768

JIMMY GUYTON,  
EMPLOYEE

CLAIMANT

TYSON POULTRY, INC.,  
EMPLOYER

RESPONDENT

TYNET CORPORATION,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 15, 2011

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

Claimant appears Pro Se.

Respondents represented by the HONORABLE E. DIANE  
GRAHAM, Attorney at Law, Fort Smith, 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 19, 2011. In said  
order, the Administrative Law Judge made the following  
findings of fact and conclusions of law:

1. The Commission has jurisdiction.
2. The employee/employer relationship existed  
between the parties on June 5, 2009.
3. Claimant sustained a compensable injury to his  
right hand/forearm on June 5, 2009.
4. Respondent accepted the injury as compensable  
and furnished medical treatment.

5. Claimant's TTD rate is \$191 and PPD rate is \$154.
6. The claimant's claim for temporary disability compensation is barred by the provisions of Arkansas Code Annotated Section 11-9-526. The claimant has therefore failed to establish that he is entitled to an award of temporary disability compensation.
7. The claimant has failed to establish by a preponderance of the evidence that he has experienced permanent anatomical impairment as a result of his compensable injury.
8. The claimant has had his one-time change of physician, and the claimant has failed to establish that additional medical treatment is reasonably necessary for his 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.

Therefore we affirm and adopt the July 19, 2011 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 concurs, in part, and dissents, in part.

**CONCURRING & DISSENTING OPINION**

I must respectfully concur, in part, and dissent, in part, from the majority opinion. I agree that the claimant is not entitled to a second Change of Physician and I specifically concur on this point. I also agree that the claimant has failed to prove entitlement to a permanent impairment rating; therefore, I must specifically concur on this point, as well. However, after a de novo review of the record, I find that the claim for temporary total disability benefits is not barred by Ark. Code Ann. §11-9-526, and I must respectfully dissent on this issue.

The claimant sustained a work-related injury to his right hand and forearm on June 5, 2009, when his hand got caught in a conveyor belt when he attempted to nudge a piece of chicken as the belt was operating.

Because the claimant attempted to remove the chicken with the machine operating, this incident was deemed by the respondent to involve a core safety violation. As a result, the respondent suspended the claimant for three days.

The claimant initially treated for his injury at the emergency room at Howard Memorial Hospital on June 5, 2009, where multiple abrasions were documented. The hospital released the claimant with a restricted return to work of no use of his right hand or right arm through June 10, 2009.

The claimant followed up with Dr. Hasmukh Patel on June 9, 2009. Dr. Patel completed an FMLA leave form on June 9, 2009, indicating in one place that the claimant could resume regular duties as of June 9, 2009, but indicating in another place that the claimant would be incapacitated from June 9, 2009 through June 16, 2009. On another form dated June 9, 2009, Dr. Patel indicated that the claimant could return to work at a sitting job. On June 16, 2009, Dr. Patel again indicated that the claimant could return to work in a sitting job, without any reference to limitations on the claimant using his right hand or arm.

Based on a date listed in a letter of resignation that the claimant wrote, it appears that the claimant went back to the plant in order to return to work on or about June 17, 2009, which would be in accordance with the first off-work status given by Dr. Patel. At that time, the claimant learned that, in addition to his three-day suspension, he had also been given 13½ disciplinary points on a 14-point scale for not returning to work sooner, and that he also was put on probation by the respondent. The claimant resigned and left the plant, rather than returning to work on June 17, 2009, and he has not worked anywhere since.

When the claimant returned to Dr. Patel on June 25, 2009, Dr. Patel released him to regular-duty work and released him from care, to return on an as-needed basis. The claimant did not return to Dr. Patel again, but he did present to the emergency room of Medical Park Hospital on July 1, 2009, where he was treated and released. That report contains notations indicating the presence of abnormalities, including swelling, ecchymosis, and deformity.

The claimant's injury at issue is a scheduled injury. See Ark. Code Ann. §11-9-521(a). For a scheduled injury, a claimant is entitled to temporary

total disability benefits until the healing period ends or until the claimant returns to work, whichever occurs first. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2002).

However, Ark. Code Ann. §11-9-526

provides that:

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 justified.

Here, I find that the claimant's refusal to return to work was justified. The employer's assessment of 13½ points out of a 14-point scale and putting the claimant on probation for merely following his doctor's orders was, in effect, a termination of the claimant. While the employer believed the claimant had been released to return to work, the claimant was obviously following the doctor's recommendation that he stay off work through June 16. Rather than contacting the claimant and informing him that work was available within his restrictions during the time period in question, the respondent instead chose to penalize the

claimant by assessing points. I find that by assessing the 13½ points and putting the claimant on probation, the respondent did not in actuality offer the claimant employment suitable to his capacity. I find that the claimant's refusal to return to a job that was not actually offered was justified.

In conclusion, I find that Ark. Code Ann. §11-9-526 does not act as a bar to the claimant's receipt of temporary total disability benefits under Wheeler.  
Supra.

For the aforementioned reasons, I must concur, in part, and dissent, in part, from the majority opinion.

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PHILIP A. HOOD, Commissioner