

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G004431

HERMINIO MOJICA, EMPLOYEE	CLAIMANT
AERT, INC., EMPLOYER	RESPONDENT
CHARTIS, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 24, 2011

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed November 9, 2010. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 28, 2010, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. The parties' stipulation that claimant was earning an average weekly wage of \$533.76 which would entitle him to

compensation at the weekly rates of \$356.00 for total disability benefits and \$267.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to benefits pursuant to A.C.A. §11-9-505(a) for a period not exceeding one year beginning on the date of his termination. Respondent is entitled to a credit for any wages earned by the claimant during this one year period of time.
4. Respondent is not entitled to a credit for any unemployment benefits received by the claimant during this one year period of time.
5. Respondent has controverted claimant's entitlement to all unpaid §11-9-505(a) benefits.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the November 9, 2010, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and

adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with 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 respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to benefits pursuant to Ark. Code Ann. § 11-9-505(a). Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

On March 6, 2010, the claimant was working for the respondent employer as a fiberglass operator when some fiberglass flew into his eye. The claimant talked to his supervisor, Roy Acuff about getting the fiberglass out, and Mr. Acuff told him to take care of it. The claimant was unable to get the fiberglass out of his eye in the cafeteria. The claimant left the respondent employer's premises and went home to get his wife to help him get the fiberglass out of his eye. The claimant did not clock out. The claimant returned to the respondent employer after he was home for about 15-20 minutes and finished working the remainder of the day. The claimant was terminated a few days later for failing to clock out and leaving the respondent's premises. The respondent employer has a company policy that all employees must clock out before they leave the premises and failing to do so results in termination.

The claimant contends that he is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505(a)(1) which provides:

Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment 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 benefits received and the average weekly wage lost during the period of such refusal, or for a period not exceeding one (1) year.

In order to establish his claim for additional benefits under this section, the claimant has the burden of proving that the following four requirements are met:

- (1) That he sustained a compensable injury;
- (2) That suitable employment within the claimant's physical and mental limitations was available with his employer;
- (3) That the employer refused to return him to work;
- (4) That the employer's refusal to return the claimant to work was without reasonable cause.

See Torrey v. City of Ft. Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996). In Torrey, supra the Courts stated that:

At a minimum Ark. Code Ann. § 11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary.

The claimant contends that he is entitled to benefits pursuant to Ark. Code Ann § 11-9-505(a), and the Administrative Law Judge awarded these benefits. In my opinion, a review of the evidence demonstrates that the respondents clearly are not required to pay benefits pursuant to Ark. Code Ann. § 11-9-505(a). The evidence demonstrates that the claimant's termination was caused by his own actions. The claimant admitted that he knew that the respondent employer had a strict policy regarding clocking out, yet he failed to clock out before leaving on the night of March 6th. There was testimony presented at the hearing that six employees had been terminated from the respondent employer since 2007 for violation of this policy. It is clear that the claimant was terminated for violating company policy. Therefore, the respondents should not be held responsible for paying benefits pursuant to § 505. Accordingly, for all the reasons set forth above, I

Mojica - G004431

7

respectfully dissent from the majority's award of
benefits.

KAREN H. MCKINNEY, Commissioner