

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G100550

IDA M. PETTUS, EMPLOYEE	CLAIMANT
DEPARTMENT OF EDUCATION, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 30, 2011

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

claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE RICHARD SMITH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed

OPINION AND ORDER

The claimant appeals a decision by the Administrative Law Judge finding that the claimant failed prove by a preponderance of the evidence she was entitled to temporary total disability benefits from January 15, 2011 to a date yet to be determined. Based upon our de novo review of the record, we affirm the decision of the Administrative Law Judge.

The claimant worked for the respondent employer for the past 13 years as an education program advisor. She provided technical educational assistance to Arkansas public

schools. The first eight years of the job, the claimant provided assistance to Little Rock area schools. The last three to four years, the claimant provided assistance to schools in the Hot Springs area and Montgomery county. In September 2010, the claimant was reassigned to Harrisburg, Arkansas.

According to the claimant, on December 13, 2010, the claimant was walking to the technology building in Little Rock after dropping off her computer. She testified that she slipped on the sidewalk and fell on her right knee and hit her left knee. The claimant sought medical treatment and came under the care of Dr. Ethan Schock. The claimant underwent an MRI. The claimant testified she continues to have pain in her knee. The claimant testified to having a sharp pain on the right side of her knee.

Dr. Schock released the claimant to return to work with sit down, desk work and no excessive walking or travel restrictions. On December 20, 2010, the claimant continued to be assigned to Harrisburg and she requested a transfer to Little Rock. The claimant was terminated on January 14, 2011 for issues unrelated to her Workers' Compensation claim. The claimant testified that she was having problems with her

supervisor, Mr. Harvey.

The claimant was off work from December 13, 2010, through December 17, 2010, following her slip and fall. The claimant testified that she only worked part of two days in December 2010, and returned to work full time on January 3, 2011, and continued to work until she was terminated. The claimant worked in the Little Rock office between January 9 and 14, 2011. The claimant's last doctor's visit was on March 4, 2011, with Dr. Ethan Schock.

The latest medical report in evidence was a March 4, 2011, evaluation from Dr. Ethan Schock where he noted the claimant might have a meniscal tear and he ordered an MRI. An MRI was performed on February 8, 2011. There was no mention of the claimant's inability to work or other conservative treatment in Dr. Schock's records. The December 20, 2010, report from Dr. Keith Cooper recommended the claimant return to light duty and recommended she not travel for the next couple of weeks but be allowed to do sit down desk work. Dr. Cooper suggested if significant travel was required in her job or excessive standing or walking, she should remain off work. The claimant did return to work and was accommodated in the Little Rock office in January

2011. The claimant's employment terminated for reasons unrelated to the compensable injury. The claimant's employment was terminated for insubordination and for reasons related to job performance. The claimant had been reprimanded in May and September 2010. Ultimately, she was terminated as the result of not keeping her calendar updated.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002); Ark. State Hwy. Trans Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Without an initial finding of compensability, a claimant cannot be awarded temporary total disability benefits or additional medical treatment. See, Ark. Code Ann. §11-9-102(4) (D) (Supp. 2005). Although objective medical findings are not directly necessary for the Commission to award temporary total disability benefits, such findings are required for the underlying injury to be compensable. Williams v. Prostaff Temporaries, 64 Ark. App. 128, 979 S.W.2d 911 (1998), aff'd, Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999). When an injured employee

is totally incapacitated from earning wages and remains in his/her healing period, he is entitled to temporary total disability. Id.

The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. v. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his/her injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The question of when the healing period has ended is a factual determination for the Commission. Arkansas Highway & Trans. Dep't. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993); Mad Butcher, supra.

The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. McWilliams, supra; Mad Butcher, supra. Conversely, the healing period has not ended so long as treatment is administered for the

healing and alleviation of the condition. McWilliams, supra;  
J.A. Riggs Tractor v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d  
51 (1990).

In order to be entitled to temporary total disability compensation for a scheduled injury, the employee must prove: (1) that she remains within her healing period; and (2) that she has not returned to work. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Since the claimant's injury is a scheduled injury, temporary total disability benefits are only appropriate when she proves by a preponderance of the evidence that she has not returned to work because she remained in her healing period. Fendley v. Pea Ridge School District, 97 Ark. App. 214, 245 S.W.3d 676 (December 20, 2006). See also, Ark. Code Ann. §11-9-521(a) (Repl. 2002); Wheeler, supra. In Fendley v. Pea Ridge School District, supra, the Court agreed with the Commission's analysis that a claim for temporary total disability for a scheduled injury cannot be considered in a vacuum and stated that "the employee's failure to return to work must be causally related to the injury..."

Our review of the evidence demonstrates that the

claimant was terminated from the respondent employer for reasons unrelated to her compensable injury and is not entitled to temporary total disability. This case is akin to the case of Robertson v. Pork Group, Inc. 2011 Ark. App. 448, \_\_\_ S.W.3d \_\_\_ (2011), which was affirmed by the Court of Appeals. The claimant in Robertson was on light duty and was fired for insubordination. The claimant in Robertson had also sustained a scheduled injury. The Commission found and the Court affirmed that the claimant was not entitled to temporary total disability benefits. The case of Mackey v. Cobb Vantress, 2011 Ark. App. 88, \_\_\_ S.W.3d \_\_\_ (2011) is another case analogous to the case presently before us. In the Mackey case, the claimant had suffered a scheduled injury, returned to work, and was terminated. The Court held that the claimant's return to work ended entitlement to temporary total disability benefits.

Therefore, after considering the evidence of record, we find that the claimant has failed to prove by a preponderance of the evidence that the claimant was entitled to temporary total disability benefits from January 15th to a date yet to be determined. The evidence and the medical records indicate that the claimant was released to return to

work with restrictions on December 20, 2010. The respondent employer accommodated the claimant's restrictions.

The claimant returned to work for the respondent employer, but was terminated for cause by the respondent employer on January 14, 2011. Therefore, based upon the holdings of the Court in Robertson and Mackey, the claimant is not entitled to temporary total disability benefits. Accordingly, we hereby affirm the decision of the Administrative Law Judge. This claim is denied and dismissed.

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**

I must respectfully dissent from the majority opinion. After a de novo review of the record, I would award the requested temporary total disability benefits.

The general rule is that an employee who has suffered a scheduled injury is entitled to temporary total

or temporary partial disability benefits during his healing period or until he returns to work, whichever occurs first, regardless of whether he has demonstrated that he is actually incapacitated from earning wages. Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 152, 41 S.W.3d 822, 826 (2001) (citing Ark. Code Ann. §11-9-521) (Repl. 1996). What constitutes a "return to work" under Ark. Code Ann. §11-9-521 (Repl. 2002) is not defined by the Workers' Compensation Act; however, this Court has stated that an unsuccessful attempt to return to work does not bar additional benefits under the statute. Farmers Coop v. Biles, 77 Ark. App. 1, 6-7, 69 S.W.3d 899, 903 (2002).

However, the general rule found in Wheeler is touched upon by Ark. Code Ann. §11-9-526, which states:

If an 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.

In Superior Industries v. Thomaston, 72 Ark. App. 7, 32 S.W.3d 52 (2002), the employer argued by analogy that

since an employee could be denied disability benefits when the employer provides suitable employment and the employee refuses it, then the employee should also be disqualified when his employment was terminated for misconduct. Id at 11, 32 S.W.3d at 54. The Court in Superior Industries rejected that argument. Noting that there was no statutory basis for the employer's argument, the Court instead held that an employee was entitled to benefits where the employee did not refuse employment but instead accepted the employment and was later terminated not by his own choice, but at the option of the employer. Id.

The Court of Appeals revisited Superior Industries in Tyson Poultry, Inc. v. Narvaiz, 2010 Ark. App. 842. In Narvaiz, the Court held that "there can be instances of nonperformance or insubordination by an employee that would support a finding that an employee effectively refused suitable employment by engaging in misconduct intended to provoke his termination." Narvaiz at 2. The Court then limited the holding of Superior Industries "to its facts" and reversed and remanded for further proceedings. Id.

Under these cases, the proper disposition of this case would be for the Commission to make the findings required by Narvaiz. In Narvaiz, the Court concluded that

the essential question was whether the claimant effectively refused suitable employment by engaging in misconduct intended to provoke his termination. Here, the claimant clearly did not engage in misconduct intended to provoke her termination. In fact, it is her testimony that she is pursuing avenues to be re-instated in her job. The claimant testified that the supervisor, when she terminated her, stated that she was tired of the claimant filing grievances and requesting FMLA benefits. At least one of the grievances and the FMLA benefits were related to the claimant's workers' compensation claim. Although the respondent claims that the claimant's termination was due to her failure to keep her calendar up-to-date, I find, as the Court of Appeals affirmed the Commission in American Railcar Industries v. Gramling, 2010 Ark. App. 625, that the respondent's stated reason for termination is a pretense, and the real reason for her termination is the respondent's frustration with the claimant's inability to travel and missing work due to her workers' compensation claim. The claimant testified that she asked to be allowed to show that her calendar was, in fact, up-to-date, but was not allowed to do so.

The latest case from the Court of Appeals to

address this issue is Robertson v. Pork Group, Inc., 2011 Ark. App. 448. Here, the claimant was terminated for making racial slurs and using profane language. I find that the conduct in Robertson, Id., is the type of misconduct intended to provoke termination. Here, an alleged failure to keep an up-to-date calendar simply does not rise to the level of misconduct contemplated by Narvais, and certainly does not justify violating the general rule found in Wheeler, Supra.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner