

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F811715

BETTY A. STARKS, EMPLOYEE	CLAIMANT
FAMILY DOLLAR STORES, INC., EMPLOYER	RESPONDENT
SEDGWICK CMS, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 8, 2011

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

Claimant appeared *pro se*.

Respondent represented by HONORABLE MARK ALAN PEOPLES, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and Reversed in Part.

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant was entitled to benefits pursuant to Ark. Code Ann. § 11-9-505(a) and any temporary total disability benefits for the period December 31, 2008 through February 6, 2009. Based upon our de novo review of the record, we find that the decision of the Administrative Law Judge should be affirmed in part and reversed in part. The decision awarding the claimant temporary total disability benefits through February 6, 2009 is hereby be affirmed. However, the finding

awarding the claimant temporary total disability benefits after that period of time and the award pursuant to Ark. Code. Ann. § 11-9-505(a) should be and hereby is reversed.

The claimant was employed by the respondent employer as a store manager. On November 19, 2008, the store that the claimant was manager of was the target of an armed robbery. The claimant sustained an admittedly compensable psychological injury. The claimant was paid temporary total disability benefits through December 31, 2008. She was released to full duty effective February 6, 2009. The claimant did not return to work for the respondent employer until October 4, 2009.

The claimant contends that she 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 her claim for additional benefits under this section, the claimant has the burden of proving that the following four requirements are met:

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

See Edward 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-entrance into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary.

We find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505(a). The

claimant's failure is rooted in her failure to prove two prongs of the test. The claimant cannot prove that the respondent employer refused to return her to work and she cannot prove that if the respondent employer did refuse her return to work, that the refusal was not without reasonable cause. The evidence demonstrates that the claimant did return to work within a reasonable time after the employer learned of her full duty release.

The respondent offered the testimony of Robert Davis, who is the District Manager and the claimant's direct supervisor. Mr. Davis supervises 16 stores in three states. Mr. Davis stated that on the day after the armed robbery, he met with the claimant and agreed that she would take a leave of absence from her job as store manager. He told the claimant that he wanted to have weekly contact with her so that he would know how she was doing. The claimant did not contact Mr. Davis until December 1, 2008 and reported that she was seeing a psychiatrist.

The next contact Mr. Davis had with the claimant was the second week in January of 2009. The claimant expressed an interest in returning to work and Mr. Davis told the claimant that he needed a doctor's note with any

restrictions that she might have. He provided the claimant with a fax number. He had no further contact with the claimant until the second week of February, 2009. At that time, Mr. Davis reminded the claimant that he really needed to hear from her regarding her status no less frequently than once a week. The claimant repeatedly failed to contact Mr. Davis once per week, but it appeared to be more like once per month. He mentioned to the claimant that he had not received the requested documentation regarding her release to return her to full duty. It was shortly after this time, that the claimant filed for unemployment compensation.

Sometime in the spring of 2009, the claimant called Mr. Davis to tell him about the conviction of the robbery assailants. She told Mr. Davis at the time that "she was ready to move on with her life." The claimant made no mention to Mr. Davis of a desire to return to work.

It was not until September 9th of 2009, that Mr. Davis was contacted by a specialist liaison out of the corporate offices regarding the possibility that the claimant could return to work. The claimant had accused Mr. Davis of refusing to return the claimant to work. Mr. Davis immediately began efforts to get the claimant back on the

job, which she did on October 4, 2009. Mr. Davis ultimately received the release from the claimant at his personal fax machine on September 18, 2010. Mr. Davis conveyed his concern to the claimant that the release was stale as it was dated February 9, 2009, and asked the claimant if she could obtain a more current one. The claimant was unable to offer such and Mr. Davis contacted corporate who agreed that the claimant could return to work on October 4, 2009. The claimant alleges that she spoke to Mr. Davis on several occasions and that he refused to return her to work. The claimant offered testimony and cell phone bills that allegedly show that the claimant contacted Mr. Davis's cell phone. However, all these records show is that the claimant made a few calls to Mr. Davis, but they do not indicate that all of the calls were answered or if the claimant ever spoke to Mr. Davis. The calls range in duration from one minute to approximately seven minutes. The claimant testified that she left voice messages for Mr. Davis during February of 2009, but Mr. Davis testified that this did not happen. She also testified that in her phone call with Mr. Davis where she talked about the conviction of the assailants that she mentioned returning to work. However, Mr. Davis denied that

this part of the conversation took place. Further, the claimant testified that she mentioned to Mr. Davis that she wanted to return to work in December of 2008, but he testified that there was never a mention of her return to work until the second week of January in 2009.

With regard to the cell phone records, the claimant testified that she contacted Mr. Davis at least "over 10" times during February 2009 and that her cell phone records would support this testimony. However, the cell phone records do not support the claimant's contention.

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id.

The claimant's credibility is suspect at best.

There is absolutely no evidence the claimant contacted Mr. Davis more than ten times in February of 2009. Her cell phone records do not bear this out, nor does the testimony of Mr. Davis support this contention. The burden of proof is on the claimant to prove her claim and the claimant has failed to do so. There is no evidence that the claimant's employer refused to return the claimant to work at any time. As soon as the respondent employer was provided with a return to work slip, the claimant was returned to work.

When we consider the fact that the claimant filed for unemployment benefits upon getting a release from the doctor, the testimony of Mr. Davis that supports the fact that the claimant never made any contact with him about returning to work after he had a conversation with her about the conviction of the assailants, and the fact that there was a lapse of approximately seven months before she contacted Mr. Davis again about returning to work, we cannot find that the claimant has met her burden of proof. Accordingly, the decision of the Administrative Law Judge awarding benefits pursuant to Ark. Code Ann. § 11-9-505(a) should be reversed. Accordingly, we hereby reverse this finding of the Administrative Law Judge.

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 her healing period, she 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 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 evidence demonstrates the claimant was released to return to work on February 6, 2009. The evidence also shows that the claimant filed for and received unemployment benefits until she returned to work in October of 2009. Although she argued she contacted Mr. Davis repeatedly to return to work, the evidence, as noted above, does not bear this out. Simply put, the claimant has failed to prove by a preponderance of the evidence that she was entitled to temporary total disability after February 6, 2009. Accordingly, we affirm the award of temporary total disability through February 6, 2009, and reverse the award of temporary total disability after February 6, 2009.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents in part and concurs in part.

CONCURRING AND DISSENTING OPINION

After my de novo review of the entire record, I must respectfully dissent in part from the majority opinion, because I agree with the Administrative Law Judge that the claimant is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505(a). I concur with the majority on temporary disability benefits.

Ark. Code Ann. § 11-9-505(a) (Repl. 2002)

provides:

1) 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 to the employee the difference between benefits received and the average weekly wages lost during the

period of the refusal, for a period not exceeding (1) year.

Before Ark. Code Ann. § 11-9-505(a) applies, several requirements must be met. The employee must prove by a preponderance of the evidence that he sustained a compensable injury; that suitable employment which is within his physical and mental limitations is available with the employer; that the employer has refused to return him to work; and that the refusal to return him to work is without reasonable cause. Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

The parties stipulated that the claimant sustained a compensable injury when she was the victim of an armed robbery, satisfying the first requirement. The claimant has been returned to her employment, within her limitations, which was available in February 2009, satisfying the second requirement.

The claimant testified convincingly that she had a copy of her February 2009 release to full duty faxed to her employer and that she spoke with her supervisor regularly about her desire to return to work. However, the claimant was not returned to work, until she spoke with manager in the corporate office in October 2009. This constitutes a

refusal to return the claimant to work from February 6, 2009 to October 3, 2009, satisfying the third requirement. There is no justification for the refusal to return her to work. She was capable of working, and as soon as the corporate office was involved, the claimant was promptly reinstated. There was no reasonable cause, satisfying the fourth requirement for benefits under Ark. Code Ann. §11-9-505(a). The respondents should be held responsible for benefits under Ark. Code Ann. §11-9-505(a), from February 6, 2009 to October 3, 2009.

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

PHILIP A. HOOD, Commissioner