

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H102028

JORDEN M. DELA-CRUZ, EMPLOYEE	CLAIMANT
PEPSI COLA METRO BOTTLING CO., EMPLOYER	RESPONDENT
INDEMNITY INS. CO. OF NO. AM., CARRIER	RESPONDENT

OPINION FILED JANUARY 27, 2022

Hearing before Administrative Law Judge O. Milton Fine II on November 18, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Andy Caldwell, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Lee J. Muldrow, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 18, 2021, the above-captioned claim was heard in Little Rock, Arkansas. A prehearing conference took place on October 18, 2021. The Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

The parties discussed the stipulations set forth in Commission Exhibit 1. With an additional one reached at the hearing, they are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

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2. The employee/employer/carrier relationship existed at all relevant times, including February 20, 2021, when Claimant sustained a compensable injury to his right ankle and leg.
3. Respondents have accepted this claim and paid certain benefits.
4. Respondents have controverted Claimant's entitlement to additional benefits.
5. Claimant's average weekly wage entitles him to the maximum compensation rates.
6. Temporary total disability benefits have been paid on this claim through July 31, 2021.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit

1. After the amendment of the first issue, the following were litigated:
 1. Whether Claimant is entitled to additional temporary total disability benefits from August 1, 2021, through September 1, 2021.
 2. Whether Claimant is barred from receiving additional temporary total disability benefits under Ark. Code Ann. § 11-9-526 (Repl. 2012).
 3. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved.

Contentions

The respective contentions of the parties, following amendment at the hearing, read as follows:

Claimant:

1. Claimant contends that he sustained injuries to his right ankle and right leg in the course and scope of his employment when he fell on February 20, 2021.
2. Respondents have denied payment of temporary total disability benefits even though Claimant was still off work per his surgeon, Dr. Eric Boe.
3. Claimant contends that he is entitled to additional temporary total disability benefits from approximately July 15, 2021, through September 1, 2021, and attorney's fees.
4. All other issues are reserved.

Respondents:

1. Respondents contend Claimant has received all temporary total disability benefits to which he is entitled.
2. Claimant was released for light-duty work effective July 15, 2021, and work consistent with the release was offered by the employer. He is thus foreclosed from receiving additional temporary total disability benefits under Ark. Code Ann. § 11-9-526 (Repl. 2012).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, I hereby make the

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following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from August 1, 2021, to September 1, 2021, because the preponderance of the evidence establishes that he is barred from receiving additional benefits of this type during this period under Ark. Code Ann. § 11-9-526 (Repl. 2012).
5. Claimant has not proven by a preponderance of the evidence that his counsel is entitled to a controverted attorney's under Ark. Code Ann. § 11-9-715 (Repl. 2012).

CASE IN CHIEF

Summary of Evidence

The hearing witnesses were Claimant and Matthew Todd Clark.

Along with the prehearing order discussed above, the exhibits admitted into evidence in this case were Claimant's Exhibit 1, a compilation of his medical records, consisting of one index page and seven numbered pages thereafter; Claimant's Exhibit 2, non-medical records, consisting of one index page and three numbered pages thereafter; and Respondents' Exhibit 1, another compilation of Claimant's medical records, consisting of one index page and nine numbered pages thereafter.

Adjudication

A. Temporary Total Disability

Introduction. Claimant, who was employed as a driver for Respondent Pepsi Cola Metro Bottling Company (“Pepsi”), sustained a compensable injury to his right ankle and leg on February 20, 2021. Respondents accepted these injuries and paid benefits pursuant thereto, including temporary total disability benefits through July 31, 2021. He has alleged that he is also entitled to such benefits from that date through September 1, 2021, when his physician released him to full duty. Respondents have denied their responsibility for such benefits, contending that Ark. Code Ann. § 11-9-526 (Repl. 2012) would foreclose him from receiving them.

Standards. Claimant’s stipulated compensable injuries are scheduled ones. See Ark. Code Ann. § 11-9-521(a)(4) (Repl. 2012). An employee who has sustained a compensable scheduled injury is entitled to temporary total disability compensation “during the healing period or until the employee returns to work, whichever occurs first” *Id.* § 11-9-521(a). See *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Claimant must prove his entitlement to additional temporary total disability benefits by a preponderance of the evidence. Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012). This standard means the evidence having greater weight or convincing force.

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Barre v. Hoffman, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, 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.*

Evidence. Claimant, who is 29 years old, is employed as a Geo driver for Respondent Pepsi. He described his duties in this position: "I drive an eighteen-wheeler around for Pepsi generally delivering products from different stores, various locations."

Asked how his compensable injuries occurred, he responded:

We came in, that snowstorm that was real bad, we hadn't worked that whole week, and we came in before all the ice was melted and I was trying to figure out which of the trucks was mine to use for the day and slipped on ice in the work parking lot.

He reported the injury. That same day, he underwent surgery on his right ankle. This was performed by Dr. Boe. Later, he went to Concentra Clinic. A physician there, Dr. Scott Carle, released Claimant to sedentary work on February 25, 2021. However, Pepsi never offered him work within this restriction.

After his operation, Claimant went to California to stay with his parents. He did this because he was unable to stand for a period of three months. His employer was aware of his temporary relocation. In fact, he saw a Concentra doctor in California, and underwent physical therapy while he was there. Pepsi received copies of notes from those appointments. Claimant stated that he stayed in constant communication with Pepsi while he was absent from Arkansas. He periodically returned to Arkansas to see Dr. Boe, however. Boe released him to regular duty as of September 1, 2021; and Claimant has returned to his job at Pepsi in that capacity. Through July 31, 2021, he was receiving temporary total disability benefits while he was off work in connection with his injury.

Claimant's initial testimony was that he was never offered light duty by Pepsi while he was located in California. The following exchange took place:

Q. And at any time prior to being released as of September 1st [of 2021], did Pepsi offer you to return to work at light duty?

A. No.

Q. Did you ever refuse to return to work in any capacity?

A. No.

Shown the screen shots of text messages between his supervisor, Todd Clark, and himself that are in evidence, on pages 2-3 of his non-medical exhibit, Claimant stated that they do not show that he was offered the opportunity to return to work at light duty. In fact, the text message shown on page 3 of that exhibit reflects that when he sent Clark on July 20, 2021, an image of the last doctor's note (dated July 19, 2021) that Boe

gave before Claimant returned to Arkansas from California, Clark simply responded with a “thumbs-up” emoji. The following exchange then occurred:

Q. Did [Clark] ever ask you following this communication to return to work light duty or in any other capacity before September 1st?

A. No.

Q. And again, you didn't refuse to return to work light duty or in any other capacity prior to September 1st?

A. Correct.

When questioned by Respondents, Claimant clarified that after seeing Boe in Arkansas on July 19, he went back to California. He flew back and forth from California to Arkansas to treat for his ankle. Claimant testified that while in California, he saw a physician there, Dr. Diana Johns, about his injury.

In reference to Johns's report, the following exchange took place on cross-examination:

Q. If your supervisor testifies that after receiving, after the company received this report from Dr. Johns releasing you for light duty, that he communicated with you and advised you that the company was willing to make light duty available to you, would you dispute that?

A. Yes.

Q. Okay.

A. If you'll look closely at the bottom of that, it says I cannot drive a truck, which is a fundamental part of my job.

Q. My question is: would you dispute the fact that your supervisor advised you that light duty was available to you in line with the note that Dr. Johns had suggested? In other words, Dr. Johns had outlined restrictions. **Were you notified by your supervisor after**

the company received that note that the company would make light duty available to you?

A. Yeah.

Q. **There is also—if your supervisor were to testify that he communicated that to you and the two of you agreed that you would be returning to work on July 15th in a modified duty capacity, would you dispute that?**

A. No.

Q. No?

A. No. That was something unrelated to work, it was a note for the bank. I do know what you're talking about.

Q. Well, did you explain that—

A. But that was also prior to the doctor's note that you have on file there that says July 1st.

Q. I understand. But what I'm saying is was it conveyed to you in late June by your supervisor, Mr. Clark, that the company was willing to make modified duty work available, and **did you agree at that time to return to work on July 15th?**

A. **At that time, yes.**

...

Q. So did you in fact advise Mr. Clark that you had an appointment [with Dr. Boe on July] 19th?

A. Yes.

...

Q. Did Mr. Clark, after receiving that note from Dr. Boe, tell you that the light duty offer was no longer available?

A. No.

While Claimant testified that Dr. Boe gave him a release prior to the one on July 19, 2021, such is not in evidence. Claimant related that he has not viewed Boe's letter dated October 12, 2021, in which he states that the July 19 letter—which states that Claimant is released to light duty as of September 1, 2021—is in error. But Claimant denied that Boe informed him that he was releasing him to light duty as of July 19, 2021.

In his testimony on redirect examination, Claimant related that the agreement that he would return to work on July 15, 2021, arose as a result of his needing a letter from Pepsi to his bank to enable him to secure a loan. Claimant asked Clark for a letter stating when he would be returning to work. That letter gave an expected return-to-work date of July 15, 2021. According to Claimant, that date was based on what was known at the time it was prepared; but it changed. Claimant did not testify that the change of date occurred as a result of the July 19 letter. Instead, he stated: "My treatment plan got pushed out because Sedgwick, the insurance company, hadn't started my physical therapy, so I hadn't yet begun physical therapy in California." Per Claimant, there was an agreement that he was no longer going to return to work as of July 15.

Clark, a seven-year employee of Respondent Pepsi, was Claimant's supervisor during the time period at issue. He testified that based upon Dr. John's June 1, 2021, report, he was advised by his employer that Claimant had been released for limited duty. He was asked whether a limited duty job could be made available for Claimant;

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and he answered in the affirmative. In late June, according to Clark, he informed Claimant of this. The following exchange took place:

Q. Did you, during the course of your communications, agree, or did he agree on a time when he would be available to return to work in a light duty capacity for the company?

A. Based on emails that I have gone back, it showed July 15th.

Q. All right. So it's your understanding that he agreed that as of July 15 he would be able to return to modified duty with the company?

A. Yes, sir.

Q. With the understanding, according to the medical reports, that he would be available for full duty on September 1st?

A. Yes, sir.

Clark informed the safety manager of Pepsi and the adjustor on the claim of Claimant's agreed-upon return of July 15.

According to the witness, Claimant informed him that he was going to be returning to Dr. Boe on July 19, 2021. Claimant stated that he would provide him another doctor's note; and he in fact did so. The following exchange occurred:

Q. Now, at any time between the time you talked with Mr. Dela Cruz or communicated with him at the end of June and receiving this note after July 19th, did you at any time indicate to him that the light duty or modified duty offer was off the table?

A. No, sir.

Q. As far as you were concerned, what you had communicated to him was light duty was still available, is that right?

A. Yes, sir.

...

Q. And is it fair to say that at no time did you indicate to Mr. Dela Cruz that the company was no longer able to make limited duty or modified duty available to him?

A. No, sir.

The following exchange took place on cross-examination:

Q. The light or limited duty position that you've testified, are you aware of any correspondence that's sent from either you or anyone with Pepsi to Mr. Dela Cruz formally making an offer of light duty work available to him?

A. I do not.

Q. Are you aware of any specific refusal by Mr. Dela Cruz to refuse to return to light duty work?

A. No, sir.

...

Q. Are you aware of any instance where Mr. Dela Cruz specifically refused to return to work on anything that was offered to him?

A. Not that I'm aware of, sir.

Under additional questioning, Clark denied that the letter that he authored to the bank, at Claimant's request, had anything to do with the July 15 return date. He stated that the purpose of the letter was strictly to confirm that Claimant would still have a job with Pepsi upon his return. In contrast to his earlier testimony, Clark denied authoring that letter. His testimony was that it did not mention a return-to-work date.

The medical records in evidence reflect that on February 20, 2021, Concentra wrote that Claimant could return to work at sedentary duty as of February 25, 2021, with the following restrictions:

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- No standing for more than one hour
- Must use crutches or scooter
- Non-weight bearing
- Wear splint/brace on right lower extremity up to or more than eight hours per day
- No walking on uneven terrain

Dr. Johns's June 1, 2021, report reflects that she released him with the following provisions:

Return to modified work/activity today
Patient may work their entire shift

...

May lift up to 20 lbs constantly
May push/pull up to 20 lbs constantly
May stand occasionally
May walk occasionally
May not drive company vehicle due to functional limitations – can't get into cab
Additional Restrictions and Limitations: on feet 5 minutes every 30 minutes, using ankle support
No squatting
No kneeling
No climbing stairs
No climbing ladders

On July 19, 2021, Dr. Boe wrote that Claimant "may return to work light duty as of 9/1/2021." This was changed on July 29, 2021, when Boe wrote: "It is my medical opinion that Jorden Dela-Cruz may return to work light duty at this time. He may return to work with no restrictions on 9/1/2021. Please disregard previous letter." A report by Johns bearing the same date, however, reads that Claimant may "[r]eturn to full

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work/activity today[.]” Boe reiterated on August 23, 2021, that Claimant could return to full duty on September 1, 2021.

Later, on or around¹ October 12, 2021, Dr. Boe wrote:

To Whom It May Concern,

Patient was seen on 07/19/2021 and was released for light duty but was not ready to return to full activity until 09/01[/]2021 at the earliest. I did not think that he was able to return to full duty at that time, as he still had a limp and was not walking normally. The work note stating return to work dated July 19th was incorrect. We saw this and it was corrected 10 days later on July 29.

Patient was then seen again on August 23, 2021, and was found to have clinically improved and asked to return to full duty on September 1, 2021.

Discussion. The evidence shows that during the period at issue, August 1, 2021, to September 1, 2021, Claimant did not return to work due to his stipulated compensable right lower extremity injury. A claimant’s failure to return to work, for purposes of being entitled to temporary total disability benefits, must be for reasons related to the work-related injury. *Fendley v. Pea Ridge School District*, 97 Ark. App. 214, 245 S.W.3d 676 (2006). I credit Dr. Boe’s opinion that he could return to work at full duty as of that latter date. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). Claimant remained in his healing period during this period.

¹The correspondence is undated; but a notation at the top reflects that it was faxed on October 12, 2021.

But Respondents have argued that in the event that Claimant has shown his entitlement to additional temporary total disability benefits, Ark. Code Ann. § 11-9-526 (Repl. 2012) would foreclose him from receiving them for the period sought here. This provision reads:

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 justifiable.

In *Cantrell v. Temple Inland, Inc.*, 2010 AR Work. Comp. LEXIS 194, Claim No. F904606 (Full Commission Opinion filed June 3, 2010), the Commission wrote:

An offer of suitable employment is a condition precedent to applying Ark. Code Ann. § 11-9-526. *Webb v. Webb*, Full Commission Opinion, June 29, 2000, (Claim No. E906155). Moreover, work must be available within the employee's physical restrictions. *McCullor v. Democrat Printing & Lithographic Co.*, Full Commission Opinion, April 28, 1998, (Claim No. E608050). The claimant must unjustifiably refuse employment which is suitable to his capacity. *Barnette v. Allen Canning Company*, 49 Ark. App. 61, 896 S.W.2d 444 (1995).

The evidence establishes that Johns released Claimant to light duty as of June 1, 2021. It also shows that later that month, he and his supervisor, Clark, agreed that Claimant would return to work at light duty on July 15, 2021. Pepsi offered light-duty work; and Claimant (at least initially) accepted this offer. That offer was never withdrawn. However, he did not go back to Pepsi on July 15. Shortly after the return was to have taken place, on July 19, 2021, Claimant went back to the doctor. Clark was aware of this turn of events; Claimant sent him a copy of Dr. Boe's report. As quoted above, the report reflects that as of that date, Claimant's physician was of the opinion that Claimant could return to work at light duty as of September 1, 2019. Boe amended

this on July 29, 2021, making him eligible for light-duty work “at this time”—i.e., as of that date. But Claimant did not go back to Pepsi then, either. Certainly, it makes sense that he did not go back to work that particular day, because this appointment, according to the medical record in Respondents’ exhibit was at Johns’s clinic in California. Consequently, through July 29, 2021, his refusal to return was justifiable under § 11-9-526.

But this does not overlap with the period for which Claimant is seeking additional temporary total disability benefits, which begins on August 1, 2021, and extends through September 1, 2021. The evidence preponderates that Claimant’s refusal to return to work extended throughout that one-month span, and that such was not justifiable. Thus, he is foreclosed under § 11-9-526 from receiving the additional benefits that he has requested herein.

B. Attorney’s Fee

Introduction. Claimant has asserted that he is entitled to a controverted attorney’s fee in this matter.

Standard. One of the purposes of the attorney’s fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). In this case, the fee would be 25 percent (25%) of any indemnity benefits awarded herein, one-half of which would be paid by Claimant and one-half to be paid by Respondents in accordance with *See Ark. Code Ann. § 11-9-715* (Repl. 2012). *See Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

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Discussion. As discussed above, Claimant has not proven that he is entitled to additional temporary total disability benefits. For that reason, the evidence does not preponderate that his counsel is entitled to a controverted fee thereon.

CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, this claim for additional benefits is hereby denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge