

## ARKANSAS COURT OF APPEALS

DIVISION III

No. CA10-107

AMERICAN RAILCAR INDUSTRIES,  
INC. and SPECIALTY RISK SERVICES  
APPELLANTS

V.

KYLE GRAMLING

APPELLEE

**Opinion Delivered September 22, 2010**

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION  
[NO. F811161]

AFFIRMED

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### RAYMOND R. ABRAMSON, Judge

This is a workers' compensation appeal in which appellee Kyle Gramling suffered an admittedly compensable left-foot injury in April of 2008 while working for appellant American Railcar Industries (ARI). Gramling was initially examined by the company physician who returned Gramling to light-duty work for one day, then released him to full duty thereafter. Because the pain in his foot continued to worsen, Gramling was subsequently referred to an orthopedic physician who diagnosed Gramling with a more significant injury. Afterward Gramling returned to various light-duty work for ARI.

On October 28, 2008, Gramling was terminated by ARI. The stated reason for the termination was that Gramling had been caught sleeping on the job and had become a safety hazard due to the somnolence caused by his Crohn's disease medications. Gramling had been diagnosed with Crohn's disease prior to his employment with ARI; had passed a pre-

employment physical despite the diagnosis; and had taken the offending medication throughout his year-and-a-half employment with ARI without previous complaint. ARI relied on a single examination and “fitness of duty” report by a nontreating physician completed that same date at the request of ARI.

Gramling filed a claim for temporary total disability benefits. ARI and its carrier, Specialty Risk Services, resisted the claim, arguing that appropriate benefits were being paid as a result of his compensable left-foot injury, but that Gramling was not entitled to temporary total disability benefits because his current problems were related to his Crohn’s disease and not his work-related injury. Gramling prevailed before the administrative law judge (ALJ). ARI and its carrier appealed to the Workers’ Compensation Commission seeking reversal of the award of temporary total disability benefits. The Commission affirmed the ALJ’s decision. ARI and Specialty Risk Services now appeal the Commission’s decision alleging that there was insufficient evidence to support the award of temporary total disability benefits following Gramling’s termination on October 28, 2009. We affirm.

We review a decision of the Workers’ Compensation Commission to determine whether there is substantial evidence to support it. *Rice v. Georgia-Pacific Corp.*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). Substantial evidence is that relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission’s findings and will affirm if its findings are

supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The issue is not whether we might have reached a different decision or whether the evidence would have supported a contrary finding; instead, we affirm if reasonable minds could have reached the conclusion rendered by the Commission. *Sharp County Sheriff's Dep't v. Ozark Acres Improvement Dist.*, 75 Ark. App. 250, 57 S.W.3d 764 (2001). It is the Commission's province to weigh the evidence and determine what is most credible. *Minn. Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Appellants initially argue that, because Gramling was not totally incapacitated from earning wages and had returned to work after his injury, he is barred from receiving temporary total disability benefits for the period following his termination. Appellants claim that Gramling's ability to return to work reveals that he was not totally incapacitated from earning wages as a result of his compensable injury. However, it is not necessary for a claimant with a scheduled injury<sup>1</sup> to prove that he is totally incapacitated from earning wages in order to collect temporary total disability benefits. *Fendley v. Pea Ridge Sch. Dist.*, 97 Ark. App. 214, 245 S.W.3d 676 (2006). Rather, he is entitled to temporary total 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*, 73 Ark. App. at 152, 41 S.W.3d at 826.

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<sup>1</sup> The ALJ found that Gramling's injury was a "scheduled injury" pursuant to Arkansas Code Annotated section 11-9-521 (Repl. 2002). The Commission adopted that finding, and appellants do not contest it.

Thus, the real issue is whether Gramling's return to both full and light duty work during his healing period bars his claim for temporary total disability benefits. Appellants assert that Gramling's return to work bars his claim for temporary total disability benefits.

First, Gramling's attempt to return to full duty work does not act as a bar to his claim. After diagnosing a bruised foot, Dr. Schott, the company physician, released Gramling to full duty after one day of light duty restrictions. Gramling repeatedly complained that his symptoms worsened over time and requested a referral to a specialist. The orthopedic specialist, Dr. Schechter, discovered that Gramling had suffered an injury to the peroneal nerve, a more significant injury than previously diagnosed by Dr. Schott. Dr. Schechter then removed Gramling from full duty and placed light duty restrictions upon his ability to work. Thus, while Gramling did return to full duty work at ARI for several months, he was unable to continue on such course due to the pain and numbness associated with his compensable injury. An unsuccessful attempt to return to the workforce does not act as a bar to additional temporary total disability benefits. *See Farmers Co-op v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

Nor does Gramling's return to work with light duty restrictions bar his claim. Arkansas Code Annotated section 11-9-526 (Repl. 2002) provides that "if an injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of the refusal, unless the refusal is justified in the Commission's opinion." Thus, under the express wording of the statute, if Gramling had refused the proffered light duty work, his claim would be barred. To find that his acceptance of that

same work would also act as a bar would render an absurd result.

Next, appellants claim that the ALJ erred in relying on *Superior Industries v. Thomaston*, 72 Ark. App. 7, 32 S.W.3d 52 (2000), for the conclusion that, because ARI terminated Gramling, he was incapacitated from earning wages and was, thus, eligible for temporary total disability benefits. This argument is misplaced.

First, in *Thomaston*, we refused to apply Arkansas Code Annotated section 11-9-526 by analogy to a situation where an employee was terminated. We found that there was no evidence that Mr. Thomaston had refused employment; rather, he had accepted employment and was later terminated at the option of his employer. We then focused on whether Mr. Thomaston was within the healing period and was totally incapacitated from earning wages. After reviewing the record, we found that Mr. Thomaston was clearly within his healing period when he was terminated and that there was evidence that he was totally incapacitated as he could not continue with his light duty work.

Appellants distinguish *Thomaston* by asserting that Gramling was terminated purely because of his own conduct—falling asleep—not because of an inability to perform his duties as a result of a compensable injury. ARI attributes Gramling’s inability to perform his job requirements to the medication Gramling was taking for his Crohn’s disease, not his compensable injury.

The Commission found otherwise. The ALJ’s opinion adopted by the Commission noted that Gramling had been receiving medical treatment for his Crohn’s disease since 1999, and there

was no evidence that it had served as an obstacle to his employment prior to his compensable injury. The Commission found that, after sustaining his compensable injury, Gramling was “belittled by his group leader, specifically monitored or stalked by [the] Safety Administrator, and directed to stop talking to his co-workers by Human Resources Manager.” The Commission further found that ARI’s referral to a non-treating physician for a “fitness for duty evaluation” appeared, on its face, to be “nothing more than a ploy to punish [Gramling] and to remove him from the work premises.” Additionally, the Commission noted that Gramling was taking pain medication for both his compensable injury and his Crohn’s disease and determined that, based on the evidence presented, any sleep disturbance Gramling was experiencing was the product of pain growing out of his compensable injury.

In workers’ compensation cases, the Commission functions as the trier of fact. *Blevins v. Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988). The determination of the credibility and weight to be given a witness’s testimony is within the sole province of the Commission. *Murphy v. Forsgren, Inc.*, 99 Ark. App. 223, 258 S.W.3d 794 (2007). 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 it deems worthy of belief. *Farmers Co-op. v. Biles*, 77 Ark. App. at 4–5, 69 S.W.3d at 902. Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Maya v. Newberry’s 3N Mill*, 102 Ark. App. 119, 282 S.W.3d 269 (2008).

The Commission, rejecting the evidence presented by ARI as not credible, found that

Gramling was terminated, not because of misconduct, but because of his physical inability to perform his duties as a result of a compensable injury. Reviewing the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, we find that there is substantial evidence in the record to support its conclusion.

The Commission further found that Gramling was within his healing period. Appellants argue that Gramling's condition had, at best, stagnated and he had not proceeded toward any improvement as it related to the compensable foot injury. However, appellants completely ignore the evidence to the contrary. On the date of his termination, Gramling had an appointment scheduled to discuss an upcoming recommended spinal cord stimulator implant. Additionally, on February 10, 2009, Dr. Schechter opined that Gramling had not reached maximum medical improvement. Thus, there was sufficient evidence to support the Commission's findings.

Because Gramling was within the healing period and because he has not "returned to work" for purposes of the statute, he was entitled to temporary total disability benefits. Accordingly, we affirm.

GLADWIN and GLOVER, JJ., agree.