

# ARKANSAS COURT OF APPEALS

DIVISION I  
No. CA11-738

ARTURO GOMEZ

APPELLANT

V.

CROSSLAND CONSTRUCTION CO.,  
INC., and TRAVELERS INDEMNITY  
COMPANY

APPELLEES

Opinion Delivered December 14, 2011

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION  
[NO. G008181]

AFFIRMED

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## RAYMOND R. ABRAMSON, Judge

Appellant Arturo Gomez appeals from the Arkansas Workers' Compensation Commission's decision denying his claim for temporary-total-disability (TTD) benefits following his knee surgery. We affirm.

Gomez suffered a compensable injury to his right knee while working for appellee Crossland Construction Company on July 13, 2010. Crossland accepted the injury as compensable and provided medical treatment and accommodations at work. Appellant's treatment eventually included surgery on September 7, 2010, to repair a right meniscal tear. Appellant sought TTD benefits from the date of his surgery to a date to be determined, and a hearing was held on this claim on December 14, 2010.

At the hearing before the administrative law judge (ALJ), many of the pertinent facts were undisputed. Appellant testified regarding his injury and treatment. He stated that, while the doctor released him to go back to work with restrictions on September 9, he could not



do so because he was unable to drive to work. He denied that Crossland offered him transportation to work. Appellant stated that he was not sure when exactly he was able to begin driving again following surgery, but he thought it was about four weeks. He disagreed with a physical therapist's note stating that, at a September 24 appointment, appellant said he had been driving. Appellant testified that he spent his time taking walks and doing exercises. During the two days a week that his wife worked, he sometimes took care of his two-year-old daughter.

Anahi Gonzalez, a human resources assistant for Crossland, testified at the hearing that she accompanied appellant to his doctor's appointments following his injury. She spoke Spanish and helped with translating. Gonzalez testified that appellant was able to return to work on September 9 with the restriction that he only perform sit-down work, and Crossland had sit-down work available for him on that date. The job was to be a guard at one of the job sites, checking people in and out. According to Gonzalez, appellant disagreed with his doctor's release and said he did not feel "ready to go back to work" and did not feel "comfortable." He expressed some concern about his supervisor following his restrictions, but she reassured him that "it's something we don't have a problem with." Regarding transportation, Gonzalez stated that appellant was released by his doctor to drive on September 15, the last day a Crossland employee provided him transportation to a doctor's appointment.

Ms. Gonzalez testified that a Crossland employee who missed more than ten days at work was subject to termination. She further testified that appellant was warned on Friday,



October 1 that he would be terminated if he did not return to work on Monday, October 4; when he did not appear for work on that date, Gonzalez sent him a letter explaining that he was terminated.

Robert Gonzalez testified that he was a superintendent for Crossland and appellant began working under him in August 2010, after his knee injury. He testified that he was able to give appellant work within his restrictions and appellant was able to do that work. After the surgery, appellant was restricted to working while sitting down, and the job of guard/door watch fell within those restrictions. This was a position that was required at the Sam's Club job site. Gonzalez testified that appellant had been offered transportation because he was not able to drive after surgery. Gonzalez had offered to pick him up himself, but the truck he drives was too small for appellant to have his leg stretched out. So, on two occasions, Gonzalez sent another employee to pick up appellant, but both times appellant did not come to work.

The ALJ denied appellant's claim for TTD benefits, finding that appellant was offered transportation and light-duty work, but he unjustifiably refused to work and therefore was not entitled to benefits under Arkansas Code Annotated section 11-9-526 (Repl. 2002). Gomez appealed the ALJ's decision to the Commission, which affirmed and adopted the ALJ's decision. This appeal followed.

For his sole point on appeal, Gomez argues that the Commission erred in opining that he failed to prove that he is entitled to TTD benefits. Gomez contends that the Commission



misapplied the law by denying him benefits under Arkansas Code Annotated section 11-9-526, which he contends applies only to nonscheduled injuries.

The language of the statute itself does not offer any distinction between scheduled and nonscheduled injuries:

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.

Ark. Code Ann. § 11-9-526. Appellant relies on Ark. Code Ann. § 11-9-521(a), which provides: "An employee who sustains a permanent compensable injury scheduled in this section shall receive . . . temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first . . ." Appellant contends that he was still in his healing period and had not returned to work, making him entitled to TTD benefits.

Appellant contends that *Fendley v. Pea Ridge School District*, 97 Ark. App. 214, 245 S.W.3d 676 (2006), stands for the proposition that an injured worker who suffers a scheduled injury is not required to prove that he is totally incapacitated from earning wages in order to collect TTD benefits; rather, he is entitled to TTD benefits during his healing period or until he returns to work, whichever occurs first. In *Fendley*, the claimant was a physical education teacher who suffered a scheduled injury to her ankle, underwent surgery, and received some TTD benefits. In deciding whether to extend those benefits, the Commission considered a letter from Fendley's doctor stating that she could perform some work duties (such as sitting



and teaching) but could not perform activities that required the full strength of her atrophied calf. In reversing and remanding the denial of TTD benefits, this court noted:

As a starting point in our analysis of this appeal, we note the importance of the fact that Fendley’s injury is a “scheduled” injury. Therefore, the standard used for temporary total disability for a non-scheduled injury, which only allows benefits when a claimant is within her healing period and when she suffers a total incapacity to earn wages, does not apply. Instead, as we outlined in *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001), it is not necessary for a claimant with a scheduled injury to prove that she is totally incapacitated from earning wages in order to collect temporary total disability benefits. Arkansas Code Annotated § 11-9-521 provides that a claimant is entitled to temporary total disability benefits “during the healing period or until the employee returns to work, whichever occurs first . . . .”

Although we agree with the Commission that this language cannot be considered in a vacuum and that the employees’ failure to return to work must be causally related to the injury, we take issue with the Commission’s conclusion that because Fendley “has failed to prove that she was totally incapacitated from earning wages” her claim for additional benefits is “denied.” In making this determination, the Commission’s own opinion evidences that it held Fendley to a stricter standard than required by law. Because Fendley suffered from a scheduled injury, she was not required to show that she was totally incapacitated from working—only that she had not returned to work because she remained in her healing period.

*Id.* at 216–17, 245 S.W.3d at 677–78 (citations omitted).

*Fendley* is distinguishable from the present case. As the ALJ (and, thus, the Commission) noted in the present case, there was no evidence in *Fendley* that the employer had offered the claimant light-duty work within her restrictions.<sup>1</sup> Therefore, unlike here, there was evidence that the failure to return to work was causally related to the injury.

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<sup>1</sup>Appellant quotes the Commission’s opinion as stating that Fendley was offered a teaching contract. This court’s opinion does not make reference to whether she was offered a job within her restrictions, and section 11-9-526 was not at issue.



Cite as 2011 Ark. App. 787

Appellees cite *Walker v. Cooper Automotive*, 104 Ark. App. 175, 289 S.W.3d 184 (2008), and *American Railcar Industries, Inc. v. Gramling*, 2010 Ark. App. 625, as supporting their position that section 11-9-526 “will operate to bar TTD benefits in scheduled injury cases under an appropriate set of facts.” In *Walker*, the claimant suffered a compensable knee injury. The ALJ denied the request for TTD or TPD (temporary partial disability) benefits, finding that the claimant refused suitable employment offered in accordance with Arkansas Code Annotated section 11-9-526. This court reversed that finding on the ground that there was no substantial evidence of unjustifiable refusal to work light duty offered to or provided for appellant. In so holding, this court cited sections 11-9-521 and 11-9-526 and applied section 11-9-526 to a scheduled injury case, as had the Commission.

In *Gramling*, the Commission awarded TTD benefits after Gramling suffered a scheduled injury, and the employer appealed. This court both cited *Fendley* (“it is not necessary for a claimant with a scheduled injury to prove that he is totally incapacitated from earning wages in order to collect temporary total disability benefits”) and held that Ark. Code Ann. § 11-9-526 did not bar Gramling’s TTD claim because he had *accepted* the light-duty work (although he was later terminated). In both *Gramling* and *Walker*, section 11-9-526 was applied in the context of scheduled injuries.

The basic rule of statutory construction is to give effect to the intent of the legislature. *Aloha Pools & Spas, Inc. v. Employer’s Ins. of Wausau*, 342 Ark. 398, 403, 39 S.W.3d 440, 443 (2000). The Workers’ Compensation Law must be strictly and literally construed by the Commission and the courts, and a particular provision in a statute must be construed with



reference to the statute as a whole. *Id.* Appellant urges an interpretation of the workers' compensation statutes that would require Ark. Code Ann. § 11-9-521(a) to be applied in isolation and to the exclusion of the statute precluding a worker who unjustifiably refuses work from receiving benefits. Looking at the purpose of section 11-9-521(a), it becomes clear that the General Assembly did not intend that workers who are able to go back to work should regardless continue to receive TTD benefits during the entirety of their healing periods. Instead, an injured worker with a scheduled injury is entitled to temporary benefits for the healing period *or* until the employee returns to work, *whichever occurs first*. See Ark. Code Ann. § 11-9-521(a). If the legislature did not intend for a worker who returns to work to receive TTD benefits, surely it did not intend to allow a worker who was able to return to work—but unjustifiably refused—to continue to receive those benefits. Strict construction of a statute does not mandate a literal interpretation that leads to absurd results where an alternative interpretation better effects the statute's purpose. *Tyson Poultry, Inc. v. Narvaiz*, 2010 Ark. App. 842 (citing *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004)). Here, holding that section 11-9-526 is inapplicable to scheduled injuries would yield an absurd result, and we will not so hold.

Affirmed.

WYNNE and BROWN, JJ., agree.