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ARKANSAS COURT OF APPEALS
DIVISION IV
No. CV-22-25

JON ROGERS

APPELLANT

V.

ARAMARK AND SEDGWICK CLAIMS
MANAGEMENT

APPELLEES

Opinion Delivered December 14, 2022

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION

[NO. G806247]

AFFIRMED

BART F. VIRDEN, Judge

Appellant Jon Rogers sustained an admittedly compensable lower-back injury while employed by appellee Aramark. The Arkansas Workers' Compensation Commission found that Rogers failed to prove entitlement to temporary total-disability (TTD) benefits from April 26, 2019, to a date yet to be determined. Rogers argues that the Commission erred in denying TTD benefits because he is still within his healing period and was capable of performing only light-duty work when he was terminated by Aramark. We affirm.

I. *Background*

Rogers began working for Aramark in November 2015 as a sales-route representative. His position required him to deliver work-related necessities, including clean uniforms, towels, and mats and to pick up dirty items for cleaning. On March 9, 2018, Rogers injured

his lower back when he was pulling a heavy laundry cart off of his truck. The injury occurred on a Friday; his pain worsened over the weekend; but he returned to work on Monday. He sought medical treatment on his own the following day.

Recognizing the injury as having been work related, Aramark sent him to the Arkansas Occupational Health Clinic where he received conservative treatment, including physical therapy, heat and ice applications, and over-the-counter medications. Dalana Rice, ARNP, released Rogers to return to light-duty work on April 12, 2018, with restrictions of no lifting over ten pounds and limited bending and twisting. Aramark accommodated the light-duty restriction by providing Rogers with an employee who rode with him on his route and did the heavy lifting and physical part of the job while Rogers drove, completed paperwork, and spoke with the clients. Rogers was later referred to Dr. George Deimel, an orthopedist, who gave him injections that provided only temporary relief. Dr. Deimel released Rogers to return to light-duty work with the same restrictions as before. Rogers had at least two MRIs as well as an EMG and nerve-conduction studies, and he had been referred for additional medical treatment.

On April 25, 2019, Rogers was fired after a client along his route complained of his behavior, which included allegations of sexual harassment. There had been other client complaints in Rogers's personnel file. On July 17, 2019, Dr. Deimel was asked, "Since Mr. Rogers continued working until he was terminated on April 26, 2019, do you have any basis for keeping him off work based on your exam and diagnostic studies?" Dr. Deimel wrote in

response, “Continue work.” On August 5, 2019, in response to more questions regarding Rogers’s ability to work, Dr. Deimel reported that

[t]here are no objective findings based on the new diagnostic studies that would suggest Mr. Rogers should continue off work. He was continuing to work, albeit with persistent left hip pain, in the setting of his initial work comp injury. If he was evaluated clinically, we would have him continue at his previously assigned work status.

Aramark agreed to Rogers’s request for additional medical treatment but contested his claim to TTD benefits from April 26, 2019, to a date yet to be determined. Following a hearing, an administrative law judge (ALJ) found that, although Rogers remained within his healing period, he had failed to prove that he suffered a total incapacity to earn wages and was thus not entitled to TTD benefits. The Commission unanimously affirmed and adopted that opinion. The Commission noted that Rogers had been released to light-duty work by various medical providers since his initial treatment. The Commission also found that

[p]er Dr. Deimel, the claimant was capable of returning to work at light duty with no lifting more than 10 pounds. Even though claimant had been terminated by respondent, he was capable of returning to work for another employer within the restrictions imposed upon him by Dr. Deimel.

II. *Standard of Review*

When the Commission affirms and adopts the ALJ’s opinion, thereby making the findings and conclusions of the ALJ the Commission’s findings and conclusions, we consider both the ALJ’s opinion and the Commission’s opinion in our review. *Brannigan v. Univ. of Ark., Pub. Emp. Claims Div.*, 2022 Ark. App. 313, 652 S.W.3d 182. In reviewing decisions from the Commission, we view the evidence and all reasonable inferences in the

light most favorable to the Commission's decision and affirm if it is supported by substantial evidence. *Turcios v. Tyson Foods, Inc.*, 2016 Ark. App. 471, 504 S.W.3d 622. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.* When the Commission denies benefits because the claimant has failed to meet his or her burden of proof, the substantial-evidence standard of review requires that we affirm if the Commission's decision displays a substantial basis for the denial of relief. *Bean v. Reynolds Consumer Prods.*, 2022 Ark. App. 276, 646 S.W.3d 655. The issue is not whether the appellate court might have reached a different result from the Commission but whether reasonable minds could reach the result found by the Commission; if so, the appellate court must affirm. *Id.* Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Id.*

III. Discussion

In order to be entitled to TTD benefits for an unscheduled injury, a claimant must prove by a preponderance of the evidence that he remains within his healing period and suffers a total incapacity to earn wages. *Allen Canning Co. v. Woodruff*, 92 Ark. App. 237, 212 S.W.3d 25 (2005). Rogers argues that he was still within his healing period; however, no one disputes this. After all, Aramark had agreed to send him for additional medical treatment. TTD benefits do not, in all cases, correspond to the healing period. *Cnty. Mkt. v. Thornton*, 27 Ark. App. 235, 770 S.W.2d 156 (1989). In any event, remaining within the healing period is only part of the inquiry.

Rogers also argues that he was totally incapacitated from earning wages. He contends that, while Aramark accommodated his restrictions, he clearly had no options for work once Aramark fired him. He asserts that the type of light-duty job that he was performing at Aramark would be “rare to find” and that his restrictions prevent him from being able to work within his field or in any competitive work environment.

There is no indication in the record that Rogers was fired by Aramark because he could not perform the light-duty job that had been created for him. In fact, Rogers testified that he would still be working at Aramark if he had not been terminated. Moreover, the testimony established that Rogers drives, completes paperwork, and interacts with clients. Moreover, Dr. Deimel specifically reported that Rogers is capable of returning to work within his restrictions. See *Jordan v. Home Depot, Inc.*, 2013 Ark. App. 572, 430 S.W.3d 136 (affirming the Commission’s denial of TTD benefits because, even if the healing period continued, claimant did not prove a total incapacity to earn wages because he testified that he was able to drive a vehicle and to participate in physical activities such as hunting and camping). Although Rogers argues that his restrictions prevent him from working elsewhere, he admitted that he had not applied for any other job. The Commission obviously did not believe Rogers’s testimony that he could not work elsewhere and relied on Dr. Deimel’s statement that there was no reason that Rogers “should continue off work.” We hold that the Commission’s decision displays a substantial basis for the denial of relief. Fair-minded people could agree that Rogers is not totally incapacitated from earning wages.

We note that, while Rogers asserts that he was wrongfully terminated by Aramark, he acknowledges that neither the ALJ nor the Commission made a ruling on whether his termination was for cause. Regardless of the reason for Rogers's termination, we have affirmed the denial of TTD benefits when an injured employee is returned to work but subsequently loses her job through no fault of her own. See *Johnson v. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1994) (affirming Commission's denial of TTD benefits because claimant's healing period had ended, *and* in any event, she was not totally incapable of earning wages in that she had returned to light-duty work; she testified that she would probably still be working for her former employer had she not been laid off; she subsequently worked part time for a photographer; and she helped her husband at his service station and testified that she was physically capable of doing so).

Finally, Rogers discusses Ark. Code Ann. § 11-9-526 (Repl. 2012), which provides that, if any 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 justifiable. Rogers relies on *Tyson Poultry, Inc. v. Narvaiz*, 2012 Ark. 118, 388 S.W.3d 16, and *Superior Industries v. Thomaston*, 72 Ark. App. 7, 32 S.W.3d 52 (2000), to argue that his termination did not amount to a refusal of suitable employment.¹

¹Rogers also relies on *Robertson v. Pork Group, Inc.*, 2011 Ark. App. 448, 384 S.W.3d 639, and *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001), but those cases involved scheduled injuries and permanent disability. At issue was Ark. Code Ann. § 11-9-521 (Repl. 2012), which provides that the employee shall receive benefits during his healing period or until he returns to work, whichever occurs first. There is no mention of an incapacity to earn wages.

In both of those cases, the *employers* were appealing *the award* of TTD benefits and had argued below and on appeal that those claimants had effectively refused light-duty work that had been made available to them by getting fired for misconduct. Moreover, the Commission specifically ruled on section 11-9-526. Here, Aramark did not argue below that this section applied to bar Rogers from receiving benefits, and the Commission neither made reference to that section nor mentioned any refusal of work. This argument is being raised by Rogers for the first time on appeal, and we thus cannot address it. *Smith v. Commercial Metals Co.*, 2011 Ark. 218, 382 S.W.3d 764.

Affirmed.

ABRAMSON and KLAPPENBACH, JJ., agree.

Tolley & Brooks, P.A., by: *Evelyn E. Brooks*, for appellant.

Anderson, Murphy & Hopkins, L.L.P., by: *Randy P. Murphy* and *William McGrath*, for appellee Aramark.