ARKANSAS COURT OF APPEALS

DIVISION II

No. CA08-766

SUPERIOR INDUSTRIES & CROCKETT ADJUSTMENT, APPELLANTS V. KENNY SHADDOCK, APPELLEE	**Opinion Delivered** 11 FEBRUARY 2009 APPEAL FROM THE WORKERS' COMPENSATION COMMISSION, [NO. F705427] AFFIRMED

D.P. MARSHALL JR., Judge

The question presented is whether the Workers' Compensation Commission erred by awarding Kenny Shaddock benefits for being totally disabled temporarily by a neck and back injury. Superior Industries, Shaddock's former employer, argues that the Commission's award fails as a matter of law and, in any event, fails for want of supporting substantial evidence. The case is about Shaddock's need for pain medicine and the resulting limitations on his ability to drive to work.

I.

The facts about disability are largely undisputed, but we state them in the light most favorable to the Commission's decision. *Murphy v. Forsgren, Inc.*, 99 Ark. App. 223, 224, 258 S.W.3d 794, 797 (2007). In late April 2007, Shaddock injured his cervical spine at C6-7 while hanging a forty to fifty pound wheel. The x-rays and

MRI revealed a herniated disk. Shaddock's doctor sent him to bed for two days, and prescribed medicine, a neck collar, and physical therapy. In early May, his doctor released Shaddock to work light duty with restrictions.

Superior provided Shaddock a new job—marking wheels—that accommodated all his restrictions. Shaddock performed the new job without difficulty. Until early May, however, Shaddock could not drive pursuant to his doctor's orders. Shaddock's wife was his taxi to work and therapy. For two weeks, Shaddock's doctor lifted the no-driving restriction. But in late May, Shaddock's doctor increased his pain medicine, reinstated the no-driving restriction, and maintained Shaddock's release to work light duty.

Shaddock lives in Bella Vista. Superior is in Rogers. When his doctor reinstated the no-driving restriction, Shaddock could not drive at all. His wife could no longer take off work to drive him. The Shaddocks had recently moved to Northwest Arkansas, and had no extended family to call on. Shaddock asked their minister to provide rides, but he could not. Shaddock also asked Superior to provide transportation, but the company said no. Eventually Shaddock missed three days of work, and Superior terminated him at the end of May.

The first week in June, Shaddock's doctor wrote Superior. He confirmed that Shaddock could work light duty. He was not supposed to drive or operate heavy machinery within six hours of taking his pain medicine. "He may try driving to work

without having taken the Tramadol, take one half table[t] of Tramadol at work but may not operate heavy machinery." So far as the record discloses, the parties never discussed reinstatement or this new protocol for taking the pain medicine and driving.

Shaddock has not worked for pay since his termination. He testified to substantial limitations on his activities, saying that he spent most of the time in his recliner because of pain. He worked in ministry as a young man, and since his accident, he has volunteered as a youth pastor and associate pastor. Others drove him to his church work. By the date of his deposition in July 2007, Shaddock was driving without any problem. At the time of the later hearing before the ALJ, he was controlling his neck and back pain with Excedrin.

The ALJ concluded that Shaddock was totally disabled temporarily from 27 May 2007—his termination date—to an undetermined future date. The Commission affirmed, one Commissioner dissenting on the TTD issue.

II.

Shaddock was totally disabled if his compensable injury made him unable "to earn any meaningful wages in the same or other employment." Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2002). His total disability was temporary if he was within his healing period. *Palazzolo v. Nelms Chevrolet*, 46 Ark. App. 130, 133, 877 S.W.2d 938, 940 (1994). Superior concedes by silence on appeal that, in late May 2007, Shaddock was still in his healing period. So the central disputed issue remains Shaddock's ability

to earn any meaningful wages after his injury.

Because Superior provided Shaddock a light-duty job, which he could and did perform, another statute came into play. If he "refuse[d] employment suitable to his . . . capacity offered to or procured for him . . ., [Shaddock] shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal [was] justifiable." Ark. Code Ann. § 11-9-526 (Repl. 2002).

We address Superior's matter-of-law argument first. The employer contends, on the authority of *Coleman v. Pro Transportation, Inc.*, that Shaddock's inability to drive is not a justifiable excuse for refusing employment under the Code. We do not read *Coleman* so broadly. A combination of circumstances there prompted this court to affirm the Commission's finding that Mr. Coleman's refusal to return to work was not justifiable as a matter of fact. *Coleman v. Pro Transportation, Inc.*, 97 Ark. App. 338, 348–49, 249 S.W.3d 149, 156–57 (2007). An inability to drive to work resulting from a compensable injury (or its treatment) is a fact bearing on whether the employee's refusal to work was "justifiable" under the statute. We decline to hold that this situation presents a purely legal question. Justification is about reasonableness under all the material circumstances, a matter quintessentially for the finder of facts.

The harder question is whether substantial evidence supports the Commission's decision that Shaddock's refusal to work was justifiable. Superior presses its point with

great force, emphasizing several points. The company promptly provided Shaddock with a light-duty job, which he could and did perform. Shaddock's doctor released him to work with limitations, which the substitute job accommodated. Shaddock's doctor eventually changed the timing directions for Shaddock's pain medicine so it would not interfere with his driving to work. And Shaddock has been paid in the past for doing the kind of pastoral work he did as a volunteer after his injury.

Shaddock points to the proof on the other side of the balance. He made repeated and good-faith efforts to get others to drive him to work. His neck and back injury impaired one of his arms, restricted his neck motion, and caused him pain. When Shaddock missed work, he was under doctor's orders not to drive after taking his prescribed pain medicine. The new medicine routine, finally, was an experiment—the doctor wrote that Shaddock "may try driving" to work in the morning and delaying his pain medicine. The record is silent about whether the experiment worked and Shaddock could delay his medicine and drive.

If Shaddock had refused to work in mid-June, after his doctor had changed the medicine routine and the change had worked so that Shaddock was able to drive in the morning, then this would be a different case. On this record, however, a reasonable person could conclude that Shaddock's refusal to work in late May 2007 was justifiable. The question is not how we would have weighed the proof in the first instance. *Amaya v. Newberry's 3N Mill*, 102 Ark. App. 119, 125–26, ___ S.W.3d ___,

___ (2008). Instead, we must defer to the Commission's factual finding because substantial evidence supports this conclusion: for some undetermined period, Shaddock's compensable injury prevented him from earning any wages because he could not drive to the job that Superior had provided or any job that he could perform. *Ibid*.

We do not hold that an employer must arrange transportation for every injured worker who cannot drive. The circumstances presented are peculiar: the doctor's clear restriction (for about two weeks) against driving, combined with the inability of family and friends to give Shaddock a ride, the lack of any public transportation, the uncertain effectiveness of the new medicine schedule, and the distance between Shaddock's home in Bella Vista and Superior's plant in Rogers. In the unique circumstances, we affirm the Commission's finding that Shaddock was totally disabled temporarily starting on the date that Superior terminated him. When his temporary disability ended was not addressed below. And that question remains open.

Affirmed.

KINARD and GLOVER, JJ., agree.