NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

ROBERT RAMSEY, Petitioner, vs. EXPRESS EMPLOYMENT PROFESSIONALS, AIU INSURANCE CO. (NATIONAL UNION FIRE OF PITTS PA), and THE WORKERS' COMPENSATION COMMISSION, Respondents.	)	Case No. 121,780

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

SUSTAINED

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OPINION BY STACIE L. HIXON, JUDGE:

Robert Ramsey (Claimant) appeals a decision of the Workers'

Compensation Commission finding he was not entitled to temporary total disability (TTD) benefits, after he was terminated for failing a drug test in violation of company policy at the same time that he was cleared to work alternative or light duty. We find no error and sustain the decision of the Commission.

BACKGROUND

Claimant was employed by staffing agency Express Employment Professionals (Express) and was assigned to work at a recycling center as a slinger/operator of a garbage truck. On December 14, 2021 (date of injury), Claimant sustained an injury while riding on the back of the truck. He continued to work through pay period ending January 16, 2022.

Claimant contended he timely notified the recycling center of his injury but ultimately was told he needed to notify Express. When Claimant did so, Express sent him for medical treatment on January 28, 2022. On that date, the treating physician placed him on light duty restriction. On the same date, Claimant testified positive for marijuana. Express terminated Claimant due to this violation of company policy.[1]

[1] The briefs and the record are silent on the exact date of termination. Express states that Claimant was terminated after it received the test results, while Claimant states he was terminated for violation of the drug policy. Express's witness at trial testified Claimant was terminated immediately following his drug screen but did not provide the exact date.

On March 4, 2022, Claimant filed a Form 3 alleging injury to his shoulders, neck and back on the date of injury. Express denied compensability of the claim. At trial in September 2022, the ALJ found a compensable work-related injury to Claimant's right shoulder and ordered treatment. It reserved the issue of injury to other body parts and TTD benefits for a future hearing. Thereafter, Claimant underwent shoulder surgery in January 2023. He was off work following surgery and received TTD benefits from January 26, 2023 through February 11, 2023. He was then declared fit to return to work with a weight restriction on the right arm.

On June 5, 2023, the ALJ conducted a second trial regarding Claimant's neck and back injury and his request for TTD benefits from the time of termination in January 2022 forward through his January 2023 surgery, and from February 11, 2023 to the present and continuing. Claimant asserted he was and remains entitled to TTD because, though released to light duty, he was not offered and did not perform alternative work. Express testified that alternative work was available, but contended it was not obligated to allow Claimant to work because he failed a drug test on the same day he was restricted to light duty and was thus terminated. The ALJ denied TTD benefits, finding that Express was not obligated to offer alternative work to an employee who violated the employer's policies, following *Akers v. Seaboard Farms*, 1998 OK CIV APP 169, 972 P.2d 885. The Commission affirmed that order.

Claimant appeals.

STANDARD OF REVIEW

This case falls under the Administrative Workers' Compensation Act (AWCA), 85A O.S.2021, § 1 *et seq.* Our standard of review of an appeal from the Commission under that Act is set forth in section 78(c). A decision of the Commission may be modified, reversed, remanded or set aside only if it was:

> 1. In violation of constitutional provisions;
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> 2. In excess of the statutory authority or jurisdiction of the Commission;
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> 3. Made on unlawful procedure;
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> 4. Affected by other error of law;
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> 5. Clearly erroneous in view of the reliable, material, probative and substantial competent evidence;
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> 6. Arbitrary or capricious;
>
> 7. Procured by fraud; or
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> 8. Missing findings of fact on issues essential to the decision.

Id.

ANALYSIS

Claimant asserts the Commission erred as a matter of law by denying TTD, because it terminated him without offering or allowing him to perform alternative work, or by finding an offer of alternative work was not required when Claimant was terminated. He contended that he therefore remains entitled to TTD as a

matter of law.[2] Express argues it was not required to offer Claimant alternative work because he violated company policy by failing a drug test and may be considered to have refused that work. Thus, Express argues Claimant was not entitled to TTD benefits under the law in that circumstance.

Resolving this issue requires us to interpret the meaning of 85A O.S.2021, § 45. When construing a statute, "[w]e examine a whole legislative act in light of its general purpose and object, and give effect to the legislature's intent by construing and applying the language in a manner which does not destroy the obvious purpose and design of the statutory language." *Assessments for Tax Year 2012 of Certain Properties Owned by Throneberry v. Wright*, 2021 OK 7, ¶ 15, 481 P.3d 883. "We start with a reading of the statutory language which gives full

[2] Claimant also asserted the Commission's Order was not supported by substantial evidence, claiming there was no evidence that Claimant was actually terminated. We reject this assertion. Claimant admits in his briefing that his employment was terminated without an offer of alternative duty because he failed a drug test. These undisputed facts are the crux of his appeal. Similarly, Claimant also argued that the Commission's determination that alternative work was available is not supported by substantial evidence because it claims Express did not establish that alternative work it had available was within Claimant's restrictions. The record reflects Claimant was released to light duty on the date of treatment, with a restriction of no use of his right hand. As found in the record and acknowledged in Claimant's own briefing, Express's witness testified that, if the client location did not or could not offer light duty, Express would bring Claimant into its own office to do simple work such as putting together paper packets or highlighting papers. Claimant never argued or presented evidence that he would be unable to perform that work. Rather, Claimant argued that Express's witness *did* "competently" testify such work was available but did not offer it. Even if we consider this issue, raised for the first time on appeal and contrary to Claimant's own representations to the Commission, such evidence is sufficient to support the Commission's determination that alternative duty work was available to Claimant. Moreover, the issue on appeal is whether Express was obligated to offer alternative duty work to Claimant following his positive drug test or pay TTD.

force and effect to each relevant statutory provision expressing the legislature's intent by the plain meaning of the language therein." *Id.*

Section 45(A) governs Claimant's eligibility for TTD and states:

> A. Temporary Total Disability.
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> 1. If the injured employee is temporarily unable to perform his or her job or any alternative work offered by the employer, he or she shall be entitled to receive compensation equal to seventy percent (70%) of the injured employee's average weekly wage, but not to exceed the state average weekly wage, for one hundred fifty-six (156) weeks. Provided, there shall be no payment for the first three (3) days of the initial period of temporary total disability. . . .[3]

Meanwhile, subsection 45(B) provides:

> B. Temporary Partial Disability.
>
> 1. If the injured employee is temporarily unable to perform his or her job, but may perform alternative work offered by the employer, he or she shall be entitled to receive compensation equal to seventy percent (70%) of the difference between the injured employee's average weekly wage before the injury and his or her weekly wage for performing alternative work after the injury, but only if his or her weekly wage for performing the alternative work is less than the temporary total disability rate. The injured employee's actual earnings plus temporary partial disability compensation shall not exceed the temporary total disability rate.
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> 2. Compensation under this subsection may not exceed fifty-two (52) weeks.

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[3] Section 45(A) allows up to 156 weeks of TTD benefits. It also allows up to an additional 52 weeks if such time is needed to reach maximum medical improvement, upon a showing of medical necessity by clear and convincing evidence.

> 3. If the employee refuses to perform the alternative work offered by the employee, he or she shall not be entitled to benefits under subsection A of this section or under this section.

Id.[4]

Here, Claimant asserts section 45(A) provides he remained eligible for TTD from the time of his termination forward, because he was not offered alternative employment. In particular, Claimant reads "alternative work offered by the employer" in isolation under both section 45(A) and (B) to suggest that he remains entitled to TTD in all circumstances, unless he was in fact offered and/or allowed to perform alternative work. The question is whether the plain language of the statute reflects such an intent under the facts of this case.

Reviewing the plain language of section 45(A), it provides TTD for those unable to perform their job or "any" alternative work offered by the employer. Section 45(A) does not specifically require the employer to offer alternative work in every instance or remain liable for TTD. It also does not state that an employee who is not offered alternative work is automatically considered temporarily totally

[4] The AWCA does not define "temporary total disability." However, it defines "temporary partial disability" as "an injured employee who is temporarily unable to perform his or her job, but may perform alternative work offered by the employer . . . ." 85A O.S.2021, § 2. Oklahoma case law has defined "temporary total disability" as "the healing period or that time following an accidental injury when an employee is totally incapacitated from work due to illness resulting from injury." *Yeatman v. Northern Okla. Res. Ctr. of Enid*, 2004 OK 27, ¶ 20, 89 P.3d 1095.

disabled.[5] Section 45(A) also does not explicitly address whether an employee who has been medically cleared to perform alternative work is entitled to benefits if his employment is otherwise subject to termination based on a violation of company policy, such as a failed drug test. Claimant asks us to read these requirements into the statute, though contrary to its plain language and the Legislature's use of the word "any," in reference to alternative work offered.

Turning to section 45(B), unlike section 45(A), it provides temporary partial disability benefits (TPD) for an employee who "may perform" alternative work offered, i.e., an employee who is physically able to perform the work and is permitted to do so by the employer.[6] Section 45(B) also does not expressly provide that an employee who is not offered alternative work remains eligible for TTD, and does not address a scenario in which an employee is able to perform

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[5] When the Legislature has wished to craft a specific procedure requiring notice of alternative employment, it has done so. In 2005, 85 O.S.Supp.2005, § 14 was amended to codify that, "[i]f an injured employee, only partially disabled, refuses employment consistent with any restrictions ordered by the treating physician, the employee shall not be entitled to temporary benefits during the continuance of such refusal unless in the opinion of the treating physical such refusal was justifiable; provided, before compensation may be denied, the employee shall be served with a notice setting forth consequences of the refusal of employment and that temporary benefits will be discontinued fifteen (15) days after the date of such notice." That language is not found in section 45 of the AWCA.

[6] "May" refers to either something being a possibility, or to being permitted to do something. *See* Black's Law Dictionary (12th ed. 2024). In context, "may" likely concerns permitting an employee to perform the work, as opposed to mere possibility he may do so. "May" appears to pertain to more than an ability, given that different language is used in section 45(B) than in section 45(A). *See also Hess v. Excise Bd. of McCurtain Cty.*, 1985 OK 28, 698 P.2d 930; *Osprey L.L.C. v. Kelly-Moore Paint Co.*, 1999 OK 50, 984 P.2d 194 (interpreting the word "may" in statutes as permissive rather than mandatory).

alternative work but is not permitted to do so because he has violated company policy.

Reading section 45(A) and (B) together, the statute clearly intends that employees who are physically unable to perform their job or alternative work are entitled to TTD. Yet it also clearly intends that employees who are able to perform alternative work must do so if made available by the employer. Nowhere does the statute expressly require an employer to offer alternative work when the Claimant has violated company policy. Claimant invites us to read the reference to "alternative work offered by the employer" in section 45(A) and (B) in isolation to render him eligible for TTD through the present time unless alternate work was expressly offered. We decline to read this requirement into the statute based on the facts here.[7]

In our view, Claimant falls within section 45(B). He was physically able to perform alternative work but was not permitted to do so by the employer because he failed a drug test. Thus, he is not entitled to benefits under the statute. To hold otherwise would require the employer to either offer and/or allow an employee to work alternative duty, despite failing a drug test or otherwise violating company policy, or to pay TTD to an employee who is not temporarily totally disabled.

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[7] Our opinion is limited to the unique facts of this case.

Such a result is against the obvious purpose of the statute and is unsupported by its plain language.

Moreover, section 45(B)(3) expressly provides that an employee who refuses to perform alternative work is not entitled to benefits under subsections 45(A) or (B). Express argues that Claimant's failure of a drug test was akin to a refusal to perform alternative work, precluding entitlement to benefits pursuant to *Akers v. Seaboard Farms*, 1998 OK CIV APP 169, 972 P.2d 885. Meanwhile, Claimant argues that the later case of *Patterson v. Sue Estell Trucking Co.*, 2004 OK 66, 95 P.3d 1087, precludes denial of TTD benefits because Claimant was not offered alternative work and thus remained eligible for TTD under the statute. We agree with Express.

Akers and *Patterson* were decided before section 45 was enacted.[8] As discussed, we find Claimant was not entitled to TTD benefits under the plain language of the statute. However, our interpretation is also consistent with both

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[8] Versions of the prior Workers' Compensation Act, 85 O.S. § 1, *et seq.*, in effect when *Akers* and *Patterson* were decided did not contain the language set forth in section 45(B) expressly stating that the employee is not eligible for benefits if he refuses to perform alternative work offered. At the time the claimant was injured in *Akers*, 85 O.S.Supp.1996, § 14(A) provided simply that "[i]f the employee is capable of returning to modified light duty work, the attending physician shall promptly notify the employee and the employer or the employer's insurer in writing thereof and shall also specify what restrictions, if any, must be followed by the employer in order to return the employee to work." Section 22, which governed eligibility for TTD, did not address the issue of light or alternative duty. 85 O.S.Supp. 1994, § 22. The statutory language in effect during *Patterson* was substantially similar and also did not address refusal to work light or alternative duty. *See* 85 O.S.Supp.2001, §§ 14, 22.

Akers and *Patterson.* In *Akers*, 1998 OK CIV APP 169, a claimant was released to light duty and worked a few days before he failed a drug test and the employer fired him. The claimant argued the employer could not deny TTD at that point, because it remained obligated to offer and allow him to work light duty following his injury. However, the court found that the employee's "ability to perform light work . . . is sufficient evidence to sustain a finding by the Workers' Compensation Court that the employee is not temporarily totally disabled." *Akers*, 1998 OK CIV APP 169, at ¶ 7. Further, the court found there is "nothing in our law which compels an employer to continue offering light duty, or for that matter, any type of work, to employees who violate the employer's policies." *Id.* at ¶ 10. Moreover, the court found that the employee's violation of company policy amounted to a refusal to continue to work light duty and sustained the order denying TTD. Section 45(B)(3) expressly provides a refusal to work light duty renders an employee ineligible for TTD or TPD benefits. Pursuant to the persuasive authority of *Akers*, Claimant's violation of company policy was a refusal to work alternative duty.

The Oklahoma Supreme Court's later decision in *Patterson*, 2004 OK 66, does not compel a different result. Unlike this case, the *Patterson* claimant was never released to light duty and remained temporarily totally disabled. That claimant was injured during a motor vehicle accident in the course of his

employment. Employer terminated the claimant after he was cited for reckless driving and sought to deny TTD benefits. *See id.* at ¶ 15. The Court found the prior Workers' Compensation Act did not authorize denying TTD to an employee injured on the job because he was later fired. *Id.* at ¶ 8. Moreover, continued employment was not required to continue to receive benefits. *Id.* Thus, while the claimant remained temporarily totally disabled, the employer could not deny him TTD even if he was ultimately terminated for misconduct. Claimant argues he holds the same position as the claimant in *Patterson* because he was fired before being offered or allowed to work alternative duty.

However, the *Patterson* Court distinguished its holding from *Akers* based on facts similar to the instant case. It noted *Akers*' finding that the physical ability to perform light work was competent evidence the employee was not temporarily totally disabled, as well as *Akers*' holding that the law does not compel the employer to continue offering work to an employee who violates company policy. *Id.* at ¶¶ 13-14. *Patterson* particularly notes that these distinguishing factors were the basis for the *Akers* court's "characterization of the employee's loss of earning power as resulting from his own actions in losing his employment, rather than from

his injury . . . ." *Id.* at ¶ 14.[9] While the Court found those factors were distinguishable from the case before it, it did not overrule or disapprove of *Akers*.

Here, like *Akers*, Claimant's physical ability to perform alternative work is evidence that Claimant was not temporarily totally disabled. Like *Akers*, his loss of earning power during the relevant period was not due to his injury, but his own actions in violating company policy. As addressed above, nothing in the express language of section 45 provides that Claimant remains entitled to TTD because it was not offered in these circumstances. Likewise, nothing in the statute provided that Express was required to either offer alternative work and retain Claimant as an employee following a positive drug test or remain liable for TTD benefits upon his termination. Further, Claimant's violation of company policy is considered a refusal to perform alternative work, which deprives him of benefits under the statute. It makes little difference whether the employee was expressly offered alternative work before Claimant may be considered to have refused in this

[9] The Oklahoma Supreme Court also distinguished *Akers* but did not disapprove it, in *B.E.& K Construction v. Abbott*, 2002 OK 75, 59 P.3d 38. In *B.E.&.K.*, the employee had returned to light duty but volunteered for a planned reduction in force. After the lay-off, the employer sought to deny TTD for the period thereafter. The Oklahoma Supreme Court declined to consider the employee's volunteering for the lay-off to be a refusal to perform light work, as urged by the employer. Rather, the Court found the decision to lay off employees remained with the employer and declined to hold the employee had refused light work. *Id.* at ¶ 16. The Court indicated that case was distinguishable from *Akers*, where the employee was terminated for cause, which was considered a refusal to continue performing alternative work.

particular circumstance. We must therefore sustain the Commission's order denying TTD benefits.

CONCLUSION

For the foregoing reasons, we sustain the Commission's Order Affirming Decision of Administrative Law Judge of November 6, 2023.

SUSTAINED.

HUBER, P.J., concurs, and BLACKWELL, J., dissents.

BLACKWELL, J., dissenting:

I respectfully dissent. Entitlement to temporary partial disability benefits requires the employer to have offered alternative work. 85A O.S. § 45(B). If no alternative work is offered, and the claimant "is temporarily unable to perform his or her job," the claimant is entitled to temporary total disability benefits. 85A O.S. § 45(A). Here, it is undisputed that the claimant was never offered alternative work and was unable to perform his prior work during the relevant period. He was, therefore, entitled to TTD benefits. The Commission's decision to the contrary should be reversed.

January 22, 2025