

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211817

JAMI HARRIS	CLAIMANT
CITY OF FAYETTEVILLE	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 12, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

Respondents represented by CHRIS BRADLEY, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 26, 2003, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on June 17, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On August 5, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on August 5, 2002.

4. Medical expenses have been paid.

5. The claimant is entitled to a weekly compensation rate of \$350.00 for temporary total disability and \$263.00 for permanent partial disability.

6. Respondents have accepted a 7 percent permanent partial impairment to the body as a whole.

By agreement of the parties the issues to litigate are limited to the following:

1. Benefits under 505(a).
2. Rehabilitation.
3. Attorney's fees.

The claimant specifically reserves the right to litigate wage loss over the 7 percent impairment rating and all other issues.

In regard to the foregoing issues the claimant contends that the City maintained suitable employment available within the employee's physical and mental restrictions following the release by his primary treating physician. It appears the respondents' position is the claimant has several transferrable skills and strong educational background which will allow him to transfer to other physically appropriate work. However, he is not qualified to return to work for the City.

In regard to the foregoing issues the respondents contend that they have reasonable cause for not returning claimant to employment with the city and that there is no suitable employment available for claimant within the employee's physical and mental limitations. Further, respondents contend they have provided re-employment assistance to claimant so to return him to work.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1. The parties jointly submitted medical records marked Joint Exhibit No. 1. The respondents proffered documentary evidence marked Respondents' Proffered Exhibit No. 1.

#### DISCUSSION

The claimant testified that he was 33 years old, married and had two children. The claimant testified that he graduated from high school and had sixty some hours from Texas Southern University. The claimant testified that he currently has enrolled at Northwest Arkansas Community College and is seeking a degree in elementary education. The claimant testified that he also has received training through I Tech doing night courses in computer skills. The claimant testified that he has worked as a security guard as well as a team leader for Lowe's Home Center. The claimant testified that for a period of time he was part owner in J & B Automotive which was an automobile service repair shop. The claimant testified that he has worked for the respondent twice, his first job was working as a route worker in the solid waste department and then was moved to truck driver. The claimant explained that he had a Class A drivers licence allowing him to drive a tractor trailer. The claimant explained that when he first was hired by the respondent, he was in recycling and then after

about thirty days he was promoted to truck driver but these jobs were basically the same, explaining that he would go out on the truck, pick up the bins and sort the material in the bins. The claimant testified that when he was hired the second time by the city, he was again placed in the solid waste recycling division and again had the title of Route Worker and then was promoted to truck driver. The claimant testified that he also worked in the MRF for a little while explaining that this job entailed pushing cardboard and paper products which are unloaded off of the recycling truck onto a conveyor belt so that it could be taken up into a large machine and bailed. The claimant testified that he also has worked as a roll off driver, explaining that this job dealt with large containers which they would pick up by lowering the bed of the truck, attaching onto a large trash container, rolling it up onto the back of the truck, lowering the truck bed with the container on it, tarping the top of the container and then driving the truck to the unload point. The claimant explained that this reverse process is done to return the container to its location explaining that they would back into an area, lift the bed of the truck, let the container roll off of the truck, the container would be unattached and you would drive off. The claimant testified that he had just started doing some cross training on commercial trash pick up and described this job as driving a truck which had a large claw on it. The claimant explained that when they had oversized trash such as a washer or dryer or limbs more than four feet long, the respondent

would be called and they would go out with this truck, pick up the item with the claw and put it in the back of he truck.

The claimant testified that on August 5, 2002, he injured his low back when loading newspapers on one of his routes. The claimant testified that he felt immediate pain in his low back, reported this to the respondent and was sent to the doctor. The claimant remembers that he was treated by Dr. Gaston and was initially taken off work for three weeks and then was returned to light duty. The claimant testified that the pain persisted and this time the respondents sent him to a chiropractor and again he was returned to light duty work. The claimant remembered that the respondent had him working in the MRF when he was on light duty and he also went out with other crew members doing the roll off job. The claimant testified that he had restrictions of no heavy lifting and he had to watch when he was bending trying to pick up things, noting that he had to correctly do lifting. The claimant testified that he continued to work for the respondent up until October 25, 2002. The claimant testified that up until October 2002 he was able to do the different jobs assigned to him, however, the recycling job did give him problems since it required a lot of lifting, turning and twisting as well as lifting things above his head.

The claimant testified that he was taken off work in August and referred to Dr. Blankenship, a neurosurgeon. The claimant stated that Dr. Blankenship sent him to rehab for strengthening. The claimant testified that he also underwent a functional capacity

evaluation on January 16, 2003, and it was his understanding that he should not return to doing his previous job in the recycling department due to the lifting, twisting and bending required on this job. The claimant testified that as a result of his FCE he had a meeting with the respondent's personnel and they did not have anything for him within his restrictions.

The claimant testified that he applied for two jobs and interviewed for one with the respondent outside the solid waste department. The claimant testified that he applied for a job with code compliance and then another job as a field supervisor stating that he met the educational background and physical qualifications for these jobs. The claimant testified that he was told that these positions were given to someone else. The claimant testified that he discussed with Michelle, who is in Human Resources, his desire to remain an employee with the respondent and even discussed with her job opportunities within the solid waste division. The claimant testified that with the exception of the recycling truck, he felt he was capable of physically performing the other jobs within the department such as roll off, MRF and commercial. The claimant testified that he knew that one man had quit in the commercial division of the solid waste department of the respondent and he was physically capable of performing the commercial job. The claimant testified that within the solid waste department employees were moved around to fulfill whatever need existed. The claimant testified that he was available to return to work for the respondent after the gentleman left in commercial.

The claimant testified that he learned he had been terminated by the respondent when he visited with Michelle and she told him that she had already typed out a letter notifying him of his termination. The claimant testified that they discussed his situation and agreed that he could not physically return to his job in recycling. The claimant testified that Michelle gave him a brochure on Arkansas Rehabilitation and she provided him a list of current jobs available with the respondent. The claimant testified that was how he learned of the two positions which he applied for but was not hired. The claimant agreed that the respondent did employ a vocational rehabilitation specialist, Mr. Dale Thomas, to visit with him. The claimant stated that he visited with Mr. Thomas on two occasions. The claimant testified that, Mr. Thomas, after visiting with him, gave him a long list of jobs for him to contact about employment. The claimant testified that this job list was just jobs which might fit his qualifications, not jobs necessarily that were hiring. The claimant testified that he made several telephone calls but without success. The claimant testified that he did go to Arkansas Rehabilitation and received funding so that he could return to school. The claimant testified that he enrolled in summer school and is currently pursuing a degree in elementary education. The claimant testified that he is estimated to graduate in 2006. The claimant testified that returning to school had been his long range plan and he had hoped to be able to work and go to school part time. The claimant testified that currently he is involved with his schooling,

observation and student teaching approximately eight to ten hours per day. The claimant testified that by looking in the newspaper he was aware of openings within the solid waste department. The claimant testified he did not apply for these positions because it was during the summer when he had already entered summer school.

On cross examination, the claimant testified that after visiting with Mr. Dale Thomas, the rehabilitation counselor, he was not encouraged to pursue jobs with the respondent. The claimant testified that when his employment with the respondent came to an end he applied for and began receiving unemployment benefits. The claimant testified that he currently was receiving unemployment and that in order to continue this benefit his instructors have to sign a form for him. The claimant agreed that as of the end of May when he started summer school classes, he became unavailable for employment. The claimant agreed that Michelle in human resources had printed out for him all the job announcements which the respondent had and each one of these jobs set forth the requirements for each of the positions that was open. The claimant testified that out of this group of job announcements he picked out two which he felt qualified and able to perform. The claimant testified that after he was terminated he had no further contact with Michelle.

Michelle Bechhold testified on behalf of the respondents stating that she was employed by the respondent and had been so employed for approximately fifteen years. Ms. Bechhold testified that she currently is working in human resources as the director.

This witness testified that the respondent has a little over six hundred employees in their different departments. Ms. Bechhold was asked about the open positions which the claimant had applied for and in both instances, in her opinion, the claimant was not qualified nor was he physically able to perform these jobs. Ms. Bechhold also explained that the various jobs in the solid waste department where the claimant had previously worked would be better discussed by the supervisor, Mr. Caudle. This witness did state that the residential pick up using the claw had not gone into affect the date of the claimant's termination and that the roll off jobs were not in full force and still were not in full force at this time. Ms. Bechhold testified that based on the fact that there was no suitable position for the claimant, he was terminated.

On cross examination, Ms. Bechhold testified that she thought it would be beneficial to the claimant to look into rehabilitation and she made him aware of the program. This witness testified that from the date of the claimant's termination until the end of May 2003 in the solid waste department there has been six new hires for five positions. Ms. Bechhold testified that at the time she had last visited with the claimant, the new commercial pick up procedure was discussed but it did not go into place until April 2003. Ms. Bechhold also testified that she does not hire in the solid waste department for a particular position that all new hires are hired in as truck drivers and it is up to the supervisor to place the drivers in whatever position is needed.

Ronnie Caudle testified on behalf of the respondents stated that he was the operations supervisor in the solid waste management division. Mr. Caudle agreed that his area of supervisor covers the MRF facility, roll off program, solid waste, residential waste and recycling. This witness testified that even though the commercial routes use trucks with front end loaders to pick up the containers and dump them into a hopper, it is not uncommon that debris falls out and the driver must climb on top of the truck and throw the loose debris or bags into the hopper. Mr. Caudle stated that most of these bins are filled with restaurant debris and the bags are very heavy weighing fifty pounds or more. Mr. Caudle testified that the roll off job does use the truck to pick up the container but the tarp which must be used to cover the debris in the container weighs up to fifty pounds and the driver must get up into the container and walk down the middle of the container pulling the tarp. This witness testified that the debris in the container usually is construction materials and it is ver uneven walking. Mr. Caudle went through all of the different jobs in the solid waste department and pointed out the difficulties which the claimant would have performing each of these tasks. Mr. Caudle stated that there was really nothing in his department that the claimant could do on an everyday basis without some kind of assistance from somebody somewhere.

The parties have stipulated and the record sets forth that the respondents accepted the claimant's compensable low back injury and

has paid all of his medical treatment as well as his 7 percent permanent partial impairment rating to the body as a whole.

The claimant underwent a functional capacity evaluation on January 16, 2003, and as a result of this testing it was determined that the claimant was not able to return to his pre-injury job. This report sets forth that the claimant can perform work to the light physical demands of lifting twenty pounds on an occasional basis, ten pounds on a frequent basis and negligible weight on a constant basis. This report also sets forth that the claimant has potential to perform work to the medium physical demands which allow twenty to fifty pounds on an occasional basis and ten to twenty-five pounds on a frequent basis and ten pounds on a constant basis. It is also noted that he is able to sit and stand for periods of time so it was felt that he could return to a light physical demands level position with very little difficulty. This report recommends that the claimant would benefit from vocational rehabilitation.

The claimant has testified that the respondents initially provided work for him when he was on light duty. The claimant testified that he did a variety of things even riding as a second driver on jobs which normally required just one person. The claimant's physical restrictions as set forth in the functional capacity evaluation, limit the amount of lifting which he is able to do on a consistent basis and discourages work on uneven surfaces. Based on the claimant's testimony as to the jobs in the solid waste department as well as the testimony of the respondents'

witnesses describing jobs which the claimant expressed interest in, there are no jobs available which would fall within this claimant's physical restrictions. Certainly, employers are encouraged to make work available to injured employees in hope of returning them to the work place, however, an employer is not legally obligated to create an otherwise non-existing job classification when the claimant desires to return to work with certain permanent restrictions. The respondent herein did make light duty work available to this claimant during his healing period in hope of facilitating his reentry into the work force. However, an employer is not required to create a full time light duty position in order to accommodate a claimant's restrictions. I find, therefore, that the claimant has failed to prove by a preponderance of the evidence that he is entitled to 505(a) benefits.

I do find that the claimant has proven by a preponderance of the evidence that he is entitled to a rehabilitation program at the assistance of the respondent. In Tackett v. Hickory Springs Manufacturing Co., Full Workers' Compensation Commission, August 14, 1979 (C715817) four questions were set forth which must be answered in determining if rehabilitation, at the respondent's expense, is appropriate. These four questions are as follows;

1. Can the claimant return to his old job, if modified?
2. Can the claimant be re-employed by the same employer, in a different job?
3. Does the claimant have transferable job skills which would enable him, without a specialty retraining program, to be gainfully employed within his community in a job paying

similar wages to those received prior to injury?

4. Does the claimant need re-employment assistance (such as placement assistance or on the job training) in order to help him attain the job transfer to such employment?

In the present case, it has been determined by the claimant as well as by his FC that he is not able to return to his old job and that the respondent does not have employment for this claimant within his job restrictions. In the case herein the claimant does have transferable job skills, however, due to his now physical limitations, most of the jobs available to him in the community would not be available due to his physical limitations. In answering question number four, the respondents have provided this claimant with re-employment assistance through Mr. Dale Thomas and after evaluation even Mr. Thomas has recommended that he undergo a rehabilitation program. I find, therefore, that his reentry into school seeking an elementary education degree is reasonable and fits within his physical limitations. The respondents, therefore, shall provide rehabilitation benefits in accordance with Arkansas law to this claimant.

#### FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On August 5, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on August 5, 2002.

4. Medical expenses have been paid.

5. The claimant is entitled to a weekly compensation rate of \$350.00 for temporary total disability and \$263.00 for permanent partial disability.

6. Respondents have accepted a 7 percent permanent partial impairment to the body as a whole.

7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to 505(a) benefits from the respondent. See discussion above.

8. The claimant has proven by a preponderance of the evidence that he is entitled to a rehabilitation program. See discussion above.

9. The respondents have controverted this claimant's entitlement to a rehabilitation program.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he is entitled to 505(a) benefits.

The claimant is entitled, at the respondent's expenses, to rehabilitation benefits as proved for in Arkansas law.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said

attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE