

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F403638

DUDLEY COBBLE, Employee	CLAIMANT
AYERS DRYWALL, INC., Employer	RESPONDENT
COMMERCE & INDUSTRY INS. CO., Carrier	RESPONDENT

OPINION FILED SEPTEMBER 15, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by MELISSA ROSS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 17, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 8, 2005, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained a compensable injury to his low back on April 7, 2004.
4. The respondent has accepted and paid permanent partial disability benefits based upon a 25% rating to the body as a whole.
5. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$351.00 for total disability benefits and \$263.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Wage loss disability.
2. Attorney fee.

The claimant contends that he is entitled to permanent disability greatly in excess of his impairment rating, and that any disability benefits in excess of the impairment rating have been controverted and that his attorney is entitled to an appropriate attorney's fee.

The respondents contend that all appropriate benefits have been and are continuing to be paid with regard to this claim. The claimant was afforded vocational rehabilitation efforts and failed and/or refused to participate in the same. As such, it is respondents' contention the claimant is not entitled to wage loss disability benefits or any permanent disability benefits above and beyond his impairment rating.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on June 8, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has refused to participate in or cooperate for reasonable cause with an offered program of rehabilitation or job placement assistance; therefore, he is not entitled to benefits for wage loss disability pursuant to A.C.A. §11-9-505(b)(3).

#### FACTUAL BACKGROUND

The claimant is a 33-year-old man with a 12<sup>th</sup> grade education who throughout most of his adult life has performed drywall work. Claimant worked for the respondent

performing drywall work and suffered a compensable injury on April 7, 2004, when he was in an attic taping a firewall and fell through the ceiling approximately 17 to 18 feet. On April 14, 2004, the claimant underwent surgery for a fracture at the L-1 level. Claimant was subsequently released by the surgeon and received follow-up care from Dr. Brooks. Dr. Brooks assigned the claimant a permanent physical impairment rating in an amount equal to 25% to the body as a whole which was accepted and paid by the respondent.

Claimant has filed this claim contending that he is entitled to benefits for a loss in wage earning capacity in excess of the 25% rating.

### ADJUDICATION

When considering claims for permanent partial disability benefits for a loss in wage earning capacity the Commission may take into account various factors including the percentage of the permanent physical impairment, the claimant's age, education, work experience, and all other matters reasonably expected to affect their future earning capacity. A.C.A. §11-9-522(b)(1).

Respondent contends that claimant is barred from receiving benefits for wage loss disability because he failed to participate in or cooperate with an offered program of rehabilitation or job placement assistance. A.C.A. §11-9-505(b)(3) provides:

The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

The Commission has held that in order to rely upon A.C.A. §11-9-505(b)(3) to foreclose a claimant's entitlement to wage loss disability benefits, the respondent must

show that claimant refused to participate in a program of vocational rehabilitation or job placement assistance, or through some other affirmative action indicating an unwillingness to cooperate in those endeavors. *Lohman v. SSI, Inc.*, Full Commission Opinion filed June 2, 2005 (F105152); *Knight v. Andrews Transport*, Full Commission Opinion filed April 17, 2001 (E408356); *Newman v. Crestpark Retirement Inn*, Full Commission Opinion filed September 14, 1998.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant refused to cooperate in efforts of vocational rehabilitation and/or job placement assistance; therefore, he is not entitled to benefits for wage loss disability.

As previously noted, the claimant underwent surgery for a L-1 fracture on April 14, 2004. Following claimant's surgery he was eventually released to Dr. Brooks for follow-up care. In a report dated August 2, 2004, Dr. Brooks indicated that claimant could return to work eight hours per day with frequent standing, walking, driving, and sitting. Dr. Brooks indicated that claimant could occasionally pull/push 50 pounds, bend and stoop, and perform overhead activities. Claimant could perform constant hand and arm motion and that he should only occasionally lift 25 pounds with frequent lifting of 10 pounds. Dr. Brooks also indicated that claimant should not work on ladders or stilts. Finally, Dr. Brooks opined that it would be in claimant's best interest to learn another occupation which would be safer and less strenuous on the claimant's back.

In a report dated October 11, 2004, Dr. Brooks indicated that claimant had reached maximum medical improvement and assigned a 25% impairment rating. He continued claimant on the same restrictions of August 2, and again indicated that claimant should undergo some type of retraining.

By November 10, 2004, claimant had undergone a functional capacities evaluation which set out various restrictions. Dr. Brooks stated that he agreed with those restrictions

but also indicated that claimant should not climb ladders or use stilts. Although claimant was working full time, he requested that Dr. Brooks limit him to only four days a week instead of five. Dr. Brooks indicated that he would keep claimant working five days per week and not cut his work to four days per week as requested.

After claimant's release following his surgery claimant returned to work for respondent for some period of time. Beginning some time in January 2005 the claimant began performing "patch work" drywall jobs for other employers. Claimant testified that he does not climb on ladders or scaffolds, and that he mainly fixes holes that are the result of cutting, water leaks, or other damage. Claimant estimated that he has earned approximately \$9,000.00 performing these jobs during the year 2005.

In December 2004, the claimant met with Ginny McWilliams, a certified and licensed rehabilitation counselor of 32 years. McWilliams testified at the hearing that her primary goal with any individual is employment. McWilliams testified that she starts with an assessment of a particular individual and then discusses various job placement or retraining plans. McWilliams testified that once the assessment is performed and discussions have occurred about various job placements and/or retraining, the individual is then asked to sign an IWRP - Individualized Written Rehabilitation Plan. McWilliams testified that the IWRP sets out the individual's particular vocational goal and includes details and responsibilities of both the claimant and the carrier toward achieving the individual vocational goal.

According to McWilliams' testimony, which I find to be credible, she performed the vocational assessment and then had a discussion with claimant about job placement versus retraining. McWilliams testified that when claimant indicated that he would prefer to simply return to work she discussed specific types of jobs such as a light truck driver. At that point claimant would indicate that he wanted to consider retraining. When McWilliams then attempted to discuss retraining with the claimant he would indicate that

he did not believe he could sit in class, comprehend the subject matter, and could not pass tests. McWilliams testified that she eventually terminated her rehabilitation efforts with the claimant because the claimant would not commit to the IWRP which would set out a specific vocational goal.

Although I do not find that the claimant refused to participate in a program of vocational rehabilitation or job placement assistance, I find that claimant through his unwillingness to work with McWilliams in determining whether job placement assistance or retraining was more appropriate indicated an unwillingness to cooperate in the offered program of rehabilitation or job placement assistance.

While McWilliams did not identify specific jobs for which claimant should apply or provide specific programs of retraining, that is not required by A.C.A. §11-9-505(b)(3). McWilliams testified that her procedure is to perform the vocational assessment and then permit the individual to determine whether they wished to simply return to work with job placement assistance or whether they wished to undergo some type of retraining. Once the individual makes that determination the IWRP is completed and the specific goals and responsibilities are set out. In this particular case, McWilliams was unable to provide a specific program of job placement assistance or retraining because of claimant's unwillingness to commit to one program or the other. When claimant initially indicated that he wished job placement assistance and McWilliams began discussing various employments such as truck driving, the claimant then indicated that he wished to undergo retraining. When McWilliams began to discuss retraining programs with the claimant, he indicated that he did not believe he could complete retraining. This prevented McWilliams from developing a more detailed plan.

In summary, the respondent offered the claimant job placement assistance or retraining through Ginny McWilliams, a licensed and certified rehabilitation counselor for 32 years. Following the initial assessment, McWilliams could not get claimant to commit

to either job placement assistance or retraining. I find that by his actions the claimant indicated an unwillingness to cooperate in the respondent's endeavor to provide job placement assistance or retraining. Therefore, pursuant to A.C.A. §11-9-505(b)(3), claimant is not entitled to benefits in excess of his permanent physical impairment rating.

ORDER

Pursuant to A.C.A. §11-9-505(b)(3), claimant is not entitled to permanent partial disability benefits in excess of his permanent physical impairment rating. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

---

GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE