BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F311143

STANLEY JOHNSON, Employee	CLAIMANT
MCKEE FOODS, Employer	RESPONDENT #1
RISK MANAGEMENT RESOURCES, Carrier	RESPONDENT #1

OPINION FILED NOVEMBER 22, 2005

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

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by CURTIS L. NEBBEN, Attorney, Fayetteville, Arkansas.

Respondent #2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas, although not present at hearing.

STATEMENT OF THE CASE

On October 26, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 24, 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 prior opinion of November 2, 2004 is final.
2. Claimant reached the end of his healing period on October 20, 2004.
3. Respondent #1 has accepted an 11% impairment rating.

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

1. Claimant's entitlement to permanent total disability benefits, or, in the alternative, wage loss.

2. Attorney fee.

3. Whether respondent #1 must first pay the claimant's anatomical ratings for the compensable injury prior to payment of any permanent and total disability benefits to which the claimant may be found entitled. Whether respondent #1 is entitled to credit for

payment of permanent partial anatomical disability benefits against its $75,000.00 maximum liability pursuant to A.C.A. §11-9-502(b)(1).

The claimant contends he is unable to return to any gainful employment and alternatively he is unable to return to any gainful employment making the same or similar wages.

Respondent #1 contends that the claimant has not sustained a permanent disability in excess of 11%. The respondents further contend that a job search was conducted for the claimant and available jobs offered to him which were refused and therefore the claimant is not entitled to any wage loss.

Respondent #2 contends that respondent #1 must first pay permanent partial disability in the form of the anatomical ratings for the claimant's compensable injury before payment of permanent total disability benefits. Additionally, respondent #1 is not entitled to credit against its $75,000.00 maximum for payment of the claimant's permanent partial anatomical ratings for the compensable injury.

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 witness and to observe his 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 August 24, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant refused to cooperate with job placement assistance offered to him by the respondent; therefore, pursuant to A.C.A. §11-9-505(b)(3) claimant is not entitled to permanent disability benefits in excess of his permanent physical impairment rating.

DISCUSSION

The claimant is a 55-year-old man who completed the tenth grade and earned his GED while serving in the Army. While in the Army the claimant drove trucks and worked as a mechanic. After receiving an honorable discharge the claimant attended college for approximately three months before going to work for a railroad as a foreman on a work gang which rebuilt railroad track. Claimant performed that job for approximately 17 years and suffered an injury to his back while working for the railroad in 1987. Claimant received medical treatment and was off work for a period of time as a result of that injury. Claimant eventually settled that claimant with the railroad and did not miss any additional work until his most recent accident on October 6, 2003.

Following claimant's work with the railroad he began working as a truck driver performing both long and short haul trucking. Claimant eventually became employed by respondent #1 as a long haul truck driver and suffered a compensable injury to his back while unloading his truck on October 6, 2003.

Following claimant's compensable injury he was initially treated conservatively by Dr. Moffitt and by Max Beasley, a nurse practitioner in Dr. Moffitt's office. When claimant did not respond to conservative treatment, an MRI scan was performed which revealed a herniated disc at the L5-S1 level. Claimant was subsequently referred to Dr. Luke Knox, neurosurgeon, who performed surgery on claimant's lumbar spine on February 27, 2004. Following a prior hearing in this case on May 12, 2004, an opinion was filed on May 27, 2004, finding that the surgery performed by Dr. Knox was causally related to claimant's compensable back injury. That opinion was subsequently affirmed and adopted by the Full Commission on November 2, 2004.

Subsequent to the last hearing claimant has continued to receive medical treatment from Dr. Knox. At Dr. Knox's request claimant underwent a functional capacities evaluation on October 5, 2004, which indicated that claimant should perform sedentary to

less than sedentary job activities. In a report dated October 24, 2005, Dr. Knox stated that claimant had reached maximum medical improvement and assigned him a permanent physical impairment rating in an amount equal to 11% to the body as a whole. Respondent #1 accepted liability for benefits associated with the 11% impairment rating.

Claimant has now filed this claim contending that he is entitled to permanent disability benefits in excess of his permanent physical impairment rating.

ADJUDICATION

As previously noted, Dr. Knox in a report dated October 24, 2005 indicated that claimant had reached maximum medical improvement and he assigned claimant a permanent physical impairment rating in an amount equal to 11% to the body as a whole. Dr. Knox did not opine that claimant was permanently totally disabled as claimant now contends, but rather indicated that claimant should pursue employment detailed by the functional capacities evaluation which limited him to a 10 to 15 pound weight restriction. A review of the functional capacities evaluation which was performed on October 5, 2004 indicates that significant physical limitations have been placed upon the claimant's ability to return to work. Despite those significant limitations the respondent hired Re-Employment Services to assist claimant in returning to work within his restrictions. Initially, Serena Gay, an employee of Re-Employment Services, conducted a telephonic interview with the claimant on January 13, 2004 in an effort to obtain background information, work history, education, and an occupational skills assessment. Based upon this information Re-Employment Services identified several potential jobs within claimant's physical restrictions. One of these jobs was as an admissions clerk for Washington Regional Medical Center. Re-Employment Services sent a form containing a job description along with the physical requirements to Dr. Knox for approval. On February 11, 2005, Dr. Knox indicated that this job would be appropriate for the claimant. Another job identified was

a customer services representative for United Blood Services. Re-Employment Services again sent a form containing the job description and physical requirements to Dr. Knox who on March 21, 2005 signed the form indicating that the job was appropriate for the claimant.

Claimant admitted that Re-Employment Services had attempted to help him find a job. Claimant also admitted that he informed Re-Employment Services that he could not work at that time. Not only did claimant believe that he was incapable of performing any work, but claimant also indicated that he was not interested in working for the wages paid by the prospective jobs.

> Q. Now, whether or not you've done some type of clerical job, if the hospital was willing to train you, you still weren't willing to give that a chance?
>
> A. Not at that time, no.
>
> Q. Well, is now a different time?
>
> A. Well, at those price ranges, yes.
>
> Q. Now, why - - why - - what difference do the price ranges make?
>
> A. I can't afford to work for that amount of money.

At the hearing the claimant admitted that he is currently drawing $1,850.00 a month in railroad disability benefits. According to claimant's testimony a job earning $8.50 per hour would eliminate that benefit.

Not only did claimant indicate that he informed Re-Employment Services that he could not work at that time, but claimant also admitted that he even refused certified mail from Re-Employment Services.

> Q. Do you remember refusing certified mail you would get from this Re-Employment Services?
>
> A. Yes.
>
> Q. Okay. Is there a reason you refused it?

A. They just kept looking for other jobs, and I told her at that time I couldn't do anything.

Q. So you didn't even open up the package?

A. No.

The statute addressing offered rehabilitation or job placement assistance is codified at A.C.A. §11-9-505(b)(3):

> 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.

In order for the provisions of A.C.A. §11-9-505(b)(3) to apply the respondent must show that the claimant refused to participate in job placement assistance or that through some other affirmative action indicated an unwillingness to cooperate in such an endeavor. *Lohman v. SSI, Inc.*, Full Commission Opinion filed June 2, 2005 (F105152); *Knight v. Andrews Transport*, Full Commission Opinion filed April 17, 1998 (E408356), citing *Newman v. Crestpark Retirement Inn*, Full Commission Opinion filed September 14, 1998 (E418166).

In this particular case, I find that the respondents have met their burden of proving by a preponderance of the evidence that the claimant refused to participate in job placement assistance and that he showed an unwillingness to cooperate in the job placement assistance effort. I also find that this refusal and unwillingness was without reasonable cause. Here, while claimant contends that he is permanently totally disabled and it was his opinion that he was incapable of returning to any type of work, claimant's authorized treating physician, Dr. Knox, was not of that same opinion. As previously

noted, Dr. Knox in his report of October 24, 2005 indicated that claimant should pursue employment as detailed by the functional capacities evaluation which limited him to a 10 to 15 pound weight restriction. Although claimant had had significant physical limitations placed upon his ability to return to work, the respondent contracted with Re-Employment Services to assist claimant in procuring employment. Re-Employment Services identified several potential jobs within claimant's physical limitations and two of those jobs were specifically approved by Dr. Knox as appropriate for the claimant. Despite the fact that Dr. Knox had indicated that these jobs were appropriate, claimant made no effort to apply for those jobs, instead informing Re-Employment Services that he could perform no job activities. The evidence also indicates that claimant is drawing $1,850.00 a month in railroad disability benefits and that employment would jeopardize that benefit. Claimant also indicated that he was not interested in earning the wages paid by the jobs identified by Re-Employment Services. It should be noted that the entire purpose of awarding permanent disability benefits in excess of the permanent physical impairment rating is to compensate a claimant for the difference in their earning capacity after a compensable injury.

Finally, claimant not only refused to investigate or consider applying for the jobs identified by Re-Employment Services, but claimant by his own admission even refused to open mail sent to him by Re-Employment Services.

Given the evidence presented, I find that claimant refused to participate in job placement assistance and through his actions showed an unwillingness to cooperate in job placement assistance. I also find that this was without reasonable cause. Therefore, pursuant to A.C.A. §11-9-505(b)(3) claimant is not entitled to permanent disability benefits in excess of his permanent physical impairment rating.

Having found that claimant is not entitled to permanent disability benefits in excess of his impairment rating, the issues involving the Death and Permanent Total Disability

Trust Fund are moot.

ORDER

Claimant failed to cooperate in job placement assistance offered to him by the respondent; therefore, he is not entitled to permanent disability benefits in excess of his permanent physical impairment rating pursuant to A.C.A. §11-9-505(b)(3). His claim for said benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE