

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM F307539**

**STEPHEN O. BLAKE,  
EMPLOYEE**

**CLAIMANT**

**LITTLE ROCK  
TOOL SERVICE, INC.,  
EMPLOYER**

**RESPONDENT**

**ZURICH AMERICAN  
INSURANCE CO.,  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED AUGUST 11, 2006,**

Pursuant to a hearing conducted May 15, 2006, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Terence C. Jensen, Attorney at Law, Benton, Arkansas, appearing for the claimant, and

Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

**STATEMENT OF THE CASE**

This was a hearing to consider the extent of the claimant's permanent disability as a result of his compensable injuries.

The claimant contended that he should be awarded wage loss disability benefits substantially in excess of his anatomical impairment. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant has not sustained wage loss disability exceeding the level of his anatomical impairment and, further, that Ark. Code Ann. §11-9-505 bars the claimant's recovery of wage loss benefits exceeding the level of his impairment because he refused vocational rehabilitation services offered by the respondents.

The record, which included medical records and the testimony of the claimant, his wife, vocational experts, and Dr. Scott M. Schlesinger by deposition, was closed at the conclusion of the hearing, consistent with the Prehearing Order and Ark. Code Ann. §11-9-715(c).

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant suffered compensable injuries to his neck and low back May 10, 2003; his average weekly wage was \$644.00; his neck injury required surgery, performed December 9, 2003, by Dr. Schlesinger; as the result of the neck injury, the claimant sustained permanent anatomical impairment of 9% to the body as a whole; as the result of his low back injury, the claimant sustained permanent anatomical impairment of 5% to the body as a whole; and the claimant reached the end of his healing period as to his back injury on or about April 5, 2004.

3. As a result of his compensable injury, the claimant has sustained permanent disability in the total amount of 40%, consisting of his anatomical impairment of 9% to the body as a whole and 5% to the body as a whole, together with his wage loss disability.

4. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

## DISCUSSION

On May 10, 2003, the claimant suffered injuries to his neck and low back when he stepped off a slightly elevated platform at work onto a wet floor, slipped, and fell backward, landing partially on the platform with his head and neck. He reported the injury but no forms were filled out at that time. Over the weekend, his symptoms worsened and on Monday he complained again at work and eventually consulted the company physician, Dr. Scott Carlee.

The claimant came under the care of Little Rock neurosurgeon Dr. Scott M. Schlesinger who performed surgery on the claimant's cervical spine December 9, 2003, and rated the claimant's impairment, because of this injury, at 9% to the body as a whole. The claimant also had injured his lower back, although not as severely as his neck. Dr. Schlesinger eventually rated his impairment for the injury to his lumbar spine at 5% to the body as a whole.

A functional capacity evaluation on April 14, 2004, concluded that the claimant was capable of working at the light-medium physical demand level, with some restrictions against deep forward bending and frequent performance of either forward bending, squatting, or kneeling. The validity profile for this evaluation showed that the claimant gave good effort during the testing. An additional functional capacity evaluation on April 5, 2005, concluded that the claimant again put forth consistent effort and was then more functional and performed at an increased work level when compared with the April 14, 2004, evaluation. The conclusion was that the claimant could perform work at the medium physical demand classification for an eight-hour day.

Vocational specialists, Bob White for the claimant and Heather Naylor for the respondents, evaluated the claimant and testified at the hearing. Mr. White noted the claimant's limited educational background, his age, and his restrictions, including his subjective limitations, and his

stated need to lie down during the day, and concluded that the claimant could not physically meet the demands of sedentary or light work and that vocational assistance would be unsuccessful.

Ms. Naylor had been in contact with the claimant during the early part of 2006 from February through April. It was her opinion that the claimant could return to the workforce in the sedentary, light and medium classifications. She noted that the claimant expressed subjective limitations that were different from the conclusions of the functional capacity evaluation and that he did not feel he was capable of any work because of limitations in his ability to stand, sit, and walk.

Ms. Naylor identified several possible job opportunities in the area for the claimant to consider. She also reported that she had discussed with him the possibility of obtaining his GED and that this would enhance his ability to be employed. She suggested that he register with the Employment Security Department. She further reported that she asked if the claimant would be interested in vocational rehabilitation assistance which might include assisting him in enrolling in a GED program, learning skills for interviewing and job seeking, and labor market research to identify potential job opportunities, but was advised by the claimant that he was not interested. Nevertheless, she continued to identify jobs in the area that the claimant might be able to obtain in light of his education and work experience.

At the hearing, she explained that during this process, if an employer described a job that might be appropriate for the claimant, she did not arrange with the employer for the claimant to apply for the job immediately, but merely eventually passed the job information to the claimant after which the claimant might inquire, sometimes finding that by then the job was no longer available. Thus, the efforts of Ms. Naylor did not involve actual “placement” of the claimant in a job, at least in the ordinary sense of the word.

Ark. Code Ann. §11-9-505(b)(3) provides that 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 disability benefits exceeding his anatomical impairment.

There was no indication that a “program” of rehabilitation was presented to the claimant or that there was an offer to place the claimant in a job, rather than merely offering helpful suggestions about where to look for work and how to do so more successfully. Yet, the claimant’s response to Ms. Naylor’s efforts was meager. In spite of the encouragement of Ms. Naylor, the claimant has done little in the way of attempting to find work, has not considered a temporary employment service, and has not looked into retraining. He also testified that he did not recall Ms. Naylor discussing a possible GED program and did not contact Ms. Naylor to pursue vocational assistance further. However, he testified that he would try to work if Ms. Naylor indicated she could help him find a job. However, he also stated that he did not think he could work more than four hours because of the level of his pain and that he had to lie down daily.

Although the claimant’s cooperation with Ms. Naylor was limited, it was affected by his symptoms which he perceives to be limiting his ability to function. In that regard, the testimony of Dr. Schlesinger indicated that the symptoms described by the claimant were not inconsistent with the condition of his spine that had resulted from his injury at work. However, Ms. Naylor indicated that she relied only on objective measures and disregarded subjective complaints of the employee when assessing their ability to return to the workforce. In short, while the claimant could have taken greater advantage of the encouragement and suggestions offered by Ms. Naylor, nevertheless, he appears to have sufficiently complied with the statutory requirement and, his failure to cooperate

fully with Ms. Naylor was not unreasonable in light of the circumstances of his continuing physical symptoms, so that he is not barred from receiving permanent disability benefits in excess of his anatomical impairment.

On the other hand, his limited attempts to return to work over this period deprive the record of evidence concerning his actual ability to function in the workplace and act as an impediment in assessing his overall level of disability. Certainly, the claimant's education is limited and his physical condition, including his anatomical impairment for both low back and cervical spine injuries makes returning to work more challenging for him. However, he has a history of steady work as a machinist and has experience as a welder and as a janitor or light maintenance man. The claimant will be 49 years of age in November. When the entire record is considered, it appears that he has sustained permanent disability at the level stated above.

#### **AWARD**

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

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RICHARD B. CALAWAY  
Administrative Law Judge