

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F309658**

**BOBBY PRESCOTT, EMPLOYEE**

**CLAIMANT**

**MOORE ROBINSON, INC., EMPLOYER**

**RESPONDENT NO. 1**

**FEDERATED MUTUAL INSURANCE COMPANY,  
INSURANCE CARRIER**

**RESPONDENT NO. 1**

**DEATH AND PERMANENT TOTAL  
DISABILITY TRUST FUND**

**RESPONDENT NO. 2**

**OPINION FILED FEBRUARY 6, 2007**

Hearing before Administrative Law Judge Barbara Webb on November 8, 2006, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by Mr. Philip M. Wilson, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by Mr. Eric Newkirk, Attorney at Law, Little Rock, Arkansas.

The Death and Permanent Total Disability Trust Fund was represented by Ms. Judy W. Rudd, Attorney at Law, Little Rock, Arkansas.

A hearing was held on the above-styled claim on November 8, 2006, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on September 26, 2006. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as amended on the record are hereby accepted:

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

2. The employer/employee/carrier relationship existed on September 4, 2003, when the claimant sustained a compensable back injury.
3. The claimant was earning sufficient wages to entitle him to a compensation rate of \$329.00 for TTD and \$247.00 for PPD.
4. Respondents have paid medical benefits.
5. Claimant has received a 10% permanent impairment rating.

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. End of healing period.
2. Claimant's anatomical impairment rating.
3. Controversion and attorney's fees.

\_\_\_\_\_The record consists of a one volume transcript of the November 8, 2006 hearing, consisting of the testimony of Bobby Prescott, and all documentary evidence consisting of Commission's Exhibit 1 (Pre-hearing Order); Commission's Exhibit 2 (October 25, 2006 Letter); Joint Exhibit 1 (Medical Exhibits, No. 1); Joint Exhibit 2 (Medical Exhibits, No. 2); Claimant's Exhibit 1 (November 1, 2006 Letter); Respondents' Exhibit No. 1 (November 2, 2006 Letter).

#### **FACTUAL BACKGROUND**

Bobby Prescott is 56 years of age (bd. 8/26/50). He completed the sixth grade and can barely read and write. He was injured in a motor vehicle accident on September 4, 2003, while working for Moore Robinson Goodyear where he repaired and replaced tires and performed oil changes. He was treated at the emergency

room and ultimately underwent a left lumbar discectomy on his low back performed by Dr. Akin in September of 2003. He was subsequently evaluated by Dr. Ackerman, who initially prescribed medications and administered epidural shots for pain. Prescott testified that his condition initially improved after the surgery but deteriorated over time. He was subsequently evaluated by Dr. Ron Williams and was prescribed a TNS device, which Prescott testified did not do any good. He was subsequently referred by Dr. Akin for a fusion surgery which was performed on July 5, 2005. Prescott explained that the surgery helped his back pain but that his leg continued to hurt. He subsequently underwent a third surgery on October 25, 2005, to remove certain hardware from his left side. He explained that the surgeries improved his symptoms but did not stop them. He continued to have pain in his left foot, the top of his toes, ankles, left hip, and back. He testified that he cannot sit too long, has difficulty getting up and down, and does not sleep very well. He continues to take pain medication and is currently under the medical care of Dr. Hart. Hart has administered nerve block injections and has recommended a pain stimulator. Prescott explained he can walk around the yard. He explained that after a functional capacity evaluation on December 28, 2005, he could hardly get out of bed for two to three days. He testified that he was interested in vocational rehabilitation if he could get out of pain. He is currently on social security disability and received a \$100,000.00 settlement through a third-party action resulting from the work incident.

\_\_\_\_\_Medical records reflect the claimant sought medical treatment in February, 2002, for back pain after lifting a tire off a truck at work. He was treated conservatively and released to return to work in March of 2002.

Clinic Notes from Dr. Akin at the Neurological Surgery Associates, P.A., reflect that Prescott sought treatment on September 17, 2003, complaining of low back, left hip and left leg pain as a result of a motor vehicle accident at work. He denied prior back problems. He was diagnosed with a left sided L5-S1 herniated disc and was scheduled for a left lumbar discectomy on September 23, 2003. On October 8, 2003, the claimant returned post op to Dr. Akin for a follow-up evaluation. Prescott reported that the numbness in his left foot and back pain had improved significantly, but reported a degree of intermittent spasm in his left hamstring area. He was directed to remain off work for another 6 weeks and to begin back strengthening exercises. In November of 2003, he reported that he was now able to mow the lawn and that his overall pain had improved, although he still had a moderate degree of back pain. He was scheduled for physical therapy and directed to return in 6 weeks for a follow-up progress visit. On December 2, 2003, Dr. Akin responded to a written inquiry from Prescott's case manager that he anticipated that Prescott would reach MMI and return to full duty work on January 7, 2004. On December 11, 2003, the claimant returned to Dr. Akin with complaints that the physical therapy was causing his back pain to worsen. Akin recommended a discogram which was rejected by Dr. Jouett upon his review. On February 5, 2004, the claimant was seen by Dr. Akin and advised to remain off work until further

notice. On March 3, 2004, Prescott was evaluated by Dr. Wayne Bruffett of the Arkansas Spine Center. At that time, he complained of 60% back pain and 40% left lower extremity pain. Dr. Bruffett noted that the claimant had multilevel degenerative disc disease with collapse of the disc space at 4-5 and 5-1. He noted that the claimant might require a two-level fusion after conservative treatment. He recommended continued nonsurgical management and referred the claimant to Dr. Ackerman for consideration of some epidural injections. He noted that he advised Prescott that there was a chance with a multi-level fusion that his back could hurt worse than the current condition. He noted that if all other nonoperative efforts failed, he would recommend a discogram. He opined that if the discogram reflected a three-level problem, surgery would not be helpful and he could be left with residual pain worse than what he was currently experiencing.

On April 20, 2004, Dr. Ackerman evaluated the claimant. He noted persistent radiculitis and some history of muscle spasms. He scheduled the claimant for an epidural steroid injection and prescribed oxycodone for pain. The claimant was administered the steroid injection on May 5, 2004, and given a release to return to work with restrictions on May 11, 2004. On May 18, 2004, the claimant returned to Dr. Ackerman complaining of numbness in his lower extremity. His medications were adjusted and he was referred to Dr. Reginald Rutherford for an EMG nerve conduction test. The nerve conduction study resulted in findings of mild left S1 radiculopathy. On June 3, 2004, Prescott returned to Dr. Ackerman complaining of pain in his lumbar spine and lower extremity. He was advised that he would

experience some pain for the rest of his life. On June 23, 2004, Dr. Ackerman gave Prescott a 10% impairment rating to the body as a whole, noting that he had denervation at S1 and surgery on his lumbar spine for a discogenic problem with radiculopathy.

On July 1, 2004, the claimant returned to Dr. Ackerman advising that his pain is the same and that he was not working. On July 6, 2004, an x-ray of the lumbar spine was interpreted by Dr. Scott Schlesinger as showing degenerative changes, but no spondylolisthesis. He noted there is no fracture or dislocation and were otherwise unremarkable. On July 19, 2004, clinic notes reflect that the claimant returned to Dr. Ackerman with pain in the lumbar spine with radiation in both lower extremities and for a refill of medications. He was assessed with the possibility of an unstable lumbar spine and scheduled for facet joint injection therapy and SI joint injection. He was given restrictions to work 2 hours with lifting restrictions. On August 10, 2004, the claimant reported that his pain was worse. X-rays revealed degenerative changes, most pronounced at L4-5 and L5-S1 with marginal osteophytosis as well as moderate-to-severe degenerative narrowing. No instability was noted. On August 16, 2004 he was administered an L5-S1 facet joint injection. On August 26, 2004, clinic notes reflect that Dr. Ackerman opined that based on objective findings that he had nothing further to offer the claimant and recommended a functional capacity evaluation. On September 8, 2004, Ackerman recommended that the claimant return to Dr. Akin for further treatment. On September 13, 2004, Dr. Akin recommended that the claimant proceed with fusion

surgery after noting a decline with increased pain with positive findings after a positive discogram and conservative management by Dr. Ackerman without improvement. On September 30, 2004, Dr. Jouett noted in his second review that the chance of improvement through surgery was extremely low and recommended further evaluation by Dr. Earl Peebles, an orthopedic surgeon. On January 6, 2005, clinic notes reflect that claimant returned to Dr. Ackerman for a refill of medications noting that the discogram and follow-up appointments with Dr. Akin were not approved. On March 21, 2005, the claimant returned to Dr. Ackerman with continued severe pain. It is noted that a TENS unit trial conducted by Dr. Williams was not successful. Dr. Ackerman observed "It is my medical opinion that discography is indicated at this time...". On April 14, 2005, clinic notes reflect that the claimant received a recommendation for surgery from Dr. Bruffett but that the discography had not been approved. On May 31, 2005, Dr. Akin noted that the claimant had failed multiple conservative treatment measures and scheduled him for fusion surgery at L4-5 and L5-S1. On July 5, 2005, the claimant underwent lumbar fusion surgery. On August 11, 2005, he was evaluated post-op by Dr. Akin and reported new numbness on the left foot and soreness in his back. On September 27, 2005, it was determined that the claimant was symptomatic from his lumbar hardware encroaching on the nerve root. On October 26, 2005, the claimant underwent a third surgical procedure for removal of left-sided pedicle screws at L4, L5, and S1. On November 16, 2005, the claimant was seen post-op after removal of the hardware. The notes reflect that the claimant stated that his back and leg

pain had improved significantly and that he was overall very pleased with the results of his surgery. Dr. Akin recommended that he undergo a functional capacity evaluation and declared him at maximum medical improvement. On December 28, 2005, the claimant underwent a functional capacity evaluation. From his evaluation, the report concluded that Prescott demonstrated the ability to perform work at the Medium work category with certain limitations. It was noted that his pain ratings were higher than normal but his other measures and cardiovascular response were within acceptable limits. On January 3, 2006, claimant returned to Dr. Akin with complaints of severe pain in his left toe. On January 26, 2006, Dr. Akin noted continued complaints of back pain and neuropathic pain involving the left lower extremity. He noted that a trial for a dorsal column stimulator was denied but a nerve root block was approved to determine if the claimant was a candidate for the stimulator. On February 6, 2006, the claimant was evaluated by Dr. Thomas Hart. He was scheduled for an MRI, further EMG and nerve conduction studies, and a lumbar sympathetic block. The EMG was performed by Dr. Rutherford on February 14, 2006, and resulted in findings of persisting left S1 radiculopathy and new development of left L5 radiculopathy with moderate changes. The MRI taken February 15, 2006, revealed varying degrees of disc degeneration at L4-5 and L5-S1 with spinal stenosis caused by broad-based disc bulging at L4-5. On February 16, 2006, after further evaluation, Dr. Hart performed a left L4 sympathetic block and recommended left L4/L5/S1 selective nerve root injections. On March 2, 2006, Dr. Hart performed the first injections and noted that if treatment failed, the claimant

should be placed in protocol for consideration of a trial spinal cord stimulator. On March 16, 2006, Hart performed a second series of injections with noted improvement in his back. On March 6, 2006, a third series of injections were administered due to continued complaints of thigh pain. On April 18, 2006, the claimant was seen by Dr. Akin who noted that claimant's back pain has dramatically improved, as well as his leg pain with the steroid injections by Dr. Hart. He declared him at Maximum Medical Improvement, gave him a 10% disability rating and released him to return to work with restrictions as set forth in the FCE. On June 16, 2006, the claimant returned to Dr. Akin. Prescott advised that he recently exacerbated his back pain by mowing his lawn and the pain was not resolving with conservative care. On June 29, 2006, Dr. Hart administered another injection. On July 13, 2006, Dr. Hart recommended a psychological evaluation to obtain clearance for placement of a spinal cord stimulator.

### **CONTENTIONS**

The claimant contends he is entitled to additional temporary total disability through June 7, 2006, and is entitled to permanent total disability benefits based on a rating of 14%, as well as attorney's fees. Claimant reserves the issue of wage loss. The respondents contend that claimant has been paid all appropriate benefits to which he is entitled, i.e. a ten percent impairment rating has been paid and they controvert any benefits awarded in excess of the ten percent paid.

The Death and Permanent Total Disability Trust Fund has deferred to the outcome of litigation on the end of the hearing period, extent of disability, and

respondents No. 1's entitlement to credit for payment of the anatomical impairment rating as permanent and total disability benefits before the final end of healing period.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The claimant sustained a compensable back injury on September 4, 2003.
3. The claimant was earning sufficient wages to entitle him to a compensation rate of \$329.00 for TTD and \$247.00 for PPD.
4. Respondents No. 1 accepted a total of 10% anatomical impairment rating.
5. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits in that the preponderance of the evidence demonstrated that claimant reached the end of his initial healing period on June 23, 2004, but subsequently reentered a second healing period in July of 2005, which ended on April 18, 2006, when claimant reached maximum medical improvement.
6. Claimant's medical treatment after April 18, 2006, was for the purpose of pain management and did not constitute a new healing period.

7. Claimant has failed to prove by preponderance of the evidence that he is not capable of undergoing a vocational rehabilitation evaluation as requested by the respondents.

## **DISCUSSION**

### **TEMPORARY TOTAL DISABILITY BENEFITS**

To be entitled to temporary total disability benefits, a claimant must remain in his healing period and be totally unable to earn wages. Ark. State Hwy. & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. J. A. Riggs Tractor Co. v. Etkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve the condition, the healing period has ended. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). For the purpose of defining disability, “any other employment” means any other employment in lieu of the one in which the employee was injured. Stevens v. Mountain Home Sch. Dist., 41 Ark. App. 201, 850 S.W.2d 335 (1993).

### **End of Healing Period**

The threshold issue in this case is a determination of when Prescott’s healing period ended. Stated differently, the determination of when Prescott reached maximum medical improvement.

The Arkansas Workers' Compensation Act does not define maximum medical improvement. However, Ark. Code Ann. § 11-9-102(12) states that "healing period" means that period for healing of an injury resulting from an accident. The healing period ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. Clairday vs. The Lilly Company, Inc., No. CA05-696, (April 19, 2006). The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982); Arkansas Highway & Transportation Department v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993); Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

In the instant case, I find that the evidence demonstrates that claimant's condition stabilized after the first surgical treatment in September of 2003. The claimant testified that his condition improved. He was declared at maximum medical improvement, given an impairment rating and released to return to work with some restrictions. In June of 2004, Dr. Ackerman assigned the claimant a total of 10% to the body as a whole. Although the problems improved, the claimant continued to treat with Dr. Akin for lower back pain and subsequently underwent two

additional surgical procedures in July and October of 2005. I find that the claimant entered a second healing period in connection with the fusion surgery and third surgery in October of 2005. In December of 2005, the claimant underwent a functional capacity evaluation and was determined to be capable of performing at the medium work category. He was released by Dr. Akin after reports of dramatic improvement by the claimant on April 18, 2006. I further find that the second healing period ended when the claimant was determined to have reach maximum medical improvement and released to return to work with certain restrictions by Dr. Akin on April 18, 2006. On July 19, 2006, Dr. Akin assigned an additional 4% impairment rating in accordance with the AMA Guides.

Based on the preponderance of the evidence in the case, I find that the claimant reached the end of his second healing period for his back injury on April 18, 2006, when he was released to return to work. At that time, Dr. Akin opined that there was no further medical intervention needed. Moreover, the medical evidence in the case demonstrates that all subsequent treatment including the treatment by Dr. Hart has been directed at relieving pain symptoms and not intended to be a cure for the claimant's condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124 , 628 S.W.2d 582 (1982).

Alternatively, even if the claimant remained in his healing period from the date of injury until April 18, 2006, I find that the claimant has failed to prove that he was unable to return to work during the period of time between his first surgical procedure and the fusion procedure.

### **Permanent Anatomical Impairment**

Ark. Code Ann. § 11-9-704(c)(1)(B)(Repl. 2002) provides that “[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.” Further, permanent disability “benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.” Ark. Code Ann. § 11-9-102(4)(F)(ii)(a)(Supp. 2002). The Commission has adopted the American Medical Association’s Guides to the Evaluation of Permanent Impairment, (4<sup>th</sup> Ed 1993) for use in assessing the extent of permanent anatomical impairment. The burden rests upon the claimant to prove the existence and extent of permanent physical impairment. He must show that any permanent physical impairment is supported by objective and measurable physical or mental findings, Ark. Code Ann. § 11-9-704(c)(1)(B). He must also show that the degree or percentage of permanent physical impairment is calculated in a manner that conforms to the Guides. The claimant must also show that the compensable injury or injuries was the “major cause” of the specific degree or percentage of permanent physical impairment, Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). The term “major cause” is defined as more than 50% of the cause, Ark. Code Ann. § 11-9- 102(14)(A).

Although expert medical opinion may be relevant to the existence and extent of permanent physical impairment, it is the obligation of this Commission, rather than any medical expert, to ascertain the existence and exact extent of permanent physical impairment in a manner that conforms with the requirements of the Act.

In order for expert medical opinions to be considered by the Commission on this issue, they must be stated within a reasonable degree of medical certainty, Ark. Code Ann. § 11-9-102(16)(B). In determining the existence or extent of permanent physical impairment neither any medical expert nor this Commission may consider complaints of pain. In regard to the claimant's compensable injury, no consideration can be given to loss of range of motion in determining the existence or extent of permanent physical impairment. Ark. Code Ann. § 11-9-102(16)(A)(ii).

The respondents have not controverted and have paid the 10% rating assigned to claimant by Dr. Akin and Dr. Ackerman. However, Dr. Akin's chart notes of July of 2006 reflect that claimant has a 14% impairment permanent disability rating with respect to the body as a whole per the 4<sup>th</sup> Edition of the Guides of Permanent Impairment. The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury

is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

In this case, I find that the additional 4% impairment rating assigned by Dr. Akin is supported by the medical evidence in this case. Benefits for permanent impairment must be based on an impairment rating using the AMA Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> Ed. 1993). The Commission may review the Guides even if the Guides are not in the record, and the Commission may determine its own impairment rating under the Guides, rather than simply assessing the validity of impairment ratings assigned by doctors. Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3rd 811 (2003).

In the instant case, the claimant underwent a left lumbar discectomy at L5-S1 on September 23, 2003. Following the surgery, the claimant continued to have back pain and a subsequent EMG on May 18, 2004, revealed findings of mild left S1 radiculopathy. Table 75 of the Guides, at II. E., assigns a 10% impairment rating for a surgically treated disk lesion with medically documented residual pain and rigidity. The claimant subsequently underwent a L4-5 and L5-S1 fusion in July of 2005. In October of 2005, the claimant underwent a third surgical procedure to remove certain hardware. An additional 2% is added according to Table 75, at II.

G., for the second operation in July of 2005, and an additional 1% is added for the third surgical procedure in October of 2005. In addition, since the second surgery also involved a second new level, an additional 1% is added for the second level according to Table 75, at II. F. These percentages added together equal a 14% permanent physical impairment rating to the claimant's body as a whole. The preponderance of the evidence demonstrates that the major cause of the 14% impairment rating was the September 4, 2003, compensable injury, since but for the work-related injury the claimant would not have undergone surgery for which he is assigned impairment under the Guides. Pollard v. Meridian Aggregates, 88 Ark. App. 1, 193 S.W.3d 738 (2004).

### **Vocational Rehabilitation**

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent anatomical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. Emerson Electric v. Gaston, *supra*.

In determining wage loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

Ark. Code Ann. §11-9-505(b)(3)(Repl. 2002) provides that an employee is not required to enter any program of vocational rehabilitation against his or her consent. However, the statute further provides that if an employee waives rehabilitation or refuses to participate in or cooperate with either an offered program of rehabilitation or job placement assistance, the employee shall not be entitled to permanent partial

disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings. In the instant case, the preponderance of the evidence clearly demonstrates that although both Dr. Akin and Ackerman have released the claimant to medium duty work, the claimant has not sought subsequent employment. The claimant has indicated a willingness to seek rehabilitation but contends that he is not physically able to return to work. The respondents have requested that claimant undergo a vocational rehabilitation evaluation by a vocational expert.

Claimant suggests that his back problems preclude him from completing his vocational evaluation and returning to work. It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). It is important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). Based on my review of the credible evidence, I find that claimant has not established by a preponderance of the evidence that he is not able to participate in the requested vocational rehabilitation evaluation by a vocational expert. Until claimant has undergone the evaluation, it

impossible to determine whether claimant is a suitable candidate for rehabilitation.  
Coosenberry v. McCrosey Sheet Metal, 6 Ark. App. 177, 639 S.W.2d 518 (1982).

**CONTROVERSION**

\_\_\_\_\_Based on my review of the preponderance of the evidence in this case, I find that Respondent No. 1 has fully controverted payment of permanent partial disability benefits in excess of 10%. I have determined that claimant is entitled to a total impairment rating of 14%. Respondents have paid and are entitled to a credit for the 10% of the rating paid. Claimant's attorney is entitled to an attorney's fee for the additional 4% rating awarded.

**ORDER**

For the reasons discussed herein, Respondents No. 1 are directed to pay additional benefits and attorney's fees in accordance with the findings of fact and conclusions of law set forth herein.

**IT IS SO ORDERED.**

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**BARBARA WEBB**  
Administrative Law Judge