

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E813005

JOHN DAVID STEWART, EMPLOYEE	CLAIMANT
MILLER COUNTY, SELF-INSURED EMPLOYER	RESPONDENT
AAC RISK MANAGEMENT, THIRD PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED AUGUST 18, 2003

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE GREG GILES, Attorney at
Law, Texarkana, Arkansas.

Respondents represented by HONORABLE J. MATTHEW MAULDIN,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

This case comes on for review by the Full
Commission on appeal by respondents from an opinion filed
herein by an Administrative Law Judge on September 6, 2002.

The Administrative Law Judge entered the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction of this
claim.
2. On October 13, 1998, the
relationship of employee-employer
existed between the parties.

3. On October 13, 1998, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$244.00/\$1813.00 for total disability/permanent partial disability benefits.
4. On October 13, 1998, the claimant sustained an injury arising out of and in the course of his employment.
5. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of October 13, 1998.
6. The claimant's healing period ended March 2, 2001.
7. The claimant has a permanent physical impairment in the amount of 15% to the body as a whole.
8. When the claimant's age, education, work experience, permanent restrictions and other matters are considered, he has been rendered permanently totally disabled within the purview of the Arkansas Workers' Compensation statutes as a result of the October 13, 1998 compensable injury.
9. The respondent has controverted the payment of permanent disability benefits in excess of the claimant's anatomical impairment.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made

by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

We therefore affirm the September 6, 2002 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner Yates dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he was permanently and totally disabled. Based upon my de novo review of the record, I find that the

claimant has failed to meet his burden of proof. In my opinion, the claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage loss disability benefits.

The claimant sustained an admittedly compensable injury on October 13, 1998. This injury resulted in the claimant having to undergo two surgeries to his lower back and he has been assessed with a 15% permanent impairment rating, which has been accepted and paid by the respondents. At this juncture, the claimant contends that he is permanently and totally disabled. The respondents contend that the claimant is not entitled to any wage loss disability benefits. I agree with the respondents.

I find that the evidence does not support a finding of permanent and total disability. The claimant sustained an injury to that portion of his body which is not scheduled under the Act. Therefore, the claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. §11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which he was receiving at the time of the injury. When making a determination of the degree of permanent

disability sustained by an injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the workers' future earning capacity. Such other matters are motivation, post-injury income, credibility, and demeanor. 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). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

In considering the factors which may affect an employee's future earning capacity, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning

capacity. City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W. 2d 946 (1984); Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W. 2d 276 1982.

The evidence is clear that the claimant declined the plan of vocational rehabilitation that was provided for him and, therefore, should not receive any permanent benefits in excess of his permanent impairment rating. Ark. Code Ann. §11-9-505(b) (3) (Repl. 2002) provides that:

The employee shall not be required to enter any program of vocational rehabilitation against his 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 evidence is clear that the claimant declined the plan for vocational rehabilitation that was provided for him. In an initial rehabilitation evaluation report dated April 16, 2002, Ms. Terry Owens presented the claimant with three vocational options. These options were: (1) A small business set up in small engine repair, (2) self-employment woodworking, and (3) flexible part-time employment in the community that is within the sedentary to light work classification. Ms. Owens opined that helping the claimant

focus on productive activity could have a positive impact on his pain complaints.

At the time of the hearing, the claimant had failed to take advantage of any of these options. The claimant attributed his failure to pursue any of these options to the fact that he could not do anything and that he could not make a living at any of those options. However, vocational rehabilitation had been recommended to the claimant by both Dr. Saer and Dr. Ackerman. On January 18, 2002, Dr. Saer reported that the claimant was functioning in the sedentary to light range. A Functional Capacity Evaluation report indicated that the claimant could lift up to 15 pounds occasionally, which is in the light category of work for an 8-hour day. Further, the claimant's own vocational rehabilitation witness, Mr. Bob White, stated that he did not disagree with the options presented to the claimant by Ms. Owens. In his March 12, 2002 report, Mr. White stated:

I do agree that [the claimant] may be able to do some work on a limited, part time basis and/or he may be able to engage in some type of retraining.

The claimant testified that he had built a shop onto his house and had previously constructed wooden bird houses. The claimant also admitted that he would be

proficient enough to build picture frames, shadow boxes, and some shelves if he was provided with the proper equipment. The claimant testified during his deposition that he would have been able to pursue small engine repair and woodworking if he were given the proper tools. The claimant took a correspondence course in small engine repair in order to prepare himself for this business. However, the claimant has failed to pursue that option. The claimant testified that his medications decreased his alertness and made him forgetful. This was the claimant's reasoning for not being able to pursue the small engine repair business. I would note that while the claimant was taking Oxycontin medication, which he claims decreases his alertness and makes him forgetful. However, he was able to concentrate enough to complete a certification class in small engine repair. He has also driven from Texarkana to Little Rock on at least two occasions, indicating that he was able to concentrate long enough to complete the trip. I would note that the claimant told Dr. Ackerman on February 20, 2001, that he was unable to drive a vehicle. This is diametrically opposed to what the claimant testified he was able to do.

The claimant told Ms. Owens that he reads frequently. I submit that reading is an activity which requires a great deal of concentration.

Therefore, when I consider all the evidence, I find that the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled. Therefore, I must respectfully dissent from the majority opinion.

JOE E. YATES, Commissioner