

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F012942

JEFFERY W. ASHCRAFT,
EMPLOYEE

CLAIMANT

HEADLEE'S INDUSTRIAL COMPANY,
EMPLOYER

RESPONDENT

HIGHLANDS INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 16, 2005

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

Claimant represented by HONORABLE PHILIP M. WILSON, Attorney
at Law, Little Rock, Arkansas.

Respondents represented by HONORABLE ERIC NEWKIRK, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed March 26, 2004. The administrative law judge
found that the claimant proved he was entitled to wage-loss
disability in the amount of 20%. After reviewing the entire
record *de novo*, the Full Commission finds that the claimant
is precluded from receiving wage-loss disability pursuant to
Ark. Code Ann. §11-9-505(b)(3). We therefore reverse the
decision of the administrative law judge.

I. HISTORY

Jeff Ashcraft, age 31 (8-10-72), testified that he had a general education diploma. Mr. Ashcraft testified that his work history involved manual labor. The claimant's testimony indicated that he began working for the respondent-employer in 2000. The claimant testified that he was a sandblaster and painter, and that his work occasionally required heavy manual labor. The parties stipulated that the claimant sustained a compensable injury on October 24, 2000. The claimant visited Dr. Maurice M. Smith on November 30, 2000:

Mr. Ashcraft states that he fell approximately 20 to 25 feet off the top of a water tower landing on his buttocks and since that time he has had significant back pain....

Plain films obtained on 10-25-00 were reviewed and there appears to be a significant compression fracture of L1 with about 50% loss of vertebral body height anteriorly....

Dr. Smith's impression was "severe compression fracture of the L1 vertebral body, which is probably a burst, fracture." In June 2001, Dr. Smith performed an "anterior L1 vertebrectomy and T12 to L2 anterior fusion with autologous bone and allograft humeral strut and Z-plate instrumentation."

The claimant underwent a functional capacity evaluation on July 19, 2002:

From a physical/functional standpoint, Mr. Ashcraft demonstrates the ability to lift up to 50 pounds occasionally floor to waist level as his optimal work load and 40 pounds to an overhead position, as well as bilaterally carry 40 pounds maximum before discontinuing due to his reported increased lower back discomfort and fear of further injury....From a non-materials handling standpoint, it is this therapist's opinion that Mr. Ashcraft demonstrated unrestricted capacities relating to sitting, walking continuous on treadmill, stair climbing, ladder climbing, crawling, balancing, stooping/bending, kneeling, crouching, and reaching. His overall stand/walk tolerance is equivalent to occasional to frequent type work demands. It is felt that Mr. Ashcraft would be best suited at seeking employment options initially allowing him to sit, stand, and walk at his leisure. Furthermore, it is this therapist's opinion that he will more than likely increase his endurance/stamina levels for sitting, standing, and walking activities as a result of resuming work and/or increasing his physical activities/lifestyle above a sedentary status.

Dr. Smith reported on August 14, 2002:

Mr. Ashcraft returns today. He is status post a L1 vertebrectomy and fusion from T12 to L2 performed on 6-18-01. He has had a long course since his surgery, but has eventually done well and has a solid fusion. He initially sustained a significant burst fracture of L1 which was treated with a hard brace. However, he failed conservative treatment in a brace and had further collapse of his vertebral body and increasing kyphosis. He had over 50 percent collapse of her (sic) vertebral body and had significant canal compromise, as well. He underwent an anterior vertebrectomy at L1 and fusion from T12 to L2.

At the present time, his neurologic exam is good. He is no longer taking any pain medicine and he has just completed a functional capacity evaluation by Mr. Frank Armstrong which has placed

him at a medium type work level with lifting no greater than 50 pounds occasionally, and 20 pounds frequently. I am in agreement with this restriction and in terms of a partial impairment rating, I believe he should receive 23 percent impairment rating, as he falls into Category 4, as he clearly has greater than 50 percent compression of one vertebral body without residual neurologic compromise.

From a neurosurgical perspective, I believe Mr. Ashcraft has done well and he will follow-up with us on a yearly basis for routine follow-up.

The parties stipulated that the claimant's healing period ended August 14, 2002, and that the respondents accepted a 20% whole-body impairment. (The claimant does not argue that he is entitled to greater than 20% anatomical impairment.)

Dr. Smith stated in March 2003, "In reviewing his work restrictions, I do believe these may be a little bit heavy. I will change his work restrictions from medium work level to light work level, exerting up to 20 pounds of force occasionally, and up to 10 pounds of force frequently, and/or a usual amount of force constantly."

Terry H. Owens, a rehabilitation case manager, reported on April 2, 2003:

At the request of attorney Eric Newkirk, for Cunningham Lindsey, a vocational evaluation was completed for Mr. Ashcraft and is outlined below. The purpose of this evaluation was to determine the vocational outlook and employability of Mr.

Ashcraft. It is my opinion he could benefit from vocational services and return to gainful employment.

Mr. Ashcraft has reached maximum recovery from his back injury and subsequent surgery. An FCE indicates he is capable of *medium* level employment, but would need to change body position when working. He related he would like to return to work but the pain symptoms keep him from having the confidence that he can. My vocational research indicates he is employable in several entry level occupations in Pine Bluff, with wages ranging from \$5.15 to \$6.50/hour....

It is my recommendation that Mr. Ashcraft participate in rehabilitation services and receive assistance in preparing for and finding suitable employment. If requested, I could provide him job seeking skills training, job application preparation and employment identification. If Mr. Ashcraft is unable to perform beyond the *light* classification of work, he will likely need rehabilitation services to help him secure suitable employment.

It is my opinion that Mr. Ashcraft is capable of work activity, at least at the *light* level, and he needs to be engaged in a vocational rehabilitation program, either through Rehabilitation Management, or Arkansas State Rehabilitation Services. Mr. Ashcraft appears to be medically stable and should be ready to begin the rehabilitation process.

Ms. Owens reported on April 22, 2003:

I spoke to Mr. Ashcraft on 4/18 and requested to meet with him to begin initiating rehabilitation services. He seemed to have had a change of opinion regarding return to work and training. Mr. Ashcraft said that he thought about the training and did not think he could sit in school chairs all day, as he is unable to sit on his couch. I was unable to understand whether he actually contacted the rehabilitation services, or

made the decision that he could not tolerate sitting for training and did not contact the agency. I related that rehabilitation services is not only about training, but helping one obtain employment. He said he did not know of anyone that would hire him with a "bad back." I explained that there were certainly some types of employment he could no longer do, but we would not pursue these types of jobs. I asked if he would be willing to meet with me to initiate rehabilitation services, and begin exploring suitable employment. He reluctantly agreed.

Mr. Ashcraft initially agreed to meet with me on April 22 to receive job seeking skills training and further discuss rehabilitation services. However, on 4/21 he called and requested that I go through his attorney to set up a follow up appointment. I went through the proper steps to receive approval from his attorney, which was granted.

I called Mr. Ashcraft and told him that approval was given by the paralegal, but that participation in rehabilitation services was his decision. I told him he could call his attorney's office to confirm their approval. He said he wanted to do that and he would call me back. He called my office back and left a message stating that he did not desire to 'take the course', and advising that he did not want me to come meet with him and provide the services we had discussed. Therefore, I did not pursue rehabilitation efforts any further....

As Mr. Ashcraft declined RMI services and canceled the 4/22 appointment, I will no longer pursue the offer of vocational rehabilitation services.

Bob White, a vocational specialist, provided a vocational assessment for the claimant's attorney on December 23, 2003:

At age 31 Jeffery is much too young to be permanently and totally disabled. While I professionally believe he can perform the exertional requirements of light work, I do not believe he can stand for 6 to 8 hours in an 8 hour work day or work on concrete, uneven terrain, heights, ladders or engage in postural stress on even an occasional basis.

I believe he will require sedentary work, although he can lift more than demanded by sedentary criteria.

He has no skills to offer an employer and has only his physical ability to perform work.

I agree with rehabilitation managements opinions regarding contact with state rehabilitation services and I believe if he is to return to the labor force he will require some type of re-training meeting sedentary criteria and allowing some ability to change or shift positions.

Without benefit of re-training, while theoretically Mr. Ashcraft may be able to perform some type off (sic) work, in reality I seriously doubt he is employable....

A pre-hearing order was filed with the Commission on January 28, 2004. The claimant contended, among other things, that he had sustained wage-loss disability "substantially in excess of his permanent impairment." The claimant contended that a program of rehabilitation was not reasonably necessary, and that he had not unreasonably refused to participate. The respondents contended that the claimant had sustained no wage-loss disability. The respondents contended that the claimant "refused to

participate in, or cooperate, in a recommended program of vocational rehabilitation, thereby limiting him to his permanent impairment."

The administrative law judge found, "The claimant has proven, by a preponderance of the credible evidence that he sustained wage-loss disability in excess of the twenty percent (20%) anatomical impairment sustained as the result of his October 24, 2000, injury and subsequent surgery. The claimant has sustained an overall permanent partial disability of forty percent (40%) to the body as a whole, specifically, a twenty percent (20%) permanent impairment and a twenty percent (20%) wage-loss disability." The ALJ ordered the respondents to pay wage-loss disability in the amount of 20%; respondents appeal to the Full Commission.

II. ADJUDICATION

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-505(b), provides:

(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 the present matter, the Full Commission finds that the claimant waived rehabilitation and refused to participate in or cooperate with an offered program of rehabilitation and job placement assistance. The 31-year-old claimant sustained what was surely a painful burst fracture at L1 in November 2000. The claimant underwent surgery in June 2001. By July 2002, a functional capacity evaluation indicated that the claimant could perform medium-level work. In August 2002, Dr. Smith indicated that he agreed with the results of the functional capacity evaluation. The respondents accepted a 20% anatomical impairment rating.

Dr. Smith changed the claimant's restrictions to light work in March 2003. The respondents' rehabilitation manager, Terry Owens, began consulting with the claimant in April 2003. Ms. Owens credibly identified a number of job positions for the claimant and gave the claimant the number for State Rehabilitation Services. However, the claimant subsequently informed Ms. Owens that he essentially did not wish to pursue vocational rehabilitation. The respondents cross-examined the claimant at hearing:

Q. And do you recall meeting with Terry Owens?

A. Yes, sir.

Q. Do you recall her trying to offer rehabilitation services to you?

A. She talked to me about them.

Q. Do you recall her making arrangements and trying to sit down with you and make some plans?

A. No, sir. She come to my house and we talked about it. She told me about it, and that was the last time I heard from her.

Q. Did you ever tell her you didn't want to pursue it any further?

A. I told her I didn't think nobody would hire me at that time.

Q. Did you tell her you didn't want to pursue it any further?

A. I guess, to the best of my knowledge.

Based on the evidence before us, the Full Commission finds that the claimant simply refused and was unwilling to cooperate with rehabilitation and job placement assistance offered him by the respondents. The claimant offered no reasonable explanation for why he chose to stop working with the rehabilitation manager. Because the preponderance of evidence indicates that the claimant waived rehabilitation and refused to cooperate with an offered program of rehabilitation and job-placement assistance, he is not entitled to receive wage-loss disability in excess of his

permanent anatomical impairment. Ark. Code Ann. §11-9-505(b) (3).

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant waived rehabilitation and refused to participate in or cooperate with an offered program of rehabilitation and job placement assistance. The claimant is therefore precluded from receiving wage-loss disability in excess of his anatomical impairment, pursuant to Ark. Code Ann. §11-9-505(b) (3). The decision of the administrative law judge is reversed, and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I respectfully dissent from the Majority's decision to deny the claimant any wage loss disability benefits in this claim. In my opinion, the Majority's denial of benefits is not warranted by the facts.

In denying the present claim, the Majority is relying upon A.C.A. §11-9-505 (B). That section provides, in essence, that if a claimant unreasonably refuses to cooperate with or participate in an offered program of vocational rehabilitation retraining or job placement assistance, they will not be eligible to receive any permanent disability benefits in excess of their permanent impairment. In this case, the Majority has found that a vocational expert retained by the respondent, Terry Owens, made such an offer of vocational rehabilitation and job placement to the claimant which he declined to participate in. However, I find that the contact between the claimant and Ms. Owens was investigative only and did not in any way constitute a vocational rehabilitation plan or job placement assistance as those terms are used in the Workers' Compensation Act. I also note that the claimant did cooperate with the respondent in that he underwent a functional capacity examination and met with Ms. Owens at his residence. The claimant also sought rehabilitation assistance from the State Department of Rehabilitation Assistance, a division of the Arkansas Department of Human Services.

Ms. Owens testified at the hearing about her contact with the claimant. She met with him on one occasion at his place of residence and later prepared a lengthy report regarding her evaluation of the claimant's vocational situation. In a report dated April 2, 2003, she listed a number of jobs which she believed were within the claimant's physical limitations. All of these jobs, with one exception, had a starting salary of approximately one-half of the claimant's wages at the time of his injury. This particular job, that of a mechanical draftsman, was significantly outside the claimant's pre-injury job skills and would have required a substantial amount of retraining before he would be able to undertake it. At the conclusion of her report, Ms. Owens recommended that the claimant be provided vocational rehabilitation services either her organization or through *State services*. She also stated that, "*If requested*, that I provide employment seeking skills to Mr. Ashcraft to include job search techniques, completing applications, interviewing, etc..". Lastly, she stated, "If I work with Mr. Ashcraft, that I provide labor market/job opening updates and regularly communicate these to Mr. Ashcraft for his followup and pursuit."

At the hearing, Ms. Owens was asked by the claimant's attorney whether she had actually offered him a rehabilitation plan:

Q: And, again, for the record, no rehabilitation plan has ever been offered, is that right?

A: Well, you can't offer a plan until we have services to write a plan.

Q: I understand, but, madam, I am just asking you, has a plan of vocational rehabilitation ever been specifically offered to this claimant?

A: If you would like to call offering rehabilitation services being the plan, yes, that kind of plan was offered, but. . . .

Q: I am talking about a specific plan.

A: . . . A written plan was not offered because one could not be developed.

Obviously, the respondent, acting through Ms. Owens, did not ever offer the claimant a specific rehabilitation proposal or any real job placement assistance. Ms. Owens merely evaluated the claimant's vocational needs. Her recommendation as set out in her report of April 2, 2003, stated that the claimant should

pursue rehabilitation services through her company or through the State rehabilitation system. The claimant, opted to pursue the latter method. That is, he contacted the Arkansas Department of Rehabilitation Services and obtained assistance through them. Also, the claimant sought vocational counseling from Bob White, whose Vocational Assessment, dated December 23, 2003, is part of the record. Additionally, the claimant sought employment on his own and was given assistance from a State rehabilitation counselor. In fact, it appears that the State Rehabilitation Services had located a forklift operator job which was within his restrictions that he was interested in pursuing.

Contrary to the Majority's conclusion, the record provides ample evidence that the claimant was in fact pursuing a plan of rehabilitation and job placement. The plan was simply not under the auspices of the respondent's agent, Ms. Owens. Further, in seeking aid from the Arkansas Department of Rehabilitation Services, the claimant was following Ms. Owens' recommendation. The record also reflects that Ms. Owens not only directed the claimant to this State agency but provided him a phone number so that he could directly contact them.

The respondent asserts that the claimant refused their offer of services when he did not follow up with a meeting with Ms. Owens which she attempted to schedule in April 2003. However, in the case of Newman v. Crest Park Retirement Inn, E418166, 1998 AWCC 325 (September 14, 1998), the Commission held that not meeting with a rehabilitation specialist retained by the respondent was not a sufficient basis to find that the claimant had refused an offered plan of vocational rehabilitation. Further, in Johnson v. Mid America Packaging, E400710, 1997 AWCC 187 (April 17, 1997), the Commission held that merely providing job search data was not considered a rehabilitation plan. See also Hooker v. Tri-State Mechanical and Electrical, E404490, 1997 AWCC 428 (December 4, 1997).

In conclusion, I find that, not only did the claimant cooperate in developing a vocational retraining and job placement program, he followed the recommendation of the respondent's vocational expert and sought assistance from the Arkansas Rehabilitation Services Department. It also appears that the Arkansas Rehabilitation Services was having some success in returning the claimant to the work force. In denying this claim, the Majority is ignoring the fact that the claimant was pursuing a plan of vocational

rehabilitation, just not one controlled by the respondent. I believe the Administrative Law Judge's decision should be affirmed and the claimant should be awarded wage loss disability benefits in an amount equal to 20% to the body as a whole.

For these reasons, I dissent.

SHELBY W. TURNER, Commissioner