

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F105152

ERNEST DALE LOHMAN, EMPLOYEE	CLAIMANT
SSI, INC., EMPLOYER	RESPONDENT
VILLANOVA INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 2, 2005

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

Claimant represented by HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE MELISSA ROSS CRINER, 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 August 5, 2004. The administrative law judge found that the claimant was "entitled to permanent disability benefits in an amount equal to 60% to the body as a whole as a result of wage loss from his compensable injury." After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. We find that the claimant refused to participate in or cooperate with an offered program of rehabilitation and job placement assistance. The claimant is therefore not entitled to permanent partial disability benefits in excess

of his permanent physical impairment, pursuant to Ark. Code Ann. §11-9-505(b)(3).

I. HISTORY

Dale Lohman, age 39, testified that he graduated from the 11th grade. Mr. Lohman testified that he worked as a mechanic, and then drove a propane truck for 10 years. The claimant's testimony indicated that he began working for SSI, Inc. in about 1998. The claimant described his job duties as "slinging a sledgehammer all day" and later performing finish work.

The parties stipulated that the claimant "suffered compensable injuries on April 16, 2001." The claimant testified that he slipped and fell a distance of 20 feet off a roof. Dr. Arthur M. Johnson assigned a 15% permanent impairment rating on September 18, 2001. The parties stipulated that the respondents accepted and were paying permanent partial disability benefits based on a 15% rating.

The claimant testified that following his release from Dr. Johnson, "my spine and my neck still bothered me. I don't know how to - let me rip your spine out of your back and - that's how it feels."

A vocational consultant with NuQuest Resources wrote to an adjuster on March 28, 2002:

Mr. Lohman has started an active job search using the physical abilities that he reports to have. He is placing applications for employment for a variety of positions that are currently open in

the Van Buren/Ft. Smith, Arkansas area based on job leads that I am providing. He has also registered with the Employment Security Department (state unemployment office). They have sent him on one interview.

I am encouraged by Mr. Lohman's motivation to seek employment. I intend to maintain regular telephone and in person contact with him during this initial period of job searching.

I have requested that Mr. Lohman obtain physician approval before accepting work to insure that re-employment does not exacerbate symptoms....

Dr. Johnson reported on April 23, 2002, "X-rays show the fusion of the anterior and posterior C5-T2 with anteroposterior fixation construction with no evidence of failure of the hardware with good placement. IMPRESSION: Satisfactory fusion construct, C5-T2 with good fusion mass."

Dr. Johnson noted on April 23, 2002:

Mr. Lohman is a patient who is seen for neck pain and is actually doing better. He is not having as much pain as he was. Usually the pain is more intermittent and usually resolves with weather changes or it tends to get worse as he works throughout the day.

His strength is 5/5 and he has good movement of his extremities and his neck. His x-rays look good with excellent fusion of the cervical spine with anteroposterior fusion construct. The CT myelogram shows central disc herniation is focal at C4-5, just slight eccentric to the right.

No additional surgical intervention will be necessary in his treatment. At this point we will discharge him from the neurosurgery clinic and he is to return to work without restrictions. The patient was cautioned to exercise discretion in lifting and performing jobs that would put him at risk of c-spine injury.

The claimant testified, "After Dr. Johnson said he could no longer see me, he couldn't give me any more medication, then I contacted you or workmen's comp or somebody and they got me with Dr. Short."

The claimant presented to Dr. Bradley M. Short on June 6, 2002:

Mr. Lohman is a 37-year-old gentleman who was in his usual state of health, when on 5/17/2001, he fell from a scaffolding at approximately 18 feet. He allegedly landed on the top of his head and his complaint in the emergency room was pain in the interscapular level. He was admitted to St. Edward Mercy Medical Center under the attendance of Dr. Arthur Johnson. He was diagnosed with a traumatic cervical spine fracture, C6-7. He also had a fracture of his right upper extremity, right distal radius fracture, for which he was attended by Dr. Jeffrey Evans. He was eventually stabilized, cleared medically, and taken to the operating room where he underwent a surgical procedure by Dr. Johnson, which reportedly consisted of an anterior cervical discectomy and fusion at C5-6 and C6-7, and C7-T1 with removal of half the vertebral body of C7, decompression of the spinal canal, and plating with an Atlantis anterior cervical plating system, and placement of a halo external fixation device. He underwent a second surgery on 5/8/2001, in which he underwent posterior fusion of the Synthes cervical thoracic spine rod system with Stealth stereotactic navigation with pedicle screws in T1 and T2.

He was eventually discharged from the hospital, has been cleared medically and surgically; however, he continues to have a fair amount of discomfort and pain. He has been referred for an evaluation. He reports that he has medicines which include OxyContin, which has been helpful in his pain, but his current doctor is unable/unwilling to continue him on these medicines....

I do not believe that he will be able to return to work as a roofer. We will need to schedule a

functional capacity evaluation. We will see him after this. In the meantime, we will start him on pain medicines and copies of his prescriptions are in his chart. He does appear to be profoundly depressed....

A functional capacity evaluation was administered on June 20, 2002, and the following results were reported: "The results of this evaluation indicate that Dale Lohman demonstrated the ability to work in the LIGHT category of work for an 8 hour day, according to U.S. Department of Labor Standards. Based on the self-limiting behaviors demonstrated by Dale throughout testing, the above stated physical demand level would be considered his minimal work tolerance. Dale did not demonstrate the ability to perform the material handling or the positional demands required of a Construction Worker."

A representative of Rehabilitation Management, Inc. reported on August 6, 2002:

Following an initial evaluation conducted May 23, 2002, it was determined that job placement services would commence with Mr. Dale Lohman. Since that time, Dr. Arthur Johnson has issued work restrictions. In addition, Mr. Lohman has been evaluated by Dr. Bradley Short and has participated in a functional capacity evaluation....

A resume was previously developed on behalf of Mr. Lohman. Job development has been conducted on behalf of Mr. Lohman. Job leads have been identified in the Ft. Smith/Van Buren, Arkansas area and his resume has been faxed to potential employers. Mr. Lohman has not participated in a vocational counseling appointment during this reporting period, as he did not keep the appointment scheduled for July 15, 2002, and has

not attempted to rescheduled (sic) the missed appointment....

During this reporting period, 27 job leads have been developed. These jobs are primarily driving, light warehouse, production and/or various entry-level positions. Entry-level wages of the positions identified were approximately \$7.50-\$8.50 per hour....

As of the date of this report, I am recommending conclusion of vocational services, if agreed by all parties. Mr. Lohman has been provided with a number of job leads and has not conducted follow-up with these employers (based upon our last conversation). In addition, Mr. Lohman is reluctant to return-to-work through job placement services at this time, as he fears this will compromise his SSDI award. Finally, Mr. Lohman has been engaged in work as a roofing crew supervisor during this reporting period. The length of employment, duties or wages of the position are not known.

Dr. Short reported on September 10, 2002, "He has run out of his medicines early and I had a lengthy discussion with them (sic) about this. He reports that it is effective for his pain. I have referred him to Dr. Bier who is a psychologist to speak to him about this."

The record contains a report from Crawford Investigation Services, dated October 4, 2002. The report indicates that an investigator conducted surveillance on the claimant on September 28, 2002 and September 30, 2002. No apparent physical restrictions were reported by the investigator.

Bruce Harrod, a private investigator with Crawford, testified for the respondents that he observed the claimant in September 2002. Mr. Harrod testified that he watched the

claimant get on and off bleachers at a football game, and that the claimant carried a young child on his back during halftime. Mr. Harrod later observed the claimant entering and leaving Wal-Mart, and cleaning out the back of truck at Wal-Mart. Mr. Harrod agreed that he never saw the claimant "show any signs of having trouble turning his head."

A psychologist, Dr. Patricia J. Walz, evaluated the claimant and reported on April 23, 2003:

Mr. Lohman demonstrated intellectual functioning in the Extremely Low to Borderline range with Achievement scores in the extremely low range with the exception of word identification (The WRAT does not measure reading comprehension). Based on his performance on the WAIS and WRAT, he would need assistance with his finances if he was awarded benefits. Although he reported a history of learning impairment and earned IQ scores in the subaverage range on the WAIS-III, I don't believe he'd qualify for a diagnosis of Mild Mental Retardation based on his functional capacity. While he is not functioning as well as he previously did because of his chronic pain and depression, he appears to have had only impairment in academic skills prior to his accident and injury. Since then, he has been more socially withdrawn and reports chronic depression with vegetative symptoms including poor concentration, impaired sleep & appetite, and low energy. He also reports feeling despondent and useless. He appears to have an agitated, edgy kind of depression in which he worries excessively and doesn't really feel he has much control over his worry. This depression is severe enough to interfere with his ability to function on the job in that it would interfere with his concentration and attention and his irritability could interfere with his relationships with peers, supervisors and the public.

Dr. Walz diagnosed "Axis I: Major Depression, Recurrent, Moderate without Psychosis," "Somatoform Pain

Disorder," and "Axis II: Borderline Intellectual Functioning."

Dr. Short wrote on May 29, 2003, "Apparently, Mr. Lohman had presented to the emergency room at Crawford Memorial Hospital and at Sparks over the weekend May 16, 17, and 18th. I do have an emergency room report from Sparks Regional Medical Center. He was diagnosed with opiate withdrawal. Apparently he has been misusing his pain medicine and running out early....Mr. Lohman will be able to receive copies of his records and they can be forwarded to his physician of choice. I have opted not to continue to treat him because of his continued misuse of pain medicines for his chronic pain situation after his industrial injury."

Dr. Reza Shahim informed an attorney for the respondents on June 17, 2003, "Mr. Lohman may return to light duty for a period of three months, with no lifting greater than 40 pounds, no twisting and bending during that period. If he returns to work, he should have a primary physician or a rehab vocation physician that follows him and determines after that period of light work, whether or not he is capable of returning to full duty at that point."

The claimant began treating with Dr. George Howell on June 27, 2003. Dr. Howell noted, "Patient suffered a fracture of his C-spine on April 17, 2001. He now has chronic pain in his neck, back, shoulders and hips. Also,

he indicates that he has pain in his left index finger to the point that he wishes he could cut it off....I'll have him check back in two weeks for me to see him and see about adjusting his medications at that time according to his needs." Dr. Howell noted on June 11, 2003, "Patient has been taking his OxyContin 40 mg one twice a day usually in the early morning and mid afternoon. He is taking the Lorcet 10/650 two in the morning, two in the afternoon and usually two at bedtime. He also takes Xanax 1 mg one q.i.d. We'll have him to continue this regimen and give him medications to last him for one month. It seems that this regimen has fairly well controlled his pain."

The claimant continued to follow up with Dr. Howell, who noted on October 2, 2003, "Patient suffers from chronic neck and back pain. He is post surgical. He reports that since he has been on his current regimen he has increased his physical activities. He goes for walks, etc. He also suffers from chronic anxiety disorder."

The claimant also saw Dr. Terry Brackman on October 2, 2003. The impression of Dr. Brackman, an osteopathic physician, was "1. Cervical brachial syndrome. 2. Thoracic pain. 3. Lumbago. 4. Bilateral hip pain."

A pre-hearing order was filed on October 7, 2003. The claimant contended that he was entitled to permanent disability "greatly in excess of his 15% rating." The

respondents contended that they had paid all appropriate benefits. The respondents contended that they were "attempting to provide rehabilitation or job placement assistance and cannot take a position on wage loss disability until such has been completed."

The parties agreed to litigate the issues, "1. Extent of claimant's permanent disability benefits. 2. Attorney fee."

Another representative of Rehabilitation Management, Inc. informed the respondents' attorney on October 13, 2003 that the claimant had not responded to written or telephone correspondence attempting to initiate job placement. However, the record indicates that the claimant did meet with the vocational case manager on October 20, 2003. Terry H. Owens reported on October 28, 2003:

Mr. Lohman and I met in his home on 10/20/03, with the opportunity to continue the vocational rehabilitation process. It appears that Mr. Lohman has decreased the amount of medication that he takes which, as he reports, increases his pain and decreases his physical activity throughout the day. Although Mr. Lohman said he would like to return to work, he does not feel he is capable of working an eight-hour day. A Functional Capacity Evaluation in 2002 indicates he is capable of *sedentary to light* employment at eight hours a day, lifting no more than 25 pounds....

I have encouraged Mr. Lohman to obtain his GED and I will send information for the Workforce Development Center in Fort Smith. I can assist Mr. Lohman in identifying appropriate work activity, and work him back into the labor market through supportive vocational services....

Terry Owens testified that she arranged adult education and job-skills training for the claimant. Ms. Owens testified that she identified a number of job leads for the claimant within his physical restrictions, but that the claimant followed up on none of the leads. Ms. Owens also testified that she arranged for the claimant to attend physical therapy for approximately six weeks, but that the claimant went to one physical therapy session and did not return.

Dr. Brackman noted on October 30, 2003 that the claimant was "having problems with crying spells, mood swings, and mental jumbling where he thinks of a hundred things at one time, but cannot concentrate on one subject." Dr. Brackman essentially planned to adjust the claimant's narcotic medication.

The last report of record from Dr. Howell occurred on November 25, 2003:

Patient suffers from chronic pain secondary to traumatic injury of his C-spine and T-spine. He had fractures of the C5, C6 and C7 and T1, T6 and T7. He has chronic neck and dorsal trunk pain and also shoulder pain and radicular pains in the both of his upper extremities and hands. He also has gross tremor and muscular dysfunction and disequilibrium of his upper extremities. He suffers from chronic anxiety and depression. He cares for three kids at home. His wife divorced him about two years ago. The (sic) have children ages 7, 8 & 11. The 7 and 8 year olds are females and the 11 year old is a male. He states that he gets a lot of help from his former mother-in-law. She is there to help him with the children.

I am going to have him to continue his medications, which include OxyContin 40 mg one b.i.d., Lorcet 10/560 two t.i.d., Xanax 1mg one b.i.d. and two at bedtime....

Meanwhile, Terry Owens reported on December 1, 2003:

It has been extremely difficult to communicate with Mr. Lohman during this reported period. Mr. Lohman has not followed through with the recommendations and the request he made for physical therapy. He attended one session and has not returned. He has not communicated with me and I have had a difficult time reaching him by phone. Numerous letters have been sent to Mr. Lohman via certified mail to ensure receipt. I have been requested to close my file (see attached addendum)....

Terry Owens included the following Addendum on December 2, 2003:

On Wednesday, November 26 I received a voice mail from Mr. Lohman apologizing over and over for missing his 11/24 meeting with me. He asked for another chance and said he would not "keep doing this to [me]". I left a message with Crockett Adjustment since I felt that Mr. Lohman has no true intentions of following through with vocational assistance.

Ms. Owens testified, "I was told by the insurance carrier that they had given him opportunity to participate in vocational rehab and in physical therapy and without his follow-through on those they did not feel like that I should continue the services with him."

The last treatment of record for the claimant was a visit with Dr. Brackman on January 23, 2004. Dr. Brackman planned increases/adjustments to the claimant's medication and additional diagnostic testing.

Hearing before the Commission was held on July 12, 2004. The claimant testified that he was physically unable to return to work for the respondent-employer, stating, "Just being on my feet for that period of time would kill me. And my back, my spine aches." The claimant testified:

Q. Do you know of any job that you could do in your present condition on a regular basis?

A. No, I really don't. I mean, what can I do? You know, my spine has been ripped out, and my neck - I mean, I can't work like I used to. You know, I ain't got the strength. I ain't got the endurance, really, you know. It will never be the same.

The administrative law judge found, "Claimant is entitled to permanent disability benefits in an amount equal to 60% to the body as a whole as a result of wage loss from his compensable injury." The respondents appeal to the Full Commission.

II. ADJUDICATION

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his earning capacity. Ark. Code Ann. §11-9-522(b)(1).

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 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 to rely upon Ark. Code Ann. §11-9-505(b)(3) to foreclose the claimant's entitlement to permanent partial disability, the respondents must show that the claimant refused to participate in a program of vocational rehabilitation or job placement assistance, or, through some other affirmative action, indicated an unwillingness to cooperate in those endeavors. Knight v. Andrews Transport, Workers' Compensation Commission E408356 (April 17, 1998), citing Newman v. Crestpark Retirement Inn, Workers' Compensation Commission E418166 (Sept. 14, 1998).

In the present matter, the administrative law judge found that the claimant proved he was entitled to wage-loss disability in the amount of 60%. The Full Commission reverses this finding. The Full Commission finds that the claimant refused to participate in or cooperate with an offered program of rehabilitation and job placement assistance. The claimant is therefore not entitled to permanent partial disability benefits in excess of his permanent physical impairment, pursuant to Ark. Code Ann. §11-9-505(b)(3).

The claimant, age 39 and an 11th grade graduate, sustained admittedly-compensable injuries in April 2001. The claimant underwent cervical-thoracic surgery and was released with an accepted 15% permanent impairment rating in September 2001. A vocational counselor stated in March 2002 that the claimant was motivated to seek employment. Dr. Johnson, the treating surgeon, noted in April 2002 that the claimant was doing better. Dr. Johnson released the claimant to "return to work without restrictions. The patient was cautioned to exercise discretion in lifting and performing jobs that would put him at risk of c-spine injury."

The record therefore indicates that the claimant was able to return to at least restricted work following his release from Dr. Johnson.

The claimant began treating with Dr. Short in June 2002. Dr. Short noted that the claimant had sustained a traumatic cervical spine fracture and a right distal radius fracture. Dr. Short did not believe that the claimant "will be able to return to work as a roofer." A subsequent functional capacity evaluation indicated that the claimant could perform light work. The claimant consulted with another vocational manager in August 2002. The vocational manager identified several prospective light-duty jobs for the claimant but noted that the claimant had not

participated. It was also noted that the claimant "is reluctant to return-to-work through job placement services at this time, as he fears this will compromise his SSDI award. Finally, Mr. Lohman has been engaged in work as a roofing crew supervisor during this reporting period. The length of employment, duties or wages of the position are not known."

Based on our review of the record, the Full Commission is unable to determine that the claimant's refusal to participate in vocational rehabilitation had anything to do with mental depression or addiction to prescribed medication. The claimant just chose not to participate. We recognize that a psychologist diagnosed depression in April 2003. The claimant does not contend, however, that he sustained a compensable mental injury or illness pursuant to Ark. Code Ann. §11-9-113. In May 2003, Dr. Short noted a diagnosis of "opiate withdrawal" and opted not to continue to treat the claimant "because of his continued misuse of pain medicines for his chronic pain situation after his industrial injury." In June 2003, Dr. Shahim stated that the claimant could return to light-duty work for at least three months.

The claimant began seeing another physician, Dr. Howell, in June 2003. Dr. Howell wrote that the claimant's medication regimen had "fairly well controlled his

pain....He reports that since he has been on his current regimen he has increased his physical activities. He goes for walks, etc. He also suffers from chronic anxiety disorder." The evidence demonstrates, therefore, that the claimant was physically able to return to gainful employment at that time.

After the claimant contended that he was entitled to permanent partial disability in excess of his anatomical impairment rating, the claimant began consulting with Terry Owens of Rehabilitation Management in October 2003. Ms. Owens arranged (1) physical therapy; (2) adult education; and (3) job placement assistance. By December 2003, Ms. Owens was forced to note that the claimant "has no true intentions of following through with vocational assistance." Ms. Owens' notes do not indicate, nor does any other evidence in the record show, that the claimant was depressed to the point that he could not participate in vocational rehabilitation.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's award of permanent partial disability benefits. Because the claimant refused to participate in or cooperate with an offered program of vocational rehabilitation, he shall not be entitled to permanent partial disability in excess of the

percentage of his permanent physical impairment. This claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____The Majority opinion reverses the Administrative Law Judge's decision to award the claimant permanent disability benefits in an amount of 60% to the body as a whole. The Majority largely based its decision on the finding that the claimant, without reasonable cause, refused to participate or cooperate with an offer of rehabilitation and job placement assistance. I find the claimant did not refuse to participate or cooperate with any offer of rehabilitation and that if he did so, he had reasonable cause for failing to participate. I further find that the claimant suffered from major depression during the time he was being offered rehabilitation and job placement assistance, and that if he did, in fact, fail to participate in rehabilitative services, it was due to circumstances

beyond his control as his depression prevented him from doing so. For these reasons, I respectfully dissent.

The Majority opinion finds the claimant unreasonably refused to participate in rehabilitative services. In supporting this finding, they conclude that the claimant did not suffer a compensable mental injury and did not demonstrate he was depressed to such a degree that he was unable to participate. The Majority further opined that the claimant was released to at least restricted work after his release from Dr. Johnson, implying their belief that he was able to participate in the rehabilitative services. Lastly, the Majority found that because the claimant refused to participate in rehabilitative services, he should not be awarded wage-loss benefits in excess of his anatomical rating.

First, I find that the claimant did not refuse to participate in vocational rehabilitation or job placement assistance. On March 28, 2002, Dale Thomas, Vocational Consultant, composed a letter indicating the claimant had begun actively seeking employment and been on an interview. Thomas reported that he was "encouraged by Mr. Lohman's motivation to seek employment." This record indicates that the claimant did, in fact, participate in vocational and job placement assistance as required by Ark. Code Ann. §11-10-505(b)(3). On August 6, 2002, Tanya Rutherford Owen

composed a "Progress Report", which indicated that Dr. Johnson had released the claimant to return to work but to exercise caution with regards to lifting. Owens also reported she spoke with the claimant on July 16, 2002 by telephone, and that the claimant indicated he was working, "off and on" as a supervisor for a roofing crew. Owens indicated the claimant, "indicated he was unsure of how to proceed because he was awaiting a decision from his June SSDI hearing. He did not know if pursuing work would compromise approval of his claim." Owens went on to indicate that she advised the claimant to contact her if he wanted to continue to pursue job placement.

Since the purpose of providing rehabilitative and job placement services is to help workers return to work, I find that the claimant had already fulfilled the goals of his program at that point and therefore was no longer required to participate in order to satisfy the provisions of Ark. Code Ann. §11-10-505(b) (3). The contents of Owens' report indicates that the claimant did not refuse to participate in rehabilitative or job placement services. The claimant's comments to Owens that he was working indicate that he had already found a more proficient, better mechanism to attempt to return to the workforce. Additionally, there is no indication that Owens told the claimant that he needed to continue with rehabilitative or

job placement services in the future. In fact, Owens recommended conclusion of services because the claimant had not followed up with job leads, expressed concern over returning to work due to a potential SSDI award, and because he had already been engaging in work. This release, based in part on the claimant's return to work further supports a finding that the claimant adequately performed rehabilitative and job placement assistance requirements.

After the report from Owens in August 2002, the next report regarding the claimant's vocational rehabilitation is dated October 13, 2003. The Progress Report from that date indicates that the claimant was referred for services. The author of the report indicates that he had been attempting, without success, to initiate contact with the claimant in order to resume rehabilitative services. The next Progress Report, dated October 28, 2003, indicates a meeting was conducted with the claimant on October 20, 2003 and that several actions were identified to help the claimant in returning to work. The report also indicated the claimant wanted to return to work but was concerned that he could not work full-time because his pain medication had been substantially reduced since his Functional Capacity Exam from 2002. The claimant also complained that at times his hands were numb and that he experienced soreness after driving. The claimant requested

physical therapy to strengthen his body to the point he could return to work in the future. The report also indicated that the claimant would be advised of potential jobs to apply for and was encouraged to attempt to get his GED and to go through additional employment seeking skills. The claimant subsequently submitted to an initial evaluation by the physical therapist, in order to determine what treatment was needed. The claimant attended no subsequent appointments.

On December 1, 2003, a Progress Report indicates the claimant was mailed a list of job vacancies and was instructed to attempt to gain his GED. The items were not returned by the claimant. Terry Owens, Rehabilitation Case Manager, also indicated the claimant had not availed himself of any other advised programs or services and that the claimant had failed to maintain contact. Owens recommended and successfully suspended rehabilitative services at that point.

I find that after the claimant satisfied the obligations placed upon him in 2002, he was under no obligation to resume participation in rehabilitative or job placement assistance programs again. I find that since the claimant had already participated in similar services back in 2002 and participated again in 2003, it would be unjust to require him to continue with services indefinitely.

Additionally, I note that the claimant was referred for such services at a date peculiarly close to the beginning of litigation and find that he did, in fact, participate in services in 2003. The claimant met with Owens on one occasion and went to one physical therapy session, each indicating that he did, in fact, participate with suggested services.

I also find that if the claimant did refuse services, he did so with reasonable cause. The Majority finds that the claimant failed to participate in rehabilitation or job placement assistance and that the lack of participation was not due to depression. I find that any failure to participate was likely due to depression, due to choosing not to participate because the program recommendations were not viable, and in an attempt to protect entitlement to any SSDI benefits. I further find that any failure of the claimant to participate for these reasons amounted to reasonable cause.

The claimant's depression was documented throughout the medical reports and the notes completed by those attempting to return the claimant to return to work. It appears that after the claimant's injury he went into a depressive state. Later, the claimant began abusing prescription pain medication and his doctor refused to treat him. The claimant subsequently received treatment from Dr.

Howell, but did not receive medication to treat his depression and received pain medication in smaller dosages. The time period where the claimant was receiving less medication and not being treated for his depression appears to be during the same time period in which the respondent is contending the claimant refused to participate, indicating the claimant's depressive state likely was the cause for any alleged failure to participate on the part of the claimant.

The claimant's medical records consistently indicate the claimant had struggles with depression and pain. On June 23, 2002 Dr. Short indicated that the claimant appeared, "profoundly depressed," and indicated, "I do not believe he will be able to return to work as a roofer. Dr. Short further indicated he would start the claimant on pain medication and that he offered to prescribe Prozac.

On July 2, 2002, Dr. Short changed the claimant's prescription for Prozac to, "Celexa 10 mg po q. day for several days then 20 mg a day." Dr. Short also indicated that the claimant had been increasing his dosage of OxyContin on his own, but that since the claimant was more functional at that dosage, he opted to, "increase his OxyContin from 20 to 40, 1-2 b.i.d. and increased his Roxicodone."

On September 10, 2002, Dr. Short indicated that the claimant had run out of medication early and that he was referring the claimant to speak to a psychologist. Dr. Short also indicated he was considering increasing the claimant's dosage of Celexa. On December 25, 2002 Dr Short noted the claimant's mood was "low" and added Lexapro in a dosage of an extra 10 mg a day to the claimant's list of medications.

_____The claimant was hospitalized from May 16 to May 18, 2003 due to opiate withdrawal. On May 29, 2003 Dr. Short refused to continue treating the claimant as he learned the claimant was, "misusing his pain medicine and running out early."

The claimant subsequently received treatment from Dr. Howell and Dr. Brackman. On June 27, 2003 Dr. Howell indicated he was prescribing, "OxyContin 40 mg one t.i.d., Lorcet 10/650 one q.i.d. and Xanax 1 mg one q.i.d." Dr. Howell also indicated Dr. Brackman had prescribed Zanaflex and Neurontin.

On November 25, 2003 Dr. Brackman indicated, "Anxiety/depression which is not being treated at this time. Dr. Howell has him on Xanax, but he is not taking anything to aid the depression component. He is having problems with crying spells, mood swings, and mental jumbling where he

thinks of a hundred things at one time, but cannot concentrate on one subject.”

These records exemplify that prior to Dr. Johnson dismissing the claimant, the claimant was receiving treatment for depression, whereas, after the dismissal he was not. Additionally, I note that Dr. Walz's report from April 23, 2003 indicates that the claimant's depression was severe enough to interfere with his ability to function at a job and could inhibit his dealings with others, indicating that even before the alleged refusal, the claimant's depression was severe enough to cause concern with regards to being able to return to the workforce. I note that the first evidence of the claimant's alleged refusal to participate is noted in the October 13, 2003, a time that corresponds with the period where the claimant was not being treated for depression. I further note that Owens, the respondent's own witness, testified that a person with depression would have decreased incentive and motivation. Specifically Owens said,

A: Well, generally what it does it decreases ones' incentive or motivation. They are so depressed they don't have that ability to initiate an activity. So first of all, you may not ever get up and get enough energy to go and apply for a job.

Q: As a vocational expert, if somebody approached you and asked you to help place someone and you knew that person had a current diagnosis of major

depression would you recommend that the depression be treated before you tried to place them?

A: More than likely, I would, depending on how it's exhibiting itself and it's not already being treated. If it's being treated and it's still exhibiting in the moderate to severe, then the treatment needs to be looked at to consider if there needs to be different medications, more medications, or some other psycho-therapies going on in conjunction with that before they're really able to work with you and to follow through with the things you need them to do.

Owens further testified,

Q: So if the level of major depression is moderate or above, do you agree that that's a significant potential impediment that ought to be dealt with before your services are likely to be effective?

A: I think they can go simultaneously and I have done that in the past, but it has got to come to some control to be effective for my services to be effective.

Owens' testimony, when viewed in conjunction with the medical records indicating the claimant had been diagnosed with depression and was not receiving treatment for depression, indicate that the claimant's depression would likely impact his ability and drive to cooperate with the vocational and job placement services. As the claimant had no control or choice regarding suffering from depression, I find that his alleged failure to participate

was due to circumstances beyond his control and therefore constituted reasonable cause for refusal of services.

I further find that any alleged failure to participate was likely due to the claimant's increase in pain or due to the futility of following through with the rehabilitative plan. In addition to suffering from depression, in the Fall of 2003 the claimant was also suffering from increased pain due to a decrease in pain medication. The claimant testified that when he underwent the Functional Capacity Exam in 2002 he was taking around six OxyContin per day, that he subsequently went through withdrawal, but that he no longer wanted to take large doses of pain medication because he did not want, "to go through that again." The claimant further testified that as a result of his medication being decreased, his ability to function as well was no longer there. This is corroborated by Owens' reports from October 2003 indicating that the claimant refused to increase his pain medication to avoid having problems with his medication again. Additionally, the claimant told Owens he was depressed, that he was sore after driving for a 10-mile radius and that his hands tend to, "fall asleep", even while driving. Owens also noted that the claimant's right arm seemed, "to have lost muscle tone."

The claimant's work history largely consisted of working as a propane driver and as a construction worker. The position as a propane truck driver required the claimant to lift a hose containing approximately 40 pounds of propane at a time. The claimant has an eleventh grade education, but has difficulty learning and has an IQ of 70. In 2002 the claimant's Functional Capacity Exam indicated the claimant would be able to lift up to 20 to 25 pounds at a time and restricted him from working in construction. A psychological evaluation, completed by Dr. Patricia Walz in April 2003 revealed that the claimant had "Major Depression" and "Borderline Intellectual Functioning." Walz's exam indicated that the claimant likely did not qualify as mildly retarded but that he would need assistance with finances if he received benefits. In June and September 2003, Dr. Shahim indicated the claimant would be able to return to work so long as he lifted no more than 40 pounds at a time. Based on these recommendations, in October 2003 Owens recommended the claimant apply for various jobs. The jobs largely consisted of positions for drivers, for production work, custodial work, and as a "counter person". Additionally, Owens recommended the claimant have physical therapy to strengthen his body and to attempt to get his GED.

These recommendations, which I note were peculiarly close to the start of litigation, were not consistent with the claimant's physical and mental abilities and as such, I find that any alleged failure to refuse to participate would be reasonable. It is undisputed that the claimant was still taking heavy medication in Fall 2003 in the form of OxyContin. It is also undisputed that he continued to complain of severe pain due to the decrease his medication. I find that it would be unlikely for the claimant to retain work as a driver or doing production work for multiple reasons. First, production work and delivery frequently requires twisting, bending, and lifting items continuously throughout the day. As the claimant cannot lift large amounts of weight and suffers from numbness in his hands, it is unlikely he would physically be able to perform the tasks required by those jobs. Furthermore, it is also unlikely that any employer would want the liability risk of allowing him to operate heavy machinery while taking such medication. Finally, the claimant has a borderline intelligence, has a third grade mathematical ability and has great difficulty learning math, indicating he likely would not be successful in working in positions such as a counter person where he would be required to count change. As such, it is likely any job placement assistance or rehabilitative services would not have been successful.

In conclusion, I find that the Administrative Law Judge's award of a 60% impairment rating was not based on a finding that the claimant was depressed. The claimant is not seeking additional benefits for that diagnosis, but is instead simply arguing that his depression hindered his ability to locate additional work or to participate in vocational rehabilitative services. Additionally, given the claimant's work history, age, and educational background, I find that the Administrative Law Judge's award of benefits was appropriate, even without considering the claimant's depression. For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner