

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307539

STEPHEN O. BLAKE,
EMPLOYEE

CLAIMANT

LITTLE ROCK TOOL SERVICE, INC.,
EMPLOYER

RESPONDENT

ZURICH AMERICAN INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 20, 2006

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

Claimant represented by the HONORABLE TERENCE C. JENSEN,
Attorney at Law, Benton, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE,
Attorney at Law, Little Rock, Arkansas.

Decision of the administrative law judge: Reversed.

OPINION AND ORDER

The respondent appeals and the claimant cross-appeals from an administrative law judge's opinion filed on August 11, 2006. The administrative law judge found that "As a result of his compensable injury, the claimant has sustained permanent disability in the total amount of 40%, consisting of his anatomical impairment of 9% to the body as a whole

and 5% to the body as a whole, together with his wage loss disability.”

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

The claimant, age 50 (11/10/57), had worked for the respondent as a machinist. On May 3, 2003, the claimant sustained admittedly compensable injuries to his neck and back when he slipped and fell on a wet floor, landing backwards. The respondent paid all appropriate medical benefits, temporary total disability compensation, and anatomical impairment ratings in the amount of 9% to the body as a whole for the claimant's neck injury, and 5% to the body as a whole for his low back injury.

Although the respondent accepted the claimant's neck and back injuries as compensable and paid the aforementioned appropriate benefits, it has resisted his claim for wage-loss disability benefits. Therefore, the claimant has

brought this action asserting his entitlement to these benefits.

The claimant underwent treatment for his compensable neck injury with Dr. Scott Schlesinger, who performed surgery on the claimant's cervical spine on December 9, 2003. He also provided the claimant with conservative treatment for his back injury. Ultimately, Dr. Schlesinger assessed the claimant with the aforementioned anatomical impairment ratings for his compensable injuries.

On January 30, 2006, the claimant underwent an independent evaluation with Dr. Scott Schlesinger to address recommendations for additional treatment. He noted that the claimant had persistent symptomatology in his neck and back that had remained about the same. However, Dr. Schlesinger wrote, in pertinent part:

I see no reason for any further radiologic investigation. I see no reason for any further treatment. I don't think Botox injections or any other injections are likely to be of a lasting benefit to Mr. Blake.

I think he has reached maximum medical improvement for his neck and back injuries in April 2005 and further treatment is not likely to be of any benefit. I would state this with a reasonable degree of medical certainty. He has already applied for and I have encouraged him to seek his Social Security Disability

benefits. He does not feel there is any work available for him in the category that he is restricted.

The claimant underwent a functional capacity evaluation on April 8, 2005. The results of this evaluation indicated that the claimant gave a reliable effort. The claimant demonstrated the ability to perform material handling activities at the medium level with an occasional lifting of up to 50 pounds. Prior to this, on April 14, 2004, the claimant underwent a functional evaluation which indicated he could perform light-medium physical demand work level. The evaluator noted that the claimant had passed the validity criteria, which suggested good effort and valid results.

A hearing was held in this matter on May 15, 2006. During the hearing, Bob White, a vocational rehabilitation specialist, gave testimony during the hearing on behalf of the claimant. Mr. White testified that he had interviewed the claimant, reviewed his medical documents, reports, and the deposition of Dr. Scott Schlesinger, along with his functional capacity evaluation. Mr. White stated that based on a current combination of factors, it would essentially be very difficult for the claimant to meet the physical demands

of either sedentary or light work, and in his opinion, vocational efforts are inappropriate because he does not believe they will work. Mr. White agreed that he was of the opinion that the claimant was not a vocational rehabilitation candidate and could not reenter the job market. Mr. White further agreed that his May 11, 2006 letter accurately reflects his opinions. Specifically, in this letter, he stated:

It is my opinion, based on review of the medical records and professional interview, in combination with Mr. Blakes [sic] education, age and work history, he cannot physically meet the demands of sedentary or light work and that vocational assistance will be unsuccessful and produce no results. I have no recommendations in this case.

The claimant also gave testimony during the hearing. The claimant admitted to having injured his neck and back. The claimant testified he has undergone surgery to his neck, but not for his back. According to the claimant, he continues to have problems with his neck and back, as he has pain in his neck and problems turning his head from side to side, along with tingling of the right arm.

The claimant admitted to returning to work for the respondent in 2004, and to having worked full days for only a couple of days. Thereafter, the claimant testified that

he began working four-hour days due to his physical condition.

According to the claimant, he completed the 10th grade, before dropping out of school, as he was in special classes and has problems reading and is able to divide and multiply to a certain point. The claimant testified he had worked for the respondent 19 years.

On cross-examination, the claimant admitted he does not take any prescription medication for his neck or back. The claimant agreed he was placed on layoff by the respondent in October of 2004 due to restructuring. At which point, he filed for unemployment benefits and began looking for work, primarily as a machinist or welder. He also admitted to looking for work pursuant to a list provided to him by Ms. Naylor. The claimant testified he looked for work with the Coors Company, as they run lathe machines and deal with ceramic. He also admitted to applying for work with Wal-Mart, while drawing unemployment benefits.

The claimant admitted that he did not look into retraining or job placement, which had been recommended to him. He further admitted he did not ever check with a temporary service about a job as a machinist.

He admitted that prior to being laid off by the respondent, he performed work on the grinding machine, as a knife tech, a mill job, and soldering job duties. The claimant also agreed that he worked as a supervisor for the respondent for approximately three years, maybe four years, off and on, wherein he was required to order for the department, schedule work days, train new employees and do some light soldering work.

According to the claimant, he had surgery on his neck in December of 2003. The claimant admitted he is able to read and write to a point, and that he missed his GED by three points back when he took it (years prior to his injury), but he has not tried to go back and take it again. He admitted to meeting with Ms. Naylor, and being provided a list of jobs that were available. The claimant testified:

Q. She [Ms. Naylor] had in here during the last meeting you had told her that you "were not interested in vocational assistance." Do you remember telling her that?

A. About the GED or school, whatever you want to call it.

Q. Well, she had down, "Not interested in vocational assistance. If you change your mind, please contact me" Did you ever contact Ms. Naylor?

A. No.

Upon being questioned further as to what he did to assist Ms. Naylor in finding him a job, the claimant testified, "Nothing."

The claimant essentially admitted he has not had treatment for his back or neck since his release by Dr. Schlesinger in April of 2005. The claimant admitted he is treated for asthma and has applied for Social Security Disability benefits, which is pending.

On redirect examination, the claimant testified that when he returned to work for the respondent, he was working only four hours a day due to symptoms in his left arm, back, and neck.

On recross examination, the claimant admitted that no doctor has restricted him to work only four hours a day.

The claimant's wife of two years, Sheila Blake, gave testimony. Mrs. Blake essentially testified that the claimant is limited in his ability to walk and stand for prolonged periods, as he has "good days" and "bad days." She also agreed that the claimant has problems communicating, as he stutters, and is slow catching on to what is written. According to Mrs. Blake, on various days,

the claimant contacted employers from the list of jobs made available to him by Ms. Heather Naylor pursuant to the letter dated March 30th.

Heather Naylor, a vocational specialist for the respondent gave testimony during the hearing. Ms. Naylor testified that she reviewed the claimant's medical records, including his surgical history from his fusion, as well as other physicians, including Drs. Safman and Moore, as well as his two functional capacity evaluations. According to Ms. Naylor, it was her understanding that the 2005 functional capacity evaluation showed that the claimant was capable of performing work in the medium capacity work demands. She admitted that all of the claimant's prior work has been in line with the recommendations of the FCE. Ms. Naylor testified she encouraged the claimant to obtain his GED, but it is not a necessity for getting a job as a machinist. However, she did admit that based on her experience as a rehab counselor, obtaining your GED does enhance your employability and more and more employers prefer and require that. According to Ms. Naylor, she asked the claimant if he would be interested in further services, and he stated that at that time, he was not. She testified

these services would have included interviewing skills, how to fill out applications, techniques on how to approach employers, resume development, and identification of job possibilities for him. Ms. Naylor testified she issued her first report to the claimant on February 10, 2005, wherein she indicated that she was going to check on the GED status and possibly a labor market survey. According to Ms. Naylor, she issued a labor market survey identifying job possibilities for the claimant on March 30th. Ms. Naylor essentially testified that she did not follow-up with the claimant after this because when she sent him the letter, he did not contact her asking for any further assistance and he had indicated during her meeting with him that he was not interested in her services. She also admitted that she issued a report on April 19th, indicating her goal for him, which was, "Return to the workforce on a full-time basis within the capabilities set forth by the FCE," which was the same as the one set forth in the March of 2006 letter. Ms. Naylor agreed that under either functional capacity evaluation, the claimant would be able to return to work as a machinist, which would allow him to be employed at \$16 an hour. She agreed that she would encourage the claimant to

complete his GED, look through the newspaper and find a job, register with the Employment Security office, as well as temporary agencies.

On April 6, 2006, Dr. Scott Schlesinger's deposition was taken. According to Dr. Schlesinger, he began treating the claimant in September of 2003 for his May 10, 2003 injury. He testified he performed surgery on the claimant on December 9, 2003, in the form of an anterior cervical decompression and fusion at C5-6. On March 1, 2004, he instituted conservative care for the lumbar spine with epidural injections. Dr. Schlesinger admitted to declaring maximum medical improvement in April of 2005 and having him undergo an FCE evaluation, which assessed him as being able to return to a medium category of work. He also admitted to having assessed the claimant with a nine percent rating for the cervical spine, and a five percent rating for the lumbar spine. He testified that the claimant had some disk protrusions, that were not surgical in nature but believed to be related to his injury. According to Dr. Schlesinger, he released the claimant from care on April 8, 2005, as he had nothing further medically to offer him at that time, nor did he make any specific recommendations for treatment or

any type of referral. He testified he did not see the claimant again from a workmen's [sic] comp standpoint until January of 2006. At which point, a neurological examination was performed.

On cross examination, Dr. Schlesinger testified that when he saw the claimant in January of 2006, he complained to him of neck and low back pain. He agreed that if the claimant is complaining of pain in his spine in both sitting and walking, it could be consistent with his injuries. Dr. Schlesinger also testified that complaints of dropping or mishandling objects with his hands could be attributable to old damage to his spinal cord, as well as various other complaints.

Prior to the hearing, a prehearing telephone conference was held in this claim, and as a result, a Prehearing Order was entered in this matter on March 27, 2006. The following stipulations were submitted by the parties and accepted:

- 1). The employment relationship existed at all pertinent times.
- 2). Compensable injuries occurred to the claimant's neck and low back on May 10, 2003.
- 3). An average weekly wage of \$644.00.

4). The claimant's neck injury required surgery, performed December 9, 2003, by Dr. Scott Schlesinger.

5). Permanent anatomical impairment of 9% to the body as a whole as a result of the neck injury.

6). Anatomical impairment of 5% to the body as a whole as a result of the claimant's low back injury.

7). That the claimant reached the end of his healing period as to his back injury on or about April 5, 2004.

At the hearing, the parties limited the issue to be determined to wage-loss disability. All other issues were reserved.

The claimant contended that he sustained wage loss disability substantially in excess of his anatomical impairment.

The respondent contended that the claimant did not sustained [sic] wage loss disability exceeding the level of his anatomical impairment. The respondent further contended that under §11-9-505, it has provided the claimant with rehabilitation services that were refused by the claimant, therefore, §11-9-505 bars claimant's recovery of wage-loss benefits exceeding the level of his anatomical impairment.

After a hearing before the Commission, the administrative law judge found that, "As a result of his compensable injury, the claimant has sustained permanent disability in the total amount of 40%, consisting of his anatomical impairment of 9% to the body as a whole and 5% to the body as a whole, together with his wage loss disability."

The respondent appeals and the claimant cross appeals to the Full Commission. The respondent appeals contending the claimant is precluded pursuant to Ark. Code Ann §11-9-505(b) (3), from receiving wage-loss disability. The claimant cross-appeals contending that his wage-loss disability is far greater than the 26% awarded by the administrative law judge.

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.

The administrative law judge essentially found that there was no indication that an offer of program of rehabilitation or job place assistance was made to the claimant. The Full Commission reverses this finding. We find that the claimant waived rehabilitation and refused to participate in or cooperate with an offered program of rehabilitation and job placement assistance. The 50-year-old claimant sustained compensable injuries to his neck and back on May 10, 2003. The claimant underwent fusion surgery to his neck in December of 2003, with Dr. Schlesinger, who later implemented conservative treatment for his lumbar spine injury. On April 8, 2005, Dr. Schlesinger declared that the claimant had reached maximum medical improvement and released him from treatment without any restrictions. The claimant underwent two functional capacity evaluations. The most recent FCE indicated that the claimant could perform medium level work. In January of 2006, Dr. Schlesinger indicated that the claimant did not require further radiologic investigation or treatment for his compensable injuries. The respondent has accepted a 9% anatomical impairment rating for the claimant's neck injury

and a 5% anatomical impairment rating for his back injury. The respondent's rehabilitation manager, Heather Naylor, began consulting with the claimant in February of 2005. Ms. Naylor credibly identified a number of job positions for the claimant and offered to provide him with additional job assistance services. The claimant testified that at various times he followed up on the listing. However, during his interview with Ms. Naylor, the claimant informed her that he did not wish to pursue vocational assistance. As a result, Ms. Naylor did not provide him with any additional listings or services under the program such as GED assistance, interviewing skills and resume assistance. The claimant's testimony corroborates Ms. Naylor's assertion (See testimony outlined above). While we recognize that Mr. White has opined that the claimant cannot physically meet the demands of sedentary work or light work and that vocational assistance would be unsuccessful and not produce any results, the Full Commission does not attach any weight to this opinion given all of the evidence to the contrary, as one functional capacity evaluation confirmed that the claimant is capable of performing light-medium work, and his

most recent functional capacity evaluation confirmed that he is capable of performing medium level work.

Accordingly, the Full Commission finds that the claimant simply refused and was unwilling to cooperate with rehabilitation and job placement assistance offered him by the respondent. The claimant offered no reasonable explanation for why he chose to stop working with the rehabilitation specialist. 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 therefore reversed, and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.