NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403638

DUDLEY COBBLE, EMPLOYEE — CLAIMANT

AYERS DRYWALL, INC., EMPLOYER — RESPONDENT

COMMERCE & INDUSTRY INS. CO., CARRIER — RESPONDENT

OPINION FILED APRIL 13, 2006

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

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

Respondent represented by HONORABLE MELISSA ROSS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed September 15, 2005.

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

> 1. The stipulations agreed to by the parties at the pre-hearing conference conducted on June 8, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

> 2. Claimant has refused to participate in or cooperate for reasonable cause with an offered program of rehabilitation or job placement assistance; therefore, he is not entitled to benefits for wage loss disability pursuant to A.C.A. §11-9-505(b)(3).

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, 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.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

On September 15, 2005, an Administrative Law Judge issued a decision finding that the claimant refused to cooperate or participate in vocational rehabilitation services. The Administrative Law Judge further found that the claimant was denied to wage loss benefits pursuant to Ark. Code Ann. §11-9-505(b)(3). The Majority now affirms and adopts that decision as their own.

After a de novo review of the record, I find that the claimant did not refuse to cooperate or participate in vocational rehabilitation services. In my opinion, the evidence reflects that the claimant fully cooperated in the aforementioned services and that he is motivated to return to work. Accordingly, I must respectfully dissent.

On April 7, 2004, the claimant sustained an admittedly compensable injury. The injury occurred when the claimant fell approximately 20 feet. The claimant underwent multiple surgeries as a result. His first procedure was described as,

1. Retroperitoneal approach to L1 burst fracture.
2. L1 vertebrectomy.
3. T12 to L1 fixation with Synmesh cage.
4. TLS plating, T12 to L2.

On April 14, 2004, the claimant underwent another surgery to treat his L1 bursa fracture.

On April 19, 2004, the claimant was discharged from the hospital. The DISCHARGE SUMMARY indicated that the claimant had a diagnosis of "L1 burst fracture, incomplete paraplegia." On May 25, 2004, the claimant returned for a follow up visit with Dr. D. Wayne Brooks. Dr. Brooks indicated that the claimant would continue to take Oxycontin and placed him on restrictions of lifting 25 pounds on an occasional basis and 10 pounds on a frequent basis. Dr. Brooks further indicated that the claimant should not use stilts or ladders and indicated that he would likely be unable to continue in his former occupation.

On July 12, 2004, Dr. Martin Greenberg noted the claimant was still undergoing physical therapy. He indicated the claimant could return to work with no lifting of more than 50 to 75 pounds. Dr. Greenberg continued the claimant on Oxycontin. The report also indicated the claimant had

reached maximum medical improvement and assigned a 12% impairment rating. The claimant returned to Dr. Greenberg on August 6, 2004. The report indicated that the claimant could return to work without restriction and switched the claimant from Oxycontin to Vicodin.

On October 11, 2004, Dr. Brooks indicated that he would continue the claimant on restrictions. His report noted that the claimant had returned to work but that he was having difficulty. Dr. Brooks indicated that the claimant was taking three Vidodin a day and indicted that the claimant had balance impairment. Dr. Brooks also opined that the claimant was at maximum impairment and assigned him a 25% impairment rating. Last, Dr. Brooks opined that he did not believe the claimant would be able to do manual labor on a long term basis.

On October 28, 2004, the claimant submitted to a Functional Capacity Exam (FCE). The report from the FCE indicated that the claimant cooperated in the test and that the test would therefore be an adequate representation of his abilities. The FCE report classified the claimant as being able to performed “Medium” level work. It described

that level as being able to lift 25 pounds on an occasional basis and 20 pounds on a frequent or constant basis.

The claimant was next treated by Dr. Brooks on November 10, 2004. The report from that visit indicated the claimant would continue to take hydrocodone. Dr. Brooks opined that the claimant had asked him to consider whether he should only work four days a week. Dr. Brooks indicated that the claimant could continue on “full duty” and generally agreed with the recommendations of the FCE. However, Dr. Brooks recommended that the claimant avoid using ladders and stilts.

On December 9, 2004, Dr. Brooks indicated that he was treating the claimant for pain management. He opined that the claimant suffered from cauda equina syndrome with bilateral paralysis but that the claimant suffered little paralysis. He also noted the claimant continued to have difficulty with balance and that he would continue to prescribe Hydrocodone for the claimant. Last, he noted that the claimant was undergoing occupational retraining and expressed his satisfaction with that development.

A vocational assessment was performed on December 2, 2004. A report from that date noted the claimant continued to take hydrocodone and Celebrex daily. The report provided the claimant was able to return to work so long as he had breaks for sitting and standing. It also indicated that the claimant was able to drive, to pick eggs for his parents, and to do all daily activities. The report also noted that the claimant was considering applying for social security benefits.

The report from the assessment listed the claimant's last employment wage rate as $10 per hour and noted he had no work experience other than in the drywall or construction field. The report provided the claimant, "states he has always been able to find employment and states he doesn't mind hard work." The report indicated that the claimant would be unable to work at his prior place of employment and noted his medication might impair his driving ability and judgment. The counselor noted that when she asked the claimant about retraining he indicated he was not good at school. Last, the report stated, "It is this Counselor's opinion that client is not interested in

retraining and only somewhat interested in returning to employment."

A report dated December 29, 2004, indicated that the claimant met a short term goal of contacting her with a new phone number. Little new information was provided in the report. It indicated the claimant, "states that he wants to return to work, but his actions indicate reluctance in locating employment." Despite this language, the record did not indicate the reason for the conclusion that the claimant did not want to return to work. It listed an action plan of meeting for job search/placement on January 20, 2005.

A report from February 19, 2005, indicated the claimant's file was being closed. The report indicated,

> After meeting with client, it was apparent that he does not wish to return to work. He did not want to complete the IWRP or discuss job placement. He was content to remain at home, helping his family, and going to flea markets. Until client is motivated to return to work, there is little vocational assistance that will assist him.

The report further indicated that, "when pressed to complete an IWRP or possible job search, he would not commit to doing any of vocational aspects of returning to work." Finally,

the report indicated the adjuster was recommending the claimant's file be closed.

The claimant described his past work experience as doing work that required him to use ladders and stilts and lift 60-70 pounds at a time. He said he had previously worked for a floor cleaning company and indicated that also required him to lift in excess of 50 pounds.

The claimant testified that he continued to take Ultracet and Celebrex daily he said he was having back pain and problems with losing balance. He indicated he tried to return to his prior job after being released to work but was unable to complete his duties.

The claimant testified that around the first of 2005 he had returned to do some drywall work but indicated it was lighter work than his previous work with the respondent. The claimant said that he is no longer required to lift or to use ladders or scaffolding. He described it as doing "patchwork". He testified that he usually worked two to three hours per day and said that he had earned around $9,000. He testified that he also picks eggs for around 90 minutes once per week for his parents. He said he was not

paid for that work. The claimant testified that he has not made job applications other than for his drywall patchwork. He said he was unaware of what other work he would be able to obtain and that was why he had not made applications.

The claimant denied that McWilliams recommended any particular training. He said McWilliams asked what type of work he would like to do, but did not tell him of any job openings. The claimant testified he told McWilliams he was interested in computers and said that he expressed concern with returning to school because he had previously had difficulty in school.

McWilliams testified that when completing a rehabilitation plan you would, "meet, you complete an assessment, and you start at that point, discussing job placement, job search, job leads en route to completing and signing an individual rehabilitation plan." She indicated that you would then sign an "IWRP" or individualized written rehabilitation plan.

McWilliams testified that the claimant would vary from wanting retraining or job placement. She said,

> He wanted retrained, then he'd want job placement, just depending on what we

> were talking about. When I would come up with specific jobs, like a light truck driver, which is what I think he was doing at one point, or a dispatcher or – or he could find jobs in his area, what he could be doing such as job leads. Then he would tell me he would want retraining.
>
> Okay. Then we would discuss retaining, but he would not know if he wanted – like computers, we brought that up, computer retraining. I asked him – that was a viable goal. He said, "But I can't type." I said Okay. But you can do typing"– "we can do typing. there's" – - "but you would have to go to class for the computer." He could not sit in class, he told me. He could not – - he had a problem with comprehension and he couldn't pass tests.

McWilliams indicated she had 33 years of experience in vocational rehabilitation and said the claimant would no longer be able to perform heavy work. However, she was unable to testify as to how much of the workforce was comprised of heavy duty work. McWilliams testified that she did not have a set opinion as to whether the claimant should have attempted retraining or job placement. However, she also said that she believed the claimant could go into job placement and that was the ultimate goal for vocational rehabilitation. She also

testified that she never went into job placement because the claimant was wavering back and forth between wanting job placement and retraining. She said she never discussed specific jobs or potential employers. Last, McWilliams testified that she was not surprised the claimant was working she said. “I think he was inter – I mean, I – I believe he was interested in employment. I do not believe he was interested in Vocational Rehab.”

By virtue of relying on the decision of the Administrative Law Judge, the Majority denies the claimant wage loss benefits pursuant to Ark. Code Ann §11-9-505 (b)(3). Specifically, they opine that the claimant did not refuse rehabilitation but that “his unwillingness to work with McWilliams in determining whether job placement assistance or retraining was appropriate indicated an unwillingness to cooperate in the offered program of rehabilitation or job placement assistance.” In my opinion, the claimant did not refuse to cooperate or participate in vocational rehabilitation. Instead, I find that McWilliams had the duty to assist the claimant in determining which

course of action was best and then implementing a plan for him to follow.

Ark. Code Ann. §11-9-505(b)(3) provides

> 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 my opinion, the record shows that the claimant was a motivated individual who wanted to return to work but was denied vocational rehabilitation after he failed to come up with his own program for retraining or job placement. I note that the claimant appeared to be interested in either retraining or job placement, which exhibits his flexibility and willingness to return to work. This interest in returning to work is illustrated by the fact that he ultimately found work without the assistance of vocational rehabilitation.

I also find the testimony of McWilliams to be inherently contradictory. Accordingly, I find that it should be entitled to little weight. Specifically, I note that McWilliams concluded that the claimant was not motivated in returning to work. Yet she later testified that she was not surprised he returned to work and that she believed he wanted to return to work. Her credibility is further diminished when she failed to exhibit any knowledge as to the job market for manual labor in Arkansas. I find this particularly disconcerting since she presumably is an expert in that field and was responsible for researching the market to enable the claimant to reenter the workforce.

In this instance, the Majority and the respondents argue that the claimant failed to commit to either retraining or to job placement in an apparent lack of motivation. In my opinion, this reasoning is flawed for multiple reasons.

First, in my opinion, the respondents never actually provided a program for vocational rehabilitation. McWilliams testified that she never actually offered the claimant any particular program of action. Instead, she

simply met with the claimant and then decided he was not motivated to return to work. I note that McWilliams testified that re-employment was always the goal in vocational rehabilitation. She also said she believed the claimant could have gone into job placement services and that such action was the ultimate goal of vocational rehabilitation assistance. However, despite this testimony and her testimony that she believed the claimant was interested in returning to return to work, she never implemented a job placement program or gave the claimant a list of prospective jobs or employers.

This Commission has in the past, found that when a worker's rehabilitation plan only consisted of a list of jobs without ascertaining whether the jobs were within the claimant's abilities, the claimant had not unreasonably refused to participate in an offered program of job placement assistance. Johnson v. Mid-America Packaging, Claim No. E400710, (Full Commission Opinion Filed April 17, 1997).

Certainly, in this instance the Commission should have found that the claimant did not unreasonably refuse to

cooperate in an offered program. In this instance, McWilliams did not even identify jobs for the claimant despite having knowledge of his limitations and abilities. Accordingly, if, under the rationale of Johnson, one cannot be denied when only a list of jobs are provided, then one certainly should not be penalized when even less assistance is provided.

I further find that is in error to claim that the claimant's input on his preferences somehow indicated an unwillingness to cooperate. While the claimant expressed some concern as to his ability to perform classroom work, that does not indicate he refused to do classroom work, nor does it indicate he refused to return to work or aid in developing a program. In my opinion, it simply indicates he wanted to go down a path where he would be successful and that he was simply advising McWilliams of potential difficulties.

Last, I find that McWilliams was in the best position to develop a program for the claimant. She has 33 years of experience in her field. Accordingly, it is not logical to make the claimant come up with his own program.

The claimant testified he was unsure of what options were available to him in retraining or in job placement. This is the exact reason for vocational rehabilitation. In my opinion, to make the claimant come up with his own plan for return to work or for retraining defeats the purpose of vocational rehabilitation services, and unjustly penalizes him for McWilliams' failure to do her job.

I also note that the claimant's rehabilitation program was cut off because he was allegedly uninterested in returning to work. Ironically, the claimant had already attempted to return to work on one occasion and subsequently gained employment on his own. I note that there is nothing in the record to indicate that the claimant requested such action. Instead it appears that this was a unilateral decision made by McWilliams. As such, I find that McWilliams unjustly concluded the claimant was unwilling to return to work.

In finding that the claimant is not precluded from receiving wage loss benefits pursuant to Ark. Code Ann. §11-9-505(b)(3), I find that the claimant is entitled to wage loss benefits in excess of his anatomical rating. While the

claimant has been able to return to work, he has also had a substantial reduction in wages. Likewise, as admitted by McWilliams, the claimant is no longer able to do heavy work, thus eliminating a large amount of his earning potential.

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

In this instance, the claimant sustained an injury which resulted in the respondents agreeing to pay a 25% impairment rating. The claimant has a high school education, but indicated he had difficulty with school. The claimant's

only work history is performing heavy, manual labor. His condition is such that he has to continue to take pain medication and that he has loss of balance and the inability to lift heavy items. Furthermore, he also has to have frequent breaks from standing or sitting. Despite these limitations, the claimant has managed to locate gainful employment, which shows that he is motivated to return to work. However, he has now substantially reduced his wages. Before, he was earning $10 an hour; whereas at the time of the hearing in August 2005, he estimated he had only earned $9,000 that year.

The medical records indicate that the claimant will be unable to return to his prior work. This is corroborated by the results of the claimant’s FCE and by the assessment of McWilliams. In fact, McWilliams admitted that the claimant had eliminated an entire group classification of work for which he was available. While the claimant has returned to work, his wages have been drastically reduced and his ability to be gainfully employed was greatly diminished by his admittedly compensable injury. Accordingly, I find that the claimant should have been

awarded wage loss benefits in excess of his previously accepted impairment rating.

For the aforementioned reasons, I respectfully dissent.

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SHELBY W. TURNER, Commissioner