

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210837

JOHN COLEMAN,
EMPLOYEE

CLAIMANT

PRO TRANSPORTATION,
EMPLOYER

RESPONDENT

COMMERCE & INDUSTRY INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 14, 2006

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

Claimant represented by the HONORABLE KEVIN ODUM, Attorney
at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD
WORLEY and the HONORABLE MELISSA ROSS CRINER, Attorneys at
Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and
reversed in part.

OPINION AND ORDER

The respondents appeal an administrative law judge's
supplemental opinion filed May 4, 2005. The administrative
law judge found that the claimant was temporarily totally
disabled beginning September 20, 2002 through September 29,
2003. The administrative law judge excluded from evidence a
proffered exhibit of the respondents. The administrative
law judge found that the claimant had sustained anatomical

impairment in the amount of 11% and wage-loss disability in the amount of 45%.

After reviewing the entire record *de novo*, the Full Commission affirms in part and reverses in part the opinion of the administrative law judge. The Full Commission finds that the claimant did not prove he was entitled to temporary total disability compensation. The Full Commission finds that the claimant proved he was entitled to a 4 ½ % anatomical impairment rating, and wage-loss disability in the amount of 10%. We find that the proffered exhibit of the respondents should be admitted into evidence pursuant to Ark. Code Ann. §11-9-705.

I. HISTORY

John D. Coleman, age 52, testified that he had obtained a G.E.D. and had attended college for two years. According to Mr. Coleman's testimony, his employment history mainly involved driving and manual labor. The claimant testified that he began driving for Pro Transportation in 1999.

The parties stipulated that the claimant "sustained compensable injuries to his low back, neck, shoulder, left arm, leg, and foot" on September 19, 2002.

On November 26, 2002, Dr. Carle assigned work restrictions and stated that the claimant was unable to perform commercial motor vehicle operations.

Jim White, formerly the respondent-employer's Director of Safety, sent a certified letter to the claimant dated November 27, 2002:

I have been notified by Dr. Scott Carle of Concentra Medical Center, that you are released to light duty effective 11/26/02.

This letter is to notify you that Pro Transportation has a light duty position open. Please report to the Safety Department at 0800 AM, Monday, December 2, 2002, for your assignment....

The claimant agreed at hearing that he received the certified letter.

Mr. White testified:

Q. What was the light-duty position that you had?

A. We had a job that I had set up that we had created out in the guard shack to check trucks in and out, coming in off of the yard, sedentary position.

Q. When you say "created," did you create it specifically for John or is this a job that had already been in existence?

A. No, we would have created that job for light duty....

Q. Does it require any lifting?

A. No....And 10/11, I tried calling him. 11/26, I got the release for light duty from Dr. Carle. 11/27, I sent certified mail. And 12/8, I got - Mr. Coleman called and says he wasn't coming in, still hurts.

Q. So according to your records, the first time you had talked to him after this letter was December 8th?

A. 12/8 of '02.

Q. Do you know or have any knowledge of whether John Coleman reported to work on December 2nd?

A. Oh, he did not.

The claimant began treating with Dr. Andrew Prychodko on February 10, 2003. Dr. Prychodko's assessment included lumbar back pain with radiculopathy, cervical strain, neck pain, and shoulder impingement syndrome. Dr. Prychodko stated that the claimant was unable to work from September 19, 2002 through March 7, 2003.

A lumbar MRI was taken on March 1, 2003, with the impression, "L4-5, L5-S1 disc desiccation bulge and L4-5 annular tear with associated facet hypertrophy and resultant bilateral mild lateral recess narrowing." The impression from a cervical MRI taken on March 1, 2003 was, "Minimal degenerative spondylosis especially at C5-6 level with uncinata hypertrophy, mild and resultant mild bilateral neural foraminal narrowing."

Dr. Prychodko reviewed the diagnostic studies and stated on March 3, 2003, "The case manager was here today asking about restricted work. Having spoken with Mr. Coleman about some of the administrative events he has already encountered, I advised her that right now we should pursue the physical therapy. If the employer can identify a job that might suit Mr. Coleman, and I am provided with the job description, I will be glad to review it."

Dr. Prychodko reported on April 3, 2003, "CT scan revealed a healing rib fracture, but no post-contusion pulmonary fibrosis or other parenchymal pathology." Dr. Prychodko opined that the claimant was unable to work from April 3, 2003 through May 9, 2003. On May 9, 2003, Dr. Prychodko stated that the claimant was unable to work from May 9, 2003 through July 3, 2003.

A Functional Capacity Evaluation was performed on August 27, 2003, with the conclusion, "Mr. Coleman's demonstrated efforts were submaximal and do not represent his true maximal tolerances. He did demonstrate the ability to work at least at the MEDIUM Physical Demand Classification as determined through the Department of Labor for an 8-hour day. Until Mr. Coleman puts forth maximal

effort on a consistent basis no further recommendations are warranted."

The record indicates that on September 24, 2003, Dr. Jim J. Moore released the claimant to medium work, return to work date September 25, 2003.

The claimant testified that he contacted Jim White, and that Mr. White informed him no restricted work was available. The record indicates that the claimant's employment was terminated on or about September 25, 2003 (possibly October 27, 2003). The claimant testified that he subsequently filed for unemployment, and that he applied for employment at several different places. The claimant agreed on cross-examination that he did not receive unemployment.

Dr. Prychodko stated on September 29, 2003, "Mr. Coleman has resigned himself to not being able to get further care due to administrative (sic) from AIG and is therefore deemed to be at MMI from this practical consideration."

Dr. Prychodko wrote on October 8, 2003, "His lumbar impairment is DRE Category II (Guides to the Evaluation of Permanent Impairment, 4th Edition, Ch 3 p 102) giving 5% to the whole person. The cervical impairment is also DRE Category II (Guides, Ch 3, p 104) at 5%. The other injuries

have healed and are rated at 0%. The combined whole person impairment rating is 10%."

Dr. Moore wrote on November 11, 2003, "I have also received a report from Dr. Prychodko dated 10-08-03 in which he describes suggesting an impairment rating based upon DRE Category II both cervical and lumbar at 5% each or a total of 10%. I have no quarrel with this rating. This is based upon the AMA Guidelines, 4th Edition." Dr. Moore diagnosed, "Cervical and lumbar sprain/strain."

The claimant testified that he began working at Lowe's in about November 2003.

The claimant continued to occasionally follow up with Dr. Prychodko.

The record indicates that Dr. Moore assigned a 4 ½ % permanent partial impairment rating on or about February 6, 2004. The respondents' attorney stated at hearing that the respondents had accepted a 4 ½ % permanent partial impairment rating as assigned by Dr. Moore.

A pre-hearing order was filed on August 5, 2004. The claimant contended, among other things, that he was entitled to "an impairment rating of 5% or 6% to the neck and 5% to the lumbar." The claimant contended that he "suffered a substantial wage loss when going from \$47,288.13 to \$7.90

per hour." The respondents contended, among other things, that all appropriate benefits had been paid and were continuing to be paid.

The administrative law judge scheduled a hearing for September 29, 2004 on the issues of "temporary total disability benefits (12/2/02 through 02/10/03); medical benefits subsequent to November 11, 2003; permanent physical impairment (10% to the whole body); wage loss benefits; and controverted attorney fees[.]"

The August 5, 2004 pre-hearing order stated:

All medical reports and documentary evidence, not previously identified and exchanged during the Pre-hearing Conference, relied upon by the parties and to be introduced and made a part of the record in this claim shall be identified and furnished to opposing party within seven (7) days of authorship [the date reflected on the document]. **Failure to comply with this provision of the Pre-hearing order shall result in the exclusion of the document(s).** All medical reports, medical depositions, and documentary evidence relied upon by the parties and to be introduced and made a part of the record shall be exchanged among the parties, with a copy being furnished for the Commission's file, pursuant to Ark. Code Ann. §11-9-705, seven (7) days prior to the scheduled hearing.

A hearing was held on September 29, 2004. At that time, the respondents attempted to proffer a surveillance report dated September 24, 2004. The administrative law judge stated that the "cutoff date" had been September 22,

2004. The administrative law judge denied the respondents' request for a continuance and denied the respondents' request to proffer the surveillance report.

The administrative law judge filed an opinion on December 27, 2004. The administrative law judge found that the claimant proved he was entitled to temporary total disability compensation, anatomical impairment, wage-loss disability, and medical expenses. The respondents appealed, and the Full Commission remanded the matter. The Full Commission directed the administrative law judge to "conduct those proceedings necessary to allow the respondents to proffer the video surveillance and accompanying report, and to determine whether introduction of this evidence into the record would comply with the relevant provisions of Ark. Code Ann. §11-9-705."

The administrative law judge filed a supplemental opinion on May 4, 2005. The administrative law judge found, in pertinent part:

5. The claimant was temporarily totally disabled for the period beginning September 20, 2002, and continuing through the end of his healing period, September 29, 2003, as a result of the September 19, 2002 compensable injuries.

6. The proffered exhibit of the respondents, consisting of three (3) video surveillance discs and an accompanying September 24, 2004, narrative report, was submitted subsequent to the September

22, 2004, cut-off date contained the (sic) August 5, 2004, Pre-hearing Order, and does not comply with the relevant provisions of Ark. Code Ann. §11-9-705. Accordingly, the proffered exhibit of Respondents is excluded from consideration as evidence in the record in this claim. Likewise, the proffered exhibit of the claimant offered in response to the proffered exhibit of the respondents, is also excluded from consideration as evidence in the record in this claim.

7. The claimant has sustained permanent physical impairments in the amount of 5% and 6% to the body as a whole relative to his lumbar and cervical spine injuries, respectively, growing out of the September 19, 2002, compensable injuries.

8. In addition to his anatomical impairment, when the claimant's age, education, work history, permanent restrictions and limitations are considered, the evidence preponderates that claimant has sustained a loss of earning capacity or wage loss in the amount of 45% as a result of the September 19, 2002, compensable injuries.

9. The respondent shall pay all reasonable related medical, hospital and medical expenses arising out of the injury of September 19, 2002.

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The administrative law judge found in the present matter, "The claimant was temporarily totally disabled for the period beginning September 20, 2002, and continuing through the end

of his healing period, September 29, 2003, as a result of the September 19, 2002, compensable injuries." The Full Commission reverses this finding.

The claimant contended at pre-hearing and on appeal that he was entitled to temporary total disability beginning December 2, 2002 and continuing through February 10, 2003. The Full Commission finds that the claimant did not prove he was entitled to temporary disability for this period. The claimant sustained compensable injuries on September 19, 2002. Dr. Carle released the claimant to restricted work on November 26, 2002. Mr. White credibly testified that he created a light duty position for the claimant beginning December 2, 2002. The claimant agreed at hearing that he received correspondence notifying him that this position was available. The record indicates that the employment position offered by the respondents was appropriate for the claimant's physical limitations. The claimant chose not to avail himself of this opportunity to earn wages.

The respondents on appeal cite Ark. Code Ann. §11-9-526:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion

of the Workers' Compensation Commission, the refusal is justifiable.

The respondents did not cite this statute during pre-hearing or at hearing before the administrative law judge, but the claimant does not object to the statute's inclusion on appeal to the Full Commission. The record indicates that the claimant indeed unjustifiably refused offered employment which was suitable to his capacity. The Full Commission therefore finds that the claimant did not prove he was entitled to temporary total disability compensation beginning December 2, 2002.

The Full Commission recognizes Dr. Prychodko's note in February 2003 taking the claimant off work beginning September 19, 2002. We find that this off-work slip is entitled to minimal weight when compared to the claimant's unjustifiable refusal of suitable employment beginning December 2, 2002. We also recognize Dr. Prychodko's March 2003 note, where he offered to review any suitable "job description." But suitable employment had already been offered the claimant on December 2, 2002, before Dr. Prychodko came on the case in February 2003. The Full Commission reverse the administrative law judge and finds that the claimant did not prove he was entitled to the

requested period of temporary total disability compensation. Even if the claimant remained within a healing period as of December 2, 2002, the claimant did not prove he was totally incapacitated to earn wages after his refusal of suitable employment offered on December 2, 2002.

B. Anatomical Impairment

An injured worker must prove by a preponderance of the evidence that he is entitled to an award for a permanent physical impairment. Weber v. Best Western of Arkadelphia, Workers' Compensation Commission F100472 (Nov. 20, 2003). Any determination of the existence or extent of anatomical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. §11-9-704(c)(1)(B). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A)(i).

The Commission has been directed to adopt an impairment rating guide to be used in the assessment of anatomical impairment. See, Ark. Code Ann. §11-9-522(g). The Commission therefore established Rule 34, which adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) published by the American Medical Association. To the extent that they allow subjective criteria for establishing

an impairment rating, the Guides must yield to the statutory definition of anatomical impairment. Rizzi v. Sam's Wholesale Club, Workers' Compensation Commission E515370 & E112991 (April 1, 1999).

Ark. Code Ann. §11-9-102(4)(F)(ii)(a) provides, "Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." "Major cause" means "more than fifty percent (50%) of the cause," and a finding of major cause "shall be established according to the preponderance of the evidence." Ark. Code Ann. §11-9-102(14).

The administrative law judge found in the present matter, "The claimant has sustained permanent physical impairments in the amount of 5% and 6% to the body as a whole relative to his lumbar and cervical spine injuries, respectively, growing out of the September 19, 2002, compensable injuries." The Full Commission does not affirm this finding. In correspondence of record dated February 6, 2004, the respondents asked Dr. Moore to assign an impairment rating pursuant to the Guides, Table 75. Dr. Moore's handwritten notes on the correspondence indicated that, pursuant to the Guides, he assigned the claimant a 2%

rating for the cervical spine and a 2 ½ percent rating for the lumbar spine. Counsel for the respondents stated on the record that the carrier accepted this rating. We find that Dr. Moore's combined 4 ½ percent rating complies with the Guides and is based on objective findings pursuant to Ark. Code Ann. §11-9-704(c) (1) (B).

Dr. Prychodko assigned a purported 10% whole-person impairment rating in October 2003. Dr. Moore stated in November 2003 that he had "no quarrel" with the 10% impairment rating assigned by Dr. Prychodko; however, Dr. Moore did not revise the 4 ½. percent rating he previously assigned. The Full Commission is aware of Dr. Prychodko's September 2004 deposition testimony. Dr. Prychodko testified that he had assigned a 5% impairment rating based on an annular tear at L4-5. We recognize that the March 2003 lumbar MRI showed degenerative bulging and an annular tear. Even if the compensable injury was the major cause of the degenerative bulging and annular tear, there is no provision in the Guides for assigning permanent impairment based on an annular tear. Moreover, the Commission in previous cases has cited expert medical testimony indicating that an annular tear cannot form the basis for an impairment rating pursuant to the Guides. See, Taylor v. Arkansas

Aluminum Alloys, Inc., Workers' Compensation Commission E804908 (Nov. 15, 2002); Kendrick v. Classic Contractors, Inc., Workers' Compensation Commission E606943 (March 23, 1999).

The remainder of Dr. Prychodko's deposition testimony indicates that his assessment of the claimant's anatomical impairment was based on degenerative changes in the claimant's spine, rather than objective medical findings resulting from the claimant's compensable injury. The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). In the present matter, the preponderance of evidence demonstrates that Dr. Moore's assessment of 4 ½ percent is entitled to greater weight than Dr. Prychodko's assessment at deposition of 10% anatomical impairment and 11% anatomical impairment. The Full Commission therefore does not affirm the administrative law judge's finding that the claimant sustained anatomical impairment in the amount of 11%.

C. Wage Loss

In considering claims for wage-loss disability, 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 or her future earning capacity." Ark. Code Ann. §11-9-522(b)(1).

In the present matter, the Full Commission has found that the claimant proved he was entitled to a 4 ½ percent anatomical impairment rating. The administrative law judge found that the claimant had sustained wage-loss disability in the amount of 45%. The Full Commission does not affirm this finding. The claimant is only age 52 and has two years of college credits. The claimant sustained a compensable injury in September 2002. The respondents provided light-duty work for the claimant, available beginning December 2002, but the claimant did not avail himself of this employment opportunity. The claimant's lack of motivation when appropriate work was offered impedes our assessment of his wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

The testimony at hearing indicated that the claimant was working at Lowe's. Based on the claimant's age, education, work experience, and lack of motivation to return to work for the respondents, the Full Commission finds that

the claimant sustained wage-loss disability in the amount of 10%.

D. Admission of evidence

The administrative law judge entered a pre-hearing order on August 5, 2004. The pre-hearing order explicitly stated, "All medical reports and documentary evidence ... shall be identified and furnished to opposing party within seven (7) days of authorship [the date reflected on the document]. **Failure to comply with this provision of the Pre-hearing order shall result in the exclusion of the document(s).**"

A hearing was held on September 29, 2004. At that time, the respondents attempted to enter into evidence a surveillance report dated September 24, 2004. This report clearly missed the seven-day deadline provided for in the administrative law judge's pre-hearing order. However, the administrative law judge would not even let the respondents proffer the document. This was error, as the Full Commission unanimously found in its order of remand dated March 15, 2005. The administrative law judge allowed a proffer following the remand, but excluded the surveillance evidence from the record. The respondents appeal this finding to the Full Commission.

The Commission has broad discretion with reference to admission of evidence, and our decision will not be reversed absent a showing of abuse of discretion. Brown v. Alabama Elec. Co., 60 Ark. App. 138, 959 S.W.2d 753 (1998). The Commission is not bound by technical or statutory rules of evidence. Ark. Code Ann. §11-9-705(a). The Commission should be more liberal with the admission of evidence, rather than more stringent. Bryant v. Staffmark, Inc., 76 Ark. App. 64, 61 S.W.3d 856 (2001).

We note the relevant language of Ark. Code Ann. §11-9-705(c) (2) (A): "Any party proposing to introduce *medical reports* [emphasis supplied] or *testimony of physicians* at the hearing of a controverted claim shall, as a condition precedent to the right to do so, furnish to the opposing party and to the commission copies of *the written reports of the physicians* of their findings and opinions at least seven (7) days prior to the date of the hearing."

In the present matter, the respondents did not seek to introduce medical reports, testimony of physicians, or written reports of physicians. The respondents instead sought to introduce surveillance data. The Full Commission finds that the administrative law judge should have allowed introduction of this non-medical evidence, which was

presented at the beginning of the hearing and did not violate the express provisions of Ark. Code Ann. §11-9-705. Also with regard to this non-medical documentary evidence, we note the express holding of the Court of Appeals in Bryant, supra, where the Court held that the Commission should be more liberal with the admission of evidence rather than more stringent.

The Full Commission thus admits into the record the respondents' exhibit detailing the September 2004 surveillance of the claimant. This Investigative Report essentially demonstrates that the claimant was functioning without apparent physical limitations. In Hampton v. Dee's Construction, Workers' Compensation Commission E801254 (May 22, 2003), the Full Commission discussed some surveillance evidence in holding the claimant to a 35% permanent partial disability rating. In an earlier case, Hunt v. Pinewood Nursing Home, Workers' Compensation Commission E308852 (Aug. 1, 2000), the Full Commission briefly discussed surveillance evidence in affirming an award of only 2% permanent partial disability.

The respondents in the present matter apparently rely on the surveillance report to question the claimant's credibility. The Full Commission finds that this evidence

indicates that the claimant is not entitled to wage-loss disability greater than 10%.

E. Medical Treatment

Finally, the employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

The administrative law judge found in the present matter, "The respondent shall pay all reasonable related medical, hospital and medical expenses arising out of the injury of September 19, 2002." The Full Commission finds that the claimant did not prove he was entitled to additional medical treatment after November 11, 2003, the date Dr. Moore agreed with Dr. Prychodko's assessment that the claimant had reached maximum medical improvement. We recognize that Dr. Moore and Dr. Prychodko assigned conflicting anatomical impairment ratings. Nevertheless,

permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing Quachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969).

We also recognize that the Commission can award medical treatment for continued pain even after the end of the claimant's healing period. Georgia-Pac. Corp. v. Dickens, 58 Ark. App. 266, 950 S.W.2d 463 (1997). In the present matter, however, the preponderance of evidence does not demonstrate that continued pain management or physical therapy after November 11, 2003 would be reasonably necessary in connection with the claimant's compensable injury. We thus attach minimal weight to Dr. Prychodko's speculative testimony at deposition that the claimant might require additional medical treatment in connection with his compensable injury.

After reviewing the entire record *de novo*, the Full Commission affirms in part and reverses in part the opinion of the administrative law judge. The Full Commission finds that the claimant did not prove he was entitled to temporary total disability compensation. We affirm the administrative

law judge's finding that the claimant proved he was entitled to an award for anatomical impairment, but we find that the claimant sustained such impairment in the amount of 4 ½ percent rather than 11%. The Full Commission finds that the claimant sustained wage-loss disability in the amount of 10%. We find that the proffered exhibit of the respondents should be admitted into evidence pursuant to Ark. Code Ann. §11-9-705. Finally, the Full Commission finds that the claimant did not prove he was entitled to additional medical treatment after November 11, 2003. For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(2) (Repl. 2002).

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

As indicated in the Majority's Opinion, an Administrative Law Judge held that the claimant had

sustained an anatomical impairment of 11% to the body as a whole and wage loss disability in an amount equal to a 45% impairment to the body as a whole. In addition, the Judge awarded the claimant temporary disability benefits for a period of approximately one year. The Majority has reduced the Administrative Law Judge's award of permanent disability benefits to 4.5% and 10%, respectfully, and has reversed the award of temporary disability benefits entirely. Because my de novo review of the evidence convinces me that the Administrative Law Judge's awards were correct and should be affirmed, I must respectfully dissent from the Majority's Opinion.

The first issue is whether the claimant is entitled to temporary total disability benefits. The Administrative Law Judge found that the claimant was disabled and within his healing period from September 20, 2002 through September 29, 2003. There does not appear to be any dispute that this particular finding is correct. However, the respondent has argued, and the Majority has found, that the claimant is not entitled to temporary total disability benefits during this period because of respondent made a bonafide offer of re-employment which the claimant refused. The Majority finds that this refusal justifies a

denial of temporary total disability benefits pursuant to Ark. Code. Ann. §11-9-526. That section provides, in essence, that if an injured worker is released to return to work with restrictions, and the employer offers a job within those restrictions, the injured worker cannot receive temporary total disability benefits during the time that he or she refuses to perform the offered employment.

I disagree with the Majority's decision to deny the claimant temporary total disability benefits after the claimant's treating physician, Dr. Andrew Prychodko, an occupational medicine specialist in Little Rock, Arkansas, found that he was totally disabled in February 2003. In my opinion, based upon a review of Dr. Prychodko's medical reports, it is clear that the claimant's condition had continued to deteriorate primarily because the respondent had refused to approve various physical therapy and other treatment modalities recommended by his prior treating physicians. I find that the claimant became totally disabled on February 10, 2003, the date of Dr. Prychodko's report to that effect and would be entitled to continue receiving temporary total disability benefits until Dr. Prychodko found that he was at the end of his healing period on or about September 29, 2003.

The Majority also has reduced the Administrative Law Judge's award of anatomical impairment from 11% to the body as a whole to 4.5% to the body as a whole. In my opinion, the Majority's finding as to the claimant's impairment rating is not correctly derived from the **AMA Guides to the Evaluation of Permanent Impairment**, and is based upon an opinion which does not meet the requirements of the Workers' Compensation Act.

In finding that the claimant's anatomical impairment was 11% to the body as a whole, the Administrative Law Judge was relying upon the opinions of Dr. Andrew Prychodko as set out in his written reports and more fully explained in his deposition. In testifying in the deposition, Dr. Prychodko explained the evaluations system in the **AMA Guides** using both the Injury Model rating and the Range of Motion model.

According to Dr. Prychodko, using the Injury Model contained in the **AMA Guides**, the claimant would be entitled to an impairment rating of 5% to the body as a whole based upon his lumbar injuries and an additional 5% impairment to the body as a whole based upon his cervical injuries. Dr. Prychodko further explained that this evaluation is based upon objective factors such as muscle spasms and results

from the claimant's diagnostic testing using MRI's and CT scans.

Later, during cross-examination, he was asked to reevaluate the claimant using Table 75 which is contained in the Range of Motion model. In making this evaluation, Dr. Prychodko noted that Table 75 is designed to be used in conjunction with range of motion measurements taken by the physician. As he stated, using the table by itself may not give an accurate representation of a claimant's permanent impairment since the table is not intended to be used by itself. However, using the factors enumerated in Table 75 of the AMA Guides, Dr. Prychodko found that the claimant's lumbar condition resulted in an impairment of 5% to the body as a whole, and his cervical injuries corresponded to a 6% impairment to the body as whole, for a total of an 11% anatomical impairment. The Administrative Law Judge found that this opinion was stated within a reasonable degree of medical certainty, was in accordance with the AMA Guides, and was entitled to considerable weight. Accordingly, he awarded the claimant anatomical impairment benefits based upon that rating.

The Majority is reversing the Administrative Law Judge and finding that the claimant is only entitled to 4.5%

impairment to his body as a whole. This impairment rating is derived upon what purports to be an opinion from Dr. Jim Moore, a Little Rock neurosurgeon. Dr. Moore's opinion, if it can be called that, is set out in a marginal notation in a letter sent to him by the claimant's attorney. In that letter, dated February 6, 2004, respondent's counsel comments on earlier letters from Dr. Moore and requests that he rate the claimant according to "Table 75" which (presumably referring to the table in the AMA Guides). Dr. Moore returned the letter with a handwritten note in the margin which appears to state as follows:

Table 75 AMA 4th Ed.

II

A

C1 0%
L 0%

B

C4 4%
L5 5%

Average C1 2% PPD
L 2 1/2%"

Initially, Dr. Moore appeared to be saying that the claimant had sustained a 4% impairment as a result of his cervical condition and a 5% impairment due to his lumbar condition, for a total of 9% impairment to the body as a

whole. However, Dr. Moore then, inexplicably, reduced both those impairment ratings to 2% and 2.5% for a total of 4.5%. With all due respect to Dr. Moore, I do not discern any procedure for reducing the impairment provided for in Table 75 by one-half. His handwritten notation seems to suggest that the reduction is based upon an "average" but he does not explain how this comes to be. This impairment rating does not seem to be in accordance with the AMA Guides and, in my opinion, is not one upon which we can rely based upon the Workers' Compensation Act and our own Rule which designates the AMA Guides to the Evaluation of Permanent Impairment as the rating to be used to determine the extent of permanent impairment. Once again, the AMA Guides simply do not have any basis for reducing the 9% originally set out by Dr. Moore to 4.5%.

I also note that Dr. Moore previously stated that he agreed with Dr. Prychodko's evaluation. In his letter of November 11, 2003, the correspondence apparently referred to in the letter from respondent's attorney, Dr. Moore discusses Dr. Prychodko's rating and notes that it is based upon the AMA Guidelines, 4th Edition, and states: "I have no quarrel with this rating."

Another section of the Workers' Compensation Act which is particularly relevant to this section is Ark. Code Ann. §11-9-102 (16) (B) which states that: "medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty." In this case, there is no evidence as to what degree of certainty Dr. Moore is attaching to what is asserted to be an opinion. I raise this objection since Dr. Moore's marginal notation appears to modify the impairment rating specified by the AMA Guides. There is no rational basis set out in the notation as to why he did this nor does he explain how the Guides would permit such a reduction. I believe that it is improper for us to assume that Dr. Moore is basing his impairment rating, such as it is, on any reasonable degree of medical certainty when it appears to be contradicted by not only his prior opinion, but the AMA Guides themselves. We cannot substitute what appears to be little more than guess work for a considered medical opinion.

The well reasoned opinion of Dr. Prychodko stands in marked contrast to the marginal notation relied upon by the Majority. It is obvious from reviewing Dr. Prychodko's deposition that he was very familiar with the AMA Guides and

how they are intended to relate to specific patients. Dr. Prychodko's explanations as to the difference between disability and impairment and his obvious understanding of how various physical conditions relate to the specific criteria of the Guides strongly supports his conclusion. I find that Dr. Prychodko's opinions regarding the claimant's permanent impairment is much more compelling than the handwritten notation from Dr. Moore and is entitled to much greater weight and credibility. I therefore conclude that the claimant is entitled to permanent disability benefits based upon an anatomical impairment of 11% to the body as a whole.

I also disagree with the Majority's reduction of the claimant's wage loss award from 45% to the body as a whole to 10% to the body as a whole. I find that this reduction is unwarranted and not supported by the facts of this case.

At the time of his injury, the claimant was employed as an over-the-road truck driver earning in excess of \$47,000.00 per year. Following his injury, he was off work for an extensive period of time because of limitations placed upon him by his physician. However, in late

September 2003, he was released to return to work and given a list of restrictions. Even Dr. Moore, a consulting physician chosen by the respondent, opined that he would not be able to return to his duties as a truck driver. In fact, Dr. Moore recommended, in his letter of November 11, 2003, that the claimant could only return to work as a dispatcher.

Testimony regarding the claimant's possible return to work for the respondent was provided by Jim White, the Safety Director of the respondent employer at the time of the claimant's injury. According to Mr. White, while the respondent did have a light duty work program, these were only intended as temporary jobs and that the respondent did not have any permanent jobs for the claimant to return to given his restrictions.

Given the claimant's background, it is obvious to me that he is not going to be able to return to any employments with an income anywhere near his pre-injury wages. The claimant's educational level includes a GED and two years of college. However, he has no academic degrees, nor any vocational education or certifications other than a commercial driver's license. All of the claimant's past employments required heavy lifting and other activities

precluded by his medical restrictions. In short, the claimant, who is presently 52 years of age, has no specialized training or job skills that would permit him to readily find other employments anywhere near the salary range he had prior to his injury. However, because he had no other sources of income, the claimant sought employment shortly after being released by Dr. Prychodko. As the claimant testified at his hearing, he applied for employment at numerous locations and finally found work through a temporary employment agency at a neighborhood Lowe's store. By the time of the hearing, he had become a full-time employee of Lowe's and was earning approximately \$8.25 per hour.

Obviously, the claimant's income has been significantly reduced as a result of his compensable injury. While the respondent asserts that he could find higher paying jobs using his commercial driver's license, there is no evidence of this other than the respondent's assertion. In this regard, I note that the claimant, who is obviously motivated to return to work, would have sought and obtained a higher paying job if he had been able to do so. This Commission has frequently penalized claimant's because of what is called a "lack of motivation" when they have not

returned to work at the time of the hearing. In this case, this claimant had sought and obtained custodial employment at a Lowe's store in which he spends the day dusting shelves, moving shopping carts, and performing similar tasks. These duties are within what the doctor prescribed for him and, unfortunately, this employment provides an income of approximately one-third of what he was earning prior to his injury.

At this juncture, I must also comment on certain video evidence offered by the respondent which show the claimant undertaking his duties at Lowe's. I find this video evidence to be of little probative value since it does little more than show the claimant engaging in the type of activity his doctor advised him that he could perform. That is, he is shown pushing shopping carts, dusting shelves, occasionally bending or stooping, and similar light to medium work. He is also shown riding a motorcycle and running certain daily errands. Nonetheless, I agree with the Administrative Law Judge's initial decision to prohibit the respondent from offering the surveillance video of the claimant into the record.

In the Prehearing Order dated August 5, 2004, the parties were advised that the matter was set for hearing on

September 29, 2004 and that all evidence which was to be relied upon by other parties must be provided to the opposing party within seven days prior to the hearing. The respondent did not begin the surveillance of the claimant until September 22, 2004, and did not provide the claimant copies of either the investigative report or the video until September 27, 2004, less than two days prior to the hearing. The Majority provides no clear rationale for allowing this evidence to be entered other than it is within our discretion to do so. I find that this evidence should not be admitted because the respondent could have easily obtained it well before the hearing and entered it following the correct procedure. In this regard, I note that the claimant's counsel stated in a pretrial dialogue with the Administrative Law Judge that in fact surveillance had been taken of the claimant well before the hearing but was not being tendered because it did not show the claimant engaging in any significant activity.

It is required that evidence be exchanged before the hearing date so as to avoid needless surprise and to prevent one party from gaining an unfair advantage because of their superior knowledge of the information to be offered as evidence. In this case, the claimant was given a choice

of attempting to rebut the evidence on the date of the trial or agree to a continuance which would have further delayed adjudication of this case. I find that had the respondent wanted to offer this kind of evidence, they had ample time to do so. Admission at this late date is clearly prejudicial to the claimant and the respondent should not benefit from their dilatory conduct.

In considering the video evidence, the Majority states that the investigative information, "essentially demonstrates that the claimant is functioning without apparent physical limitations." Later, the Opinion sets out a finding, "that this evidence indicates that the claimant is not entitled to wage loss disability greater than 10%." In my opinion, both of those statements are contrary to the evidentiary record. The issue to be decided here is whether the claimant, because of restrictions from his compensable injury, is able to return to his former wage earning capacity. Both Dr. Prychodko, the claimant's treating physician who is most familiar with his case, and Dr. Moore, the consulting physician chosen by the respondent, were of the opinion that the claimant could not return to his truck driving duties. Further, it was opined, based upon the claimant's FCE and the opinion of his doctors, that the

claimant work in a medium category. This includes the type of activity he was undertaking in his custodial job at Lowe's.

I believe that the Majority is confusing the claimant's functional ability with his economic loss. While it is true that the claimant can perform activities sufficient to carry out his employment duties at Lowe's, the actual limitations placed upon him preclude him from finding the types of jobs with an earning potential comparable to truck driving. Quite simply, the claimant is unlikely to find a custodial job or similar employment that pays \$47,000.00 per year. Most likely, his job future will be with employment similar to what he has obtained now which are paying him substantially less than \$20,000.00 per year. In my opinion, that is sufficient evidence to establish that the claimant has sustained a wage loss in the amount of at least 45% to the body as a whole as awarded by the Administrative Law Judge. In my opinion, this award should be affirmed.

The last issue which I feel compelled to comment on is the Majority's blanket ruling that the claimant is not entitled to any further medical treatment. I find that this ruling is overly broad and precludes the claimant from

medical treatment that he may need, and is apparently seeking, because of his injury. The claimant's medical records indicate that he is still taking certain medications to alleviate his symptoms, including pain, stiffness, and related problems. Also, he may need future medical management in form of additional physical therapy or pain management. The Commission, by making a blanket finding that he is not entitled to any medical treatment on or after November 23, 2003, is precluding the claimant from obtaining reasonable and necessary medical treatment, the provision of which is one of the stated priorities of the Workers' Compensation Act.

For the reasons set out above, I respectfully dissent from the Majority's Opinion.

SHELBY W. TURNER, Commissioner