

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311143

STANLEY JOHNSON,
EMPLOYEE

CLAIMANT

MCKEE FOODS,
EMPLOYER

RESPONDENT NO. 1

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER/TPA

RESPONDENT NO. 1

PERMANENT & TOTAL DISABILITY
TRUST FUND

RESPONDENT NO. 2

OPINION FILED JUNE 16, 2006

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

Claimant represented by the HONORABLE CONRAD ODOM,
Attorney at Law, Fayetteville, Arkansas.

Respondents No. 1 represented by the HONORABLE CURTIS
NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed November 22, 2005. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties
at the pre-hearing conference conducted on
August 24, 2005, and contained in a pre-

hearing order filed that same date, are hereby accepted as fact.

2. Claimant refused to cooperate with job placement assistance offered to him by the respondent; therefore, pursuant to A.C.A. §11-9-505(b)(3) claimant is not entitled to permanent disability benefits in excess of his permanent physical impairment rating.

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.

Therefore we affirm and adopt the November 22, 2005 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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority is affirming and adopting an Administrative Law Judge's denial of any wage loss benefits based upon the Judge's finding that the claimant did not cooperate with a program of job placement. I find that the Majority's conclusion in this regard is contrary to the Workers' Compensation Act as it has been interpreted and applied by both this Commission and the Arkansas Court of Appeals. For that reason, I respectfully dissent from the Majority's Opinion.

The claimant was involved in an admittedly job-related accident which resulted in injuries to two levels in his lumbar spine. The claimant was surgically treated for this injury and was temporarily totally disabled for a substantial period of time and incurred a large amount of medical expenses. In addition to accepting liability for those medical and disability benefits, the respondent accepted and began paying benefits based upon an anatomical impairment of 11% to the body as a whole.

The dispute in this case concerns the claimant's entitlement to wage loss disability benefits or permanent total disability benefits. The claimant contends that his compensable back injury has rendered him totally disabled from pursuing any gainful employment. However, the Administrative Law Judge held that the claimant was not entitled to any permanent and total disability benefits in excess of those he was entitled to receive for his anatomical impairment because the claimant unreasonably refused to cooperate with a program of re-employment assistance pursuant to Ark. Code Ann. §11-9-505 (b) (3). That section provides as follows:

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."

During the course of this claim, the respondent retained Re-Employment Services, a vocational consulting company from Lake Mary, Florida, to conduct a vocational evaluation of the claimant. A representative

of this company called the claimant in January 2004 and conducted an interview with him over the telephone. According to the claimant, the conversation lasted no more than about five minutes. As a result of this telephone call, the company produced a report dated January 17, 2005, which briefly summarized background information regarding the claimant, his past work history, and medical limitations. Surprisingly, the report states that retraining is not recommended because the claimant had "valuable work experience and transferrable job skills" that would assist him in seeking gainful employment. However, that report does not specify what those transferrable job skills were. In this regard, I note that the claimant has a 10th grade education and a job history that consists of laying railroad tracks and driving a truck for a variety of long and short-haul trucking companies and the respondent. All of those employments are clearly outside the claimant's limited physical restrictions and there is no indication that those occupations provided him any transferrable job skills.

An addendum to the reports list several jobs which Re-Employment Services believes that the claimant would be able to perform. In reviewing those jobs, I

note that they are all either clerical positions in the medical field, retail sales clerk, or similar jobs. All of them would apparently require some degree of computer skills and possibly additional job training. The jobs which seemed to be within the claimant's physical restrictions paid in the range of \$8.00 to \$8.50 per hour. That amount is substantially less than the claimant's previous wages of \$50,000.00 to \$60,000.00 per year.

Admittedly, the claimant did not follow up and apply for the recommended positions, and he failed to pick up certain certified mail he had received from Re-Employment Services. The failure to apply for the recommended positions and pick up the certified mail was the basis for the finding that the claimant had refused re-employment services and was, therefore, not entitled to benefits pursuant to Ark. Code Ann. §11-9-505 (b) (3).

I find that the actions of the claimant do not constitute a refusal to cooperate with job placement assistance as that term is used in the Workers' Compensation Act. In this regard, I note the claimant underwent a functional capacity assessment and was found to have given a full effort. Also, the claimant did

conduct an interview with Re-Employment Services, the company retained by the respondent.

As indicated above, the basis for concluding that the claimant did not cooperate with Re-Employment Services, is failure to follow up on a job and due to unidentified certified mail from Re-Employment Services. However, I believe that a five-minute telephone call is an insufficient method to obtain adequate information to prepare a meaningful vocational assessment.

Accordingly, it is only arguable, at best, that any job placement assistance was provided to the claimant.

However, even assuming that such was the case, I am of the opinion that the claimant's conduct was reasonable and did not constitute a bar to him receiving wage loss or permanent total disability benefits.

At the time the interview was conducted with Re-Employment Services, the claimant was receiving total disability benefits from the railroad retirement and disability program (the claimant was apparently receiving these benefits in lieu of Social Security because of his long employment with the railroad prior to his career as a truck driver). The claimant testified at the hearing that his disability benefits were in the amount of \$1,850.00 per month. This income

is substantially higher than the income the claimant would have received from the employment recommended by Re-Employment Services. Obviously, the claimant would have been foolish to forfeit these benefits in an attempt to obtain employment at jobs which he was clearly unqualified to perform.

In Alewine v, International Fire Protection, Full Commission Opinion July 21, 2003 (E906048), we affirmed an Administrative Law Judge who had awarded a claimant wage-loss disability benefits and rejected the respondent's argument that his conduct violated Ark. Code Ann. §11-9-505(b)(3). In that case, the claimant was receiving disability benefits from the Social Security Administration and a labor union disability fund. He declined to seek the recommended employment from a vocational evaluation company and we held that this refusal was justified. In reaching that conclusion, we stated as follows:

As the respondents' brief indicates in great detail, the respondents' theory that the claimant failed to cooperate with efforts at his rehabilitation appears to be based to a large extent on the claimant's lack of response to a "deadline" imposed by the respondents' vocational rehabilitation consultant, Gay Signoff, concerning a decision to further pursue rehabilitation and/or job placement.

We are not persuaded from this evidence that the claimant refused to participate in, or cooperate with, rehabilitation efforts without reasonable cause. We point out that the record actually reflects that the claimant did participate in a vocational rehabilitation assessment provided by the respondents' hand-selected provider. As noted above, the claimant has been approved for Social Security and has received disability benefits from a union contract. The claimant elected to continue to receive these additional benefits rather than try to return to work at a sedentary job for reduced wages. We find that the claimant's lack of response to Mr. Signoff's "deadline" communications, apparently prepared during a period in anticipation of litigation, does not arise to an unreasonable lack of cooperation with rehabilitation or job placement, as the respondent suggest on appeal."

See also Lohman v. SSI, Inc., ___ Ark. App. ___, ___ S.W. 3d ___, (March 15, 2006).

In short, it is my opinion that the job openings highlighted by the vocational report are really nothing more than a list of job openings for which the claimant, who had a 10th grade education, is clearly not qualified to perform. There is nothing in his background to suggest that he has any aptitude or ability in computer data entry or retail sales, and it is unlikely that he could be employed in such a capacity. Further, in order to accept the suggested employment, the claimant would have to accept a

substantial reduction in his income. That reason has previously been held by this Commission to justify a refusal to pursue such employment. On that basis, I would reverse the Administrative Law Judge's finding that the claimant is disqualified from any permanent disability benefits in excess of those he is entitled to receive based upon his anatomical impairment.

I would further find that the claimant's job-related injuries have caused him to be permanently and totally disabled. In this regard, I note that he is clearly unable to return to his former employment as a truck driver or railroad construction worker and I do not believe that he has any other viable or transferrable job skills.

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

SHELBY W. TURNER, Commissioner