

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206578

RONALD ROGERS,
EMPLOYEE

CLAIMANT

OUACHITA ROCK, INC.,
EMPLOYER

RESPONDENT

FIRST COMP INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 23, 2006

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

Claimant represented by the HONORABLE ORVIN FOSTER,
Attorney at Law, Mena, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed August 5, 2005. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 11, 2002, the relationship of employee-employer-carrier existed between the parties.
3. On June 11, 2002, the claimant earned wages sufficient to entitle him to

weekly compensation benefits of \$400.00 for total disability and \$300.00 for permanent partial disability.

4. On June 11, 2002, the claimant sustained various compensable injuries to his thoracic spine, right shoulder, and right wrist. He also subsequently experienced a compensable consequence, in the form of complex regional pain syndrome or reflex sympathetic dystrophy involving his right upper extremity.
5. There is no dispute, at the present time, over the claimant's entitlement to reasonably necessary medical services for these compensable injuries.
6. There is no dispute, at the present time, over the payment of temporary total disability benefits.
7. The claimant's healing periods from the effects of his various compensable injuries had ended by June 9, 2003.
8. The respondents have voluntarily paid permanent partial disability benefits for a permanent physical impairment of 6% to the body as a whole and 20% to the arm below the elbow.
9. The greater weight of the credible evidence proves that the claimant's compensable injuries were the major cause of permanent physical impairment in the amount of 20% to the arm below the elbow for the compensable wrist injury, 5% to the body as a whole for the compensable thoracic injury, and 7% to the body as a whole for the compensable right shoulder injury. The claimant has failed to prove that he has experienced any permanent physical impairment as a result of his compensable consequence of reflex sympathetic dystrophy. The foregoing assessments of permanent physical impairment are based upon objective and

measurable physical findings, give no consideration to pain or (in the case of the thoracic injury) to loss of range of motion, and are calculated in a manner that conforms to the official rating guide for this jurisdiction.

10. The greater weight of the credible evidence fails to prove that the claimant has been rendered permanently totally disabled as a result of the effects of his various compensable injuries.
11. The greater weight of the credible evidence also establishes that the claimant has experienced an additional permanent partial disability for permanent functional disability or loss of wage earning capacity in the amount of 12% to the body as a whole. This degree of permanent functional disability or loss of wage earning capacity is based solely upon the claimant's compensable "unscheduled" injuries to his thoracic spine and right shoulder.
12. The claimant is entitled to an overall permanent partial disability benefits (sic) for a permanent partial disability of 20% to the arm below the elbow, and 24% to the body as a whole (this latter amount includes permanent partial disability benefits for both permanent physical impairment and permanent functional disability or loss of wage earning capacity).
13. The respondents have controverted the claimant's entitlement to permanent disability benefits in excess of those for a permanent partial impairment of 20% to the arm below the elbow and 6% to the body as a whole.
14. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the permanent partial

disability benefits herein awarded in excess of 20% to the arm below the elbow and 6% to the body as a whole.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 5, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. §

11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a 5% impairment to the body as a whole for his compensable thoracic injury, a 7% impairment to the body as a whole for his shoulder injury, and that he is entitled to wage loss disability.

Based upon my de novo review of this claim, I find that Dr. Bruffett, using Table 75 of the AMA Guides, assigned the claimant a 2% rating on April 23, 2003, for his thoracic spine fracture. On June 3, 2003,

Dr. Pearce opined that the claimant had reached maximum medical improvement, was in no further need of treatment, and assigned the claimant with a permanent physical impairment rating of 7% to the claimant's upper body for his shoulder injury, which translated into 4% to the body as a whole, which he later changed to reflect 0% permanent physical impairment to the body as a whole for the claimant's shoulder injury. Although the Administrative Law Judge suggested that Dr. Pearce was somehow influenced to change his mind concerning the claimant's degree of physical impairment, the record is devoid of evidence that supports such an assumption. Then, on May 11, 2004, almost a year later, Dr. Pearce returned with a revised rating of 11% to the claimant's upper body, which translated into 7% to the body as a whole. Although the Administrative Law Judge found this to be the most accurate rating because of Dr. Pearce's use of a goniometer, the Administrative Law Judge acknowledged that there had been no change in the claimant's condition since the time of his first rating. The fact that there had been no appreciable changes in the claimant's physical condition was, in fact, the Administrative Law Judge's basis for finding that the claimant's healing period had ended no later June 9, 2003. Further, although Dr. Pearce's May 11, 2004,

calculation was supposedly founded on purely objective findings, in his report he makes numerous references to the claimant's subjective complaints of pain. That there were no objective changes in the claimant's physical condition as of May 2004, indicates that complaints of pain were a major consideration in Dr. Pearce's final impairment rating.

In regard to the rating assigned by Dr. Bruffett, concerning the claimant's spinal injury, a review of the AMA Guides, 4th edition, reveals that this rating is well founded and accurate. More particularly, Dr. Bruffett used that portion of the Guides that most precisely reflects the claimant's actual degree of physical impairment. In addition, a review of Dr. Short's rating shows that it is confusing and difficult to follow insofar as it appears to combine the rating for the claimant's thoracic spine, together with his scheduled wrist injury, to arrive at a total rating for the claimant's body as a whole for his upper extremities. Obviously, the claimant's scheduled wrist injury should not be considered in a determination of impairment to the body as a whole. Therefore, Dr. Short's impairment rating concerning the claimant's "upper extremity" is erroneously founded and should not be taken into consideration. Ark. Code Ann. §11-9-522;

See also, Anchor Construction. Co., v. Rice, 252 Ark. 460, 479 S.W.2d 573 (1972). Finally, the medical records demonstrate that the opinion of Dr. Bruffett should be given greater weight than that of Dr. Short. Dr. Bruffett treated the claimant extensively throughout the course of his recovery, whereas, Dr. Short saw the claimant only one time for the sole purpose of assessing his impairment. Therefore, Dr. Bruffett is better qualified to offer an opinion based upon his professional observations of the claimant's condition and progress. Therefore, I find that the claimant's award of benefits based upon physical impairment thoracic spine should reflect the 2% rating assigned by Dr. Bruffett.

However, in regard to the claimant's impairment for his shoulder, whereas Dr. Short was unequivocal in his opinion that the claimant should receive a rating of 4% to the body as a whole for this injury, the claimant's treating physician, Dr. Pearce, offered conflicting opinions. Although Dr. Pearce waffled in his opinion regarding the extent of the claimant's anatomical impairment for his shoulder, his original rating of 4% was the same as that assigned by Dr. Short. Applying the Administrative Law Judge's reasoning in determining the end of the claimant's

healing period, it is apparent that Dr. Pearce's initial rating of 4% should be adopted over his final rating of 7% which was assigned almost a year later. Essentially, Dr. Pearce opined that the claimant had reached maximum medical improvement for his shoulder injury as of June 3, 2003, had sustained a permanent physical impairment of 4% to the body as a whole as a result of this injury, and released the claimant from further treatment and recommended that he continue home exercises.

Approximately one year later, the claimant returned to Dr. Pearce with subjective complaints of pain, wherein Dr. Pearce stated that a recent MRI showed no objective changes in the claimant's physical condition. As the Administrative Law Judge stated, "Clearly, a mere continuation in the claimant's chronic symptoms from this permanent injury is not sufficient, in and of itself, to extend the claimant's healing period."

Applying this same logic to the claimant's impairment rating, clearly the mere continuation in the claimant's chronic symptoms, absent objective medical evidence that the claimant's shoulder condition deteriorated, is not sufficient, in and of itself, to increase the claimant's degree of anatomical impairment a year after he reached maximum medical improvement and was released from further treatment. Both Drs. Pearce and Short opined the

claimant sustained 4% permanent physical impairment to his shoulder as a result of his compensable injury. Furthermore, the respondent, in good faith, accepted and paid this 4% rating. The medical evidence shows no objective changes in the claimant's condition from June of 2003 to May of 2004. Therefore, I find that the award of disability benefits based on a 7% permanent physical impairment for the claimant's right shoulder should be modified to reflect an award based on 4% permanent physical impairment to the body as a whole.

Last for consideration is the issue of wage loss benefits. The Administrative Law Judge found that the claimant has proven by a preponderance of the evidence that he is entitled to 12% functional disability benefits above and beyond his anatomical impairment. However, my review of the record does not support such a finding. The claimant was unwilling to participate in efforts by Ms. Naylor, a vocational consultant, to assist him with job placement. Pursuant to Ark. Code Ann. §11-9-505(b)(3), no employee who 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. Moreover, the Commission may take into account the claimant's refusal to pursue rehabilitation in determining his degree of disability where that refusal hinders the Commission's attempts to assess the extent of disability. Second Injury Fund v. Robinson, 22 Ark. 157, 737 S.W.2d 162 (1987). Here, the claimant's refusal to follow up on job opportunities furnished by Ms. Naylor, and his failure to respond to Ms. Naylor's repeated attempts to communicate with him about job placement, clearly demonstrates that the claimant, without good cause, failed to participate in or cooperate with job placement assistance. Moreover, the claimant's refusal to attempt to return to his former occupation on a trial basis impedes the Commission's ability to fully assess the claimant's disability. In a transparent attempt to exonerate himself, the claimant testified that he did not follow Dr. Bruffett's recommendation to return to his former occupation on a trial basis because, "Dr. Bruffett ain't never rode no bulldozer." The claimant added to that bold assumption by stating, "And Dr. Bruffett's back don't hurt like mine does." The claimant could not remember Ms. Naylor recommending that work hardening might enable him to return to normal work activities. However, Ms. Naylor testified that when she approached

the claimant with this proposal, he informed her that he did not want to attempt to go back to heavy equipment operation. Moreover, Ms. Naylor testified that it is her professional opinion that the claimant is fully capable of returning to a medium capacity occupation, based on the results of his functional capacity evaluation and the fact that he is under no medically imposed restrictions.

The claimant testified that he still has his CDL license, and he admitted that he is under no known medical restriction that would prevent him from driving a truck. The claimant further admitted that he was under no known medical restriction that would prevent him from operating heavy equipment, such as a backhoe or grader. The claimant finally admitted that he was under no current medically imposed work restrictions whatsoever. He further admitted that he did not follow up on any of the job opportunities that Ms. Naylor had provided for him, nor did he follow up on her recommendation to attempt work hardening in his former occupation. When asked why he had not pursued one job in particular, which was a supervisory position for a construction company, the claimant testified that he did not want to spend time away from home. According to the claimant, he

had quit such a job prior to his compensable injury due to the travel involved.

At the time of the hearing, the claimant stated that he had completed a beginner's course in computers at a local community college, and that he was planning to attend another such class in the near future. The claimant agreed that he felt compelled to acquire some computer training in hopes of someday working in that field. The claimant further agreed that he has applied for social security disability benefits, which have thus far been denied.

The above clearly demonstrates the claimant's unwillingness to participate in Ms. Naylor's job placement assistance. Moreover, none of the claimant's treating physicians have placed restrictions on the claimant that would prevent him from working in some capacity, and Dr. Bruffett has even recommended that the claimant should attempt to return to work in his former occupation. Yet, the claimant has made no earnest effort to return to work whatsoever subsequent to his compensable injury, even though he has long since reached the end of his healing period and been released to return to work without restrictions. Therefore, I find that the claimant has refused to participate in job placement assistance, and therefore his claim for wage

loss benefits is barred under Ark. Code Ann. §11-9-505. Even if the claimant's wage loss claim was not barred, a finding which I do not make, the claimant's lack of interest in pursuing employment and his negative attitude in looking for work would act as impediments to our full assessment of wage loss.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner