

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402502

LARRY BUTLER,
EMPLOYEE

CLAIMANT

CONTINENTAL EXPRESS,
EMPLOYER

RESPONDENT

GIBRALTAR NATIONAL INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 2, 2007

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

Claimant represented by the HONORABLE M. SCOTT WILLHITE,
Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD
WORLEY, Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed September 21, 2006. The administrative law
judge found that the claimant failed to prove he was
entitled to wage-loss benefits or vocational rehabilitation
benefits. After reviewing the entire record *de novo*, the
Full Commission affirms the administrative law judge's
finding that the claimant did not prove he was entitled to

vocational rehabilitation. We reverse the administrative law judge's finding that the claimant did not prove he was entitled to wage-loss disability. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 5%.

I. HISTORY

Larry Donnell Butler, age 45, testified that he was a high school graduate and subsequently attended the University of New Orleans for two years, where he studied philosophy. Mr. Butler then became involved in what he described as the Black Student Movement, working for such causes as nuclear disarmament and clean air and water. The claimant testified that he then took general studies for about a year at Sojourner-Douglass College.

The claimant testified that he earned an Associate of Arts at Tallahassee Community College before going full-time into trucking. The claimant testified, "I decided to go school (sic) to drive trucks and to write westerns." The claimant testified that the majority of his adult work history involved truck driving. However, the claimant testified that he had a certificate from Writer's Digest School in fiction writing and the National Radio Institute in non-fiction writing.

The claimant testified that he began working for Continental Express in about December 2002. The parties stipulated that the claimant sustained a compensable back injury on March 1, 2004. The claimant testified that he was involved in a motor vehicle accident. A physician's clinical impression on March 1, 2004 was "Strain (L low back)."

The claimant was treated conservatively.

An x-ray of the claimant's lumbar spine was taken on March 2, 2004, with the following impression: "1. Incomplete sacralization of L5 with bilateral anomalous articulation. 2. Mild narrowing L4-5 and L5-S1 disc spaces. 3. Negative for fracture. 4. Straightened lumbar lordosis suggesting muscle spasm."

The record indicates that the claimant underwent a course of physical therapy beginning in June 2004.

Dr. Allen C. Dukes assessed the following on September 28, 2004: "Lumbar disc syndrome with a small herniations (sic) at L4-5 and L5-S1 without any radiculopathy whatsoever....The patient has reached MMI as of today. We will now request a permanent impairment rating and request an appointment to see Dr. Mauro for this to be done as soon as possible."

The parties stipulated that the claimant reached maximum medical improvement on September 28, 2004. The claimant testified that he did not return to work for the respondent-employer.

Dr. Kirk J. Mauro evaluated the claimant on October 11, 2004:

Mr. Larry Butler is a 42-year old, right-handed black male who tells me on 3/1/04, he believes he was in North Dakota, driving a truck for Continental Express (semi), when he was in a motor vehicle accident involving another semi-tractor trailer. He was wearing a seat belt. He denies any head trauma or loss of consciousness....He complains of ongoing pain in the cervical and lumbar area....A cervical MRI scan reveals some degenerative changes and facet abnormality but the lumbar MRI reveals a two-level disc herniation at L4-L5 and L5-S1. The patient, apparently, was treated conservatively. He had no evidence of radiculopathy and no surgical intervention was required.

He has never returned to work. He lives alone. He is independent with feeding, grooming, dressing and bathing. He is able to do cooking, cleaning and laundry, with pain and discomfort. He has increasing low back pain with bending, lifting and carrying. He has not had any falls....He complains of occasional tingling dysesthesia in the right posterior thigh and occasionally into the right medial foot....His low back is worse than the neck....

He can walk prolonged distances. He tells me that he walks in excess of six blocks. He can sit for greater than one hour, with pain and discomfort and occasional spasm in the low back. He denies any paracervical spasm.

He had a previous low back injury in 1994, which resolved after seven to ten days of rest....The patient admits his overall symptomatology has not changed in greater than 60 days.

Dr. Dukes documents the patient was at maximum medical improvement on 9/28/04....

He has an Associate Degree from college. He is able to read and write....

IMPRESSION: Work related motor vehicle accident, occurring 3/1/04, with two-level documented lumbar disc herniation, with musculoligamentous injury to the paralumbar spine, with occasional complaints of cervical discomfort, without objective abnormality.

The patient is at maximum medical improvement. I agree with Dr. Dukes, as of 9/28/04. Using the 1996 Florida Guidelines, I refer you to page 12, a single level lumbar disc herniation equals a 6% whole person impairment, but because there is actually two levels of disc herniation, an additional 1% would be appropriate (see page 13) and, therefore, the patient is deserving of a total 7% whole person impairment, for a two-level disc herniation, directly related to the events of 3/1/04.

There is no indication that surgery is needed or necessary.

No impairment is appropriate for the cervical spine, based upon the fact that the patient does not have rigidity or spasm.

I find no reason to believe this patient has evidence to suggest traumatic brain injury....

As related to work employability, the patient should have an FCE, but there is no reason to believe he cannot return to employment, based upon all current objective findings.

Dr. Dukes followed up with the claimant and stated on October 21, 2004, "We reviewed an impairment rating study done by Dr. Mauro with the patient and with his case manager. They understand and Mr. Butler has reached MMI as of September 28, 2004. Mr. Butler may now return to work at a medium level capacity."

A physical therapist noted the following on November 19, 2004: "Functional capacity evaluation completed in 2 hours and 15 minutes. Test terminated by this evaluator secondary to patient yelling obscenities to this evaluator. Patient was asked to leave the clinic. Overall test was not valid secondary to inconsistencies with static tests, self limiting behaviors leading to incomplete tolerance tests and incomplete Waddell's testing."

Dr. Mauro wrote to an attorney on January 20, 2005:

Mr. Brown (sic) was not able to complete the functional capacity evaluation. His exam, unfortunately, resulted in him being very angry and frustrated. He had some inconsistencies, and it was felt the patient was capable of light to medium duty capacity, but further discussions could not be obtained because of the lack of completion of the test.

The patient presents today and I discussed with him repeating the test. He absolutely disagrees. He tells me that he cannot do it and that he will not proceed. We discussed his ongoing pain in the low back area. He is aware that he has a two-level disc herniation. I offered him the

possibility of seeing an anesthesiologist or a surgeon. He told me that he doesn't want anyone sticking any needles in him or cutting on him.

The patient is unchanged as compared to previous evaluation.

IMPRESSION: Work related motor vehicle accident, occurring 3/1/04, with a documented two-level lumbar disc herniation, with associated pain and discomfort....

Under the AMA Guidelines, the patient would be deserving of a 5% whole person impairment (Fifth Edition, page 385, category-II, because of the disc herniation without radiculopathy). The patient may work in a light to medium capacity job, based upon the incomplete information from the FCE. Unfortunately, we cannot get further opinion.

The parties stipulated that the claimant had been assigned a five percent (5%) impairment rating, which rating had been accepted and was being paid. The claimant testified, "I was paid permanent partial disability for so many weeks and then it cut off."

The claimant underwent another functional evaluation on February 11, 2005: "Functional capacity evaluation was completed in 2 hours and 45 minutes. Mr. Larry Butler did not show any physical distress and was able to leave this testing site under his own power. Mr. Butler demonstrated consistent effort throughout the evaluation. As stated above, he demonstrated lighth-medium (sic) physical demand

level. All reliability tests were valid rendering this test valid. Mr. Butler scored 1 out of 5 in Waddell's testing, indicating the lack of non-organic symptomology."

The claimant followed up with Dr. Mauro on February 23, 2005: "The patient presents today, and he completed his outpatient functional capacity evaluation. Overall, this reveals the patient is capable of light to medium duty work, with 37 pounds of lifting. The patient and I discussed that he has a known two-level disc herniation. He was previously provided an impairment rating. He tells me that he is trying to decide that to do, concerning his employability."

Dr. Mauro wrote the following on May 31, 2005:

It is my medical opinion, as a Board Certified Physiatrist, that the patient does have permanent injury and impairment directly related to the events of March 1, 2004. I do [not] believe this patient is capable of returning to long distance truck driving. He would have difficulty with recurrent getting in and out of the truck, prolonged sitting, using the equipment, such as moving tarps or unloading materials from his truck. The patient does have permanent restrictions directly related to the events of March 1, 2004.

The bracketed "not" seen above was handwritten on Dr. Mauro's letter.

On July 25, 2005, the claimant applied for part-time employment with The Research Network. The claimant

testified that he took surveys over the phone for Research Network, his first job after leaving Continental. The claimant testified that he worked four to six weeks for Research Network, earning minimum wage part-time.

The claimant testified that he subsequently worked for a few months with Association of Community Organizations for Reform Now (ACORN).

The claimant followed up with Dr. Mauro on September 15, 2005:

As previously stated, the patient was not able to return to his long-distance truck driving job. He tells me he is currently employed, 30 to 40 hours per week, doing phone surveys, primarily sitting, in a sedentary to light duty type job. He complains of recurrent and low back pain and discomfort. He tells me today he wants to see someone else....

No examination occurred. The patient, once again, was angry, frustrated and raising his voice. The patient tells me that he wants to try massage therapy, and I gave him a prescription for six visits. He asked me about going to aroma therapy and some type of integrative homeopathic, and I told him that I would not order this....

I am releasing him from my care. He is referred to Dr. Alexander or Dr. Martin....

A representative of "Qwik Truk" mailed the following to the claimant's attorney on April 26, 2006:

Mr. Butler called this morning and indicated that you wanted the start up information, for being a broker or agent, as well as the informational DVD

and other materials that we have available.

I am faxing you the start up information....We hope that Mr. Butler will be able to attend school and make a successful start on a new career.

The claimant testified on direct:

Q. What position have you identified that you might like to pursue in the trucking industry now?

A. Trying to be a broker....

Q. Have you submitted some documents to me that we in turn submitted to the Court for consideration on a position that you're trying to pursue?

A. Yes....

Q. How much do you think it would cost?

A. I think about thirty-two thousand (\$32,000) to set it up....

Q. Were you attempting to pursue a school to put you in a position to learn this occupation?

A. Yes, they've got a school for it. I asked Continental too if they thought they had something like that, and they said not right then. I felt kind of bad about it, you know what I'm saying, because that would put me working for another trucking company doing that, but you know, I've got to learn something. I'm a man without a career. All I've got is minimum skills now.

A pre-hearing order was filed on May 1, 2006. The claimant contended that he sustained a compensable injury to his back on March 1, 2004. The claimant contended that he was entitled to attorney's fees, wage-loss benefits,

rehabilitation, and reimbursement for mileage. The respondents contended that all appropriate benefits had been paid. The respondents contended that there was an overpayment of permanent partial disability benefits in the amount of \$3,060.00, and that the respondents would be seeking a credit for that overpayment in the event the claimant was found to be entitled to additional benefits.

The parties agreed to litigate the following issues: "1. Whether claimant is entitled to wage-loss benefits. 2. Whether claimant is entitled to vocational rehabilitation. 3. Claimant reserves all other issues, including reimbursement for mileage. 4. Attorney's fees."

A hearing was held on June 22, 2006. The claimant testified that he was working for a business named Entropy, delivering newspapers to vending machines and to stores. The claimant testified that he was earning about \$1,000 monthly, working seven days a week, two to five hours a day. The claimant testified that he was physically unable to resume work as a truck driver for Continental.

The respondents' attorney questioned Stephen Pete Campbell, executive vice-president of Continental Express:

Q. Are you familiar with Mr. Butler?

A. I've met Mr. Butler once or twice, yes....

Q. Do you recall at any point in time him contacting you regarding return-to-work efforts subsequent to September 28, 2004?

A. I do not....

Q. Are there trucking companies out there who have jobs, including Continental, but other trucking companies, who would be available to hire someone not having to lift more than thirty-seven pounds?

A. A competitive route or a bread route come to mind. It would be light duty trucking....

Q. And do you, in fact, for Continental have any jobs that are out there that don't require any unloading or loading of the trucks?

A. If we have city jobs all they do is deliver trailers in the city of Little Rock....

Q. To your knowledge did Mr. Butler ever make any effort whatsoever to return to work at Continental?

A. I have no knowledge of that.

The claimant's attorney cross-examined the witness:

Q. Mr. Campbell, are you here to put Mr. Butler back to work?

A. Mr. Butler, if he'd like to come back to work he would need to contact our recruiting and rehire department. We would recruit him like any other driver. We could go through the process....

Q. And was Mr. Butler terminated?

A. He was terminated for lack of contact. We didn't hear from him, and I have the date here.

Q. Now did you have someone from Continental attempt to contact him to determine whether he was coming back?

A. Yes.

Q. Okay. And what was the response?

A. That person's name is Leah Burton and she got no response....

The administrative law judge found, in pertinent part: "6. The claimant has failed to prove by a preponderance of the evidence that he is entitled to wage-loss benefits; 7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to vocational rehabilitation benefits."

The claimant appeals to the Full Commission.

II. ADJUDICATION

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, 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 future earning capacity. Ark. Code Ann. §11-9-522(b)(1).

Ark. Code Ann. §11-9-505(b) provides:

(1) In addition to benefits otherwise provided for by this chapter, an employee who is entitled to receive compensation benefits for permanent disability and who has not been offered an opportunity to return to work or reemployment assistance shall be paid reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation if the commission finds that the program is reasonable in relation to the disability sustained by the employee.

The administrative law judge found in the present matter:

6. The claimant has failed to prove by a preponderance of the evidence that he is entitled to wage-loss benefits;
7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to vocational rehabilitation benefits.

The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 5%. The claimant is only age 45 and has taken a number of college-level studies. He has an associate of arts degree from a community college, in addition to having earned certificates for writing. The claimant testified that his work history primarily involves driving a truck. The claimant was involved in a work-related motor vehicle accident on March 1, 2004, and the parties stipulated that the claimant sustained a compensable back injury on that date. The claimant was treated conservatively for a low-back strain.

The parties stipulated that the claimant reached maximum medical improvement on September 28, 2004, but the claimant did not return to work for the respondent-employer. On October 21, 2004, Dr. Dukes opined that the claimant could return to work at a medium-level capacity. Dr. Mauro assigned a 5% anatomical impairment rating on January 20, 2005. Neither party on appeal questions the validity of this rating. The parties stipulated that a five percent (5%) impairment rating had been accepted and was being paid. A functional capacity evaluation on February 11, 2005 indicated that the claimant could perform light to medium work. Dr. Mauro reviewed the functional capacity evaluation and stated on February 23, 2005, "this reveals the patient is capable of light to medium duty work, with 37 pounds of lifting."

The claimant has worked for at least two different employers after being pronounced at maximum medical improvement. The preponderance of evidence before the Commission demonstrates that this 45-year-old college-educated claimant is capable of performing at least light to medium duty work and should be able to secure steady gainful employment. However, the record also indicates that the claimant cannot return to his prior work as a long-haul

truck driver. Dr. Mauro did not think that the claimant could resume work as a truck driver. Mr. Campbell for the respondents testified that the claimant's employment had in fact been terminated. The record indicates that the claimant did not attempt to perform even light work for the respondents after being pronounced at maximum medical improvement. When the Full Commission considers the claimant's relative youth, his education, his diverse work history yet demonstrated lack of motivation in returning to full-time work, and his 5% anatomical impairment, we find that the claimant proved he sustained additional wage-loss disability in the amount of 5%.

The Full Commission affirms the administrative law judge's finding that the claimant did not prove he was entitled to "vocational rehabilitation benefits." Specifically, we find that the respondents should not be required to pay for a training course for the claimant with "Qwik Truk." The record before us indicates that Qwik Truk is a company involved in starting in-home freight brokerage businesses. The claimant testified that setting up such an in-home business would cost \$32,000. Pursuant to Ark. Code Ann. §11-9-505(b)(1), the Full Commission does not find that such a program would be reasonable in relation to the

disability sustained by the employee. The respondents did not offer such a program to the claimant. Stephen Campbell testified that the respondent-employer did not have a brokerage division. The instant claimant's educational and work history does not show a prior aptitude or interest in a home-based brokerage business.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant did not prove he was entitled to wage-loss benefits. We find that the claimant proved he was entitled to wage-loss disability in the amount of 5%, in addition to the 5% anatomical impairment accepted and paid by the respondents. The respondents are entitled to a credit for any overpayment of permanent partial disability benefits. The Full Commission affirms the administrative law judge's finding that the claimant did not prove he was entitled to vocational rehabilitation benefits; specifically we find that the claimant did not prove that the respondents were liable for any course of study for an in-home freight brokerage business. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(a) (Repl. 2002). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an

additional 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

Commissioner Hood concurs and dissents.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority opinion, finding the claimant is entitled to wage loss benefits in the amount of 5% in excess of his permanent anatomical impairment rating and denying his request for vocational rehabilitation benefits. Specifically, I agree with the Majority's finding the claimant is entitled to wage loss benefits in the amount of at least 5%; however, I would have awarded wage loss benefits in a higher amount. Furthermore, I must respectfully dissent from the finding that the claimant is not entitled to vocational rehabilitation benefits.

_____I first address the claimant's entitlement to wage loss benefits. The claimant testified that he has a varied work history, including working at fast food

restaurants and working for an activist organization. He further testified that the bulk of his work history was spent as an over-the-road truck driver. The claimant testified that he earned from \$2,800 to \$3,000 per month while working for the respondent employer.

The claimant further testified that after he was placed at maximum medical improvement for his injury, he sustained other work. Specifically, the claimant testified that in September or October 2004, he worked for Research Network performing phone surveys. He testified that he earned minimum wage and that he worked part-time for approximately 20 hours per week. He subsequently worked for ACORN. He was earning \$1,400 a month to help organize and help low income communities with various issues. The claimant was discharged from that job because the employer decided not to organize in Tallahassee. The claimant then began working at Entropy delivering newspapers. The claimant testified that he was still employed by Entropy at the time of the hearing. He testified he earns \$1,000 per month, but that he has expenses of approximately \$300 in gasoline necessary to perform his job. He testified that he has

problems performing the job due to his admittedly compensable injury.

The claimant testified that he has attempted to find other work with the state to no avail. He has also gone to the Workforce Development Center in an attempt to find work. The Workforce Development Center assigned the claimant to work on a cleaning crew. The claimant said that he would have to carry vacuum cleaners up and down stairs and that he would not be able to perform such duties. The claimant further testified that he preferred not to work in a convenience store or fast food, in part, because he would have to cut his dreadlocks, which he maintained he had for religious reasons. He further indicated he wanted to go to school to become a broker. This would in essence, consist of taking a class to learn how to connect truck companies with parties that need to have freight to haul.

The claimant submitted information regarding a program designed to train and supply workers with the skills and equipment to be a broker. The claimant indicated that he was interested in the program because he was familiar with the trucking industry and believed

the position would provide him more money than his current job. Furthermore, he believed it would comport with his current physical abilities. The claimant testified that he had asked the respondent-employer if they had a similar program and they did not. Stephen Campbell testified that the respondent-employer did not have a broker division.

In my opinion the claimant is entitled to wage loss benefits in an amount greater than 5%. I find the claimant is an extremely motivated individual, as evidenced by the fact that he has returned to work after being placed at MMI. Furthermore, I note that the claimant has even left one job in order to work for another, higher paying job. Likewise, I note the claimant has also requested additional training in an attempt to better himself and to increase his job opportunities, which also shows his motivation to return to work. When considering the claimant's wages at the time of the injury in comparison to the jobs he has sustained afterward, it is evident that he has sustained substantial wage loss. In fact, the highest wage the claimant earned after his accident was \$1,400 per month, whereas before the injury he was earning \$2,800 to

\$3,300 per month. While the claimant admittedly is intelligent and has an education, it is also evident that he has a somewhat limited work history and that he has had substantial difficulty in replacing his wages due to the nature of his injury.

I note the claimant's reluctance to work in a convenience store or a fast food restaurant. Given his educational background and his current physical restrictions, I cannot find fault with his decision. Furthermore, I do not believe that to be awarded wage loss benefits one has to accept any job. Nor do I find that a expressing a preference regarding an occupation to be evidence of lack of motivation. I also do not believe that if the claimant were to return to work in a grocery store or a fast food restaurant he would be able to replace his wages or that the jobs would comply with his physical restrictions. Rather, work in fast food restaurants and grocery stores would almost certainly result in a substantial loss in earnings and require the claimant to perform work in a capacity in excess of his physical abilities.

Finally, I note the claimant was restricted from working at more than a light to medium level

capacity. Prior to the injury he had no such restriction. Accordingly, I would have awarded wage loss benefits substantially higher than 5% in excess of his anatomical rating.

_____I further find that the claimant is entitled to the requested vocational rehabilitation benefits.

Arkansas Code Ann. §11-9-505 provides in pertinent part,

(b) (1) In addition to benefits otherwise provided for by this chapter, an employee who is entitled to receive compensation benefits for permanent disability and who has not been offered an opportunity to return to work or reemployment assistance shall be paid reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation if the commission finds that the program is reasonable in relation to the disability sustained by the employee.

In this instance, the claimant is requesting training to learn how to be a broker in the truck driving industry. The claimant credibly testified that he could not return to his prior job and that he attempted to pursue broker training with the respondent employer to no avail. Certainly the claimant has experience in the trucking industry, thus enabling him

to be successful in this area. In my opinion, he has shown his entitlement to the requested benefits.

I note that the Majority provides almost no explanation for the denial of the requested benefits. Rather, it simply appears that the Majority did not believe such a program to be reasonable. They also attempt to assert that a reason for denying the program would be that his work history does not show a prior aptitude or interest in such a program. I must respectfully disagree.

The claimant has worked the majority of his adult life as a truck driver. This indicates that he has both an aptitude and interest directly related to the trucking industry. An important part of the trucking industry relies on brokers and there is no evidence that the claimant's past experience would not assist him in such an endeavor. Furthermore, I find that simply because the claimant does not have past work history in the exact area of brokering is not a reason to preclude him from receiving training. In fact, it only seems logical that the purpose of vocational training would be to provide assistance to workers who

can no longer find a job that is identical to the work they performed before being injured.

Finally, I briefly address the opinion set forth by the Concurring opinion, which reasons that the language of Ark. Code Ann. §11-9-505(b)(1) is not designed for programs to show workers how to start an in-home business. I first note that the concurring opinion cites no authority for such a proposition. I also find that to limit a claimant to either on-the-job training or other "classroom" training is to limit their opportunity to replace their wages. This is contradictory to the purpose of providing vocational rehabilitation.

In sum, I found the claimant to be a motivated individual that, despite his injury, has managed to secure other work. However, due to the severity of his injury he is unable to replace his wages. In an attempt to earn a new skill and diminish his loss of earning potential he has requested a reasonable form of training. Unfortunately the Majority has chosen to deny this training and has provided little explanation for their rationale in doing so.

For the aforementioned reasons, I respectfully concur in part and dissent in part.

PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part, and dissent in part from the majority opinion. Specifically, I concur in the finding that the claimant did not prove he is entitled to vocational rehabilitation; however, I must dissent from the finding that the claimant is entitled to wage-loss disability in the amount of 5%.

With regard to vocational rehabilitation benefits, Arkansas Code Annotated §11-9-505(b)(1) provides in pertinent part that an employee may be entitled to "...reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation if the commission finds that the program is reasonable in relation to the disability sustained by the employee." First, I cannot find that the "Qwik Truk" is a program of vocational rehabilitation. As found in the majority opinion, "Qwik

Truk" is a company involved in the starting in-home freight brokerage businesses. I do not read A.C.A. § 11-9-505(b)(1) as a grant program for an employer to finance the start up costs for an injured employee to open his own business. Second, and more importantly, I find that the claimant's minor injury which only resulted in a 5% anatomical impairment rating is not such that it requires retraining for the claimant to continue to earn a meaningful living. Accordingly, I concur with the majority opinion finding that the claimant did not prove entitlement to vocational rehabilitation.

With regard to the award of wage loss disability, I cannot find that the claimant has proven entitlement to such benefits. The claimant is relatively young. He has a college education, with an Associates Degree of Arts; and, he has certificates from Writer's Digest and the National Radio Institute for both fiction and non-fiction writing. The claimant chose to pursue a career in truck driving in order to earn a living and work on his writing. Despite the claimant's chosen career path that involved heavy lifting at times, the claimant is clearly capable of earning a living without

reliance on his physical strength. Moreover, the minor restrictions placed upon the claimant of no lifting over 37 pounds, do not limit the claimant in his ability to earn wages equal or greater than he was earning at the time of his injury. The claimant is a very intelligent person and his minor compensable injury had not required any medical treatment for over a year and a half as of the date of the hearing. The only true factors weighing on the claimant's wage earning capacity are self imposed by the claimant, such as his refusal to cut his knee length hair or to apply for a job with the state. Under these circumstances, and after considering the claimant's age, education, work experience, medical evidence, as well as, his motivation to return to full time work and his post-injury income I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage loss benefits over and above his physical impairment rating. Therefore, I must respectfully dissent, in part, from the majority opinion.

KAREN H. McKINNEY, Commissioner