

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F014051

CARROLL DEAL, EMPLOYEE	CLAIMANT
SEA ARK MARINE, INC., EMPLOYER	RESPONDENT NO. 1
FREMONT INDEMNITY COMPANY c/o ARKANSAS PROPERTY & CASUALTY GUARANTY FUND, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

**OPINION FILED OCTOBER 2, 2008**

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE JEREMY SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed.

**OPINION AND ORDER**

The claimant appeals a decision by the Administrative Law Judge finding that the claimant failed to prove by a preponderance of the evidence that he is permanently and totally disabled and that Ark. Code Ann. §11-9-521(f) is not unconstitutional. After conducting a de

novo review of the record, we find that the decision of the Administrative Law Judge should be affirmed.

The claimant is a twenty-nine year old high school graduate. He had difficulties in school, repeating the third grade, and requiring remedial classes until high school. The claimant ultimately completed high school making average grades in courses like history, geometry, and science. He excelled, however, in the more hands-on technical courses such as agricultural engineering, clothing, and shop. Following high school, the claimant worked doing odd jobs as a handyman's helper, fixing fences, painting, and other tasks. He worked as a meter reader for the water company, where he went door-to-door and called out meter readings to his co-worker following in a car.

On July 10, 2000, the claimant began working as a "rigger helper" for the respondent employer helping build large coast guard boats. He worked in that capacity for nearly six months until he was injured in an explosion on December 7, 2000. The explosion killed one of the claimant's co-workers and injured another. The claimant and two co-workers were applying insulation to the hull of a 40-foot cabin cruiser when one of the other employees, who was

in the hull of the boat at the time of the accident, imprudently decided to use his cigarette lighter. The flame from the cigarette lighter caused the residual fumes from the insulation glue to ignite and explode with such force as to propel the boat, which weighed approximately 15,000 pounds, through the 26-foot high roof of the rigging department. The claimant sustained a severe right leg injury.

The claimant was taken for treatment and came under the care of the orthopedist, Dr. Allan Pollard, who performed an initial surgery within days after the accident to try to pin the claimant's ankle and save it from amputation. Within weeks, the claimant underwent a second surgery with Dr. Pollard, to fuse the ankle and foot. Unfortunately, the foot fused in a mis-aligned position, turned inward, making it difficult for the claimant to walk. For some time, he used crutches or a cane.

After the claimant healed from his second surgery, he was able to return to sedentary duty work as a switchboard operator for the respondent employer. The claimant answered phones and transferred calls. He was able to sit or stand as needed. The claimant received a

permanent anatomical impairment rating of 49% which the respondents accepted and paid.

Due to the difficulties caused by his in-turned foot, the claimant underwent a third surgery on July 3, 2003, Dr. Pollard corrected the foot misalignment and fused the foot back into the correct position, making it easier for the claimant to walk and maneuver. The claimant worked for the respondent employer until the day before he had the third surgery. Following the surgery, the claimant entered a second healing period, and the respondents paid him temporary disability benefits. The Claimant again reached maximum medical improvement from the third surgery on August 31, 2004, and was released by Dr. Pollard to return to sedentary work. The Claimant inquired about returning to work for the respondent employer but his former sedentary duty job no longer existed, and there was no suitable work available for him. The claimant did not seek employment elsewhere.

In July of 2003, the respondents arranged for vocational consultant Heather Naylor to conduct a vocational assessment and provide rehabilitation/job placement assistance for the claimant. Over the course of the next

months, she made numerous attempts to contact the claimant in writing and by phone, but her efforts were unsuccessful. Finally, in December of 2003, she was able to make contact with the claimant. She met with him on January 9, 2004, when she conducted a vocational evaluation interview and administered written testing to the claimant. The claimant's personal injury attorney became aware of Ms. Naylor's involvement and sent documentary information for her review and consideration pertaining to high school grades, post-high school testing scores (from vocational school entrance exams), and information from a rehabilitation program analyzing those prior scores.

Ms. Naylor completed a vocational evaluation report on January 12, 2004, finding that the claimant could return to sedentary work duties with a sit-stand option and recommended adult education and/or retraining. The claimant was set up for adult education on February 2, 2004, but he failed to attend that testing. Instead, the claimant sought the services of a vocational consultant, Robert White, hired in conjunction with the claimant's personal injury case. Mr. White interviewed the claimant, but he did not administer any testing and did not have the opportunity to

observe the claimant personally until the made-whole hearing before the United States District Judge in conjunction with the personal injury settlement. On February 2, 2004, Mr. White completed his report which was based on a one hour telephone interview of the claimant. Mr. White suggested two scenarios: (1) that the claimant could return to the labor force on a part time basis performing sedentary unskilled work at minimum wage or (2) that the claimant was permanent and totally disabled due to various factors including no skills to offer an employer and competitive nature of the labor market and employer preference to hire physically capable employees.

On February 9, 2004, the claimant's personal injury attorney wrote Ms. Naylor and expressed displeasure at the content of her vocational evaluation report. He advised Ms. Naylor that he had instructed the claimant to have no further contact with her. The claimant refused all further contact and interaction with Ms. Naylor. Furthermore, there were no efforts made by Mr. White to provide any kind of job placement assistance, to identify other sedentary duty jobs, or to provide recommendations for other adult education or retraining. The claimant

subsequently received a substantial sum of money as settlement from his personal injury case and was also approved for and received Social Security Disability benefits.

Although he admittedly has no other physical limitations or problems other than his ankle, the claimant has made absolutely no effort to find a job or seek education and/or retraining which might facilitate or expedite his return to the workforce. He is able to use a home computer from which he is able to access the Internet, but has not used it to look for work or to further his education. The claimant's wife is a literacy coach and teacher and he had not sought her assistance in furthering his literacy skills. It is of note that the claimant has bought a new truck, a fishing boat, a four-wheeler and purchased an annual hunting lease. He is able to mow his yard in the summer months using a riding lawnmower. He is able to perform household chores which do not involve carrying heavy weights. The claimant admitted that during the years that followed his 2003 surgery, he has been able to fish from his boat and hunt for turkey and deer on his leased hunting land. He has been able to shoot both a rifle

and a 60-pound-pull compound bow from one of two deer stands (one elevated five steps off the ground). He has been able to travel to and from his stands by four-wheeler across ravines and through wooded terrain.

The claimant has continued with follow-up visits with Dr. Pollard once or twice a year. The claimant testified that he still has some pain and swelling in his leg, but he is able to manage without any prescription medication.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962). According to Ark. Code Ann. § 11-9-519(e)(1), "Permanent total disability means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." The question of whether an employee with a single scheduled injury is permanently

totally disabled must be "determined in accordance with the facts," under Ark. Code Ann. § 11-9-519(c). If a scheduled injury employee is able to earn some meaningful wages in at least some capacity, then he is not entitled to permanent disability benefits beyond those benefits set forth in the schedule provided in Ark. Code Ann. § 11-9-521.

The claimant in this case has failed to prove by a preponderance of evidence that he is permanently and totally disabled. The claimant has significant impairment to his ankle, limited education, and limited transferrable skills. However, the claimant's anatomical impairment is limited to his lower extremity and in our opinion his capabilities far exceed his disabilities. The evidence demonstrates that the claimant worked for the respondent employer doing receptionist work until the day before his third surgery on July 3, 2003. That surgery corrected the misalignment of his foot that impaired his ability to walk. Once the claimant healed from that surgery, his physical capabilities were better than before the surgery, no longer requiring crutches. Significantly, the claimant testified at the hearing that if his receptionist job had remained available

for him he probably would have continued working at that job.

Dr. Pollard's medical reports on the claimant since August 31, 2004, have all indicated that the claimant was able to work in a sedentary capacity. There was absolutely no medical evidence whatsoever suggesting that the claimant was totally incapacitated from working. The claimant is young, has no other medical problems or impairments, and is able to read and write, albeit slowly and carefully. He has shown that he is able to engage in physical activities which are consistent with the types of physical abilities required for at least sedentary work. He is able to drive, ride a four-wheeler, mow his yard and perform household chores. He is also able to use a computer. Simply put, we cannot find that the claimant has proven by a preponderance of the evidence that he is permanently and totally disabled.

The respondents contended that the claimant refused the vocational assistance offered by the respondents. We agree. If an employee unreasonably waives rehabilitation or job placement assistance, the injured employee will not be entitled to any permanent benefits in

excess of the anatomical impairment. Ark. Code Ann. § 11-9-505(b) (3). Ark. Code Ann. § 11-9-505(b) (3) specifically provides:

The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

The claimant refused vocational assistance offered by the respondents through Ms. Naylor which occurred because his personal injury attorney instructed the claimant not to have anything further to do with Ms. Naylor as of February 9, 2004. The claimant's personal injury attorney indicated the refusal was due to Ms. Naylor's failure to consider the claimant's academic history, including the school and testing records supplied by the claimant to Ms. Naylor. However the evidence demonstrates that Ms. Naylor considered the documentary evidence provided to her. Her January 12, 2004 Initial Vocational Evaluation reports states:

Mr. Deal graduated from high school in 1998 from Fountain Hill High School in Fountain Hill, AR. Up until the tenth grade, he was taking resource classes. He said that when he got in high school, he stopped taking resource classes and began taking regular classes. Mr. Deal described his high school performance as in the C and D, average level. After high school, Mr. Deal said he was interested in attending Forrest Echoes Vocational School in Crossett in 1998. He took their entrance exam but was unable to pass it. He said he had difficulty with the reading comprehension section of the entrance exam.

The decision by the claimant's personal injury attorney to refuse vocational assistance was unreasonable in light of the fact that Ms. Naylor's report comments on the claimant's academic history and inability to pass the Forrest Echoes entrance exam—specific knowledge she obtained from the documents provided by the claimant's attorney. The evidence further demonstrates that the claimant's refusal of vocational rehabilitation assistance was unreasonable based on his belief that he was neither able to work, nor an employable job candidate. At the hearing, the claimant repeatedly asserted that he did not think he could do any work and did not believe any employer would hire him in his condition. His personal belief was contrary to the opinion

of Dr. Pollard, who opined the claimant could work in a sedentary capacity, and the vocational expert, Ms. Naylor, who also recommended the claimant could work in a sedentary work capacity, or perhaps in an even greater capacity if educated or trained further.

The present case is analogous to the facts in Ashcraft v. Headlee's Industrial Co., Inc., Full Commission Opinion filed February 16, 2005 (F012942) (affirmed 2005). In Ashcraft, the claimant was offered rehabilitation and job placement assistance which was initially accepted but then rejected. In Ashcraft, the claimant dismissed these efforts as unnecessary because of a personal belief that no employer would hire him on account of his injury. In Ashcraft, the claimant doubted he was physically capable of pursuing further education. In another interesting parallel to the present case, Ashcraft had also hired vocational consultant Bob White, who opined that Ashcraft had "no skills to offer an employer," the same exact language Mr. White employed with the present claimant. Further in Ashcraft, Mr. White reported, "...while theoretically Mr. Ashcraft may be able to perform some type off [sic] work, in reality I seriously doubt he is employable." Mr. White gave

virtually the same testimony in the present case. The claimant, based on advice of his personal injury attorney, unreasonably halted all attempts for vocational rehabilitation offered by the respondents. In our opinion, the evidence demonstrates that the claimant has continued his refusal of vocational assistance by not cooperating and availing himself of the rehabilitation services offered by the respondents.

The claimant testified at the hearing that since 2004, he has made no efforts whatsoever even to look for work that he might potentially be able to do—even part-time. The claimant further testified since 2004, he has made no efforts whatsoever to look into other retraining or rehabilitation programs, nor contacted Ms. Naylor or Mr. White to see what additional assistance might be available. The claimant testified that he had not availed himself of even the most available resources, his computer with internet access or his wife, who works as a literacy coach educating teachers on how to teach children to read. The evidence demonstrates that claimant has pursued other activities such as fishing, turkey hunting, deer hunting with a rifle, deer hunting with a bow, riding his four-

wheeler and enjoying company of friends at his hunting lease. The claimant has used his financial resources to pursue his hobbies: buying a four-wheeler; buying a fishing boat; buying a truck to pull the boat and carry the four-wheeler; paying for a hunting. Accordingly, we find that the claimant has unjustifiably refused to participate and cooperate with job placement assistance and is therefore barred from receiving permanent and total disability benefits even if we were to find the claimant to be permanently and totally disabled, a finding which we do not make.

The claimant contends that the prohibition against the consideration of wage loss disability over and above the injured's workers' permanent physical loss is unconstitutional. The claimant's constitutional challenge to Ark. Code Ann. § 11-9-521 has already been addressed by the Arkansas Workers' Compensation Commission in the case of Conway Thompson v. State Highway & Transportation Dept., Full Commission Opinion filed November 4, 1997(E400490). In that case, the claimant argued that Ark. Code Ann. § 11- 9-521 violated the Equal Protection Clause of the 14<sup>th</sup> Amendment of the United States by precluding permanent

disability benefits in excess of the schedule, unless the claimant was permanently and totally disabled. The Commission carefully analyzed Thompson's constitutional challenge and upheld the statute. The Commission affirms the finding of the Administrative Law Judge that the statute is constitutional.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. Based on a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence his entitlement to permanent and total disability benefits.

Permanent total disability means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

Ark. Code Ann. §11-9-519 (e) (1). The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-519 (e) (2). The Arkansas Court of Appeals stated in McDonald v. Batesville Poultry Equip., 90 Ark. App. 435, 206 S.W. 2d 908, that an employee who has suffered a scheduled injury may claim entitlement to permanent total disability pursuant to Ark. Code Ann. §11-9-519. At the time of the hearing the claimant was twenty-eight (28) years old. It is undisputed that he has a 49% anatomical impairment rating to the lower extremity. The claimant testified that his lower extremity (including his foot and ankle) swells, is tender and feels "like its burning" if he does not elevate it regularly. The claimant testified that he has good days and bad days with his condition and that on a bad day he is unable to put his put foot down on the floor. He testified that on a bad day he goes straight from elevating his lower extremity in the bed to elevating his lower extremity on the couch. The claimant testified that on a good day he can get around pretty well, but that even on the good days he still suffers from throbbing, swelling, burning and tenderness. The claimant testified that due to the condition of his lower

extremity he has been unable to return to work. The claimant testified, at his deposition and at the hearing, that he would be willing to undergo vocational rehabilitation, and that if a job was available that he could do, he was willing to try.

A medical report from Dr. James Pollard, dated October 25, 2004 states:

With regards to the patient's work restrictions, the patient is unable to do any prolonged standing or walking. He must do sedentary work that is primarily seated with limited standing and walking...With regards to the patient's work place abilities, my recommendation is that he do sedentary work with no prolonged standing or walking, and this will be a permanent restriction for him.

The vocational rehabilitation records show that the claimant took the Adult Basic Learning Examinations three times before his accident. The highest he scored in reading was at a seventh grade level and the highest he scored in language was at a fifth grade level. In fact, on August 6, 1998, the claimant was assessed as having a reading disorder, a mathematics disorder and a disorder of written expression. Ms. Heather Naylor, a vocational expert hired by the respondent, tested the claimant after his

accident and concluded that his reading ability is at a seventh grade level, his spelling ability is at a sixth grade level and his math ability is at a fifth grade level. In the vocational rehabilitation report dated January 12, 2004, Ms. Naylor wrote:

As Mr. Deal has a limited work history due to his young age and no education beyond high school, he has very few skills that would transfer to sedentary occupations. According to his physician, he will need a sedentary occupation when he returns to work. Because of these factors, he really needs some type of short term training to be able to pursue a wider range of jobs.

I think Mr. Deal is a good candidate for training because of his young age and motivation; he expressed to me several times that he is anxious to return to work.

Mr. Bob White, a vocational expert who reviewed and evaluated the claimant's records at the behest of the claimant, and who also testified at the claimant's Social Security Disability hearing, after which the claimant was deemed disabled for the purposes of Social Security law, testified:

In terms of what I've heard here today, and subsequently talking to Mr. Deal again, I'm not ever going to say remediation is impossible, but I do

think any time you're functioning at a sixth grade level or below, it is likely to be extremely long-term, extremely difficult and it's going to have to be very, very consistent... I think we're looking at a very long-term process.

Regarding the claimant's lack of transferable skills, Mr. White testified:

Your honor, he has no skills which would be consistent with his educational level in terms of his academic functioning. Basically, he's done unskilled work...

Regarding the claimant's medical restrictions, Mr. White testified:

Obviously, Dr. Pollard, in his notes, limited him to sedentary work and indicated that he did need to elevate the leg. So from that standpoint, Your Honor, and the fact that we have somebody who is limited academically, who has only done unskilled work, his vocational options really are limited...

Based on the above, I find that the claimant has clearly met his burden of proving his inability to earn any meaningful wage in the same or other employment. The claimant, due to his physical restrictions cannot return to any type of physical labor. Due to his learning disabilities, the claimant cannot pursue lighter, sedentary employment. Ark. Code Ann. §11-9-519 (c) states that

permanent and total disability shall be determined in according to the facts. Here, the facts show, despite the majority's assertion to the contrary, that the claimant has proved by a preponderance of the evidence his entitlement to permanent and total disability benefits.

Additionally, I disagree with the majority's finding that the claimant has unreasonably refused to participate with vocational rehabilitation and job placement assistance. The claimant did not refuse vocational rehabilitation. The claimant's personal injury attorney engaged in a dispute with the workers' compensation carrier, a dispute which has since resolved. The claimant's workers' compensation attorney and the claimant have repeatedly stated that the claimant is willing to undergo vocational rehabilitation. The respondent has not provided any vocational rehabilitation other than evaluation. The respondent has not offered an educational program, nor has the respondent offered job placement assistance.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner