

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705431

ROBERT LOVEJOY, EMPLOYEE	CLAIMANT
CITY OF ROGERS, EMPLOYER	RESPONDENT
MUNICIPAL LEAGUE WCT, CARRIER	RESPONDENT

**OPINION FILED NOVEMBER 4, 2009**

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

Claimant represented by HONORABLE AARON MARTIN, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE J. CHRIS BRADLEY, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed April 8, 2009.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 21, 2009, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties stipulation that claimant's healing period ended on November 20, 2007 is also hereby accepted as fact.

3. The parties stipulation that respondent has controverted claimant's entitlement to vocational rehabilitation is also hereby accepted as fact.

4. Claimant has failed to prove by a preponderance of the evidence that his proposed plan of rehabilitation of attending the University of Arkansas is reasonable in relation to the disability he sustained.

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.

Thus, we affirm and adopt the 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.

---

A. WATSON BELL, Chairman

---

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I find that the claimant is entitled to vocational rehabilitation benefits in the form of tuition and related expenses for the claimant to pursue a degree in marketing management from the University of Arkansas. He has proven by a preponderance of the evidence that he was entitled to permanent disability benefits, that he was not offered a return to employment or employment assistance, and that his proposed vocational rehabilitation program is reasonable in relation to his disability.

Vocational rehabilitation benefits are addressed in Ark. Code Ann. Section 11-9-505:

(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 re-employment 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.

(2) The employer's responsibility for additional payments shall not exceed seventy-two (72) weeks, regardless of the length of the program requested.

There are several elements to a 505(b) claim.

First, the claimant is "entitled to receive compensation benefits for permanent disability benefits" as Dr. Kyle issued a 6% permanent anatomical impairment rating for his compensable back injury, which the respondent accepted and paid.

The second element requires that the claimant had "not been offered an opportunity to return to work or re-employment assistance." The claimant suffered a compensable injury to his low back on May 22, 2007. The claimant was treated by Dr. Neaville, who was the fire department physician. Dr. Neaville referred the claimant to a neurosurgeon, Dr. Kyle. On August 6, 2007, Dr. Kyle reported that the claimant was "physically unfit to return

to work as a firefighter/paramedic." The claimant did not return to work with the fire department or the City of Rogers, and he testified that he was not offered employment of any kind by either entity.

By September 2007, the claimant had decided to retire from the fire department and to seek benefits through LOPFI, which apparently is a retirement insurance program for fire fighters. A September 24, 2007 letter from Dr. Blaiser, the review doctor for LOPFI indicated that while Dr. Blaiser resisted making a disability determination on a thirty-two year old man who had a limited course of treatment, he did find that the claimant was disabled from work as a firefighter due to his multilevel degenerative disc disease.

On September 25, 2007, Dr. Kyle ordered a functional capacity evaluation and a work hardening program, and limited the claimant to no lifting over fifty pounds. The FCE occurred on October 11, 2007, with reliable results, showing the claimant could work at the medium classification, with occasional lifting of up to fifty pounds. On November 15, 2007, the physical therapist, Stephen Joseph, reported that the claimant had completed the

work hardening program. The claimant had progressed to lifting 50 pounds on a constant basis and had a 110 pound maximum lift. This placed him in the very heavy category of work. On November 20, 2007, Dr. Kyle reported that the claimant had a permanent impairment rating of 6% and was cleared for heavy category of work.

The record does not reflect that the claimant ever had an offer to return to work, in a full or limited capacity. The claimant was not offered work within his restrictions at any time. The claimant requested vocational rehabilitation in the form of college course work at some time prior to August 19, 2008, which was denied by the respondent in a letter dated August 19, 2008 from Glenda Robinson of the Municipal League:

I am in receipt of your letter requesting vocational rehabilitation. It was my understanding that it was your choice to not return to work for the City of Rogers and to retire prior to completing your work hardening program. In addition it was my understanding that you had started classes in the fall of 2007. The letter I have from Dr. Richard Kyle date 11/20/07 indicates that you were cleared for work in the heavy category of work.

We would not be responsible for your education since this is something that you have chosen to do rather than return to work.

The claimant repeated his request, and on September 29, 2008, Glenda Robinson replied:

After reviewing your file, I feel our position must remain the same. At the time you completed your work hardening program, if you had been unable to return to work in a heavy work category we would have contacted a vocational rehabilitation counselor to assist in locating another job for you in a lighter category. We did not have the opportunity to evaluate this option when you completed your work hardening. You had already elected to file for disability and return to school.

I understand that you were given you[r] LOPFI disability; however, we are not required to follow their procedures or decisions.

The claimant was not offered employment at any time. His request for vocational rehabilitation was denied, based essentially upon the fact that the treating physician, the respondent's physician, reported that the claimant could not return to work as a firefighter. The respondent's position suggests that the claimant has refused employment, which he has not. He was never offered a return to work. Thus the second element is satisfied. The suggestion that the respondent "did not have the opportunity" to offer him work is at best a red herring. The respondent did not offer him re-employment or re-employment assistance, and therefore Ark. Code Ann. Sec. 11-9-505(b) (1) is triggered.

The third element requires that the commission find that the "the program is reasonable in relation to the disability sustained by the employee." The claimant was thirty-two years old at the time of his injury. He had been focused on firefighting in his employment and his education since at least as early as the fall of 2004. While employed as a firefighter and in school to complete an associate's degree in fire science and a paramedic certificate, the claimant was injured and told that he could not return to employment as a firefighter. Despite the FCE and work hardening results, which show remarkable improvement, it remains questionable that the claimant could return to the work of a fire fighter. The only evidence of the requirements of the job is the testimony of the claimant, who stated that lifting more than 110 pounds, his limit, was a regular necessity. Certainly, if he had to rescue the average adult, he would have to move more than 110 pounds.

On the other hand, the claimant has demonstrated an aptitude for college course work and has accumulated one hundred three hours with a grade point average of 3.96. At the hearing he explained his rationale for his proposed vocational rehabilitation. His current plan is to complete

his degree at the Walton College of Business in marketing management at the University of Arkansas. He planned to work for one of the vendors or Wal-Mart in the area. In researching job requirements, he "discovered that it's a requirement to absolutely have your Bachelor's degree; that experience is helpful. And there's also some requirements as far as like knowledge with Retail Link and some other programs that are required for your vendors and those companies here." He chose this area: "Well, in this area, obviously, the vendor world and Wal-Mart run this economy. So the opportunities for job placement in that field is more prosperous than any others." Entry level positions pay from \$40,000 to 60,000, depending on the company. He was earning approximately forty thousand dollars a year with Rogers fire department, and he had the opportunity to earn more, through promotions.

The majority found that because the claimant was able to return to a heavy category of work, although perhaps not firefighting, college course work was not a reasonable rehabilitation choice. I find that the proposed course work is reasonable, given that the claimant had committed to the profession of firefighting which he can no longer pursue. I

use the term "committed," because the claimant did commit to the profession, doggedly pursuing a degree in fire science and a paramedic certificate, with the aim of a career as a professional firefighter and paramedic with the fire department. I also note that the claimant maintained a 3.96 grade point average. The opportunities for promotion and for earning a similar wage and a higher wage in the future that he had in his chosen profession are severely limited in general heavy labor. The claimant will be able to pursue similar wages and future opportunities by building on the college course work he has already completed with his proposed studies in marketing management.

I find that the claimant has proven by a preponderance of the evidence that he has met the requirements of Ark. Code Ann. Sec. 11-9-505(b) and is entitled to vocational rehabilitation benefits in the form of tuition and related expenses for the claimant to complete a marketing management degree at the University of Arkansas. I find that the respondent controverted the claim for vocational rehabilitation benefits, entitling the claimant to an award of attorney's fees as well.

For the foregoing reasons, I must respectfully  
dissent.

---

PHILIP A. HOOD, Commissioner