

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F712434

GILBERTO VITE, EMPLOYEE	CLAIMANT
GILBERTO VITE, EMPLOYER	RESPONDENT NO. 1
FIRSTCOMP INSURANCE COMPANY, CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED NOVEMBER 9, 2009

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

Claimant represented by HONORABLE JASON HATFIELD, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by HONORABLE RANDY MURPHY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE CHRISTY KING, Attorney at Law, Little Rock, Arkansas

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed March 19, 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 November 13, 2008, and contained in a pre-hearing order filed November 14, 2008, are hereby accepted as fact.

2. Claimant earned an average weekly wage of \$587.30 which would entitle him to compensation at the rate of \$392.00 for total disability benefits and \$294.00 for permanent partial disability benefits. Respondent is entitled to a credit for any benefits paid in excess of these compensation rates.
3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any permanent disability benefits as a result of his compensable injury.
4. Claimant has failed to prove by a preponderance of the evidence that additional medical treatment from Dr. Routsong is reasonable and necessary for his compensable injury.

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 would award a permanent anatomical impairment rating of 8% and permanent total disability benefits.

The claimant was injured on November 19, 2007 when a roll of carpet weighing more than 350 pounds fell on the claimant, pinning him to the ground. The majority relied upon the medical opinion of Dr. Peeples, the independent medical examiner, over that of Dr. Routsong, the claimant's treating physician. I find that Dr. Routsong's opinion is entitled to more weight than the opinion of Dr. Peeples, in regard to the claimant's permanent anatomical impairment and his ability to return to the workforce.

I find that Dr. Routsong's permanent anatomical impairment rating was based upon objective findings of

injury by a preponderance of the evidence. The very first medical record of Dr. Routsong, of November 26, 2007, shows a diagnosis of thoracolumbar sprain and thoracolumbar somatic dysfunction, with no spinal cord or spinal nerve compression. Prescriptions were issued for Ibuprofen, Hydrocodone, and Methocarbam. Methocarbam is a "muscle relaxant used to treat pain caused by muscle spasms," according to the prescription form. Muscle spasms are objective findings, and the combination of the prescriptions for muscle relaxants and for physical therapy are sufficient to infer that muscle spasms existed. See Fred's Inc. v. Jefferson, 361 Ark. 258, 206 S.W.3d 238 (2005). Dr. Routsong continued the prescriptions, including the muscle relaxer on December 17, 2007, and the claimant began physical therapy on December 27, 2007. The therapist observed muscle guarding and decreased lumbar lordosis. On January 21, 2008, Dr. Routsong specifically prescribed Soma for muscle spasms. The Soma prescription was continued through April 30, 2008. On April 30, 2008, Skelaxin, another muscle relaxer was prescribed. Muscle spasms, guarding and decreased lordosis are all objective findings.

Certainly, the April 30 opinion of Dr. Routsong is insufficient for the purposes of establishing the claimant's permanent impairment, as Dr. Routsong was apparently unfamiliar with the use of the Guides in workers' compensation cases. The June 2 opinion was made by Dr. Routsong was based upon "physical evidence," and the 10% rating can be attributed to the AMA Guides' Tables 70, 72 and 74. However, I find that the more appropriate rating is to be drawn from Table 75, in the amount of 8%, for "Intervertebral disk or other soft-tissue lesion ... unoperated on, stable, with medically documented injury, pain, and rigidity associated with moderate to severe degenerative changes on structural tests" on two levels, L3-4 and L4-5. I find that the claimant has a permanent anatomical impairment rating of 8%, entitling him to permanent partial disability benefits.

The claimant sought permanent total disability benefits. I would award these benefits, based upon his compensable injury, his permanent anatomical impairment rating, his age, his limited ability to speak, read and write English, his severely restricted job skill set, his limited mental acuity, and the restrictions imposed by his

daily pain and pharmaceutical regimen. These limitations are demonstrated through the claimant's testimony, the medical records including the opinion of Dr. Routsong, and the professional opinion of Tanya Owen, vocational rehabilitation specialist.

At the time of the hearing, the claimant was 54 years of age. He had a sixth grade education. His ability to speak, understand, read and write English is limited. He installed carpet for thirty years. Before his injury he was able to bend, stoop, and all the other physical requirements of his job, "perfectly." He had never seen a doctor, chiropractor or therapist for back pain. He testified that since the accident, he needed pain medication on a daily basis and that it became progressively worse. The claimant stated that he could not work as a carpet layer since the accident, because he could not lift or use the necessary equipment.

The claimant explained that he had pain going down into his shoulders and his legs. His leg pain came and went, but he had it often and on a daily basis. His shoulder pain did not go away. He had extreme pain in his knees which came and went. He also had numbness in his

knees at time. He experienced low back pain as well. He could not walk and do his job because of the knee pain. He could not lay carpet because of his knee pain. The claimant also testified that his pain prevented him from driving more than a little.

As to the claimant's motivation to work, he testified that he had worked since he was 12 or 13 years old, doing hard physical labor, which he enjoyed. He would still be working if he had not been hurt.

Tanya Owen testified that she is a vocational rehabilitation specialist for people with disabilities. She reviewed medical records, including Dr. Routsong's, physical therapy records and the functional capacity evaluation. She met with the claimant and did vocational testing. She interviewed him about his work and educational background. She also reviewed labor market data, information about his area and local unemployment, which gave her a good indication of how many jobs would be available; how many people are competing for the jobs that would be available; and if the area offers economic and vocational options to people. The unemployment rate for Benton County, where the claimant lived, in September 2008, was 3.5%. It means that

most of the people in Benton County were employed, which means there were ample opportunities.

Owen explained her transferable skills analysis of the claimant:

... I look at someone's work skills that they've acquired. In his case, he had worked, primarily, as a carpet layer. I factor in the different physical functional limitations outlines and see if there are any jobs that would result, so they would both be within his skill level and within the functional limitations I demonstrated. And in his case, there were no transferable skills, which is not uncommon for someone who's worked in construction.

Likewise, the claimant also explained the vocational testing she performed on him. She gave his a wide range achievement test, measuring reading, spelling and arithmetic. This was done in English to ascertain his English reading skills. He scored at the third grade level in reading, the kindergarten level in spelling and the fifth grade level in arithmetic. She also administered the Raven Progressive Matrices to the claimant, which she explained:

It is a non-English test, but what it does is it gives us a fairly good idea of someone's ability to learn and someone's ability to store information and recite that; so it gives us a pretty good predictor as if we sent someone to school, how they're going to do. For his age group, he scored at about a 23 to 24 percentile, which means he - had 27 correct out of the 55 he tried. ... It's not good. It - I would say - I -

this would not be the profile of someone that I would send for a retraining program, simply because there's a very poor reading ability, combined with a poor learning ability. That person's likely not to be successful in a retraining program.

Owen testified that it is her conclusion that the claimant was not gainfully employable at that time. She looked at a client's work history, acquired skills, current functional abilities. She also looked at other postural limitations, especially his upper extremities and his ability to perform job tasks in the economy, which would include reading and writing. Based upon this information, she determined whether there were jobs available in his area which met his vocational profile. The claimant's functional abilities were limited to sedentary work. His vocational profile showed:

a 54 year old gentleman who did not - who is not fluent in English; who had a limited English reading ability; who had no work skills outside of construction; who had no computer skills; who had limited ability to learn those computer skills. And in my opinion based on the culmination of all those factors, he would be unlikely to be able to get and - and keep work. There just simply aren't a lot of sedentary, unskilled jobs to begin with. And, certainly, for those jobs, if you send someone to apply for those and they can't fill out the employment application in English - because it's in English - there's going to be a significant barrier to entry.

Owen testified that her opinion was supported by Dr. Routsong, who indicated on March 6 that the claimant was limited to lifting no more than five pounds and needed to be able to sit as needed. When his restrictions and the vocational profile were considered together, she concluded that there are no jobs in his area for him. She came to that conclusion without regard to the functional capacity evaluation, although that supported her conclusion too.

Based upon her vocation and training, Owen put more weight on the treating physician's opinion than on Dr. Peebles' report after his one-time evaluation: "I mean, certainly, the treatment team is - would be the people who have the input in vocational rehabilitation matters." She would not send the claimant back to work as a carpet layer based upon Dr. Peebles' report of his one-time evaluation of the claimant. She would not pick the one time doctor over the treating doctor. She did not have access to Dr. Peebles' report at the time of her evaluation.

Owen explained that functional capacity evaluations are very important to clarify the limitations - physical, postural, environmental - of a person. Those types of limitations are very important to a vocational

rehabilitation evaluation. The functional capacity evaluation gives global information about work. She found Dr. Routsong's opinion and the functional capacity results to be consistent.

Owen testified that she used the functional capacity evaluation in formulating her opinions and would prefer that the testing be valid. She noted that "there is a difference between reliability and validity from a technical standpoint." She would feel more comfortable doing vocational planning with a valid test. "... I can probably point to cases where [a patient was manipulative during an FCE] and the treating doctor may say one thing, but the FCE may show something else ... in which case I would go with what the treating doctor said." She used the tests whether they are valid or invalid. She thoroughly reviewed the claimant's functional capacity evaluation, which said that his abilities are unknown due to unreliable efforts and that he did not put forth consistent effort. Despite his inconsistent efforts, the functional capacity evaluation showed he could work at the sedentary level. The FCE was part of the foundation for her opinion.

Owen testified that carpet laying is classified as heavy level work, lifting 50-100 pounds occasionally. Medium work is 50 pounds, and light work, 20 pounds. Dr. Routsong's restriction of five pounds is consistent with the sedentary level, but actually more strict, because sedentary allows lifting up to 10 pounds.

I find that the claimant is permanently and totally disabled, due to his compensable injury, his resulting permanent anatomical impairment, his age, his limited education, his limited skill set, his limited ability to speak, understand, read and write English, and his limited potential for retraining. I find that while it is very unfortunate that the results of the functional capacity evaluation show that the claimant gave inconsistent effort preventing a complete demonstration of his capacity for work, this fact does not undermine Dr. Routsong's opinion, or Ms. Owen's vocational evaluation. I do not credit Dr. Peeples' evaluation over Dr. Routsong's. Dr. Peeples evaluated the claimant once, where Dr. Routsong treated the claimant over an extended period of time.

I find that the claimant has proven by a preponderance of the evidence that he is entitled to a

permanent impairment rating of 8%, based upon objective medical findings, and that he is permanently and totally disabled.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner