

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F012745

STEVEN TUCKER, EMPLOYEE	CLAIMANT
COOPER STANDARD AUTOMOTIVE, INC., EMPLOYER	RESPONDENT NO. 1
ST. PAUL TRAVELERS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED APRIL 29, 2009

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

Claimant represented by the HONORABLE RONALD L. GRIGGS,  
Attorney at Law, El Dorado, Arkansas.

Respondents No. 1 represented by the HONORABLE MICHAEL J.  
DENNIS, Attorney at Law, Pine Bluff, Arkansas.

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's  
opinion filed March 18, 2008. The administrative law judge  
found that the claimant "refused to participate in job  
placement assistance without reasonable cause. Mr. Tucker's  
claim for wage-loss disability benefits must therefore be  
denied pursuant to Ark. Code Ann. §11-9-505(b)(3)." After  
reviewing the entire record *de novo*, the Full Commission

reverses the administrative law judge's opinion. The Full Commission finds that Ark. Code Ann. §11-9-505(b)(3) does not apply to a claim for permanent total disability benefits. The Full Commission finds that Ark. Code Ann. §11-9-505(b)(3) does apply to a claim for permanent partial disability benefits, but that the respondents did not prove that the instant claimant acted unreasonably in refusing to cooperate with the job-placement counselor. The Full Commission finds that the claimant did not prove he was permanently and totally disabled, but that the claimant did prove he sustained permanent partial disability benefits in the amount of 20%.

#### I. HISTORY

Steven Tucker, age 39, testified that he graduated from high school in 1988. Mr. Tucker testified that he worked for five years at an office supply company as a delivery person and printing press operator. The claimant worked for three weeks at El Dorado Paper Bag and then became employed for six years as a "spinner" at Prescolite. The claimant testified that the spinner job entailed making reflectors using a device similar to a lathe. The claimant testified that he began working as a press operator for Cooper in 1997. The claimant testified that he performed piece work

for the respondent-employer and that his rate of pay on the day of the compensable injury was "\$18 to \$22 an hour, depending on what jobs we had in the press."

The parties stipulated that the claimant sustained a compensable injury to his low back on October 27, 2000. The claimant testified that he injured his low back while trying to open a mold that was stuck. Dr. D'Orsay D. Bryant, III, an orthopaedic surgeon, saw the claimant on October 27, 2000: "The patient comes in today with a complaint of severe low back pain secondary to a work related accident that happened less than an hour ago. The patient is employed at Cooper Tire as a press operator. He was trying to break a mold open and he felt a sudden severe sharp pain and felt a 'shift' in his low back. He describes the pain as 'burning pain.'" Dr. Bryant's physical examination of the claimant showed "severe spasm in the right, left and midline of the low back." The physician's impression was "Severe lumbar strain with possible disc disease."

The claimant testified that he was initially off work for approximately 10 months following the compensable injury.

Dr. Wayne L. Bruffett performed "Laminotomies at L4-5 with a partial medial facetectomy and microscopic partial

discectomy and nerve root decompression" on July 27, 2001. The pre- and post-operative diagnosis was "Herniated nucleus pulposus, L4-5, on the right."

Dr. Bruffett returned the claimant to sedentary work on August 22, 2001. The claimant testified that he returned to work "Four weeks after my surgery. I was working and going back to Little Rock three times a week for physical therapy." The claimant testified that the respondents "had me trimming parts and doing what was like a finisher that worked behind the press operators....I made approximately \$12 an hour at that job." The claimant testified that his low back condition was aggravated by his work. Dr. Bruffett performed "Laminotomies at L4-5 with microscopic partial discectomy and nerve root compression" on January 18, 2002. The pre- and post-operative diagnosis was "Recurrent disk herniation at L4-5 on the right."

Dr. Bruffett noted on January 31, 2002, "I told him that it's doubtful that he'll ever be completely pain free, but I'm hopeful that he'll recover to the point where he can return to some type of gainful employment." The claimant testified that he did not return to work for the remainder of 2002.

Dr. Bruffett performed a third surgery on October 10, 2002: "1. Posterior spinal fusion at L4-5. 2. Pedicle instrumentation, L4-5. 3. Iliac crest bone graft (left) via separate skin incision." The pre- and post-operative diagnosis was "1. Post laminectomy syndrome, L4-5. 2. Symptomatic degenerative disk disease, L4-5."

The claimant testified that he did not return to work until February 2003. The claimant testified that the respondents "started me out picking up trash outside....It was like \$12 an hour. I think they classified it as utility. It was cold weather, and I was having trouble doing that job. So they put me in the storeroom, handing out supplies to the workers." The claimant testified that he stayed in this position for about one year, earning \$12 hourly.

The claimant returned to Dr. Bryant on May 29, 2003:

The patient comes in today with a complaint of severe low back pain. The patient had surgery on July 27, 2001, by Dr. Bruffett. Following that surgery the patient initially did well, but he stated that when he went to PT, he sustained an additional injury and later underwent low back surgery in October of 2002. Pedicle screws were inserted with a bone graft from the hip. The patient has been on steroids and has gained a great deal of weight. He is currently working the storeroom at Cooper which is a light duty job. I last examined the patient two years ago, and since that time, he has gained 70 lbs. The patient stated that he has been unable to exercise because

his low back pain has been persistent in nature despite the two low back surgeries.

Dr. Bryant planned the following: "1) Medication. 2) Back brace. 3) He will continue working in the same capacity as he has before. He has a previously scheduled appointment with Dr. Bruffett on June 5, 2003."

A physical therapist provided a Functional Capacity Evaluation Summary Report on June 9, 2003 and stated in part:

Considering overall test findings and clinical observations Mr. Tucker would not be able to return to his former job due to the following lifting restrictions: Floor-knuckle 0lbs, 12" - knuckle 8lbs, knuckle-shoulder 18 lbs. and shoulder-overhead 8 lbs. He is able to carry 13 lbs for 40 feet and is able to push-pull 140 lbs. Mr. Tucker was unable to work in a static standing position or work in a stooped position. He is unable to squat without assist to get up. His current DOL is rated for Sedentary to Light work. He is capable of continuing his current job and I would hope the company would accommodate him in this area.

The therapist's Recommendations were, "Mr. Tucker does need to exercise but do (sic) to his fear of re-injury I doubt he will be compliant in this area. No further recommendations will be made at this time. The results of this evaluation were reviewed with Mr. Tucker at the conclusion of the evaluation."

The claimant followed up with Dr. Bruffett on June 19, 2003:

Mr. Tucker returns after having obtained a functional capacity evaluation. There is no change in his subjective complaints or objective findings.

The FCE is reviewed with him in detail. I think this documented that he is not capable right now of functioning in his former job position. However, he does appear to be capable of performing in a sedentary to light duty capacity, and he can function in his current job.

**IMPRESSION:**

Status post posterior spinal fusion.

**PLAN:**

I have explained the FCE to Mr. Tucker as best I can, and I think he understands this. Hopefully his employer can accommodate him by making his current position a permanent one. If they cannot, then hopefully they have some other position within the company that fits the criteria of this FCE. If they do not have this either, then he may need to find some other kind of work. However, this is going to be difficult for him based on his age, education level, FCE results, etc.

I do think he has reached a point of MMI. Based on the American Medical Association "Guides to the Evaluation of Permanent Impairment," fourth edition, I would assign to him an impairment rating of 15% of the whole person. He can come back and see me as needed.

The parties stipulated that the claimant "reached the end of his healing period and maximum medical improvement on June 19, 2003." The parties stipulated that the respondents

"accepted and made payments toward a 15% permanent anatomical impairment to the body as a whole."

Dr. Earl Peeples independently examined the claimant on August 7, 2003 and stated in part:

Mr. Tucker reports that he is back at very light duty and indicates that he has no prior injury affecting his lumbar spine....

Mr. Tucker's situation is stable. He has what appears to be a solid fusion and impairment in the order of 15% of the body as a whole is an appropriate rating for a stable lumbar fusion....From a physical point of view, I have no quarrel with Dr. Bruffett's date of maximum medical improvement and percentage of impairment. I believe it would be in Mr. Tucker's best interest to have an MMPI evaluation by Dr. Winston Wilson to see if there is any psychological contribution to his substantial pain complaints. Three surgical interventions have failed to resolve his symptoms and I believe before anything else is considered a good psychological pain profile testing would be an appropriate next step. I also recommend that the patient reduce his weight from 290 down to about 200 lb. This obviously is not an easy task but with careful monitoring of diet could be done over the next two years. This will significantly unload his lower spine.

Judy Bourne, a Claim Supervisor with Crockett Adjustment, corresponded with the claimant on March 11, 2004:

As a follow up to our meeting there at Cooper on February 17<sup>th</sup>, 2004, I wanted to put into writing what workers' comp. is offering to you. Due to the fact that you have been previously advised that the job you are currently performing is a

salaried position and temporary in nature, the following are the options that are available to you:

1. Re-training program with workers' comp. paying for a maximum of 72 weeks of lost time benefits at your TTD rate of \$394.00 per week plus payment of tuition, books, supplies and mileage.
2. When your current job is no longer available, a final settlement of your claim at a mutually agreed to amount with all benefits ceasing as of the date of the settlement.
3. Resolution through a workers' compensation hearing before an Administrative Law Judge.

We are not trying to push you into rushing into any decisions, but since the elimination date of your job is unknown, you need to give some serious thought to your future.

If you should have any questions, please feel free to contact this writer and I will attempt to answer any questions you may have.

Dr. Bryant noted on March 25, 2004, "The patient asked me for a work excuse, and I told him that I would not take him off of work, that he could continue in his current light duty capacity. He is given medications."

The parties stipulated that the claimant could not be considered permanently and totally disabled "before the last day he worked in March of 2004."

The claimant saw Dr. Bryant on April 1, 2004: "The patient comes in today with a complaint of severe low back pain increased with sitting and standing. He stated that he cannot tolerate even his light duty job at Cooper. He is on

permanent restrictions. He stated that his back has grown more painful and it's almost to his pre-surgical level. He was operated on, by lumbar fusion, by Dr. Bruffett in 2001. He stated he feels pain radiating down his legs, making it difficult to walk....The prognosis for this patient's low back is uncertain, as Dr. Bruffett has released him from his care. The patient thanked me for the medications."

Dr. Bryant reported on April 8, 2004, "The patient comes in today for re-evaluation of his back. He stated that he is able to walk much better and his low back pain has improved after the medication that I prescribed....A followup appointment with Dr. Bruffett was made so that the patient's concerns could be addressed by the operating surgeon."

The claimant followed up with Dr. Bryant on April 22, 2004:

The patient comes to the office today with a complaint of persistent, severe low back pain. The patient stated that he could not do his job in the stockroom; therefore, he was moved to another job which involved sitting. He did have some stairs to climb.

He has his appointment to see Dr. Bruffett on May 12. He requested to be off work until that time. I told the patient that I would not take him off work. I told him that Cooper had given him the lightest possible duty job to minimize the stress on his low back. I did give him an analgesic medication to take as needed, but I told him not

to take the medicine and work at the same time. He will keep his appointment to see Dr. Bruffett and he will continue working at his current light duty job.

Nevertheless, the claimant testified that he did not work after April 2004: "I was having trouble with my back again. It just kept gradually getting worse. They tried to move me out of the storeroom. I was missing days because I was in pain. So they moved me out of there and tried to put me in the lab, which was upstairs. That first day, I worked approximately four hours; and I could not do the job. They sent me home, and that was the last day I worked there."

The claimant followed up with Dr. Bruffett on May 25, 2004: "I reviewed things with Mr. Tucker and his wife. He does not have a good track record with regards to spinal surgery. Because his pain is, I think, discogenic, if he did desire surgery I think he would need a repeat discogram at L5-S, and if this is concordant he would probably need an interbody fusion. This is a very extensive undertaking given his size, previous surgery, etc. Therefore, I think he ought to make every effort to manage his symptoms nonoperatively. I really do not think it is going to be all that valuable or successful for him to try to go back to work at this time. I think he needs to see the doctors over

at Little Rock Pain Management for evaluation and treatment...."

Dr. William E. Ackerman, III performed injection treatment on July 8, 2004. Dr. Ackerman noted in part on July 20, 2004, "My goal is to wean him from his medications....My ultimate goal is to attempt him to begin training for a new occupation." Dr. Ackerman noted on November 9, 2004, "The patient relates that since the weather has changed his pain has become worse. However, he is walking 30 minutes per day." The claimant returned to Dr. Ackerman on December 7, 2004: "His pain is worse with the onset of the cold weather and rain. He is not working. His activities of daily living remain limited. He requires medications and it is my medical opinion that he will require an opioid long term."

Dr. Bruffett stated in about January 2005, "It sounds like his job has tried to modify things admirably and his job is not very strenuous. However, he is not a very reliable employee right now. If he decides he does not want to have surgery, then he probably needs to go ahead and apply for disability because I do not think that he can do a light sedentary job, and there is probably nothing he is going to be able to do. If he does elect to have surgery, I

would have that one of his goals would be to improve his pain to the point where he can return to some type of work. I would like for Dr. Krishnan to do the diskogram if possible."

Dr. Sunder Krishnan examined the claimant on January 31, 2005 and informed Dr. Bruffett, "At this point in time I am setting him up for provocative lumbar diskography next Thursday in the office." Dr. Krishnan performed "Provocative lumbar diskography targeting the L3/4 and L5/S1 levels" on February 10, 2005.

Dr. Bruffett noted on March 2, 2005, "I would not recommend any further of surgery for him. I really do not have any restrictions to place upon him. In my opinion his work activities should be based on the results of FCE. He thinks he needs to see Dr. Ackerman with regards to his medications. He can come back and see me as needed."

Dr. Ackerman stated on April 26, 2005, "It is my medical opinion that a trial dorsal column stimulator will be done to see if his pain could be managed by this modality so that I could begin weaning him from opioid medications."

Dr. Ackerman stated on June 21, 2005, "He is not working. His functional capacity evaluation is over two years old. There may be a chance that he may be able to do

light duty and a repeat FCE will be done....It is still my medical opinion that a trial dose of column stimulator may be of benefit. He will see a new pain medicine physician, as he was discharged from my care as I am leaving the state."

Another Functional Capacity Evaluation was done on July 5, 2005, with the conclusions, "Mr. Tucker underwent functional capacity evaluation this date with unreliable results for effort. Mr. Tucker put forth inconsistent effort and demonstrates inappropriate illness responses. Mr. Tucker demonstrates the ability to work at least at the LIGHT Physical Demand Classification as determined through the Department of Labor."

Dr. Bryant reported on September 10, 2005:

The patient returns to the office today for a one time evaluation regarding his chronic low back pain. I am quite familiar with this patient as I initially saw him for his low back pain on October 27, 2000 and referred the patient to Dr. Bruffett after he failed a long trial of conservative management. The patient underwent surgery by Dr. Bruffett on July 27, 2001 which consisted of laminotomies at L4-L5 with a partial medial fascetectomy and microscopic partial discectomy and nerve root decompression. Following that surgery, the patient has been evaluated on multiple occasions by Dr. Bruffett, by Dr. Ackerman who recently left the state necessitating referral to another pain medicine physician, Dr. Arshad who recommended a spinal stimulation procedure. The patient is on a large dose of narcotic medications which include

OxyContin 20 mg q.12 hours as well as hydrocodone 10 mg. for breakthrough pain. Additional medications include Avapro, Lunesta, Gabitril and Lexapro.

PHYSICAL EXAMINATION: On physical examination of the back, the patient does have a healed midline surgical scar. He has no spasm in the right and left midline of the low back. The low back is nontender in the right and left midline.

The patient had an FCE on July 5, 2005. In regards to the reliability and consistency of effort, the FCE examiner noted "the results of this evaluation suggest that Mr. Tucker gave an unreliable effort, with 34 of 56 consistency measures within the expected limits. Mr. Tucker put forth inconsistent effort throughout the evaluation process." In the conclusion, the examiner noted "Mr. Tucker underwent a function (sic) capacity evaluation on this date with unreliable results of effort. Mr. Tucker put forth inconsistent effort and demonstrates inappropriate illness responses. Mr. Tucker demonstrates the ability to work at least at the light physical demand classification as determined through the Department of Labor."

ASSESSMENT:

1. I viewed a photograph from the South Arkansas Sunday News dated August 14, 2005 which showed the Arkansas Softball Association Starburst team who won fourth place in the 16-and-under women's division. The picture showed the patient standing with the team in the background and noted that he was one of the three coaches. I discussed this with the patient, and he stated that he was only a bench coach and not an active batting or fielding instructor doing strenuous athletic activities.

However, the patient did state that he traveled with the team in his coaching responsibilities.

2. The patient's ability to tolerate work is unknown but he does qualify for the light duty classification. An inconsistent effort was noted by the examiner, and therefore the patient's true

capacity to work is unknown. The examiner noted the patient was "positive for Waddell's signs of nonorganic low back pain". The examiner further noted that "Mr. Tucker's overall general abilities do not correlate with his high pain levels of 9 on a 0 to 10 pain scale. A 9 is defined as unable to speak, crying out/moaning uncontrollably, and near delirium. The patient did not demonstrate such pain characteristics on the office visit today.

3. It is unfortunate that Dr. William Akerman (sic) has departed the state as he was a fine physician. However, I am unfamiliar with the work of Dr. Muhammad Arshad, whose correlation with the patient is as a pain medicine physician. He may be a fine physician, but I have not heard of him prior to this office visit. I am in disagreement with his assertion on his July 19, 2005 note in which he recommended the spinal stimulator to be inserted, "spinal stimulation which would eliminate the need for taking narcotic medications". In my opinion, as the patient has been on OxyContin for at least a year and despite the OxyContin, he still requires 10 mg of hydrocodone for breakthrough pain, the need for pain medication will not be eliminated by the stimulator.

In my assessment, as he has been on the pain medication for so long, the patient would still require the use of narcotic pain medication despite the spinal stimulator, even if the spinal stimulator resulted in some diminution of his pain. Before the patient requested a prescription for OxyContin, but I told him that I do not write prescriptions whatsoever for that medication. He will need to followup with Dr. Arshad for that medication. He will followup with me on an as needed basis.

The claimant testified, "I tried to go back to work again in October of '05 because I was not receiving any income and I had to do something. They had me doing finishing work again, and I did that job for eight hours

that day. The next morning when I tried to get up to go to work, I couldn't get out of bed. So I called in and told them my situation....In my lower back, it was like a pulling sensation, almost being pulled apart and aching. In my hips and legs, it was a very sharp pain that would more or less shoot constantly all the way down to my feet." The claimant testified that he had not returned to work since October 2005.

A Rehabilitation Counselor, Tanya Rutherford Owen, commenced job placement services for the claimant on January 22, 2007. Ms. Owen met with the claimant, developed a draft resume and cover letter for the claimant, and began identifying potential job leads for the claimant. Ms. Owen found potential employment for positions such as cashier, clerical work, and security guard. Ms. Owen located an adult education class where the claimant could take a computer training course free of charge. Ms. Owen continued to identify potential job leads for the claimant. Ms. Owen wrote a Progress Report #1 on February 28, 2007:

**PROBABILITY OF SUCCESS**

Poor. It is unlikely that given the lack of activity in job placement services in the first 30 days that we will be successful in placing Mr. Tucker. Although leads have been identified, I have not been provided authorization from Mr. Tucker to fax his resume to potential

employers. He has not gone in person to apply for these jobs.

Therefore, employer contact is not being made for either open positions or with employers who would like Mr. Tucker's application for their consideration.

As an opportunity to segue Mr. Tucker into employment status and to increase his vocational skills, I requested that he enroll in a free of charge computer literacy class through El Dorado adult education. It is my understanding that he has not done this.

His lack of enrollment in class and his lack of follow up on job leads causes me to believe that he will be ultimately unsuccessful in returning to work.

If requested, I will continue to work with Mr. Tucker in additional job placement efforts.

The claimant testified regarding Ms. Owens' services:

Q. What type of jobs did she suggest to you?

A. Convenience store cashier, fast food places, Home Depot cashier.

Q. Do you think you could do any of those jobs?

A. No, sir.

Q. Why not?

A. Because I cannot stay on my feet constantly. I've got to be able to sit and stand.

Q. What was the highest paying job that she sought placement for you?

A. I never sought work at those, but I think the paperwork showed like \$7.50 an hour.

Q. Did Ms. Owen suggest any changes or make any requirements for you to interview for these jobs?

A. Yes, sir.

Q. What was that?

A. A dress code - nice shoes, slacks and a button-up shirt, which I never owned any clothes like that. She wanted me to go to these different places, but I had no vehicle at the time. I was living with my mother and daddy and was using their vehicle to do things like go to the doctor and so forth....

Q. Mr. Tucker, do you know of any job suggested by Ms. Owen or anyone else that you believe you could do for eight hours a day?

A. No sir.

The claimant testified that he began drawing social security disability in April 2007.

A pre-hearing order was filed on August 13, 2007. The claimant contended that he sustained a compensable injury on or about October 27, 2000, and that he was entitled to permanent total disability. The respondents contended that the claimant "received a 15% impairment as the result of his compensable injury and has received all benefits to which he is entitled."

The parties agreed to litigate the following issues:  
"Claimant: 1. The claimant's degree of permanent disability (wage loss). Respondents No. 1: 1. Amount and nature of disability."

A hearing was held on January 10, 2008. The respondents' attorney questioned Tonya Rutherford Owen, the claimant's vocational counselor:

Q. What was your understanding of your assignment in your work with Mr. Tucker?

A. My first assignment was to perform a vocational evaluation, and I did that in October of 2006....The types of jobs I surveyed included a check cashier, a counter clerk, switchboard operator, security guard, gate guard and a retail cashier.

Q. In your opinion, given the information you had about Mr. Tucker, were those jobs appropriate?

A. Yes, sir.

Q. Both with his educational level and experience level, as well as his physical capabilities?

A. That's right....

Q. Did you follow up with Mr. Tucker as to whether he had made any efforts to pursue the leads you had provided to him?

A. I did.

Q. And what was his response to you?

A. That he had not followed up. He had not enrolled in the computer classes. He had not gone in person to apply for any jobs. On the 13<sup>th</sup> of February, I was told not to fax resumes on his behalf, based upon the advice of his counsel. So I did not do that....

Q. Did Mr. Tucker indicate to you at any time that he had undertaken any steps toward any of the suggestions you had offered him?

A. No, sir.

The claimant's attorney questioned Ms Owen:

Q. So in all these assessments and evaluations, you don't have anything in your reports as to how long my client could stand; do you?

A. I have a functional capacity evaluation that says he can stand up to 2.67 hours a day.

Q. Did any of those jobs that you suggested he go and apply for require standing for more than 2.6 hours a day?

A. It's possible; but these are jobs rated at the light level, which shouldn't involve - the DOT says standing and walking usually about six hours a day. The check cashier job is sedentary. The switchboard job is sedentary. Most security jobs in this area are sedentary. The cashier job is light. So it's possible he could stand more than 2.67 hours a day there....

Q. Now, what was the highest paying job that you referred Mr. Tucker to?

A. I believe it was \$8 an hour.

Q. Do you know what the manager of a convenience store makes per hour?

A. Probably around that, \$8 to \$9 an hour.

Q. So the only jobs you felt like he was qualified for would be maybe \$8 an hour, if he could do it?

A. Yes, sir.

The administrative law judge filed an opinion on March 18, 2008. The ALJ found, in pertinent part: "6. Mr. Tucker refused to participate in job placement assistance without reasonable cause. Mr. Tucker's claim for wage-loss

disability benefits must therefore be denied pursuant to Ark. Code Ann. §11-9-505(b) (3)."

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).

"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. §11-9-519(e) (2).

Ark. Code Ann. §11-9-505(b) provides:

(3) 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.

An employer relying upon the defense enumerated in §11-9-505(b)(3) must show that the claimant refused to participate in a program of vocational rehabilitation or job-placement assistance, or, through some other affirmative action, indicated an unwillingness to cooperate in those endeavors, and that such refusal to cooperate was without any reasonable cause. See *Burris v. L&B Moving Storage*, 83 Ark. App. 290, 123 S.W.3d 123 (2003).

The Arkansas General Assembly has directed the Workers' Compensation Commission to strictly construe the provisions of the workers' compensation act. Ark. Code Ann. §11-9-704(c)(3). Strict construction requires that nothing be taken as intended that is not clearly expressed, and its doctrine is to use the plain meaning of the language employed. *Death & Perm. To. Dis. Tr. Fund v. Rodriguez*, CA 08-842 (Ark. App. 2-11-2009), citing *American Standard Travelers Indem. Co. v. Post*, 78 Ark. App. 79, 77 S.W.3d 554 (2002). The basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature. *Teasley v. Hermann*

*Companies, Inc.*, 92 Ark. App. 40, 211 S.W.3d 40 (2005).

Statutes are to be construed such that no word is left void, superfluous, or insignificant. *Estate of Slaughter v. City of Hampton*, 102 Ark. App. 373, \_\_\_ S.W.3d \_\_\_ (2008).

Ark. Code Ann. §11-9-505(b) (3) explicitly provides that “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 [emphasis supplied].” According to his brief on appeal to the Full Commission, the present claimant contends that he is entitled to permanent total disability benefits or in the alternative permanent partial disability benefits. Relying on strict construction of the Act, as we must, the Full Commission finds that a respondent cannot rely on Ark. Code Ann. §11-9-505(b) (3) as a defense when an employee claims he is permanently totally disabled. We therefore find that the administrative law judge erred as a matter of law in denying a claim for permanent total disability benefits based on Ark. Code Ann. §11-9-505(b) (3). Based on strict construction of the act, Ark. Code Ann. §11-9-505(b) (3)

cannot act as a statutory bar of a claim for permanent total disability.

Nevertheless, the claimant bears the burden of proving by a preponderance of the evidence that he is permanently and totally disabled. Ark. Code Ann. §11-9-519(e)(2); Ark. Code Ann. §11-9-704(c)(2). The Full Commission finds that the instant claimant did not prove he was permanently and totally disabled. The parties stipulated that the claimant reached the end of his healing period and maximum medical improvement on June 19, 2003. Dr. Bryant, a treating physician, stated on March 25, 2004 and April 22, 2004 that the claimant could work in a light-duty capacity. Dr. Bruffett, the treating surgeon, noted on March 2, 2005, "I really do not have any restrictions to place upon him. In my opinion his work activities should be based on the results of FCE." A Functional Capacity Evaluation was done on July 5, 2005: "Mr. Tucker underwent functional capacity evaluation this date with unreliable results for effort. Mr. Tucker put forth inconsistent effort and demonstrates inappropriate illness responses. Mr. Tucker demonstrates the ability to work at least at the LIGHT Physical Demand Classification as determined through the Department of Labor." Neither the examinations of the treating physicians

nor the results of the Functional Capacity Evaluation indicated that the claimant was permanently and totally disabled.

Dr. Bryant, an orthopaedic surgeon, again examined the claimant on September 10, 2005 and reported no spasm on physical examination of the claimant's low back. Dr. Bryant noted that the claimant had been unreliable and inconsistent during FCE testing, and that the claimant had demonstrated inappropriate illness responses. Dr. Bryant described a newspaper photograph showing the claimant as a bench coach for a girls' softball team. Dr. Bryant expressly stated, "The patient's ability to tolerate work is unknown but he does qualify for the light duty classification." Dr. Bryant did not opine that the claimant was permanently and totally disabled.

A Rehabilitation Counselor, Tanya Owen, provided job placement assistance to the claimant beginning January 22, 2007. Ms. Owen drafted a resume for the claimant, identified a number of job leads, and set up a free computer training class for the claimant. The claimant exhibited a marked lack of cooperation with the job placement services provided by Tanya Owen. Ms. Owen credibly testified that the claimant instructed her not to fax the claimant's resume

to any potential employers. Nevertheless, we find that the respondents did not prove that the claimant acted unreasonably in his lack of cooperation with the vocational counselor. Ms. Owen conceded that the claimant cannot stand more than 2.67 hours daily. The claimant has undergone three low back surgeries with a corresponding anatomical impairment. The claimant's physical condition has deteriorated and he is now reliant on prescription narcotic medication for his chronic pain. The claimant most likely will not be able to return to his former employment position as a press operator for the respondents. The claimant testified that he was earning \$18 to \$22 hourly at the time of his compensable injury. The jobs identified for the claimant by the rehabilitation counselor did not pay in the same range. Based on the claimant's young age, his intelligence, his work experience, and the claimant's lack of motivation to return to appropriate work, the Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 20%.

Based on our *de novo* review of the entire record, the Full Commission finds that Ark. Code Ann. §11-9-505(b)(3) does not apply to a claim for permanent total disability benefits. We reverse the administrative law judge's finding

that the claimant's claim for permanent total disability must be denied pursuant to Ark. Code Ann. §11-9-505(b)(3). The claimant did not prove that he was permanently totally disabled but did prove that he was permanently partially disabled. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 20% in addition to the 15% anatomical impairment accepted and paid by the respondents. The respondents in the present matter did not prove that the claimant acted unreasonably in his lack of cooperation with the job-placement counselor. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 1996). For prevailing in part on appeal, the claimant's attorney is entitled to an additional fee of two hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 1996).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. McKINNEY, Commissioner

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

**CONCURRING AND DISSENTING OPINION**

I must respectfully concur, in part, and dissent, in part, from the majority opinion. I specifically concur in

the majority's finding that Ark. Code Ann. §11-9-505(b) (3) does not act as a bar to the claimant's receipt of wage-loss disability benefits. I also specifically concur in the majority's finding that the claimant has proved entitlement to wage-loss disability in the amount of 20% over and above his anatomical impairment rating. However, after a de novo review of the record, as I find that the claimant has proved by a preponderance of the evidence his entitlement to permanent and total disability benefits under Ark. Code Ann. §11-519 (e) (1), I must respectfully dissent from the majority's failure to award the claimant permanent and total disability benefits.

Permanent total disability is defined as inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-519 (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 same factors considered when analyzing wage loss disability claims are usually considered when analyzing permanent and total disability claims. See Ark. Code Ann. §11-9-519 (c); Cross v. Crawford Memorial Hospital, 54 Ark. App. 130, 923 S.W. 2d 886 (1996). In

determining wage-loss disability, in addition to the percentage of permanent physical impairment, the Commission may take into consideration such factors as the claimant's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity. Ark. Code Ann. §11-9-522 (b) (1). Such other matters include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961).

The claimant worked for the respondent as a press operator. He earned \$12 to \$15 per hour paid on a piecework basis. On October 27, 2000, he sustained a compensable work-related back injury attempting to open a stuck mold. The claimant underwent an L4-5 diskectomy surgery in July of 2001 and second diskectomy surgery at the same level in January of 2002. He underwent an L4-5 fusion surgery in October of 2002. The claimant testified that he returned to work for the respondent performing light duty in the storeroom in 2003 but that he could not do the work and left the position in April of 2004. The claimant testified that he again attempted to return to work for the respondent in a finishing position in October of 2005, working for an eight hour day, but was unable to get out of bed the next morning

due to his exertion, and was unable to continue in the finishing position. The claimant testified that he has not worked since October 2005 due to pain in his back and the medications he takes to control the pain. The claimant testified that he takes 500 milligrams of Hydrocodone every four to six hours for pain. The claimant testified that he also takes 20 milligrams of Oxycodone ER three times a day for pain. The claimant testified that the Hydrocodone does not completely ease the pain, and often makes him groggy and sometimes jittery. The results of Functional Capacity Evaluations performed in 2003 and 2005 indicate that the claimant can perform only sedentary to light duty, standing no more than 2.67 hours per day.

In Whitlatch vs. Southern Development, 84 Ark. App. 399, 141 S.W.3d 916 (2004), the claimant appealed the Commission's 50% wage loss disability award. The Whitlatch claimant was a manual laborer with an eleventh grade education who had sustained a back injury, undergone one surgery, and received an anatomical impairment rating of 9% to the body as a whole. He had undergone numerous procedures, tests, and treatments over a four-year period in an effort to overcome his injuries and return himself to work. The Court noted the following limitations:

As a result of his severe pain, appellant is not able to sleep at night. During the day, he tries to lay down and rest. Due to his lack of sleep, he reports that he stays, "irritable, jittery, and angry." According to appellant, he suffers side effects from the medications, which makes him "feel groggy, down, and not there all the time." Appellant stated that he spends his days getting "up and down" to get comfortable. He testified that the most comfortable position for him is lying on his left side with his left leg pulled up towards his body with his right leg straightened. He said that during the day he watches television, reads, and lies on his bed playing with his dog, a small toy fox terrier. Between the working hours of 8 a.m. and 5 p.m., he estimates that he spends four to five hours lying down and trying to cope with his pain. As a result of his pain, he is no longer able to take care of his household responsibilities, and a neighbor helps with his housework. He is unable to vacuum, cook, or wash dishes.

In Whitlatch, the claimant contended on appeal that the Commission's decision should be reversed and an award of permanent total disability entered. The Court agreed, reversed the Commission's decision, and awarded

permanent total disability benefits based on evidence of the severe pain he suffered in his back and legs along with the side effects associated with the narcotic medication taken daily.

Like the claimant in Whitlatch, Mr. Tucker has undergone extensive medical treatment for a period of more than four years, continues to suffer severe pain in his back and legs, and requires frequent periods of rest and many opportunities to lay down during the normal work day. He suffers from the same side effects brought on by the use of narcotic medication as did Mr. Whitlatch. His daily activities are similarly sedentary and his inability to perform household duties is comparable. The restrictions imposed upon Mr. Tucker, as a result of his injury, are virtually indistinguishable from those of the claimant in Whitlatch.

However, it should be noted that the claimant in this case has undergone three serious back surgeries while the claimant in Whitlatch had only one. In addition, Mr. Tucker has a 15% anatomical impairment, which is almost double the impairment suffered by Mr. Whitlatch. All things considered, this case presents an even stronger factual

basis for an award of permanent total disability than Whitlatch.

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

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PHILIP A. HOOD, Commissioner