

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E910613

MELISSA CAROL THETFORD, EMPLOYEE	CLAIMANT
ELECTRIC COWBOY, INC., EMPLOYER	RESPONDENT NO. 1
FREMONT PACIFIC, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JUNE 27, 2008

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

Claimant represented by the HONORABLE STEPHEN T. ARNOLD,
Attorney at Law, Texarkana, Arkansas.

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

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

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The Arkansas Court of Appeals has remanded for further
findings of fact. *Thetford v. Electric Cowboy, Inc.*, CA07-
716 (March 12, 2008). The Court of Appeals remands the case
for the Commission to make specific findings as to what

effect, if any, the claimant's use of pain medication has on her ability to work. The Court also directs the Commission to make specific findings of fact regarding the claimant's continued need for additional medical treatment. Pursuant to the remand from the Court of Appeals, the Full Commission finds that the claimant proved she was entitled to continued medical treatment, including medication prescribed by Dr. Tracy. We find that the claimant did not prove she was entitled to any wage-loss disability. The Full Commission finds that the claimant's use of pain medication did not render her unable to perform suitable work within her physical restrictions, and that the claimant's use of pain medication did not constitute reasonable cause for the claimant to refuse to participate in vocational rehabilitation and job-placement assistance.

I. HISTORY

Melissa Carol Thetford, age 36, testified that she quit school in the ninth grade but later obtained a G.E.D. Ms. Thetford testified that she worked as a bartender and worked at Kroger for a short time. The claimant testified that she worked at Pizza Hut in 1995, where she slipped and fell on her tail-bone. The accident at Pizza Hut did not result in any permanent disability. The claimant's testimony

indicated that she performed waitress work for two separate establishments. The claimant testified that she worked as a bartender at The Pines, predecessor to Electric Cowboy, beginning in about 1993. The claimant worked for a time at Applebee's beginning in 1997.

The claimant testified that she began working for Electric Cowboy as a bartender in August 1998. The claimant testified that she worked three nights weekly, 18-20 hours per week. The claimant testified that she sustained an injury on May 1, 1999: "I was getting a case of beer to put into the cooler and when I bent over to pick it up, I felt something pop. I got a sharp pain in my back so I sat it down." The claimant testified that her employment was terminated on August 26, 1999 because of "my attitude."

The claimant testified that she performed computer data entry work for Patterson Engineering, for a total of 30 hours, in August and September 1999.

The claimant was diagnosed as having low back pain and acute sciatica in September 1999. The record indicates that Dr. Jeffrey T. DeHaan performed a two-level diskectomy, L3-4 and L4-5, in October 1999. The parties deposed Dr. Jeffrey DeHaan on February 24, 2000. Dr. DeHaan testified regarding the claimant's permanent restrictions, "I would say she

probably should find something in the range of twenty-five pound to thirty pound limit as far as lifting is concerned down the road." Dr. DeHaan performed a "re-do diskectomy" at L4-5 in about April 2000. The claimant's testimony indicated that she worked as an apartment manager, part-time, beginning in November 2000.

An administrative law judge (ALJ) filed an opinion on June 6, 2000. The ALJ found, among other things, that the claimant sustained an injury arising out of and in the course of her employment on May 1, 1999. The ALJ found that the claimant was temporarily totally disabled beginning September 5, 1999 until a date yet to be determined. The ALJ found that the respondent shall pay all reasonable hospital and medical expenses arising out of the May 1, 1999 injury. The ALJ's decision was affirmed by the Full Commission and the Court of Appeals.

Dr. DeHaan noted in July 2000, "I think at this time we just need to go ahead and get her into PT with a little more strengthening type program. I advised her not to return to any heavy type work. I think she needs to get back in school which she's considering doing. We'll see her back here again in 6 weeks and get her in a rehab program at this time." Dr. DeHaan indicated in January 2001 that he was

going to refer the claimant to Dr. Ted Saer. The claimant's testimony indicated that she stopped working as an apartment manager in May 2001. The claimant began treating with Dr. Yeshwant P. Reddy, a physiatrist, in May 2001. Dr. Edward H. Saer, III followed up with the claimant in June 2001. Dr. Saer planned to get the claimant back to Dr. Reddy for non-operative measures.

The claimant testified on cross-examination regarding a job in September 2001, "I drove a pickup truck pulling a trailer to Louisiana and stayed there for three weeks and then I drove the truck back and got paid for the time that it took for driving, and then yes, I did drive the tractor. It wasn't even - I don't think it was even 40 hours with driving the truck behind a combine at 14 miles an hour."

Dr. Reddy informed the respondents' attorney in February 2002, "I would assume that this patient has reached maximum medical improvement. Her future treatments would include intermittent spinal injections and chronic pain management." The claimant testified that injection treatment from Dr. Reddy "hurt worse than it helped." Dr. Reddy informed the respondents' attorney in April 2002, "This lady has three-level lumbar disc disease. I do not think she will be able to return to her employment." Dr.

Reddy assigned the claimant a 14% anatomical impairment rating.

Dr. Saer stated in May 2002, "I would agree that she has reached MMI. It is difficult to say if she is able to work or not. At this point, I do not know what her permanent physical restrictions are. I have not seen her since June 26, 2001. I would defer to Dr. Reddy regarding that." On or about January 29, 2003, Dr. Saer performed an excision of recurrent herniated nucleus pulposus L4-5 right. Dr. Saer reported after a May 2003 follow-up visit, "She is doing a little walking at home, but I really think she needs to get more active. I am going to give her a referral for some physical therapy. I will refill her pain medicine, but again I talked with her about the need to come off of that. She just cannot continue to take that on an indefinite basis." The claimant testified that she had not worked since May 2003.

The claimant began treating with Dr. W. Lee Tracy in October 2003. Dr. Saer reported on November 25, 2003:

Ms. Thetford is back in follow-up. I saw her in August. She was having more pain then. We repeated the MRI, but it did not really show any changes other than some annular tears at L3-4 and L5-S1. There was no evidence of recurrent disc herniation or abnormalities at L4-5 where she had her last surgery.

She continues to have problems with her back. She controls this with activity and medication occasionally. She is following up with Dr. Tracy, her PCP.

She did see Dr. Krishnan for his evaluation. He did not feel that any additional procedures would be helpful for her....On exam she walks normally. Her back motion is fairly guarded and quite limited....She has solid fusion at L4-5. There is no evidence of instability at the other levels....

I think she is at MMI from the standpoint of her surgery. I do not think she will require any additional surgical treatment at this time, but she may need additional medical management. I would estimate an additional 5% impairment based on her discectomy and fusion, using the AMA Guidelines, 4th Edition.

The parties stipulated that the claimant reached the end of her healing period on November 25, 2003. The parties stipulated that the claimant was assigned a 19% permanent impairment rating, which rating Respondent No. 1 had accepted and paid.

Eddie Nichols, a vocational counselor with Rehabilitation Management, Inc., wrote to the claimant's attorney on January 16, 2004: "This letter is to confirm our conversation of January 15, 2004 in which you gave permission for me to complete an Initial Vocational Evaluation with Melissa Thetford. I am enclosing our professional consent form which I may need in obtaining

medical or other information to develop a vocational rehabilitation plan for Ms. Thetford."

Dr. Tracy noted on January 22, 2004, "Needs refills today....She's on Soma TID, Effexer 75 daily and hydrocodone. She normally takes 5 mg, 1 or 2 at a time. She normally gets 150 a month. This month she said she's been in a little extra pain so she used them up a little early....She comes in monthly to see me for refills. Her lawyer is handling the other part as far as settlement. Dr. Saer takes care of the back, we just take care of the monthly refills...."

The claimant underwent a Functional Capacity Evaluation on January 29, 2004, at which time John L. Looney concluded, "Ms. Thetford demonstrated ability to safely perform work in the LIGHT Physical Demand Classification as determined through the Department of Labor for an 8-hour day with the above listed limitations. She is able to safely accomplish work in this classification with consideration given to occasional position changes."

Edie Nichols submitted an Initial Vocational Evaluation on February 9, 2004:

At the request of Cathi Eckelkamp with Arkansas Property and Casualty, I met with Melissa Thetford to conduct an initial evaluation. On 1/22/04,

I traveled to DeWitt, AR to meet with her to conduct this evaluation. Ms. Thetford was cooperative and pleasant during the evaluation....

Ms. Thetford is a 32 year old woman who has undergone three surgeries on her back. She does not appear very motivated to return to the workforce at this time, and has complaints of daily pain. Ms. Thetford appears to have reached MMI from her latest surgery....

Based on Ms. Thetford's current FCE results, she would have the functional capacity to return to work now, with little if any additional training, in *sedentary* to *light* work jobs such as: cashier, receptionist, telephone sales, and other options that could be further developed through a more detailed Transferable Skills Analysis.

Although it is my opinion that Ms. Thetford could, based on her functional testing and skills, return to several types of sedentary to light jobs, it is noted that she expressed a very specific interest in the bookkeeping/accounting field, and this interest may be motivational in her return to employment. If approved by all parties, I would be glad to pursue local short-term training options in the bookkeeping/accounting area that would significantly enhance her skills, and broaden her options for return to work in *light* job classifications. I also think it would be therapeutic for Ms. Thetford to get out of the house and become involved in some type of training on a regular schedule, as an important first step in her return to appropriate employment....

Ms. Nichols recommended, "If vocational services are pursued, that I (or an RN case manager) consult with Ms. Thetford's GP to develop a plan for reduction of prescription medication levels."

Edie Nichols wrote a Progress Report on June 4, 2004: "On 6/3/04, I received approval to follow up on the recommendations that I made in the initial vocational evaluation....I will meet again personally with Ms. Thetford to discuss specific training options, including local adult education, and make specific plans with him (sic) for following through." Ms. Nichols began leaving telephone messages for the claimant and spoke with the claimant on at least one occasion. Ms. Nichols noted on July 8, 2004, "I have attempted telephone contact on several occasions. Ms. Thetford called and left a message for me yesterday, July 7. She told me that her daughter continues to have health problems and has had an MRI. She told me that her attorney has set up a FCE for her on July 20. Ms. Thetford also said that she may be getting a telephone soon....I will meet personally with Ms. Thetford to discuss specific training options, including local adult education, and make *specific* plans with her for following through. I will notify Ms. Thetford by mail as to our meeting date."

The clamant continued to follow up with Dr. Tracy, and Dr. Tracy continued to refill the claimant's medications.

Edie Nichols informed the claimant on July 12, 2004, "I received your phone message and hope that everything is

going well for you and your family. I will be able to meet with you on July 19 at 10:30 a.m., if that is convenient for you." Ms. Nichols reported on August 6, 2004, "During this reporting period, I traveled to DeWitt on July 19 for the purpose of meeting with Ms. Thetford to review and pursue local training options. Ms. Thetford was not at home when I arrived and I waited for her. A few minutes later, she came over to my car from her mother-in-law's house. She told me that she had forgotten to call me to let me know that she would be traveling to Texarkana that day for her Functional Capacity Evaluation, scheduled for the next day....I spoke with her by phone on the telephone here on August 6, and she told me that the FCE computer had stopped portions of the FCE because of elevated heart rate. Ms. Thetford said the elevated heart rate was due to the amount of pain that she was experiencing during the testing tasks. She said that she has not received the results of the test."

Ms. Nichols continued to follow up with the claimant.

The claimant's attorney corresponded with Bob White, a vocational specialist with White & Rowland, Limited, on October 23, 2004 and stated in part: "We discussed a vocational evaluation for Melissa Carol Thetford. You agreed to do the vocational evaluation for her and requested

a copy of her medical records." The claimant testified, "I had called Bob White and talked to him about making arrangements to see him and then I guess my payments, my checks ran out and then I couldn't because I didn't have the money and I couldn't afford to go."

The record contains an undated Affidavit of Mr. Robert White, stating in part, "4. Since Ms. Thetford's attorney's initial request for my vocational consultative services, I have attempted to contact Ms. Thetford by telephone at her home on approximately six to seven occasions and have left messages for her on her answering machine, requesting she contact me about arranging her requested vocational assessment. 5. Ms. Thetford has not responded to any of my messages or attempts to contact her."

Bob White corresponded with the respondents' attorney on November 16, 2004: "Be advised I have received your letter and the statements in the affidavit are correct. I am also by copy of this letter advising I am not involved in this case in any capacity and will not be performing any services regarding Ms. Thetford. Again, I have not had contact with Ms. Thetford, have not reviewed the file provided by Mr. Arnold and will have no involvement in this case now or in the future."

In a progress report dated January 4, 2005, Edie Nichols placed the claimant's file "on hold until advised to proceed." The claimant's attorney wrote to Ms. Nichols on January 10, 2005 and stated in part, "I just want to explain to you that your dogged attempts to build your file out of this case are out of order in my opinion....Ms. Thetford is awaiting further evaluation from her orthopedic surgeon, Dr. Saer, which will occur on or about January 20, 2005. In the event that Dr. Saer does not believe that additional surgical intervention is necessary, then Bob White will logically follow with his vocational evaluation to my understanding. Any evaluation and recommendations for vocational rehabilitation that you have done in any manner up to this time are therefore wholly premature and inappropriate in my opinion."

Dr. Saer noted on January 20, 2005, "She is back because she is having more trouble with her back and left leg. She says the pain never totally went away but it has been gradually increasing....It is not clear what is causing this pain. She is concerned that she is developing a problem at the other levels. It would be unlikely to have further problems at the L4-5 level but I think the only way

we are going to be able to evaluate this is with another MRI."

An MRI of the claimant's lumbar spine was taken on February 17, 2005, with the impression, "There is degenerative disk disease which extends from the L3 to the S1 level. As compared with the prior study there is little interval change."

Dr. Saer saw the claimant on February 17, 2005 and recommended electro-diagnostic testing. Dr. Saer reported on March 10, 2005, "She had her EMG/NCV study done earlier today and I have those results. Interestingly, she says that since she had the study, she is not having the pain in her left leg that she had before it....The study is basically normal....I would recommend that we get her back in to see Dr. Krishnan for his evaluation. He could also address her medication usage and whether it is appropriate for her to continue that on a long term basis. Her primary care physician, Dr. Tracy, is currently managing that."

Dr. Sunder Krishnan saw the claimant on March 28, 2005 and noted among other things, "I informed Ms. Thetford that I already evaluated her for her medication utilization several years ago and at this point in time if workman's

compensation wants another re-evaluation for her medications I would recommend referral to another physician. There is no need for me to offer this patient injections when they had made her symptoms worse in the past and when she is not interested in pursuing them. No formal visit was performed. The patient was in agreement."

Dr. Edward H. Saer informed the respondents' attorney on May 19, 2005, "I believe Ms. Thetford's recent visits were prompted by an exacerbation of her preexisting condition. I did not see any evidence of new pathology. In fact, the radiologist that read her recent MRI said that there was basically no change from her prior study. The changes that I noted at L5-S1 I do not believe are clinically significant and she does not need any surgical treatment there....Ms. Thetford's condition appears to be stable, at least radiographically, and I do not think that her prognosis has been changed as a result of this recent exacerbation. I am not able to address questions about her motivation. I am also reluctant to declare her totally and permanently disabled at this time."

A pre-hearing order was filed on September 26, 2005. The claimant contended that she was "totally and permanently disabled by her anatomical and wage-loss disabilities."

Respondent No. 1 contended, among other things, that the claimant was not permanently totally disabled because she was "able to earn meaningful wages in at least some capacity; that the claimant is not entitled to any wage-loss benefits, because she unreasonably has refused vocational rehabilitation and job placement assistance, per Ark. Code Ann. §11-9-505(b) (3) [.]"

The parties agreed to litigate issues including whether the claimant was permanently totally disabled; in the alternative, whether the claimant had sustained wage loss in excess of her assigned anatomical impairment rating; unpaid medical bills; and whether the claimant was entitled to medical treatment.

Dr. Tracy wrote on October 28, 2005, "Mrs. Thetford has been a patient of mine since 10-30-03. At that time she was on Hydrocodone and Soma....Concerning her pain medication, she takes on average 5 Hydrocodones daily. I say average, because some days it is less than and some days more than. She takes these for chronic pain. She is unable to function much at all without her medication. I believe it is her physical impairment that keeps her from being able to be gainfully employed. People believe that if you are on chronic pain medications, you are automatically addicted. I

believe people take medicines for pure addiction purposes, they require more and more over time, and in this instance, this has not happened. She states that in the past she has been on at least 3 medications in place of her present ones without success. During our visit on 10-28-05 I have come to the conclusion, to a reasonable degree of medical certainty, that Mrs. Thetford is on appropriate medical regimen."

Via certified mail on November 22, 2005, Edie Nichols identified job leads for the claimant for the positions of document examiner, secretary, and substitute teacher. Ms. Nichols reported on December 7, 2005 and stated in part, "I have completed four Labor Market Surveys in Mr. Thetford's (sic) geographical area. On 11/22/05, I sent Ms. Thetford three current job leads and requested she contact me if she was interested in pursuing any of the listed jobs. To date, I have not received a response from Ms. Thetford." Also on December 7, 2005, Ms. Nichols gave the claimant a job lead, "Life/Disability Insurance Representative." The claimant testified that she did not return Edie Nichols' telephone calls, "Because I didn't feel that I could do those jobs, not to mention that I don't - I mean, I didn't want to waste the employer's time by going and then not being able to do

the job and then getting fired and being in the same boat that I'm in now."

The parties deposed Dr. W. Lee Tracy on December 13, 2005. Dr. Tracy, a family practitioner, testified that he began treating the claimant in October 2003. Dr. Tracy testified with regard to the claimant's interest in returning to work, "I do remember having a conversation with her, and she said that, you know, she would rather be working than not working....If it was possible for her to work, that is what she would like to do." Dr. Tracy opined, however, that the claimant was not able to work in any capacity. Dr. Tracy testified that the claimant "normally can't function without the pain medication because of the pain."

A hearing was held on January 19, 2006. The claimant testified regarding her prescription medication, "I take Hydrocodone 10.650 and I take one every four to six hours as needed for pain. Then I take Soma 350 three times a day." The claimant testified that she took pain medication "Because I wouldn't be able to do anything otherwise. I hurt. I mean, even laying around the house, if I don't have that, I hurt....My back and my leg and it just - it's really bad pain....The pain is not getting any better, it's getting

worse." The claimant testified that she had always wanted to be an accountant, but that she did not think she could perform that work "Because I don't think I would be able to sit long enough without having to stand and have to go and lay down." The claimant testified that she wanted to work "if I physically thought it was possible."

The claimant testified, "I'll never be able to hold a full time job down. I won't. Why? Because I can't stay up longer than two hours without getting to hurting so bad that I cry[.]"

Edie Nichols testified that she began providing vocational consultative services to the claimant in January 2004. Ms. Nichols testified that a functional capacity evaluation had indicated that the claimant could perform light work, defined as "an occasional lift of 20 pounds with frequently carrying up to 10 pounds....I thought that she probably could in the light category with her transferable skills, such as meeting with the public and answering the phone, doing kind of a receptionist type job." The respondents' attorney questioned Ms. Nichols:

Q. What kind of information did you obtain for Ms. Thetford with respect to the Phillips Community College programs?

A. A schedule of classes that were offered, what she would need in order to enroll, the cost of tuition.

Q. Okay. Were there programs on there that had to do with her interest areas such as bookkeeping or that type of work?

A. Yes.

Q. Did she follow back up with you about that community college prospect?

A. No.

Q. Did she ever indicate to you any interest in pursuing that with accommodations?

A. No. She did say at one point that she didn't feel like she could sit in a classroom. And I said that I could talk with the college and see if some sort of accommodations could be made available, such as a footstool or being able to get up during the class and, you know, walk around, so that she wasn't sitting all of the time.

Q. Was that a possibility?

A. Yes.

Q. With those accommodations did Ms. Thetford ever indicate to you any interest in pursuing that line of retraining or those programs of retraining?

A. No....

Q. Here we are two years after you initially began your efforts to provide her with vocational rehabilitation, retraining programs, and job placement assistance. Has the claimant ever demonstrated any real interest or put forth any real effort to pursue any of the retraining or job placement assistance that you have offered?

A. No.

An administrative law judge filed an opinion on March 9, 2006. The ALJ found, among other things, that the claimant did not prove she was permanently totally disabled. The ALJ found that the respondents proved that the claimant without reasonable cause refused to participate in or cooperate with rehabilitation and job placement assistance, so that the claimant was barred from receiving wage-loss disability benefits. The ALJ found that the claimant proved she was entitled to continued reasonably necessary medical treatment. The claimant appealed to the Full Commission and Respondent No. 1 cross-appealed. In an opinion filed April 19, 2007, the Full Commission affirmed and adopted as modified. The Arkansas Court of Appeals has remanded for further findings of fact.

II. ADJUDICATIONA. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that she is entitled to additional medical treatment. *Wal-Mart Stores,*

Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003).

What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

In the present matter, an administrative law judge found that the claimant proved she was entitled to continued medical treatment by her authorized physicians, "including management of her prescription medication." The Full Commission affirms this finding. A claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004), citing *Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Dr. Tracy in the present matter has opined that the claimant is "on appropriate medical regimen." We recognize that Dr. Saer expressed concern about the claimant's chronic usage of narcotic prescription medication. However, Dr. Saer noted in March 2005 that Dr. Tracy was managing the claimant's medication and recommended an evaluation by Dr. Krishnan. Dr. Krishnan subsequently declined to evaluate the claimant's usage of medication. There are currently no medical opinions of record which

directly contradict Dr. Tracy's opinion. The Full Commission affirms the administrative law judge's findings regarding reasonably necessary medical treatment.

B. Disability

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). 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 her future earning capacity. Ark. Code Ann. §11-9-522(b)(1). A lack of interest or lack of motivation in returning to work or a negative attitude impedes an assessment of the claimant's loss of earning capacity. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

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 *Burriss v. L&B Moving Storage*, 83 Ark. App. 290, 123 S.W.3d 123 (2003).

The Court of Appeals in the instant case has directed the Commission to "make specific findings as to what effect, if any, Thetford's use of pain medication has on her ability to work." The Full Commission finds that the claimant's use of pain medication has not restricted the claimant from returning to suitable work within her physical restrictions. The claimant is only age 36 and has a GED. The claimant has worked for several different employers and was working part-time when she sustained a compensable injury on May 1, 1999. The claimant was able to perform some limited work after her compensable injury. The claimant underwent low back surgery in October 1999, April 2000, and January 2003. The claimant

was eventually assigned a 19% anatomical impairment rating, accepted and paid by the respondents.

The claimant began receiving medication management with Dr. Tracy in October 2003. Dr. Tracy stated in January 2004, "Dr. Saer takes care of the back, we just take care of the monthly refills." The results of a Functional Capacity Evaluation in January 2004 indicated that the claimant could safely perform light work for an eight-hour day with restrictions. Edie Nichols, who the Commission determines was a credible witness and a qualified vocational rehabilitation assistant, began consulting with the claimant in February 2004. Edie Nichols met with the claimant, identified several appropriate job leads, and subsequently attempted to contact the claimant on numerous occasions. The claimant never followed up on the leads, would not stay in contact with Ms. Nichols, and simply chose not to cooperate with the vocational services offered to her. The claimant's attorney arranged for the claimant to consult with Bob White, another vocational specialist, but the claimant did not cooperate with Mr. White either. The Full Commission attaches minimal weight to Dr. Tracy's opinion that the claimant was "not able to work in any capacity." The respondents proved in the present matter that the

claimant manifestly refused to participate in a program of vocational rehabilitation and job placement assistance, and the respondents proved that the claimant's refusal to cooperate was without reasonable cause. The Full Commission finds that the claimant's dependence on prescribed narcotic medication was not reasonable cause to refuse to participate in the services offered by Edie Nichols and Bob White. We thus affirm the administrative law judge's finding that the claimant was barred from receiving wage-loss disability benefits.

The Full Commission recognizes the Court's decision in *Whitlatch v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). In *Whitlatch*, the Court reversed the Commission's 50% wage-loss award and found that the claimant proved he was entitled to permanent total disability benefits. The Court considered the claimant's 11th-grade education, manual labor employment skills, severe pain, side effects of pain medication, and medical and vocational expert testimony. *Whitlatch* is distinguishable from the present matter, in that the instant claimant has a general education diploma and was identified as having several transferrable job skills. Dr. Saer was hesitant to rate the instant claimant as being permanently totally disabled.

Also in *Whitlatch*, Bob White had opined that the claimant could not perform any employment, even sedentary employment. Bob White has not offered a similar opinion in the present matter and the claimant in fact would not participate in the services offered by Mr. White. The record indicates that the instant claimant is able to perform at least restricted light-duty employment.

In *Lohman v. SSI, Inc.*, 94 Ark. App. 424, ___ S.W.3d. ___ (2006), the Court reversed the Commission's finding that the claimant refused to participate in or cooperate with an offered program of rehabilitation and job-placement assistance. The Court held, "reasonable minds could not conclude that Lohman refused to participate in or cooperate with an offered program of rehabilitation and job-placement assistance, particularly in light of appellees' refusal to provide psychological assistance that their own witness said was necessary in order for her vocational rehabilitation services to be meaningful. Therefore, his claim was not barred by Ark. Code Ann. §11-9-505(e)." *Id.*, at 431.

The record does not demonstrate in the present matter that the claimant required psychological assistance in order to participate in vocational rehabilitation. The instant claimant met with a vocational counselor on one occasion but

otherwise did not participate in any of the vocational services offered to her by Edie Nichols, the counselor referred by the respondents, or Bob White, the counselor referred by the claimant's attorney. The claimant's use of pain medication did not render her unable to work, and her use of pain medication was in no way reasonable cause to refuse to participate in vocational rehabilitation and job placement assistance.

Pursuant to the remand from the Arkansas Court of Appeals, and based on the record currently before us, the Full Commission affirms the administrative law judge's finding that the claimant proved she was entitled to continued medical treatment, including medication prescribed by Dr. Tracy. The Full Commission affirms the administrative law judge's finding that the claimant was barred from receiving wage-loss disability benefits. The Full Commission finds that the claimant's use of pain medication did not affect her ability to return to suitable work within the claimant's physical restrictions. The respondents also proved that the claimant refused to participate in a program of vocational rehabilitation and job-placement assistance. The claimant's refusal to participate was without reasonable cause, and the claimant's

use of pain medication did not constitute reasonable cause for the claimant's refusal to participate in vocational rehabilitation and job placement assistance.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

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

CONCURRING AND DISSENTING OPINION

I agree with the majority opinion finding that the claimant proved she was entitled to continued medical treatment. I must respectfully dissent from the findings that the claimant's use of pain medication did not render her unable to perform suitable work within her physical restrictions, that the claimant's use of pain medication did not constitute reasonable cause for the claimant to refuse to participate in vocational rehabilitation and job-placement assistance, and that the claimant is not entitled to permanent total disability benefits.

This case was remanded to the Commission by the Arkansas Court of Appeals with a mandate to consider what effect the claimant's use of pain medication has on her ability to work. The Commission was directed to make specific findings on this issue. The majority's findings on this issue were as follows:

(1) The claimant's use of pain medication did not render her unable to perform suitable work within her physical restrictions; and (2) The claimant's use of pain medication did not constitute reasonable cause for the claimant to refuse to participate in vocational rehabilitation and job-placement assistance.

In Lowe v. Car Care Marketing, 53 Ark. App. 100, 919 S.W.2d 520 (1996), the Arkansas Court of Appeals said that the Commission must make findings of fact which are more than mere conclusions. A simple narration of the testimony followed by a conclusion is insufficient. The Commission must detail or analyze the facts upon which the findings are based. Otherwise, a meaningful review is not possible.

While the majority certainly makes findings with regard to the claimant's use of pain medication, the opinion contains absolutely no discussion as to the

evidence supporting these findings. When this case was remanded to the Commission with instructions to make additional findings, I believe that it was anticipated that the Commission would provide more than naked conclusions that the claimant's use of pain medication would not affect her ability to work. I believe that the Court's mandate implicitly required some analysis of the evidence leading to whatever conclusions were reached by the majority. This was not done.

With reference to the effects of pain medication on the claimant's ability to work, the following evidence can be found in the record. The claimant sustained a very serious back injury for which she has undergone surgery on three occasions. She had surgery once at the L3-L4 level and three times at L4-L5. The last surgery included a fusion at L4-L5. The surgeries have been ineffective in alleviating her pain and she must take a significant amount of medication to function. She takes Hydrocodone (narcotic pain medication) every four to six hours, Soma (muscle relaxer) three times a day, and wears a Duragesic patch for pain relief. Also, she takes Effexor for treatment of anxiety and depression related to her back problems.

These medications make the claimant sleepy, groggy, and tired. After she takes these medicines, she must lay down after only a couple of hours of activity. At all times, she is either limited by debilitating pain or is under the, equally restrictive, effects of narcotics. No doctor has said that the claimant does not need the medication. In fact, even the majority opinion finds that the medication regimen is appropriate. The respondents' own vocational expert says that the claimant could not be truthful about the medications she takes and be hired for any job. In this regard, Edie Nichols testified:

Q. Now, if she told them that she was taking narcotic pain medication that she was prescribed and recommended to take, and if she had told her employer that you recommended that she was taking those medications on a daily basis, they wouldn't hire her, would they?

A. If she told them that she was taking that much medication. Probably not.

Based on the above, it is obvious that the medications required for the treatment of the claimant's injury have a significant affect on her ability to work.

Aside from the effects of medication, the record contains other important evidence of the claimant's disability. Because of pain, she is required to lay down frequently throughout the day. After 15 to 20 minutes of washing dishes she must lay down. Her activities are limited to sewing, reading, and playing video games. She can drive for only 20 to 30 minutes and usually lies down in the back seat while her husband drives. She can do only 10% of her housework and gets assistance from her daughter and husband. In one unsuccessful work attempt since the injury, the claimant worked for the apartment complex where she lived. At the time, her workers compensations checks had been terminated and she had no money. For her services, she was given rent and utilities. She answered the telephone, collected rent, and occasionally showed apartments to prospective tenants. A couch was provided so that she could lay down. The claimant was fired for not being able to perform the duties of this job.

The opinions of the doctors indicate that the claimant is unable to work. Three of the claimant's doctors have commented on this issue. Dr. Tracy, the claimant's current treating physician, has unequivocally stated that she is permanently and totally disabled. As the primary treating physician, Dr. Tracy was in the best position to assess the claimant's ability to work. Dr. Reddy said that the claimant was unable to return to her employment. On August 1, 2003, Dr. Sear said that the claimant was unable to return to work. Dr. Sear did say later, on May 19, 2005, that he was "reluctant to declare her totally and permanently disabled at this time". However, he did not say that he would not, at some time, declare her to be totally disabled. It should be noted that Dr. Sear was the physician who performed the third and last surgery on this young lady. It is understandable that a surgeon might be reluctant to declare that his patient was totally disabled after giving his best effort at correcting her problem. This would be tantamount to admitting that his treatment did not make the patient better, and might even have made her worse. Most importantly, it must be pointed out that Dr. Sear never made any statement indicating that

it was his opinion that the claimant could work. In light of these opinions, it is obvious that the doctors do not believe that the claimant is employable, even though the surgeon was, understandably, reluctant to make this declaration.

The majority recognizes the Court of Appeals decision in Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 141 S.W.3d 916 (2004), but opines that it is distinguishable from the case at hand. While there are some differences between the two cases, I disagree that they are not analogous. In Whitlatch, 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, Ms. Thetford has undergone extensive medical treatment for a period of more than four years, continues to suffer severe pain in her back and legs, and requires frequent periods of rest and many opportunities to lay down during the normal work day. She suffers from the same side effects brought on by the use of narcotic medication as did Mr. Whitlatch. Her daily activities are similarly sedentary and her inability to perform household duties is comparable. Therefore, the restrictions imposed upon Ms. Thetford, as a result of her 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, Ms. Thetford has a 19% anatomical impairment,

which is more than twice 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.

To the contrary, the majority opinion concludes that the disability suffered by the claimant herein is not as great as that of the Whitlatch claimant. The majority bases this conclusion on five different facts. Firstly, the majority points out that Ms. Thetford has a GED and Mr. Whitlatch did not. Actually, Mr. Whitlatch had more education than Ms. Thetford as he completed the eleventh grade while she finished only the eighth grade. Clearly, because of his significant physical limitations, Mr. Whitlatch would not have been employable simply because he passed a GED exam. Likewise, possessing the certificate did not elevate Ms. Thetford to an occupational level where her limitations could be accommodated, even if there exists a level of employment where an employee would be allowed to take narcotic medication, frequent rest breaks, and be given a place to lay down.

Secondly, the majority indicates that Ms. Thetford has transferable skills. The claimant has been

a bartender, waitress, and cashier. According to Ms. Nichols, the skills acquired in these jobs were meeting with the public and answering a telephone. These job requirements are common to a vast number of unskilled occupations and do not seem particularly helpful in acquiring employment which would accommodate the claimant's rather significant physical limitations.

Thirdly, the majority mentions that Dr. Sear said that he was "reluctant to declare her totally and permanently disabled at this time". This statement by Dr. Sear was discussed earlier and given its appropriate weight. As covered earlier, this statement really says nothing about whether Dr. Sear believes that the claimant can or can not work.

Fourthly, the majority says that the vocational expert, Bob White, testified in Mr. Whitlatch's case and said that he could not perform any employment and that Mr. White did not testify in this case. The fact that Mr. White did not offer an opinion in this case is totally irrelevant. No one knows what he would have said if he had evaluated the claimant and offered his opinion. To point to the fact that he said

nothing, in an effort to demonstrate that the claimant can work, defies logic.

And finally, the majority says that the record indicates that the claimant is able to perform at least "restricted light-duty employment". The majority is obviously referring to the results of the functional capacity evaluation. A functional capacity evaluation is a test performed over a several hour period which gives a snapshot of physical ability during an extremely limited period of time. It does not, and can not, determine what an individual is able to do in an actual employment situation. The claimant may have been able to lift a certain amount of weight or stand, sit, walk and bend during several hours of testing. This does not mean that she can do these things all day long or day after day. The claimant in Whitlatch also had a functional capacity evaluation which indicated he could do sedentary work for an eight hour day. The Court gave absolutely no weight to this evidence. Obviously, this was because the overwhelming weight of the other evidence of record showed that the results of the evaluation were inconsistent with reality.

Four jobs were suggested by the respondents' vocational expert. They were document examiner, secretary, substitute teacher, and insurance representative. However, the vocational expert admitted that the claimants ability to procure and perform these jobs would be questionable considering her need to rest, lay down, and the fact that she takes narcotic medication. When confronted by the Administrative Law Judge with these obstacles to employment experienced by the claimant, the vocational expert said that the claimant would need to be trained for a job where she could work at home, presumably from a couch or bed.

Instead of analyzing what effect the claimant's use of pain medication had on her ability to work, as instructed by the Court, the majority rehashes the claimant's refusal to cooperate with vocational rehabilitation and job placement assistance. It is undisputed that the claimant did not pursue rehabilitation or job placement. The majority apparently assumes that failure to participate in these activities automatically bars the claimant from receiving wage loss benefits. However, this is only true if the refusal was unreasonable. And the

claimant's refusal, in this case, was not unreasonable. She was unable to pursue any form of gainful employment and she knew it. When an employee takes the position that employment is not possible, because of conditions resulting from a compensable injury, then the relevant inquiry is whether the perceived inability to work is consistent with the evidence of record. And if it is, then offers of rehabilitation and job placement become irrelevant.

In summary, the evidence shows that the claimant suffers from a severe injury which imposes such significant limitations upon her that she is unable to work. Her doctors have confirmed this. On a daily basis, she is either in extreme pain or under the effects of narcotic medication, or both. According to the respondents' vocational expert, she would have to misrepresent her condition in order to be hired for any job. While the majority correctly finds that the medications taken by the claimant are appropriate, it failed to analyze the effects of the usage of that medication on the claimant's ability to work. This was the Courts dictate on remand. If that analysis had been performed, the logical conclusions to be reached from

consideration of the relevant evidence would be that the claimant's use of pain medication, in combination with severe pain and significant limitations from a serious injury, effectively prevented her return to work and that, because she was unable to work, her refusal to pursue vocational rehabilitation or job placement was reasonable under the circumstances.

For the reasons stated above, I find that the claimant proved, by a preponderance of the evidence, entitlement to additional medical treatment and to permanent total disability benefits. Therefore, I concur, in part, and dissent, in part, from the majority opinion.

PHILIP A. HOOD, Commissioner