BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409221

SANDRA HIXON, EMPLOYEE	CLAIMANT
BAPTIST HEALTH, SELF-INSURED EMPLOYER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY, TRUST FUND	RESPONDENT NO. 2

OPINION FILED NOVEMBER 30, 2009

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

Claimant represented by the HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent represented by the HONORABLE GAIL PONDER GAINES, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals an administrative law judge's opinion filed May 11, 2009. The administrative law judge found that the claimant proved she was entitled to additional medical treatment through Dr. Thomas Hart. The administrative law judge found that the claimant proved she "sustained a diminished earning capacity

in the amount of 50% in wage loss above her 13% impairment rating." After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion as modified. The Full Commission finds that the claimant proved additional medical treatment with Dr. Hart was reasonably necessary. The claimant proved that she sustained wage-loss disability in the amount of 25% in excess of the claimant's 13% anatomical impairment.

I. HISTORY

Sandra J. Hixon, age 51, testified that she received vocational-technical training after graduating from high school and became an Emergency Medical Technician. Ms. Hixon testified that she began working as an EMT for Baptist Health in February 1990. The claimant eventually trained to become a paramedic. The claimant began working as a paramedic for the respondent-employer in 1994. The claimant testified that she eventually became a station chief for the respondents. The parties stipulated that the claimant sustained a compensable injury on July 27, 2004. The claimant testified that she "felt something give" in her back while lifting a heavy hospital patient on a cot.

An emergency physician saw the claimant on July 27, 2004 and assessed back strain. A physician noted on July 29, 2004, "Sandy is having problems with low back pain. She was lifting a pt who weighed over 400 lbs when she had the immediate onset of discomfort in the small of her back." The claimant was assessed with sacral ligamentous strain. The claimant testified that she continued to work for the respondents.

The claimant underwent physical therapy beginning August 3, 2004. An MRI of the claimant's lumbar spine was taken on August 10, 2004, with the following impression:

> 1. Very small broad based left paracentral disc protrusion at L5-S1 without definite S1 nerve root displacement.
> 2. Small left posterolateral annular fissure at L4-5.
> 3. Minimal chronic superior endplate compression fracture at T12.

Dr. Eric D. Akin saw the claimant on August 16, 2004 and diagnosed low back pain and SI joint pain bilaterally. Dr. Akin recommended SI joint injections. Dr. Annette P. Meador performed a series of sacroiliac joint injections beginning September 1, 2004.

A Functional Capacity Evaluation was done on January 9, 2006: "Ms. Hixon underwent a functional capacity evaluation

with reliable results for a valid FCE. Ms. Hixon demonstrated the ability to work at the LIGHT Physical Demand Classification as determined through the Department of Labor with the limitations noted above."

Dr. Annette P. Meador noted on January 13, 2006:

> I just reviewed a functional capacity evaluation as performed by Tim Atkinson on Sandra Hixon. I agree with the activities as set forth on his evaluation form that can be performed on a constant basis....I also agree with the activities that she will be able to perform on a frequent basis. However, I would think that the activities performed on an occasional basis, such as pushing and pulling, should be limited to 20 pounds. I do not think that she could tolerate crawling, nor stooping, nor crouching, nor kneeling, even on an occasional basis....

The claimant testified that she began performing light duty for the respondents: "I was no longer able to work on the ambulance. I went to dispatch....I could no longer do the lifting." The claimant testified that she earned reduced wages as a dispatcher.

The claimant testified, "I was no longer allowed to see Dr. Meador. Workman's comp had closed my claim." The record contains a Change of Physician Order dated August 29, 2006: "A change of physician is hereby approved by the Arkansas Workers' Compensation Commission for Sandy Hixon to change from Dr. Annette P. Meador to Dr. Thomas Hart[.]" The

record contains another Change of Physician Order dated September 28, 2006: "A change of physician is hereby approved by the Arkansas Workers' Compensation Commission for Sandra J. Hixon to change from Dr. Erik Akin to Dr. Thomas Hart[.]"

The claimant began treating with Dr. Thomas M. Hart on October 2, 2006. Dr. Hart performed discography on October 18, 2006. Dr. Hart noted on November 3, 2006, "I think that she is going to require further evaluation by a highly trained orthopedic specialist and I would like to refer her to Dr. Wayne Bruffett for evaluation."

Dr. Wayne L. Bruffett's impression on December 13, 2006 was "Two level discogenic low back pain with equal degree of leg symptomatology." Dr. Bruffett reported in part, "Unfortunately, I do not have a quick answer to heal her complaints and her pain. To me, her MRI does not look all that bad. I have told her I would try to manage this with aggressive trunk stabilization exercises, weight loss, and that sort of thing. She says she cannot exercise at all. I have asked her about doing just simple abdominal crunches where there is really not stress put across the spine, and she says she has tried this and it hurts too badly. I am

going to have her continue to work with Dr. Hart. I really do not think I can improve her situation much surgically."

Dr. Hart noted on December 22, 2006, "We will tentatively schedule her and await approval for a percutaneous diskectomy at the L4-5 and L5-S1." The conclusion in a report from Medical Review Institute of America, Inc. dated January 8, 2007 was "The decision is to not certify percutaneous discectomy as medically appropriate." A report from Systemedic Review dated on or about January 9, 2007 indicated that a lumbar percutaneous discectomy was not approved. Dr. Hart performed a percutaneous discectomy on March 7, 2007. The claimant testified that this procedure relieved her pain symptoms "for a while."

The claimant followed up with Dr. Hart on May 3, 2007: "She is approximately two months out now status post percutaneous diskectomy at the L4-5, L5-S1. She was making some progress, but unfortunately about two weeks ago she said she was getting out of the bath when she had increase in back pain and some spasm."

Dr. Tim Burson reported on August 28, 2007: "Ms. Hixon returns and is no better. She has no changes. She has a

lot of back pain....She had an MRI which showed degenerative disk disease in her lumbar spine. She had an old diskogram which showed a painful disk at L4-L5 and L5-S1....I talked with her again about treatment options including a lumbar fusion at L4-L5 and L5-S1. After a long discussion with her and her husband, they want to proceed. This is scheduled for September 26, 2007 at Baptist Medical Center pending her Workman's Compensation approval."

The claimant underwent an L4-S1 posterior lumbar interbody fusion with instrumentation on or about September 26, 2007. Dr. Burson noted on November 8, 2007, "She is doing pretty well. She is not having constant chronic back pain that she had before. She is having stiffness. She is doing physical therapy. Overall, she is doing well." The claimant testified, "I seemed to be doing better. I was able to, it seemed, not hurt so bad. Right where the surgery site was at, it seemed to be improving with therapy."

The claimant informed Dr. Burson on December 27, 2007 that she "blew her back out" as a result of coughing from a cold. Dr. Hart stated on March 6, 2008, "Probably the most simple conservative treatment at this point is to go ahead

and line her up for a properly performed retrodiscal transforaminals right at the 3-4 level."

Another report from Medical Review Institute of America, Inc., dated March 18, 2008, stated in part, "There is little support for the TFE, itself, as the physical examination is negative, the MRI showed no L3/4 pathology, and there is no EMG to support this nerve injury. The TFE is not related to her 7/04 date of injury as she was seen much later and complained of another date of injury in 10/05; therefore, it is impossible to relate all her present symptoms to the earlier 7/04 date of injury....The retrodiscal transforaminal steroid injection, L3-4 bilaterally, are not medically appropriate....The procedure at the L3-4 level is not related to the date of injury of 7/24/04."

A Preauthorization Review Sheet from Systemedic Review, dated on our about March 18, 2008, indicated that a Retrodiscal Transforaminal Steroid Injection at L3-4 was not approved. Rudy Bischof, Senior Vice President for Crockett, informed the claimant's attorney on May 22, 2008, "With regard to your letter of 5-20-08, at this point Baptist is not authorizing any further treatment by Dr. Heart (sic);

however, we are authorizing your client to see Dr. Burson on 5-27-08."

Dr. Burson noted on May 27, 2008, "Ms. Hixon returns with low back pain with numbness and tingling in her legs. **DECISION-MAKING**: From a surgical standpoint, she has nothing on MRI that looks to be surgical. We will get her back in Dr. Hart and see if he has anything to offer." The parties stipulated that the claimant reached the end of her healing period on May 27, 2008.

Dr. Burson informed a representative of Crockett Adjustment on June 17, 2008, "I am in receipt of your letter of May 28, 2008. Ms. Hixon has reached MMI as of May 27, 2008. She has a Permanent Impairment Rating of 13% to the body as a whole as a result of the lumbar spinal fusion done on September 26, 2007." The parties stipulated that the claimant had sustained a 13% anatomical impairment.

Dr. Mark T. Jansen corresponded with the claimant's attorney on October 16, 2008:

> I am in receipt of your letter dated September 17th requesting a narrative report on behalf of Ms. Hixon. You are well aware of her previous injury and the resultant surgery performed by Dr. Tim Burson. I will bring you up to the present situation. Ms. Hixon was seen on August 18th after having fallen at home the evening before. Unfortunately, she landed squarely on the small of

> her back. This was over the site of her previous spinal internal fixation by Dr. Tim Burson....
> My current diagnosis is one of ongoing low back pain with associated sciatic distribution, worse on the right than left. This diagnosis recognizes the recent aggravation of her original injury from her fall. I am having her return to Dr. Burson for a postoperative evaluation. I have inquired through a personal note to him whether or not she might be a candidate for TEN's unit therapy in the presence of metallic hardware in her back. I am not sure if there might be a contraindication. Since she did have a positive benefit from her steroid pack, an epidural steroid injection, if feasible, might also be warranted, I would want Dr. Hart to perform this if Dr. Burson agrees.
> As per your request, I have completed your residual functional capacity evaluation to the best of my ability....

Dr. Jansen completed a "(Physical) Residual Functional Capacity Evaluation" provided him by the claimant's attorney. Dr. Jansen indicated that the claimant had significant physical restrictions, but he did not opine that the claimant was permanently and totally disabled.

Edie Nichols, a vocational consultant, provided an Initial Vocational Evaluation on November 14, 2008 and summarized her report:

> Ms. Hixon is a 50 year old lady who has approximately 16 more working years before the normal age of retirement. She has expressed an interest in returning to work, although she does not have specific occupational goals. A barrier to employment may be Ms. Hixon's perception that she can "hardly do anything," and the pending SSDI

> application. I recommend that Ms. Hixon begin now to attend classes on Tuesday's at the Arkadelphia Enrichment Center to familiarize herself further with the operation of computers. I also recommend that during this time, I meet again with her and provide her with interview skills training, resume preparation and job seeking skills training. Another recommendation is that I begin Labor Market Searches in Ms. Hixon's area and apprise her of job openings within her physical abilities, by phone and/or mail. It is my opinion that Ms. Hixon can return to gainful employment, but we will need to focus on basically *sedentary* jobs, with some possibilities into the *light* classification.

The claimant participated in a Functional Capacity Evaluation on December 17, 2008:

> Ms. Hixon did not demonstrate the ability to lift over 15 lbs. from the floor to shoulder levels and demonstrates the ability to perform lifting and carrying on no more than an Occasional basis. Ms. Hixon demonstrated limited AROM of the lumbar spine with very slow and guarded movement patterns (Occasional Stooping) and this AROM was consistent throughout testing. Ms. Hixon demonstrated a consistent gait pattern of a moderate limp favoring her RLE at a very slow pace throughout testing and performed walking and standing only at the Occasional frequency level. Ms. Hixon also did not demonstrate the ability to perform a full crouch and performed balancing, pushing/pulling, kneeling and climbing stairs all at the Occasional frequency level when taking into account an 8 hour workday.
>
> CONCLUSIONS
> Ms. Sandra Hixon completed functional testing on this date with reliable results. Overall, Ms. Hixon demonstrated the ability to perform work at the SEDENTARY Physical Demand Classification as defined by the US Dept. of Labor's guidelines over

> the course of a normal workday with the limitations noted above....

Edie Nichols corresponded with the claimant beginning December 24, 2008 with regard to various job openings. The record indicates that the claimant sent out cover letters and applied for a number of potential employment positions identified by Ms. Nichols.

A pre-hearing order was filed on January 13, 2009. The claimant's contentions were as follows: "1. Entitlement to permanent and total disability benefits; or, alternatively, wage loss. 2. Entitlement to some additional medical, as recommended by Dr. Thomas Hart. 3. Entitlement to attorney's fees." The respondents' contentions were, "1. Respondent No. 1 has accepted a 13% body-as-a-whole permanent impairment rating. 2. Respondent No. 1 contends no wage loss is owed over and above that rating. 3. The additional medical requested by the claimant is not reasonable and necessary."

The parties agreed to litigate the following issues:

> 1. Permanent and total disability, or, alternatively, wage loss.
> 2. Additional medical.
> 3. Attorney's fees.

Dr. Jansen corresponded with the claimant's attorney on January 28, 2009:

> I am in receipt of your letter of January 15th regarding the functional capacity of your client and my patient, Ms. Sandra Hixon. I have reviewed the physical residual functional capacity evaluation on Ms. Hixon completed by me on October 16, 2008. I still feel this is an accurate reflexion (sic) of my estimate of her functional capacity. I think it would be difficult for Ms. Hixon to work an 8-hour day, five days a week. She is still having significant low back pain. A sitting position with this problem would be as likely to induce increased pain as would a standing position. She is likely to require periodic narcotic analgesia on a daily basis. She has found hydrocodone to be effective for pain diminishment. There is never a time when I perceive her as pain free. As you are aware, the presence of hydrocodone in her system would call in to question the safety of her presence in a work environment, particularly if it involved critical decisions or moving machinery. I do think this medication induced restriction would, in turn, limit her eligibility for gainful employment by most employers.

A hearing was held on March 27, 2009. The claimant at hearing described her continued symptoms: "Pain in my back and down my legs; weakness; shooting pain; numbness....my legs will give out from under me. They just won't hold me up sometimes. I've fallen several times."

An administrative law judge filed an order and opinion on May 11, 2009. The administrative law judge found that the claimant proved additional treatment with Dr. Hart was

reasonably necessary. The administrative law judge found that the claimant did not prove she was permanently and totally disabled, but that the claimant proved she had sustained wage-loss disability in the amount of 50%. Both parties appeal to the Full Commission.

II. ADJUDICATION

A. 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)(Repl. 2002). 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).

An administrative law judge found in the present matter, "5. The claimant has proven by a preponderance of the evidence that the additional medical through her authorized treating physician, Dr. Thomas Hart, is reasonable and necessary and related to the compensable

injury." The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury on July 27, 2004. The claimant "felt something give" in her back and was subsequently diagnosed with a back strain. The claimant underwent physical therapy, and she began receiving injection treatment with Dr. Meador. The claimant's testimony indicated that the respondent-carrier eventually cut off additional conservative treatment with Dr. Meador. The claimant therefore requested a change of physician and was assigned to Dr. Hart. The claimant's testimony indicated that Dr. Hart's treatment provided some relief.

The claimant underwent an L4-S1 posterior lumbar interbody fusion on September 26, 2007. The claimant reported post-surgical improvement but suffered renewed symptoms when she "blew her back out" as a result of coughing from a cold. Dr. Hart indicated in March 2008 that he would schedule treatment in the form of "retrodiscal transforaminals." The respondent-carrier denied further treatment from Dr. Hart after a report from Medical Review Institute of America found Dr. Hart's proposed treatment to be "not medically appropriate." The claimant was informed

in May 2008 that the respondents would authorize a visit with Dr. Burson. Dr. Burson indicated that the claimant reached maximum medical improvement on May 27, 2008. Dr. Burson noted, however, "We will get her back in Dr. Hart (sic) and see if he has anything to offer." Dr. Jansen indicated in October 2008 that further treatment with Dr. Hart would be appropriate.

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. *Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). In the present matter, the Full Commission finds that the claimant proved she was entitled to additional treatment with Dr. Hart. We note that two treating physicians, Dr. Burson and Dr. Jansen, have indicated that additional treatment with Dr. Hart was appropriate. The claimant testified that she was willing to undergo an additional injection from Dr. Hart. "I'd be willing to try anything that might help me get back on my feet," the claimant testified. The Full Commission in the present matters finds that the opinions of Dr. Burson, Dr. Jansen, and Dr. Hart are entitled to more evidentiary weight

than the March 18, 2008 report from Medical Review Institute.

B. Wage Loss

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)(Repl. 2002).

In the present matter, an administrative law judge found that the claimant did not prove she was permanently and totally disabled. The administrative law judge found, "8. The claimant has proven by a preponderance of the evidence that she has sustained a diminished earning capacity in the amount of 50% in wage loss above her 13% impairment rating." The Full Commission finds that the claimant proved she sustained wage-loss disability in the amount of 25%.

The claimant is age 51 with a high school education. The claimant has worked in various employment capacities,

but the majority of her experience has been as an Emergency Medical Technician and Paramedic. The claimant began working for the respondents in February 1990. The parties stipulated that the claimant sustained a compensable injury on July 27, 2004. The claimant injured her lower back in the accident but continued to work for the respondent-employer. A Functional Capacity Evaluation in January 2006 indicated that the claimant could perform light physical work (this FCE was of course administered before the claimant's September 2007 surgery). Dr. Meador opined in January 2006, "I would think that the activities performed on an occasional basis, such as pushing and pulling, should be limited to 20 pounds. I do not think that she could tolerate crawling, nor stooping, nor crouching, nor kneeling, even on an occasional basis."

The claimant underwent low back surgery on September 26, 2007. The parties stipulated that the claimant reached the end of her healing period on May 27, 2008 and that the claimant had sustained a 13% anatomical impairment. Dr. Jansen informed the claimant's attorney in October 2008 that the claimant had significant physical restrictions. As the Full Commission has noted, however, Dr. Jansen did not opine

that the claimant was permanently and totally disabled. Edie Nichols began providing vocational assistance in November 2008 and opined, "Ms. Hixon can return to gainful employment, but we will need to focus on basically *sedentary* jobs, with some possibilities into the *light* classification." The claimant participated in a Functional Capacity Evaluation in December 2008. The claimant gave a reliable effort and demonstrated that she could perform sedentary work.

The Full Commission finds that the claimant was a credible witness. The claimant is relatively young, only age 51, with some vocational-technical training and work experience following high school. The record does not show that the claimant is currently able to perform her previous work duties as a full-time paramedic for the respondent-employer. The record shows that the claimant cooperated with the vocational consultant, Edie Nichols. The Full Commission does not find that the claimant proved she was permanently and totally disabled. Nor do we agree that the claimant's use of pain medication has affected her ability to return to suitable work within the claimant's permanent physical restrictions. Based on the claimant's relatively

young age, her training and work experience, and her physical restrictions, the Full Commission finds that the claimant proved she has sustained wage-loss disability in the amount of 25%.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's decision as modified. The claimant proved that retrodiscal foraminal treatment as recommended by Dr. Hart on March 6, 2008 was reasonably necessary in connection with the compensable injury. The claimant proved that she was entitled to wage-loss disability in the amount of 25% in excess of the 13% anatomical impairment assigned to her. The claimant proved that she compensable injury was the major cause of her anatomical impairment and wage-loss disability. The claimant did not prove that she was permanently totally disabled. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars ($500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2002).

IT IS SO ORDERED.

____
A. WATSON BELL, Chairman

____
KAREN H. McKINNEY, Commissioner

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

CONCURRING AND DISSENTING OPINION

I specifically concur in the majority's finding that the clamant has proved entitlement to wage-loss disability in the amount of 25% over and above her 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 her 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.

HISTORY

The claimant worked for the respondent as a paramedic supervisor. On July 27, 2004 the claimant injured herself while lifting a cot with a 400 pound patient on it. The claimant testified that she felt something give in her

back. The claimant was treated conservatively with epidural steroid injections and was eventually allowed to return to work at light duty with a back brace. On October 26, 2005 the claimant was transferring a 600 pound patient when the cot moved, throwing the claimant sideways and causing a recurrence of her condition. The claimant was treated with epidural steroid injections. After this injury the claimant was not allowed to return to ambulance and was assigned work as a dispatcher. The claimant continued to have problems with back pain and pain and weakness going down into her legs. The claimant was denied additional medical treatment by the respondent which led her to file a change of physician request with the AWCC. Her change of physician request was granted and the claimant was sent to Dr. Thomas Hart who performed a diskogram. The diskogram showed her to have an internal disk rupture at L4-L5 and L5-S1. Dr. Hart referred the claimant to Dr. Tim Burson with Neurosurgery Arkansas. On February 15, 2007, Dr. Burson stated:

> HISTORY: Ms. Hixon is a 48-year-old lady who presents today. She was lifting a patient in October of 2005 and hurt her back. She could not work. She was sent to Dr. Hart who did a diskogram. She has had low back pain with posterior lower extremity pain. She has had numbness in her lower extremities, right greater

> than left. She has had weakness. She cannot walk or sit for very long. She had a prior injury in 2004. She did physical therapy in 2004. She has not done any physical therapy this time. She initially saw Dr. Akin in 2004 who did not recommend any surgery. She went back to work in November of 2004. She also saw Dr. Meador. Now, she has back pain and lower extremity pain...
> PHYSICAL EXAM: She has a lot of back pain with palpation. She has pain with straight leg raising. She has 5/5 strength in both lower extremities. She has 2+ knee jerks and ankle jerks. She is neurologically intact.
> STUDIES REVIEWED: We reviewed her diskogram results which show her to an internal disk rupture at L4-L5 and L5-S1.
> DECISION MAKING: We discussed treatment options. If this is the cause of her back pain, she would require and interbody fusion. I do not think at this writing that open surgical options would be best for her. I agree with Dr. Hart that some type of intradiskal therapy would help her. She understands this. We left the door open for surgery in the future. We will see her back p.r.n. WE will refer her back to Dr. Hart for possibly intervention.

On March 3, 2007, Dr. Hart performed percutaneous discectomy at L4-L5 and L5-S1. After the procedure, Dr. Hart advised the claimant:

> I discussed with Ms. Hixon to take it very easy over the next few weeks. Some patients experience almost immediate relief, and that does not mean that she

> is healed. It may take up to a 5 to 6 month period of time for the healing process. If she starts feeling better, again, slowly increase her activities. I advised her to get just over-the-counter lumbar support belt to wear as a reminder that she has had the procedure. I will see her back in the office in approximately 2 weeks. To her credit though, she is trying to maintain her full-time employment. I do not think there is any doubt that she, again, has legitimate pain complaints. We will see how well she does over the next several weeks.

The claimant continued to follow up with Dr. Hart and appeared to be doing well until a May 3, 2007 clinic note of Dr. Hart's indicates that the claimant had experienced a setback when she fell in the bathtub. She reported an increase in pain and Dr. Hart observed some diffuse tenderness and paravertebral back spasm. On June 7, 2007 Dr. Hart indicated his plan as follows:

> PLAN: Basically we are going to allow her through the healing process. She is approximately 4 months now. Continuation of the Lidoderm patch as needed, Ultram ER for pain. At the end of an 8 hour day she does have some increase in her back pain complaints. Zanaflex for spasticity. I will see her back in 4 to 6 weeks. Hopefully, if she continues to improve we will try to get her to the point that she is PRN. Again, with the understanding that if she fails conservative care, she may require

> updated imaging studies and surgical consultation.

On July 12, 2007, Dr. Hart’s medical report indicates that the claimant’s back and bilateral lower extremity pain complaints had worsened since he had last seen her. Dr. Hart stated that the claimant’s condition had “deteriorated” and that he was going to send her back to Dr. Burson.

Dr. Burson’s August 9, 2007 report states:

> CHART NOTE: Ms. Hixon returns. She has seen Dr. Hart again who did intradiskal therapy. He has tried multiple procedures. She is still having problems. She has low back pain with radiation down the back of both legs. She has numbness and tingling in her left lower leg. She has back pain with prolonged walking. She had a diskogram in October of 2006 which showed a disk at L4-L5 and L5-S1. She has not had a repeat MRI for a long time. She has had tried everything for back pain without relief.

Dr. Burson recommended a repeat MRI. His report of August 28, 2007 indicates:

> CHART NOTE: Ms. Hixon returns and is no better. She has no changes. She has a lot of back pain. She is taking Tramadol and Tizanidine.
> STUDIES REVIEWED: She had an MRI which showed degenerative disc disease in her lumbar spine. She had an old diskogram

> which showed a painful disk at L4-L5 and L5-S1.
> DECISION MAKING: I talked with her again about treatment options including a lumbar fusion at L4-L5 and L5-S1. After a long discussion with her and her husband, they want to proceed. This is scheduled for September 26, 2007 at Baptist Medical Center pending her Workman's Compensation approval.

On September 26, 2007 the claimant underwent a L4-S1 posterior lumbar interbody fusion with instrumentation. On October 11, 2007 Dr. Burson's report indicates that Ms. Hixon was doing pretty well but that she had some numb places on her leg. The claimant underwent physical therapy. On November 8, 2007 Dr. Burson indicated that the claimant is having stiffness but that overall she is doing well. On December 27, 2007, Dr. Burson's report states:

> CHART NOTE: About two weeks ago, Ms. Hixon was doing pretty well but then she had a cold and coughed quite a bit. She feels like she "blew her back out." She has pain radiating down her lower extremities.

On January 10, 2008, Dr. Burson indicates:

> CHART NOTE: Ms. Hixon was doing well. She felt a pop recently and has had a lot of back pain and numbness in her legs. She has tried physical therapy, pain medication, muscle relaxers and TENS unit. She still has persistent pain.

Dr. Burson ordered a repeat MRI. On February 26, 2008 Dr. Burson stated that the MRI did not show anything surgical. He opined that the claimant's pain sounded muscular and referred her back to Dr. Hart to see if he could perform injections or rhizotomy. On March 6, 2008 Dr. Hart recommended facet injections followed by rhizotomy. The respondent denied Dr. Hart's recommendation. On May 27, 2008, the claimant returned to Dr. Burson still complaining of low back pain and numbness and tingling in her legs. Dr. Burson again referred the claimant back to Dr. Hart. On June 17, 2008, Dr. Burson wrote:

> Dear Mr. Bischof,
> I am in receipt of your letter of May 28, 2008. Ms. Hixon has reached MMI as of May 27, 2008. She has a Permanent Impairment Rating of 13% to the body as a whole as result of the lumbar spinal fusion done on September 26, 2007.

On October 16, 2008, the claimant's family physician, Dr. Mark Jansen indicated that the claimant had fallen at home and was now having sciatica sumperimposed on her chronic low back pain. Dr. Jansen treated the claimant with Sterapred DS 12-day along with Mepergain Fortis by mouth. The claimant was also given an injection of Demerol and Phenergan. Dr. Jansen indcated that on September 9, 2008

he had given the claimant a prescription of Darvocet N 100 #30 as well as Cymbalta 30 to address the pain. Dr. Jansen stated:

> My current diagnosis is one of ongoing low back pain with associated sciatic distribution, worse on the right than on the left. This diagnosis recognizes the recent aggravation of her original injury from her fall.

On October 16, 2008 Dr. Jansen also completed a Functional Capacity Evaluation in which he indicated the claimant can stand and/or walk less than 2 hours per regular work day. He also indicated that the claimant must alternate sitting and standing every 10 minutes per hour. Dr. Jansen indicated that the claimant could sit 2 to 4 hours per regular work day, alternating sitting and standing every 10 minutes per hour.

On November 14, 2008 an Initial Vocational Evaluation was completed for the claimant. In this report, it states:

> CURRENT SYMPTOMS: I asked Ms. Hixon how the injury bothers her now, and she told me that physically she can hardly do anything, and that this affects her emotionally. She said that the pain was in her lower back going to her hip areas and that she has muscle spasms in her right lower back. Her right leg is numb to her knee and sometimes goes down to

> her right calf. She said that sometimes she had pain in her left leg that followed the same pattern, but that she had no "numb spots" on her left leg.
> I asked Ms. Hixon how often she had pain, and she told me nearly all the time. She said that every night she will awaken every 1 ½ hours with a pain in her lower back. Ms. Hixon said that if she took a pain pill at night she could sleep approximately four hours.
> On a scale of 0-10 (with 10 being very severe pain), Ms. Hixon rated her pain at a 4 on the day of the evaluation. Ms. Hixon told me that if she walks too much or is on her feet too long her pain will increase. She rides in a motorized cart when she shops at Wal-Mart. If she attempts to move quickly, her legs will "give out."

The vocational consultant, Edie Nichols, summarized her opinion as follows:

> It is my opinion that Ms. Hixon can return to gainful employment, but we will need to focus on basically sedentary jobs, with some possibilities into the light classification.

On December 17, 2008 the claimant underwent a Functional Capacity Evaluation performed by Functional Testing Centers, Inc. The evaluator, Tim Atkinson, concluded that the claimant demonstrated the ability to perform work at the sedentary physical demand classification with a 15 lb. lifting restriction on no more than an occasional basis.

The evaluator also indicated that the claimant could walk and stand only at the occasional frequency level, and could not crouch, push pull, knee or climb stairs at anything other than the occasional frequency level.

On January 28, 2009, Dr. Mark Jansen wrote:

> I think it would be difficult for Ms. Hixon to work an 8-hour day, five days a week. She is still having significant low back pain. A sitting position with this problem would be as likely to induce increased pain as would a standing position. She is likely to require periodic narcotic analgesia on a daily basis. She has found hydrocodone to be effective for pain diminishment. There is never a time when I perceive her as pain free. As you are aware, the presence of hydrocodone in her system would call in to question the safety of her presence in a work environment, particularly if it involved critical decisions or moving machinery. I do think this medication induced restriction would, in turn, limit her eligibility for gainful employment by most employers.

The claimant testified that she is a high school graduate. She also attended Ouachita Vo-Tech and became an EMT in 1989. She started work for the respondent on February 1, 1990. In 1994 she completed a paramedic program at Henderson State University. Before working for the respondent the claimant worked at Beverly Health Nursing

Home as a billing clerk. Before that she worked as a factory seamstress, sewing blue jeans at Alf’s and lingerie at Vassarette. Before her years working in factories, the claimant spent nine years cleaning for the Corps of Engineers, DeGray Lake. After the fusion surgery the claimant received a letter from the respondent indicating that she no longer had a full-time position and that she had been moved to the as needed part time “pool.” The claimant has not worked since the fusion surgery on September 26, 2007.

The claimant testified that she was doing better after the fusion surgery until she experienced a coughing fit and something “went wrong” in her back. She states that she has pain in her back and down in her legs, weakness, shooting pain and numbness. The claimant testified that her legs will give out from under her and that she has experienced several falls. The claimant has testified that she has tried to look for work, on her own and with the assistance of the vocational consultant. The claimant did express concerns about whether anyone would hire her because some days her back hurts so bad she is in bed with it. The claimant testified that at least one of two times a week she

is in bed with her feet propped up and resting her back and taking pain medicine. The claimant testified that she can only sleep in 45 minute to one hour intervals because her back starts to hurt and she has to roll over. After it starts hurting she has to get up. She stated that on a good night she gets four hours sleep.

The claimant testified that she cannot sweep or mop. She cannot vacuum. She testified that she cannot wash clothes because she can’t bend over into the washing machine to get them out or bend over to put them in the dryer. She cannot load her dishwasher and her cooking is limited to what can be done in a crockpot or sandwiches. The claimant testified that if she attempts light housekeeping activities her pain increases and she starts to have spasms in her lower back, mostly on the left side.

As for activities outside the house, the claimant usually takes someone with her when she goes grocery shopping, although she is able to grocery shop by using the motorized cart at Wal-Mart. The claimant testified that due to her legs giving out, she uses a cane when she is on unfamiliar ground. The claimant testified that she is able

to attend church for no more than one hour but that she is no longer able to sit through Sunday school.

The claimant testified that she is currently taking Cymbalta and Lortab Plus, a hydrocodone pain medication. She testified that she takes a Lortab Plus every 4 to 6 hours and that she usually takes three to four a day.

DISCUSSION

The majority has failed to consider the claimant's claim for permanent and total disability benefits. While the majority states that "an administrative law judge found that the claimant did not prove she was permanently and totally disabled" and "the claimant did not prove that she was permanently and totally disabled" the majority has to do more than simply make this assertion. Nowehere in the majority opinion is the legal standard required to analyze a claim for permanent and total disability even mentioned. While the analysis required in a claim for permanent and total disability is similar to that conducted to determine wage loss disability, it is not the same. See Rutherford v. Mid Delta Community Services, Inc. ____Ark. App.___, ___S.W. 3d___ (2008). Wage loss disability is defined as the extent to which a compensable injury has affected the claimant's

ability to earn a livelihood. Lee V. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449 (2005). 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). 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); Rutherford, Supra. However, the actual statutory analysis required of the fact finder is not the same. For wage loss disability, the relevant

inquiry, based on Ark. Code Ann. §11-9-522, is: "To what extent has the claimant's compensable injury affected his or her ability to earn a livelihood?" For permanent total disability, the relevant inquiry, based on Ark. Code Ann. §11-9-519 is: "Has the claimant proved by a preponderance of the evidence the inability to earn any meaningful wage in the same or other employment?" As stated above, the majority did not conduct the relevant inquiry into the claimant's entitlement to permanent and total disability benefits.

The claimant was fifty years old at the time of the hearing. Her only education beyond high school is paramedic training. Her entire work history, with the exception of the dispatcher position for the respondent, and a short stint as a minimum-wage billing clerk consists of labor-intensive jobs. Although the claimant has demonstrated motivation to return to the work force by attending computer classes and applying for jobs as recommended by the vocational expert, the claimant does not have any job skills that readily transfer to sedentary work. The claimant is unable to perform even light housekeeping duties. She uses a cane when she leaves the house and has to use the motorized cart at Wal-Mart. Her family doctor stated:

> I think it would be difficult for Ms. Hixon to work an 8-hour day, five days a week. She is still having significant low back pain. A sitting position with this problem would be as likely to induce increased pain as would a standing position.

Based on the claimant's age, education, work experience and the medical record and vocational evaluation reports I find that the claimant has proved by a preponderance of the evidence the inability to earn any meaningful wage in the same or other employment according to Ark. Code Ann. §11-9-519.

Additionally, I would note that the claimant testified that she suffers from intense pain and takes pain medication prescribed to control her pain. This is a factor which must be considered. 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. 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. Hixon 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 cannot sleep for more than 1 ½ hours per night without taking pain medication, and only then is she able to achieve four hours of sleep. The claimant relies on narcotic pain medication, taken three to four times daily. Her activities are similarly sedentary and her inability to perform household duties is comparable. The restrictions imposed upon Ms. Hixon, 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 a 13% anatomical impairment, which is significantly greater than 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 must respectfully concur in part, and dissent, in part, from the majority opinion.

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PHILIP A. HOOD, Commissioner