

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F406739

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| MARILYN D. RITCHIE, EMPLOYEE | CLAIMANT |
| STEWART PROPERTIES, LLC, EMPLOYER | RESPONDENT NO. 1 |
| EMPLOYERS' MUTUAL CASUALTY COMPANY, INSURANCE CARRIER | RESPONDENT NO. 1 |
| SECOND INJURY FUND | RESPONDENT NO. 2 |
| DEATH & PERMANENT TOTAL DISABILITY TRUST FUND | RESPONDENT NO. 3 |

OPINION FILED MAY 12, 2009

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

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

Respondents No. 1 represented by the HONORABLE JARROD
PARRISH, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part as
modified.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed and remanded
for the Commission to make findings of fact. *Ritchie v.*
Stewart Properties, CA 08-894 (March 11, 2009). Based on

the remand from the Court of Appeals and our *de novo* review of the entire record, the Full Commission finds that the claimant proved she was entitled to a total knee replacement surgery as recommended by Dr. Lytle. The Full Commission finds that the claimant proved she was entitled to temporary total disability benefits through March 14, 2005. The claimant did not prove she was entitled to permanent total disability for her right knee injury, and the claimant did not prove she was entitled to permanent partial or permanent total disability for her low back injury. The claimant did not prove that continued treatment with Dr. Hart was reasonably necessary.

I. HISTORY

Marilyn Diane Ritchie, age 66, testified that altogether she acquired at least two years of college credits following graduation from high school. The claimant testified that her work history included employment with the Literacy Council of Union County and a headstart program. The claimant worked for MIC Technical Services from 1977 through 1994: "I was part of a team that worked in the so-called space age, where the invention of microwave integrated circuits took place, and I became a specialist in that field." From July 1999 until April 2002, the claimant

was a volunteer for Wind Of Life Ministries, which organization the claimant described as a food bank for South Arkansas. In addition "we provided other services, work skills, life skills, job search, we wrote grants, and we were specialists in learning disabilities."

The claimant signed a Resident Managers Agreement for the respondent-employer, Hampton Cove Apartments, on April 1, 2002. The claimant testified that she was responsible for collecting rent, doing light maintenance work, answering the phone, and cleaning vacant apartments. The parties stipulated that the claimant sustained a compensable injury to her right knee and lower back on March 19, 2004. The claimant testified, "I started on the early morning of the 18th and I was cleaning out flower beds, raking....raking the pine straw, which it all was very wet....I was sore all over." The claimant testified that she injured her right knee on March 19th. The claimant testified that she lost her grip on a heavy bag of cement "and it hit my leg just below my knee and caused an extreme sharp pain in the knee." The claimant could not identify a specific time when she injured her back, but "My impression would be that it was done on the 19th."

A First Report Of Injury was prepared by Lori Stewart on April 6, 2004. According to the First Report Of Injury, the claimant stated that she twisted her knee and strained her back on March 19, 2004, and that the injury occurred as the result of picking up heavy concrete bags.

The claimant treated with Dr. W. R. McKiever on April 8, 2004:

Ms. Ritchie is a 61 year old female who presents to the office with complaints of pain in her lower back and right knee. She relates that she injured it on March 18 while at work. She was putting in some flower beds in a shed. She twisted her knee. X-rays are obtained of her L spine and her right knee. There is no obvious deformity. We will follow up with an MRI of the right knee.

Dr. McKiever diagnosed "Right knee injury. Back pain."

An MRI of the claimant's right knee on April 15, 2004 showed several abnormal findings. It was noted at McKiever Clinic on April 23, 2004, "Diane is seen today for results of right knee MRI. She has fluid in the joint space, has an oblique tear of the medial meniscus. She is still having a great deal of pain with ambulation....She is being referred to Dr. Lytle....Diagnosis: "Medial meniscus tear, right knee."

Dr. John O. Lytle noted on May 3, 2004, "She injured her knee while working on 3/18/04. She was working managing

an apartment complex, up and down, and twisted her knee from multiple squatting and twisting and turning on her knee....She certainly has a swollen, tender knee, tenderness on the medial side and tenderness down into the pes." Dr. Lytle's impression was "Internal derangement of the R knee with effusion of the knee."

The claimant signed a Form AR-N, Employee's Notice Of Injury, on May 11, 2004. The claimant wrote that she had injured her knee, hip, and back as the result of dropping a heavy bag and twisting her leg and knee on March 19, 2004. Dr. Lytle assigned work restrictions on May 12, 2004. The claimant followed up with Dr. John O. Lytle on June 15, 2004:

X-RAYS: AP/lateral of her lumbar spine shows rather significant osteoporosis. There is a compression of L2 that is visible. This is noted and will probably be the same endplate finding that was seen previously. These from today are understood and dated well, which is the endplate of L2 and L1 with spurring and lipping.

AP pelvis and lateral of the R hip: I see no gross destructive arthritic change. There is some mild narrowing of the articular surface. There is no acute fx that is noted.

IMPRESSION: 1) Internal derangement of the R knee. I think this is a significant problem because of her swelling and pain. I would recommend arthroscopic evaluation. She has had satisfactory conservative treatment thus far.

2) As for her back - bursitis and possible compression fx at L2....We will plan arthroscopic surgery of the R knee as an OP in the near future. I suspect she has a meniscus tear. I will not promise complete resolution of all symptoms, because of her age and weight. However, I do think this will be significantly improved.

Dr. Lytle performed surgery on June 22, 2004:

"Arthroscopic subtotal medial meniscectomy. Chondroplasty of the lateral femoral condyle and patella." The pre-operative diagnosis was "Internal derangement of the knee." The post-operative diagnosis was "Medial meniscus tear right knee. Chondral fracture and Grade IV chondral lesion of the lateral femoral condyle. Grade II chondromalacia of the patella."

The claimant testified that she had not worked following surgery on June 22, 2004.

Dr. Lytle reported on August 25, 2004:

Ms. Ritchie is nine wks after arthroscopy of the knee. There she had significant chondromalacia and narrowing of the cartilage and meniscus tear. She has been doing a lot for herself working with health works and aquatic weight loss program. She has been in a bod pod and decreased her body fat rather significantly since here and has already lost 5.3 pounds in 17 days of working aggressively with this.

PLAN: At this point I think she is stable and has reached maximal medical benefit from her surgery and her knee injury.

According to the Guide for Evaluation of Permanent Impairment, fourth edition, as published by the American Medical Association I would rate her permanent impairment with loss of meniscus to be 2% to the lower extremity and 1% to the person as a whole.

For the knee loss of articular cartilage measured from arthroscopy down to 2 mm level, which according to Table 62 Page 83 approximately 20% to the lower extremity, 8% to the person as a whole.

Using the combined values table this is equivalent to 22% to the lower extremity and 9% to the person as a whole.

I think she has reached maximal medical benefit and I will release her at this time. I encouraged her to continue weight loss.

The parties stipulated that the respondent-carrier accepted a 22% permanent partial impairment associated with the claimant's right lower extremity.

A whole-body bone scan was done on September 24, 2004, with the following conclusions: "Evidence of increased activity in the lower lumbar spine at L4-5, both knees, right ankle, and both feet thought to be due to degenerative change. No definite findings to suggest metastatic bone disease." An MRI of the claimant's lumbar spine was taken on September 24, 2004, with the following conclusion: "Very subtle findings with probably a minimal posterolateral disc bulging at the L4-5 disc on the left side encroaching upon the left neural foramen. This is barely visible on the

transaxial sequences. No disc herniations are seen elsewhere. Therefore I believe that is a borderline normal MRI study of the lumbar spine."

Dr. Eric D. Akin, a neurological surgeon, examined the claimant on October 20, 2004:

This is a 61 year old female, who states for the past 7 months after picking up pine needles she has had progressive low back pain which radiates into the right hip. Her symptoms are increased by bending, picking up things, and walking. She reports that she has injured her left femur and has had knee surgery and ever since then she has had the chronic low back pain. She describes her discomfort as constant pain with numbness in the bilateral feet, right side worse. Pain shoots on the outside of the leg, and her left leg is numb from the knee down....

Back: She has tenderness over the entire lower lumbar area, without spasms. Lumbar flexion, extension, and rotation are within normal limits. Neurologic: Straight leg raising is negative bilaterally. Motor response is within normal limits, with no weakness. Sensory response is intact. She has exaggerated pain response....She states that she has had an MRI, but no films are available....I will need to see the films....

Dr. Akin reported on November 29, 2004:

Ms. Ritchie returns to the office 11/29/04 to review her lumbar MRI. On examination of her study, it reveals moderate degenerative changes at L5-S1, but no neural compression is seen. She continues to have complaint of back pain radiating into the right hip.

PHYSICAL EXAM: Remains basically unchanged, with tenderness over the entire lower lumbar area without spasms. Lumbar flexion, extension, and

rotation are within normal limits. Straight leg raising test is negative. Motor and sensory responses are within normal limits. She displays exaggerated pain response.

Dr. Akin diagnosed "Moderate degenerative disease, greatest at L5-S1. MDM: I do not see anything here that would require any surgical intervention, and would recommend that she be evaluated by Dr. Thomas Hart for epidural steroid injections. We will forward all of her records and a request for a appointment."

The claimant at first testified that she could not participate in treatment involving epidural steroid injections, because she was allergic to cortisone.

The claimant was seen at McKiever Clinic on December 3, 2004: "After examination she is referred to Dr. Hart for pain management. Diagnosis: Bulging disk L4-L5."

The claimant began treating with Dr. Thomas M. Hart on December 9, 2004. Dr. Hart corresponded with Dr. McKiever on December 10, 2004:

After her history and physical and reviewing her imaging studies with her today, I reassured her that she does not appear to have any strong nerve root compression signs or symptoms in her lower back.

A bone scan did indicate probably inflammatory changes at the posterior elements, i.e., the facets. I think the most simple conservative approach is to block the facets per medial branch.

If that is significant in reducing a portion of her back pain complaints, then proceed toward radiofrequency. This is a minimally invasive, outpatient, nonsurgical procedure. It is not a cure and it is no (sic) indefinite but it may provide more long term pain relief, especially with her history of significant sensitivity to multiple medications even including steroids....

The record indicates that Dr. Hart apparently performed a radiofrequency procedure on December 28, 2004. The claimant testified regarding this treatment, "It reduced the pain drastically."

Dr. Edward H. Saer, a spine specialist, evaluated the claimant on December 28, 2004:

Ms. Ritchie is a 61-year-old woman seen in the clinic at the request of Dr. McKiever. She injured her back doing some heavy lifting at work on March 19, 2004....She had facet injections done by Dr. Hart earlier today....

She has evidence of recent injection on the right side of the back. She has minimal tenderness. Her motion is actually relatively good with no spasm....

X-rays done 06/15/04 were reviewed and were relatively unremarkable. MRI done on 09/24/04 was reviewed. This is also relatively unremarkable. She has some mild desiccation at L5-S1, perhaps some facet hypertrophy at L4-5 and L5-S1.

Dr. Saer's impression was "Probable sprain/strain....I do not think she is going to need anything surgically. I

think she just needs continued nonoperative management for this. Water program would be very helpful as well."

Dr. Hart performed "denervation" procedures on January 13, 2005 and January 27, 2005.

Charlene Hardcastle, R.N., a Medical Case Manager, informed the claimant on March 3, 2005, "I have been asked by EMC to assist in the medical management of your disability." Dr. Darin K. Wilbourn, a physical medicine and rehabilitation specialist, wrote to Charlene Hardcastle on March 14, 2005:

Thank you very much for referring Ms. Ritchie for Second Opinion Evaluation. As you know, Ms. Ritchie is a 62-year-old white female who says that she initially injured her lower back and right knee on March 19, 2004 while performing her usual work duties managing an apartment complex. She says that she was doing yard work, which required her to lift heavy bags full of pine needles. She says that as a result of this heavy labor and lifting, she injured her lower back and right knee....

Ms. Ritchie saw Dr. Hart on December 9, 2004. He recommended lumbar facet joint injections on the right, which were done on December 28, 2004. Ms. Ritchie says that she did receive excellent pain relief after these injections, therefore she underwent radiofrequency ablation of the right lumbar medial branch nerves at L3-4, L4-5 and L5-S1 on January 13, 2005. Also, on December 28, 2004, she saw Dr. Ted Saer, an orthopedic spine surgeon, who diagnosed Ms. Ritchie with a probable lumbar sprain or strain and did not recommend any surgical intervention. Since January 13, 2005, Ms. Ritchie says that she is

continuing to experience left lower back pain....She says that she has not worked since her injury, and she has filed for social security disability....

ANSWERS TO SPECIFIC QUESTIONS:

1. What is Ms. Ritchie's diagnosis/prognosis?
Low back pain secondary to bilateral lumbar facet spondylosis. Her prognosis is excellent.
2. Is there any further treatment indicated for her knee injury?
Is there any further treatment needed for her back condition?
No. No.
3. She was determined to be at MMI for her knee condition on August 25, 2004.
When do you feel maximum medical improvement will be reached for her back condition?
In my opinion, she has reached maximum medical improvement for her back condition.
4. When, in your opinion, do you think Ms. Ritchie will be able to return to work?
Will there be any restrictions?
In my opinion, Ms. Ritchie should undergo a Functional Capacity Evaluation to determine exactly what she is capable of performing as far as work is concerned.
5. Is a medical impairment rating indicated at this time for her back condition, if so, please provide.
Again, in my opinion, before a permanent impairment rating is considered concerning her back condition, I recommend a Functional Capacity Evaluation as stated above.

Dr. Hart noted in part on March 21, 2005, "We clearly demonstrated previously that she had a diagnosis of lumbar facet syndrome or at least a portion of her back pain complaints after diagnostic facet injections were

performed....If Dr. Saer considers her to be a potential surgical candidate because of her discogenic pain, we can get her back at that point and perform the discography according to the North American Spine Society's Protocol and have that information for Dr. Saer at that time. PLAN: For the time being I will see her on a PRN basis."

Dr. Saer followed up with the claimant on March 29, 2005 and gave the following impression:

1. Lumbar spondylosis/degenerative disease L4-5, status post rhizotomy.
2. Different lumbar pain which is probably related to a soft tissue problem. It does not really seem to be discogenic. She tells me when she is in the water she cannot swim because lying prone and extending her back bothers her, but she can rollover onto her back and do a back stroke without any discomfort. The increased pain with extension would suggest more of a facet etiology than a discogenic etiology.

DISCUSSION:

I would agree with Dr. Wilbourn's assessment and recommendation. I think she would benefit from some physical therapy though before doing an FCE to help her through some of the pain that she is having now. I do not think she needs any surgical treatment. I reassured her about that. Dr. Wilbourn indicated that he would assign an impairment rating after the FCE. I will defer to him. I agree that she is at MMI but may need some occasional medical management in the future for this.

Physical therapy for the claimant's lumbar spine was provided beginning April 7, 2005. The claimant testified that physical therapy worsened her condition.

The claimant participated in a Functional Capacity Evaluation on April 20, 2005, with the following conclusions: "Ms. Ritchie underwent functional capacity evaluation this date with unreliable results for effort with self-limiting behaviors. Ms. Ritchie demonstrates the ability to perform work at least at the LIGHT Physical Demand Classification as determined through the Department of Labor for an 8-hour day."

The claimant followed up with Dr. Wilbourn on April 27, 2005: "Since my initial evaluation of Ms. Ritchie on March 14, 2005, she has undergone two weeks of physical therapy and a Functional Capacity Evaluation (FCE)....Per the FCE report, Ms. Ritchie gave an unreliable and inconsistent effort. Also, per the FCE report, Ms. Ritchie demonstrates the ability to perform work at least at the LIGHT physical demand classification. Currently, Ms. Ritchie says that she is continuing to experience pain in her lower back despite physical therapy....In my medical opinion, Ms. Ritchie may return to work as of today April 27, 2005 with no lifting, pushing or pulling over 20 pounds....According to the

American Medical Association's Guide to the Evaluation of Permanent Impairment, 5th edition page 384, Table 15-3, Ms. Ritchie has a 5% impairment of the whole person for her back condition."

Dr. Hart examined the claimant on May 17, 2005 and noted, "I find it quite bizarre that a functional capacity evaluation would be performed on a patient who has not reached MMI....I state still to a degree of medical certainty and probability what needs to be performed is discography. That will allow us to once and for all determine does she or does she not have discogenic pain....Ms. Ritchie needs to get back with her orthopedic surgeon about her right knee, first and foremost, about what is the next step. Once that is resolved, as to her continued back pain complaints, if she still has continuing pain, I think the most appropriate study would be discography."

Dr. Lytle saw the claimant on June 14, 2005:

Ms. Ritchie is a 62 y/o lady I am seeing for a new problem of her knee on the R side. She has tenderness anterior medially and associated with her OA. A review of her records including arthroscopy on the R knee on 6/04/05. The time we assessed it will require total knee in the future. Reviewing the records regarding her back and I feel that surgery was specific interest to relieve her of her back pain....

X-RAYS: AP, lateral, sunrise and notch view of the R knee show some narrowing of the cartilage space, significant degenerative changes in the patella femoral articulation. This does not correspond well with the findings with the surgery in 2004 with the documented summary and photographs....
PLAN: We will try to put this off as long as possible. She will require total knee replacement in the future. She is having question about trying to settle her issues with workers comp and the injury to her knee. It is my opinion that she has OA. This preexisted her injury, but certainly aggravated this and has caused this to be progressive. This was documented nicely at the time of her surgery with a large condylar fx visualized in the photographs. I previously rate her permanent impairment with no reason to change this at this time. With a total knee replacement that would presumably change according to the guidelines of permanent impairment.

Dr. Wilbourn informed the claimant's attorney on August 22, 2005, "According to the American Medical Association Guides to the Evaluation of Permanent Impairment, 4th edition, page 110, Table 72, Ms. Ritchie's injury is within the DRE Impairment category II for Lumbosacral spine impairment. This corresponds to a 5% impairment of the whole person."

Eddie Nichols, a Vocational Rehabilitation Consultant, provided a Vocational Rehabilitation Evaluation on September 29, 2005:

At the request of Nancy Smith, with EMC Insurance, I met with Ms. Ritchie to complete an initial vocational rehabilitation evaluation. Ms. Ritchie

is represented by attorney Greg Giles. Prior to my meeting with Ms. Ritchie, I contacted Mr. Giles and he granted authorization for me to meet with Ms. Ritchie....

Ms. Ritchie, by her report, has skilled/highly sedentary work experience. Consequently, she should have many skills for numerous *sedentary* or *light* jobs. She states that she has trained and supervised employees, has set-up grief recovery, family and children groups, has worked in a bookkeeping/accounting capacity and has written manuals and completed research for advanced microwave integrated circuit technologies. Her formal education has been high school and attendance at a business school in Memphis. Examples of jobs that Ms. Ritchie could perform in the sedentary to light classification include, but are not limited to the following:

- Data Entry Secretary
- Loan Record Clerk
- Secretary
- Research Assistant
- Order Clerk, Food and Beverage
- Charge Account Clerk
- Bookkeeper
- Leasing Agent
- Retail Sales Clerk

Ms. Ritchie was earning \$350 a month (plus a two bedroom apartment with utilities being paid) at her last job with Harrington Properties. Jobs, such as those listed above, based on my experience, usually pay an average of \$7 to \$8 an hour.

A Labor Market Survey would identify jobs that are available in her geographical area, and within her physical abilities. However, Ms. Ritchie's perception and attitude is that she will never be able to work again in any capacity. In my opinion, this mindset will be a significant barrier to her successful return to work.

Dr. Hart opined on November 11, 2005, "To a degree of medical certainty and probability, I think the most appropriate study at this time would be discography, if it can be performed. (I informed her I have a very long needle, and sometimes the procedure just may be impossible, due to the patient's weight!)" The claimant testified that she underwent the discography procedure recommended by Dr. Hart in about December 2005. The claimant testified that Medicaid provided payment for the procedure. Dr. Hart reported on December 22, 2005 that he had performed radiofrequency denervation/rhizotomy at L3-4, L4-5, L5-S1, and S1.

Dr. Akin noted on December 29, 2005:

The patient returns today for further evaluation of low back pain. She states that she has been on disability since 11/1/05....She does not feel that there has been any improvement in her back pain symptoms since her last visit on 11/29/04....

She is able to bend 90 degrees at the waist. However, this is quite uncomfortable for her. She has moderate paraspinous musculature spasm. No palpable deformity of the lumbar spine. She has an exaggerated pain response with palpation in the midline of the lower lumbar area.

DIAGNOSIS: Lumbar degenerative disc disease.

MDM: Ms. Ritchie appears to have primarily mechanical back pain. She does have degenerative changes in her lumbar spine and has concordant pain at the L5-S1 level, indicating that she has

discogenic pain as well. Unfortunately, due to her size it is not feasible to perform a lumbar fusion at the L5-S1 level. I do feel that weight loss by any means including surgical measures such as a gastric bypass or a gastric banding would be indicated. I think that not only her spine but also her knees are suffering due to her weight, and she is in agreement with this. I will be glad to consider her for surgery once she has been able to come within 50 lbs. of her target weight. The literature shows, however, that surgery for individuals who are greater than 50 lbs. overweight for discogenic pain is not very useful....The only thing I can recommend for the meantime would be to refer her to a pain management specialist.

Dr. Hart performed additional "surgical procedures" on February 9, 2006 and February 23, 2006.

Dr. William L. Harper saw the claimant on March 1, 2006 and diagnosed Hypertension, Obesity, and "Backache, Unspecified, Lumbar disc disease."

Dr. Hart continued his radiofrequency denervation/rhizotomies on July 13, 2006. The claimant testified that Dr. Hart also administered epidural steroid injections at that time.

Eddie Nichols corresponded with the claimant on September 6, 2006. Ms. Nichols identified current job openings of Accounting Technician, File Clerk, Commercial Banking Assistant, and Item Processing Clerk. Ms. Nichols

advised the claimant, "Please follow-up on these jobs leads as soon as possible, while they are still available."

A pre-hearing order was filed on September 6, 2006. The claimant contended that the respondents "initially paid her permanent impairment benefits pursuant to her knee injury prematurely and that at that time, she remained within her healing period and was entitled to additional temporary total disability benefits as a result of her compensable back injuries. In this regard, claimant contends that she did not reach maximum medical improvement associated with the compensable back injury until on or about April 27, 2005, so she should be awarded temporary total disability benefits during the period from August 25, 2004 through April 27, 2005." The claimant contended that "the additional medical treatment she is continuing to have with Dr. Thomas Hart, Dr. John Lytle, and other family physicians associated with her pain management, has been reasonable, necessary, and related, and respondents should be ordered to pay for that treatment, and additionally claimant contends that respondents should be ordered for her to continue to see her family physician for pain management associated with her compensable injuries." The claimant contended that the respondents had not paid a 5% impairment

rating to the claimant's low back. The claimant contended that she was "now totally and permanently disabled, or in the alternative is entitled to wage loss disability benefits in excess of the anatomical rating assigned."

Respondent No. 1 contended that all appropriate benefits had been and were continuing to be paid. Respondent No. 1 contended that the 5% rating to the claimant's lower back was "a result of arthritic changes that are not the responsibility of Respondent No. 1. Claimant has been released as having reached MMI associated with her back and knee. Therefore, TTD benefits have been discontinued. Respondents No. 1 contend additional medical treatment is not reasonable and necessary for claimant's back or knee. Respondents No. 1 contend claimant is not entitled to TTD benefits for the period 8/25/04 through 4/27/05. Respondents No. 1 contend claimant is not entitled to any PPD benefits associated with her back, but if claimant is found to be entitled to PPD benefits for her back, respondents contend claimant reached MMI for her back on 3/14/05. Respondents contend the claimant sustained no impairment to the body as a whole and, therefore, not entitled to any wage loss disability benefits. Respondents No. 1 contend claimant is not permanently and totally

disabled. If it is determined that claimant is entitled to wage loss disability benefits, respondents contend the Second Injury Fund would have liability."

Respondent No. 2, Second Injury Fund, contended that the claimant could not prove she was entitled to "any degree of PPI for her low back. The claimant's low back problems were 'latent' in that the full nature and character of such low back problems were not known to the claimant or the employer prior to the last work injury of March 19, 2004. The claimant's last injury was scheduled (right knee) and the claimant is not entitled to any amount of wage loss disability unless she can prove she is permanently and totally disabled. She cannot meet her burden of proof in that regard. There is no combination of disabilities or impairments. The Fund contends that it is entitled to any defense not specifically pled further. Second Injury Fund contends claimant suffered no permanent impairment to her back and Second Injury Fund has no liability."

Edie Nichols advised the claimant of additional job leads in correspondence dated September 21, 2006. Ms. Nichols reported on September 29, 2006:

On 08/30/06, I reopened my file on Ms. Ritchie.
On 09/05/06, I telephoned Ms. Ritchie about the results of a Labor Market Survey that I had

completed in her geographical area. She advised that she could not "work with two ruptured discs." Ms. Ritchie also told me that the Vocational Evaluation I had completed was "completely erroneous" and that she and her attorney would "clean house in court."

Since that time, I have completed three more Labor Market Surveys and have sent three letters to Ms. Ritchie detailing 9 current job openings. I have offered job seeking skills training and assistance with her resume. As yet, I have not had a reply from Ms. Ritchie....

The claimant denied at hearing that she told the vocational counselor she would "clean house in court." Meanwhile, Edie Nichols continued to follow up with the claimant with written correspondence advising the claimant of current job openings.

Dr. Hart performed another procedure on November 1, 2006. The claimant described this treatment as "the epidural to slow down the pain coming from the disc." The claimant described how the epidural injections decreased her pain: "Physically how they help is that it relieves the pain. It does not take it away completely but it puts it to a level where it is tolerable."

The record contains belated correspondence from the claimant to several employers, dated November 10, 2006: "Please find attached my resume. If you have a position compatible with my qualifications, I would appreciate you

considering me for that position. Please do not hesitate to contact me if you have questions or require more information."

A hearing was held on December 5, 2006. At that time, the parties agreed to withdraw the stipulation regarding the date of the claimant's back and knee injury. The claimant contended that the earliest date for a finding of maximum medical improvement would be April 27, 2005. Respondent No. 1 indicated that medical treatment was paid through September 2005, but that the respondents controverted facet rhizotomy and radio denervation. The claimant testified at hearing that she still felt pain in her back and legs.

An administrative law judge filed an opinion on March 2, 2007. The administrative law judge found, among other things, that the claimant failed to prove she was entitled to permanent partial disability benefits related to her back. The administrative law judge found that the claimant failed to prove she was permanently and totally disabled. The administrative law judge found that the respondents were liable for medical treatment related to the claimant's right knee until August 25, 2004, and that the respondents were liable for medical treatment related to the claimant's back until March 14, 2005. The administrative law judge found

that the claimant proved she was entitled to additional temporary total disability benefits from August 25, 2004 through March 14, 2005. The claimant appealed to the Full Commission. The Full Commission affirmed and adopted the administrative law judge's decision, but the Court of Appeals has remanded for findings of fact.

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 employee must prove by a preponderance of the evidence that she is entitled to requested 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 Respondent No. 1 was responsible for medical treatment related to the claimant's right knee until August 25, 2004. The administrative law judge found that the respondents were responsible for medical treatment related

to the claimant's back injury from March 19, 2004 through March 14, 2005. The Full Commission finds that the claimant proved she was entitled to the total knee replacement surgery recommended by Dr. Lytle. The claimant did not prove that she was entitled to continued treatment with Dr. Hart.

The parties stipulated that the claimant sustained compensable injuries to her right knee and lower back on March 19, 2004. Although the parties at hearing withdrew the stipulation regarding the exact date of injury, the claimant testified that she injured her right knee and lower back on or about March 19, 2004. The respondents do not controvert compensability of the claimed injuries to the right knee and lower back. Dr. McKiever saw the claimant on April 8, 2004 and diagnosed a right knee injury and back pain. An MRI of the claimant's right knee on April 15, 2004 showed fluid in the joint space and an oblique tear of the medial meniscus. Dr. Lytle subsequently diagnosed internal derangement and effusion of the right knee, and he performed an arthroscopic meniscectomy and chondroplasty. Dr. Lytle assigned a permanent partial impairment rating on August 25, 2004. Dr. Lytle stated, "I think she has reached maximal medical benefit and I will release her at this time."

Dr. Lytle re-examined the claimant and opined on June 14, 2005, "She will require total knee replacement in the future." Dr. Lytle recognized that the claimant had a pre-existing osteo-arthritic condition, but he opined that the compensable injury aggravated this condition and caused the condition to become progressive. In workers' compensation law, an employer takes the employee as she finds her, and employment circumstances that aggravate preexisting conditions are compensable. *Heritage Baptist Temple v. Robinson*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a preexisting noncompensable condition by a compensable injury is, itself, compensable. *Oliver v. Guardsmark*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). The instant claimant proved, in accordance with the recommendations and guidelines set forth by Dr. Lytle, that a knee replacement surgery performed by Dr. Lytle was reasonably necessary in connection with the compensable injury.

The claimant did not prove additional treatment for her back from Dr. Hart was reasonably necessary. The parties stipulated that the claimant sustained a compensable injury to her lower back on March 19, 2004. The claimant's testimony indicated that she injured her back on or about

March 18, 2004. In any event, Dr. McKiever diagnosed back pain on April 8, 2004. Dr. Akin examined the claimant in October 2004. Dr. Akin reviewed the claimant's lumbar MRI and diagnosed "Moderate degenerative disease, greatest at L5-S1." Dr. Akin stated that the claimant would not need surgery, and he referred the claimant to Dr. Hart for epidural steroid injections. The claimant began treating with Dr. Hart on December 9, 2004. Dr. Hart's subsequent treatment included radiofrequency ablation, denervation/rhizotomies, epidural steroid injections, and eventually discography. We recognize that the claimant occasionally reported short-term relief after treating with Dr. Hart. Yet the claimant told Dr. Akin on December 29, 2005, after she had seen Dr. Hart many times, "She does not feel that there has been any improvement in her back pain symptoms since her last visit on 11/29/04." The claimant also testified that she still suffered from debilitating back pain and could not function without medication.

The claimant sustained a compensable low back injury on or about March 19, 2004. An MRI in September 2004 was "borderline normal." Dr. Akin reported in October 2004 that the MRI study revealed moderate degenerative changes at L5-S1, without neural compression. Dr. Akin diagnosed

degenerative disc disease, greatest at L5-S1. Dr. Saer stated in December 2004 that the diagnostic studies showed mild desiccation and perhaps facet hypertrophy. Dr. Saer's impression was "Possible sprain/strain." Dr. Wilbourn pronounced maximum medical improvement for the claimant's back as of March 14, 2005. Dr. Saer reported on March 29, 2005 that the claimant's lumbar pain was "probably related to a soft tissue problem. It does not really seem to be discogenic....I would agree with Dr. Wilbourn's assessment and recommendation."

The record in the present matter demonstrates that the claimant reached the end of her healing period for the compensable low back sprain/strain no later than March 14, 2005. We recognize that a claimant may be entitled to ongoing medical treatment after the healing period has ended if the treatment is geared toward management of the injury. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004). The evidence in the present case does not demonstrate that continuing treatment from Dr. Hart is reasonably necessary for management of the claimant's injury. Dr. Akin opined in December 2005 that the claimant suffered from mechanical back pain and degenerative changes. The record does not show that either of those conditions was

related to the claimant's sprain/strain, and the evidence does not demonstrate that continuing treatment from Dr. Hart is reasonably necessary in connection with the claimant's degenerative condition and mechanical back pain.

B. Temporary Disability

An employee who has suffered a scheduled injury is to receive temporary total disability benefits during or healing period or until she returns to work regardless of whether she has demonstrated that she is actually incapacitated from earning wages. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.* Whether an employee's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995). For an unscheduled compensable injury, temporary total disability is that period within the healing period in

which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present matter, an administrative law judge found that the claimant was entitled to temporary total disability benefits from August 25, 2004 through March 14, 2005. The Full Commission affirms this finding. On or about March 19, 2004, the claimant sustained a compensable scheduled injury to her right knee and a compensable unscheduled injury to her lower back. Dr. Lytle performed knee surgery on June 22, 2004. Dr. Lytle reported on August 25, 2004 that the claimant had "reached maximal medical benefit from her surgery and her knee injury....I think she has reached maximal medical benefit and I will release her at this time." Dr. Lytle also assigned the claimant a permanent impairment rating to the right lower extremity. Permanent impairment is any permanent functional or anatomical loss remaining after the healing period has been reached. *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). The record in the present matter shows that the claimant reached the end of a healing period for her compensable knee injury as of August 25, 2004. Temporary total disability cannot be awarded after a

claimant's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). We recognize Dr. Lytle's opinion on June 14, 2005, "She will require total knee replacement in the future."

Nevertheless, Dr. Lytle did not state that the claimant remained within a healing period and there is no other probative evidence demonstrating that the claimant continued within a healing period for her right knee after August 25, 2004. Based on the current record before the Commission, the claimant did not prove she was entitled to temporary total disability benefits for her compensable scheduled injury after August 25, 2004.

The administrative law judge found that the claimant was entitled to temporary total disability benefits from August 25, 2004 through March 14, 2005. The respondents do not appeal this award. The record demonstrates that this period of temporary total disability benefits would be related to the claimant's compensable unscheduled low back injury. The claimant sustained a compensable lower back injury on or about March 19, 2004. Dr. Akin diagnosed "Moderate degenerative disease, greatest at L5-S1" in November 2004. Dr. Akin, a neurological surgeon, opined that the claimant would not require back surgery. Dr. Saer

diagnosed "Probable sprain/strain" in December 2004. Dr. Saer, also a surgeon, opined that the claimant would not need surgery. Dr. Wilbourn stated on March 14, 2005 that the claimant had reached maximum medical improvement for her back condition. Dr. Saer expressly agreed with Dr. Wilbourn's assessment. Dr. Hart wrote in May 2005 that the claimant had not reached maximum medical improvement. The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 949 S.W.2d 695 (1999). The Full Commission finds in the present matter that the opinions of Dr. Saer and Dr. Wilbourn are entitled to more evidentiary weight than the opinion of Dr. Hart. The Full Commission finds that the claimant reached the end of her healing period for the compensable back injury no later than March 14, 2005. The claimant did not prove she was entitled to temporary total disability benefits for her unscheduled injury after March 14, 2005. The administrative law judge's decision is affirmed.

C. Permanent Disability

1. Anatomical Impairment

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(4) (F) (ii) (a) (Repl. 2002). "Major cause" means more than fifty percent (50%) of the cause, and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14) (Repl. 2002). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In order to establish an impairment rating guide to be used in assessing anatomical impairment, the Commission has adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) published by the American Medical Association. See *Commission Rule 099.34*; Ark. Code Ann. §11-9-522(g). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-102(c) (1) (B).

In the present matter, Dr. Lytle assigned the claimant a 22% permanent partial impairment associated with the claimant's right lower extremity. The respondent-carrier

accepted and paid this rating. Dr. Wilbourn assigned the claimant a 5% whole-person impairment associated with the claimant's low back. Dr. Wilbourn based his rating on the Fourth Edition of the Guides, page 110, Table 72, DRE impairment category II for lumbosacral spine impairment. The Guides at page 3/102 contain the following *Structural Inclusions* for this category of impairment:

(1) Less than 25% compression of one vertebral body; (2) posterior element fracture *without* dislocation (not developmental spondylolysis); the fracture is healed, and there is no loss of motion segment integrity. A spinous or transverse process fracture with displacement without a vertebral body fracture is a category II impairment because it does not disrupt the spinal canal.

The evidence in the present matter does not demonstrate that the claimant sustained a 5% whole-person impairment as assessed by Dr. Wilbourn. The claimant sustained a compensable injury to her lower back on or about March 19, 2004. An x-ray in June 2004 showed a "possible compression fx at L2." However, a whole-body bone scan in September 2004 did not confirm a compression fracture. The bone scan showed only increased activity in the lumbar spine due to degenerative change. An MRI in September 2004 revealed "Very subtle findings with probably a minimal posterolateral disc bulging at the L4-5 disc on the left side encroaching

upon the left neural foramen....No disc herniations are seen elsewhere. Therefore I believe that is a borderline normal MRI study of the lumbar spine." The lumbar MRI did not confirm an L2 compression fracture. Further, there is no probative evidence demonstrating that the compensable back injury resulted in the minimal disc bulging at L4-5. Any assertion that the compensable injury caused the bulge at L4-5 would not be based on a credible analysis or interpretation of the record. Dr. Akin stated in November 2004 that the MRI showed "moderate degenerative changes at L5-S1, but no neural compression is seen." Dr. Akin's diagnosis was moderate degenerative disc disease, greatest at L5-S1. Dr. Saer noted in December 2004 that both the x-rays and MRI had been "unremarkable. She has some mild desiccation at L5-S1, perhaps some facet hypertrophy at L4-5 and L5-S1."

The evidence in the present matter does not show that the claimant sustained any structural damage to her lumbar spine as a result of the March 19, 2004 compensable injury. The Full Commission therefore finds that the 5% rating assessed by Dr. Wilbourn is not valid in accordance with the Guides. Moreover, the evidence in the present matter does not show that the compensable sprain/strain to the

claimant's back was the major cause of any degree of permanent anatomical impairment. The claimant in the present matter did not prove that she was entitled to a permanent anatomical impairment rating for her compensable back injury.

2. Wage Loss

The Arkansas Court of Appeals has held that wage-loss disability cannot be awarded without first establishing the existence of a permanent impairment. *Parson v. Ark. Methodist Hospital*, CA 07-1185 (Ark. App. 9-24-2008), citing *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000). The Court has also held, however, that a permanent partial impairment rating or rateable condition is not a prerequisite to consideration of a claim for permanent total disability. See *Rutherford v. Mid-Delta Cmty. Serv., Inc.*, CA 07-1175 (May 28, 2008).

The instant claimant contends that she is permanently and totally disabled. The Full Commission finds that the claimant did not prove that she was entitled to any percentage or degree of wage-loss disability. The claimant is age 66 with only a partial college education. However, the claimant has an extensive and varied employment history in a variety of workplace settings. The claimant's

employment history consists of very little unskilled manual labor. The claimant agreed at hearing that she had worked in the areas of engineering, microwave integrated circuitry, computers, finance, grant writing, and counseling. The record shows that the claimant is highly intelligent and capable but is plainly not motivated to return to any type of gainful employment. The claimant's negative attitude is an impediment to a full assessment of her inability to earn wages. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

A Functional Capacity Evaluation in April 2005 indicated that the claimant gave unreliable effort, and that the claimant could perform light work for an eight-hour day. Dr. Wilbourn opined that the claimant could perform restricted work duties. Yet the claimant manifestly refused to participate in the practical and reasonable vocational assistance offered by Edie Nichols beginning in September 2005. The evidence does not support the claimant's testimony that she was physically unable to cooperate with Ms. Nichols due to a cataract condition or computer problems at home. The letters the claimant sent to some employers on November 10, 2006 do not represent a legitimate or credible attempt to find suitable work within the claimant's physical

restrictions. "Permanent total disability" means "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Ark. Code Ann. §11-9-519(e)(1). The claimant has the burden of proving entitlement to permanent total disability. Ark. Code Ann. §11-9-519(e)(2). The instant claimant did not prove that she was permanently totally disabled as a result of the compensable injuries to her right knee or lower back. Nor did the claimant prove she was entitled to any degree of percentage of wage-loss disability in accordance with the factors set forth in Ark. Code Ann. §11-9-522(b)(1).

Based on the remand from the Arkansas Court of Appeals and our *de novo* review of the entire record, the Full Commission finds that the claimant proved she was entitled to a total knee replacement surgery as recommended by Dr. Lytle. The Full Commission finds that the claimant proved she was entitled to temporary total disability benefits through March 14, 2005, based on the record currently before us. The claimant did not prove she was entitled to permanent total disability for her right knee injury. The claimant did not prove she was entitled to a permanent anatomical impairment rating for her low back injury. The

claimant did not prove she was entitled to permanent partial or permanent total disability for her low back injury. The claimant did not prove that continued treatment with Dr. Hart was reasonably necessary. The Full Commission therefore affirms the administrative law judge's decision in part as modified. 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, 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, & dissents, in part.

CONCURRING & DISSENTING OPINION

I must respectfully concur in part, and dissent, in part, from the majority opinion. Specifically, I agree that the claimant is entitled to a total knee replacement surgery as recommended by Dr. Lytle. However, contrary to

the majority, I find that the claimant has entered a second healing period for her compensable knee injury and is entitled to temporary total disability benefits until a date yet to be determined. I also find that the claimant has proved by a preponderance of the evidence that her continuing need for treatment from Dr. Hart for her compensable back injury is related to her compensable injury, not solely to degenerative changes and mechanical back pain as found by the majority. I find that the treatment the claimant has received for her compensable back injury is reasonably necessary for management of the claimant's injury. I find that the claimant has not reached the end of her healing period for her compensable back injury and is entitled to temporary total disability benefits until a date yet to be determined. As the claimant has not yet reached the end of her healing period for her compensable injuries, I find that the majority's determinations regarding permanent impairment, wage loss and permanent total disability are premature, and should have been reserved for future determination.

TEMPORARY TOTAL DISABILITY FOR THE KNEE INJURY

After the end of the original healing period for a compensable injury, the claimant may undergo a second

healing period if symptoms reoccur and this is true even if permanent disability benefits were paid after the original healing period ended. Elk Roofing Co. v. Pinson, 22 Ark. App. 191 (1987). When a second period of medical complications follows an acknowledged compensable injury, creating a second distinct healing period, the employer will continue to be responsible for the payment of benefits, including temporary total disability benefits , if the second complication is found to be "a natural and probable result of the first injury". Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). Stated another way, the claimant must prove a causal connection between the second complication and the original compensable injury. Elk Roofing Co., supra. Causation will be established between a compensable injury and a second medical complication if the compensable injury is "a factor" in the resulting inability to work and need for medical treatment, even though the compensable injury is not the major cause of the disability or treatment. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004).

The causal connection between the claimants compensable knee injury and her need for treatment has been previously demonstrated and once this has been accomplished,

the causal connection to the disability has also been established. Williams v. L&W Janitorial, Inc, supra.

After establishing a causal relationship between the compensable injury and her additional medical complications, the claimant must then satisfy the prerequisites for the payment of temporary total disability benefits. The requirements for recovery of temporary total disability benefits for injuries scheduled in Ark. Code Ann. §11-9-521 are different from unscheduled injuries. For scheduled injuries, Ark. Code Ann. §11-9-521(a) provides:

An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time set out in the following schedule (Emphasis supplied.)

Interpreting Ark. Code Ann. §11-9-521(a), the Court of Appeals in Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001) said:

We must construe Arkansas Code Annotated section 11-9-521(a) using the plain meaning of the language that the General

Assembly employed. The statute expressly provides that for scheduled permanent injuries the injured employee is to receive compensation for temporary total or temporary partial during the healing period or until the employee returns to work, which ever occurs first. Conspicuously absent from the statute is any indication that the injured employee show an incapacity to earn wages as a requirement to receiving temporary benefits. This absence is key to any construction of the provision. We hold that the plain meaning of the language employed indicates that an employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability benefits during his healing period or until he returns to work regardless of whether he has demonstrated that he is actually incapacitated from earning wages.

....

The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended.

See also, Mad Butcher, Inc. V. Parker, 4 Ark. App. 124, 628 S.W.2d. 582 (1982); International Paper Co. v. McGooqan, 255 Ark. 1025, 504 S.W.2d 739 (1974).

Therefore, the claimant will be entitled to temporary total disability benefits for her scheduled knee injury as long as she remains in the healing period and has not returned to work. As previously discussed, in January of 2005, the claimant developed new problems and began additional treatment of the knee under Dr. McKiever. Both Dr. McKiever and Dr. Hart (treating physician for the claimant's back at the time), recommended that the claimant follow up with the orthopedic surgeon, Dr. Lytle, for additional treatment of the knee. Dr. Lytle resumed conservative treatment on June, 14 2005, and said that the claimant would undergo a total knee replacement in the future. Under these circumstances, it can not be said that the claimant has been restored as far as the permanent character of the injury will permit, that her condition has become stable, or that nothing further in the way of treatment will improve her condition. At the time of the hearing, she was undergoing conservative treatment for her knee and will have additional surgery to restore and improve her condition. She needs a knee replacement and a knee replacement would not be recommended for a stable knee. The claimant's healing period has not ended.

With regard to the claimant's work status, the uncontradicted evidence of record reflects that the claimant has not worked since the date of her knee surgery, June 22, 2004.

For the reasons stated above, I find that the claimant proved by a preponderance of the evidence that she experienced a second healing period, causally related to her compensable knee injury, beginning on January 10, 2005. I find that the claimant has not worked since June 22, 2004. Based on these findings, I conclude that the claimant is entitled to temporary total disability benefits from January 10, 2005 until a date yet to be determined.

REASONABLE AND NECESSARY MEDICAL TREATMENT FOR THE BACK INJURY

If treatment for the back is to be found compensable, a causal relationship must be established between the compensable injury and the medical treatment requested. The issue is whether the treatment rendered by Dr. Hart was related to the compensable back injury or related solely to degenerative conditions and mechanical back pain. If the claimant shows that the injury bears some relation to the need for treatment then the medical benefits will be compensable even if pre-existing conditions are

also a causal factor. General Electric Railcar, 62 Ark. App. 120, 969 S.W.2d 667 (1998). Causation is established upon a showing that the compensable injury was a factor in the need for treatment even if the compensable injury is not the major cause. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004).

The majority finds that the claimant's medical treatment was related to degenerative changes as opposed to the compensable injury. It is axiomatic that the employer takes the employee as he finds him and that when a compensable injury aggravates, accelerates, or combines with pre-existing conditions to produce disability or need for treatment then the resulting disability and treatment is compensable. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

The number of cases involving aggravation, acceleration and combination of pre-existing degenerative conditions in back and neck injuries was explained in the testimony of Dr. C.C. Alkire, orthopedic surgeon, in

General Elec. Railcar Repair Servs. v. Hardin, 62 Ark. App. 120 (1998), as follows:

As I'm sure you're well aware having dealt with workers' compensation insurance claims for years, most workers' compensation injuries, particularly those in the cervical spine and lumbar spine are always related to some degenerative process, regardless of the type of injury a patient may have. (emphasis added.)

The facts of this case demonstrate that, while the claimant had pre-existing degenerative changes in the lumbar spine, she was totally asymptomatic prior to her compensable back injury of March 2004. Since the date of injury, she has continued to suffer from back problems, continued to seek medical treatment and still experiences disability because of her back. She has objective medical findings which show inflammation to the facet joints and damage to the lumbosacral discs at L4/L5 and L5/S1. There was never a point in time where the treating physician ended the healing period and released the claimant from treatment for the back injury. A second opinion physician selected by a representative of the workers' compensation insurance company issued a report ending the healing period and calling an end to medical treatment. This was done at a

time when the claimant was continuing to see her treating physician, he was saying that the healing period had not ended, and was recommending additional treatment.

Therefore, resolution of the issues involves an assessment of the credibility of the conflicting medical opinions as to the causal relationship between the compensable injury and requested medical treatment.

The Commission has the duty to weigh the medical evidence and if it is conflicting, the resolution is a question of fact for the Commission. Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 84 S.W.3d 878 (2002). Dr. Hart has been the claimant's treating physician since December 9, 2004. She was referred there by Dr. McKiever, the doctor originally selected by the respondent to treat the claimant. Dr. Hart has seen the claimant numerous times and is obviously very familiar with her condition. The orthopedic surgeon, Dr. Saer, recommended continued treatment with Dr. Hart on December 28, 2004 and Dr. Akin also made the same recommendation on December 29, 2005. The opinions of Drs. Hart, McKiever, Saer, and Akin should be given greater weight than that of a second opinion doctor selected by the insurance company. And when the opinions of the treating

physicians are considered, the requisite causal connection will be found.

As stated earlier, the end of the healing period does not necessarily mark the end of compensable medical treatment, if the treatment is geared toward management of the injury. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004). Pain management can be compensable medical treatment when administered to help the claimant cope with the pain from a compensable injury. Maynard v. Belden Wire & Cable Co., Full Workers' Compensation Commission, Opinion filed April 28, 1998 (Claim No. E502002); Billy Chronister v. Lavaca Vault, Full Workers' Compensation Commission, Opinion filed June 20, 1991 (Claim No. D704562). The medical evidence and the testimony of the claimant establishes that the pain management offered by Dr. Hart for her compensable injury was of great benefit to the claimant and appropriate under the circumstances. Further, I find that the evidence confirms that the treatment rendered by Dr. Hart was not only for pain management but also directed toward diagnosis and improvement of the condition, which would also be appropriate and compensable.

Therefore, I find that the claimant's compensable injury was a factor in, and causally related to, her need for the medical treatment requested, that the compensable back injury aggravated, accelerated and combined with pre-existing conditions to produce her need for treatment, and that the treatment of Dr. Hart was not only for pain management but was also directed toward diagnosis and improvement of the claimant's back problem.

TEMPORARY TOTAL DISABILITY FOR THE BACK INJURY

The causal connection between the claimant's back injury and her need for treatment has been previously demonstrated and once this has been accomplished, the causal connection to the resulting disability has also been established. Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004).

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will

improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant's treating physician has stated that she remains in the healing period. From the time of his first visit until the date of the hearing, Dr. Hart was administering treatment and performing diagnostic studies designed to delineate the extent of the claimant's problems and to improve her condition. The neurosurgical evaluation by Dr. Akin indicated that he would consider performing back surgery on the claimant if it were not for her weight. This medical evidence confirms the presence of a healing period for the back injury.

In finding that the claimant reached maximum medical recovery and the end of the healing period, the majority, relied on the opinions of Dr. Wilburn and Dr. Saer. As stated earlier, Dr. Wilburn evaluated the claimant twice for the insurance company. Dr. Saer saw the claimant two times for surgical evaluation. Dr. Wilburn said that the claimant reached MMI on March 14, 2005 and Dr. Saer agreed. On the other hand, Dr. Hart and Dr. McKiever have treated the claimant on numerous occasions and did not determine that the claimant had reached maximum medical improvement. Of course, Dr. McKiever was also the

respondent's choice and Dr. Hart was his referral. In addition, the neurosurgeon, Dr. Akin, said that he would consider surgery on the claimant as soon as she lost some weight which would strongly indicate that the claimant had not reached maximum medical improvement. Under these circumstances, the medical opinions of Drs. Hart, McKiever, and Akin should be given greater weight than those of Drs. Wilburn and Saer. Consistent with the weight of the credible evidence, I am compelled to find that the healing period has not ended for the claimant's back injury.

With regard to the claimant's ability to work, it was her testimony that she experiences a significant amount of difficulty as a result of taking pain medication which causes her to be unable to think or function. She has difficulty with standing long enough to cook or wash dishes. She is unable to sit for prolonged periods. The claimant is unable to clean house, sweep, mop, or do laundry and she has had to hire someone to perform these chores for her. It is also important to note that the claimant suffers from both a knee and a back condition which must be considered in combination when determining her physical limitations. The evidence confirms that the claimant is currently unable to work.

Therefore, I find that the claimant proved by a preponderance of the evidence that her back injury was a factor in, and causally related to, her inability to work; that she remains in the healing period for her back injury; and that she is unable to work as a result of her back and knee injuries combined. Therefore, I conclude that the claimant is entitled, under the Workers' Compensation Law, to temporary total disability benefits from the date of last payment until a date yet to be determined.

**PERMANENT IMPAIRMENT, WAGE LOSS AND PERMANENT TOTAL
DISABILITY**

Since the claimant continues to be entitled to temporary total disability benefits, issues relating to permanent impairment, wage loss and permanent and total disability are not yet ripe and should be reserved for future determination.

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

PHILIP A. HOOD, Commissioner