

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F604492

REGINA J. WHITLEY, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT NO. 1
CLAIMS MANAGEMENT, INC., TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JANUARY 5, 2011

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

Claimant represented by the HONORABLE FREDERICK S. "RICK"
SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents No. 1 represented by the HONORABLE CURTIS
NEBBEN, Attorney at Law, Fort Smith, Arkansas.

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

Decision of Administrative Law Judge: Affirmed in part;
reversed in part.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals
an administrative law judge's opinion filed July 19, 2010.
The administrative law judge found that Dr. Hawk was an
authorized treating physician and that the respondents were

liable for his treatment. The administrative law judge found that the claimant failed to prove she was permanently and totally disabled, but that the claimant proved she sustained 20% wage-loss disability in excess of her 7% anatomical impairment. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's finding that the claimant proved she sustained 20% wage-loss disability. We do not affirm the administrative law judge's finding that Dr. Hawk's treatment was authorized or the responsibility of the respondents.

I. HISTORY

Regina Whitley, age 61, testified that she attended school through the ninth grade. Ms. Whitley testified that her employment history included work at Levi Strauss for about two years and Harrison Furniture for about one year. The claimant testified that she graduated from beauty school in 1978 and thereafter began working in a beauty shop. The claimant testified that she began working at Wal-Mart in 2005. The parties stipulated that an employment relationship existed on or about April 19, 2006, and that the claimant sustained a compensable back injury. The claimant testified that she felt immediate pain across her

back after picking up a 40-50 pound package of rock salt. The claimant signed a Form AR-N, Employee's Notice Of Injury, on April 19, 2006. The claimant wrote on the Form AR-N that she had injured her back as the result of lifting 50 pounds of rock salt, 25 pounds of soft drinks, and 40 pounds of potting soil.

The claimant testified that the respondents "took me to Dr. Armstrong" after the accidental injury. Dr. Victor M. Armstrong saw the claimant on April 20, 2006 and assessed "1) Musculoskeletal low back pain with a sciatic component." The claimant testified on cross-examination that she stopped working for the respondent-employer on about May 18, 2006. The claimant testified that pain in back precluded her from work duties such as lifting.

The claimant's exhibits indicate that the claimant treated with Dr. James M. Hawk beginning June 8, 2006. The claimant testified that Dr. Hawk had been her family physician "three or four years before I got hurt." Dr. Hawk noted that the claimant had hurt her back at Wal-Mart and that the claimant had seen Dr. Armstrong for the work-related injury. Dr. Hawk's assessment included hypertension, obesity, and "LBP/strain mgmpt per Dr.

Gallagher and Dr. Ceola." The claimant had regularly scheduled subsequent follow-up visits with Dr. Hawk. The claimant testified on cross-examination that Social Security paid for Dr. Hawk's treatment, along with Medicare or Medicaid.

An MRI of the claimant's lumbar spine on June 16, 2006 showed a disk bulge at L4-5 and a herniation at L5-S1. The claimant's testimony indicated that Dr. Armstrong referred her to Dr. Ceola. The record indicates that Dr. Wade Ceola planned to perform a two-level posterior lumbar interbody fusion on or about July 28, 2006. The claimant testified, however, that the respondent-carrier sent her to see Dr. James B. Blankenship. Dr. Blankenship examined the claimant on September 6, 2006:

She was a cashier at Wal Mart and picked up a 30 pound bag of rock salt and felt a snap in her back with acute onset of lower back pain and left leg pain....The patient has had some pain medication and a week's worth of nonsteroidal medications from Dr. Armstrong but has had no physical therapy and no steroid medication. She has a 60 pack year history of smoking....

She has a lateral disk protrusion at L5-S1 on the left....I agree with Dr. Ceola if surgical intervention is entertained that a complete facetectomy would be needed and resulting arthrodesis would also be needed....She has had her abdominal aneurysm evaluated and it is at 3.5 cm. The vascular specialist in Springfield has

told her it just needs to be followed. I have told her to coupling this with her previous heart problems and her weight that surgical intervention needs to be approached with a great deal of trepidation. She is not overly interested in having surgery right now anyway, so I have told her the best thing for us to do is to get her into an aggressive conservative treatment plan....

The claimant began a program of physical therapy on or about September 7, 2006. Dr. R. David Cannon performed an L5 epidural injection on November 2, 2006. The claimant testified that the injection helped "maybe for three or four hours." Dr. Blankenship reported on November 29, 2006:

Mrs. Whitley is back in the office today with essentially no change in her pain complaints. She does state that she did get about five hours worth of relief of her leg pain and significant improvement in her back pain after the epidural steroid injection that Dr. Cannon performed. She stated unfortunately her pain returned at the same degree that it was prior. She has been doing her physical therapy and her home exercises but does not feel like she is making much progress....

IMPRESSION: I have told her that I do feel like that her response to her epidural steroid injection is diagnostic for the lateral disk protrusion at L5-S1 that I suspected was the etiology of her leg pain. That being said, she is rather adamant right now about not wanting any surgical consideration, and I told her with her general health conditions and weight that this is probably a wise stance. I told her that if her pain was at the point to where she could not function that surgical intervention is something that could be considered. I told her

unfortunately that there is not much else we can [do] for her back at present other than her continuing on her exercise program.

RECOMMENDATIONS: I have recommended a functional capacity evaluation to evaluate what she is able to do or not able to do. I told her it may lead us to further treatment modalities, but it is likely that until she wants to consider surgical intervention that there is really nothing else that I am going to have to offer her. I will review her FCE and then make a statement at that time concerning MMI, impairment and restrictions. She agrees to this plan.

The claimant participated in a Functional Capacity Evaluation on December 5, 2006. The following recommendations were given:

Based upon the results of this evaluation, Ms. Whitley is able to perform work to the sedentary physical demands level. Her previous job was classified by the "Dictionary of Occupational Titles" as being in the light physical demands level. After talking with the client, she may have to lift up to 50 pounds on a rare occasion. She is able to lift to the sedentary to light physical demands level. She is able to sit on a frequent basis (34-66% of the day). She was able to stand for 15-20 minutes time frames before having to sit for several minutes. She is able to use her hands and arms on a frequent basis. She has the potential to return to work as a cashier with modifications. She would need to be able to sit in a chair or on a stool while checking. She would also need to have lifting restrictions of 20 pounds or less on an occasional basis. If she is to return to work, she would benefit from working a 3-4 hours to begin with and working up to a full 8 hour day.

Dr. Blankenship provided a Functional Capacity Evaluation Review on December 13, 2006:

Mrs. Whitley was last seen in the office on November 29, 2006. The patient did have a diagnostic response for her lateral disk protrusion at L5-S1 from her epidural steroid injection. At that visit, she was not interested in proceeding with possible surgical intervention. We ordered the functional capacity evaluation for further determination of what she was able to do and also get some other insights into her overall clinical condition.

I have reviewed the functional capacity evaluation in its entirety. The evaluation did demonstrate variable levels of physical effort. There were also some minor inconsistencies in the reliability and the accuracy. I have reviewed the heart rate analysis and clinical observations that were noted by the reviewer who was Jennifer Fowler at Performance, and she did have a low effort rating of 5/7 on Jamar dynamic grip test. Concerning whether the subjective reports were reliable, there were significant indications of inappropriate illness behavior and poor psychodynamics.

Concerning the possibility of surgical intervention based on the findings of poor psychodynamics and inappropriate illness behavior as well as variable effort, I do not think that the patient would be a good candidate for potential surgical intervention. Although I do feel like that she does have a symptomatic ruptured disk, the fact that she has this does not lend itself to an immediate positive response from a surgical outcome. At present, the patient is not interested in surgery but even if she did decide that her pain was bad enough that she would like to consider surgery, it is my medical opinion based on the functional capacity evaluation that surgical intervention in this patient would be

unwise. If she was adamant about considering this, then more in depth testing with neuropsychological testing would be warranted. Patients with poor psychodynamics especially with a work-related type injury generally do not respond well to arthrodesis. It is my medical opinion at present that further treatment with surgical intervention or injections would not be of long term benefit in this patient based on these FCE findings.

Based on her FCE, the patient would be able to work at a light physical demand job. The patient may lift up to 50 pounds on a rare occasion and have a 25 pound weightlifting restriction on a frequent basis. The patient may walk or sit unrestricted, but should be allowed intermittently to be able to stop and rest if walking or stand up and stretch if sitting. The patient has good knowledge of her home exercise program and should continue to do this.

In summary, at present no further treatment is recommended and I do feel like the patient is at MMI. If the patient did want to consider surgical intervention, then a formal neuropsychological evaluation may be able to better delineate specifics as to whether she would be a good candidate for that. Based on what I see on her FCE, I think it would be unwise to head down the road of surgery in a patient with obvious poor psychodynamics and findings consistent with inappropriate illness behavior....

The parties stipulated that the claimant reached maximum medical improvement and the end of her healing period on December 13, 2006.

The record contains a Physical Therapy Initial Evaluation/ Examination dated March 1, 2007. The Initial

Evaluation/Examination identified the provider as Mountaincrest Rehabilitation and the physician as Dr. James M. Hawk. The claimant apparently began a program of physical therapy at Mountaincrest.

On March 27, 2007, Dr. Blankenship filled out a questionnaire provided by Claims Management, Inc. on January 9, 2007. Dr. Blankenship indicated that the claimant had reached maximum medical improvement on December 13, 2006 and checked a box indicating "No" in answer to the question, "2. Does the patient need additional treatment to maintain his maximum medical improvement?" Dr. Blankenship indicated that the claimant had sustained 7% anatomical impairment and checked "Yes" to the question, "Do you anticipate any disability?" Dr. Blankenship did not check any boxes on a question asking whether the claimant had returned to work and whether there were any restrictions. The parties stipulated that Dr. Blankenship assigned the claimant a 7% anatomical impairment rating which had been paid.

The claimant testified that she obtained a change-of-physician to Dr. Rebecca Barrett-Tuck. Dr. Barrett-Tuck saw the claimant on July 9, 2008 and indicated that Dr. James

Hawk had referred the claimant. Dr. Barrett-Tuck signed a report on July 16, 2008:

Regina Whitley is a 58-year-old lady who comes in today for Workman's Comp and independent medical evaluation. Ms. Whitley was an employee at Wal-Mart when she picked up a 30-lb. bag of rock salt on March 19, 2006, felt a snap in her back along with severe left lower extremity pain....

I do feel that this is clearly a work-related injury, which occurred reportedly March 19, 2006. I do feel that the appropriate treatment for her injury, if her risk factors did not interfere with the appropriate treatment, would have been fusion at L4-L5 and at L5-S1....Personally, there are several reasons that I am not willing to undertake Ms. Whitley's case and provide surgical intervention due to her multitude of risk factors that I think make it highly likely that she will not respond well to surgical intervention. Those are as follows:

1. Morbid obesity. Today she clearly stated to me that Dr. Blankenship "wanted me to lose weight before surgery, and that just is not going to happen."
2. She is a heavy smoker, which makes it unlikely that her fusion will heal properly.
3. Certainly, a lesser procedure might be an option for her. However, currently her obesity is at such a level that without major neurologic deficit, I would not be willing to undertake even a simple discectomy considering the size of her abdomen and the difficulty in positioning properly. It has been two years since her injury, and she does not have neurologic deficits. Certainly, she does have the opportunity and has had the opportunity to lose weight and make herself a better surgical candidate.
4. She would need a cardiac evaluation prior to any surgical intervention.

5. She would also need followup from the vascular surgeon who originally saw her to comment on the current status of the abdominal aortic aneurysm and if this remains an issue....

I did not make a follow-up appointment for her, as at this time I do not plan on providing surgical intervention.

Dr. Hawk stated on June 5, 2009:

Within a reasonable degree of medical certainty, Regina Whitley's need for medical care, which includes pain management, stems from a low back injury sustained in 2006. Seemingly she was scanning a 50 pound bag of rock salt, but the hand scanner didn't work. Regina went to lift up the 50 pound sack. She was able to get it on the conveyor belt, however, she had instant low back pain shooting down into her legs as far as the knees. Since that time she has been unable to work. She is permanently and totally disabled because of her low back injury. She is able to perform activities of daily living and do shopping for groceries, et cetera; however, the back problem causes her chronic pain, which keeps her from gainful employment.

Dr. Barrett-Tuck corresponded with the claimant's attorney on July 13, 2009:

In regards to Ms. Regina Whitley, I saw Ms. Whitley to offer a third neurosurgical opinion regarding Ms. Whitley's injury and treatment. I did not refer her to a pain management physician. I do think it reasonable that she see a pain management physician even though I am not convinced that it will be effective for her. I believe that Ms. Whitley would respond better to weight loss and increased physical activity so that her condition could be managed with the appropriate surgical intervention.

Considering the fact that Ms. Whitley has been unwilling or unable to help herself through a weight loss and exercise, I do think it is reasonable that she see a pain management physician; however, if a response is not clearly seen early on, I do not believe it appropriate to continue that treatment indefinitely.

Robert W. White performed a "Vocational Assessment" of the claimant and informed the claimant's attorney in part on November 16, 2009, "She does not meet the criteria for sedentary or light work as those terms are defined and is not capable of even marginal physical activity. At the end of this interview she could not get up from her chair without assistance and had to be helped to her car as she had extreme difficulty walking. She is obviously obese and as stated earlier without the ability to exercise this situation is not likely to improve. I have no recommendations for Regina vocationally and would argue against any job search or employment activity as the stress would only make her situation worse. I wish her the best."

A pre-hearing order was filed on April 19, 2010. The claimant contended that she had been rendered permanently and totally disabled as a result of her compensable back injury and that she was entitled to all related benefits. The claimant contended that she was "entitled to additional

benefits including medical care for her lower back. Dr. Hawk has opined that she will need pain management for the remaining portion of her life as he stated in the Residual Functional Capacity Questionnaire he completed on October 13, 2007."

The respondents contended, among other things, that they had paid all benefits to which the claimant was entitled. The respondents contended that "all authorized, reasonable and necessary medical expenses have been paid to or on behalf of the claimant. The claimant did incur treatment by her family physician, Dr. Hawk. The respondents contend that Dr. Hawk is an unauthorized treating physician and therefore any medical expenses by or at his direction are unauthorized and not the responsibility of the respondents."

The parties agreed to litigate the following issues:

1. Constitutional issues.
2. Entitlement to permanent and total disability benefits.
3. Entitlement to reasonable and necessary medical treatment, including pain management by Dr. James Hawk.
4. Controverted attorney fees.

A hearing was held on May 19, 2010. The claimant testified that she wanted the Commission to award her

treatment with Dr. Hawk. The claimant testified that Dr. Hawk had prescribed her medication and that she took "four morphines, four Vidodins (sic), and four Somas a day." Without this medication, the claimant testified, "I wouldn't be sitting here right now. I'd be laying in bed." The claimant testified that she was unable to walk farther than approximately 50 feet. The claimant testified that she could not sit longer than 20-25 minutes. The claimant testified that she operated a riding lawn mower "once a month or once every other week....for 15 minutes." The claimant testified that her lower back pain was worsening.

The claimant testified on direct examination:

Q. Now, one thing we didn't mention, I believe you did work at Home Depot at one time.

A. Yes, sir.

Q. How long did you work there?

A. Maybe six or eight weeks, I'm not sure.

Q. Okay. Was that before you went to work at Wal-Mart?

A. No, sir, it was after.

Q. All right. What happened to that job? Were you working part-time or full-time?

A. I was part-time....I couldn't walk from the back where you clock in to where they had me

working, watering the flowers....I'd irritate my back....

Q. Did you try your best to do that?

A. Yes, sir, I did. I enjoyed the job. I was making good money. I had - I'd sit there on a stool and water - go around and water the flowers, and I'd sit on a bench and pick the petals off of the dead flowers.

An administrative law judge questioned the claimant:

Q. Who referred you to - or how did you get to Dr. Hawk?

A. Through Mark [Brelish].

Q. Your friend?

A. Uh-huh.

Q. So no doctor referred you to Dr. Hawk?

A. No, ma'am, no.

Q. Dr. Tuck didn't?

A. No. She just told me to go back to my family physician.

Q. Who was your family physician?

A. Dr. Hawk....

Q. And when did she refer you back to Dr. Hawk?

A. The day I saw her.

Q. The last time you saw her?

A. I only saw her once.

An administrative law judge filed an opinion on July 19, 2010. The administrative law judge found, among other things, that the Workers' Compensation Act was constitutional. The administrative law judge found that Dr. Hawk was an authorized treating physician, and that the respondents were responsible for Dr. Hawk's treatment. The administrative law judge found that the claimant failed to prove she was permanently and totally disabled. The administrative law judge found that the claimant proved she sustained 20% wage-loss disability exceeding the claimant's 7% anatomical impairment.

Both parties appeal to the Full Commission.

II. ADJUDICATION

A. Wage-Loss

The wage-loss factor is the extent to which a compensable injury has affected the claimant's livelihood. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005). In considering claims for permanent partial disability benefits exceeding 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). "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-9-519(e)(1)(Repl. 2002). The employee has the burden of proving inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-9-519(e)(2)(Repl. 2002).

In the present matter, the claimant is age 61 with only a ninth grade education. The claimant's employment history reflects generally unskilled labor, although the claimant did own her own salon where she worked as a hairstylist for several years. The claimant began working for the respondent-employer in 2005. The parties stipulated that the claimant sustained a compensable back injury on or about April 19, 2006. The claimant testified that she felt acute pain in her back after lifting a heavy package of rock salt. The claimant received authorized medical treatment from Dr. Armstrong, Dr. Ceola, Dr. Blankenship, and Dr. Cannon. Dr. Ceola planned to perform surgery in July 2006 but Dr. Blankenship noted in September 2006 that the claimant was

"not overly interested in having surgery right now...." Dr. Blankenship eventually arranged a Functional Capacity Evaluation for the claimant. A Functional Capacity Evaluation (FCE) done on December 5, 2006 indicated that the claimant was able to perform sedentary, light, restricted work. It was specifically noted on the FCE, "She has the potential to return to work as a cashier with modifications. She would need to be able to sit in a chair or on a stool while checking. She would also need to have lifting restrictions of 20 pounds or less on an occasional basis. If she is to return to work, she would benefit from working 3-4 hours to begin with and working up to a full 8 hour day."

Dr. Blankenship reviewed the Functional Capacity Evaluation and opined on December 13, 2006 that the claimant "would be able to work at a light physical demand job. The patient may lift up to 50 pounds on a rare occasion and have a 25 pound weightlifting restriction on a frequent basis. The patient may walk or sit unrestricted, but should be allowed intermittently to be able to stop and rest if walking or stand up and stretch if sitting."

The Full Commission affirms the administrative law judge's finding that the claimant did not prove she was permanently totally disabled. The evidence demonstrates that the claimant has some physical abilities but that the claimant is simply not motivated to return to work. The opinions of Dr. Hawk and Robert W. White that the claimant is permanently and totally disabled are entitled to minimal weight when compared with the evidence of record. The evidence does not corroborate the claimant's contention that she was physically unable to return to work for the respondent-employer as a cashier. The Full Commission places significant evidentiary weight on the results of the Functional Capacity Evaluation and the opinion of Dr. Blankenship that the claimant would be able to work at a light physical demand job. We do not find credible the claimant's testimony that she was unable to perform restricted work duties at Home Depot. The Full Commission also notes that the claimant is able to ride in a motor vehicle for extended periods and has traveled out of the country for vacations on at least two occasions following the compensable injury.

Based on the claimant's age, her lack of education, her unskilled work history, and the 7% anatomical impairment following the compensable injury, the Full Commission affirms the administrative law judge's finding that the claimant sustained wage-loss disability in the amount of 20%.

B. Authorized Physician

Ark. Code Ann. §11-9-514(a) (3) (Repl. 2002) sets forth the claimant's rights and responsibilities concerning change of physician. Ark. Code Ann. §11-9-514 also provides:

(b) Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, shall be at the claimant's expense.

(c) (1) After being notified of an injury, the employer or insurance carrier shall deliver to the employee, in person or by certified or registered mail, return receipt requested, a copy of a notice, approved or prescribed by the commission, which explains the employee's rights and responsibilities concerning change of physician.

(2) If, after notice of injury, the employee is not furnished a copy of the notice, the change of physician rules do not apply.

(3) Any unauthorized medical expense incurred after the employee has received a copy of the notice shall not be the responsibility of the employer.

See Sharp v. Lewis Ford, Inc., 78 Ark. App. 164, 78 S.W.3d 746 (2002).

An administrative law judge found in the present matter, "10. Dr. Hawke (sic) is an authorized treating physician; therefore any medical expenses by or at his direction for treatment of the claimant's compensable back injury are authorized and the responsibility of respondents no. 1." The Full Commission does not affirm this finding. The parties stipulated that the claimant sustained a compensable injury on or about April 19, 2006. The claimant signed a Form AR-N, Employee's Notice Of Injury, on April 19, 2006. The evidence therefore demonstrates that the claimant was given notice of the change of physician rules on the date of the compensable injury. *See Sharp, supra.*

The claimant received authorized treatment from physicians including Dr. Armstrong and Dr. Blankenship. The record indicates that the claimant treated with Dr. Hawk beginning June 8, 2006. The claimant testified that Dr. Hawk was her family physician, and that her friend Mark Brelish had referred the claimant for treatment with Dr. Hawk before the compensable injury. There is no probative evidence before the Commission demonstrating that Dr. Hawk was an authorized treating physician or that the claimant was referred to Dr. Hawk by an authorized physician. The

claimant testified that she received a change-of-physician to Dr. Barrett-Tuck. There is no evidence corroborating the claimant's argument that Dr. Hawk "is an authorized physician through the chain of referrals." Dr. Barrett-Tuck stated on July 13, 2009, "I did not refer her to a pain management physician. I do think it reasonable that she see a pain management physician even though I am not convinced that it will be effective for her." We cannot construe from Dr. Barrett-Tuck's report that she expressly or impliedly referred the claimant to Dr. Hawk.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's opinion in part. The Full Commission finds that the claimant did not prove she was permanently and totally disabled. We find that the claimant sustained wage-loss disability in the amount of 20%, in excess of the 7% anatomical impairment. The claimant proved that the compensable injury was the major cause of the claimant's 20% wage-loss disability. The claimant did not prove that Dr. Hawk was an authorized treating physician or that the respondents were liable for any portion of Dr. Hawk's treatment. The claimant did not prove that any applicable

provision of Act 796 of 1993 is unconstitutional. 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

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur in the finding that the claimant cannot prove by a preponderance of the evidence that Dr. Hawk is an authorized treating physician and the finding that the claimant is not permanently and totally disabled. However, I must respectfully dissent from the majority's finding that the claimant is entitled to a 20% loss in wage earning capacity in addition to her permanent anatomical impairment rating.

In my opinion, the claimant has failed to meet her burden of proof.

My review of the evidence demonstrates that the claimant has no motivation to return to the workforce. The claimant voluntarily terminated her employment with the respondent employer approximately one month after she was injured. The claimant contends she is in too much pain to work. However, her functional capacity evaluation indicated that the claimant had inappropriate illness behavior and gave sub-maximal effort. The findings stated "Ms. Whitely can do more physically at times than was demonstrated during this testing day." Dr. Blankenship, upon reviewing the results of the claimant's functional capacity evaluation, determined that the claimant could lift 25 pounds on a frequent basis, up to 50 pounds on a rare occasion, and that she could walk and sit unrestricted.

The claimant has operated her own small business wherein she performed work as a licensed beautician. The claimant demonstrated the ability to calculate payroll, order supplies and run the business successfully. She made approximately \$20,000 per year operating this business.

However, the claimant has made no attempt to get another job.

The claimant has also been able to travel. She has been on at least one cruise and also flew from Oklahoma City to Houston to Belize. She has traveled by car to New Orleans, Louisiana. The claimant is also collecting social security disability.

Simply put, I cannot find that the claimant has motivation to return to any employment. Therefore, she is not entitled to any wage loss disability benefits in addition to her permanent anatomical impairment. Accordingly, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER

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

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority opinion. Specifically, I concur in the finding that the claimant is entitled to a 20% loss

in wage-earning capacity in addition to her permanent anatomical impairment rating. However, I must respectfully dissent from the majority's finding that the claimant cannot prove by a preponderance of the evidence that Dr. Hawk is an authorized treating physician.

The record demonstrates that the claimant obtained a Change of Physician Order from the Commission to treat with Dr. Rebecca Barrett-Tuck. The claimant's testimony demonstrates that Dr. Hawk is a general practitioner and pain management specialist. The claimant testified that Dr. Barrett-Tuck referred her back to her family physician, Dr. Hawk, for pain management. No testimony or other evidence has been presented to the contrary.

Considering that Dr. Barrett-Tuck has opined that she is unwilling to undertake the claimant's case and provide surgical intervention due to her multiple risk factors and because she had no further treatment to offer claimant, I am persuaded, as was the Administrative Law Judge, that the claimant's testimony regarding this matter is credible.

As such, I find that the preponderance of the evidence demonstrates that the claimant was directed by Dr.

Barrett-Tuck to return to her primary care physician, Dr. Hawk, and Dr. Hawk is an authorized treating physician.

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

PHILIP A. HOOD, Commissioner