BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H003585

TINA WALKER, EMPLOYEE **CLAIMANT**

HINO MOTOR MFG. USA, INC.,
EMPLOYER **RESPONDENT**

SOMPO AMER. INS. CO.,
CARRIER **RESPONDENT**

OPINION FILED APRIL 24, 2023

Hearing before Chief Administrative Law Judge O. Milton Fine II on January 27, 2023, in Marion, Crittenden County, Arkansas.

Claimant represented by Mr. Steven R. McNeely, Attorney at Law, Jacksonville, Arkansas.

Respondents represented by Messrs. Michael E. and Zachary F. Ryburn, Attorneys at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 27, 2023, the above-captioned claim was heard in Marion, Arkansas. A pre-hearing conference took place on October 31, 2022. The Prehearing Order entered on November 1, 2022, pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. With an amendment of the third, they are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employer/employee/carrier relationship existed on June 2, 2020, when Claimant sustained a compensable back injury.
3. Respondents accepted this rating and have paid Claimant medical and indemnity benefits pursuant thereto, with the latter including temporary total disability benefits through May 5, 2021, and permanent partial disability benefits in accordance with an impairment rating of five percent (5%) to the body as a whole assigned by Dr. Laverne Lovell on May 5, 2021.

[T. 3-4, 41]

Issues

At the hearing, the parties discussed the issues[1] set forth in Commission Exhibit 1. The following were litigated:

1. What was Claimant's average weekly wage?

[1]Respondents at the hearing, without objection by Claimant, added an issue concerning whether the instant claim, or a portion thereof, is barred by the statute of limitations. [T. 5-6] However, when Claimant clarified later that she was not asking the Commission in this proceeding to address whether she had sustained a compensable injury to her neck, Respondents elected to reserve this issue, which only went to that aspect of the claim. [T. 42-44]

2. Whether Claimant is entitled to additional medical treatment.

3. Whether Claimant is entitled to additional temporary total disability benefits.

4. Whether Claimant is entitled to wage loss disability benefits.

5. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved. [T. 4-5]

Contentions

The respective contentions of the parties, following amendments[2] at the hearing, are as follows:

Claimant:

1. Claimant contends that she suffered a compensable back injury on June 2, 2020.

2. Claimant contends that she is entitled to additional medical treatment, specifically medial branch block injections recommended by Dr. Michael Scarbrough, along with pain management at Pain Centers of America.

3. Claimant contends that in light of the recommended treatment, she is still in her healing period and entitled to additional temporary total disability benefits from the date last paid until she is returned to work.

4. All other issues are reserved.

[2]Because of the reservation of the statute of limitations issue, the supplemental contentions concerning it have been removed. [T. 5-6, 44]

Respondents:

The claim was accepted and all appropriate benefits have been paid. The claimant is not entitled to additional medical treatment in the form of pain management. She is not entitled to wage loss. The claimant has reached maximum medical improvement.

[T. 5]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. The preponderance of the evidence establishes that Claimant's average weekly wage was $609.33, with compensation rates of $406.00/$305.00.
4. Claimant has proven by a preponderance of the evidence that she is entitled to additional treatment of her compensable back injury in the form pain management by Pain Treatment Centers of America.

5. Claimant has not proven by a preponderance of the evidence that she is entitled to additional treatment of her compensable back injury in the form medial branch blocks by Dr. Michael Scarbrough.

6. Claimant has not proven by a preponderance of the evidence that she is entitled to additional temporary total disability benefits for any period.

7. Claimant has proven by a preponderance of the evidence that she is entitled to wage loss disability of five percent (5%).

8. Claimant has proven by a preponderance of the evidence that her attorney, the Hon. Steven R. McNeely, is entitled to a controverted fee on the indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012).

CASE IN CHIEF

Summary of Evidence

Claimant was the sole witness.

In addition to the prehearing order discussed above, admitted into evidence in this case were the following: Claimant's Exhibit 1, a compilation of her medical records, consisting of two abstract/index pages and 43 numbered pages thereafter; Claimant's Exhibit 2, non-medical records, consisting of one abstract/index page and seven numbered pages thereafter; and Respondents' Exhibit 1, the Form AR-C that was filed in connection with this claim on December 6, 2021, consisting of one page.

Adjudication

A. Average Weekly Wage

Introduction. Claimant has argued that her average weekly wage for the time period pertinent to this claim was $654.00, yielding compensation rates of $437.00/$328.00. On the other hand, Respondents assert that the evidence and applicable law establish that her compensation rates should be $355.00/$266.00. [T. 4]

Standards. Arkansas Code Annotated § 11-9-705(a)(3) (Repl. 2012) provides that "[w]hen deciding any issue, administrative law judges . . . shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence." The standard "preponderance of the evidence" means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415 (citing *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947)).

In determining the average weekly wage of a claimant, Ark. Code Ann. § 11-9-518 (Repl. 2012) gives the following guidance:

> (a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.
>
> (2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

> (b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.
>
> (c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

The term "wages" is defined in Ark. Code Ann. § 11-9-102(19) (Repl. 2012) in pertinent part as follows:

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer . . . .

Discussion. When Respondents cross-examined Claimant, the following exchange took place:

> Q. At Hino you made about $14.00 an hour, does that sound right?
>
> A. No, I was $15.50 plus a dollar shift.
>
> Q. According to the Form W that you submitted in your exhibit, it looks like you were paid $1,120.00 for 80 hours of work, does that sound right?
>
> A. It kind of sounds close.
>
> Q. If you do the math on that, is that $14.00 an hour?
>
> A. They offered me 15, so I don't know where the 14 came from.
>
> Q. Are you incorporating your overtime to get to that $15.00 an hour?
>
> A. I didn't know if that's what they were required, I mean, you know, once they added in. I don't know. I'm not sure but I thought that's what it was.

Q. Okay. Your Form [AR-]W seems to indicate that you made $14.00 an hour with an additional $1,627.75 in overtime during that period. Does that sound about right?

A. It's [sic] sounds almost right, yeah.

[T. 22-23] (Emphasis added)

At the outset, I note that the Form AR-W that is in evidence does not comply with the law regarding how Claimant's wages for the 52 weeks preceding her stipulated compensable injury are to be set forth. The entries thereon are not broken out by weeks, as they should be. And "Weeks" (which, again, is a misnomer because they do not reference individual weeks) 8, 10, 13, and 18 on the form list more than 40 hours worked, but identify it as all "[s]traight [t]ime." For example, the "Week 13" line reflects that Claimant worked 83.75 hours in a 10-day (i.e., two-week) period with no overtime, even though there had to be 3.75 hours of overtime allocated between those two weeks. After due consideration, I am giving no weight to this form, except for its reflecting that she worked for Respondent Hino during 33 weeks[3] preceding the injury at issue.

[3]Per *Buxton v. City of Nashville*, 132 Ark. 511, 201 S.W. 512 (1918), I can take judicial notice of the contents of a calendar. According to the 2019 and 2020 calendars, 42 weeks elapsed between Claimant's start date of August 12, 2019, at Respondent Hino (per her testimony) and her stipulated injury date of June 2, 2020. Consequently, I can only conclude that Claimant did not work at all during nine weeks of her tenure at Hino, since they are not reflected on the Form AR-W in evidence. Those nine weeks are excluded from the calculation in § 11-9-518(b), which takes into account only weeks "worked"—not "employed." The statute must be strictly construed, in accordance with Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2012). *See Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996). "Strict construction means narrow construction and

That said, Claimant testified that it was "almost right" that she earned $14.00 per hour during the period in question, and $1,627.75 in overtime. I credit this. The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id*. In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id*.

With that to build on, Claimant's average weekly wage calculation is thus:

$14.00 x 40 hours =	$560.00
+	
$1,627.75 ÷33 weeks =	$49.33
	$609.33

The preponderance of the evidence thus establishes that Claimant's average weekly wage was $609.33, entitling her to compensation rates of $406.00/$305.00.

B. Additional Treatment

Introduction. Again, as the parties have stipulated, Claimant sustained a compensable injury to her back. In this action, she is seeking, inter alia, additional treatment of this injury in the forms of medial branch block injections and pain

requires that nothing be taken as intended that is not clearly expressed." *Hapney v. Rheem Mfg. Co.*, 341 Ark. 548, 26 S.W.3d 771 (2000).

management. Respondents have argued that they are not responsible for this treatment.

Standards. Arkansas Code Annotated Section 11-9-508(a) (Repl. 2012) states that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *See Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injury. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown*, *supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The standard "preponderance of the evidence" means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

As the Arkansas Court of Appeals has held, a claimant may be entitled to additional treatment, even after the healing period has ended, if said treatment is geared toward management of the injury. *See Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004); *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Such services can include those for the purpose of diagnosing

the nature and extent of the compensable injury, reducing or alleviating symptoms resulting from the compensable injury, maintaining the level of healing achieved, or preventing further deterioration of the damage produced by the compensable injury. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Artex*, *supra*. A claimant is not required to furnish objective medical evidence of her continued need for medical treatment. *Castleberry v. Elite Lamp Co.*, 69 Ark. App. 359, 13 S.W.3d 211 (2000).

Testimony. Claimant is a high school graduate. In addition, she has attended two semesters at East Arkansas Community College and three at Strayer University. At the former, she studied nursing and occupation therapy; at the latter, the focus of her study was business. [T. 25-26] Asked how her stipulated compensable back injury happened on June 2, 2020, she related:

> Well, we came on board after the first shift, cause I worked second shift. And we got on the line, the team lead told me, well, we're going to have to lift the pallets." I said, "For what?" [The team lead responded:] "Until we can get somebody over here." So I told her, "Wow, those pallets are heavy," you know, "I'm going to lift all night long," you know, because the pallets that these parts go onto after they are made and after they're formed, they're really heavy. And they have a machine that you take your hand and lay it up against and the pallet comes to you, which the pallet is never lifted up no type of way, because the machine slides it down to you onto the little belt, so you're never having to lift it up. Well, that night I had to lift it up. I lifted it up till about 3:30 that night, after I told my team lead at 12:00 that, you know, my back, I was feeling something in my back, cause you know, I had been lifting since I got there at 6:00. And she said, "Well," you know, "we've got to get this production out." I said, "You should call Mr. Frye." Mr. Frye was the supervisor over all of us. She didn't do that, she just told me to just go back to the line and continue to do it . . . About 5:15, between 5:00 and 5:15 I got off of work. I talked to Mr. Frye before I left. I said, "Mr. Frye, I'm hurting so bad," you know what I'm saying, "I can't hardly," you know, I'm saying go to my time clock or whatever.

[T. 12-14] After the injury was reported, Claimant was sent to the plant nurse, Chris Gross.

The following exchanged occurred:

> Q. Now, what kind of physical problems were you having at this point?
>
> A. At that point I was having, it was my neck and it was the lower part of my back. And you know, he [Gross] just, like I said, he examined me, gave me a couple of shots, gave me some pills, and told me, "I'm gonna take you off," so he did."

[T. 16] Claimant treated with Gross a number of times. These visits included hip injections. Eventually, she was sent for an MRI. This occurred on October 13, 2020. [T. 16-17] In describing the condition of her back at this time, Claimant stated:

> Getting up in the morning, in back, going to bed at night, back. I'm just still having the same problems. I don't see where nothing that they have done, no medication that they have given even worked, just even worked.

[T. 17]

From there, Claimant went to Dr. LaVerne Lovell. But while Lovell recommended surgery to address the condition of her back, Claimant did not want to go through with it. She feared that the operation would make her worse instead of better. [T. 17-18] Thereafter, Claimant went to a pain management doctor. But still, her condition did not improve. [T. 18] The following exchange took place:

> Q. Then after that you went and got treatment on your own with the Pain Treatment Center of America. Now did that treatment help you any?
>
> A. They're still working with me. This is something that my primary doctor wanted me to see, because my blood pressure stayed up

> too high, she said, and it's all about pain. That's why she sent me over there to the new pain doctor.

[T. 19]

Claimant denied having any pre-existing back problems. She pointed out that prior to beginning work at Hino, she had to pass a physical examination. It was her testimony that since her stipulated injury, she has not been involved in any accident. [T. 21-22]

On cross-examination, Claimant stated that Dr. Lovell assigned her an impairment rating of five percent (5%). She acknowledged that she refused to proceed with the back surgery because of, inter alia, the risks of it that the doctor disclosed to her. [T. 22-23]

When asked whether the pain medication that she is currently taking is working, Claimant simply responded, "No." That being the case, she was questioned why she was still using it. Her reply was that her physician has recently doubled her allowed dosage, and had scheduled her for a follow-up visit to look into the matter further. Notwithstanding this, Claimant volunteered her assessment of the situation: "So it's just a mess." [T. 29-30] Later, she described her back pain as "unbearable sometimes," and explained that the benefit of the increased dosage has helped in the sense that it helps her sleep because "you don't feel no pain when you sleep." In her opinion, her condition has worsened since the injury occurred. [T. 33]

Under questioning by the Commission, Claimant testified that along with medial branch block injections, she is seeking "[w]hatever the physicians that I go to, whatever

they suggest that can help I'm willing to accept . . . ." But she confirmed that this does not include the surgery proposed by Lovell, because she does not wish to undergo it. [T. 39]

Medical records. The records in evidence reflect that Claimant underwent a lumbar x-ray on June 9, 2020, that reflected only "[m]ild arthritic changes involving L2-L5 [and] [n]o acute abnormality of the spine . . . ." She was sent for physical therapy. A lumbar MRI that took place on October 13, 2020, showed, inter alia, "[a] small left paracentral disc protrusion" at L5-S1.

After Claimant saw Dr. Lovell on January 12, 2021, he wrote:

> HISTORY: Ms. Tina Walker is a 54-year-old lady referred by Workers' Compensation for an injury that occurred on June 2, 2020. The patient was at her workplace leaning over picking up a little platform of some sort o[f] car parts in a box that strained her low back and giving her left-sided radicular pain. The item she was lifting weighs between 20 and 25 pounds. She indicated this to the workplace. She was seen several times by local physicians and had physical therapy as well. An MRI scan of the lumbar spine was completed.
>
> Review of MRI of the lumbar spine shows stenosis at L3-4 moderate in nature that is unrelated to her work injury. **She has a small left-sided L5-S1 disc herniation that does compress the S1 root up against the facet joint on that left side. This is very likely the cause of the symptoms which she complains of today.**
>
> . . .
>
> Plan:
> I have gone over the MRI scan with the patient in detail. I have explained to her that the lumbar stenosis at L3-4 is not what I believe is symptomatic and is not related to her work injury but more than likely, she will progress at that site and sometime in the future need to have someone address that for her.

> I showed her the left-sided L5-S1 disc herniation and used a model as well to talk to her about the condition she has. I have offered her a lumbar epidural steroid injection and talked to her about a left-sided L5-S1 microdiscectomy. I went over the risks, complications and recovery of a microdiscectomy, which include but are not limited to death, paralysis, bleeding, infection, nerve root injury with residual weakness, residual neck pain, arm pain, paresthesias, bone graft migration, and recurrent laryngeal nerve palsy. The case manager and the patient will make contact with each other after the Thanksgiving holiday which is coming up and the patient will relay whether or not she would like to try steroid injection or proceed on with surgical intervention. We will wait to hear from them and if she wants to have either one, we will get that scheduled for her. She will stay in an off work status.

(Emphasis added)

On April 29, 2021, Claimant underwent a functional capacity evaluation. The report thereof reflects that she gave an inconsistent and unreliable effort, with only 15 of 45 consistency measures within expected limits. Because of this, the evaluator found that she demonstrated the ability to perform work "in at least the SEDENTARY classification of work . . . ."

On May 6, 2020, Dr. Lovell wrote that Claimant had declined surgery to address her back injury. He assigned her permanent lifting restrictions of 50 pounds on an occasional basis and 25 pounds on a frequent basis. Also, he gave her an impairment rating of five percent (5%) to the body as a whole. In response to an inquiry by Respondents' counsel, Dr. Lovell on May 20, 2021, wrote that Claimant reached maximum medical improvement on May 6, 2021. He added that while she is not in need of future treatment, she does have permanent restrictions as outlined above.

Claimant returned to Lovell on August 24, 2021. The report of that visit includes the following:

> HISTORY: Ms. Walker returns for follow-up. I released her with a PPI rating and permanent restrictions three months ago. The patient is sent back today because she was evidently complaining to her adjuster that no one was managing her pain. Prior to coming to see me, she was seen by an advanced practice nurse named Christopher Gross over in West Memphis. When she came to see me, her relationship with him was terminated. The patient desires to return back to him for longer-term pain management. I have discussed with the patient once again, whether [or] not she is interested in surgery and her response is "I am thinking about it."
>
> . . .
>
> The patient continues to complain of left sciatica and generalized low back and hip pains bilaterally. She has known left-sided L5-S1 disc herniation, and L3-4 stenosis which I have counseled her about and went over the surgical intervention, including risks and complications.
>
> . . .
>
> Plan:
> The patient appears not interested in any treatment from me today so I will give her a prescription of some Lortab and refer her back to Mr. Gross for long-term pain management. No follow-up is given to this patient at this time as I have nothing further to offer her.
>
> ADDENDUM: Ms. Walker evidently misconstrued the fact that Mr. Gross was a pain management doctor as he does not do that. We will, therefore, refer the patient back to her adjuster to allow them to seek [a] pain management doctor near the patient's home that will manage her.

From there, Claimant began undergoing pain management at Pain Treatment Centers of America. When she first presented there on June 14, 2022, she rated her pain as 5/10 on average and 9/10 at its most severe. She incorrectly informed treating personnel that she had not had "any imaging done." While her hands, knees, and cervical spine were also identified as potential problem areas, the treatment included her lumbosacral spine. When Claimant went back there on August 18, 2022, Dr. Ted

Shields wrote that the prescriptions of, inter alia, Hydrocodone, were to address conditions that included the following: chronic pain syndrome, facet arthritis of lumbar region, and lumbar spondylosis.

Discussion. In reviewing the medical records, I note that Dr. Lovell, in response to Claimant's request for pain management, referred her to Gross, the plant manager. The last time he saw her, he wrote: "We will, therefore, refer the patient back to her adjuster to allow them to seek [a] pain management doctor near the patient's home that will manage her." Lovell did not opine that such treatment was unwarranted, but instead acted to accommodate the request on August 24, 2021. This was three months after he informed Respondents' counsel that Claimant needed no additional treatment of her back. The implication is clear that the doctor reversed course from his earlier opinion. I credit this. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). Similarly, I credit Dr. Shields regarding the need for administration of medications as part of her pain management.

The evidence shows that as a result of Claimant's stipulated compensable back injury, she still suffers from pain. She has proven by a preponderance of the evidence that the pain management treatment she is undergoing at Pain Treatment Centers of America is reasonable and necessary, in that it is geared toward reducing or alleviating the symptoms resulting from her compensable injury, and that it is causally related to that injury. On the other hand, while Claimant has also contended that she is entitled to

additional treatment in the form of medial branch blocks by Dr. Michael Scarbrough, the records of Scarbrough are not in evidence to show, among other things, that he has recommended them. Thus, I am unable to find that she is entitled to these injections by him.

C. Additional Temporary Total Disability Benefits

Introduction. The parties have stipulated that Claimant was paid temporary total disability benefits regarding her compensable back injury through May 5, 2021. Herein, she is asking that she be awarded additional benefits of this type "until she is returned to work." Respondents dispute this.

Standards. The compensable injury to Claimant's back is unscheduled. S*ee* Ark. Code Ann. § 11-9-521 (Repl. 2012). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. 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). Also, a claimant must demonstrate that the disability lasted more than seven days. *Id*. § 11-9-501(a)(1).

Evidence. Claimant has undergone some training in the areas of nursing and phlebotomy. [T. 8] Asked to describe her work experience pre-Hino, she related:

> I did a lot of sitting, you know, for the elderly, sitting. It's like classified under the nurse aide, you know, grounds, you know, just sitting with the elderly, you know what I'm saying? Like reading mail to them, getting a

> meal, and different things like that, nothing really hard, just a sitter. It's almost like a companion to her.

[T. 10]

She worked in this position from 2011 until she was hired by Hino in 2019. When she began work there, Claimant first performed the following tasks:

> [B]efore I got on the line, I was taking parts out of the box which went to a gate, taking the parts out of the box, putting them on the conveyor where they'll go around, you know, cause they were making, you know, the rear end part of the trucks for the trucks.

[T. 11] Later, she was transferred to the assembly line. This job had multiple components:

> I had eight different little jobs that I do from one side to the next. I'd take and I'd put the little seals, rubber seals into the part, and then it starts to go around, and then I might put a screw in and it'll come around, then where we have this lift the part up off the belt, put it onto a pallet, rivet it down on both ends.

[T. 11-12]

According to Claimant, when she first began treating for her back injury with Nurse Gross, he took her off of work. She stated that she never went back to work at Respondent Hino since that time. [T. 16] The following exchange took place:

> Q. Now, Dr. Lovell released you from his care [o]n May 6 of 2021. Now, did you try to go back to work or talk to anybody at Hino's about going back to work?
>
> A. I did, I talked to Linda.
>
> Q. Linda who?
>
> A. Linda McDoniel.

Q. And she worked with Hino?

A. Yes.

Q. What was the nature of that conversation?

A. The nature of that conversation was, "Linda, when are they going to decide what they're gonna do, and are they gonna allow me, with everything that they've got going on, but will they let me come back to work? She said to me, "Are they releasing you [to] full [duty], or are you on restrictions?" I said to her, "Lovell said I was gonna be on restrictions." So she told me I couldn't come back with restrictions, because they didn't have any type of position that, you know, I could do on restrictions, so that's why I didn't go back. That's why I haven't gone back.

Q. So have you been back to work anywhere since then?

A. No.

[T. 19-20] No one has taken her off work since Dr. Lovell released her from treatment. [T. 24]

Discussion. As the parties have stipulated, Respondents paid Claimant temporary total disability benefits through May 5, 2021. Under *Poulan Weed Eater* and *Green Bay Packing, supra,* I am crediting Dr. Lovell's opinion that Claimant reached maximum medical improvement as of May 6, 2021. The evidence establishes that she reached the end of her healing period on that date. Consequently, she has not proven her entitlement to additional temporary total disability benefits.

D. Wage Loss Disability Benefits

Introduction. In addition, Claimant has asserted that her injury merits her wage loss disability benefits. Respondents oppose this.

Standards. To repeat, Claimant's June 2, 2020, compensable injury to her back is unscheduled. *Cf.* Ark. Code Ann. § 11-9-521 (Repl. 2012). Her entitlement to wage loss disability benefits is controlled by § 11-9-522(b)(1), which states:

> In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

See Curry v. Franklin Elec., 32 Ark. App. 168, 798 S.W.2d 130 (1990). Such "other matters" include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Id.*; *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). As the Arkansas Court of Appeals noted in *Hixon v. Baptist Health*, 2010 Ark. App. 413, 375 S.W.3d 690, "there is no exact formula for determining wage loss . . . ." Pursuant to § 11-9-522(b)(1), when a claimant has been assigned an impairment rating to the body as a whole, the Commission possesses the authority to increase the rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Cross v. Crawford County Memorial Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996).

To be entitled to any wage-loss disability in excess of an impairment rating, the claimant must prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In considering

factors that may impact a claimant's future earning capacity, the Commission considers his motivation to return to work, because a lack of interest or a negative attitude impedes the assessment of his loss of earning capacity. *Id*. The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii) (Repl. 2012) provides:

> (*a*) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
>
> (*b*) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is more than fifty percent (50%) of the cause, and has to be established by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(14) (Repl. 2012). "Disability" is the "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." *Id*. § 11-9-102(8).

Evidence. Claimant described her jobs at Hino:

> I got hired on to do . . . taking parts out of the box which went to a gate, taking the parts out of the box, putting them on the conveyor where they'll go around, you know, cause they were making, you know, the rear end part of the trucks for the trucks. And then after that I was moved to the line.
>
> . . .

> I had eight different little jobs that I do from one side to the next. I'd take and I'd put the little seals, rubber seals into the part, and then it starts to go around, and then I might put a screw in and it'll come around, then where we have this lift to lift the part up off the belt, put it onto a pallet, rivet it down on both ends. It goes into the machine and the machine reads it, it turns it upside down, it reads the part then, and then I move on and I read the serial numbers on the top and the bottom.

[T. 11-12]

The following exchange occurred:

> Q. Let's go over your conditions and how that affected other areas of your life since June of 2020 . . . [s]o has it changed your social life any? Are there things you used to do that you can't do now?
>
> A. Yeah, it has changed a lot in my life, because I go to bed with pain, I wake up with pain. They want to put me on all of these hypo-power [sic—obviously, "high-powered"] medications that all, it doesn't even give you a life because all you do is sleep your days away, you know, and I don't know, I just see no use to it, do you know what I'm saying, for your know, the medication, you know, the pain.

[T. 20-21] Her back condition has negatively impacted her dancing. She added:

> My household chores, it takes a long time for me to do certain things like stand in the kitchen for a long time at the sink washing dishes and stuff like that without me having to take a seat to, you know, rest my back . . . .

[T. 21] Notwithstanding her injury, Claimant feels that she still possesses the ability to work—albeit in a limited capacity: "I am sure with my—I have a super duper back brace he gave me that works for me. I mean, I could do it [work] sitting down." [T. 21]

When Dr. Lovell released Claimant, he assigned her permanent restrictions of frequent lifting of no more than 25 pounds, and occasional lifting of no more than 50. Her testimony was that based on her education and experience, she could find another

job within those restrictions. She hastened to add: "Well, there's some jobs out here that you don't have to lift much. It ain't a lot, but it's, you know . . . [y]ou're gonna lift something." [T.26-27]

The following exchange occurred on cross-examination:

> Q. Do you feel like you could get a job that paid more than $14.00 an hour without having to lift 25 pounds?
>
> A. I'm not really sure in the State of Arkansas, no.
>
> Q. You are fairly educated and have some college experience. I'm assuming you can read and write well?
>
> A. I can read and I can write, yes.
>
> Q. And you are [at] least capable with math and arithmetic?
>
> A. Yes, I am.
>
> Q. Do you think you could work as a clerk, a cashier, or anything like that with that injury?
>
> A. Well, I wouldn't say with that prolonged standing. I think that would get to me as far as a cashier or something like that. The prolonged normally standing, I think I could probably—
>
> Q. And prolonged standing, is that because of your knees?
>
> A. Well, my back. I mean, really my back was really the major thing, you know, that started. You know what I'm saying? All the rest started, you know, coming in, but I think the prolonged standing would probably get me.

[T. 27]

Asked why she has not applied for work anywhere, Claimant gave the following explanation:

> Because when I get up in the morning, I have to take a hydro[codone]. That's why I haven't applied for no job. When I lay down at night I have to take one. She upped them to twice a day now, cause I'm having a lot of problems. So that's why I haven't got no job, because the medication that they give, it's a real drowsy, sleepy type of medication, so, and I don't want to drive and hurt myself or hurt no one else, so that's why.

[T. 29]

Claimant has been approved for Social Security Disability. She draws $1,394.00 in monthly benefits. It was her testimony that her receipt of these benefits has not been the cause of her not looking for work. She denied that the prospect of her benefits being reduced or ended if she got another job would keep her from seeking employment; and she denied stating the opposite of this in her deposition. [T. 30-31] Claimant related that her goal is to return to work once her pain situation has been resolved. [T. 33] It was not her plan to draw disability benefits at age 56. She elaborated:

> I mean, I just thought I had at least three or four more years out there in the workforce. I've worked most of my life, so I didn't feel like I should have been hindered for a company that didn't even care about their employees, so no, I wasn't looking to be on disability at this age, no.

Hino has not offered her another job since this injury. [T. 34]

As for her returning to another position that she held earlier in her career, that of being a sitter or companion for an elderly individual, Claimant explained that while she could perform the aspect of the job that involved her simply sitting and watching the client, her back condition would not allow her to help the client if, for example, that were to fall onto the floor. [T. 35]

With respect to Claimant's functional capacity evaluation, which indicated that she put forth a sub-optimal effort (see *infra*), she explained:

> Well, I'm not saying that I hadn't limited myself, I only could do what I could do, and that was what the test was about, no pushing me. He [the evaluator] told me to do what I could do. So no, I wasn't limiting myself, I was just doing what he asked of me, but it strained anyway.

[T. 32-33]

Discussion. The evidence before me reflects that Claimant is 56 years old and a high school graduate. She has attended five semesters of college at two different institutions. Her courses of study there were occupational therapy and business. Prior to going to work for Respondent Hino, Claimant worked as a sitter/companion for elderly clients. While this job by its nature is largely sedentary, a person performing it might be called upon to help up a fallen patient.

Her position at Hino, on the other hand, involved working on an assembly line at a plant that manufactured truck parts. Some lifting was involved—in fact, extensive lifting the day of her back injury.

With respect to her stipulated compensable injury, Claimant has undergone primarily conservative treatment. While Dr. Lovell offered her surgery to address her herniation at L5-S1, she declined. Thereafter, the doctor placed her at maximum medical improvement as of May 6, 2021, and assigned her an impairment rating of five percent (5%) to the body as a whole. To help assess Claimant, she was sent for a functional capacity evaluation. However, her effort was very unreliable, with only 15 of 45 consistency measures within expected limits.

Since that time, her treatment has consisted of pain management. This has only been marginally successful; her dosage of Hydrocodone has been increased to address her pain, which she rated as averaging 5/10 to her pain management provider. As she related both to the provider and to the Commission in her testimony, the pain at times can be very severe.

As a consequence of Claimant's injury, her activities have been curtailed. She can no longer go dancing. While she believes she could still work, due to use of a back brace, she thinks she could only do so from a seated position. Notwithstanding this opinion, she has not looked for work in the aftermath of her injury. Hino did not return her to work there because she remains under the restrictions assigned by Dr. Lovell: no lifting more than 25 pounds frequently or 50 occasionally. She is now receiving Social Security Disability benefits.

I find, after consideration of Claimant's testimony, that she is not motivated to return to the workforce. But this does not prevent me from finding that the preponderance of the evidence establishes that she has suffered wage loss disability of five percent (5%), and that her compensable back injury of June 2, 2020, is the major cause of this.

E. Attorney's Fee

One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). I find that Respondents have controverted Claimant's entitlement to the wage loss disability benefits that have been awarded herein.

Consequently, she has proven by a preponderance of the evidence that her attorney should be awarded a controverted fee thereon pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012).

CONCLUSION AND AWARD

Respondents are hereby directed to pay/furnish benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809 (Repl. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a 25 percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012).

IT IS SO ORDERED.

_____
Hon. O. Milton Fine II
Chief Administrative Law Judge