**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. G306938 & G905668**

VICTORIA HARRIS-HARDY, Employee CLAIMANT

SEBASTIAN COUNTY JUDGE, Employer RESPONDENT

AAC RISK MANAGEMENT SERVICES, Carrier RESPONDENT

**OPINION FILED FEBRUARY 18, 2025**

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

## STATEMENT OF THE CASE

On November 21, 2024, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on October 14, 2024, and a Pre-hearing Order was filed on October 15, 2024. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The relationship of employee-employer-carrier existed between the parties on August 22, 2023, and on July 31, 2019.

3. The claimant sustained a compensable injury to her right knee on or about August 22, 2013.

4. The claimant sustained a compensable injury to her back on or about July 31, 2019.

5. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of $384.00 for temporary total disability benefits and $288.00 for permanent partial disability benefits.

6. All prior opinions are res judicata.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether Claimant is entitled to additional medical treatment for her compensable back injury in the form of surgery as recommended by Dr. James Blankenship.

2. Whether Claimant is entitled to temporary total disability benefits from September 23, 2024, to a date yet to be determined.

3. Whether Claimant's attorney is entitled to an attorney's fee.

The claimant's contentions are as follows:

> "a. The Claimant contends that her authorized treating physician, Dr. James Blankenship, is recommending surgery and the respondents have refused to authorize said surgery. It has already been determined that the claimant sustained a compensable injury to her lumbar spine; therefore, the basis for the respondents denial is unknown.
>
> b. The Claimant contends that she will be entitled to temporary total disability benefits during any period of time during which she is undergoing treatment by Dr. Blankenship and the respondents are unable or unwilling to provide work within restrictions that Dr. Blankenship places on her while she is recovering from the effects of her injury.
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> c. The Claimant contends that her attorney is entitled to an attorney's fee since her back claim has already been controverted and was the subject of a prior hearing that resulted in a determination that she sustained a compensable back injury."

The respondents' contentions are as follows:

> "Surgery by Dr. Blankenship is not reasonable or necessary or related to the 7-31-19 accident. Fortunately, the claimant had prior

> MRI's in 2017 and 2019 that showed only minimal disc bulging at L4-5. The latest MRI shows a new condition unrelated to the 2019 accident or a condition that is the natural process of aging and for which surgery has been proposed."

The claimant in this matter is a 58-year-old female who sustained a compensable injury to her right knee on August 22, 2013. The claimant also sustained a compensable injury to her back on July 31, 2019. This administrative law judge issued an Opinion on May 6, 2020, regarding the compensability of the claimant's July 31, 2019, back injury and her entitlement to medical treatment. Following are the Findings of Fact and Conclusions of Law that have become the law of this case:

> 1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 4, 2019, and contained in a Pre-hearing Order filed that same date and hereby accepted as fact.
>
> 2. The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her back on July 31, 2019, in the form of an aggravation of her pre-existing back difficulties.
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> 3. The claimant has proven by a preponderance of the evidence that she is entitled to medical treatment for her compensable aggravation of her pre-existing back difficulties; specifically, the respondents are to provide the claimant an appointment with Dr. Luke Knox for a neurosurgical evaluation.

The claimant now asks the Commission to determine if she is entitled to medical treatment for her compensable back injury in the form of surgical intervention as recommended by Dr. James Blankenship. Dr. Blankenship is an authorized treating physician regarding the claimant's compensable back injury.

The claimant treated for her back injury with Dr. David Knox in July of 2020. The respondent sent a letter to Dr. Knox on June 4, 2020, regarding his treatment of the claimant. On

July 27, 2020, Dr. Knox answered that letter and responded to questions posed by the respondent as follows:

> 1. Within a reasonable degree of medical certainty, Officer Harris-Hardy's current symptoms appear to be related to the 7/13/19 work injury. Supportive rationale includes her history and continued findings of numbness over the right lateral thigh.
>
> 2. As this was related to her work injury, I have recommended that the current treatment plan on Officer Harris-Hardy's lumbar spine would include pain management. I believe there is an option that she may want to consider a spinal cord stimulator at some point. I would defer to the Pain Management Service concerning these ultimate treatment options.
>
> 3. I do not believe that her being defined as maximum medical improvement at this time would be appropriate.
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> 4. I do not believe that defining an impairment rating at this time would be appropriate as well.
>
> I will plan to follow her up in two months and reevaluate her at that time.

In August of 2020 the claimant saw Dr. David Cannon for pain management. This treatment continued through January 11, 2024, and was primarily in the form of lumbar epidural injections and transforaminal injections. In a visit note dated January 11, 2024, Dr. Cannon noted that the epidural injections benefited the claimant more than the transforaminal injections and recommended another epidural injection. Dr. Cannon also gave the claimant a surgical referral to Dr. James Blankenship at that time.

On April 15, 2024, the claimant was seen by Dr. Blankenship at the Neurosurgery Spine and Pain Management Center. Following is a portion of that visit note:

> HPI:
> Lower back pain, bilateral hip and buttock pain, right greater than left. She also has right lower extremity pain. She has decreased strength in the right lower extremity. Standing and bending

increase her pain with prolonged sitting. She also injured her knee when she was injured in 07/2019 pulling a garden cart back into boxes and fell, landing on her coccyx. She has had multiple different injections by Dr. Cannon with only transient relief. She saw Dr. Lowry Barnes for her knee and has had a total knee replacement. She is currently taking some hydrocodone and occasional ibuprofen but does not tolerate NSAIDs or gabapentin or Lyrica. Her knee injury that Dr. Barnes treated her for was an old workers' comp injury. She has seen Dr. Knox in the past in 2019. Dr. Knox recommended aquatic therapy and a sympathetic block which is pending, I guess. According to this report that we have for her workers' compensation carrier, Dr. Knox did not feel like her problem was surgical, although I do not have his note to ascertain what was actually said. She had a right transforaminal ESI in 12/2022. She got about 85% relief from the December injection that lasted 4 months.

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Impression:
Her general neurological examination reveals some soft S1 findings with paresthesias in the right S1 dermatome. She has absent ankle reflexes bilaterally. I have reviewed the patient's MRI in its entirety. She has bilateral foraminal narrowing secondary to disc space settling. At the L4-5 level she has lateral recess stenosis, also has gross annual fissuring bilaterally in the extreme lateral disc space. She also has an extreme lateral disc protrusion at the L3-4 level. This MRI was done in 07/2022.

Recommendations:
I told the patient it is really impossible for me to outline an appropriate treatment course from here with the lumbar spine with a near 2-year-old MRI, so I told her we need to get an MRI and have her come back in to see me.

There were some questions that her workers' comp case manager has forwarded to me.

1. Are objective findings directly related to the mechanism of injury? The answer to that question is that I cannot really tell what her objective findings are today because I do not have a new MRI. She does have some soft S1 radicular findings which certainly could be coming from the neural compression that is noted on her 2-year-old MRI, but I am not going to state anything with absolute certainty about what is going on now based on a 2-year-old study. I

> certainly do not have any questions that the mechanism of injury is what has led to her current need for treatment.
>
> 2. I will have to defer this until I see her back with a new MRI.

On June 5, 2024, the claimant underwent an MRI of the lumbar spine without contrast. Following is a portion of that diagnostic report:

> IMPRESSION:
> 1. Severe facet arthropathy with bilateral foraminal stenosis equal at the lumbosacrum secondary to retrolisthesis and disc space posteriorly. No neural compression is noted in the canal.
>
> 2. L4-5 severe facet arthropathy with mild left greater than right lateral recess stenosis.
>
> 3. Upper lumbar facet arthropathy with no significant neural impingement.

On June 6, 2024, the claimant is seen by Dr. Blankenship for a follow-up visit after her lumbar MRI. Following is a portion of that visit note:

> HPI:
> The patient is in today for followup. She does have a new MRI for review today. She is still doing her physical therapy at Fort Smith. She says it not afforded her any relief of the pain, but it is helping some with her strengthening. She is having low back pain that radiates to bilateral hips, bilateral buttocks, and goes down the bilateral lower extremities, right greater than left. She has decreased strength in the right leg. She rates her pain about 90% towards the worst pain imaginable.
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> Impression:
> The patient's chief complaint is lower back pain, bilateral hip and buttock pain with bilateral lower extremity pain, right greater than left. She also has decreased strength in the right lower extremity. She is back in today with a new MRI. As I indicated on her initial visit, she does have retrolisthesis at the lumbosacrum. This exacerbates slightly in extension, reduces slightly in flexion. She also has in extension some slight anterior splaying of the disc space at L4-5 but a marked reduction in flexion that at her very young age would be considered segmentally unstable. I have

> reviewed her MRI in its entirety. She does have bilateral lateral recess stenosis at L4-5 and has significant foraminal stenosis, left greater than right, at the lumbosacrum. Dr. Lowry Barnes is her new doctor. He has done a total knee replacement on her. She is doing her physical therapy in Fort Smith, but is not helping her pain, although she has had some improvement in her strength.
>
> On her original MRI, she did have gross annular fissuring at the L4-5 level. It is not as apparent on this MRI, but that certainly could have healed over the last several years. Her SI joint examination is completely negative. Her piriformis examination is markedly positive. I told her that I do think that her malalignment and instability are the etiology. Unfortunately, we are fighting 5 years of multiple delays in her treatment with different positions with her workers' comp carrier delaying things. I do think her MRI demonstrates something that potentially would benefit from surgery.
>
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> Recommendations:
> I have told her, before we start talking about an L4-5, L5-S1 arthrodesis, I would like for her to get in to see Dr. David Cannon after authorization from workers' comp for consideration of a piriformis injection. I am going to have Steve write out some suggestions of what we want to do with her current therapist in Fort Smith. I told her I want to see her back in 8 weeks after this is given a little bit more time. If she is not any better at that time, then I think a discussion of an arthrodesis is not inappropriate.

On August 8, 2024, the claimant was again seen by Dr. Blankenship. Following is a portion of that visit note:

> HPI:
> The patient is in today for followup. Unfortunately, her workers' compensation carrier did not authorize any more physical therapy. She has done physical therapy in the past, and she has continued on with her home exercises and stretches that they outlined for her. She states that her pain is not changing. She still has low back pain to bilateral hips, bilateral buttocks. The right is greater than the left. She has decreased strength in the right lower extremity. Pain goes down the bilateral lower extremities to the knee on the left and down to her foot on the right. Bending, lying, and standing aggravate her pain. She has pain with Valsalva maneuver. She denies any incontinence. She rates her pain about 80% towards the

worse pain imaginable. She had a right piriformis injection that did give her some temporary relief in her leg pain but did not help her back, which we did not expect it to.

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Diagnosis:
Postlaminectomy syndrome, not elsewhere classified.

Impression:
Ms. Harris-Hardy was last seen in the office in early June. At that time, we got her in to see Dr. Cannon for consideration of piriformis injection. I also recommended her to do more physical therapy, but her workers' comp carrier would not authorize it. She did get her piriformis injection. She did have some transient relief. She failed another round of conservative treatment. Her piriformis injection did afford her some relief but only with her leg pain, and her back pain is more significant. The patient has loss of normal lumbar lordosis with marked disc space settling and severe foraminal stenosis at the lumbosacrum. She also has marked posterior splaying of the disc space in flexion with slight retrolisthesis in neutral position and exacerbation in extension, indicative of a gross segmental instability. We had previously discussed the possibility of a lumbar arthrodesis and decompression. She does have significant foraminal stenosis at L4-5, left greater than right. At the lumbosacrum, she does have foraminal stenosis and midline disc protrusion with annular fissuring. The L3-4 level does show some moderate facet changes but no significant stenosis.

Recommendations:
I told her, having failed conservative measures, albeit limited with her workers' compensation carrier, that it is time for us to discuss what type of surgical intervention will be needed. I have offered her an anterior lumbar interbody arthrodesis at the lumbosacrum. She would then undergo an L4-5 LLIF as a second stage same-day procedure. She would then undergo an LLIF at L4-5 for stabilization of her unstable disc at this level. She would also undergo a left-sided decompression with extreme lateral decompression at the L4-5 level. The medical rationale for this is she does have gross segmental instability at the L4-5 level. She also has severe foraminal stenosis at the lumbosacrum and disc space collapse. We need to elevate her neural foramen, and the only way to do this is with interbody implant at the lumbosacrum and stabilize her at L4-5 with an LLIF. Posterior pedicular fixation will supplement her anterior arthrodesis. After a lengthy

> discussion, the patient does want to proceed with surgical intervention.

On August 14, 2024, the claimant was seen by Dr. Lowry Barnes regarding her compensable knee injury. Following is a portion of that progress note:

> History of Present Illness: Victoria E. Hardy is a 57 y.o. female patient Who returns for evaluation of right knee pain and discussion of triple phase bone scan results of the right knee. Originally I saw her as an independent medical evaluation. She continues to have daily right knee pain. Pain is worse with weight-bearing. What weight-bearing she has sharp stabbing proximal medial tibia pain.
>
> Recently she saw Dr. Blankenship for low back pain. He discussed surgical intervention of the lumbar spine which she is considering.
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> Assessment & Problems addressed:
> Painful right total knee replacement due to instability and loosening of tibial component
> Smoker
> Chronic narcotic use
>
> ***
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> Plan:
> Discussed with the patient that triple phase bone scan results did show an increased update around the components of the right knee. Concerned for tibial component loosening. I am willing to proceed with revision right total knee arthroplasty with the understanding by the patient that there is a chance we may make her better with revision surgery but there is no guarantee and we may make her worse. Patient would like to proceed with revision right total knee arthroplasty. She will need to stop smoking 6 weeks then we will nicotine test her and if her nicotine is negative then we will schedule surgery. We also discussed with the patient that smoking sensation prior to back surgery very important to decrease risk post op complications especially with wound healing. We did not know if Dr. Blankenship discussed this with the patient or not. We also discussed tapering off narcotics so she will be off pain medication 6 weeks prior to surgery.
>
> My team discussed results with the case manager out in the waiting room. The case manager stated that they could nicotine test her in

> Fort Smith to save her a trip down to Little Rock. We agree. Work note was given to the patient not to lift more than 10 lb. and to be able to stand or sit as needed.

On September 23, 2024, Dr. Blankenship issued two notes regarding the claimant. One note, found at Respondents' Exhibit 1, page 9, states:

> We are currently working on getting her surgery authorized. We are going to do postoperative the patient. She and I discussed somewhat on her visit about the work she was having to do. Although it may, and it is questionable if it does, technically fall under the restrictions, she is currently having to work in a hot warehouse, and it is exacerbating her pain. Since we have already decided to head toward surgery, having her come into surgery with worsening pain is not good. I have recommended that she stay off work until we get her recovered after surgery.

The other note is found at Claimant's Exhibit 1, page 90, and states:

> Please be advised that the above patient has been a regular patient of this office and has been treated at our office.
>
> Please excuse this patient from her obligation to appear at work until after patient has recovered from surgery.

Both notes are signed by Dr. Blankenship.

On October 31, 2024, Dr. Blankenship once again sees the claimant. Following is a portion of that visit note:

> HPI:
> The patient is in today for followup. The patient continues to have low back pain that radiates to bilateral hips, bilateral buttocks, goes down the posterior bilateral lower extremities, left to the knee, the right goes all the way down into her foot. She has decreased strength in her right leg. We offered surgical intervention. She elected to proceed, but unfortunately her workers' compensation carrier has not approved this yet. She rates her pain about 90% towards the worst pain imaginable. She is also having worsening knee pain. She sees Dr. Barnes, who has recommended a right total knee revision, but Dr. Barnes thinks that she should have her back surgery done first. Workers' comp has not approved her back

> surgery but has approved her knee surgery, stating that her lumbar problems are age related.
>
> ***
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> Impression:
> Ms. Hardy has already seen me, and we discussed surgical intervention with an arthrodesis at M4-5 and L5-S1 with unilateral pedicular fixation on the left. The patient also has knee problems, and Dr. Barnes has talked to her about possibly doing a revision, which actually has been approved by her workers' comp folks, but Dr. Barnes, the patient, and myself feel like she could have her lower back down and rehabbed prior to doing a right total hip revision. Her workers' compensation carrier states that her back problems are "age related."
>
> The patient states that she has had some back problems over the years but nothing of this significance, and this exacerbation happened immediately after her injury. I have reviewed her studies again. As indicated previously, the patient has a midline disc protrusion with annular fissuring at the lumbosacrum. Her plain radiographs demonstrate the patient has retrolisthesis at the L4-5 and L5-S1 levels. These slightly exacerbate the extension and completely reduce in flexion, indicative of gross segmental instability. The patient most certainly does have degenerative changes in her back. I would be surprised if someone of her age did not have degenerative changes. Historically, the pain that she is currently having originated with her work injury.
>
> Recommendations:
> In summary, I agree completely with Dr. Barnes and the patient that fixing her back first and then considering her total knee revision is the better approach to take. I told her that my offering of surgical intervention in her lower back is unchanged. I told her I still feel like, based on a reasonable degree of medical certainty, that her need for treatment both conservatively up and until now and surgically now failing conservative treatment is still directly related to her work-related injury.

Employers must promptly provide medical services which are reasonably necessary in connection with the compensable injuries, Ark. Code Ann. §11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31

(2004). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996).

The claimant's medical record and testimony lay out a compelling case for a compensable back injury that has failed conservative treatment and is left with only surgical intervention to improve the claimant's condition. While lengthy at times, Dr. Blankenship lays out in detail the reasoning and anatomical cause for the surgical intervention he has recommended. Dr. Blankenship also believes, "based on a reasonable a degree of medical certainty, that her need for treatment both conservatively and up until now [October 31, 2024] and surgically now failing conservative treatment is still directly related to her work-related injury." The claimant is able to prove by a preponderance of the evidence that she is entitled to the surgical recommendations of Dr. Blankenship as they are reasonable and necessary treatment for her compensable back injury.

The claimant has asked the Commission to determine whether she is entitled to temporary total disability benefits from September 23, 2024, to a date yet to be determined.

In order to be entitled to temporary total disability benefits, the claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages as a result of his compensable injury. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

The claimant's failure of conservative treatment and her current need for surgical intervention due to her compensable back injury place the claimant in a continued state of a healing period. As to the claimant's total incapacity to earn wages, Dr. Blankenship in two separate notes, written on September 23, 2024, removes the claimant from work. One note,

found at Respondents' Exhibit 1, page 9, discusses the claimant's current working restrictions and circumstances which include the technicalities of her restrictions and working in a hot warehouse. Dr. Blankenship felt this combination caused a worsening of pain which in his words "is not good" coming into surgery. The other note, found at Claimant's Exhibit 1, page 90, in a straight-forward manner, removes the claimant from work beginning September 23, 2024. Dr. Blankenship has seen, treated, and evaluated the claimant on multiple occasions. Given his extensive knowledge of the claimant and her condition I agree with Dr. Blankenship's assessment that the claimant should be removed from work beginning September 23, 2024, until a date when she has recovered from surgery. The claimant is able to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 23, 2024, to a date yet to be determined.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

## FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 14, 2024, and contained in a Pre-hearing Order filed October 15, 2024, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable back injury in the form of surgical intervention as recommended by Dr. James Blankenship.

3. The claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 23, 2024, to a date yet to be determined.

4. The claimant has proven by a preponderance of the evidence that her attorney is entitled to an attorney's fee in this matter commiserate with the Arkansas Workers' Compensation Act and the benefits awarded herein.

## ORDER

The respondents shall pay the cost associated with the surgical intervention recommended by Dr. Blankenship and its aftercare.

The respondents shall pay the claimant temporary total disability benefits beginning September 23, 2024, to a date yet to be determined.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits pursuant to Ark. Code Ann. §11-9-715.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

**IT IS SO ORDERED.**

**HONORABLE ERIC PAUL WELLS**
**ADMINISTRATIVE LAW JUDGE**