UTAH LABOR COMMISSION

VICKIE CHATTERLEY, **Petitioner,** **vs.** **VARSITY CONTRACTORS INC. and TRANSPORTATION INSURANCE CO.,** **Respondents.**	**ORDER DENYING REQUEST FOR RECONSIDERATION** **Case No. 05-0453**

Varsity Contractors Inc. and its insurance carrier, Transportation Insurance Co., (referred to jointly as "Varsity" hereafter) ask the Utah Labor Commission to reconsider its prior decision concluding that Vickie Chatterley is entitled to a preliminary finding of permanent total disability under § 34A-2-413 of the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this matter pursuant to Utah Code Annotated § 63G-4-302.

BACKGROUND AND ISSUES PRESENTED

Ms. Chatterley claims permanent total disability compensation from Varsity for a work-related right-wrist injury that occurred on June 8, 2004. Ms. Chatterley also suffers from a pre-existing back problem. Judge Marlowe denied Ms. Chatterley's claim on the grounds that her pre-existing back injury, rather than her work-related wrist injury, is the "direct cause" of her disability. Following an appeal by Ms. Chatterley, the Commission reversed Judge Marlowe's determination and, instead, concluded that the wrist injury was the direct cause of Ms. Chatterley's disability. On that basis, the Commission found Ms. Chatterley entitled to a preliminary finding of permanent total disability compensation, and to an award of subsistence benefits beginning on March 11, 2005.

Varsity now asks the Commission to reconsider its decision. First, Varsity contends that, in light of the Commission's finding that Ms. Chatterley's wrist injury is the direct cause of her disability, the Commission must evaluate whether Ms. Chatterly has met the other tests for permanent total disability found in § 34A-2-413. Alternatively, Varsity contends that, if Ms. Chatterley has established a preliminary claim of permanent total disability, the Commission should determine the extent of Ms. Chatterley's physical limitations—particularly with respect to her back--so that Varsity can develop a suitable reemployment plan for Ms. Chatterley. Finally, Varsity asks the Commission to clarify that Varsity is entitled to offset the amount of permanent partial disability compensation it has already paid to Ms. Chatterley against its obligation to provide subsistence payments.

DISCUSSION

§ 34A-2-413(1)'s tests for a preliminary finding of permanent total disability. The various requirements for a preliminary finding of permanent total disability are found in subsections (1)(b) and (1)(c) of § 34A-2-413. Other than the "direct cause" requirement which was the focus of the Commission's previous decision, Varsity has not explicitly stated which other requirements it believes Ms. Chatterley has not met. It is apparent to the Commission that the undisputed facts of Ms. Chatterley's claim satisfy each of the statutory requirements set forth in subsections (1)(b) and (1)(c), with the possible exception of subsection (1)(c)(iv)'s requirement that she "cannot perform other work reasonably available" taking into consideration her age, education, past work experience, medical capacity and residual functional capacity. This requirement warrants further discussion.

As the Commission noted in its previous decision, Ms. Chatterley worked as a coal miner, home health aide, head cook and cashier before working at Varsity as a janitor, where her duties included mopping, vacuuming, emptying garbage, and shoveling snow. As also in Judge Marlowe's decision:

> [Ms. Chatterley] cannot lift more than 10 pounds with her right upper extremity and cannot engage in any repetitive wrist motion, including fine movement, manipulation and dexterity, and also pulling, pushing, grasping or twisting. [Ms. Chatterley] also suffers from degenerative conditions in her low back that resulted in permanent work restrictions of no lifting more than 15 pounds, no repetitive bending, and the need to alternate sitting, standing and walking. The functional capacity evaluation limited [Ms. Chatterley] to sedentary work based upon her 10 pound lifting limit with her right upper extremity.

The Commission adopts the foregoing findings. The Commission also notes that Ms. Chatterley is now 60 years old and has no experience, education or technical training to qualify for the types of sedentary work that are within the foregoing medical and functional limitations. The Commission therefore finds that Ms. Chatterley cannot perform other work reasonably available, as required by subsection (1)(c)(iv), as well as the other requirements of subsections (1)(b) and (c). The Commission therefore reaffirms its previous determination that Ms. Chatterley is entitled to a preliminary finding of permanent total disability.

Ms. Chatterley's physical limitations. Varsity contends that the Commission should engage in additional fact-finding regarding Ms. Chatterley's current functional limitations so that Varsity can develop a suitable reemployment plan. The Commission believes that Ms. Chatterley's medical and functional limitations set forth in the preceding part of this decision are sufficient and that no additional fact-finding is necessary.

Offset of permanent partial disability compensation against subsistence benefits. Finally, Varsity contends it is entitled to offset its previous payments of permanent partial disability compensation against its liability for subsistence benefits for the same periods of time. Ms. Chatterley concedes this point, and the Commission's previous decision specifically authorized Varsity to offset any "overpayments" of disability compensation. To the extent that clarification is necessary, the Commission's previous order should be understood to excuse Varsity from paying subsistence benefits for any period for which it has already paid temporary partial disability compensation.

ORDER

The Commission denies Varsity's request for reconsideration and reaffirms its previous decision in this matter. It is so ordered.

Dated this 31st day of December, 2008.

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Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may appeal this Order to the Utah Court of Appeals by filing a Petition For Review with that Court within 30 days of the date of this Order.