

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311733

GARY MILLER	CLAIMANT
NABHOLZ CONSTRUCTION	RESPONDENT
ACIG INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT
RISK MANAGEMENT RESOURCE, TPA	RESPONDENT

OPINION FILED OCTOBER 21, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by DON ELLIOTT, JR., Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on August 9, 2004, in Springdale, Arkansas. A pre-hearing order had been entered in this case on February 2, 2004. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On all relevant dates, including October 15, 2003, and October 23, 2003, the relationship of employee-employer-third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$440.00 for total disability and \$330.00 for permanent partial disability.
3. The claims are controverted in their entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained compensable injuries to his low back as the result of a “specific incident” on either or both October 15, 2003 and October 23, 2003.
2. The claimant’s entitlement to the payment of medical expenses, temporary total disability benefits from November 8, 2003 until a date yet to be determined, and attorney’s fees.

In regard to these issues, the claimant contends:

- “(a) Claimant contends that he sustained an injury while in the scope and course of his employment to his lower back on 10/15/03. On that date, he was working for respondent employer in Ozark, Missouri when some scaffolding that he was standing on separated causing him to twist his back.
- (b) On 10/23/03 he was working in Pittsburg, Kansas lifting some steel when he felt a sharp pain in his back.
- (c) The claim was originally admitted as compensable and temporary total disability benefits were paid through November 8, 2003.
- (d) The claimant’s authorized treating physician, Dr. Robert Foster, had ordered an MRI of his back and when the MRI was ordered the benefits were then controverted.
- (e) The claimant remains temporarily totally disabled off work under the care of Dr. Robert Foster until such time as he has the MRI.
- (f) The claimant is entitled to a controverted attorney’s fee.

In regard to these issues, the respondents contend:

“The respondents contend the claimant did not sustain an injury arising out of and in the course of his employment. The respondents contend, among other things, that the claimant does not have any measurable and objective findings to support the definition of compensable injury as defined by the Arkansas Workers’ Compensation Act.”

### DISCUSSION

\_\_\_\_\_The initial issue to be addressed concerns the question of whether the claimant sustained “compensable injuries” to his lower back or lumbar spine as the result of “specific incidents” on either or both October 15, 2003, or October 23, 2003. The burden rests upon the claimant to prove the occurrence of these alleged “compensable injuries.”

First, the claimant must “establish” by medical evidence, the actual existence of a physical

injury to his lower back or lumbar spine. Further, he must present evidence of “objective findings” to support the actual existence of this physical injury. Ark. Code Ann. § 11-9-102(4)(D).

The present case, the medical record sufficiently “establishes” the actual existence of a physical injury to the claimant’s low back or lumbar spine. The initial medical records indicate the presence of a physical injury either in the form of an acute (recent) myofascial strain in the lumbar area or a discal injury in this area. The subsequent medical reports and records tend to show that the claimant’s injury is likely discal in nature and involves the L4-5 intervertebral disc. The initial medical records further show the independent observation of “objective findings,” in the form of muscle spasms involving the musculature of the claimant’s lumbar spine. Such an “objective” finding would support either the diagnosis of the acute myofascial strain or the diagnosis of a discal injury at L4-5. Further objective evidence of the diagnosed discal injury is lacking, due to the claimant’s financial inability to procure the recommended MRI study.

In summary, it is my opinion that the claimant has “established” by the greater weight of the medical evidence the actual existence of a physical injury to his lower back or lumbar spine. The medical evidence further shows that the existence of this physical injury is supported by the independent observation of findings beyond the claimant’s voluntary control (i.e. objective findings). Thus, the claimant has satisfied the initial statutory requirements for a “compensable injury,” contained in Ark. Code Ann. § 11-9-102(4)(D).

Next, the claimant must prove that this medically established and objectively documented physical injury to his lower back or lumbar spine satisfies all of the definitional requirements of Ark. Code Ann. § 11-9-102(4)(A)(i). These definitional requirements are:

- (1) That the physical injury must arise out of and occur in the course of his employment;
- (2) That the physical injury must be caused by a “specific incident”;
- (3) That the physical injury must be identifiable by time and place of occurrence;
- (4) That the physical injury must cause internal or external physical harm to the claimant’s body;

(5) That the physical injury must require medical services or result in disability.

In order to prove the first three of these definitional requirements, the claimant must prove the existence of a causal relationship between a specific employment related incident or incidents and the medically established and objectively supported physical injuries to his lower back or lumbar spine. However, it is not necessary that he prove the existence of this causal relationship by expert medical evidence. It is also not necessary that the existence of this causal relationship be established to an absolute certainty. Finally, the claimant need not prove that the employment related specific incident was the sole or even major cause of his lumbar spine or lower back difficulties. Employment related aggravations of pre-existing conditions may still represent “compensable injuries,” Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W. 2<sup>nd</sup> 472(1997). The claimant need only show that his physical injury is logically attributable to the specific employment related incident, that it followed within a reasonable period of time after the incident, and that there is no other logical explanation for the occurrence of the injury, Hall v. Pittman Construction Company, 235 Ark. 104, 357 S.W. 2<sup>nd</sup> 263 (1962).

The claimant conceded that he had previously experienced difficulties with his back, following a workers’ compensation injury in Texas that occurred in the mid eighties. However, he testified that these complaints had long since resolved and that he had experienced no difficulties with his back for at least 10 years prior to October 15, 2003.

The claimant stated that, on October 15, 2003, he was performing his assigned employment duties for the respondent. These duties required him to work standing on a scaffold. He stated while he was the assigned task, the boards on the scaffold slipped, causing him to fall back and strike the lower part of his back on the scaffolding. According to his testimony, this incident did not cause him any significant discomfort and he “didn’t think much about it.” He testified that his difficulties only involved his back and did not include any symptoms in his lower extremities. He did not report this injury, at that time, and continued working until the particular job was finished (the Ozark, Missouri job).

He testified that while at home on Saturday, October 18, 2003, he changed the battery in his girlfriend's car. However, he denies that this activity caused any injury to his back or increased his symptoms.

He was apparently scheduled to work in the respondent's "shop" on Monday, October 20, 2003. He testified that on the morning of October, he called Larry Nixon (his overall supervisor), and informed him that he would not be in for work because his back was still hurting from the injury on the Ozark, Missouri job. He stated that Mr. Nixon asked him what he had done over the weekend and he informed Mr. Nixon about putting the battery in his girlfriend's car.

At approximately 4:00 a.m. on Tuesday, October 21, 2003, the claimant left with his immediate supervisor (Benjamin Deboard), for a job in Pittsburg, Kansas. The claimant appears to have had no difficulties performing his regularly assigned employment duties on this job, until Thursday, October 23, 2003. The claimant testified that, on that date, he and another employee (Andrew Cummings) were carrying a steel beam. He described this beam as being 20 to 30 foot long, 12 inches high and weighed approximately 250 pounds. While they were carrying this beam this, Mr. Cummings lost his footing and dropped his end of the beam. The claimant testified that he was "jerked" forward, when the load shifted. He stated that he immediately experienced an increase in his back difficulties and felt like it "kind of pinched his hip." Shortly thereafter, the claimant stated that he was pushing this beam up onto a scissor lift. He testified that at that point, his back felt like it "popped" and he experienced a significant increase in back pain that now went down his left hip into his left leg. He finished his regular work day, but stated that he did not do anything particularly heavy. By the next day, he stated that he was experiencing significant muscle spasms and pain in his back, such that he could hardly get out of bed. He stated that he advised Mr. Deboard of these problems and did not work at all on Friday, October 24, 2003. He testified that he did go back to work on Saturday, October 25, 2003, but again that he did not do anything heavy. Later that day, he left Pittsburg, Kansas, and he returned home to northwest Arkansas.

The claimant testified that he continued to experience spasms and significant difficulties with

his lower back and leg on the following day, a Saturday. On Sunday, October 26, 2003, he sought treatment for these difficulties at the emergency room of St. Mary's Hospital in Rogers, Arkansas.

The claimant testified that after his visit to the emergency room, he returned home and telephoned Mr. Deboard. He advised Mr. Deboard that he had gone to the emergency room and was informed by Mr. Deboard that he would fill out the appropriate paperwork the next day. He testified that the next day, Monday, October 27, 2003, he called into the main office and informed Mr. Nixon of his injury (on October 23), and his visit to the emergency room. He further stated that Mr. Nixon informed him that he would be sent the necessary form to fill out. The claimant testified that on October 27, 2003, his girlfriend brought him the appropriate form (an AR-N), which he immediately completed. He stated that his girlfriend returned the form to the respondent. This form has been introduced as Claimant's Exhibit No. 1.

Travis Strickland and Sean Sites, testified that they worked with the claimant on the Ozark, Missouri job. Both witnesses testified that they did not observe the claimant experience an employment related injury to his back during this time. However, both witnesses also testified that the claimant complained to them of hurting his back during this job. Mr. Strickland testified that he recalled the claimant saying that it had something to do with the scaffolding. Both witnesses also testified that after these conversations, the claimant continued to perform his regular employment activities on the Ozark, Missouri job, until that job was completed. Both witnesses further testified that they worked around the claimant on the Pittsburg, Kansas, job and recall the claimant complaining of back difficulties during this work there. Mr. Strickland also testified that the claimant's complaints increased during this job, that he started wearing a belt and "hobbled around."

Andrew Cummings, testified that he worked with the claimant on the Pittsburg, Kansas job. He testified that while they were working on this job, he and the claimant were carrying a steel beam that was 20 to 30 feet long and 12 inches wide that weighed approximately 250 pounds. He stated that while carrying this beam, he stepped on an uneven spot on the ground and dropped his end of the beam. It was his testimony that the claimant appeared to have hurt his back when this

occurred.

Ray Garrison testified that he also worked with the claimant on the Pittsburg, Kansas job. He stated that on a Thursday, he and the claimant were attempting to lift a steel beam with a scissor lift. After the claimant pushed the beam up onto the lift, the claimant told him that he had hurt his back. He testified that the claimant was holding his back, sweating, and otherwise appeared in pain. He stated that he advised the claimant to tell his supervisor, Ben Deboard.

Both Mr. Cummings and Mr. Garrison testified that for the remainder of the day of the described incidents, they only observed the claimant performing relatively light employment tasks. Mr. Cummings testified that he seemed to recall that Mr. Deboard told the claimant to “go sit down a bit.” Mr. Cummings testified that he shared a motel room with the claimant on this particular job and that the claimant couldn’t get up from bed the following morning and did not work that day. Mr. Garrison also indicated that the claimant did not work the day following the described incident. Mr. Garrison further testified that the claimant returned to work the next day but only performed relatively light tasks. Mr. Garrison stated that on that date, he specifically asked the claimant if he had seen the doctor, but that the claimant advised him that he was waiting to see a doctor when he got home. Finally, Mr. Garrison testified that the claimant had also previously told him of the prior injury in Ozark, Missouri and the prior injury while carrying the steel beam earlier on October 23, 2003.

Kim Newton testified that she was the claimant’s girlfriend and had lived with him for approximately 3 years. She is also employed by the respondent in the respondent’s main office. She stated that the first time the claimant complained of any difficulties with his lower back was after his return from the Ozark, Missouri, job. However, these complaints appear to be relatively minor and involved only the claimant’s low back. She describes these complaints as a muscle strain. She stated that the claimant only took off on Monday, October 20, 2003, as a precautionary measure to rest his back, because he knew that his crew would only be working around the shop on that day, and would be returning to more strenuous employment activities when the Pittsburg, Kansas job

started on the next day, (Tuesday October 21, 2003). She testified that after the claimant returned from the Pittsburg, Kansas job, his complaints were far more severe and now involved his lower extremities. She stated that she obtained the AR-N the first of the week following his return from a Sandy Morrison (apparently in the HR benefit department of the respondent) and took it home to the claimant to complete. She stated that she obtained this form, because someone at the emergency room of St. Mary's had told her that "something" from the claimant's employer was necessary for his treatment to be processed under workers' compensation.

Benjamin Deboard testified that he was the claimant's lead man or foreman on the Pittsburg, Kansas job. He testified that the claimant did come to him during the Pittsburg, Kansas job and tell him that he hurt his back when some steel was dropped. He also testified that at the same time the claimant informed him of the prior injury to his back on the Ozark, Missouri job. He testified that he asked the claimant several times if he was hurt bad enough to file an accident report or if he wanted to see a doctor and each time the claimant said "no." It was his testimony that the claimant was always walking around holding his back moaning and groaning, since the first day he worked for the respondent and that he was no different after either of these two incidents. However, he conceded that on Friday, October 24, 2003, the claimant did inform him that he had not slept the night before, because his back was hurting too bad and that he could not work that day. He further testified that he had personally informed Bill Thorne, the respondent's safety representative, about the claimant reporting the accident and injury to his back while Mr. Thorne was at the Pittsburg, Kansas job site. Finally, he testified that he "wrote up" the appropriate "papers" concerning the claimant's reported injury on the Monday following the Thursday on which the claimant reported the injury. This would have been Monday, October 27, 2003.

Joe Yeager testified that he was a job superintendent for the respondent. He stated that the claimant was under the direct supervision of Ben Deboard and that Ben Deboard reported to him. It was his testimony that when an employee sustains any type of employment related injury, he is to report it to his foreman and they are to report it to their supervisor. Finally, it was his testimony

that the first knowledge he had of any employment related injuries to the claimant's back was when he noticed the claimant had not shown up for work and asked Ben Deboard about the claimant's absence. At that time, he was advised by Mr. Deboard of the claimant's reported employment accidents and back injuries. He testified that this conversation took place a week and a half after October 23, 2003 (approximately the first part of November of 2003).

The respondent's final witness was Mr. Larry Nixon. Mr. Nixon testified that he was also supervisor over the claimant and was the individual who had actually hired the claimant. In his testimony, he stated that on that day, the claimant called him and advised him that he could not work that day because he was "down in his back." He stated that the claimant advised him that the reason for his back difficulties was that he changed a battery in his girlfriend's car. Mr. Nixon testified that the claimant never informed him of any employment injury to his low back in Ozark, Missouri. He further stated that Ms. Newton, also told him that the claimant's back difficulties (on that Monday), were the result of the claimant changing a battery in her car.

Finally, Mr. Nixon testified concerning the events that occurred on Monday, October 27, 2003. He stated that on that day, Ms. Newton again advised him that the claimant was having back difficulty, and would not be in for work, but did not give any cause for these difficulties. He initially testified that later that same day, the claimant called him and also informed him that he had hurt his back and had seen a doctor, but the claimant did not state how or where he had hurt his back. Mr. Nixon later changed this testimony and stated that this conversation occurred on Tuesday, October 28, 2003. Finally, he testified that the first notice he received that the claimant was contending his back difficulties were due to an employment related injury was when he saw the form AR-N on Wednesday, October 29, 2003. At that time, he stated that he called all of the claimant's other supervisors, including Mr. Deboard and presumably Mr. Yeager, and asked them to write out reports concerning any employment related injuries to the claimant's back.

In the AR-N, which was purportedly completed by the claimant on October 27, 2003, the claimant describes the incident that occurred during the Ozark, Missouri job and the incident that

occurred while he was carrying the steel beam. However, there is no mention in this form of the incident with the scissor lift.

The various medical reports and records introduced also contain histories of the onset of the claimant's back difficulties. The initial patient assessment sheet contains the following histories:

“Slipped sideways on a scaffold two weeks ago-then injured self again-complains of low back pain radiating down left leg.”

“Patient's second injury happened when he was left holding heavy items all of a sudden. Numbness and burning shooting down left leg, pain in low back with movement.”

In the emergency room physician's record of October 26, 2003, the following history is recorded as being taken from the claimant:

“(Difficulties started) with stumbling at work two weeks ago-also lifting injury recently.”

When the claimant was subsequently seen by Dr. R. Doug Foster, on November 5, 2003, a date of injury is recorded as October 5, 2003. The history of the onset of the claimant's complaints are recorded as follows:

“Gary Miller is a 52 year old male who presents today with pain his left buttock and thigh that occurred three weeks ago when he was twisting and lifting something heavy in Ozark, Missouri. He injured his back. Since then he has had persistent pain in his back and in the left side which radiates into his groin and testicle.”

The final history is found in the physical therapy initial evaluation of November 13, 2003.

This report states:

“Patient reports that he suffered three recent injuries to his lumbar spine. All three occurred with job activities. Patient notes that the first injury occurred while he was working on 10-5-2003, at which time he was standing on some boards working overhead, when the board shifted causing him to twist backwards. Patient notes that he continued to work and pain level subsided after approximately one week but with lasting soreness in the back. Patient reports next injuries occurred around 10-23-03, while he was working in Pittsburg, Kansas. Patient reports that both times he was working with steel beams. He injured his back one time when a partner that was carrying steel with him dropped steel and he twisted his back again. Patient notes that the last injury occurred when he was carrying steel on shoulders. A partner again dropped steel which caused steel to impact his shoulder and compress his spine.

Patient notes that since the last two episodes he has had significant low back pain along with left lower extremity pain and numbness. Patient is also noting pain radiating into groin and testicle region from the left hip.”

Clearly, this is not an easy case to resolve (if it were, it probably would not have proceeded to a hearing). There are some discrepancies between the various employment related accidents or specific incidents described by the claimant in his testimony and the histories recorded in the medical evidence. There is also the conflict between the claimant’s testimony and that of Mr. Nixon concerning the effect or impact on his back difficulties and his changing of the battery in Ms. Newton’s car on Saturday, October 18, 2003. There is also the testimony of Mr. Deboard that the claimant “was always walking around holding his back, moaning and groaning, since the first day he worked for th respondent” and appeared no different after the various alleged incidents.

It is apparent that the claimant’s own testimony is the only direct evidence presented to prove the occurrence of the alleged specific incident on October 15, 2003. Although the testimony of a party is never considered uncontradicted, it cannot be arbitrarily disregarded. In the present case, the claimant’s testimony concerning this incident is supported by the testimony of Mr. Strickland and Mr. Sites that the claimant began complaining of difficulties with his lower back at the end of the Ozark, Missouri job, and the testimony of Mr. Strickland that he recalled the claimant at that time, attributing this back difficulties to an accident involving the scaffolding. The claimant’s various medical histories also record this particular incident. The fact that subsequent medical records indicate that it occurred on October 5 (rather than October 15), this would appear to most likely be a simple clerical error. This specific incident is also described in the claimant’s AR-N. Finally, the testimony of Mr. Deboard indicates that this incident was also related to him by the claimant, when the claimant reported his subsequent accident and injury on October 23, 2003. The claimant’s testimony that he initially began experiencing some difficulties, which were limited to his lower back immediately following this specific incident, is also corroborated by the testimony of Mr. Strickland and Mr. Sites. It is further corroborated by the testimony of Ms. Newton that the claimant

first began complaining of difficulties with his lower back, (but only his lower back) after his return from the Ozark, Missouri job.

I would note that although Ms. Newton had lived with the claimant for several years, she is also presently an employee of the respondent and appeared to be a credible witness. Neither Mr. Strickland nor Mr. Sites have any particular relationship with the claimant and also appear to be credible witnesses.

The claimant's testimony is not the only evidence presented to establish the actual occurrence of the two specific employment related incidents on October 23, 2003. Neither, is his testimony the only evidence presented to show the contemporaneous increase in his back difficulties following these two events. Mr. Cummings was personally involved in the first of these events and was the one that actually dropped the other end of the steel beam that he and the claimant was carrying. It was also his testimony that the claimant visibly appeared to demonstrate the immediate onset of difficulties with his back, which he had not exhibited prior to this incident. Mr. Garrison's testimony indicates that he was present at the time of the second incident that involved the claimant's lifting of the beam onto the scissor lift. His testimony further indicates that he visibly observed the claimant exhibit symptoms of pain involving his lower back which he had not exhibited prior to this incident. Neither of these witnesses appear to have any relationship with the claimant. I find the testimony of both of these witnesses to be credible, particularly that of Mr. Garrison. The testimony of Mr. Deboard further shows that the claimant immediately reported an employment related incident and injury to his back on October 23, 2003. In this regard, I find Mr. Deboard to be an exceptionally credible witness. His admission of this fact, when coupled with the fact that he failed to fill out the accident report required by company policy, regardless of the severity of the injury, would almost constitute an admission against interest. His failure to follow such required company policy procedure could, if he were still employed by the respondent, represent a basis for his discharge, and could cause the respondent to be disinclined to rehire him in the future.

All of the histories recorded in the medical evidence, also indicate an increase in the magnitude of the claimant's back symptoms and the initial onset of his radicular symptoms following an employment related incident on October 23, 2003. While these medical histories may not exactly chronicle the two events described by the claimant, Mr. Cummings, and Mr. Garrison, these histories clearly record at least one of the described incidents, it is obvious that these histories, particularly the initial emergency room histories, are clearly somewhat limited and the failure to note the two specific described incidents may merely be due to the haste of the recorder.

In regard to other possible causes of the claimant's lower back or lumbar difficulties the record shows that the claimant had previously experienced difficulties with his back many years prior to October of 2003. However, there is no evidence that he had sought any medical treatment for back difficulties for over ten years prior to October of 2003. The record further shows that the claimant was able to physically perform unquestionably heavy and strenuous manual labor for many years prior to October of 2003. I place no credibility on the testimony of Mr. Deboard that the claimant had always been holding his back and moaning and groaning since his initial employment with the respondent. Clearly, it is highly unlikely that he would have been hired or retained in this position, which obviously demanded heavy lifting, if this had been the case. There is also no mention by any of the other witnesses, including the respondent's witness of the observation of such actions on behalf of the claimant. The medical evidence shows the presence of objective findings, in the form of muscle spasms to support the physician's conclusion that this is an "acute" or recent injury. Thus, I find that the claimant's prior back difficulties in 1988 would not represent a reasonable cause of his current difficulties.

There remains the matter of the claimant's installation of a battery in his girlfriend's car, on Saturday, October 18, 2003. Although Mr. Nixon testified that the claimant and his girlfriend (Ms. Newton) attributed the claimant's back difficulties on Monday (October 20, 2003), to such activities, this testimony is specifically refuted by the claimant and Ms. Newton. Ms. Newton testified that the claimant exhibited no problems changing the battery and that she had lifted the

new battery onto the car and all the claimant had to do was to attach it to the cables. It must also be noted that the testimony of Mr. Strickland and Mr. Sites clearly shows that the claimant was experiencing difficulties with his lower back or lumbar spine prior to October 18, 2003. After consideration of all the evidence, I find that the claimant's changing of the battery in Ms. Newton's car would not represent a logical and reasonable cause of his subsequently medically established and objectively documented physical injury to his low back or lumbar spine.

In summary, I find that the claimant has proven by the greater weight of the credible evidence the existence of a causal relationship between his medically established and objectively documented physical injuries to his lower back or lumbar spine and specific employment related incidents that occurred on October 15, 2003, and October 23, 2003. As the claimant has proven the existence of this causal relationship, he has satisfied the first three definitional requirements for a "compensable injury," as set out in Ark. Code Ann. §11-9-102(4)(A)(i), i.e. that these physical injuries arose out of and occurred in the course of his employment, were caused by a specific incident, and are identifiable by time and place of occurrence.

The claimant must still prove the final two requirements of this subdivision. These are that the injury caused internal or external physical harm to his body and required medical services and resulted in disability.

The medical evidence clearly shows that the claimant's injury caused internal physical harm to his body. The presence of muscle spasms noted in the musculature of the claimant's lower back is unquestionably indicative of internal physical harm to this part of his body. Thus, he has proven the fourth definitional requirement of this subsection. The claimant's testimony concerning the nature and magnitude of his difficulties and the medical evidence further demonstrates that he has required and continues to require medical services. Some of these service were obviously necessary and medically appropriate to actually treat the physical injury, itself. Other medical services are shown to be necessary and medically appropriate to properly evaluate the nature and extent of his injury. Finally, the claimant's testimony and the medical evidence proves that the

claimant's injury has produced some period of temporary total disability, thus, the claimant has satisfied the fifth and final definitional requirement of the afore cited subsection.

In summary, I find that the claimant has proven by the greater weight of the credible evidence that he experienced a "compensable injury" within the meaning of the Act, to his back or lumbar spine on October 15, 2003, and October 23, 2003. He would be entitled to appropriate benefits provided by the Act for this compensable injury.

First, he would be entitled to reasonably necessary medical treatment for this compensable injury, Ark. Code Ann. §11-9-508. The evidence presented shows that the medical service provided the claimant by and at the direction of the physicians at the emergency room of St. Mary's Rogers Memorial Hospital and the medical services provided and recommended at the direction of Dr. R. Doug Foster, were necessitated by and connected with the claimant's compensable injury. This includes the diagnostic testing recommended by Dr. Foster, which the claimant has been unable to obtain. These medical services are also of a type and nature commonly recognized by the medical community as being appropriate for the evaluation and treatment of injuries such as that experienced by the claimant. Thus, these medical services represent "reasonably necessary medical services" under Ark. Code Ann. §11-9-508, and should be the liability of the respondents herein.

The final matter concerns the claimant's entitlement to temporary total disability benefits. In order to be entitled to such benefits, the claimant must prove by the greater weight of the credible evidence that he has continued within his healing period from the effects of his compensable injury and has been rendered totally disabled, by this injury, from performing all forms of regular gainful employment for which he is otherwise qualified (not just the employment he actually held at the time of his injury). However, the claimant need not show that his injury has rendered him totally incapacitated or bedfast.

The issue of the duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. The Courts have held that the

healing period continues until the claimant has achieved the maximum benefit of time and medical treatment and the resolution or stabilization of the actual physical damage produced by the compensable injury. Once this underlying physical damage resolves or at least stabilizes, then the claimant's healing period has needed.

In the present case, the medical evidence shows that the claimant clearly continued within his healing period from the effects of his compensable injury through at least November 26, 2003 (his last scheduled appointment with Dr. Foster). However, due to the lack of medical evidence, it is impossible to determine when or if the physical damage produced by the claimant's compensable injury has stabilized after that date.

The lack of this evidence is in no way shown to be the fault of the claimant, but rather the respondent's refusal to provide appropriate medical services. The claimant cannot be penalized simply because he does not have the appropriate finances to obtain such services on his own.

On the other hand, the medical evidence also indicates that the claimant's compensable injury may only be in the form of a musculoskeletal strain or sprain. In that event, such an injury would have reasonably been expected to have resolved or at least stabilized, even without medical treatment, prior to the present time. The respondents refusal to provide the claimant with appropriate medical services cannot be used simply as a penalty. Nor, should the claimant be awarded temporary total disability benefits on this basis in excess to those which he would properly be entitled by law.

Therefore, I find that the claimant has proven that he continued within his healing period from the effects of his compensable injury from October 26, 2003 through at least, November 26, 2003. The greater weight of the credible evidence further shows that during this period the claimant was medically restricted and physically incapable of performing any type of regular gainful employment. Thus, he is entitled to temporary total disability benefits for, a t least, this period.

The claimant's entitlement to temporary total disability benefits from November 27, 2003 through a date yet to be determined is reserved for future determination, after the diagnostic

testing recommended by Dr. Foster has been performed. At that time, both parties will be allowed to present any additional relevant evidence they may desire in regard to continuing temporary total disability benefits, after November 26, 2003.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, including October 15, 2003, and October 23, 2003, the relationship of employee-employer carrier- third party administrator existed between the parties.
3. The appropriate weekly compensation rates are \$440.00 for total disability and \$330.00 for permanent partial disability.
4. On October 15, 2003 and October 23, 2003, the claimant sustained compensable injuries to his low back or lumbar spine. The claimant has established by medical evidence, supported by objective findings, the presence of a physical injury to this portion of his body. He has further proven by the greater weight of the credible evidence that his physical injury arose out of and occurred in the course of his employment, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal physical harm to his body, required medical services, and resulted in some disability.
5. The medical services provided the claimant by and at the direction of physicians at the emergency room of St. Mary Rogers Hospital and the medical services provided and recommended to the claimant by Dr. Robert Foster constitute reasonably necessary medical services for the claimant's compensable injury. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.
6. The claimant has proven that his compensable injuries have rendered him temporarily totally disabled for the period beginning November 8, 2003, and

continuing through, at least November 26, 2003. The issue of the claimant's entitlement to additional temporary total disability benefits, after November 26, 2003, is reserved for future determination, in the manner heretofore set forth in this Opinion.

7. The respondents have controverted the claim in its entirety and have denied the claimant's entitlement to any and all benefits.
8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on any weekly indemnity benefits herein or hereinafter awarded to the claimant.

#### ORDER

The respondents shall pay to the claimant temporary total disability benefits for the period beginning November 8, 2003 and continuing through at least November 26, 2003.

The respondents shall be liable for the expense of reasonably necessary medical services provided to the claimant for his compensable injury by and at the direction of the physicians at the emergency room of St. Mary's Rogers Hospital and the medical services provided and recommended to the claimant for his compensable injury by and at the direction of Dr. Robert Foster. This liability is subject to the medical fee schedule established by this Commission.

The respondents shall pay to the claimant's attorney one-half of the maximum statutory attorney's fee on all weekly indemnity benefits herein or hereinafter awarded to the claimant, which shall be in addition to such benefits. The respondents shall also hold from any weekly indemnity benefits herein or hereinafter awarded to the claimant the remaining one-half of this maximum statutory attorney's fee.

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

All such accrued benefits shall bear the maximum legal interest rate until paid.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge