

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F311727

RITA C. HENDRIX, EMPLOYEE

CLAIMANT

OAKDALE NURSING HOME, EMPLOYER

RESPONDENT

**CANNON COCHRAN MANAGEMENT
SERVICES, CARRIER/TPA**

RESPONDENT

OPINION FILED JUNE 10, 2005

A hearing in this case was conducted on April 18, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Searcy, White County, Arkansas.

Claimant was represented by Eddie H. Walker, Jr., Attorney at Law, Fort Smith, Arkansas.

Respondents were represented by James A. Arnold, II, Attorney at Law, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on January 18, 2005; a Prehearing Order was filed in this matter on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to seven stipulations. Six of these stipulations are set forth in the Prehearing Order and were confirmed by the parties at the hearing; the parties agreed to a seventh stipulation at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on October 17, 2003, and at all other relevant times.

2. Claimant sustained a compensable injury to her lumbar spine on October 17, 2003.

3. Respondents have paid temporary total disability benefits for October 24, 2003 to January 28, 2004 and March 1, 2004 to May 23, 2004.

4. Respondents acknowledge that Claimant is entitled to temporary partial disability benefits from January 29, 2004 through February 28, 2004.

5. Claimant sustained a 5% permanent impairment rating as a result of her compensable injury.

6. Claimant's temporary total disability rate is \$200.00; and her permanent partial disability rate is \$154.00.

7. Respondents controvert additional temporary total disability and permanent partial disability benefits over the impairment rating.

At the April 18, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Respondents are entitled to a credit for the difference between temporary total disability benefits and temporary partial disability benefits for the time period from January 7, 2004 through January 28, 2004, with the exception of a five-day period from January 10, 2004 through January 14, 2004.

2. Whether Respondents are entitled to a credit for temporary total disability benefits paid to Claimant from March 23, 2004 through May 23, 2004.

3. Whether Claimant is entitled to additional temporary total disability benefits from May 24, 2004 through October 25, 2004.

4. Whether Claimant is entitled to permanent partial disability benefits due to wage-loss disability.

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

Claimant contends that, despite a doctor's release with restrictions, she was unable to work from January 7, 2004 through January 28, 2004; therefore, she claims entitlement to temporary total disability benefits actually paid during that time. Even though she was being treated for a neck problem from March 23, 2004 through May 23, 2004 (and beyond), Claimant argues that her compensable lumbar spine injury was such that she could not work, so that she is entitled to temporary total disability benefits for this period, as well. Further, she claims that her compensable lumbar spine injury also kept her off work from May 24, 2004 until October 25, 2004, so that she is entitled to temporary total disability benefits for this period. Claimant has been assigned a 5% permanent impairment rating based upon her compensable lumbar spine injury; she seeks further permanent partial disability benefits for wage-loss disability. She also seeks an attorney's fee.

As noted in the stipulations, Respondents concede that they paid Claimant temporary total disability benefits for certain periods. However, they claim that she was only entitled to temporary partial disability benefits from January 7, 2004 through January 28, 2004, with the exception of a five-day period from January 10, 2004 to January 14, 2004, so that they are entitled to a credit for the difference between temporary total and temporary partial disability benefits. Respondents further argue that Claimant's neck problem is a nonwork-related independent intervening cause under Ark. Code Ann. § 11-9-102(4)(F)(iii), so that Claimant was not entitled to temporary total disability benefits from March 23, 2004 through May 23, 2004. Similarly, Respondents deny that Claimant is entitled to temporary total disability benefits from May 24, 2004 to October 25, 2004, to the extent that she was being treated for her neck problems during that time. Respondents also dispute Claimant's

entitlement to permanent partial disability benefits and an attorney's fee.

RECORD

As invited by the Prehearing Order, Respondents submitted a letter dated May 2, 2005, as their post-hearing brief. Claimant submitted a letter dated May 5, 2005, acknowledging receipt and review of Respondents' brief and declining to submit her own. These two items - Respondents' May 2, 2005 letter brief and Claimant's May 5, 2005 letter - will be "blue backed" and considered a part of the record in this matter.

DISCUSSION

Claimant testified as to the circumstances surrounding her October 17, 2003 lumbar spine injury.

I had come in to work and had started getting my patients up for supper. I went in and got one of my little lady residents up, and that's when I had a severe pain to go through the back. And I went ahead - this was approximately around 4:15. So I went ahead and started doing my job; and as the day went on, the pain got worse.

After supper, we went to put them to bed. On my lunch break, I come in to put this one elderly man on a urinal, to stand him up to use the urinal. He asked me to lean over and turn his TV so he could see it better. That's when I leaned over his bed to turn the TV, and I couldn't hardly get back up. The pain was so severe that I had to have help to go to the time clock.

The parties stipulated that Claimant's lumbar spine injury was compensable.

On October 20, 2003, Claimant presented to the White County Medical Center emergency room; she was initially assessed with a back strain. However, Dr. Ronald Baker's October 21, 2003 note states that Claimant "had an MRI today while in the ER that showed a herniated nucleus pulposus at L5-S1 putting pressure on some nerve roots, especially on the right." She was admitted to the hospital on October 21, 2003, and

subsequently discharged on October 24, 2003.

Dr. Bruce Safman examined Claimant on November 17, 2003. He noted that Claimant's MRI "shows disc herniation at L5-S1 with impingement on the right neural foramen." Upon examination of Claimant, Dr. Safman concluded that "[t]his patient does have a herniated disc." He recommended conservative treatment and kept her off work.

Claimant returned to the White County Medical Center emergency room on December 3, 2003; Dr. Patrick Chan examined her on December 4, 2003. He noted that Claimant was admitted to the hospital "mainly for right lower extremity pain involving the buttock and posterior thigh up to the knee level. She has intermittent pain in right lateral calf and dorsal aspect and lateral aspect of right foot." Following an examination and a review of Claimant's MRI, Dr. Chan diagnosed "[r]ight lower extremity pain secondary to L5-S1 moderately large herniated nucleus pulposus." He recommended medication, physical therapy, and lumbar epidural steroid injections. Claimant's December 6, 2003 discharge summary states that Claimant "is not to work until February 15, 2004."

On December 29, 2003, Claimant presented to Dr. Safman a second time. She reported "having fairly severe pain." Following an examination, Dr. Safman recommended that Claimant remain on medication but not repeat her epidural injections; he also recommended a referral to Dr. Wayne Bruffett. Although he initially determined to keep Claimant off work, an addendum to his December 29, 2003 note states:

I spoke with [Claimant's] adjuster this evening. He relates that they have sedentary work at the nursing home that she could sit and stand as needed. She does not have to engage in any physical labor. In view of this, I will give her a trial at work where she is able to sit and stand as needed 4 hours a day and no lifting over 4 pounds.

Dr. Safman signed a release returning Claimant to work with these restrictions on

December 29, 2003.

Claimant testified that she did attempt to work four hours each day for two or three days, but she “ended up back in the hospital.” She believed that the Respondent employer violated her restrictions by assigning work that involved bending, and that this was what forced her to return to the hospital. She was admitted to the White County Medical Center on January 10, 2004; an emergency room note records Claimant’s “history of recently being released from worker’s compensation to go to light duty.” The emergency room physician assessed “[i]ntractable radicular back pain with history of ruptured disc at L5-S1.” When Dr. Chan examined her on January 11, 2004, Claimant reported that she “worked for two days and was unable to continue to work due to severe right lower extremity pain.” Dr. Chan again recommended medication, physical therapy, and a lumbar epidural steroid injection. This injection was performed on January 12, 2004; Claimant was discharged from the hospital two days later.

Claimant testified that she did not return to work for the Respondent employer after her attempt to work in January of 2004. On January 26, 2004, Dr. Chan administered another injection of lumbar epidural steroid. Claimant testified:

Q. Between the time Dr. Safman gave you the restricted duty return to work slip and when you got that January 26, '04 injection, were you able to work other than those two or three part-time days?

A. No, sir.

Q. Did you refuse any work that was actually offered to you during that period of time?

A. No, sir.

As noted above, Respondents acknowledge that Claimant is entitled to temporary partial

disability benefits from January 29, 2004 through February 28, 2004.

Dr. Safman referred Claimant to Dr. Bruffett; he examined Claimant on March 1, 2004. She reported her pain “as extremely severe ... sharp and constant” and “worse with standing, walking, lifting, exercise, twisting, bending, squatting, kneeling, climbing stairs, or sneezing, and relieved to some degree by heat and rest. She has tried to continue to work but she cannot really function well.” Upon examination and a review of Claimant’s MRI, Dr. Bruffett recorded an impression of “[h]erniated disc L5-S1 with classic S1 radiculopathy.” He recommended a microscopic partial discectomy, which Claimant elected to undergo. Dr. Bruffett noted in a March 1, 2004 letter to Doug King that Claimant “seems to be motivated to return to work, and this is a very promising sign.” Nonetheless, he signed a note dated March 1, 2004 indicating that Claimant could not return to work.

Although Claimant’s surgery was scheduled for March 23, 2004, she developed a complaint of severe neck pain prior to the surgery, and it was cancelled. Claimant reported, and Dr. Bruffett agreed, that this neck pain was not related to her compensable lumbar spine injury. The medical records reflect that Dr. Bruffett put further treatment of Claimant’s lumbar spine injury on hold, while he concentrated on treating her neck problem. Claimant underwent an anterior cervical discectomy and fusion for a cervical disc herniation. Claimant testified:

Q. ... We’re basically talking about the end of March until the end of October in 2004. During that period of time, how was your back?

A. It was about the same. It hurt. It seemed like if I stood or walked or bent or sat any extreme time, the pain gets real severe down the right leg and in the hip.

Q. In your opinion, during the period of time between the end of March and October 25 of ‘04, if you had not had the neck problem and just had the back

problem, would you have been able to work?

A. I don't understand.

Q. With just the back problem, would you have been able to work?

A. No, sir.

Q. Why not?

A. I couldn't do it. The pain was too bad.

Q. Now, the medical records indicate that Doctor Bruffett believes you got a good result on your neck surgery. Do you agree with that?

A. Yes, sir, I do.

...

Q. Now, the medical records appear to indicate that in July of '04, Doctor Bruffett basically released you in regard to your neck and was then focusing on your back. Do you remember that?

A. Yes, sir, I do.

Upon cross-examination, Claimant agreed that Dr. Bruffett was treating her neck from March 23, 2004 until July 21, 2004, at which point he began treating her back again.

In a July 21, 2004 note, Dr. Bruffett recorded Claimant's report that "she really has no leg pain." She was not asymptomatic; "[s]he does still have some back pain radiating over into the right hip." Dr. Bruffett recommended medication and physical therapy and wrote: "I am going to go ahead and release her back to work with no lifting, pushing, or pulling greater than 20 pounds and no repeated bending, twisting, or stooping." As noted above, Claimant testified that she could not work due to the pain in her back. She also testified that the physical therapy did not do her "any good."

In a note dated August 30, 2004, Dr. Bruffett recorded the following:

[Claimant] indicates to me that she does not really want to treat this any

further. She says she can probably live with things as they are. When I asked her about returning to her previous job, she says that she is having too much pain to do that.

Dr. Bruffett did not mention further treatment; he did recommend a functional capacity evaluation, which Claimant underwent on September 16, 2004. She returned to Dr. Bruffett on October 25, 2004; he noted, upon review of Claimant's functional evaluation, "that she is able to function in a medium demand capacity.... She can occasionally lift up to 50 pounds." He repeated his impression of a herniated lumbar disc, and assigned Claimant an impairment rating of 5% of the whole person. He released Claimant to return to work with no lifting greater than fifty pounds.

A. Credit - January 7, 2004 through January 28, 2004

Respondents paid temporary total disability benefits to Claimant from October 24, 2003 until January 6, 2004; these payments are not in dispute. Respondents also paid temporary total disability benefits from January 7, 2004 through January 28, 2004; these payments are in dispute. Except for a five-day period of hospitalization from January 10, 2004 through January 14, 2004, Respondents argue that Claimant was only entitled to temporary partial disability payments from January 7, 2004 through January 28, 2004. They seek a credit for the difference between temporary total disability benefits actually paid and temporary partial disability benefits allegedly due. Claimant argues that she was, in fact, entitled to the temporary total disability benefits actually paid.

The question is whether Claimant proved her entitlement to temporary total disability benefits. If she did not sustain her burden of proof on this point, then the question concerning Respondents' entitlement to a credit would arise.

Temporary total disability is that period within the healing period in which the

employee suffers a total incapacity to earn wages. Fred's, Inc. v. Jefferson, ___ Ark. ___, ___ S.W.3d ___ (March 31, 2005). "Disability" means 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. Ark. Code Ann. § 11-9-102(8). The "healing period" is that period for healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(12). The healing period ends when the employee is as far restored as the permanent nature of her injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 228, 79 S.W.3d 414, ___ (2002). The claimant bears the burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits. See Ark. Code Ann. § 11-9-704(c)(2). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant sustained her burden of proving by a preponderance of the evidence that she was entitled to temporary total disability benefits from January 10, 2004 through January 28, 2004. Claimant testified that she did attempt to work under Dr. Safman's release, but that her compensable lumbar spine injury forced her to return to the hospital on January 10, 2004. She further testified to her inability to earn wages after that date due to her back condition; her five-day hospitalization corroborates her claimed inability to work even part-time under restrictions. The medical records demonstrate that Claimant was within her healing period during this time; surgery was scheduled to treat her

back well after this time period, and she ultimately was not released until October of 2004.

However, I find that Claimant did not sustain her burden of proving entitlement to temporary total disability benefits from January 7, 2004 through January 9, 2004. Claimant testified that she did work for two or three days under Dr. Safman's release; obviously, she did earn some wages during this time period. In order to be temporary totally disabled, she had to suffer a total incapacity to earn wages. Apparently, she was not totally incapacitated during these three days. Respondents are therefore entitled to a credit for the difference between temporary total disability benefits paid and temporary partial disability benefits for these three days.

B. Credit - March 23, 2004 through May 23, 2004

As noted above, Claimant was scheduled for surgery on March 23, 2004, to address her compensable lumbar spine injury. However, an unrelated neck problem resulted in the cancellation of the surgery; this neck problem was the primary focus of Claimant's treatment until July 21, 2004. Respondents paid Claimant temporary total disability benefits from March 23, 2004 through May 23, 2004. They now argue that Claimant's neck problem was a nonwork-related independent intervening cause, so that Claimant was not entitled to temporary total disability benefits from March 23, 2004 through May 23, 2004, under Ark. Code Ann. § 11-9-102(4)(F)(iii).

When an employee is determined to have a compensable injury, the employee is entitled to temporary disability as provided by the workers' compensation law. See Ark. Code Ann. § 11-9-102(4)(F)(i). However, benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. Ark. Code

Ann. § 11-9-102(4)(F)(iii). It must first be determined whether there is a causal connection between the primary injury and the subsequent disability; if there is such a connection, there is no independent intervening cause unless the subsequent disability was triggered by activity on the employee's part which was unreasonable under the circumstances. See Hislip v. Helena/West Helena Schools, 74 Ark. App. 395, 399, 48 S.W.3d 566, ___ (2001) (citations omitted); Taylor v. Carwell Elevator Co., Full Workers' Compensation Commission Opinion filed January 14, 2003 (F103361).

I find that Claimant sustained her burden of proving a causal connection between her compensable lumbar spine injury and her subsequent disability for the period that includes March 23, 2004 through May 23, 2004. Claimant credibly testified that even without her neck problem, her compensable lumbar spine injury would have prevented her from working. The medical records reflect that Dr. Bruffett took Claimant off work on May 1, 2004 due to her compensable injury. He released Claimant to return to work with some back-related conditions on July 21, 2004 and continued to treat her compensable injury until August 30, 2004, demonstrating a continuing causal connection.

I further find that Claimant's neck problem was not an independent intervening cause. Under the applicable test, it may be that Claimant's neck problem prolonged her need for treatment; the medical records demonstrate that her neck problem caused the cancellation of her back surgery. However, the record fails to indicate any activity on Claimant's part that was unreasonable under the circumstances. Stated another way, there is nothing in the record upon which to base a finding that Claimant's neck problem was unreasonable under the circumstances. Therefore, there is no independent intervening cause. Compare Taylor, supra ("Based on the record before us, to find that the

claimant's activity was unreasonable under the circumstances would require speculation and conjecture, which cannot be substituted for probative evidence.”).

Based upon the foregoing findings, I further find that Respondents are not entitled to a credit for temporary total disability benefits paid from March 23, 2004 through May 23, 2004. Her disability at this time was causally connected to her compensable injury; there is no proof of an independent intervening cause, because there is no proof of unreasonable activity on Claimant's part.

C. Temporary Total Disability from May 24, 2004 through October 25, 2004

Claimant argues that she is entitled to temporary total disability benefits from May 24, 2004 through October 25, 2004, the date upon which Dr. Bruffett issued Claimant's final work restriction and assigned her permanent impairment rating. Respondents challenge Claimant's entitlement to these benefits, claiming that she was still being treated for her neck problem during a portion of this time. The law concerning eligibility for temporary total disability benefits has previously been recited.

I find that Claimant sustained her burden of proving by a preponderance of the evidence that she was entitled to temporary total disability benefits from May 24, 2004 though August 30, 2004. For the reasons given in the preceding section of this opinion, to the extent that Claimant was being treated for her neck problem during this period, that does not constitute an independent intervening cause: there is no proof of unreasonable conduct on the Claimant's part as required by the statute and interpreting case law. Claimant credibly testified that she was incapacitated from earning wages due to her compensable injury. She remained in her healing period; at least through August 30, 2004, Dr. Bruffett prescribed medication and physical therapy to treat her compensable lumbar

spine injury.

However, I find that Claimant is not entitled to temporary total disability benefits after August 30, 2004. On that date, Claimant informed Dr. Bruffett that she no longer desired treatment for her compensable injury and that “she can probably live with things as they are.” Claimant thus chose to end her healing period, thereby ending her eligibility for temporary total disability benefits. See Breakfield v. In & Out, Inc., 79 Ark. App. 402, 88 S.W.3d 861 (2002) (affirming a Commission decision “that [a claimant’s] healing period ended when she abandoned her course of treatment”).

D. Wage-loss Disability

Claimant was assigned a 5% permanent impairment rating; she now seeks permanent partial disability benefits due to wage-loss disability. At the April 18, 2005 hearing, Claimant testified concerning her efforts to find employment after her October 25, 2004 release. Among other efforts, she attempted to return to work for the Respondent employer. She claimed that she tried to make an appointment with the Human Resources Manager, Travis Raye. However, she testified that “[h]e was always either gone or busy and couldn’t come to the phone, and he never called me back.” Claimant then attempted to find work elsewhere, with no success.

On cross-examination, Claimant testified as follows:

Q. Now, you say you knew that the nursing home told you they would make work available to you within your restrictions after October 25 of 2004?

A. Yes, sir.

Q. And you say you called out there?

A. Yes, sir, I did.

Q. Did you ever go out there?

A. No, sir, I did not.

Q. All you ever did was call on the phone?

A. Yes.

Q. And when you didn't get in touch with Travis, you didn't do anything else?

A. Yes, sir.

Claimant acknowledged receipt of a letter in March of 2005, that repeated the Respondent employer's offer to return Claimant to work on a permanent basis within her restrictions.

Respondents called Travis Raye, the Respondent employer's Human Resources Manager, to testify.

Q. Were you aware that [Claimant] was released to return to work with certain permanent restrictions in October of 2004?

A. Yes.

Q. Did you have occasion to personally talk with [Claimant] on the telephone after Doctor Bruffett released her?

A. Yes. After I sent the first letter, I spoke to [Claimant] once on the phone.

Q. Did you talk about the fact that you were willing to return her to work?

A. Yes, I did, sir.

Q. Did she ever show up?

A. No, sir.

Q. At my suggestion, did you send her another letter in the Spring of 2005 and offer her a job again?

A. Yes, sir.

Q. To your knowledge, has she ever called you?

A. I believe she made contact with our administrators once and told the administrator that she'd get in touch with me at another time.

Q. She didn't ask you to return the call?

A. Not that I'm aware of, sir.

On cross-examination, Raye confirmed that the Respondent employer would create a permanent light duty job for Claimant within her job restrictions. He testified that he and Claimant did discuss her employment after Dr. Bruffett released her in October of 2004; Raye testified that he told Claimant a position was available, but "she declined the position." When asked how much Claimant was to be paid, Raye responded "[h]er regular rate." He reiterated that, as of the time of the hearing, employment was still available to Claimant.

Q. Is [the Respondent employer] willing to still create that job?

A. Yes, sir.

Q. So if she decided to come back to work for you tomorrow, [you] would be willing to put her back to work within her medical restrictions?

A. Within her medical restrictions, yes, sir.

...

Q. And it's your testimony that [the Respondent employer] is willing to do that on a permanent basis?

A. That is correct, sir.

Q. You are willing to do that if she comes out there tomorrow and says, "I'm ready to go back to work"?

A. Definitely, sir.

On rebuttal, Claimant testified that after her release in October of 2004, she "did tell them [the Respondent employer] that I had another job opportunity to take care of an

elderly lady. Mr. Raye did say that if it didn't work out, to let him know." She concluded as follows:

Q. ... You've heard Mr. Raye testify here today that if you come out there tomorrow, they're willing to accommodate you?

A. Yes, sir, I did.

Q. Do you intend to go out there tomorrow and try to go to work?

A. Yes, sir, I am.

An employee may be eligible for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment. See Ark. Code Ann. § 11-9-522(b)(1). However, so long as the employee, subsequent to her injury, has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than her average weekly wage at the time of the accident, she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment. Ark. Code Ann. § 11-9-522(b)(2). The employer or its workers' compensation insurance carrier has the burden of proving the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than her average weekly wage at the time of the accident. Ark. Code Ann. § 11-9-522(c)(1).

I find that Respondents sustained their burden of proving that Claimant received a bona fide offer to be employed at wages equal to her average weekly wage at the time of her compensable injury. Raye credibly testified that, following Claimant's October of 2004 release, the Respondent employer offered her a permanent job within her restrictions at "[h]er regular rate." Claimant confirmed that she knew the Respondent employer would make work available to her within her restrictions. Raye testified that she declined the job;

Claimant testified that she “had another job opportunity.” The preponderance of the evidence establishes that Claimant did receive a bona fide offer to be employed at wages equal to her average weekly wage at the time of her accident (indeed, at the time of the hearing, Raye credibly testified that this offer was still available to Claimant). Thus, Claimant is not entitled to permanent partial disability benefits in excess of the percentage of her permanent physical impairment. See Ark. Code Ann. § 11-9-522(b)(2).

E. Attorney’s Fee

Claimant’s compensable injury occurred after July 1, 2001; therefore, her request for an attorney’s fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Under the statute, attorney’s fees shall only be allowed on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). This opinion awards Claimant temporary total disability benefits from May 24, 2004 through August 30, 2004; it also denies Respondents’ claims for credit for temporary total disability benefits previously paid. The parties stipulated that Respondents controvert additional temporary total disability benefits. Therefore, Claimant is entitled to an award of an attorney’s fee under the statute.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on October 17, 2003, and at all other relevant times.
3. Claimant sustained a compensable injury to her lumbar spine on October 17, 2003.
4. Respondents have paid temporary total disability benefits for October 24, 2003

to January 28, 2004 and March 1, 2004 to May 23, 2004.

5. Respondents acknowledge that Claimant is entitled to temporary partial disability benefits from January 29, 2004 through February 28, 2004.

6. Claimant sustained a 5% permanent impairment rating as a result of her compensable injury.

7. Claimant's temporary total disability rate is \$200.00; and her permanent partial disability rate is \$154.00.

8. Respondents controvert additional temporary total disability and permanent partial disability benefits over the impairment rating.

9. Claimant did not sustain her burden of proving entitlement to temporary total disability benefits from January 7, 2004 through January 9, 2004; Claimant worked for four hours during each of these days, indicating that she did not suffer a total incapacity to earn wages on these days. Respondents are therefore entitled to a credit for the difference between temporary total disability benefits paid and temporary partial disability benefits for these three days.

10. Claimant sustained her burden of proving by a preponderance of the evidence that she was entitled to temporary total disability benefits from January 10, 2004 through January 28, 2004. Claimant credibly testified that she was unable to work due to her compensable lumbar spine injury; her five-day hospitalization corroborates her claimed inability to work even part-time under her restrictions. Claimant remained within her healing period during this time; surgery was scheduled to treat her back well after this time period. Respondents are therefore not entitled to the credit sought during this period.

11. Respondents are not entitled to a credit for temporary total disability benefits

paid from March 23, 2004 through May 23, 2004, because Claimant's neck problem was not an independent intervening cause. There was a causal connection between Claimant's compensable lumbar spine injury and her disability during this time period; Claimant credibly testified that, even without her neck problem, she would have been unable to work due to her compensable injury. Treatment for Claimant's compensable injury continued well after her neck problem resolved. Further, the record fails to indicate any activity on Claimant's part that was unreasonable under the circumstances. Therefore, her neck problem and its treatment do not constitute an independent intervening cause under Ark. Code Ann. § 11-9-102(4)(F)(iii).

12. Claimant sustained her burden of proving by a preponderance of the evidence that she was entitled to temporary total disability benefits from May 24, 2004 through August 30, 2004. Claimant credibly testified that she was incapacitated from earning wages due to her compensable injury; she remained in her healing period, receiving treatment for her compensable lumbar spine injury through August 30, 2004. Again, her neck problem does not constitute an independent intervening cause, because there is no proof of unreasonable conduct on the Claimant's part.

13. Claimant did not sustain her burden of proving that she is entitled to temporary total disability benefits after August 30, 2004. On that date Claimant informed Dr. Bruffett that she no longer desired treatment for her compensable injury, thereby choosing to end her healing period and her eligibility for temporary total disability benefits.

14. Respondents sustained their burden of proving that Claimant received a bona fide offer to be employed at wages equal to her average weekly wage at the time of the accident. After her October 25, 2004 release, Respondents offered Claimant a permanent

position within her restrictions, with compensation at her regular rate of pay. Claimant confirmed that she knew the Respondent employer would make work available to her within her restrictions. Therefore, Claimant is not entitled to permanent partial disability benefits in excess of the percentage of her permanent physical impairment.

15. Claimant is entitled to an attorney's fee under Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). Respondents controverted Claimant's claim for additional temporary total disability benefits, and sought credit for temporary total disability benefits previously paid; this opinion denies a substantial amount of the credit sought, and awards temporary total disability benefits to Claimant.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits 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 and Death and Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml