

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F311482**

<b>MARGARET L. STROUD, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>OZARK OPPORTUNITIES, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>LIBERTY INSURANCE CORPORATION, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED MARCH 31, 2005**

A hearing in this case was conducted on February 3, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Harrison, Boone County, Arkansas.

Claimant was represented by Evelyn E. Brooks, Attorney at Law, Fayetteville, Arkansas.

Respondents were represented by Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A prehearing telephone conference was held on this claim on August 17, 2004; 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 three stipulations. The first stipulation is set forth in the Prehearing Order and was confirmed by the parties at the hearing; the remaining two stipulations were agreed to by the parties at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on August 26, 2003, and at all other relevant times.
2. Claimant's average weekly wage is \$310.00; her temporary total disability

benefits rate is \$207.00.

3. Respondents controvert this claim in its entirety.

At the February 3, 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 Claimant sustained a compensable injury on August 26, 2003.

2. Whether Claimant provided the Respondent employer with notice or reported the injury under Ark. Code Ann. § 11-9-701.

3. Whether Claimant is entitled to reasonably necessary medical benefits.

4. Whether Claimant is entitled to temporary total disability benefits.

5. Whether Respondents are entitled to a credit for payments by other providers under Ark. Code Ann. § 11-9-411.

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

Claimant contends that she sustained a compensable gradual onset injury to her back that first became apparent to her on August 26, 2003. She further contends that her alleged compensable injury is the major cause of her disability and need for treatment, whether she had preexisting degenerative disc disease or not. She seeks medical benefits, temporary total disability benefits, and an attorney's fee. She claims that she is still within her healing period and in need of further evaluation.

Respondents contend that Claimant's injury did not occur in the course and scope of her employment. They argue that the major cause of her condition is her preexisting degenerative disc disease. If a compensable injury is found, Respondents argue that Claimant did not give adequate notice under Ark. Code Ann. § 11-9-701, and that they are

entitled to a credit for payments by other providers under Ark. Code Ann. § 11-9-411. If temporary total disability benefits are contemplated, Respondents argue that Claimant's healing period ended on June 1, 2004, as evidenced by Dr. James Blankenship's report of that date.

### **DISCUSSION**

Claimant began working for the Respondent employer in 1984. As of August 2003, she was employed as a teacher's aide in a classroom of twenty children ranging in age from three to five years old. She testified that her "responsibilities were any and everything that was needed for the children. Maintaining the center, so that it met all of the licensing codes, and on the playground and all the surrounding area." Claimant worked with two other employees, the center's director and a family service worker. Claimant prepared the center for school in August of 2003 by cleaning, and then lifting and arranging, furniture such as desks, tables, chairs, and cabinets.

When the new school year began, Claimant and her fellow employees attempted to fix improperly installed playground equipment by shoveling pea gravel to create a "fall zone" and then moving the playground equipment. They began shoveling the pea gravel the first day the children returned to school, which Claimant recalled was August 17, 2003. While the children were outside playing for an hour each morning, the three employees rotated shoveling for ten to fifteen minutes each. After two or three days of shoveling, Claimant recalled noticing "my shoulders and my arms and stuff, because I wasn't used to shoveling. It was just stress."

After a few days of shoveling, Claimant and her fellow employees attempted to move the playground equipment. She testified that this equipment weighed "at least over

200 pounds” and that it had to be moved “between twenty and twenty-five foot.” She recalled:

We picked it up and moved it a little bit, then picked it up and moved it a little bit. Because, when you lifted it up to pick it up, you couldn’t stand up. You had to stay bent over, so we’d take five or ten steps and then set it down, and then pick it up and move it again.

This took about thirty minutes.

Q. Okay. Now, when did you first have problems with your back? When did you notice a problem?

A. Well, I was stressed that night, but, mostly, the next day, when we came in, we started shoveling again. I couldn’t -- you know, I just felt tired and my arms were sore. My back was sore from bending over, so I didn’t bend over to shovel.

Q. Okay. So what day was that?

A. I don’t remember the date.

Q. Okay. I’m just asking in relation to moving the equipment. We just need to know when you first had a problem with your back.

A. It would be the 26th.

Q. Okay. And did you just testify that that was the day after you moved the equipment?

A. Well, I was -- the day that we did move it, I was stressed and -- because it wasn’t something I was used to lifting, and my muscles were sore from shoveling, before that, so the next day was when I really started noticing it. And I’d have to sit down, when they’re all in child development, in the appropriate chairs. That’s what we have to sit on, and, when I was sitting in it and getting up, I was noticing strain, or when I would bend over to put things on the table or to help the children at the tables.

Claimant first believed she’d “just pulled some muscles or strained some muscles.”

However, “[i]t just progressively started hurting more. I was having problems moving around. I couldn’t sit for very long. I couldn’t stand. Several times, my legs would go

numb and I had to be assisted by one of the other teachers that were there to get -- and just having problems walking.” She switched duties with her fellow employees: they began doing the mopping and cleaning, while Claimant completed their paper work.

On September 16, 2003, Claimant presented to Dr. Margo Lockyer. When asked if she reported to the Respondent employer that she needed to see a doctor, Claimant replied: “No. The Center Director at the center, she knew. And I had talked to her and tried to get in, and that’s the soonest I could get in to the doctor.” Claimant’s symptoms were that she hurt in her hip, lower back, and legs. Claimant recalled thinking: “I had strained the muscles, but I thought maybe it had caused a kidney infection or something, from the strain of, you know, lifting all of it.” (Claimant had experienced a kidney infection prior to this incident.) In a note dated September 16, 2003, Dr. Lockyer wrote that Claimant was being treated for low back pain; she released Claimant to light duty with restrictions, including no lifting greater than ten pounds.

Claimant returned to work until September 19, 2003, when she was told that she could not continue working because of the restrictions. Her work required her to be able to lift fifty pounds and to be able to move around, but Claimant testified that she definitely could not lift and that she was having problems with her legs; “my leg even went out from underneath me, at one point.” These symptoms were new to Claimant.

Q. Had you ever had any of these problems before that school year?

A. No.

Q. Had you ever had any back injuries before?

A. No. Other than, like, stress or strain.

Q. Have you ever had to have an MRI before?

A. No.

Claimant underwent an MRI of her lumbar spine on September 24, 2003. This study reported: "There is desiccation of disc material at 5-1. There is a small left paracentral herniated nucleus pulposus at 5-1, slightly indenting the thecal sac and slightly displacing the left S1 nerve root. No other abnormalities are identified." In a note dated September 25, 2003, Dr. Lockyer wrote: "[Claimant] has a herniated disc L5-S1 and is being treated for low back pain with medications and physical therapy." Dr. Lockyer restricted Claimant from lifting greater than fifteen pounds, or engaging in repetitive bending or lifting.

Claimant recalled:

Q. Now, when did you report this injury to your employer?

A. After I had the MRI, and they told me it was a herniated disk. And I asked her how I could have done that, and she said it could have been anything from bending over to lifting. And that's what -- you know, I told her that I'd been moving the stuff at school, and, you know, I have to bend over every day, at school, and twist and lift and everything else.

On cross-examination, Claimant confirmed that she did not report "this" to her employer until after she had the MRI. At that point, thinking back, she surmised that her injury stemmed "[f]rom lifting the playground equipment. Because I was stiff and sore. See, I pulled the muscles in my chest and my arm, but they got better. But, in my back, it never got better. It just kept getting worse." Even though she noticed her back hurting the day after moving the equipment, she did not report it to her employer because she "just thought it was sore muscles." After the MRI, Claimant discussed what could have caused her injury with her two co-workers, but she denied speculating as to the cause of her injury.

Q. So you're kind of speculating about what it was?

A. No. I know that I was hurting when -- after I had lifted that, but I didn't know any specific thing. Whether it was the file cabinets, the tables, the shoveling, or the actual playground equipment. It's just the day after the playground equipment is when I really started to notice having problems.

Q. But you didn't tell anybody, right?

A. Well, yes and no. I mean, I work with these ladies, and they knew I was having problems. That's why they were doing my wor[k], and I was doing theirs.

Claimant insisted that she told her fellow employees "that I was hurt. I didn't know for sure what I had done. What specific time I had done it."

As noted, Claimant's treatment history includes physical therapy and medication. At the February 3, 2005 hearing Claimant testified that her physical therapy has ended. She underwent an epidural block for "[b]ulging disc syndrome at L4, L5 and L5, S1" on October 28, 2003. She underwent nerve block procedures on November 12, 2003 (at L4, L5, and S1); December 17, 2003 (at the same levels); and January 14, 2004 (at C5, C6, and C7). Despite this last procedure's treatment of her cervical spine, Claimant stated that she is not claiming a neck injury.

The record indicates that Dr. Blankenship first examined Claimant on March 3, 2004. Her chief complaint was "[l]ower back pain deep in her tail bone with sitting and increasing in her lower back when going from sitting to standing[.]" A patient history form of that same date notes this pain "5 months after lifting equipment." Claimant also reported bilateral upper hip and posterior upper right leg pain. Upon physical examination, Dr. Blankenship noted that Claimant's "neurologic examination is completely unremarkable with the exception of some decreased sensation in the right foot. She has 3+ tenderness at the right sciatic notch, however." Upon reviewing Claimant's lumbar MRI and "plain

films,” Dr. Blankenship observed that “[s]he has marked disc degeneration at the L5, S1 level.” He opined: “I do feel like that based on the findings of this MRI that a strong component of the patient’s pain is discogenic in origin.” Dr. Blankenship adjusted Claimant’s medications and recommended continued physical therapy and then stated: “I have asked her to try this diligently for the next month and then come back in to see us. If, at that time, she is not any better, we can consider discography for possible surgical solution to her problem.”

On April 6, 2004, Claimant reported “much less intense pain than she did on her last visit” to Dr. Blankenship; she also expressed her satisfaction with her physical therapy. Dr. Blankenship did not note any changes in Claimant’s physical exam, and recorded an impression of “[i]mproving mechanical lower back pain.” He again adjusted Claimant’s medications and addressed her exercise and physical therapy programs.

Claimant again presented to Dr. Blankenship on June 1, 2004. On a pain drawing form, she indicated that her pain was somewhat less intense or widespread than her first visit, but that she continued to experience pain in her low back into her left and right legs. Upon physical examination, Dr. Blankenship did not note any changes, and recorded an impression of “[r]esolving myofascial and mechanical lower back pain.” He recommended that Claimant continue an aggressive exercise therapy program, and told Claimant “that I would plan on seeing her back only as needed.”

Her husband’s health insurance paid some of Claimant’s bills, but she denied receiving any kind of disability income. She does have unpaid medical bills because the health insurance policy does not cover everything. Although she saw Dr. Lockyer two or three months prior to the hearing, she has not returned because she “can’t afford it, and

I already owe them over a thousand dollars.”

As to her current condition, Claimant testified that she is under Dr. Lockyer’s care and that her restrictions have not been lifted. She would like to avoid surgery and is not currently taking medications that would interfere with the classes she is taking. When she is at school taking classes, “[s]ometimes, through the day, I’ll go out and sit in the car and lay down, because there’s too much pressure on my back.” She attempted to return to work at the center three or four times but was physically unable to do her former job. She has been unable to find another job within her restrictions. Claimant does not believe there are any jobs she could do if she was not in school, “[b]ecause I can’t sit for long periods of time, and I can’t stand and walk for long periods of time. I can’t lift, and I can’t bend very much.” While she did not testify to wanting any particular medical treatment, Claimant does “just want to feel better.”

#### **A. Compensability**

Claimant contends that she sustained a compensable gradual onset injury to her back which first became apparent to her on August 26, 2003. Her testimony establishes that she cannot identify a specific causal incident or specific time and place of occurrence. See Ark. Code Ann. § 11-9-102(4)(A)(ii)(b).

A claimant seeking benefits for a gradual-onset injury must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was the major cause of the disability or need for treatment.

Wal-Mart Stores, Inc. v. Leach, 74 Ark. App. 231, 234, 48 S.W.3d 540, \_\_\_ (2001); see Ark. Code Ann. §§ 11-9-102(4)(A)(ii) and 11-9-102(4)(E)(ii); Philpott v. Cargill, Full

Workers' Compensation Commission Opinion filed March 15, 2002 (F002377). "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).

Furthermore, the injury must be established by medical evidence supported by objective findings. Philpott, supra; see Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). Objective medical evidence is necessary to establish the existence and extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. Leach, 74 Ark. App. at 234, 48 S.W.3d at \_\_\_.

I find that Claimant sustained her burden of proving by a preponderance of the evidence that she suffered a compensable gradual onset back injury in August of 2003. The elements of her compensable claim are discussed below.

1. The injury arose out of and in the course of her employment. The parties stipulated that the employee-employer-carrier relationship existed on August 26, 2003; Claimant's testimony establishes that she was employed by the Respondent employer that month. In the course of her duties in August of 2003 she lifted and arranged furniture such as tables, desks, chairs, and cabinets; shoveled pea gravel for several consecutive days; and lifted (with her co-workers) bulky, heavy playground equipment and carried it while bent over. Claimant first noticed a problem with her back the day after moving the playground equipment. Based upon this evidence, I find that Claimant's injury arose out of and in the course of her employment.

2. The injury caused physical harm requiring medical services. Claimant testified

that “my back, it never got better. It just kept getting worse.” Eventually, she could not sit or stand for long periods, nor could she lift or bend. Prior to her injury, she had never experienced a back injury or these symptoms, nor had she needed an MRI. After her injury, she experienced these symptoms; underwent an MRI; learned she had a herniated disc; and required medications, physical therapy, and epidural and nerve block procedures. The medical records reflect that she attained some measure of relief from these treatments, although she remains in pain, under work restrictions, and under a doctor’s care. Therefore, I find that Claimant’s injury caused her physical harm that required medical services.

3. The injury is the major cause of disability or need for treatment. I find that Claimant’s injury is the major cause of her disability or need for treatment. She denied prior back injuries or symptoms such as she experienced after lifting the playground equipment; she testified to these symptoms and a need for treatment afterwards, and this testimony is corroborated by the medical records. These records report Claimant’s stated history and symptoms consistent with her testimony at the hearing. Even if Claimant had preexisting degenerative disc disease, she established that her low back was asymptomatic prior to her compensable injury but became symptomatic and required treatment due to her work activity. “Major cause” can be established by a showing that an asymptomatic preexisting condition became symptomatic, and thus required treatment, due to a work related aggravation of that condition. See Parker v. Atlantic Research Corp., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (June 30, 2004).

I note Respondents’ argument that Claimant is speculating as to the major cause of her injury or that it arose out of or in the course of her employment. However, her initial

attribution of her pain to a kidney infection or initial uncertainty as to causation is not fatal to her claim. Compare Oldaker v. Ellison Enterprises, Inc., Full Workers' Compensation Commission Opinion filed February 24, 2005 (F210279) (even though the claimant "at first didn't know what was causing her back pain," the Commission found her gradual onset back injury to be compensable). Claimant's initial self-diagnosis was promptly corrected by an MRI and her doctor; armed with this information, Claimant identified the cause of her injury and reported that history thereafter.

4. Medical evidence supported by objective findings establishes the injury.

Claimant's September 24, 2003 MRI revealed "a small left paracentral herniated nucleus pulposus at 5-1." The next day, Dr. Lockyer wrote that "[Claimant] has a herniated disc L5-S1 and is being treated for low back pain with medications and physical therapy." Dr. Blankenship reviewed the MRI and observed "marked disc degeneration at the L5, S1 level." I interpret Dr. Blankenship's statement as addressing the existence and extent of Claimant's injury, not its cause. Based on the foregoing, I find that medical evidence supported by objective findings establishes the existence and extent of Claimant's injury.

To summarize, I find that the evidence of greater convincing force establishes that Claimant sustained a compensable gradual onset injury to her back in August of 2003 as she engaged in work activities; she first became cognizant of her back injury on August 26, 2003. Therefore, Claimant has established a compensable gradual onset back injury by a preponderance of the evidence.

**B. Notice**

Respondents argue that Claimant did not comply with Ark. Code Ann. § 11-9-701 as to notice of or reporting her injury. Under that statute, an employee shall report an injury

to the employer in a specified manner; the employer is not responsible for benefits prior to receipt of the employee's report of injury. Ark. Code Ann. § 11-9-701(a)(1). Failure to give notice does not bar a claim if the employee had no knowledge that the condition arose out of and in the course of the employment. Id. § 11-9-701(b)(1)(B). The Commission has observed that "'subjective beliefs and lack of understanding,' if reasonable under the circumstances, appear to be exactly the type of situations which would excuse the failure to give notice under Ark. Code Ann. § 11-9-701(b)(1)(B)." Sherry v. McDonald's, Full Workers' Compensation Commission Opinion filed August 19, 1994 (E115727).

I find that Claimant's delay in reporting her injury does not bar her claim. She knew that her back began hurting the day after moving the playground equipment, but she ascribed her pain to having "just pulled some muscles or strained some muscles" which resulted (she thought) in a kidney infection. She did not know that she had a herniated disc. However, Claimant understood the true nature and cause of her condition after her September 24, 2003 MRI; she then reported the injury to the Respondent employer. Claimant's subjective pre-MRI belief concerning her condition was reasonable under the circumstances; therefore, her claim is not barred, under the exception in § 11-9-701(b)(1)(B). Compare Keller v. Kroger, Full Workers' Compensation Commission Opinion filed July 30, 1996 (E408308) (where, after an MRI revealed a herniated disc, a claimant then attributed her condition to a specific incident occurring a month earlier and filed a claim, the Commission excused notice under § 11-9-701(b)(1)(B) "because claimant was unaware of the nature of her injury or its likely causation until the... MRI").

### **C. Medical Benefits**

An employer shall promptly provide for an injured employee such medical treatment

as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). Reasonably necessary medical services “may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury.” Greer v. Phillip Mitchell Construction, Full Workers’ Compensation Commission Opinion filed February 14, 2003 (E906565) (citations omitted). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Hamilton v. Gregory Trucking, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (March 16, 2005).

I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to reasonably necessary medical benefits. Claimant’s compensable injury was a factor in her need for medical treatment - she did not have these symptoms, and consequently need treatment, until she sustained her injury. She has a herniated disc; her condition has been treated by medications, physical therapy, and epidural and nerve block procedures. On March 3, 2004, Dr. Blankenship observed that she “had appropriate medical treatment with the steroid medication.” His records indicate that Claimant experienced some pain relief from her medications and physical therapy while under his care. Nonetheless, she continues to experience pain, remains under Dr. Lockyer’s care, and is under work restrictions. Thus, the record reflects Claimant’s need for medical treatment in connection with her compensable gradual onset back injury.

**D. Temporary Total Disability Benefits**

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

employee suffers a total incapacity to earn wages. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 172, 72 S.W.3d 889, \_\_\_ (2002). “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 hearing 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).

I find that Claimant sustained her burden of proving her entitlement to temporary total disability benefits from September 19, 2003 to June 1, 2004. She was discharged by the Respondent employer on September 19, 2003 because could not work at the center due to her restrictions; she could not work elsewhere due to her physical condition. She credibly testified to her inability to work within that time frame; her testimony is corroborated by Dr. Lockyer’s restrictions.

However, the record establishes that Claimant’s healing period ended on June 1, 2004. On that date Dr. Blankenship assessed “[r]esolving myofascial and mechanical lower back pain,” recommended continued home exercise, and planned on seeing Claimant back “only as needed.” While Claimant remains under work restrictions and Dr. Lockyer’s care, she could not identify any medical procedure that has been recommended to improve her condition, nor did the medical records reveal any recommended procedure or treatment. She testified that surgery has not been recommended, and that she does

“not really” want surgery; her physical therapy is “all finished now.” Based upon the foregoing, it is apparent that Claimant’s low back is as far restored as the permanent nature of her injury will permit; the record does not establish anything in the way of treatment that will improve her condition.

Therefore, Claimant is entitled to temporary total disability benefits from September 19, 2003 until June 1, 2004. Claimant’s healing period ended on that last date.

**E. Credit for Payments by Other Providers**

Claimant testified that some of her medical bills have been paid under her husband’s health insurance policy. Ark. Code Ann. § 11-9-411(a) provides that “[a]ny benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services... whether those benefits were paid under a group health care service plan of whatever form or nature.” Therefore, Respondents are entitled to a reduction in medical benefits payable to Claimant equal to the amount of benefits Claimant previously received under her husband’s health insurance policy. See Dooley v. Automated Conveyor Sys., Inc., 84 Ark. App. 412, 143 S.W.3d 585 (2004).

**F. Attorney’s Fee**

Since Claimant’s compensable injury occurred after July 1, 2001, 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; the

parties stipulated that Respondents controverted her claim in its entirety. 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 August 26, 2003, and at all other relevant times.
3. Claimant's average weekly wage is \$310.00; her temporary total disability benefits rate is \$207.00.
4. Respondents controvert this claim in its entirety.
5. Claimant proved by a preponderance of the evidence that she sustained a compensable gradual onset injury to her back which first became apparent to her on August 26, 2003. Her injury arose out of and in the course of her employment, because she first noticed a problem with her back after performing her job duties of lifting and arranging furniture, shoveling pea gravel, and lifting and carrying (while bent over) heavy playground equipment. However, she could not identify a specific causal incident or specific time and place of occurrence. Her injury caused physical harm requiring medical services: she sustained a herniated disc, requiring treatment such as medications, physical therapy, and epidural and nerve block procedures. Since Claimant was asymptomatic prior to performing her enumerated job duties in August 2003, but became symptomatic after lifting the playground furniture, I find that Claimant's injury is the major cause of her disability or need for treatment. Finally, Claimant's September 24, 2003 MRI revealed a herniated disc at L5-S1; this finding, together with the medical records, constitutes medical evidence supported by objective findings that establish the injury.

6. Claimant's failure to immediately report her injury does not bar her claim, pursuant to Ark. Code Ann. § 11-9-701(b)(1)(B). She did not know she had a herniated disc until her September 24, 2003 MRI. Her subjective pre-MRI belief concerning her condition and its cause was reasonable under the circumstances; she was unaware of the true nature of her injury or its cause until after her MRI.

7. Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to reasonably necessary medical benefits in connection with her injury. Claimant did not have her symptoms, and consequently need treatment, until she sustained her August 2003 compensable gradual onset injury in her back. Treatment since that injury provided some relief, but she continues to experience pain, remains under a doctor's care, and is on work restrictions.

8. Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 19, 2003 to June 1, 2004. Claimant credibly testified to her inability to work within that time frame. However, as of June 1, 2004, based upon Claimant's testimony and the medical record, it is apparent that Claimant's low back is as far restored as the permanent nature of her injury will permit; the record does not establish anything in the way of treatment that will improve her condition.

9. Respondents are entitled to a reduction in medical benefits payable to Claimant equal to the amount of benefits Claimant previously received under her husband's health insurance policy, pursuant to Ark. Code Ann. § 11-9-411(a). Her husband's health insurance policy paid some of her medical bills.

10. Claimant's attorney is entitled to the maximum prescribed attorney's fee under

Ark. Code Ann. § 11-9-715. The parties stipulated that Respondents controverted this claim, which would include the indemnity benefits awarded in this opinion.

**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.**

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D. FRANKLIN AREY, III  
Administrative Law Judge

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DFA/ml