

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBERS F306079, F406144, F509749**

**LORI D. WILLABY, EMPLOYEE**

**CLAIMANT**

**BEVERLY HEALTHCARE, EMPLOYER  
INSURANCE COMPANY OF PA., CARRIER**

**RESPONDENT #1**

**NEWTON COUNTY NURSING HOME, EMPLOYER  
CANNON COCHRAN MANAGEMENT, CARRIER**

**RESPONDENT #2**

**OPINION FILED OCTOBER 10, 2006**

A hearing in this case was conducted on May 4, 2006, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Harrison, Boone County, Arkansas.

Claimant was represented by Jason Hatfield, Attorney at Law, Fayetteville, Arkansas.

Respondent #1 was represented by Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

Respondent #2 was represented by James A. Arnold, Attorney at Law, Fort Smith, Arkansas.

**STATEMENT OF THE CASE**

A prehearing telephone conference was held on this claim on December 6, 2005. A Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to five stipulations. Three of these stipulations are contained in the Prehearing Order and were confirmed at the hearing; the parties agreed to the remaining two stipulations at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed between Claimant and Respondent #1 on October 23, 2002 and May 29, 2003 and at all other relevant times.

2. The employee-employer-carrier relationship existed between Claimant and Respondent #2 on April 8, 2004 and at all other relevant times.

3. Respondent #1 and Respondent #2 controvert additional benefits.

4. When employed by Respondent #1, Claimant's average weekly wage was \$320.00.

5. When employed by Respondent #2, Claimant's temporary total disability rate was \$167.00 and her permanent partial disability rate was \$154.00.

At the May 4, 2006 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 low back injury on October 23, 2002.

2. Whether Claimant sustained a compensable injury, aggravation, or recurrence of her low back injury on May 29, 2003.

3. Whether Claimant sustained a compensable injury, aggravation, or recurrence of her low back injury on April 8, 2004.

4. Whether Claimant is entitled to medical treatment.

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

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

## DISCUSSION

After working in a number of factory or clerical jobs, Claimant obtained her CNA license in 2001 and then began working for Respondent #1. She summarized her job duties as “total care of the residents” including getting them in and out of bed. Claimant denied any back or spine problems prior to her employment by Respondent #1. She described an incident in October of 2002.

Q. Tell us what happened on October 23rd, 2002.

A. Well, they had a -- I was on E Hall, and B Hall had a complication and they come and got me to go down there and help them. And they had put about a 280 pound lady in a lift, and it malfunctioned and I caught her. So I was squatted down working on the machine when she fell out of it.

Q. Okay. And did you experience any pain as a result of this incident?

A. Yeah, quite a bit of pain, but there wasn't -- I mean, I went to the doctor the next day. It wasn't something I went right then for. It kind of set in overnight; it got really bad as the night went on.

Q. Where was the pain located?

A. Lower back.

Claimant reported this incident the day that it occurred. She presented to Dr. Mahlon Maris the next day with the approval of Respondent #1. He initially returned her to work on light duty, but later returned her to full duty.

Claimant missed “[a]bout four days” of work as a result of the October 23, 2002 injury. She described her back condition after she returned to work.

Well, after I went back to full duty, it bothered me sometimes. And it wasn't severe, but I think -- I always thought it was just muscles, needed to get muscles strengthened back up.

....

Like I said, it wasn't all the time. It didn't bother me all the time. Once I went back to full duty, it bothered me in the beginning and then it kind of got better.

When asked if she "g[ot] over" this incident, Claimant replied: "In time, yeah."

While still employed by Respondent #1, Claimant experienced a second incident in May of 2003.

Q. And why don't you tell us what happened on May 29, 2003?

A. I came in early that day. It was like -- I come in at four o'clock, because they were short-handed. And we got everybody up, and I went down to the dining room, so we could feed them breakfast, and I picked up a chair, a table chair, and it just tore it all up again.

Q. Okay. And, when you say tore all up again, what --

A. It brought me to my knees that time. It hurt pretty bad, so --

Q. What hurt very --

A. My lower back.

Her pain was in the same area as before, "[a]ll over the lower back." She reported the incident and received approval to present to Dr. Maris.

Conservative treatment did not satisfy Claimant. She recalled that Dr. Maris treated her with physical therapy, pain medication, and muscle relaxers. She believes the physical therapy "just made it worse" and that this conservative treatment has not yet helped her

back pain. Claimant confirmed that she was released to return to full duty in September of 2003 by Dr. Don Vowell. Nonetheless, she did not return to work for Respondent #1 because she was still having back problems.

Due to her continuing back problems and numbness in her legs, Claimant eventually began working for Respondent #2 on March 5, 2004 as a receptionist rather than returning to her CNA duties. She advised Respondent #2 of her back condition when she was hired. Although her regular duties consisted of “[n]ormal office work,” she still did CNA work on occasion: “When they needed help out on the floor, yeah, I would go out on the floor.” Claimant could not consistently work a regular schedule; she would sometimes leave early, or not come in at all, due to her pain.

Claimant described a third incident in April of 2004, while in Respondent #2's employ.

Q. What happened on April 8, 2004?

A. They asked me to go -- they were really short-handed, and they asked me to go out to help, and I went out to take a lady to the doctor. And, when I was transferring her back and forth, I re-injured myself, again.

Q. And where was the pain located?

A. Lower back.

Q. Was it in a similar location as before?

A. Same. Yeah, same location.

Q. Have you ever been pain-free, in your low back, since May 29, 2003?

A. No.

Claimant was asked if she worked for Respondent #2 “through May”; she responded: “Somewhere in there, yeah.” She continued with conservative treatment and later applied for social security disability benefits. She remains on medication and would like to have the myelogram recommended by Dr. Luke Knox. She testified that she’d like to “[s]top the damage” and return to work.

Claimant was questioned extensively concerning her condition between the May 2003 and April 2004 incidents. She has used pain medications for her back since the May 29, 2003 incident. She explained why she did not return to work for Respondent #1 after this incident, despite being released by Dr. Vowell in September of 2003: “Because my back was still bothering me. I was still having problems.” Respondent #2’s attorney questioned Claimant about her condition on cross-examination:

Q. And, despite the fact that Dr. Vowell released you to return to work without restrictions, were you able to?

A. No.

Q. Despite the fact that he released you from treatment, were you even any better than you had been when you first lifted the chair [in May of 2003]?

A. No.

Q. In addition to the low back problems, did you also have numbness into both legs?

A. Yes.

Q. And have you continued to have all of those symptoms?

A. Yes.

Q. The low back pain and the numbness in both legs, consistently and continually, ever since you lifted the chair?

A. Yes.

....

Q. Did you have any new symptoms, any pain or numbness in any part of your body, after the April [2004] incident at Newton County, that you hadn't already been having since you lifted the chair?

A. No.

Respondent #1's attorney further explored this matter on recross-examination.

Q. Your words are, "I transferred a resident [in April 2004], and did it all over again."

A. I hurt my back, in other words. It hurt my back. It pulled it again.

Q. But your testimony today was that it never had gone away, so how could you do it all over again?

A. Well, there's -- this is my opinion of it. There's pain that you can deal with, and there's pain that you can't deal with. And I was always in pain, but sometimes I slip up and it makes things worse. Still, today, it does that.

Claimant received treatment from a number of doctors. Dr. Maris provided treatment needed due to her first and second incidents, until she was examined by Dr. Vowell in August of 2003. After he released Claimant, Dr. Margo Lockyer treated her and made her referral to Dr. Knox; she presented to Dr. Knox in August of 2005.

On October 24, 2002, the day after her first incident, Claimant presented to Dr. Maris' clinic. His note of that date records that she complained of low back and leg pain,

increased swelling, and spasms. She gave a history of catching a falling patient while in a squatting position. Upon examination, Dr. Maris assessed acute lumbar strain and prescribed a number of medications, including Flexeril; he took Claimant off work until October 28, 2002. In a letter dated September 1, 2005, Dr. Maris was asked: "Did you treat Lora Willaby for low back spasms on October 24, 2002?" Dr. Maris responded "Yes."

Dr. Maris continued to treat Claimant for less than a month. She reported that her back pain was better on October 28, 2002, but that she still had spasms. Dr. Maris prescribed physical therapy and returned Claimant to work with restrictions. On November 4, 2002, Claimant reported that her back felt much better and that she worked okay without specific discomfort. She also reported that physical therapy helped. Following an examination Dr. Maris continued Claimant on medications, physical therapy, and work restrictions. On November 11, 2002, Claimant reported continuing muscle spasms over the past few nights. Dr. Maris continued her Flexeril; he also continued her on a period of light duty, then permitted her to return to work on full duty.

The next medical record in evidence is dated May 29, 2003, the date of Claimant's second incident. A note of that date records this history: "Was assigned to help [with] feeding in dining room, was not wearing a support belt, leaned forward beyond base of feet to pick up a dining room chair ... & felt sudden onset pain in low back with radiation into both buttocks/hips." Upon examination, Dr. Maris assessed acute lumbar strain and prescribed medications, including Celebrex and Skelaxin. Claimant was taken off work.

When asked in the September 1, 2005 letter if he “treat[ed] Lora Willaby for low back spasms on May 29, 2003,” Dr. Maris responded “Yes.”

Claimant continued to receive treatment from Dr. Maris; his assessment remained the same, and he continued her on medications. She reported on June 9, 2003, that physical therapy “makes her back pain worse.” She underwent an MRI of her lumbar spine on June 13, 2003. That study resulted in the following impression:

1. Mild degenerative disease at 2-3 and 3-4.
2. Mild broad based annular bulge at 3-4.
3. Small annular fissure at 4-5.
4. No herniated nucleus pulposus or significant spinal stenosis.

Dr. Maris referenced this study in his note dated June 12, 2003. He amended his assessment of Claimant to include degenerative disc disease as well as strain.

Although Claimant attempted to return to work, she reported on June 18, 2003 that she “[w]ent to work, did not do any lifting & the pain became intolerable after 2-3 hrs. Took ½ Skelaxin, [no] help.” Claimant complained of pain across her back and tingling down her legs to her feet. On June 23, 2003, Claimant presented to Dr. Maris continuing to complain of pain and muscle spasms. A note of that date seems to indicate the presence of spasms and assesses “L/S strain work related.” Claimant reported that she was taking less medications and doing her exercises, and that her back felt better on June 27, 2003. However, on July 22, 2003, she “reinjured back” at work without a specific incident. Claimant was taken off work; Dr. Maris went so far as to discuss a possible change of

occupation during a July 23, 2003 examination. He kept Claimant off work, prescribed Flexeril, and made a referral to Dr. Vowell.

Claimant presented to Dr. Vowell twice; his first note is dated August 13, 2003. After giving the history of her two incidents, Claimant reported that “her pain is in her lower back, and she has a lot of burning in her lower back with pain into her buttocks with intermittent numbness in her legs and feet...” Although Claimant complained of spasms, Dr. Vowell was unable to palpate spasms upon examination. He recorded the following impression: “[T]his lady has a low back sprain. She may have an annular injury of her disc at L4-5.” He continued Claimant’s Flexeril, adjusted other medications, prescribed aqua therapy three times a week for four weeks, and permitted work only under certain restrictions.

Claimant again presented to Dr. Vowell on September 9, 2003. He recorded that Claimant gave “a lot of excuses that she can’t take her medicine.” He opined: “I really have nothing else to offer this lady. I think she is able to work. I am going to return her to her full job status.”

Dr. Lockyer’s first note is dated April 9, 2004, the day after Claimant’s third incident. A note of that date records that Claimant “hurt back at work yesterday transporting a resident from toilet”; she complained of back pain and numbness down both legs. Although the writing is not entirely legible, this note seems to make reference to a finding of “paraspinal spasm.” Claimant was assessed with lumbar strain and prescribed Flexeril

for “muscle spasm.” No improvement was reported during a May 6, 2004 examination, so Dr. Lockyer requested an EMG and nerve conduction value study. She also continued Claimant’s Flexeril.

Claimant underwent the requested study on May 7, 2004. This study produced the following impression: “1. Normal nerve conduction values, no evidence of neuropathy. 2. Abnormal EMG, suggest L-5 radiculopathy bilateral.” An MRI of Claimant’s lumbar spine dated May 14, 2004, recorded “[n]o change” from the previous MRI dated June 13, 2003; the second study also noted “[n]o HNP or spinal stenosis is identified.”

Claimant continued to see Dr. Lockyer from May 17, 2004 through July 13, 2005. Notes within this time period document Claimant’s chronic low back pain and her prescribed medications, including pain relievers. She underwent an MRI of her lumbar spine on July 11, 2005. It produced the following opinion: “Lower lumbar degenerative disc disease which is moderate at L4-5 where there is mild posterior disc protrusion and a small annular fissure. There is no evidence of disc herniation or significant neural encroachment.” Dr. Lockyer’s July 13, 2005 note records Claimant’s gradually worsening pain; she referred Claimant to Dr. Knox.

Dr. Knox examined Claimant on August 18, 2005. He recorded Claimant’s history and that she “has been through the gambit of conservative measures related to back and leg pain....” Upon examination, he found “significant paraspinal muscle spasm....” He read Claimant’s MRI as depicting “a small, herniated disc at 4-5.” Dr. Knox was not convinced

that a surgical option existed; however, given Claimant's earlier "positive electrical studies" he recommended a lumbar myelogram. Depending on what it revealed, the doctor "would reconsider the possibility of surgical decompression."

Reference has been made to the September 1, 2005 letter to Dr. Maris, including a questionnaire. He was asked, "Can a mild broad based annular bulge at L3-4 or small annular fissure at L4-5 result in back pain?" Dr. Maris responded "Yes." When asked if the same findings could cause "pain and numbness in legs," Dr. Maris again responded "Yes." He agreed that "a mild broad based annular bulge at L3-4 or a small annular fissure at L4-5" could result from "lifting incidents." He confirmed that his opinions and answers to the questions were based upon a review of his file and reports and were given to a reasonable degree of medical certainty.

Respondent #2's Exhibit #1 contains three notes from Dr. Tom Langston, dated April 10, April 15, and May 1, 2003. Thus, these notes were compiled shortly before Claimant's second incident in May of 2003. None of the notes record any complaints by Claimant of back or leg pain. This exhibit also contains another nerve conduction and EMG study, dated July 11, 2005. This study produced the following impression: "1. Normal nerve conduction values, no evidence of neuropathy. 2. Abnormal EMG, consistent with L-5 radiculopathy bilateral."

Claimant's Exhibit #2 is patient profile listing for Claimant, issued by Sullivan Main Street Pharmacy. Claimant testified that all of her prescriptions were filled by this

pharmacy. Respondent #1's attorney noted a gap in Claimant's prescriptions between October 14, 2003 and April 9, 2004. Asked to explain this gap, Claimant replied: "Probably because I still had a lot left over from what Maris and them had done.... I was getting samples, too."

**A. Claimant's October 23, 2002 Injury**

Claimant must prove that she sustained a compensable injury.

"Compensable injury" means: ... an accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence.

Ark. Code Ann. § 11-9-102(4)(A)(i); see Hargis (War Eagle) Transp. v. Chesser, 87 Ark. App. 301, \_\_\_ S.W.3d \_\_\_ (2004). A compensable injury must be established by medical evidence supported by objective findings. 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).

The employee must sustain her burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). "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 her October 23, 2002 low back injury is compensable. Claimant's injury is accidental: on October 23 2002, she caught a falling, heavysset patient, while squatting down repairing a machine. This caused physical harm to her body in the form of low back pain. The accidental injury arose out of and in the course of her employment. Her job as a CNA required her to provide "total care of the residents"; she was engaged in her job duties at the time she sustained her injury. Her accidental injury required medical services. Dr. Maris examined Claimant the day after the incident and assessed an acute lumbar strain. He prescribed medications and other conservative treatment, including physical therapy; he also took Claimant off work for a short period.

Claimant's compensable injury is established by medical evidence supported by objective findings. The notes of Dr. Maris, as well as his answers to the September 1, 2005 questionnaire, are medical evidence in support of this claim. Claimant complained of spasms; Dr. Maris affirmed that he treated spasms; and he prescribed Flexeril for her condition. These constitute objective findings. See Fred's, Inc. v. Jefferson, 361 Ark. 258, 262-65, \_\_\_ S.W.3d \_\_\_, \_\_\_ (2005).

**B. Claimant's May 29, 2003 Injury**

Claimant asserts that on May 29, 2003, she sustained either a compensable injury, an aggravation, or a recurrence of her earlier low back injury. The rules regarding compensable injuries are outlined above.

An aggravation is a new injury resulting from an independent incident; being a new injury with an independent cause, it must meet the requirements for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 810, 20 S.W.3d 900, \_\_\_ (2000) (citations omitted). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury; it exists when the second complication is a natural and probable consequence of a prior injury. Id. at 809, 20 S.W.3d at \_\_\_ (citations omitted). The basic test is whether there is a causal connection between the two episodes. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 71, 644 S.W.2d 321, \_\_\_ (1983); see Smith v. O'Reilly Automotive, Inc., Full Workers' Compensation Commission Opinion filed April 18, 2006 (F303464 and F303465).

I find that Claimant did not sustain a recurrence in May of 2003. The proof demonstrates that her May 29, 2003 incident is not a natural and probable consequence of her compensable October 23, 2002 low back injury. She was able to return to full duty after the October 2002 injury: "[I]t bothered me in the beginning and then it kind of got better." Dr. Langston's three medical records from April and early May of 2003 are void of any low back or leg pain complaints.

I find that Claimant's May 29, 2003 incident is an aggravation of her earlier low back injury. There is an independent cause: Claimant "picked up a chair ... and it just tore it all up again." Her pain was in the same area as before, in her lower back. This constitutes a new injury with an independent cause. Compare King v. Peopleworks, Full Workers'

Compensation Commission Opinion filed December 19, 2005 (F114039 and F207329) (discussing a finding of a “compensable aggravation”).

Since this is an aggravation, Claimant must meet the requirements for a compensable injury; I find that she sustained her burden of proving by a preponderance of the evidence that her May 29, 2003 aggravation is compensable. Claimant experienced an accidental injury: she was at work, in the dining room, when she picked up a chair on May 29, 2003 and felt immediate pain. This caused physical harm to Claimant’s body; she recalled that the incident “brought me to my knees that time. It hurt pretty bad....” She felt this pain “[a]ll over the lower back.” Her injury arose out of and in the course of her employment: she was at Respondent #1's facility, engaged in her CNA duties, at the time. Claimant’s accidental injury required medical services. Dr. Maris examined Claimant on the day of the incident, assessed an acute lumbar strain, took Claimant off work, and prescribed medications. She began physical therapy shortly thereafter.

There is medical evidence supported by objective findings to establish Claimant’s compensable May 29, 2003 aggravation. Medical records on and after the date of the injury provide medical evidence. Objective findings include the June 13, 2003 MRI that revealed a mild broad based annular bulge at L3-4 and a small annular fissure at L4-5. In response to the September 1, 2005 questionnaire, Dr. Maris confirmed that he treated Claimant for low back spasms on May 29, 2003. These constitute objective findings.

**C. Claimant's April 8, 2004 Injury**

Claimant asserts that on April 8, 2004, she sustained either a compensable injury, an aggravation, or a recurrence of her earlier low back injury. Again, the applicable rules are outlined above.

I find that Claimant's April 8, 2004 injury is a recurrence of her earlier low back injury. The proof demonstrates that her pain did not resolve after the May 29, 2003 incident; her symptoms on and after April 8, 2004 were identical to her symptoms after May 29, 2003; and she continued to take medications between these incidents. Although she did testify to an incident on April 8, 2004 (transferring a patient), Claimant's testimony, on the whole, demonstrates that her back condition never resolved after her May 29, 2003 injury. In the interim between the second and third incidents, her pain might vary in degree, but not in kind and in location. Thus, her third incident is merely another period of incapacitation resulting from her second incident.

**D. Medical Treatment**

Claimant seeks continuing medical treatment for her back condition. She made specific reference to the myelogram suggested by Dr. Knox.

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 need not establish that the compensable injury is the major cause for the need for medical treatment; rather, it is sufficient if the compensable injury is a factor in the resulting need for medical treatment. See Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004); Ballance v. K.C. Contracting, Full Workers’ Compensation Commission Opinion filed August 30, 2004 (F204392). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Hamilton v. Gregory Trucking, 90 Ark. App. 248, \_\_\_ S.W.3d \_\_\_ (2005).

I find that Claimant sustained her burden of proving that she is entitled to additional medical treatment at the expense of Respondent #1. For example, Dr. Knox recommends a lumbar myelogram. Depending upon the result of that study, he may reconsider the possibility of surgical decompression. Thus, this treatment is necessary to accurately diagnose the nature and extent of Claimant’s condition, and may lead to the reduction or alleviation of her symptoms. Further, Claimant testified to continuing pain which is being treated by medications. This also constitutes reasonably necessary medical services to reduce or alleviate her symptoms. In addition, her October 2002 compensable injury, as well as her March 2003 aggravation and the related April 2004 recurrence, are all factors

in her need for medical treatment. She did not have back or spine problems prior to her employment by Respondent #1; these injuries arose during that employment, and they are now factors in her resulting need for treatment.

#### **E. Temporary Total Disability Benefits**

Claimant seeks temporary total disability benefits. She missed four days of work in connection with her October 23, 2002 compensable injury. However, with the exception of her employment by Respondent #2, Claimant has not worked since the second incident in May of 2003. She confirmed that Respondent #1 paid some temporary disability benefits after her May 2003 incident. However, her testimony was unclear as to how long those benefits had been paid, and no other proof was offered as to the amount paid.

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, 361 Ark. 258, 265, \_\_\_ S.W.3d \_\_\_, \_\_\_ (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).

I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits commencing May 30, 2003 to a date yet to be determined, excluding the period that she worked for Respondent #2, from March 5, 2004 until May 31, 2004. Claimant remains within her healing period. She continues to receive medical treatment in the form of prescriptions, and Dr. Knox recommends a myelogram for the purpose of determining whether further treatment will improve her condition. She has been disabled since the May 2003 second incident. Her compensable aggravation of that date worsened her back condition and caused sufficient pain that she has not been able to work. Thus, she is incapacitated from earning wages.

The period that Claimant was employed by Respondent #2 should be excluded because she did earn wages during this time. She testified that she began working for Respondent #2 on March 5, 2004. She did not dispute Respondent #1's attorney's suggestion that she worked for Respondent No. 2 "through May" of 2004. Although Claimant testified that she was not able to work some days for Respondent #2, and could only work partial days on other occasions, Claimant never offered specific proof sufficient to determine whether she was entitled to temporary total or temporary partial disability during this employment.

Nonetheless, this unsuccessful attempt to work for Respondent #2 while she was still within her healing period does not affect her eligibility for temporary total disability benefits after the attempt. See Morgan v. Quick Lay Pipe, Full Workers' Compensation Commission Opinion filed June 16, 2006 (F409390); compare Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 134-36, 84 S.W.3d 878, \_\_ (2002) (in a scheduled injury case, finding that an unsuccessful attempt to return to work does not bar temporary total disability benefits). If, during the healing period, an employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, her temporary disability is deemed total. Farmers Cooperative v. Biles, 77 Ark. App. 1, 5-6, 69 S.W.3d 899, \_\_ (2002). Claimant's uncontroverted, credible testimony is that she could not consistently work for Respondent #2 without pain and discomfort.

I acknowledge Dr. Vowell's release of Claimant to return to full duty in September of 2003. He apparently believed Claimant was engaged in some form of malingering. However, I find Claimant's testimony as to her inability to work to be more credible. Her testimony is corroborated by the medical records, including her subsequent studies and Dr. Knox's ability to palpate spasms upon examination. The preponderance of the evidence does not support Dr. Vowell's assertion that Claimant could return to work in September of 2003.

To summarize, Respondent #1 is responsible for paying claimant temporary total disability benefits from May 30, 2003 to a date yet to be determined, with the exception of

that time that she was employed by Respondent #2, from March 5, 2004 through May 31, 2004. Claimant remains within her healing period. For the time specified, she was incapable of earning the wages she received at the time of her compensable aggravation on May 29, 2003. Respondent #1 is entitled to a credit for any temporary total disability benefits already paid to Claimant since May 29, 2003.

**F. Attorney's Fee**

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). Respondent #1 controverts additional benefits. Further, Claimant is awarded temporary total disability benefits for the period specified above. Therefore, pursuant to the statute, Claimant is entitled to an award of an attorney's fee on the amount of temporary total disability benefits awarded herein.

\_\_\_\_\_ **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 between Claimant and Respondent #2 on April 8, 2004 and at all other relevant times.
3. Respondent #1 and Respondent #2 controvert additional benefits.
4. When employed by Respondent #1, Claimant's average weekly wage was \$320.00.

5. When employed by Respondent #2, Claimant's temporary total disability rate was \$167.00 and her permanent partial disability rate was \$154.00.

6. Claimant sustained her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back on October 23, 2002. This injury was accidental: on that date, while squatting down repairing a machine, Claimant caught a falling, heavyset patient. This caused physical harm to her body in the form of low back pain. The accidental injury arose out of and in the course of her employment, in that Claimant was engaged in her job duties at the time. Medical services were required, in the form of medications and other conservative treatment. The medical records provide medical evidence, which is supported by objective findings in the form of a doctor's treatment for spasms and prescription of Flexeril.

7. Claimant sustained her burden of proving by a preponderance of the evidence that on May 29, 2003 she suffered a compensable aggravation of her earlier low back injury. Claimant's act of picking up a chair, which resulted in back pain, constitutes an independent cause for her aggravation. This act constitutes an accidental injury: on May 29, 2003, Claimant was at work, in the dining room, when she picked up the chair and felt immediate pain. Her injury caused physical harm, in the form of pain in her low back. The injury arose out of and in the course of her employment: Claimant was engaged in her CNA duties at the time. Medical services were required, in the form of medications and physical therapy. Medical records provide medical evidence, and objective findings in support of that evidence

include Claimant's June 13, 2003 MRI and a doctor's confirmation that he treated Claimant for low back spasms.

8. Claimant sustained her burden of proving by a preponderance of the evidence that on April 8, 2004 she experienced a recurrence of her earlier low back injury. Claimant's pain did not resolve after the May 29, 2003 incident; her symptoms on and after April 8, 2004 were identical to her symptoms after May 29, 2003; and Claimant continued to take medications between her second and third incidents.

9. Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her back condition at the expense of Respondent #1. Her continuing need for medications, as well as the recommended myelogram, are examples of reasonably necessary medical services required to diagnose the nature and extent of Claimant's condition and to reduce or alleviate her symptoms. Claimant did not have back or spine problems prior to her employment by Respondent #1; her October 2002 compensable injury, as well as her March 2003 aggravation, are thus at least factors in her need for medical treatment.

10. Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to additional temporary total disability benefits from May 29, 2003 to a date to be determined, with the exception of the time that she was employed by Respondent #2 from March 5, 2004 until May 31, 2004. Claimant remains within her healing period: she still requires medications, and a lumbar myelogram is recommended to explore the possibility of additional treatment. She has been disabled since the May 2003 incident; her

compensable aggravation of that date worsened her back condition and caused sufficient pain that she has not been able to work. Although she earned wages during the time of her employment by Respondent #2, this constitutes an unsuccessful attempt to work and does not affect Claimant's eligibility for temporary total disability benefits after the attempt.

11. Claimant is entitled to an award of an attorney's fee on the amount of temporary total disability benefits awarded herein. Respondent #1 controverted additional benefits.

**AWARD**

Respondent #1 is 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 Respondent #1 in accordance with Ark. Code Ann. § 11-9-715 and Death & 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

DFA/ml