

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. G905930**

**KENNETH L. ANDERSON, EMPLOYEE**

**CLAIMANT**

**CENTRAL ARKANSAS WATER, EMPLOYER**

**RESPONDENT**

**CENTER STREET RISK SERVICES,  
CARRIER/TPA**

**RESPONDENT**

**OPINION FILED FEBRUARY 2, 2022**

A hearing was held before ADMINISTRATIVE LAW JUDGE KATIE ANDERSON in Little Rock, Pulaski County, Arkansas.

Claimant, Mr. Kenneth L. Anderson, was represented at the hearing by Ms. Laura Beth York, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Mr. Lee J. Muldrow, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on November 4, 2021, in Little Rock, Arkansas. A Prehearing Order was previously entered in this case on September 16, 2021.

**Stipulations:**

During the prehearing telephone conference and/or during the hearing, the parties agreed to the following stipulations. They read:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed on August 20, 2019, at which time Claimant sustained an injury to his lower back.
3. Respondents have controverted the claim in its entirety.
4. At the time of the incident, Claimant was earning sufficient wages to entitle him to compensation rates for temporary total disability (TTD)/permanent partial disability (PPD) of \$457.00/\$343.00.

5. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

Issues:

By agreement of the parties, the issues to be litigated at the hearing were as follows:

1. Whether Claimant sustained a compensable injury to his low back on August 20, 2019.
2. Whether Claimant is entitled to initial medical treatment for his low back injury.
3. TTD from August 20, 2019, to March 9, 2020.
4. Additional treatment for the low back injury.
5. Attorney's fees.
6. All other issues are reserved.

Contentions:

The following contentions were submitted by Claimant:

On August 20, 2019, Claimant was putting in a water line when his leg got stuck in the mud. He tried pulling his leg out and felt immediate pain in his low back. Respondents denied the claim in its entirety. Claimant sought treatment on his own. An MRI revealed a disk extrusion at L5-S1 that impinged the right S1 nerve root. Claimant underwent surgical repair on October 9, 2019. Claimant contends that he sustained a compensable low back injury in the scope and course of his employment, and that he is entitled to medical benefits, TTD benefits, and that his attorney is entitled to an attorney's fee. All other issues are reserved.

The following contentions were submitted by Respondents:

Respondents contend that Claimant's injuries did not arise out of and in the course of his employment.

Summary of Evidence:

The record consists of the hearing transcript of November 4, 2021, and the exhibits contained therein. Specifically, the following exhibits have been made a part of the record: Commission's Exhibit #1 included the Prehearing Order entered on September 16, 2021, and the parties' responsive filings; Claimant's Exhibit #1 consisted of fifty-eight (58) pages of medical records; Respondents' Exhibit #1 consisted of twenty-five (25) pages of medical records; Respondents' Exhibit #2 was a one (1) page New Employee Safety Orientation form; Respondents' Exhibit #3 was an eight (8) page document consisting of Respondent-Employer's Workers' Compensation Policy; and Respondents' Exhibit #4 was a one (1) page e-mail from Claimant to Respondent-Employer with his notice of resignation.

Witnesses:

During the hearing, Kenneth Anderson (Claimant, used interchangeably herein), Kevin Hall, Chris Shahan, Eric Smith, and Mark Ekelcamp testified at the hearing.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the evidence and other matters properly before the Commission, and after having had an opportunity to hear the testimony of the witnesses and observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code

Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. I hereby accept the aforementioned stipulations as fact.
3. Claimant proved that he sustained a compensable injury to his low back on August 20, 2019, while working for Respondent-Employer when he attempted to extricate his lower leg that was caught in the mud.

4. Claimant proved by a preponderance of the evidence that the medical treatment of record, to include the conservative treatment prescribed by Dr. Simpson in the October 2021 medical note, was reasonably necessary in connection with his compensable low back injury of August 20, 2019.
5. Claimant proved by a preponderance of the evidence that he was entitled to temporary total disability compensation from September 4, 2019, the last date he was able to work after his injury, until March 9, 2020, the date Claimant reached the end of his healing period when he was released at maximum medical improvement with no restrictions by Dr. Simpson.
6. Claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715.

### **CASE IN CHIEF**

#### Hearing Testimony:

#### Claimant:

Claimant was thirty-one (31) years old at the time of the hearing. He graduated from high school in 2009 and thereafter obtained his EMT certification from the University of Arkansas for Medical Sciences. He worked as an EMT for approximately three (3) years, and as a coroner for approximately six (6) months. He began working for Respondent-Employer in May of 2019 and worked there until he was injured on August 20, 2019. He explained that he worked as a water distribution specialist for Respondent-Employer. He stated that he was responsible for digging holes or trenches in the ground and routing water lines through to residential or commercial buildings.

On the day of the accident, August 20, 2019, he was working in Maumelle. He explained the incident as follows:

We were working on a water line running underneath the street, and I was in a hole on one side of the street. The guys on my crew were across the road using a machine that pushed [*sic*] water line underneath the roadway, and while I was in the hole on the other side, it was wet. I think it rained that day. It was real wet and sappy. I was standing in the hole about - - how I ended up getting about waste [*sic*] deep - - well, not quite waste [*sic*] deep, about a little over knee deep in mud. And

anybody will tell you once you get sucked into that mud it's hard to get out of it, especially with, you know, your rain boots on.

So I was trying to pull myself, use my shovel to stabilize myself, and when I was trying to twist and pull, I twisted and pulled and just felt a pop in my back. You know, I had some minor pain at the time. Didn't think nothing of it, you know? Continued my job, went on about my day, and then as the week progressed, the pain did as well and it got to the point where I tried to come back.

Like I said, as the week went on the pain got worse. Came back that following week, which I believe it was a Tuesday because I remember we had a long weekend in between, and the pain was just unbearable. I initially went to say something to my supervisor about it. I mentioned the time that it happened, and he immediately told me that because I waited to tell - - you know, tell him the injury, it was going to automatically be a three-day suspension.

Claimant further explained that there was no one else in the hole with him on August 20, 2019, when he injured his low back. Specifically, his co-worker was on the other side of the street, and his foreman, Mark Ekelcamp, was sitting in his truck doing paperwork. Claimant further testified that he did not report his low back injury to Ekelcamp that day. He testified that there were rumors among fellow employees at work that injuries on the job impacted bonuses, and because he was new to the job, he did not "want that target on [his] back." Moreover, John Hall, also a foreman, had previously mentioned that on-the-job injuries could impact bonuses and make the foreman "look bad."

Claimant stated that based on that information, he did not report the August 20, 2019, incident and that he just wanted to do his job and go home. Because his pain became worse over the next week and because there was a long weekend in between, he reported the incident on the following Tuesday to Chris Shahan, who was his supervisor. Claimant testified that Mr. Shahan's response was that Claimant would be subject to an automatic three (3)-day suspension since he had not reported the August 20, 2019, incident immediately. As a result of Mr. Shahan's response, Claimant decided to try to "live with it" and did not officially report the August 20, 2019, incident

that day. He continued to work that day, and the pain became unbearable. Claimant did not ask for medical treatment at the end of that day. However, Claimant testified that when he spoke with Mr. Shahan again, Mr. Shahan told Claimant that “he would call Kevin [Hall] himself and he would get back with me.”

Claimant’s first medical visit for his back was when he saw Dr. David Gerson, his primary care physician, on September 4, 2019. Claimant testified that he first learned at his deposition that Dr. Gerson’s report stated “left-sided, left lower leg, no previous back injury, went to pick something up from the floor when he had sudden pain.” He testified that the report was inaccurate and confusing because he had explained to Dr. Gerson that he had gotten his foot stuck in the mud while at work. Claimant had also explained to Dr. Gerson that after the August 20, 2019, injury, his back pain ultimately became unbearable when he was installing meter boxes at work. Claimant stated, “So I don’t know if maybe the last thing I told him, the bending over, was the one thing that stuck and that’s what he documented, but the initial documentation that the doctor put down was not what I actually told him happened, so I’m not sure where the mix up there was.” Claimant also acknowledged the error in Dr. Gerson’s notes about the pain being in his left lower leg because all of his pain had been on the right side, and he had “never had really any complications with [his] left side.” After an x-ray, Dr. Gerson recommended an immediate MRI, which was performed the next day, on September 5, 2019. The MRI revealed a disc extrusion at L5-S1 that was impinging and traversing the right S1 nerve root. Claimant did not return to work after the MRI due to his pain.

On September 6, 2019, Claimant was taken to Concentra by Mr. Shahan. Claimant testified that after his visit to Concentra, his claim was denied. Nevertheless, he underwent a discectomy to address his low back issues on October 9, 2019. Claimant stated that he was ultimately released

by Dr. Simpson on March 9, 2020, and that he had not returned to work between September 4, 2019, and March 9, 2020. He stated that his wife was working, so the family had her income while Claimant was treating for his back injury. Claimant testified that he had always been a healthy person and that he had not had a previous low back injury prior to August 20, 2019.

Claimant sent an e-mail to Respondent-Employer on February 28, 2020, giving notice of his resignation from his employment. Thereafter, he was released by Dr. Simpson on March 9, 2020, and in following Dr. Simpson's advice to find other work than what he was doing previously for Respondent-Employer, he returned to work as an EMT with the Department of Defense on March 10, 2020.

As for his back symptoms, he stated that his back had "its ups and downs" and that some weeks were better than others. He stated that he had "a lot" of swelling in his back, and he took over-the-counter medication for his symptoms.

Claimant testified that as a new hire, he received a New Employee Safety Orientation checklist dated June 12, 2019, which he had signed, and he indicated that he had received a packet of new employee information, although he did not recall seeing the information during his onboarding with Respondent-Employer. He agreed that the packet included Respondent-Employer's Workers' Compensation Policy, which explained the process for reporting a work-related injury. Claimant agreed that the packet also appeared to have been revised after he had signed the checklist form.

On cross-examination, Respondents' attorney asked Claimant to confirm that Kevin Hall led Claimant's new employee orientation. However, Claimant testified that Kevin Hall had not taught his orientation class, and in fact, he had never met Kevin Hall. Claimant also testified that he did not recall if he was told during the orientation process that he had to report a work injury

immediately. However, Claimant agreed that the policy stated that a work injury had to be reported immediately or the employee would be suspended without pay for three (3) days, and he agreed that Mr. Shahan told him when he reported the incident that he would be suspended without pay for three (3) days because he had not immediately reported the injury.

Claimant confirmed on cross-examination that he was released to return to work by Dr. Simpson and found other full-time work as an EMT with comparable pay. Claimant confirmed that he voluntarily resigned from work with Respondent-Employer on February 28, 2020. Claimant testified that he did not receive any workers' compensation benefits after his injury and that most of his medical bills were paid through his group health insurance.

Regarding the September 3, 2019, conversation between Claimant and Mr. Shahan, Claimant testified that he reported to Mr. Shahan that day that his back was hurting, and he needed medical treatment; however, he did not state specifically that he hurt his back at work. Mr. Shahan responded stating that an on-the-job injury required a lot of paperwork and could cause "issues." The next day on September 4, 2019, the pain became unbearable, and he testified that he knew he had to report to Mr. Shahan that he had hurt himself on the job and that he needed to file a workers' compensation claim. Mr. Shahan responded that because of the late notice of the on-the-job injury, Claimant was subject to suspension without pay for three (3) days. On cross-examination, Claimant also stated that he visited his primary care physician's office that day, where an x-ray showed signs of a significant back injury; however, he did not go to the doctor until after he had spoken with Mr. Shahan.

Lastly, Claimant clarified that he had not had any prior back problems or injuries before August of 2019.



On redirect examination, Claimant clarified that Kevin Hall did not perform his new employee orientation, and he could not recall the female instructor's name. Claimant also testified that he had filed for social security disability benefits while he was off work; however, it was denied. He stated that he had not filed for short-term disability. Lastly, as for the conversations between Claimant and Mr. Shahan, Claimant confirmed the following:

Q: Okay. Now, there's some discrepancies here in terms of discussing an injury and reporting an injury; okay?

A: Uh-huh.

Q: Now, you mentioned to us that Mr. Shahan advised you of that three-day suspension.

A: Uh-huh.

Q: Was that the first time that you discussed the injury, or was that the first time you reported the injury?

A: I believe that was the first time I reported the injury, if I vaguely remember correctly. I remember telling him that my back was hurting and that he was like, "Well, you know, if you hurt it at work, you know, it's a big deal. It's paperwork. You know, there's going to be problems." And then I kind of felt like that was me - - that was a sign that I was going to have a target on my back, so I just dropped it and I tried to go work as much as I could. And then when it got to the point where I couldn't work anymore because of the continuous progression of the pain, that's when I went to him and I told him "I know we've discussed this before, but I'm going to have to, you know, do something." And that's when he immediately told me it'd be a three-day suspension.

Q: Okay. So the first time that you discussed the workers' comp claim with him and he advised you of that three-day policy, you didn't say I want to fill out the worker's comp paperwork right now?

A: No, ma'am. I did not.

Q: Okay. Was it offered to you that day?

A: No, ma'am. I was just told that - - I was just told that, you know, if I hurt myself at work it'd be a big deal and a lot of paperwork and it was not offered to me, no, ma'am.

Q: Okay.

Kevin Hall:

Kevin Hall, director of environmental health and safety at Respondent-Employer, testified that he had been employed there for eighteen (18) years. Mr. Hall testified that he personally knew the Claimant and that he had conducted Claimant's new employee safety orientation. Mr. Hall testified that during the orientation class the workers' compensation policy was covered in detail, including when and how to report an injury, and each employee received a copy of the policy. As the instructor moved through each of the orientation topics, the employees placed their initials beside each category that had been covered. Once the session was complete, the employees signed the document, and it was retained in each employee's file. Mr. Hall explained that there had been a revision to the policy since Claimant's hire date; however, he was "a hundred percent confident" that the reporting section (including the suspension language) had not changed in ten (10) years.

Mr. Hall testified that he was aware that Claimant had reported an injury on the job. Once notified, he instructed Mr. Shahan to take Claimant to Concentra. Mr. Hall agreed that he was not in any position to know if Claimant was hurt on the job or not, but that he could say that if he was injured on the job, he did not report it in accordance with the company's policy.

On cross-examination, Mr. Hall testified that he had, in fact, conducted the new employee orientation that Claimant attended; however, he admitted that he had not signed the new orientation checklist as the instructor. When asked why the company had a policy suspending a worker who failed to report an accident, Mr. Hall responded:

A: Sure. And so 13 years ago - - 12 or 13 years ago we were having a lot of issues at the company where employees were not reporting. They would come in three or four or five days after the alleged injury happened and so it was taking a lot of my time, a lot of supervisors' time, to go back and investigate the alleged injury and so we as a company decided that we needed to do something to prevent that from happening and so we created a

policy where if an employee did not report the injury immediate [sic] then we would have a disciplinary action put in place.

Q: So it's essentially the culture for employees to not want to immediately report their injury?

A: In the past it was difficult to get an employee to report on time, so we created a new policy - - added to our policy where they were trained and given the opportunity to report the injury like they're supposed to - -

Q: Okay.

A: - - in accordance with the workers' compensation law.

Thereafter, Mr. Hall testified that he received notice of Claimant's alleged work-related injury on September 3rd or 4th. He explained that generally, when he was notified of a work-related injury by an employee, he would have a conversation with that employee, conduct an investigation of the accident, and then speak to Mackie Tiner, the third-party administrator. In this case, however, he did not have a conversation with Claimant about his alleged work injury.

Mr. Hall testified that he was not aware that Claimant had any prior back issues and that Claimant would not have been required to report that before beginning a heavy-duty position. However, he stated that there was a pre-employment physical that new employees must obtain before starting work, and he agreed that Claimant had passed his pre-employment physical examination.

Chris Shahan:

Mr. Shahan testified that he was currently an assistant director for Respondent-Employer; however, he was previously one of Claimant's supervisors. Mr. Shahan testified that early in 2019, Claimant reported to him that he was having pain in his back and needed to see a doctor. At that time, Claimant did not report that his back pain was related to his work. After Claimant reported that his back pain was related to a work injury, Mr. Shahan informed Claimant that, per company

policy, he would be suspended for three (3) days for not timely reporting the injury. After he learned that Claimant felt that his injury was work-related, Mr. Shahan reported the situation to the safety supervisor, Mr. Hall, and then Shahan took Claimant to Concentra for treatment. Mr. Shahan stated that he did not have personal knowledge of whether Claimant's injury was work-related, but he could state that Claimant did not follow company procedures with regard to reporting the injury timely.

On cross-examination, Mr. Shahan testified that although he was Claimant's supervisor on or around August of 2019, he typically saw Claimant for a few seconds daily when Claimant walked by his office to clock in upon arrival at work. Claimant would then go to his truck to begin his job duties. Mr. Shahan was unsure if he had seen Claimant between August 20, 2019, and September 3, 2019.

Also on cross-examination, Mr. Shahan testified that Claimant reported to him on September 3, 2019, that his back was hurting and that he needed medical treatment. Mr. Shahan replied that Claimant would need to use a sick day. Mr. Shahan testified that on that day, he did not ask Claimant if his complaints of lower back pain had anything to do with a work injury. As a result, Mr. Shahan did not report to Mr. Hall that he and Claimant had a conversation regarding Claimant's back pain. Mr. Shahan testified that he notified Mr. Hall on September 3rd or 4th that Claimant had reported that his back pain was related to a work injury.

Eric Smith:

Mr. Smith testified that he was currently employed with Respondent-Employer and that he worked with Claimant in 2019. Mr. Smith testified that in June of 2019, he was experiencing some hip pain when he returned from vacation. When he returned to work, he and Claimant discussed

having a deep tissue massage. Specifically, Mr. Smith stated that Claimant told him that he would get a deep tissue massage periodically due to his low back pain.

On cross-examination, Mr. Smith testified that in June of 2019, he was a water distribution specialist for Respondent-Employer and worked with Claimant daily. Mr. Smith stated that he was aware of the company policy that failure to immediately report a work injury would result in a suspension. He also stated that he did not report the hip pain he was experiencing at work because he injured his hip while on vacation. He was unsure if he had completed any paperwork regarding the injury, but his supervisor was aware that he had injured his hip. Mr. Smith testified that he had back and hip pain for several weeks; however, he did not request medical treatment. He did not report to his supervisor that his hip pain had worsened when he was digging holes while on the job; rather, he “just worked through it.”

Mark Ekelcamp:

Mr. Ekelcamp testified that he was a distribution foreman for Respondent-Employer. He had the opportunity to work with Claimant and was working with him on the day Claimant allegedly injured his back while at work. That day, they were repairing and replacing water pipes near a country club in Maumelle. On August 20, 2019, he and Claimant were both working in a mud-filled ditch. Mr. Ekelcamp testified that while he did not observe any signs or have any indication that Claimant had injured himself that day, he could not state for certain that Claimant had not injured himself on August 20, 2019.

On cross-examination, Mr. Ekelcamp testified that Claimant had not complained of back pain prior to August 20, 2019, nor had he seen Claimant having trouble walking or exhibiting behavior indicating that he was in pain prior to the August 2019 event. He agreed with Claimant’s testimony that Claimant did not inform him that he had been injured on the job on August 20,

2019. When asked how long Mr. Ekelcamp had been aware that Claimant sustained a work-related low back injury, he stated that he learned of Claimant's injury two (2) months prior to the hearing.

Claimant's testimony on recall:

On recall, in response to Mr. Smith's testimony, Claimant testified that he had never had a deep tissue massage. He remembered that when Mr. Smith returned from vacation, Claimant had to assist Mr. Smith with his work.

Also on recall, Claimant reiterated that he had not received any medical treatment on his back prior to August 20, 2019. There were also no medical records to indicate that he had sought treatment for low back prior to August 20, 2019.

Medical Exhibits:

After a thorough review of the medical exhibits, the relevant medical records are summarized below.

Medical records showed that on September 4, 2019, Claimant visited his primary care physician, Dr. David Gerson, where Claimant reported that he had been experiencing low back pain (right sided) radiating down to the left lower leg and lateral toes. Dr. Gerson's notes indicated that Claimant had not had any prior low back pain and that he had sudden lancinating pain in his low back when he picked something up from the floor. Claimant's examination and imaging indicated that he needed an MRI on his low back. Dr. Gerson prescribed pain medication, anti-inflammatories, and muscle relaxers.

On September 5, 2019, Claimant's MRI revealed a lateral recess and foraminal disc extrusion at L5-S1 that was impinging the traversing right S1 nerve root.

On September 6, 2019, Claimant presented at Concentra with back and right leg/hip pain following a work incident where he tried to remove his right leg from a mud hole resulting in low

back and right hip pain. At Concentra, he was diagnosed with lumbar strain, bulging lumbar disc, and radiculopathy of the leg. Claimant was prescribed medication and was referred for an orthopedic evaluation. He was also given a referral for physical therapy. Clinic notes indicated that Claimant could return to work with the following restrictions: no lifting more than ten (10) pounds; may push/pull up to twenty (20) pounds up to three (3) hours a day; may bend up to three (3) hours a day; may engage in activities requiring trunk rotation up to three (3) hours a day; frequent position changes; no squatting; no kneeling; and no climbing ladders.

On September 16, 2019, Claimant saw Dr. Pervie Simpson for his complaints of back pain. Dr. Simpson's notes indicated that Claimant's pain began on August 20, 2019, and was worsening. Claimant described the incident to Dr. Simpson, who noted the following: "He states on 8/20 he got his foot stuck in some deep mud while working. He got his leg out by doing some twisting and felt a ripping feeling. He limped around for a couple of days, and he was putting in a meter box and he felt a sharp pain shoot into his ankle and this pain has been there ever since. He has been off work since 9/3/19. He denies any cardiac history, use of blood thinners, and DM." Dr. Simpson opined that Claimant had a herniated nucleus pulposus at L5-S1 on the right and had an absent ankle reflex on that side. He recommended a steroid injection for Claimant's low back pain.

Ultimately, on October 9, 2019, Claimant underwent a right L5/S1 discectomy. When Claimant returned for a post-operative visit on October 17, 2019, Dr. Simpson's notes indicated that Claimant was doing well; that he was not having any radicular pain; and that he should be off work for at least another two (2) months. Dr. Simpson noted that Claimant may or may not be able to return to his strenuous lifting job and that the determination would have to be made at a later date once he had additional time to heal.

Claimant returned to Dr. Simpson on November 26, 2019, approximately six (6) weeks post-surgery. Claimant reported a return of his pain, and clinic records indicated that Claimant's last round of physical therapy was the previous Tuesday. However, clinic records also indicated that Claimant could heel-toe walk bilaterally and that his gait was intact. Dr. Simpson prescribed a steroid dose pack that day.

At his return visit to Dr. Simpson on December 9, 2019, Claimant reported an increase in pain. Specifically, Dr. Simpson's notes stated:

Mr. Anderson presents today for increased pain. He states that he bent over slightly on Friday before PT[,] and he had a sudden shooting pain down his right side. He states that this pain has continued[,] and he still has pain today although it has slightly improved. He is still taking Mobic and this helps some. He states since his last visit he hasn't had much pain[,] and the pain he had prior to that visit was alleviated with the Medrol dose pack. He states today he has pain even just sitting down. The day his pain started he still went to PT and states his pain got worse after PT. Dr. Simpson suggested he stay off work until we see him back in 2 weeks following Medrol dose pak [*sic*] to see how he progresses.

On December 23, 2019, Claimant returned to Dr. Simpson for a follow-up visit, and he reported that he was "definitely doing better since his last visit." Claimant stated that his back pain would come and go, but the pain in his right leg was constant. Claimant felt that he could return to work on light duty but did not feel like he could perform full duty at a heavy-duty job. Dr. Simpson noted that Claimant would go back to work on restricted activity, and if Respondent-Employer did not offer that, he would obtain another MRI of the lumbar spine.

On February 3, 2020, Claimant saw Dr. Simpson for continued follow-up of back pain. Claimant reported right leg pain again that day as well. Dr. Smith noted that a recent prescription for a steroid pack had helped Claimant's pain. Upon physical examination, Claimant could heel-toe walk; however, Claimant showed signs of radicular pain down his right leg when walking on his toes. As a result, Dr. Simpson ordered another MRI.



On March 9, 2020, Claimant returned to Dr. Simpson. At that visit, Claimant reported that he was having minimal pain. He reported that he had passed his Army physical without issue and that he had started a new job as a medic in the Army. Based on his MRI, Dr. Simpson stated that Claimant had some scarring in the lumbar region, but that clinically Claimant was doing “extremely well.” Dr. Simpson released Claimant from his care, stating that “the MRI that he had today shows that he has some scar [*sic*] but I do not believe clinically he has a recurrent disc.”

Based on the medical records, Claimant returned to Dr. Simpson on October 5, 2021, when he began having back pain again. Claimant reported that the pain was severe and was a “shooting”-type pain that was radiating into his right glute muscle. According to Dr. Simpson’s notes, the pain did not extend into his right leg. As a result, Dr. Simpson recommended conservative treatment consisting of physical therapy and anti-inflammatory agents for the low back pain at that time. Dr. Simpson noted that if Claimant should develop radicular symptoms, he should return to the clinic for an examination as soon as possible.

Documentary Exhibits:

Respondents’ Exhibit #2 included a New Employee Safety Orientation checklist indicating that Claimant had undergone safety training in numerous areas, except for Employee Right to Know and Confined Spaces. Claimant had also signed and dated the form on June 12, 2019.

Respondents’ Exhibit #3 contained the Workers’ Compensation Policy for Respondent-Employer, revised August 5, 2019. In Section 1 of the policy, the reporting process was explained.

It stated the following:

Employees must report ALL work[-]related injuries and/or illness to their supervisor as soon as the incident occurs. The supervisor must contact EHS as soon as possible after employee notification. The employee must complete the appropriate paperwork on the day of the incident (or as soon as possible thereafter if the incident has left the employee unable to complete the form).

If an employee FAILS to report an injury (requiring medical attention) immediately, he/she will be suspended without pay for 3 days. A second offense will result in immediate termination of employment.

Lastly, Respondents' Exhibit #4 was a notice (sent via electronic mail) to Respondent-Employer (specifically Sonia Leszczyna) from Claimant regarding his voluntary resignation as of February 28, 2020.

### ADJUDICATION

#### A. Compensability:

Claimant contends that on August 20, 2019, he sustained a compensable injury to his low back while he was installing a water line for Respondent-Employer. Claimant contends that he attempted to extricate his left foot/leg from a mud-filled ditch when he began having immediate pain in his low back. Respondents have controverted this claim in its entirety, asserting that Claimant's injuries did not arise out of the course and scope of his employment with Respondent-Employer.

Ark. Code Ann. § 11-9-102(4)(A) defines "compensable injury" as:

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, 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[.]

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).

Claimant must prove by a preponderance of the evidence that he sustained a compensable injury. Ark. Code Ann. § 11-9-102(4)(E)(i). Preponderance of the evidence means the evidence

having greater weight or convincing force. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 442 (1947).

It is well-settled that under Arkansas workers' compensation law that an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. Hickman v. Kellogg, Brown & Root, 372 Ark. 501, 277 S.W.3d 591 (2008). A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which workers' compensation is sought. Id. An aggravation is a new injury resulting from an independent incident, and being a new injury with an independent cause, it must meet the definition of a compensable injury in order to establish compensability for the aggravation. Id. at 511-12, 277 S.W.3d at 600.

A review of the evidence demonstrates that Claimant proved by a preponderance of the evidence that he sustained a compensable low back injury during and in the course of his employment with Respondent-Employer on August 20, 2019, and that the injury caused internal harm to the body which required medical services.

Claimant credibly testified that on August 20, 2019, while employed with Respondent-Employer, he sustained an injury to his low back. At the time, he was working in a trench and routing water lines near a country club in Maumelle. He was in the trench alone, and the other members of his crew were on the other side of the road using a machine to push the water line underneath the roadway. Claimant stated that it had recently rained, and the trench where he was standing was full of mud. At one point, the mud was just over Claimant's knee. As he tried to pull himself out of the mud, he used his shovel to stabilize himself, and while trying to twist and pull his leg from the mud, he felt a pop in his back. At the time, he described the pain as mild to

moderate, and he continued with his work. However, his pain became increasingly worse over the next week. I find Claimant's account of the incident to be credible and corroborated by the medical records.

Claimant verified that the first doctor he saw after the alleged incident was Dr. Gerson on September 4, 2019. He testified that when he saw Dr. Gerson, he reported the initial injury at work, and he also reported that his pain had worsened since that time. In addition to the August 20, 2019, event, Claimant also explained to Dr. Gerson about a day when Claimant spent significant time bending over while installing meter boxes. Claimant also told Dr. Gerson that he had not experienced low back symptoms prior to August 20, 2019, and he testified that he had not sustained a low back injury prior to August 20, 2019. Claimant verified that after an x-ray revealed significant findings, Dr. Gerson suggested that he have an MRI. The MRI was performed on September 5, 2019, and it revealed a disc extrusion at L5-S1 that was impinging and traversing the right S1 nerve root. Thereafter, Claimant was seen at Concentra on September 6, 2019. He was diagnosed with lumbar strain, bulging lumbar disc, and radiculopathy of the leg. On September 16, 2019, Claimant saw Dr. Pervie Simpson for his complaints of back pain. On October 9, 2019, Claimant underwent a right L5/S1 discectomy.

Thereafter, Claimant continued with post-operative care and treatment for continued back pain until March 9, 2020, when Dr. Simpson released Claimant from his care. At that visit, Claimant reported that he was having minimal pain; that he had recently passed his Army physical without issue; and that he had started a new job as a medic in the Army. Based on his MRI results, Dr. Simpson stated that Claimant had some scarring in the lumbar region, but that clinically Claimant was doing "extremely well." Dr. Simpson determined that Claimant had reached maximum medical improvement, and he released Claimant from his care.

It is undisputed that Claimant did not report the incident immediately; however, I find Claimant's explanation to be credible. When asked why he did not report the incident immediately, Claimant explained that he initially had only minor pain after the August 20, 2019, injury, so he continued to try to work. However, he testified that, "Like I said, as the week went on the pain got worse. Came back that following week, which I believe it was a Tuesday because I remember we had a long weekend in between, and the pain was just unbearable." He also testified that once his pain became worse, he told his supervisor, Mr. Shahan, that he was having low back pain. Claimant did not state at that time that the pain was related to a work injury. Claimant further testified that Mr. Shahan's response was that if his back pain was the result of a work injury, it would result in voluminous paperwork and that Claimant would be suspended for not reporting it immediately. Claimant testified that as a result of that conversation and the discussion among co-workers that filing a workers' compensation claim impacted everyone's bonuses, he decided to wait and see if his pain resolved or improved. However, Claimant's testimony was that over the time span of a week or more, his pain became so unbearable that he could not get out of bed to go to work. At that point, Claimant spoke with Mr. Shahan again regarding his back pain and informed Shahan that he wanted to file a workers' compensation claim as he was experiencing back pain so significant that he could not work and he needed medical attention. Mr. Shahan responded that he was going to discuss the situation with the safety supervisor, Mr. Hall, and report back to Claimant. After speaking with Mr. Hall, Mr. Shahan spoke with Claimant again on the morning of September 6, 2019, and Shahan drove Claimant to Concentra for medical treatment. I find Claimant's testimony to be credible in that he did not immediately report his back injury due to the fact that the pain was minor at the outset but became exponentially worse over the course of a week or so.

Based on the testimony and medical records, a preponderance of the evidence shows that Claimant began having low back pain radiating down the right leg that consistently worsened after the August 20, 2019, injury at work for which he was treated conservatively. Objective findings included MRI results that confirmed a lateral recess and foraminal disc extrusion at L5-S1 that was impinging the traversing right S1 nerve root. Claimant was treated conservatively and ultimately underwent a discectomy on October 9, 2010. Furthermore, despite Respondents' assertion that Claimant may have experienced prior low back pain, the medical records corroborated Claimant's testimony that he had not previously suffered a low back injury or undergone any prior back treatment or surgery. In reaching my conclusion, I am persuaded by the fact that Claimant had no documented back problems prior to August 20, 2019. I am also persuaded by the fact that the record contains no credible evidence indicating any other activities or events that would have caused the low back injury at issue.

I recognize that there was some discussion of a statement in Claimant's medial record from September 4, 2019, when he saw Dr. Gerson for the first time, which read, "Patient complaining of 1 week low back pain rt-sided down to the left lower leg as far down as his lateral toes. ... He had gone to pick up something up off the floor when he had sudden lancinating pain." However, I am persuaded that the reference to Claimant's left lower leg pain was a clerical error. Therefore, I find that the evidence as a whole establishes that Claimant consistently reported to medical staff that he had low back pain radiating down his right leg after the incident at work on August 20, 2019. Furthermore, Claimant also credibly testified that he had explained to Dr. Gerson at his first visit that he injured his low back at work and that some time had passed between the incident and when his pain worsened. Claimant explained to Dr. Gerson that since the August 20, 2019, incident, he had recently spent a day installing meter boxes for Respondent-Employer (requiring

significant bending) and thereafter had a significant increase in pain in his low back. There was no testimony elicited from any witnesses or any documentary evidence to prove otherwise. Therefore, I am convinced that the notes in the medical record from that day were referencing the more recent activity of installing meter boxes that also exacerbated Claimant's existing low back pain.

Therefore, considering the continual complaints of low back pain after Claimant's work-incident on August 20, 2019, and Claimant's credible testimony that the pain worsened over the course of a week or so; the objective findings of the September 5, 2019, MRI revealing an injury to his low back in the L5-S1 area; the medical records (including surgical reports) from Dr. Simpson, Claimant's neurosurgeon; there being no medical opinions to contradict Dr. Simpson's medical opinion; and the lack of any documentation of any issues with his back prior to the incident; and there being no evidence of an independent intervening injury, I find that Claimant has established that his current low back injury arose out of in the course and scope of his employment, and that the injury caused internal harm to the body which required medical services and resulted in a period of temporary disability. The accidental injury was caused by a specific incident identifiable by time and place of occurrence. Claimant established a compensable back injury by medical evidence supported by objective findings not within his voluntary control.

Therefore, due to the foregoing reasons, I find that Claimant has established by a preponderance of the evidence all of the elements necessary to establish a compensable low back injury on August 20, 2019.

B. Medical Treatment:

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).

On the basis of the record as a whole, and after reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that all of the medical evidence of record is causally related to Claimant's compensable low back injury of August 20, 2019. I, therefore, further find that Claimant has sustained his burden of proving by a preponderance of the evidence that the medical treatment of record, including surgery, is reasonably necessary in connection with the compensable injury he received on August 20, 2019, namely, to his low back.

Furthermore, it is well settled under workers' compensation law that an employee may be entitled to ongoing medical treatment after the healing period has ended if the medical treatment is geared toward management of the employee's injury. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004).

Here, Claimant was found to be at maximum medical improvement and released by Dr. Simpson on March 9, 2020. Since March 10, 2020, Claimant has maintained his employment as an EMT. At the hearing, Claimant stated that he currently had good and bad days with regard to his low back pain and that he took over-the-counter medication for his low back pain as necessary. However, in October of 2021, Claimant returned to Dr. Simpson for complaints of low back pain for which Dr. Simpson recommended conservative treatment of physical therapy and anti-inflammatory medication. Based on the testimony and the medical records, I find that Claimant had some recurring low back pain symptoms between March 9, 2020, and October of 2021, and



that he is entitled to conservative treatment as prescribed in Dr. Simpson's October 2021, medical note.

Hence, Respondents are therefore liable for all medical treatment of record for Claimant's compensable low back injury, including the conservative treatment (physical therapy and anti-inflammatory medications) prescribed by Dr. Simpson in October of 2021 for further management of Claimant's low back pain.

C. Temporary Total Disability from August 20, 2019, through March 9, 2020:

Claimant contends that he is entitled to temporary total disability compensation from August 20, 2019, the date of his work-related injury, until March 9, 2020, the date he was found to be at maximum medical improvement and discharged from Dr. Simpson's care.

The injury to Claimant's low back is an unscheduled injury. An injured employee for an unscheduled injury is entitled to temporary total disability compensation during the time that he is within his healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The evidence demonstrates that, after Claimant sustained a compensable injury to his low back on August 20, 2019, he continued working through September 3, 2019, when the pain in his low back became unbearable, and he could no longer work as a result of his injury. Claimant testified that he did not return to work from September 4, 2019, through March 9, 2020, when he was released by Dr. Simpson as having reached maximum medical improvement. Claimant

testified that as of March 10, 2020, he was employed as an EMT and had continued to maintain that employment through the date of the hearing.

In summary, the medical evidence and Claimant's testimony demonstrate that Claimant remained within his healing period and was totally incapacitated from earning wages from September 4, 2019, through March 9, 2020.

Under these circumstances, I find that Claimant proved by a preponderance of the evidence his entitlement to temporary total disability compensation from September 4, 2019, the last date he was able to work, until March 9, 2020, the date Claimant reached the end of his healing period when he was released at maximum medical improvement with no restrictions by Dr. Simpson.

D. Attorney's Fee:

Respondents have controverted this claim in its entirety. Therefore, Claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded herein to Claimant, pursuant to Ark. Code Ann. § 11-9-715.

**AWARD**

The Respondents are directed to pay benefits in accordance with the findings of fact set forth herein this Opinion.

All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809.

Pursuant to Ark. Code Ann. § 11-9-715, Claimant's attorney is entitled to a twenty-five percent (25%) attorney's fee on the indemnity benefits awarded herein. This fee is to be paid one-half by the carrier and one-half by Claimant.

**IT IS SO ORDERED.**

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**KATIE ANDERSON**  
**ADMINISTRATIVE LAW JUDGE**