

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H101010

SONDRA DAVIS, EMPLOYEE	CLAIMANT
LITTLE RIVER NURSING HOME AND REHAB, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 30, 2021

Hearing held before Administrative Law Judge Chandra L. Black, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Andy L. Caldwell, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Melissa F. Wood, Attorney at Law, Little Rock, Arkansas.

**Statement of the Case**

On September 14, 2021, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A Prehearing Telephone Conference was conducted on April 20, 2021, from which a Prehearing Order was filed on that same day. I marked said order and the responsive filings as Commission's Exhibit No. 1.

Stipulations

During the Prehearing Telephone Conference, and/or the hearing, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-insurance carrier relationship existed at all relevant times, including on or about December 9, 2020.

3. The Claimant’s average weekly wage (AWW) was \$390.00 at the time of her alleged injury.

4. All issues not litigated are reserved under the Arkansas Workers’ Compensation Act.

5. The Respondents have controverted this claim in its entirety.

Issues

The parties agreed to litigate the following issues:

1. Whether the Claimant sustained compensable injuries to her back and thoracic spine.<sup>1</sup>

2. Whether the medical treatment of record was reasonable and necessary in connection with the Claimant’s alleged compensable injury.

3. Whether the Claimant is entitled to temporary total disability benefits from December 10, 2020 to a date yet to be determined, excluding the days the Claimant returned to work, which was from December 26, 2020 through January 4, 2021.

4. Whether the Claimant failed to give notice to the Respondents until January 18, 2021.

5. Whether the Claimant’s attorney is entitled to a controverted attorney’s fee.

Contentions

The respective contentions of the parties are as follows:

Claimant:

Claimant contends that her AWW will be determined by the contract of hire, wage records and Arkansas law. The Claimant contends that she sustained injuries to her back, neck, shoulders and other whole-body parts in the course and scope of her employment on December 9, 2020 when she lifted a 50-pound pot of water. The Claimant is under the care and treatment of Dr. Steven

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<sup>1</sup> Although during the hearing, the parties refer to the Claimant’s injury as a back injury, the primary bodily part at issue here is the Claimant’s “thoracic spine.”

Nalbach and is scheduled for surgery on April 9, 2020 [sic]. The Respondents have controverted this claim in its entirety. The Claimant contends that she is entitled to TTD from the date of the accident to a date yet to be determined, medical care and treatment, payment of medical expenses, payment of out-of-pocket expenses, controversion and attorney's fees. All other issues are reserved.

Respondents:

Respondents contend that Claimant did not sustain a compensable injury to her back on 12/9/20 or at any other time while working for Respondent/Employer. She did not give notice of the alleged injury until 12/16/20. At the hearing, the Respondents amended the date for failure to give notice to January 18, 2021.

Based on my review of the record as a whole, to include the aforementioned documentary evidence, 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).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. I hereby accept the above-mentioned proposed stipulations as fact.
3. The Claimant proved by a preponderance of the credible evidence that she sustained a compensable injury to her thoracic spine in the course and scope of her employment with the Respondents on or about December 10, 2020.
4. On December 11, 2020, the Claimant notified her supervisor that she injured her

back at work on the prior evening of December 10, 2020.

5. The Claimant proved by a preponderance of the evidence her entitlement to temporary total disability compensation from December 11, 2020 until June 17, 2021, except for the days that the Claimant returned to work for the Respondents.

6. The Claimant proved by a preponderance of the evidence that the medical treatment of record was reasonably necessary in connection with the injury received by her on December 10, 2020.

7. The Claimant's attorney is entitled to a controverted attorney's fee on the indemnity benefits awarded per this Opinion.

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

#### Summary of Evidence

The following witnesses testified during the hearing: Ms. Sondra Davis (the Claimant), Mr. Richard H. Davis, Mr. Kenneth Wilkerson, and Ms. Melissa N. Atwood.

The record also consists of the hearing transcript of the September 14, 2021, and the exhibits contained therein. Specifically, the following exhibits have been made a part of the record: Commission's Exhibit 1 includes the Commission's Prehearing Order dated April 20, 2021, and the parties' respective response to the Prehearing Questionnaire; Claimant's Medical Exhibit, consisting of 88 numbered pages was marked as Claimant's Exhibit No. 1; Respondents' Hearing Exhibit Index Medicals, consisting of 14 numbered pages were marked as Respondents' Exhibit 1; Respondents also introduced into evidence a compilation of Respondents' Hearing Exhibit Index of Non-Medicals, consisting of six numbered pages, it was marked as Respondents' Exhibit 2.

## **Testimony**

### Mrs. Sondra Davis/the Claimant

The Claimant, age 61, began working for Little River Nursing and Rehab/respondent-employer in 2012. She initially worked in the laundry area. However, she later transferred to a position in the kitchen. The Claimant agreed that she sustained an injury while working in December 2020.

She testified that she hurt herself while lifting a pot of water from the sink to take and fill up the steam table. The Claimant agreed that the pot actually weighed approximately 25 pounds. She essentially testified that she felt an immediate pop between her shoulder blades. The Claimant testified that Keith (a coworker) was present when her injury occurred. However, since that time, Keith suffered a heart attack and died.

While working for Little River, the Claimant's working hours were from 1:00 p.m. until 7:30 p.m., and employment duties entailed that of a cook. The Claimant testified that her injury occurred on a Thursday. She essentially testified that her injury happened on either the 9<sup>th</sup> or 10<sup>th</sup> of December 2020. The Claimant confirmed that Keith was not her supervisor. However, they worked closely together.

The Claimant testified that her supervisor was Kenneth Wilkerson. She denied calling Mr. Wilkerson on the night of her injury to report it. Instead, the Claimant called Mr. Wilkerson the following morning, which was on a Friday. According to the Claimant, she told Mr. Wilkerson she hurt her back the night before at work and would not be reporting for work that day.

She confirmed that she did not seek medical treatment on Friday because her doctor's office was not open. The Claimant sought medical treatment the following Monday from Little

River Medical Clinic. At that time, the Claimant complained of back pain. She confirmed that she told them, she was hurt at work while lifting a pot. The Claimant further confirmed that she initially took off work for four days. She agreed that at some point she returned to work. The Claimant confirmed she was off work on December 11, 2020 but was scheduled to be off for the weekend. She was on PTO/vacation leave on December 14 and 15, 2020. The Claimant confirmed that she took sick leave December 16, 17, 20, 21, 22 and 23, 2020.

However, on December 26, 2020 the Claimant reported for work with the Respondents. According to the Claimant, it did not go well. She testified that she was unable to lift the pots, and her back started hurting. Per the Claimant, she had to call a coworker to come back in so she could go home. She agreed that she stopped working January 4, 2021. Since this time, the Claimant has not returned to work.

Regarding the Claimant's medical care, she confirmed that she treated with Little River Medical Center under the care of Dr. James Oglesby. The Claimant confirmed that Dr. Oglesby ordered some diagnostic studies. Ultimately, Dr. Oglesby referred the Claimant to a doctor in Tyler, Texas, Dr. Stephen Nalbach, who is a back surgeon. The Claimant verified that Dr. Nalbach performed surgery on her back on April 9, 2021. She agreed that the surgery improved her back pain. However, the Claimant agreed that she uses a wheelchair and is unable to walk.<sup>2</sup> She denied having problems walking before her back surgery.

She confirmed that Dr. Nalbach released her from his care back to treatment with Dr. Oglesby. As of the date of the hearing, the Claimant continued to treat with Dr. Oglesby. However, the Claimant verified that she has not returned to work. The Claimant denied that she is able to return to work for Little River performing the work she previously performed.

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<sup>2</sup> Although the Claimant appeared at the hearing in a wheelchair, her testimony and the documentary evidence show that she is not completely limited to a wheelchair.

Regarding the current problems she has on a day-to-day basis, that she contends are related to the injury, the Claimant testified that she cannot walk, and her legs “swell up” daily. She is unable to wear sandals. The Claimant testified that she is also unable to stand for any length of time. She went on to explain that she is able to walk holding on to a cabinet or something else; however, the Claimant testified that she is unable to walk the length of a room. The Claimant confirmed that she also needs the help of a cane or walker to ambulate.

According to the Claimant, she must have assistance to shower. Her husband helps her to get in and out of the shower. However, the Claimant explained that she does not get into a bathtub at any time. The Claimant takes Gabapentin, three times a day. This medication is prescribed by Dr. Oglesby. She denied that she is able to clean up and do things around the house. Her husband and grandchildren who live with the Claimant and her husband do all of the household chores. Per the Claimant, her oldest grandchild is thirteen and the youngest is seven. The Claimant denied doing any cooking or laundry. She is unable to go grocery shopping by herself. According to the Claimant, if she goes to the grocery store, she must use a cart or her wheelchair. The Claimant denied having any back or legs problems prior to her injury at work. Nor was she under the care of any doctor for her back or legs.

On the evening of her injury, the Claimant agreed she was unable to walk to her car by herself. The Claimant testified that Keith had to help her to the car. According to the Claimant, since her injury, Little River has made some changes to the steam table. The Claimant explained, “They put a hose to where you don’t have to tote water to it no more.”

On cross examination, the Claimant confirmed that her deposition was taken on June 7, 2021. She confirmed that she worked as the evening cook at Little River.

The Claimant gave the following explanation of what her job duties entailed as a cook for Little River:

A Okay. I cooked supper for the nursing home. I cooked supper for the jail house.

Q There are some one hundred residents, approximately, at Little River, right?

A Yeah. At times, yes.

Q And then thirteen in the jail?

A Yeah. Somewhere usually around that amount.

With respect to her deposition testimony about her injury, the Claimant admitted that she testified that she thought her injury occurred on December 7, on a Thursday around 7:00 or 7:30 p.m. The Claimant essentially confirmed she testified that she injured her back lifting a 25-pound pot of water.

She admitted that she did not tell anyone at Little River she was going to see the doctor on Monday morning. However, the Claimant admitted that she testified during her deposition that she called Kenneth that morning and told him she was going to see a doctor because she was not any better. She explained: "I might of called him before I went to the doctor then." The Claimant admitted that Kenneth would have known that because she hurt her back at work. She used her insurance policy with Blue Cross and Blue Shield to pay for her treatment. The Claimant verified that she told her doctors that she hurt herself at work while lifting a pot.

Under further questioning, the Claimant admitted that she had problems with restless leg syndrome prior to her work injury. The Claimant essentially confirmed that she began taking medication for that condition a year or two before her injury. As of the date of the hearing, the Claimant continued to be employed by Little River Nursing Home. She has applied for Social



Security Disability. She admitted that she listed disabilities to include her back and restless leg conditions on the application for disability. Currently, that application is still pending.

She also admitted that she is familiar with Medcor, a workers' compensation reporting company. The Claimant confirmed that she testified during her deposition that prior to this claim, she called Medcor to report that she cut her finger. She essentially agreed that Medcor arranges for medical treatment for workers' compensation claims. However, the Claimant admitted that she did not call Medcor after this injury.

On redirect examination, the Claimant denied having any swelling associated with her restless leg syndrome condition. She denied knowing on her own that she needed to call Medcor for her finger injury. Instead, the Claimant went to get a Band-Aid for her finger and was told she had to call Medcor to report her injury. The Claimant denied that when she reported her injury to Kenneth, he instructed her to call Medcor. However, she confirmed that she did not contact Medcor for this claim.

During the hearing I was given the opportunity to observe the Claimant's feet. Based on my observation of them, the Claimant continues with significant swelling of the feet and ankles.

Mr. Richard H. Davis/Claimant's husband

Mr. Davis was called as a witness to testify on behalf of his wife. They have been married for thirty-seven years, but there was a one-year gap in their first marriage. However, during their most recent marriage, they have been married for fifteen years.

He admitted that he was not at the job site with the Claimant when she was injured. However, Mr. Davis did see his wife before she went to work that night. Mr. Davis denied that the Claimant was having problems with her leg before her work injury. He was not aware of any medical treatment for her back prior to her injury.

Regarding the Claimant's call to her supervisor, Mr. Kenneth Wilkerson, to report her injury, Mr. Davis admitted that he overheard the conversation. According to Mr. Davis, the Claimant called and told Mr. Wilkerson she hurt her back and would not be in to work.

Mr. Davis confirmed that he sees his wife on a day-to-day basis. He agreed that since the Claimant's injury, he has noticed her having significant problems that she did not have before her injury. According to Mr. Davis, the Claimant has gotten worse since her injury. Mr. Davis testified that he has noticed that the "Claimant is unsteady and went to using a cane and then to a walker." He essentially testified that the Claimant fell one morning and "lost the feeling in both her legs." Per Mr. Davis, she has been in a wheelchair since that time. (TR 40)

According to Mr. Davis, the Claimant occasionally uses a wheelchair. He admitted that the Claimant is able to walk 25 feet. Mr. Davis testified that the Claimant is only momentarily able to walk without assistance because she is very unsteady. Mr. Davis confirmed that he has to help his wife to climb in and out of the shower, and with chores around the house.

#### Mr. Kenneth Wilkerson

Mr. Wilkerson was called to testify on behalf of the Respondents. He is the dietary manager at Little River Nursing Home and Rehab. Mr. Wilkerson has worked there for over one and a half years. Mr. Wilkerson gave an overview of his job duties. Specifically, he is responsible for patient dietary care along with staffing, and making sure the equipment is working properly, and various other duties. He confirmed that he is familiar with the Claimant.

Specifically, Mr. Wilkerson gave the following explanation of the procedure for the Claimant or any other employee for reporting a work-related injury at Little River:

A As policy is concerned, if she had a work-related injury, the first thing she would do is tell me that she was injured or whatever may be. Once she tells me that, I fill out an incident report. The incident report goes by witness, what time it happened, what did you hurt, this type of thing, and I turned it in to administration.

Q At that point, do they handle it?

A Yeah.

Mr. Wilkerson confirmed that he is familiar with the Form P/the workers' compensation poster that describes what to do if an injury occurs while performing employment duties. He testified that their Form P is posted in the break room. According to Mr. Davis, the Claimant received additional training about the Form P as to what to do if she is injured during in-service with their physical therapist. He stated that the therapist also provided additional information on proper lifting methods.

He admitted that he recalled a conversation with the Claimant in which she told him she hurt her back. Next, Mr. Wilkerson was shown what has been marked as Respondents' Exhibit 2, at page 5. It is a letter authored by Mr. Wilkerson detailing the summary of what the Claimant told him about her back. He maintained that the Claimant called him on December 9, 2020 to report her injury. Mr. Wilkerson agreed that the document states that the Claimant told him she strained her back "while piddling around the house" and would not be in to work. According to Mr. Wilkerson, the Claimant also told him she was not going to the doctor and was going to take some medication and should be all right in a few days.

Mr. Wilkerson further testified that the Claimant called him back when it was time for her to return to work. At that time, the Claimant told him she was going back to the doctor because she was not doing well. After her doctor's visit, the Claimant came in and gave him a doctor's note stating that she was not able to return to work until a certain amount of time. Mr. Wilkerson testified that this conversation took place on December 10, 2020 and she came in the next day. He confirmed that he drafted the document on January 25, 2021. Mr. Wilkerson confirmed that the Claimant came to him on December 16, 2020 and told him she needed to be off work until

December 19. At that time, the Claimant presented to him another doctor's statement. He maintained that he was not aware at that time, the Claimant was claiming a work-related injury.

According to Mr. Wilkerson, if the Claimant had told him she hurt her back lifting pots, he would have filled out an incident report. He denied saying anything to the Claimant to discourage her from filing or reporting a work-related injury or receiving any kind of compensation. Mr. Wilkerson confirmed that the Claimant worked until January 4, 2021.

Under further questioning, Mr. Wilkerson testified:

Q From December 9<sup>th</sup> or so up until that date, did she tell you that she'd hurt herself?

A Well, we had a conversation that last time that she worked, and it was like, yeah, messing around with those ..... Lifting those pots, you know, I hurt my back, and I'm like, well Sondra, why would you be lifting those pots like that anyway? She said I ain't got time for that. I've got to, you know, get..... I've got to keep moving, get the meal out and all of this here, but it wasn't like I'm hurt, I need to see a doctor I need to do this or that. None of that never happened. I never heard that conversation.

Q If you had, what would you have done?

A I would have filed the incident report.

Mr. Wilkerson essentially testified that the Claimant worked the full day, and never said anything to him that would make him think she was unable to do the job. Mr. Wilkerson denied that the Claimant ever told him that on the evening of the injury she was unable to walk and had to have someone help her to the car. According to Mr. Wilkerson, his conversation with the Claimant about the pots took place around December 19, 2020 or the end of December or the first part of January. Mr. Wilkerson denied that he understood that the Claimant was reporting an injury to him because of the way the conversation went. He explained, in relevant part, "... You know, it wasn't like I'm hurt, I need to see a doctor, you need to ..... Could you file a incident report with me, you know, I don't think I can do this job."

On cross examination, Mr. Wilkerson confirmed that he was instructed by the administrative assistant to draft the January 25, 2021 document because the Claimant had filed a workers' compensation claim. He verified that Claimant called him the day after her alleged incident and told him she hurt her back. Mr. Wilkerson denied that the Claimant told him she was going to the doctor. However, Mr. Wilkerson verified that a few days later the Claimant brought him a doctor's note. He admitted that he would have been disciplined, had he not filled out an incident report when the Claimant reported an injury to him. Mr. Wilkerson admitted that he completed the January 25, 2021 document based on his memory as of that date.

Mr. Wilkerson admitted that they have made some modifications to the kitchen area since the Claimant's alleged injury. The maintenance guy hooked a hose directly to the water steam table.

On recross examination, Mr. Wilkerson denied that he told the Claimant she had a certain period of time to report injuries.

Melissa N. Atwood

Ms. Atwood was called as a witness on behalf of the Respondents. She is the Business Office Assistant for Little River. According to Ms. Atwood, she performs a variety of duties at for Little River Nursing. Ms. Atwood answers the phones and oversees payroll and workers' compensation claims.

Specifically, Ms. Atwood explained the procedure for an employee with any injury. She verified that the employee reports the injury to their supervisor. The employee fills out all the necessary paperwork and turns it in to Ms. Atwood. She then reports the injury to their workers' compensation carrier.

Ms. Atwood was shown a copy of Respondents' Exhibit 2, starting at page two of the document. She identified the document as being the incident report. Ms. Atwood confirmed that the document shows that the injury was reported on January 18<sup>th</sup> of 2021.

She testified that the report was done because the doctor's office, Little River Medical Center, called wanting their workers' compensation information. According to Ms. Atwood she was not aware of a claim until then.

Specifically, Ms. Atwood confirmed that she asked the Claimant to make a statement about the claim. Ms. Atwood also talked to Mr. Wilkerson, and he told her, and he denied being aware of a work-related injury.

On cross examination, Ms. Atwood confirmed that the report was prepared by someone at Medcor, after she called in the alleged injury to them. She confirmed that the incident report shows an incident date of December 9, 2020.

Ms. Atwood admitted that she called in the injury on December 18, 2020. However, the document states that the date the injury was reported to management was January 14, which is before the date of the call. She was unable explain why the date was different. Specifically, Ms. Atwood stated, "I don't know."

She admitted that the Claimant told Mr. Wilkerson she hurt herself handling the pots and pans the last week she worked. However, she admitted that she never received a first report of injury from Mr. Wilkerson. She essentially verified that there was never anything that Mr. Wilkerson did to start the process for a workers' compensation claim.

Under further questioning, Ms. Atwood testified:

Q Okay. After hearing his testimony, when he heard that she was contending that she injured herself with pots and pans, should he have?

A Well, I guess, if he thought that it was a workers' compensation claim.

### **Medical Evidence**

My review of the medical record shows that on December 4, 2020, the Claimant sought medical treatment from Little River Medical Center due to upper thoracic back pain. The Claimant reported that she injured her back while lifting heavy objects at work. Dr. James Oglesby assessed the Claimant with “Thoracic back pain,” for which he prescribed medications, and took her off work for 48 hours. On December 16, 2020 Dr. Oglesby authored a Referral Order. At that time, Dr. Oglesby referred the Claimant to physical therapy due to low back pain.

The Claimant saw Dr. Oglesby for a follow-up visit on December 18, 2020. The Claimant continued with moderate back pain and a lot of discomfort. She reported to Dr. Oglesby that she had pain when lifting a gallon of milk.

Despite physical therapy, the Claimant continued with mid thoracic back pain. Although on December 28, 2020, the Claimant was somewhat better.

On December 31, 2020, the Claimant returned to Dr. Oglesby for a return visit of her thoracic spine pain. At that time, the Claimant could hardly walk. She was concerned about getting back to work. Dr. Oglesby referred the Claimant to physical therapy for rehabilitation of her back. The Claimant was noted to have a gait abnormality.

Dr. Oglesby saw the Claimant on January 4, 2021 for a follow-up visit. The Claimant reported that her pain was moderate and hurt enough to be dreadful. At that time, Dr. Oglesby’s assessment was, “Noted decreased muscle spasms after treatment. Unable to tolerate prone position still but PT did the MT in sitting position.” Dr. Oglesby continued the Claimant’s strengthening physical therapy exercises.

On January 15, 2021, a CT scan was performed of the Claimant’s thoracic spine, with the following impression:

1. Age-indeterminate compression fractures of the thoracic spine, as detailed above. Consider further evaluation with MRI to determine acuity, as clinically indicated.
2. Degenerative changes otherwise noted, as detailed above.

Dr. Oglesby saw the Claimant on January 18, 2021 for a follow-up visit. He noted that the Claimant had sustained a compression fracture of the thoracic vertebra- recent CT revealed multiple level compression fractures, five (5) to be exact. The Claimant reported that she had pain radiating downward from her thoracic spine area. She reported that she also had some numbness to her upper thigh. Per these notes, Dr. Oglesby opined that the Claimant was a possible candidate for kyphoplasty. He ordered an MRI and suggested a possible neurosurgery consultation once he received those results. Dr. Oglesby continued the Claimant's medication regimen.

The Claimant continued to treat with Dr. Oglesby. On January 22, 2021, the Claimant saw Dr. Oglesby for a return visit due to her continued complaints of persistent pain. He noted that the Claimant had made little progress and still had difficulty with lifting at work.

On January 30, 2021, Dr. Ryan T. Fitzgerald authored a report of his opinions regarding imaging and provided medical records for the Claimant to include imaging of Radiograph of the lumbar spine dated June 28, 2005; CT of the abdomen and pelvis dated December 20, 2020; and CT of the thoracic spine of January 15, 2021. Dr. Fitzgerald opined, in pertinent part:

In sum, the finding on the 12/920 exam of a mild superior endplate compression deformity at T7 is of uncertain acuity based on the available imaging. The subsequent exam on 1/15/21 showed new compression of the T7 body and adjacent stranding indicative of an acute/subacute injury as well as additional mild compression deformities at T6 and T5 of uncertain acuity. In my opinion, the stated mechanism [lifting a large pot of water] would be unlikely to result in such an injury in the absence of advanced osteoporosis.

On March 2, 2021, the Claimant underwent an MRI of the thoracic spine, without contrast with the following impression:

1. Study moderately limited by motion artifact. Cord compression is seen at T6 at T7. A CT may be helpful to further assess the compression fractures and bony canal stenosis.



2. Subacute partial compression fractures at T8 and T12.

Dr. Stephen Nalbach evaluated the Claimant on March 23, 2021. Her chief complaint was pain between the shoulder blades and difficulties ambulating. Dr. Nalbach wrote, in relevant part:

**HISTORY OF PRESENT ILLNESS:**

A 60-year-old female who was lifting heavy equipment while at work and felt a pop. This led to severe pain that is not relented, although this was several months ago. She images in January and then another MRI. She showed further acute compression at T6-7 with compression on the spinal cord and was referred for neurosurgical opinion. She has had difficulties ambulating and her balance has been off.

\* \* \*

**DIAGNOSTIC STUDIES:**

Data and Imaging were reviewed. I reviewed the CT and MRI of the T-spine while this is degraded by motion artifact. There are acute compression fractures T6 and T7 with retropulsion and spinal cord compression. She also had a bone density scan revealing very severe osteoporosis.

**IMPRESSION & PLAN:**

This is 60-year-old female with severe compression fracture leading to retropulsion spinal cord compression at T6-7. Given her osteoporosis, a large decompression fusion she would not do well with and I am not sure her bones were[sic] fused[sic]; however, to help her get out of pain we may perform T6-T7 kyphoplasties at this [sic] levels. Given her osteoporosis, however, with the cord compression, I think she needs some room, so I would perform T6-T7 open laminectomies at these levels as well. Given kyphosis, I would like for her to be in a brace postoperatively. This also must be done with intraoperative monitoring. Risks and benefits were reviewed including but not limited to bleeding, infection, failure to relieve symptoms, need for further operations, CSF leak, nerve injury, paralysis, and death. The patient wishes to proceed as soon as possible. All of her questions were answered and she is happy and satisfied with this treatment plan.

Dr. Nalbach authored an Operative Report on April 9, 2021 after performing surgery on the Claimant. Specifically, Dr. Nalbach, wrote in relevant part:

**PREOPERATIVE DIAGNOSIS:** Compression fractures with spinal stenosis and myelopathy.

**POSTOPERATIVE DIAGNOSIS:** Compression fractures with spinal stenosis and myelopathy.

OPERATION:

1. T6 and T7 transpedicular vertebral body biopsy and kyphoplasty.
2. T6 and T7 laminectomy for decompression.
3. Use of intraoperative microscope.
4. Use of intraoperative neuromonitoring.

On May 19, 2021, the Claimant presented to Dr. Nalbach's (under the care of Amanda Shipp, AARN, FNRC) clinic to follow-up T6-7 laminectomies and kyphoplasties. For the most part, the Claimant reported that she felt she was doing well from a surgical standpoint, with dramatic improvement in her back pain. The Claimant did have complaints of some lower extremity swelling and pain as well as hematuria, for which she was following up with her primary care doctor the next day. At that time, Dr. Nalbach wrote, in relevant part:

**BRIEF EXAM:** Her incisions are well-healed. She has equal strength and sensation throughout, with the exception of some decreased effort to the left lower extremity due to the pain. There is significant swelling in this extremity.

**DIAGNOSTIC STUDIES:** AP lateral x-rays of the T-spine show multiple compression fracture deformities with kyphoplasty performed at T6-T7. There is kyphotic deformity as well as scoliosis deformity, and compression fractures appear stable compared to prior MRI.

**IMPRESSION:** 60-year-old female status T6-T7 laminectomies and kyphoplasty's.

**PLAN:** From our standpoint, the patient is doing quite well since surgery with a signification reduction in back pain. She will contact the office if she has any further needs, otherwise she can follow-up in an as needed fashion.

The Claimant saw Dr. Oglesby on June 17, 2021 for a follow-up visit. At that time, Dr. Oglesby noted that the Claimant's back pain seemed to be much improved. On exam healing was also noted at the operative site with no signs of infection. The Claimant reported that she was ambulatory at home with a walker. Although the Claimant had exhausted her physical therapy benefits, she continued under the care of home health. In addition, Dr. Oglesby noted, in relevant part: "**Edema of the lower extremity** - persistent bilateral lower extremity edema and that the Claimant was elevating her legs."

## Adjudication

### A. Compensability

Ark. Code Ann. §11-9-102(4) (Repl. 2012) provides, in pertinent part:

(A) “Compensable injury” means:

(i) 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[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D) (Repl. 2012). “Objective findings” are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(4)(16)(A)(i) (Repl. 2012).

The employee has the burden of proving by a preponderance of the evidence that she sustained a compensable injury. Ark. Code Ann. §11-9-102(4)(E)(i) (Repl. 2012). Preponderance of the evidence means the evidence having greater weight or convincing force. *Metropolitan Nat’l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003), citing *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, I find that the Claimant proved by a preponderance of the evidence that she sustained a compensable thoracic spine injury while lifting a 25-pot of water at work on December 10, 2020. Here, the Claimant was unable to recall the exact date of her injury, but she did recall that it occurred on a Thursday. Hence, the Claimant proved by a preponderance of the evidence that there was a specific incident identifiable by time and place of occurrence. It is well settled in workers’ compensation law that the Claimant does not have to identify an exact date of injury; rather, the alleged specific incident must be “identifiable” by time and place of occurrence. *See* Ark. Code Ann. §11-9-102(4)(A)(i); *Edens v. Superior Marble Glass*, 346 Ark.

487, 58 S.W. 3d 369 (2001). After having observed the Claimant's demeanor during the hearing and when comparing it with the other evidence of record, including the testimony elicited from the other witnesses, I found the Claimant to be an extremely credible witness. Her testimony comports with the medical evidence of record, portions of Mr. Kenneth Wilkerson's testimony, and the timeline of events leading up to her first doctor's visit. As such, I am persuaded that the Claimant's injury occurred on or about Thursday, December 10, 2020.

Nevertheless, the Claimant was employed as a cook for the respondent-employer, Little River Nursing and Rehab. The parties stipulated that the employment relationship existed in December 2020. The Claimant essentially testified that she felt a pop in between her shoulder blades as she lifted a 25-pound pot of water to transfer it from the sink to the steam table. Her testimony demonstrates that the only witness to this incident is now deceased. The Claimant testified that her injury occurred during the evening of December 9, or December 10, 2020, on a Thursday. She completed her workday but had to have help from a coworker getting to her car. The Claimant testified that she informed her supervisor, Kenneth (Wilkerson), the following morning, that she had injured her back the prior evening. However, Mr. Wilkerson maintained that the Claimant told him she injured herself "piddling around the house." I am not persuaded that Mr. Wilkerson's testimony in regard was forthcoming.

However, I found the Claimant's testimony to be a consistent account of her injury and with the other evidence of record. Specifically, the medical evidence of record explicitly corroborated the Claimant's testimony. The Claimant received medical care from Little River Medical Center under the care of Dr. Oglesby on December 14, 2020. At that time, it was specifically noted, "This is a 60 y/o female who comes in today c/o low back pain. Pt states she was lifting pots at work, and she thought that maybe she hurt her back while lifting pots. But, pt states that whenever

she coughs her pain is really bad.” The reports from the Claimant’s subsequent medical providers support the Claimant’s contention that she sustained a work-related injury.

Considering all of the foregoing, I find that the Claimant proved by a preponderance of the evidence that she sustained a compensable injury in accordance with Ark. Code Ann. §11-9-102(4)(A)(i) (Repl. 2012). The Claimant proved that she sustained an accidental injury causing physical harm to the body while lifting a 25-pound pot of water while performing employment duties for Little River Nursing and Rehab. As such, the Claimant proved that the injury arose out of and in the course of employment and required medical services, including surgical intervention by Dr. Nalbach on April 9, 2021. The injury was caused by a specific incident and was identifiable by time and place of occurrence on or about December 10, 2020. Additionally, the Claimant established a compensable injury by medical evidence supported by objective findings not within the Claimant’s voluntary control. These objective medical findings included in particular, but not limited to those revealed on the January 15, 2021 CT scan which showed multiple compression fractures to be exact, and the MRI of March 2, 2021, which demonstrated compression fractures at seen at T6 and T7. I find that these objective medical findings are causally related to the Claimant’s December 10, 2020 accidental work-related injury and were not the result of a prior injury or pre-existing condition.

Of note, I recognize that the Claimant suffered from pre-existing advanced osteoporosis; however, prior to her work incident, the Claimant was able to perform her laborious job duties without any physical restrictions, was not under the care of a healthcare provider for this condition. Nor was the Claimant taking any type of medications for this condition. In fact, the testimony elicited from the Respondents’ witnesses does not demonstrate that the Claimant missed work due to her pre-existing osteoporosis or even complained to either of them about any physical

limitations relating to her spine prior to her injury. Due to foregoing, I have attached minimal weight to the opinion of Dr. Ryan T. Fitzgerald.

To summarize, based on all of the foregoing evidence, I find that the Claimant has established by a preponderance of the evidence all of the elements necessary to establish a compensable thoracic spine injury arising out and in the course of her employment with Little River while lifting a 25-pound pot of water on December 10, 2020.

B. Notice of Injury

Ark. Code Ann. §11-9-701(Repl. 2012) provides:

(a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury....

(b)(1) Failure to give the notice shall not bar any claim:

(A) If the employer had knowledge of the injury or death;

(B) If the employee had no knowledge that the condition or disease arose out of and in the course of the employment; or

(C) If the commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

The respondent-employer contends that they did not receive notice of the Claimant's injury until January 18, 2021. However, the evidence proves that the Claimant's injury was made known to Mr. Wilkerson the day after it occurred, on the morning of December 11, 2020, which prior to her first doctor's appointment. This finding is based on the testimony of the Claimant, Mr. Wilkerson, and the medical records. Both the Claimant's and Mr. Wilkerson's testimony show that there was a telephone conversation between the Claimant and Wilkerson about her back condition the day after her injury. The Claimant credibly testified that during that conversation, she told Mr. Wilkerson she hurt her back at work. Mr. Davis also confirmed that he overheard the

conversation; and his testimony proves that the Claimant told Mr. Wilkerson she hurt her back and would not be in to work.

However, Mr. Wilkerson testified that the Claimant told him she hurt her back at home. The medical reports show that the Claimant reported to Dr. Oglesby on December 14, 2020 and subsequent healthcare providers that she hurt her back at work. Because the Claimant's testimony comports with the contemporaneous medical reports, I am persuaded that she told Mr. Wilkerson she hurt her back at work.

Based on the foregoing, I am persuaded that the preponderance of the credible evidence establishes that the Claimant's conversation with Mr. Wilkerson took place on December 11, 2020 at which point the Claimant reported to Mr. Wilkerson that she had sustained a back injury the night before while at work lifting a pot. Therefore, I find that the preponderance of the evidence establishes that the Claimant provided the respondent-employer with notice of her December 10, 2020 injury, the following morning of December 11, 2020. Hence, the Respondents are not liable for any indemnity or medical benefits on this claim prior to December 11, 2020.

#### 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) (Repl. 2012). The Claimant proved that the medical treatment of record was reasonably necessary in connection with her compensable injury on December 10, 2020.

#### D. Temporary Total Disability Compensation

An injured employee for an unscheduled injury is entitled to temporary total disability compensation during the time that she is within her 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 is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition, the healing period has ended. Id. Temporary total disability cannot be awarded after the Claimant's healing period has ended. Trader v. Single Source Transportation, Workers' Compensation Commission E507484 (February 12, 1999).

Here, the Claimant suffered a compensable injury to her thoracic spine on December 10, 2020. The evidence shows that the Claimant attempted to return work for a few days following her work-related accident. The Claimant testified she was not able to physically do the work, so she stopped reporting for work. She sought conservative treatment from her primary care physician, without any relief of her symptoms. Ultimately, the Claimant underwent thoracic spine surgery by Dr. Nalbach on April 9, 2021. The Claimant's last office visit of record with Dr. Nalbach was on May 19, 2020. At that time, Dr. Nalbach opined that the Claimant was doing well from a surgical standpoint, with dramatic improvement in her back pain. The final medical record is from Dr. Oglesby on June 17, 2021. At that time, the Claimant was much improved on exam and healing at the operative site with no signs of infection. The Claimant continues on Gabapentin. As of the date of the hearing, the Claimant continued to follow-up with Dr. Oglesby for refills of this medication and her compensable injury.

Therefore, I find that the Claimant proved that she remained within her healing period and was totally incapacitated to earn wages from December 11, 2020 through June 17, 2021 except for the days she worked.



E. Controverted Attorney's Fee

The parties stipulated that the Respondents have controverted this claim for initial benefits in its entirety. Therefore, pursuant to Ark. Code Ann. §11-9-715(Repl. 2012), the Claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded to the Claimant,

**AWARD**

The Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her thoracic spine on December 10, 2020. The Claimant gave the Respondents notice of her injury on December 11, 2020. The Respondents are liable for payment of all reasonable and necessary medical services of record provided in connection with the Claimant's compensable injury. The Claimant is entitled to temporary total disability compensation beginning December 11, 2020 and continuing through June 17, 2021 except for the days she returned to work.

Pursuant to Ark. Code Ann. §11-9-715(a)(1)(B) (Repl. 2012), the Claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits payable to the Claimant. This fee is to be paid one-half by the carrier and one-half by the Claimant.

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 (Repl. 2012).

Moreover, all issues not litigated herein are reserved under the Arkansas Workers'

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Compensation Act.

**IT IS SO ORDERED.**

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**CHANDRA L. BLACK**  
**Administrative Law Judge**