

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H402231**

WHITNEY BRAY, EMPLOYEE

CLAIMANT

**SIZZLIN' SKILLET LLC,
UNINSURED EMPLOYER**

RESPONDENT

OPINION FILED MAY 23, 2025

Hearing before Administrative Law Judge O. Milton Fine II on April 25, 2025, in Forrest City, St. Francis County, Arkansas.

Claimant *pro se*.

Respondent¹ represented² by Ms. Ashley Dawn Walker Love, West Memphis, Arkansas.

STATEMENT OF THE CASE

On April 25, 2025, the above-captioned claim was heard in Forrest City, Arkansas. A prehearing conference took place on March 10, 2025. Respondent failed to appear at that conference. The Prehearing Order entered on that date pursuant to the conference was admitted without objection as Commission Exhibit 1.

Stipulations

The parties reached no stipulations.

¹Due to Respondent's repeated failure to file a prehearing questionnaire response, and to its failure to appear on the prehearing telephone conference, it was banned from offering any documents into evidence and from calling any witnesses. See Commission Exhibit 2.

²Ms. Love, who has an ownership interest in Respondent, is not an attorney. She was permitted to represent it before the Commission under Ark. Code Ann. § 11-9-704(c)(1)(A)(i) (Repl. 2012). See *Bouland v. Erwin Keith, Inc.*, 2013 Ark. App. 460, 2013 Ark. App. LEXIS 460.

Issues

The parties discussed the issues set forth in Commission Exhibit 1. The following were litigated:

1. Whether Claimant was an employee of Respondent employer on August 3, 2023.
2. Whether Claimant sustained a compensable injury to her lower back by specific incident.
3. Whether Claimant is entitled to reasonable and necessary medical treatment of her alleged injury.
4. Whether Claimant is entitled to temporary total disability benefits from January 2, 2024, to a date yet to be determined.
5. What was Claimant's average weekly wage?

All other issues have been reserved.

Contentions

The respective contentions of the parties read as follows:

Claimant:

1. Claimant contends that she sustained a compensable injury to her lower back by specific incident on August 3, 2023, and that she is entitled to medical and indemnity benefits pursuant thereto.

Respondents:

1. Respondent failed to offer any contentions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her 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 over this claim.
2. Claimant has proven by a preponderance of the evidence that she was an employee of Respondent on August 3, 2023.
3. Respondent owes the \$361.75 transcript bill of my reporter, Dawn Crawford, and is hereby ordered to pay it as outlined in the letter dated May 21, 2025, by June 20, 2025.
4. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her lower back by specific incident on August 3, 2023.
5. Claimant has proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment of her compensable lower back injury. Moreover, she has proven by a

preponderance of the evidence that all of her lower back treatment that is in evidence was reasonable and necessary.

6. Claimant has not proven by a preponderance of the evidence that she is entitled to temporary total disability benefits for any period.
7. Because of Finding/Conclusion No. 6, *supra*, the issue of the valuation of Claimant's average weekly wage is moot and will not be addressed.

CASE IN CHIEF

Summary of Evidence

Claimant was the sole witness.

In addition to the Prehearing Order discussed above, admitted into evidence in this case were the following: Commission Exhibit 2, documents underlying the decision to bar Respondent from presenting a defense, consisting of four pages; Claimant's Exhibit 1, a compilation of her medical records, consisting of 43 pages; and Claimant's Exhibit 1, non-medical records, consisting of 14 pages.

Adjudication

A. Employment Relationship

Introduction. Claimant has alleged that on August 3, 2023, she sustained a compensable injury while employed by Respondent. If she does not meet the definition of "employee" contained in Ark. Code Ann. § 11-9-102(9)(A) (Supp. 2024), her alleged injury is not one governed by the provisions of the Arkansas Workers' Compensation Act.

Standards. Whether a claimant was an independent contractor or an employee at the time he was injured is a question of fact. *Moore v. Long Bell Lumber Co.*, 228 Ark. 345, 307 S.W.2d 533 (1957); *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982). Section 11-9-102(9)(A) was amended in 2019 by the General Assembly to read that a claimant's status is to be determined by consideration of the twenty-factor test required by the Empower Independent Contractors Act of 2019, Ark. Code Ann. §§ 11-1-201 et seq. (Supp. 2019). Per § 11-9-204, that test comes from IRS Rev. Rul. 87-41, 1987-1 C.B. 296:

- (1) A person for whom a service is performed has the right to require compliance with instructions, including without limitation when, where, and how a worker is to work;
- (2) A worker is required to receive training, including without limitation through:
 - (A) Working with an experienced employee;
 - (B) Corresponding with the person for whom a service is performed;
 - (C) Attending meetings; or
 - (D) Other training methods;
- (3) A worker's services are integrated into the business operation of the person for whom a service is performed and are provided in a way that shows the worker's services are subject to the direction and control of the person for whom a service is performed;
- (4) A worker's services are required to be performed personally, indicating an interest in the methods used and the results;
- (5) A person for whom a service is performed hires, supervises, or pays assistants;
- (6) A continuing relationship exists between a worker performing services and a person for whom a service is performed;
- (7) A worker performing a service has hours set by the person for whom a service is performed;

- (8) A worker is required to devote substantially full time to the business of the person for whom a service is performed, indicating the person for whom a service is performed has control over the amount of time the worker spends working and by implication restricts the worker from obtaining other gainful work;
- (9)
 - (A) The work is performed on the premises of the person for whom a service is performed, or the person for whom a service is performed has control over where the work takes place.
 - (B) A person for whom a service is performed has control over where the work takes place if the person has the right to:
 - (i) Compel the worker to travel a designated route;
 - (ii) Compel the worker to canvass a territory within a certain time; or
 - (iii) Require that the work be done at a specific place, especially if the work could be performed elsewhere;
- (10) A worker is required to perform services in the order or sequence set by the person for whom a service is performed or the person for whom a service is performed retains the right to set the order or sequence;
- (11) A worker is required to submit regular oral or written reports to the person for whom a service is performed;
- (12) A worker is paid by the hour, week, or month except when he or she is paid by the hour, week, or month only as a convenient way of paying a lump sum agreed upon as the cost of a job;
- (13) A person for whom a service is performed pays the worker's business or traveling expenses;
- (14) A person for whom a service is performed provides significant tools and materials to the worker performing services;
- (15) A worker invests in the facilities used in performing the services;
- (16) A worker realizes a profit or suffers a loss as a result of the services performed that is in addition to the profit or loss ordinarily realized by an employee;

- (17) A worker performs more than de minimis services for more than one (1) person or firm at the same time, unless the persons or firms are part of the same service arrangement;
- (18) A worker makes his or her services available to the general public on a regular and consistent basis;
- (19) A person for whom a service is performed retains the right to discharge the worker; and
- (20) A worker has the right to terminate the relationship with the person for whom a service is performed at any time he or she wishes without incurring liability.

The preface to that regulation reads:

As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. **The twenty factors are designed only as guides** for determining whether an individual is an employee; special scrutiny is required in applying the twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement (that is, whether the person or persons for whom the services are performed **exercise sufficient control** over the individual for the individual to be classified as an employee).

(Emphasis added) The *degree of control* is still the key determination. This goes along with what the court wrote in *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982):

There are numerous factors which may be considered in determining whether an injured person is an employee or an independent contractor for purposes of workers' compensation coverage. Obviously, the relative weight to be given the various factors must be determined by the Commission. Some of the factors which might be considered, depending on the facts of a given case, are [the nine factors omitted] These are not all the factors which may conceivably be considered in a given case, and it

may not be necessary in some cases for the Commission to consider all of these factors. **Traditionally, the “right to control” test has been sufficient to decide most of the cases, although many variations of “control” have probably been squeezed into that test.**

(Emphasis added)

Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Claimant must prove by a preponderance of the evidence that Respondent was her employer. This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

A claimant’s testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness’ credibility and how much weight to accord to that person’s testimony are solely up to the Commission. *White v. Gregg Agric. Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

After consideration of the evidence in light of the above authorities, I find that a preponderance of the evidence readily establishes that Claimant was an employee of Respondent on the alleged date of injury, August 3, 2023. All of the elements of the 20-factor test that apply to the situation at hand—a server working at a restaurant—show that Claimant was an employee there as opposed to an independent contractor. The first factor—the degree of control—most certainly does. And it shows that Respondent

had the right to require compliance by Claimant with its instructions, including without limitation when, where, and how she was to work. The second factor does not apply to this situation. The third factor, however, certainly applies and weighs in favor of Claimant being an employee of Respondent. Her services as a waitress were integrated into Respondent's business operation such that a customer would easily discern that her services were subject to the direction and control of Respondent. As for the fourth factor, Claimant's services were performed personally. The fifth factor does not apply here. With regard to the sixth and seventh, however, Claimant had a continuing relationship with Respondent; and her hours there were set by the establishment. As for the eighth and ninth factors, Claimant worked 20 to 25 hours a week for Respondent—substantially full-time—and the work had to be performed on the premises of Respondent. With regard to the tenth, Claimant's services as a waitress made her part of a food-serving process that had ordered steps. Therefore, she was required to perform her services in the order or sequence set by Respondent. The eleventh factor does not apply here. As for the twelfth, Respondent paid Claimant by the hour. The thirteenth factor does not apply. The fourteenth likewise weighs in favor of employment status because Respondent, a restaurant, furnished Claimant with the tools with which she did her job. Concerning the fifteenth, she did not invest in the restaurant. With regard to the sixteenth, Claimant did realize a profit or suffer a loss as a result of the business that was in addition to the profit or loss ordinarily realized by an employee. While she received tips, they are something that is ordinarily realized by a restaurant employee. The seventeenth factor, concerning whether Claimant performed

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more than de minimis services for more than one person or firm at the same time, unless the persons or firms are part of the same service arrangement, likewise argues in favor of her employee status. All of her waitressing services were for customers of Respondent. As for the eighteenth factor, Claimant's services were available to the general public only to the extent that they were offered through the restaurant. Finally, concerning the last two factors, the restaurant had a right to discharge Claimant, and (as shown *infra*), she had a right to resign without incurring liability.

To repeat, each and every one of the applicable factors point to Claimant being an employee of Respondent, as opposed to an independent contractor. She has proven by a preponderance of the evidence that she had this status on the alleged date of injury, August 3, 2023.

B. Compensability

Introduction. Again, Claimant has argued that she suffered a compensable lower back injury in a specific incident on August 3, 2023, while working for Respondent.

Standards. In order to prove the occurrence of an injury caused by a specific incident identifiable by time and place of occurrence, a claimant must show that: (1) an injury occurred that arose out of and in the course of his employment; (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death; (3) the injury is established by medical evidence supported by objective findings, which are those findings which cannot come under the voluntary control of the patient; and (4) the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Mikel v. Engineered Specialty Plastics*, 56

Ark. App. 126, 938 S.W.2d 876 (1997). If a claimant fails to establish by a preponderance of the evidence any of the above elements, compensation must be denied. *Id.*

Evidence. Claimant's testimony was that she went to work for Respondent, a West Memphis restaurant, in January 2022 as a waitress there. She described her duties as a server:

I came in in [sic] the morning, and I set up the tables, made sure the tables were set up. I prepared the drinks, the teas and stuff for the day, and I waited on the people, brought them their drinks, and cleaned off their tables and such, washed the dishes from their dishes.

Turning to the alleged August 3, 2023, event, which Claimant testified took place at approximately 10:30 a.m., she related:

I carry this big—big thing of tea and first, it's a big pot, and I have to lift it up on this burner, and there's a big urn of tea. There's two of them. You have to make unsweetened and sweetened, and I was carrying it, and my back popped. I was getting the other one—a couple of the guys to help me carry it because it's heavy to lift it up on top of the table, and I was told I wasn't allowed to do that . . . [a]nd I informed [Ashley Dawn Walker Love] that I was hurt. I hurt my back. She—I told her, and she told me that was my problem, to figure it out.

Testifying further, Claimant explained that the tea urn was “a big cylinder”—similar to what is in use at other restaurants. She was required, as part of her job duties, to pick it up off the floor in the back of the establishment, carry it to the front, and place it on the counter so that it could be used to fill and refill beverage glasses. Because the urn was so heavy and full, Claimant had to carry it between her legs while walking with it. After her back popped, which occurred after she had taken only a few steps, Claimant was unable to hoist the container to the counter, which was three to four feet high. She had

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to enlist the aid of a co-worker, Adam Soto, to help her do lift it. Claimant stated that she informed him that she had hurt her back. After the alleged incident, she finished out her workday.

It was the testimony of Claimant that she began to experience “severe pain” in her back after this incident. She had difficulty straightening up. The first treatment she underwent took place the day after the alleged incident, on August 4, 2023. On that occasion, prior to going to work, she went to Marion Minor Medical Clinic. The clinic set her up to undergo an MRI at Methodist Diagnostics. Thereafter, she treated at NEA Baptist Hospital with Danny Ricker. She has had only one physical therapy appointment. The reason for this is that the therapy was so painful that it had to be discontinued. Claimant added that she recently underwent a second MRI. But she has not seen the report, and it is not in evidence. Currently, she is treating for her back with Dr. Ted Shields at Pain Treatment Centers of America (“PTCOA”). However, his records are not in evidence, either. According to Claimant, she has declined to undergo injections at PTCOA because she is afraid to do so. The medication that she is receiving for her back consists of Percocet, which is a pain killer. Later in her testimony, she admitted that as of the date of her alleged back injury, she was already taking pain killers. Claimant hastened to add that while as of August 3, 2023, she was only taking the medication on an as-needed basis, she now takes it four times a day. Dr. Shields prescribed her a back brace.

The medical records in evidence reflect that Claimant underwent a lumbar MRI on October 30, 2023. In reviewing this MRI against one that Claimant had on November 8, 2019, Dr. Christopher Todd authored a report that reads in pertinent part:

The lumbar vertebral bodies remain grossly normal in height and alignment. Disc space height is well maintained. Disc desiccation is demonstrated at L5-S1. Marrow signal is unremarkable. Conus medullaris is normal in appearance terminating at the T12-L1 disc space. Mild facet osteoarthropathy is demonstrated involving the mid and lower lumbar spine.

T12-L1: No significant disk bulging, canal stenosis, lateral recess or neural foraminal narrowing.

L1-L2: No significant disk bulging, canal stenosis, lateral recess or neural foraminal narrowing.

L2-L3: No significant disk bulging, canal stenosis, lateral recess or neural foraminal narrowing.

L3-L4: No significant disk bulging, canal stenosis, lateral recess or neural foraminal narrowing.

L4-L5: Generalized disc bulging is demonstrated. There is no central canal stenosis or lateral recess narrowing. Mild to moderate neural foraminal narrowing is demonstrated bilaterally.

L5-S1: Generalized disc bulging is demonstrated. There is no central canal stenosis or lateral recess narrowing. Mild to moderate neural foraminal narrowing is demonstrated on the left.

IMPRESSION: Generalized disc bulging involving the lower lumbar spine resulting in mild to moderate neural foraminal narrowing bilaterally at L4-5 and moderately advanced neural foraminal narrowing [on] the left at L5-S1.

On December 2, 2023, Claimant presented to Michael Charlton, N.P., at Marion Minor Medical Clinic “with a 2 day history of lumbar pain.” The report of that visit

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continues: Denies known trauma. Denies unusual activity.” Charlton’s examination notes read in pertinent part:

BACK: Right lumbar paraspinous musculature with trigger points. Normal curvature, no vertebral tenderness, motor function, sensation to light touch, and DTR’s intact. Negative cervical compression test. Straight leg raise positive on right at 20 degrees, crossed legs pulling down right leg to knee. Patient does describe occasional muscle spasms with lying flat and sitting. Side to side with mild pain and no vertebral tenderness. No mention of bulging disk in past, and no disc tenderness in lumbar or sacrum today.

Claimant returned to Charlton on March 15, 2024, with essentially the same findings as in December 2023.

On April 3, 2024, Claimant went to the NEA Baptist Neurosurgery Clinic and saw Danny Ricker, N.P. The report contains the following history: “Whitney B. Bray is [a] 57 y.o. year old [sic] female that presents with lower back pain. It was caused by lifting a heavy pot, she has had problems since August.” Ricker also wrote:

Radiographic studies:

I have personally reviewed the images listed below and these are my findings from looking at these images. These findings have been discussed with the patient.

Lumbar MRI revealed: 10/30/23 (outside)

L2-3 bilateral facet disease

L3-4 bilateral facet disease

L4-5 diffuse bulge with mod bilateral foraminal stenosis

L5-S1 diffuse bulge with mod left foraminal stenosis

Ricker referred Claimant to physical therapy.

On April 26, 2024, Claimant went to Fenter Physical Therapy for an evaluation. She told the therapist, Joey Britt, that since August 2203, her lower back had been hurting and had been progressively worsening to the point that lengthy bouts of

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standing or walking had become painful. Britt wrote: “Pt has already had a[n] MRI of the lumbar spine and Medical records indicate degenerative changes including disc bulges at multiple levels along with moderate to severe foraminal stenosis at the lower lumbar levels.”

Claimant returned to the NEA Baptist Neurosurgery Clinic on June 25, 2024. There, she presented with gluteal and sacroiliac pain. She told treating personnel that the most recent episode of pain started more than one month earlier. Ricker wrote: “This is a chronic problem.” Claimant told him that she had been on Percocet since 2019, and that she had only tried one visit to physical therapy—on April 26, 2024—but discontinued it because it made her pain worse. Ricker wrote:

Lumbar MRI revealed @ Methodist Diagnostic 5/12/2024

L1-2 min bulge with bilateral facet disease

L2-3 min bulge with min bilateral foraminal stenosis and bilateral facet disease

L4-5 bilateral facet disease with mod left worse than right foraminal stenosis

L5-S1 left bulge with mod bilateral foraminal stenosis

Ricker recommended that she discuss with her physician whether she should undergo an injection in her lower back versus her right hip.

On December 21, 2024, Claimant underwent another MRI. It reads in pertinent part:

L4-L5: Facet and endplate degenerative changes. Some asymmetric bulge to the left. Moderate to marked left and moderate right foraminal stenosis. No canal stenosis.

L5-S1: Facet and endplate degenerative changes along with trace disc bulging. Moderate to marked bilateral foraminal stenosis. No canal stenosis.

IMPRESSION:

1. Multilevel foraminal stenosis due to facet and endplate degenerative changes with some low-grade bulging at L4/5 and L5/S1.
2. No large disc herniation or canal stenosis.

Discussion. In this case, the evidence reflects that Claimant has objective findings of an injury to her lower back. These findings come from multiple MRIs that Claimant has undergone since the alleged date of injury that show that she has disc bulging at L4-5 and L5-S1. Further, the injury caused internal or external harm to the body that required medical services.

As for whether this lumbar condition arose out of and in the course of her employment at Respondent, and was caused by a specific incident that is identifiable by time and place of occurrence, the evidence shows that on August 3, 2023, at approximately 10:30 a.m., Claimant was performing her job as a server when she undertook one of her duties: to carry the urn of tea from to the back of the restaurant to the front and place it on the counter. Because the contain was full, it was heavy. On this occasion, Claimant experienced a pop in her back. Thereafter, she began having lower back pain. The next day, August 4, 2023, she sought treatment at the Marion Minor Medical Clinic and eventually underwent an MRI. Again, the MRIs document that injury that she suffered that day. I find that those findings are causally related to the above-described specific incident, which is identifiable by time and place of occurrence.

A causal relationship may be established between an employment-related incident and a subsequent physical injury based on the evidence that the injury manifested itself within a reasonable period of time following the incident, so that the

injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). That is the case here. In sum, Claimant—whose testimony I credit—has proven by a preponderance of the evidence that she suffered a compensable injury to her lower back by specific incident.

B. Medical Treatment

Introduction. Claimant has alleged that she is entitled to reasonable and necessary medical treatment in connection with her lower back injury.

Standards. Arkansas Code Annotated Section 11-9-508(a) (Repl. 2012) states that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown, supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

As the Arkansas Court of Appeals has held, a claimant may be entitled to additional treatment even after the healing period has ended, if said treatment is geared

toward management of the injury. See *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004); *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Such services can include those for the purpose of diagnosing the nature and extent of the compensable injury; reducing or alleviating symptoms resulting from the compensable injury; maintaining the level of healing achieved; or preventing further deterioration of the damage produced by the compensable injury. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Artex, supra*.

Discussion. I find that Claimant has proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment of her compensable lower back injury. Moreover, I have reviewed her treatment records that are in evidence, and I find that she has proven by a preponderance of the evidence that all of the treatment of her compensable lower back injury that is in evidence was reasonable and necessary.

C. Temporary Total Disability

Introduction. Claimant has also alleged that she is entitled to temporary total disability benefits as a result of her compensable injury.

Standards. The compensable injury to Claimant's lower back is unscheduled. See Ark. Code Ann. § 11-9-521 (Repl. 2012). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which she has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has

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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). Also, a claimant must demonstrate that the disability lasted more than seven days. *Id.* § 11-9-501(a)(1).

Evidence. Claimant's testimony was that except for one or two days' absence, she continued to work for Respondent after her back injury until the first week of January 2024. Asked what happened in January, she responded:

I called Ms. Ashley and told her I couldn't work anymore due to my—I had health problems, my problems in my back, but I told her my health problems. I had "health problems" is what I said.

During the approximately five-month period that she worked after injuring her back, according to Claimant, she complained about her back every day. Soto helped her carry the tea urn; she never again carried it by herself. Despite her physical difficulties, she persisted in her job because she had bills to pay. Asked if she worked anywhere else after she resigned from Respondent, Claimant replied: "No I wasn't able to work. I can't—I couldn't stand up. I couldn't even—can't even cook, stand in my kitchen and cook because my back, my lower back." In addressing the circumstances that led to her ultimately quitting her job, Claimant denied suffering another injury.

The following exchange took place:

Q. Has any doctor taken you off work in connection with your back?

A. No, I wasn't able to work so I quit, and I haven't been able to go back since.

Q. When you quit—

A. To work.

Q. —you testified that in January of 2024—were you on restrictions then when you quit, or did you just quit because you decided on your own you couldn't do the job?

A. I decided on my own I couldn't do a job. I had to find—I just recently found a sit-down job, a desk job, two weeks ago—well, three weeks now. No until then, I couldn't find a sit-down job, a desk job, because I can't stand up for a period of time anymore.

In describing her work and educational history, Claimant stated that she has a bachelor's degree in social work from the University of Memphis. She worked for thirteen years as a licensed alcohol and drug abuse counselor and as a case manager for two different treatment facilities before she began waitressing. The license has lapsed, and she has learned that she would have to go back to school for a year in order to get the license reinstated. Food service and counseling are the only two areas in which she has worked.

The following exchange occurred:

Q. Do you not believe that there was anything else that you could do physically that you would, that your skills as a licensed—and I realize at that time your license was no longer active—as a social worker that may be transferable, that you could have done work in some kind of related field after you left Sizzlin' Skillet?

A. No, because I have trouble just—I can't even cook anymore. I can't stand at my sink long enough to cook because my lower back starts hurting me so bad. All I can do is sit there and go, uh, uh, uh. It's terrible.

Discussing the job she recently obtained, Claimant stated that it involves taking camping reservations. Asked if she could have performed that job at the time she resigned from Respondent, Claimant answered: “Yes, if I knew about the job I could have . . . I looked for jobs.” But she added that the job is part-time (30 hours a week)

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and pays only \$12.00 per hour, while her server position paid \$11.00 per hour plus tips—and that she made \$330.00 to \$400.00 per week in tips while waitressing (during a 20 to 25-hour workweek).

On cross-examination, Claimant admitted that after she resigned from Respondent, she contacted the establishment multiple times by phone and even in person in an effort to be re-hired. In explaining why she did this, Claimant stated: “I needed the financial support to pay my bills.”

Discussion. In *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002), the Arkansas Court of Appeals wrote: “If, during the period while the body is healing, the employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, his temporary disability is deemed total.” Here, the evidence shows that Claimant continued to perform her job as a server for five months after she suffered her compensable lower back injury. The only change in her duties was to receive help in lifting/carrying the aforementioned tea urn. The two best judges of her ability to work were (1) her doctors and (2) herself. But as Claimant acknowledged in her testimony: (1) no doctor has taken her off work; (2) she attempted to return to work at Respondents shortly after tendering her resignation; and (3) she has the educational background and physical condition that would still enable her to work at a desk job. Consequently, I am unable to find that Claimant has suffered from a total incapacity to earn wages. She has not proven by a preponderance of the evidence that she is entitled to temporary total disability benefits for any period.

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E. Average Weekly Wage

Because of the above finding, the issue of the valuation of Claimant's average weekly wage is moot and will not be addressed.

CONCLUSION AND AWARD

Respondent is hereby directed to pay/furnish benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums shall be paid in a 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). See *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Respondent owes the \$361.75 transcript bill of my reporter, Dawn Crawford, and is hereby ordered to pay it as outlined in the letter dated May 21, 2025, by June 20, 2025.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge