

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E500479

JACK ESTRIDGE, EMPLOYEE	CLAIMANT
WASTE MANAGEMENT, EMPLOYER	RESPONDENT #1
TRANSPORTATION INSURANCE CO., CARRIER	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JULY 16, 2003

Hearing before Administrative Law Judge Andrew L. Blood, on October 21, 1998, at El Dorado, Union County, Arkansas, and remand from the Full Commission.

Claimant represented by the Honorable Robin Carroll and the Honorable Floyd M. Thomas, Jr., Attorneys at Law, El Dorado, Arkansas.

Respondents No. 1 represented by the Honorable Judy Robinson Wilber, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the Honorable Judy Rudd, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The hearing was conducted in the above-styled claim to determine claimant's entitlement to workers' compensation benefits. It was stipulated that the employment relationship existed on September 28, 1994, and that the claimant earned wages sufficient to entitle him to weekly compensation benefits at the maximum applicable level.

The claimant contends that he sustained an injury arising out of and in the course of his employment with respondent on September 28, 1994; as a result of said injury, he required medical treatment

and has incurred a permanent impairment in the amount of 11% to the body as a whole. The claimant seeks the aforementioned workers' compensation benefits as well as controverted attorney's fees and reserves all other issues.

Respondents No. 1 contend that the lifting incident in September 1994 did not cause the compensable injury, as the term are defined under the Workers' Compensation Act, in that the same did not result in internal or external physical harm. Respondents No. 1 contend that while the first MRI, according to Dr. Mason, established the claimant had a herniated disc, during surgery on January 19, 1995, Dr. Mason discovered that there was no herniated disc; that the diagnosis at that time was spondylosis and facet hypertrophy, both of which are degenerative in nature. As a consequence of the afore, the Respondents #1 contend that the conditions as diagnosed by Dr. Mason are not work related and not compensable injuries under the Act. In the alternative, Respondents No. 1 contend that if it is found that the claimant has sustained a compensable injury as a result of the lifting incident of September 1994, then, the condition for which surgery is recommended is degenerative disc disease, and, again, that the same is not related to anything resulting from the lifting incident. With respect to the 11% impairment assessed claimant, Respondents No. 1 contend that the basis for the rating is degenerative disc disease and, therefore, the work injury is not the major cause of the claimant's anatomical impairment rating under the statute and is not compensable as a permanent disability.

In light of the issues in dispute being that of compensability, Respondent No. 2, the Second Injury Fund, waived its appearance at the hearing.

The testimony of Mr. Jack Estridge, the claimant, coupled with the deposition testimony of Dr. J. Zachary Mason, along with medical reports and other documents comprise the record in this claim.

From all of the evidence, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction.

2. On September 28, 1994, the relationship of employee-employer-carrier existed among the parties.

3. On September 28, 1994, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$267 for temporary total disability benefits.

4. On September 28, 1994, the claimant sustained an injury arising out of and in the course of his employment.

5. The claimant's healing period ended April 15, 1996.

6. The claimant has a permanent physical impairment in the amount of 11% to the body as a whole as a result of his September 28, 1994, compensable injury.

7. The Respondents #1 shall pay all reasonable hospital and medical expenses arising out of the injury of September 28, 1994.

8. Respondents No. 1 have controverted the payment of workers' compensation benefits.

CONCLUSIONS

The principal issue before the Commission at this juncture is that of compensability. The respective positions of the parties relative to the afore are set forth above in their contentions.

The claimant, with a date of birth of October 15, 1949, has an eighth grade education. The claimant presents an employment history consisting of heavy, manual labor jobs since approximately the age of 16.

The record reflects that while the claimant has worked principally performing heavy, manual labor jobs throughout his employment history, he has on occasion been both self-employed and performed duties as a supervisor. Further, claimant was drafted into the U.S. Army and assigned duties in the combat zone during the Vietnam conflict a total of 11 months, 8 days from December 1, 1969. The claimant was in a combat setting during his military service and received an honorable discharge.

The record reflects that a majority of the work performed by the claimant during his civilian employment entailed work in the oil fields. The claimant also worked as a skidder driver in the log woods and for a very short period, approximately two days, in a factory setting.

The claimant commenced his employment with respondent in 1992 as an equipment operator. The claimant acknowledged that he had previously experienced pulled muscles in his upper back on one to two occasions, during which he missed one to two days from work. Additionally, the claimant's prior medical history reflects that at

one juncture he underwent surgery for a hernia, however, missed a minimum amount of time from work, and upon returning to work continued to discharge employment duties in a supervisory capacity. The claimant has also suffered injuries to his fingers.

The claimant acknowledged receiving medical treatment relative to various physical and psychological complaints from the VA Hospital, to include lancing a cyst, and treatment for post-traumatic stress disorder, which was diagnosed in 1990. The testimony of the claimant reflects that he has had inpatient hospitalization on two occasions relative to the post-traumatic stress disorder. The evidence reflects that one of the hospitalizations was while the claimant was employed by respondent, and one prior to his employment. Finally, the claimant receives VA benefits as a result of service-connected injuries and disability, the post-traumatic stress disorder.

The claimant denies that he experienced low back complaints or required treatment relative to same prior to September 28, 1994. As previously noted, claimant commenced his employment with respondent in 1992 as a heavy equipment operator. The evidence reflects that claimant sustained his injury of September 28, 1994, as the result of a lifting incident within the course and scope of his employment with respondent. Specifically, claimant was in the process of carrying a cross tie when he sustained his injury. The testimony of claimant reflects:

. . . .I said, 'I am going up here and get these crossties ready.' And he told me how many we was going to need, and they was sitting inside the fire wall

where we pulled the tank, and I got out of the truck, put my gloves on, and the crossties were old railroad crossties. They weren't fully green or nothing. I picked it up and started walking. We had washed rock about that big, big old round gravel (indicating), and I guess I walked eight or ten foot and the crosstie started slipping out of my hands. I squatted real fast to get another hold on it, and then when the weight hit me, in my back here, it was kind of a sharp pain and a deep burning in there. I just dropped the crosstie,. . . (T. 17.)

Following the September 28, 1994 incident involving the cross tie, claimant immediately reported the injury to his supervisor, Mr. Chris Tuney. The claimant's testimony reflect in reporting the symptoms or complaints to Mr. Tuney:

. . . .I said, 'I ain't never had nothing like this to happen to me before,' just a muscle, you know, in the upper part of my back hurt, and they set me up with Doctor Owens. (T. 18.)

The evidence in the record reflects that on October 4, 1994, the claimant was seen by Dr. J. Douglas Owens, relative to the September 28, 1994 lifting incident. After relating the history of his injury to Dr. Owens, a physical examination was had. Dr. Owens noted that the plain films of the lumbosacral spine showed no gross abnormality, except straightening of the normal lordotic curve. The claimant was prescribed medication, to include Valium for muscle spasms. The claimant was again seen by Dr. Owens on October 7, 1994, at which time he was allowed to return to work at light duty on October 10, 1994, and to regular duty on October 17, 1994. (RX. 1, pp. 59-62.)

The claimant's testimony reflects that while he attempted to

perform work in accordance with the restrictions placed on him by Dr. Owens, he continued to experience pain in his low back. Specifically, claimant noted that he was assigned to the track hoe, a heavy piece of equipment, with a comfortable seat; however, while the majority of his physical efforts were upper body movement, his low back pain continued to increase. The claimant finally returned to Dr. Owens and additional diagnostic studies were performed. Specifically, on December 2, 1994, claimant underwent an MRI of his lumbar spine at South Arkansas Radiation Therapy Institute, pursuant to referral by Dr. Owens. (RX. 1, p. 58.) The claimant was later referred by Dr. Owens to Dr. J. Zachary Mason, a Little Rock neurosurgeon.

On December 21, 1994, claimant was evaluated by Dr. Mason pursuant to the above-cited referral. The December 22, 1994 report of Dr. Mason relative to the initial evaluation of claimant reflects, in pertinent part:

TESTS ORDERED/REVIEWED: The MRI does show him to have marked degenerative changes at L5-S1 with anterior disc herniation as well as some posterior herniation. The herniation at the L5-S1 level projects more to the left. At L4-5 he has a broad based herniation which projects both to the left and the right.

IMPRESSION: I do not think that he will respond to any further conservative measures.

RECOMMENDATIONS: I have recommended to him that he have a lumbar myelogram to look at this more closely and then to proceed with surgery as indicated. He is to discuss this with his worker's compensation carrier and then to notify us after he obtains approval to make the

proper arrangements. (RX. 1, pp. 12-13.)

On January 23, 1995, claimant underwent a lumbar myelogram pursuant to the referral of Dr. Mason, under the care of Dr. Henry Lile. The impression generated pursuant the lumbar myelogram and post-myelogram CT scan of the lumbar spine resulted in a decision to proceed to surgery. (CX. 1, pp. 19-20.) The discharge summary relative to the claimant reflects that he was admitted to Baptist Medical Center on January 23, 1995, under the care of Dr. Mason with an admitting diagnosis of lumbar herniated nucleus pulposus. On January 24, 1995, the claimant underwent a surgical procedure in the form of a foraminotomies at L4-5 bilaterally and at L5-S1 on the right. The claimant's discharge diagnosis was that of facet hypertrophy. (CX. 1, p. 8.)

The evidence reflects that following the claimant's January 25, 1995 discharge from Baptist Medical Center, he continued under the care of Dr. Mason relative to his back complaints. During the March 15, 1995 follow-up visit, Dr. Mason observed that most of the claimant's complaints were arthritic in nature and that the claimant was neurologically intact. The March 15, 1995 report further reflects a recommendation that the claimant start a reconditioning program such as work hardening to help get him into shape to return to work. The report concludes:

I do not have much else that I can do for him at the present time. I would like to see him again for follow-up evaluation after he has completed his Work Hardening. (RX. 1, p. 9.)

The evidence reflects that after Dr. Mason learned that the

claimant had not participated in the work hardening program per his recommendation, he authored a release returning the claimant to regular work, effective April 17, 1995. The claimant had not been seen by Dr. Mason since March 15, 1995, until he was seen in follow-up on May 11, 1995. The May 11, 1995 report of Dr. Mason reflects, in pertinent part:

Mr. Jack Estridge returned to my office on May 10, 1995. The patient relates to me that he is having a great deal of difficulty trying to do anything at this point in time. He seems to be much worse overall. He tells me that he has not done any of the work hardening we recommended. After we heard that he was not attending work hardening and was not returning to see us we released him from our care on April 11, 1995. He was released to return to work effective April 17, 1995.

Today the patient tells me he is unable to perform work due to his pain. He complains of a burning sensation that radiates down both legs.

* * *

His surgery was done on January 24, 1995. At that time he underwent a bilateral decompressive medial facetectomy at L4-5 and a medial facetectomy at L5-S1 on the right. He had bulging spondylitic discs which were firm with no evidence of herniation.

IMPRESSION: His symptoms predominantly seem to be inflammatory but he has not responded to the nonsteroidal anti-inflammatory medications. (RX. 1, p. 6.)

Dr. Mason recommended that the claimant have a lumbar MRI scan as a result of the evaluation of May 10, 1995.

The record reflects that on May 12, 1995, claimant underwent

an MRI of his lumbar spine pursuant to the recommendation of Dr. Mason of May 10, 1995. The MRI report, performed by Dr. Michael T. King, relative to the claimant, reflects, in pertinent part:

1. Moderate postoperative diskectomy scar at L4-L5 resulting in mild symmetrical anterior effacement of the dural sac. There is no recurrent HNP at this level.
2. Minimal right-sided epidural fibrosis at L5-S1, again with no recurrent HNP.
3. There is chronic L5-S1 disc protrusion with associated end-plate spurring which causes a moderate right L5 foramen stenosis.
4. Mild degenerative facet arthropathy bilaterally at L4-L5. (CX. 1, p. 21.)

In July 1995, claimant was referred by respondents to Dr. Edward H. Saer, III, a Little Rock orthopedic physician. Dr. Saer's July 6, 1995 report relative to his evaluation of the claimant reflects the history of the claimant's injury and treatment relative to same. Dr. Saer also had access to the claimant's prior medical relative to treatment received for complaints growing out of the September 28, 1994 accident. The report reflects, in pertinent part:

. . . .He injured his back on September 28, 1994 lifting cross ties. He developed pain in the back as well as in the lower extremities, worse on the right than the left. He remained symptomatic and ultimately was worked up and noted to have some stenosis at L4-5 and L5 on the right and underwent decompression in January 1995. He did well for the first couple of days after surgery but then symptoms recurred and he's been symptomatic ever since.

* * *

X-rays show some narrowing and early degenerative change at L4-5 and L5-S1.

His preoperative myelogram and CT showed spondylosis with lateral recess encroachment at L4-5 worse on the left than the right and some changes at L5-S1 on the right. His surgery included decompressive medial facetectomy at L4-5 bilaterally and L5-S1 on the right. No HNP was identified. Post-operative MRI shows evidence of scarring but no recurrent HNP. He does have some end plate spurring at L5 on the right and facet arthropathy at L4-5.

His persistent symptoms are probably related to his degenerative disc disease. I don't think that further surgery is likely to be particularly helpful at this time. He needs to get into a good conditioning program, both aerobically, as well as for his back. He needs to start on some trunk stabilization exercises. I've recommended that he cut down and quit smoking. Epidural and/or facet injections may also be helpful. I'm going to give him some Ultram to try for his pain. We'll get that set up and I'll see him back in 6 weeks. (CX. 1, pp. 23-24.)

Between July 18, 1995 and August 17, 1995, claimant received treatment under the care of Dr. Sarah Yousuff in the form of steroid injections pursuant to the referral of Dr. Saer. (RX. 1, pp. 34-42.) Additionally, on August 24, 1995, claimant was referred by Dr. Yousuff to Dr. Thomas Hart for radio frequency facet rhizotomy. (RX. 1, p. 33.) The claimant was seen by Dr. Hart on September 14, 1995, and underwent the aforementioned recommended procedure. (RX. 1, pp. 31-32.) On September 29, 1995, claimant was again seen by Dr. Yousuff, at which time he was

referred back to Dr. Saer for re-evaluation. (RX. 1, p. 30.)

On October 27, 1995, claimant was again seen by Dr. Saer. After noting the results of the claimant's treatment under the care of Dr. Yousuff, the October 27, 1995 report reflects:

His symptoms most likely are related to his persistent degenerative disc disease. I think it would be helpful to do discography to make sure that the discs themselves are not a source of pain. If they are not, it may be reasonable to consider posterior fusions as an option. I discussed this today with him and his rehab nurse. We will get that scheduled and I'll see him back afterwards. (CX. 1, p. 26.)

Dr. Saer was unable to get the discogram approved until March 5, 1996. An April 15, 1996, office note of Dr. Saer relative to the claimant reflects the result of the discogram as normal at L3-4, very abnormal at L4-5, causing concordant pain, and at L5-S1 at abnormal but not terribly painful. Dr. Saer's impression of the claimant's complaint reflected in the April 15, 1996 office note was that of post laminectomy discogenic pain. The report further reflects:

RECOMMENDATIONS:

I had a long talk with Mr. Estridge and his wife about this. He has had extensive non-operative treatment including therapy, injections, medications, etc. None of this has really afforded him much relief.

I talked with them about further surgery in the form of spinal fusion. I explained what this would involve as well as the associated risks and possible complications. Because of the discogenic nature of the pain he would need an interbody fusion. This would probably be better be done anteriorly. He would need

posterior stabilization and fusion as well. I discussed the deleterious effects of smoking and indicated that he would need to stop beforehand. The other risks and possible complications were discussed in detail, including use of instrumentation and the current FDA status of that. (CX. 1, p. 27.)

The testimony of the claimant reflects that after considering the status of his pain, although he is still unable to perform any pre-September 1994 physical activity or return to gainful employment, he has elected not to proceed with the fusion. The claimant returned to the care and treatment of Dr. Mason in 1997, after having treated with Dr. Saer and others. Responsive to an inquiry from claimant's attorney, in a November 19, 1996 correspondence, Dr. Saer observed that he had last seen the claimant on April 15, 1996, and that the claimant had elected not to have surgery, he had reached maximum medical improvement effective the date of the last visit. Dr. Saer deferred to Dr. Mason regarding the claimant's impairment rating. (CX. 1, p. 29.)

On February 5, 1997, claimant was seen by Dr. Mason for the first time since May 1995. After reciting the history of claimant's injury and treatment relative to same in the interim, Dr. Mason observed that the claimant had come in to obtain an impairment rating and also a referral for a functional capacity evaluation. After conducting a physical examination of the claimant during the February 5, 1997 visit, Dr. Mason's diagnosis of the claimant's complaint was that of status post-lumbar foraminotomy bilaterally, L4-5 and L5-S1, right. The report further reflects:

The patient does have an impairment rating to the body as a whole of 11% based on his surgical changes and the degenerative disc problems that he has at the L4-5 and L5-S1 levels. It is possible that if the patient were to proceed with a lumbar fusion that his impairment rating would be somewhat higher. The rating is based on the AMA Guides to the Rating of Permanent Impairment. Fourth Edition. (RX. 1, p. 4.)

The present claim is one governed by the provisions of Act 796 of 1993. The respondents assert that the claimant did not sustain a compensable injury as the term is defined under the Workers' Compensation Act. Respondents acknowledge that a lifting incident occurred in September 1994. Further, respondents assert that if it is found that the claimant sustained a compensable injury in the lifting incident in September 1994, the condition for which surgery is recommended is degenerative disc disease and not related to anything resulting from the lifting incident.

At the outset, it is noted that there is no evidence in the record to reflect that the claimant required treatment relative to his low back prior to his employment with respondent. While there are medical reports in the record citing complaints of back pain prior to the September 28, 1994 injury in the employment of respondent, the same was attributable to upper back pain, the trapezius area, and headaches. Because of the service-connected disabilities, claimant has access to medical resources at the VA Hospital, and has utilized such access. Again, a review of the medical from the VA Hospital does not disclose treatment relative to claimant's low back prior to September 28, 1994. The claimant

refused to receive treatment relative to low back by VA medical personnel when receiving treatment for other complaints after he sustained the September 28, 1994 injury.

In order to establish a compensable injury pursuant to the provisions of Act 796 of 1993, the claimant's injury has to be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(5) (A) (i) provides:

- (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. . . .

Ark. Code Ann. §11-9-102(5) (D) mandates that a compensable injury be established by medical evidence, supported by objective findings as defined by Ark. Code Ann. §11-9-102(16). An objective finding is defined as a finding that cannot come under the voluntary control of the patient. (Ark. Code Ann. §11-9-102(16) (A) (i); see Cox v. C.F.S.I. Temp. Employment, 57 Ark. App. 310, 944 S.W.2d 856 (1997)).

In the instant claim, claimant reported the September 28, 1994 incident to his supervisor following the lifting incident. The claimant experienced an immediate onset of pain in his lower back and a burning sensation as a result of attempting to prevent the cross tie from falling. The claimant was seen for medical treatment relative to the reported September 28, 1994 injury, on

October 4, 1994, by Dr. J. Douglas Owens. Objective findings recited in Dr. Owen's October 4, 1994, report relative to the claimant included straightening of the normal lordotic curve. Dr. Owens directed diagnostic studies, to include an MRI of claimant's lumbar spine, which reflected definitive findings regarding degenerative disc disease and possible anterior disc herniations. A number of diagnostic studies were performed prior to the claimant's January 24, 1995 surgery under the care of Dr. Zachary Mason. The record is clear that claimant underwent surgery relative to his September 28, 1994 injury.

The deposition of Dr. Mason was obtained on January 27, 1998, during which time he was questioned extensively regarding diagnostic studies performed relative to the claimant, his findings, and the treatment rendered relative to the findings. The deposition of Dr. Mason reflects:

Q [Mr. Davis] From performing the surgery, do you believe that the facet hypertrophy and the disc bulge -- and this may not be a fair question -- contributed equally to the problems he was having when you did the surgery or did one contribute more than the other?

A [Dr. Mason] Probably they are a combination of the two that have caused this problem with compression on the nerve roots because the facet bulge is above the nerves and the bulge of the disc is beneath so that the two compress the nerve in between them. (JX. 1, p. 12.)

At another point, Dr. Mason testified:

A Well, it's a difficult thing to answer. Certainly to develop spondylosis and degenerative changes, it takes a long

time for that to develop. Based on the patient's history as it's presented to us, he wasn't having these problems. He was able to work without difficulty.

So what you have to think is that something happened with this lifting injury that caused even worse injury to the disc and based on the patient's history and what he tells us, you would think that, yes, that would be greater than 50 percent what caused his problem, some internal disruption of the disc causing his pain. (JX. 1, pp. 22-23.)

Dr. Mason responded with respect to objective evidence of acute changes in the back, when questioned:

A At the time of surgery, we did not find an acute change such as a soft disc herniation or something that looked as if it had extruded, causing pressure on the nerve roots.

That's only on the external aspect of a disc. I mean we didn't open the disc because there was not an indication to do it, but what I can't answer, and actually no one actually can, is if he had something that shifted or changed inside the disc within the degenerated material that was present that would suddenly give him a big difference in his pain. (JX. 1, pp. 25-26.)

Finally, Dr. Mason summed up his assessment of the September 1994 injury and the causal nexus to the surgery:

A The patient's pain, based on his history, started after the lifting injury and based on that information as well as our findings of degenerated discs, I have felt that his injury was as a result of the lifting injury within a reasonable

degree of medical certainty.
(JX. 1, p. 27.)

At another juncture during the course of the deposition, Dr. Mason elaborated on the extent of the claimant's anatomical impairment and the basis for same. (JX. 1, p. 18.) See, Service Chevrolet v. Atwood, 61 Ark. App. 190, 966 S.W.2d 909 (1998).

It is, therefore, my opinion, after a thorough consideration of all of the evidence in this record, to include the testimony of witnesses, a review of the medical reports, and application of the pertinent statutory provision and case law, that the claimant has sustained his burden of proof by a preponderance of the credible evidence that he sustained an injury arising out of and in the course of his employment with respondent, which resulted in internal and external harm to the body requiring medical services and resulted in disability, on September 28, 1994. Respondents No. 1 has controverted the claimant's entitlement to workers' compensation benefits as a result of the September 28, 1994 compensable injury.

Following the February 4, 1999, ruling of the Administrative Law Judge growing out of the October 21, 1998, hearing, an appeal was filed by respondents to the Full Commission. In an Opinion filed July 13, 1999, the Full Commission reversed the ruling of the Administrative Law Judge relative to compensability. The Arkansas Court of Appeals affirmed the ruling of the Full Commission. In an opinion delivered December 15, 2000, the Supreme Court of Arkansas reversed ruling of the Arkansas Court of Appeals and the Full Commission.

Following the ruling by the Supreme Court of Arkansas, on July 16, 2001, the Full Commission entered an order directing the Respondents to comply with the award set forth in the opinion of the Administrative Law Judge. Respondents filed a motion for reconsideration of the afore ruling. In a November 13, 2001, order, the Full Commission vacated the July 16, 2001, order, and remanded the case to the Administrative Law Judge for more adequate findings on the issue of whether the claimant has proven by a preponderance of the evidence that his compensable injury is the major cause of his permanent impairment.

Claimant sought an appeal of the November 13, 2001, ruling of the Full Commission. In an opinion delivered November 6, 2002, the Arkansas Court of Appeals dismissed the appeal. The file was reassigned to the Administrative Law Judge on July 11, 2003.

The relevant statute to the issue on which this claim was remanded provided as follows:

(ii)(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

Ark. Code Ann. §11-9-102(4)(F) (Repl. 2002). "'Major cause' means more than fifty percent (50%) of the cause." Ark. Code Ann. §11-9-

102(14)(A) (Repl. 2002). "A finding of major cause shall be established according to the preponderance of the evidence...." Ark. Code Ann. §11-9-102(14)(B) (Repl. 2002).

The compensability of claimant's September 28, 1994, injury has been established. The injury was sustained in a lifting incident. The evidence preponderates that claimant preexisting degenerative disc disease prior to his compensable injury of September 28, 1994. The compensable injury {lifting of the railroad crossties} aggravated claimant's preexisting degenerative disc disease and resulted in the need for medical treatment, to include surgery.

On January 24, 1995, claimant underwent surgery under the care of Dr. J. Zachary Mason, a Little Rock neurosurgeon, relative to his compensable September 28, 1994, injury. During the surgery Dr. Mason found some compression on two nerve roots.

When questioned regarding the major cause relative to the compensability issue Dr. Mason testified:

A Well, it's a difficult thing to answer. Certainly to develop spondylosis and degenerative changes, it takes a long time for that to develop. Based on the patient's history as it's presented to us, he wasn't having these problems. He was able to work without difficulty.

So what you have to think is that something happened with this lifting injury that caused even worse injury to the disc and based on the patient's history and what he tells us, you would think that, yes, that would be greater than 50 percent what caused his problem, some

internal disruption of the disc causing his pain. (JX.1, pp.22-23).

As previously noted, following a February 5, 1997, examination, Dr. Mason diagnosed the claimant's complaint as status post-lumbar foraminotomy bilaterally, L4-5 and L5-S1, right. Dr. Mason further assessed the claimant with an impairment rating of 11% to the whole body based on surgical changes and the degenerative disc problems at the L4-5 and L5-S1 levels. (RX.1, p.4).

During his January 27, 1998, deposition, Dr. Mason testified that the 11% permanent impairment rating assigned the claimant was based on the American Medical Association Guides, Fourth Edition:

Yes. The impairment rating actually is assigned using the guide that has an assessment for patients with spondylotic changes and cord compression, you then have surgery to decompress the nerve roots and there's a 10 percent per level for an initial level and 1 percent for an additional level. (JX.1, p.18).

Table 75, of the American Medical Association Guides, 4th edition, set forth the impairment rating as relayed by Dr. Mason. In *Second Injury Fund v. Stephens*, 62 Ark. App. 255, 970 S.W. 2d 331 (1998), the Arkansas Court of Appeals held, with respect to the "major cause" requirement that the same was satisfied by evidence that an injury necessitated performance of surgery and that the surgery at the site of a previous surgery was the reason for the additional 2% impairment rating.

It is further my opinion, after a thorough consideration of

all of the evidence in this record, to include the testimony of the witnesses, a review of the medical reports, and application of pertinent statutory provision and case law, that the claimant has sustained his burden of proof by a preponderance of the evidence that he has incurred a permanent physical impairment in the amount of 11% to the body as a whole as a result of the September 28, 1994 compensable injury. Respondents No. 1 has controverted the claimant's entitlement to workers' compensation benefits as a result of the September 28, 1994 injury.

AWARD

Respondents No. 1 is hereby ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$267 for the period covering September 27, 1994 through the end of claimant's healing period, as a result of his compensable injury of September 28, 1994. Said sums approved shall be paid in a lump sum without discount. Respondents No. 1 may claim credit for sums heretofore paid toward the discharge of the aforementioned obligation.

Respondents No. 1 is further ordered and directed to pay to the claimant permanent disability benefits to correspond with the claimant's anatomical impairment of 11% to the body as a whole, at the weekly compensation benefit rate of \$200, commencing with the end of the claimant's healing period, April 15, 1996.

Said sums accrued shall be paid in lump without discount.

Respondents No. 1 is further ordered and directed to pay all reasonably related medical, hospital, nursing, and other apparatus

expenses, to include medical related travel, growing out of the claimant's compensable injury of September 28, 1994.

Maximum attorney's fees are herein awarded to the claimant's attorneys, the Honorable Robin Carroll and the Honorable Floyd Thomas, on the controverted portions of this award, pursuant to Ark. Code Ann. §11-9-715, and, in accordance with Holiday Inn-West v. Coleman, 31 Ark. App. 224, 792 S.W.2d 345 (1990).

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS ORDERED.

ANDREW L. BLOOD
Administrative Law Judge