

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F402435**

<b>RANDALL HIGHTOWER, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>KROGER, SELF-INSURED EMPLOYER</b>	<b>RESPONDENT</b>
<b>SEDGWICK, THIRD-PARTY ADMINISTRATOR</b>	<b>RESPONDENT</b>

**OPINION FILED DECEMBER 15, 2004**

Hearing before Administrative Law Judge Andrew L. Blood, on November 17, 2004, at Newport, Jackson County, Arkansas.

Claimant represented by the Honorable Kenneth A. Olsen, Attorney at Law, Little Rock, Arkansas.

Respondent represented by the Honorable Wendy S. Wood, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted in the above-style claim to determine claimant's entitlement to workers' compensation benefits.

Pre-hearing conferences were conducted in this claim, from which a Pre-hearing Order was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the hearing, and the parties' respective position relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Randall Hightower, the claimant, Keith Mossman, coupled with the November 16, 2004, deposition of Dr. Edward Saer, along with medical reports and other documents comprise the record in this claim.

## DISCUSSION

Randall Hightower, the claimant, with a date of birth of November 28, 1957, is a highschool graduate who began his employment with respondent while in highschool as a part-time employee on June 17, 1974. Mr. Hightower became a full time employee of respondent in 1976, and continued in the employment of same through February 16, 2004.

In June 9, 1994, claimant suffered an injury to his lower back while discharging employment duties for respondent. After an initial evaluation by Dr. Randall Hunt, respondent's designated medical provider, claimant was referred to Dr. Robert Dickens, a Little Rock neurosurgeon, for further treatment. The June 9, 1994, injury was reported to appropriate supervisory personnel of respondent and accepted as compensable. On August 16, 1994, claimant underwent surgery under the care of Dr. Dickens the diagnosed herniated nucleus pulposus at L4-5 on the left. (JX. #1, p. 4). Claimant was last seen by Dr. Dickens relative to the June 9, 1994, injury, on December 9, 1994. (JX. #1, p. 8). On January 25, 1995, Dr. Dickens assessed the extent of the claimant's permanent physical impairment relative to the June 9, 1994, injury and subsequent surgery at 10 % to the body as a whole. (JX. #1, p. 9).

Claimant acknowledged that subsequent to the December 1994, release by Dr. Dickens he experienced occasional back pains after a hard day of work. Claimant resumed his regular employment duties with respondent following his recovery from the 1994 injury. The medical in the record reflects that claimant was seen on two (2) occasions in 1998 by Dr. Jerry Frankum, a Newport physician, for complaints of low back pain. (JX. #1, p. 10-11). Claimant was referred by Dr. Frankum to Dr. Ronald N. Williams, a Little Rock neurosurgeon, for treatment of his back pain. (JX. #1, p. 13) On October 2, 1998, claimant underwent a lumbar steroid injection by Dr.

Bob W. Smith, at White County Medical Center, pursuant to a referral of Dr. Williams, relative to low back pain. (JX. #1, p. 14-15).

On August 21, 2001, claimant was seen by Dr. J. D. Allen, a Batesville orthopedic physician, in follow-up of his right knee complaint. During the visit Dr. Allen noted that claimant was also having some problems with his back for which he was referred to Dr. Bruce Safman, a physical medicine and rehabilitation physician.

Dr. Safman's August 24, 2001, report reflects his impression of the claimant's complaint as left sacroiliac strain, lumbar enthesopathy, and status post surgery for herniated disc. Claimant underwent trigger point injection of the sacroiliac region by Dr. Safman on August 24, 2001. The medical in the record reflects that claimant was again seen by Dr. Safman on September 28, 2001, and was scheduled to be seen again three (3) weeks thereafter. There are no medical reports in the record to reflect that claimant was seen by any physician relative to his back between the September 28, 2001, visit to Dr. Safman and February 16, 2004.

In July 2003, claimant was promoted to the position of head clerk in his employment with respondent. The head clerk position in the Newport store carries with it at times supervisory responsibilities in the absence of the manager and co-manager. Claimant's testimony reflects that he did not undergo any training in the position with respect to the handling of workers' compensation claim. Claimant was aware of the identity of the company doctor, Dr. Hunt. Further claimant's testimony reflects that it was his understanding that work related injuries were to be reported to supervisors. Claimant was not familiar with the completion of workers' compensation forms or the mechanism for instituting claim forms.

Claimant's testimony reflects that on February 16, 2004, he worked his regular shift, 1:00

P.M. until 10:00 P.M. During the course of his shift claimant performed a substantial amount of lifting while stocking the store. Claimant noted that the stocking of the bleach and cases of soft drink, Big K, were the heaviest items lifted. The testimony of the claimant reflects that by the time he completed his shift he was experiencing pain in his lower back. Claimant testified that at the time the pain was similar to that previously experienced.

The medical records of Dr. Clifford Boswell, the claimant's family physician, reflects an entry of February 16, 2004, at 11:00 relative to the claimant regarding a call to USA Drug Store for vicodin. (JX. #1, p.21). An earlier January 26, 2004, entry in the records of Dr. Boswell regarding the claimant, reflects that an appointment was scheduled with Dr. Allen for "3-2-04 @ 9:45 for left knee pain." (JX. #1, p.21).

The testimony to the claimant reflects that when he arrived home from work after his February 16, 2004, shift, he experienced pain in his low back which made it difficult for him to get out of his truck. The next morning, Tuesday, February 17, 2004, he was experiencing such sever pain in his lower back that he felt he had suffered a new injury, rather than a continuance of the prior 1994 injury. Claimant was scheduled to work on February 17, 2004, however testified that he was unable to do so due to the back pain. Claimant's testimony reflects that he called his supervisor, Mr. Keith Mossman, the store manager, and informed him that he had hurt his back lifting the cases of Big K soft drink the previous night and would not be able to work. Claimant testified that he told Mr. Mossman that he would rest in bed.

The testimony of the claimant reflects that he was scheduled to be off work on Wednesday, February 18, 2004. Claimant's testimony reflects that he rested his back from the time he got off work on February 16, 2004, until he drove to work on Thursday, February 19,

2004. Claimant noted that once he arrived for work on Thursday, February 19, 2004, he was in sever pain when he got out of his vehicle at work. Claimant informed his supervisor, Mr. Mossman, that he was unable to work due to his back pain from the injury of February 16, 2004. After picking up his check, claimant returned home and had his wife call Dr. Hunt, the respondent's designated medical provider, to schedule an appointment. Dr. Hunt was out of his office at the time the attempt was made to schedule the appointment. As a consequence of the afore, an appoint was scheduled with Dr. Boswell for Friday, February 20, 2004.

On Friday, February 20, 2004, claimant was seen by Dr. Boswell relative to his low back pain. Claimant testified that he relayed a history of his work related injury to Dr. Boswell at the time of the visit. The February 20, 2004, office note of Dr. Boswell reflects, relative to the claimant's visit:

Randall was unloading some soft drinks last week and has had pain in his back since. He has a history of a diskectomy at the L3-4 level in 1990. He occasionally has some low back pain but states this is worse. He is now having pain down into his right leg. He took a Flexeril and Vicodin last night, which helped his pain somewhat. He is going to take off next week.  
OBJECTIVE: Tenderness to palpation at the right lower spine area. Straight leg raise causes pain down the back of his leg.  
ASSESSMENT: Lumbar strain. (JX. #1, p. 21).

Claimant testified that he was informed by Dr. Boswell that he should either be off work or placed on light duty. Claimant maintains that he provided the light duty slip to his supervisor and was informed that there was no light duty work available. The testimony of the claimant reflects that he used vacation time while he was off work in order to insure that he would continue to have a paycheck.

The medical in the record reflects that Dr. Boswell referred the claimant to White River

Medical Center for a MRI of his lumbar spine. On February 26, 2004, claimant underwent a lumbar MRI. (JX #1, p. 22). Claimant was seen in followup by Dr. Boswell on February 27, 2004:

Randall came in for results of his MRI. I explained to him that he had a bulging disk posteriorly at the L3-4 level and that we needed to get set up with a neurosurgeon. He is wanting to check with some of his relatives to work at CARTI in Little Rock. He will call me back Monday ..we will get him set up. I told him that at the present time he would need to go back at light duty, on lifting over 20 pounds, no standing over 30 minutes at a time. . . (JX. #1, p. 21).

A March 1, 2004, entry in the records of Dr. Boswell reflects that an appointment was scheduled for the claimant with Dr. Saer for April 22, 2004. Claimant was again seen in the office of Dr. Boswell on March 2, 2004, and provided a note reflecting the assessment of bulging disk at L3-4, and a need to be on light duty until after seen by a neurosurgeon. (JX. #1, p.21).

The testimony of the claimant reflects that in March 2004, he was contacted by the assistant manager of the store, Ms. Vanessa Smith, and directed to report to work for light duty. The testimony of the claimant reflects that the afore request was make after he was directed to come in and completed a workers' compensation claim form. Claimant testified that he reported to work as directed and was given a hand-held scanner to confirm the products on the shelves with the labels. Claimant maintains that he was unable to perform the job for more that three (3) hours before having to abandon same due to residuals of his injury.

Claimant's testimony reflects that he was informed by the claims adjuster, Ms. Janet Morton, that his claim for workers compensation benefits was being denied because he had pre-existing back problems. Once the claim was denied claimant was able to receive short term

disability benefits through an insurance policy of the union. Respondent contributed to the insurance policy. Claimant received six (6) months of indemnity benefits at a rate of \$225.00 per week. The testimony in the record further reflects that some of the cost of claimant's surgery by Dr. Saer was paid by the group health insurance carrier.

Mr. Keith Mossman, the manager of the Newport store of respondent, testified that he had been the manager of the store since February 2004. Prior to being promoted to manager of the Newport store, Mr. Mossman had worked a co-manager of a Kroger store in Jonesboro, Arkansas for six (6) years. Claimant was already in the position of head clerk in the Newport store at the time of Mr. Mossman's arrival. Mr. Mossman testified that while he did not provide any management training to the claimant relative to completion of workers' compensation paper work or procedures, he assumed that the same had been provided at the time he was placed in the position.

Mr. Mossman's testimony reflects that he completed the workers' compensation paperwork relative to the claimant at the time it was made known to him that the claimant's need for medical treatment was reported as the product of a work-related injury, March 2, 2004. Prior to the March 2, 2004, date Mr. Mossman testified that the claimant was alleging a work related injury. Mr. Mossman acknowledged that he received a telephone call from the claimant on the morning of February 17, 2004, in which claimant relayed that he had hurt his back and would be unable to report to work. There is no testimony from Mr. Mossman reflecting that he inquired further of the claimant regarding the nature of the back injury during the February 17, 2004, conversation. The testimony of Mr. Mossman reflects that he arranged for the claimant to be off work on February 17, 2004, and February 18, 2004, as vacation time.

Mr. Mossman acknowledged that claimant was scheduled to report for work on Thursday, February 19, 2004. Mr. Mossman testified that claimant reported to the store and relayed that he was in too much pain to work. The testimony of Mr. Mossman reflects that the claimant appeared to be in pain at the time of the February 19, 2004, reporting.

Mr. Mossman testified regarding respondent's the procedure for reporting work related injuries. Specifically, the employee is directed to report the injury to their department head, who in turn report it to the store manager, co-manager, or head clerk. Since the claimant was working as head clerk at the time of his incident, Mr. Mossman testified that he should have immediately notified the manager. Mr. Mossman offered that at his Jonesboro store it was not uncommon for the manager to be called at home under circumstances similar to that of the claimant. Finally, the testimony of Mr. Mossman reflects that once the claim was reported by him to risk management it was out of his hand, and he no further dealings with same.

On April 22, 2004, claimant was initially seen by Dr. Edward H. Saer, III, a Little Rock orthopedic surgeon, pursuant to the referral of Dr. Boswell. The April 22, 2004, report of Dr. Saer reflects:

Mr. Hightower is a 46-year-old man seen at the request of Dr. Boswell. He has had some occasional back pain in the past but reports that he is doing significantly worse since February 16, 2004 after doing a lot of bending and lifting. He reports pain in the lower back that radiates down his legs to his knees. It really does not go below the knees. The pain is relative constant and he says it is usually a dull pain. It is worse if he bends and better if he walks or changes position. He reports no numbness or tingling in the lower extremities and he denies any bowel or bladder changes.

\* \* \*

**IMPRESSION:**

Central herniation at L3-4, annular tear at L2-3, prior surgery at L4-5.

**PLAN:**

His pain is probably coming from the L3-4 disk. I think a course of physical therapy would be helpful and I will give him a referral for that. I will also arrange for an ESI. I am going to start him on some Vioxx. I will see him back in several weeks. At this point, I do not think he is ready to return to work. (JX. #1, p. 24-25).

Claimant was again seen by Dr. Saer on May 20, 2004. After noting the results of claimant's physical examination, and the treatment measures undertaken by claimant since the pervious visit, Dr. Saer noted in the May 20, 2004, clinic note:

**DISCUSSION:**

I reviewed his prior reports. I talked with him and his wife about this and explained that surgery for disk herniations that cause predominantly back pain is not as successful as it is with radicular symptoms. At this point I am a little reluctant to recommend any surgery because his pain is predominantly in the back itself. I am not sure why he did not get relief with the ESI because it helped him in the past. I think that it would be worth trying it again though to see if the second would give him better relief. He will continue with his physical therapy and Vioxx. I will see him back in several weeks. He will remain off work for now. (JX. #1, p. 26)

During claimant's June 17, 2004, visit, Dr. Saer reported:

Mr. Hightower is back in follow-up. Unfortunately, he is continuing to have trouble with his back.

He describes pain primarily in the lower back but states that he has also been having some discomfort that goes up into the upper back and even into the neck. He thinks it may be related to some of the exercise he was doing in therapy. He has cut back and some of his neck symptoms have settled down.

\* \* \*

**DISCUSSION:**

I talked with him about this. I think we are at the point where he

need to look at this a little bit further to see if his stenosis and disk herniation at L3-4 are significant enough to require surgery. We will get a myelogram and post-myelogram/CT to evaluate this further. Surgery does not look like it is going to be a good option, then we will need to ge him in to see someone who specialize in nonoperative management. (JX. #1, p. 27).

On June 24, 2004, claimant underwent the recommended diagnostic studies. (JX. #1, p.

28-30). Thereafter claimant was seen by Dr. Saer on July 1, 2004:

He had his myelogram and post-myelogram/CT, and I reviewed the films and the report today. He does have fairly sever stenosis at L3-4. There is some central bulging of the disk. I went back and reviewed his prior MRI and also his plain films. The L5 is transitional. The L4-5 is where he had his prior surgery. He does have central disk protrusion on the MRI but it does not look all that significant on the axials. A CT/myelogram though clearly shows cutoff and fairly severe stenosis at the L3-4 level on the post-myelogram/CT.

**DISCUSSION:**

I had a long talk with the patient and his wife about this. I think he needs to have this treated surgically. He has already had good nonoperative management so far.

I explained what the surgery would involve as well as the risk and possible complications including persistent pain. . . . Hopefully this will relieve his acute symptoms. We will need to see if the disk is herniated at the time of surgery. . . . (JX. #1, p31)

On July 28, 2004, claimant underwent a decompressive laminectomy at L3-4 bilaterally under the care of Dr. Saer. Claimant was seen in follow by Dr. Saer on August 12, 2004:

His back is doing okay. He reports some discomfort in the right lateral hip region when he walks much. This is different from what he had prior to the surgery though. He also reports occasional discomfort up above the incision.

\* \* \*

I do not think he is ready to return to work. Unfortunately he has

exhausted his short-term disability benefits and there is no long-term disability available. I think it is going to be a while yet before he will be able to return to the type of work that he was doing before, if at all. (JX.#1, p. 37).

In a September 9, 2004, correspondence to claimant's attorney Dr. Saer outlined the extent of his contact with the claimant to include the history of claimant's injury, results of diagnostic studies, and medical treatment rendered:

I initially saw him on April 22, 2004. He indicated that he had injured his back on 2/26/04 bending over picking up cases to make a display. I do not believe, however, that he was seen as a workers' compensation patient.

He was worked up and noted to have severe stenosis at L3-4 with central herniation at that level. I believe he has a congenitally small canal but the stenosis is probably precipitated by the central herniation that he had at the L3-4 level, which could be related to an acute injury. (JX. #1, p. 38).

Claimant was again seen by Dr. Saer on September 16, 2004, during which time he was examined. Dr. Saer recommended physical therapy in conjunction with claimant's treatment program, however noted that claimant did not have the financial resources to go back to physical therapy. Claimant was scheduled to return to Dr. Saer in one month to six (6) weeks following the September 16, 2004, visit. The parties obtained the deposition of Dr. Saer on November 16, 2004, during which time another medical report was included as an exhibit. (JX. #2).

Claimant was last seen by Dr. Saer on November 2, 2004. Dr. Saer noted with respect to the November 2, 2004, visit, that claimant was continuing to have some pain, however not so much in the back but in the hip and some swelling in his legs. Dr. Saer attributed the afore to possible lack of exercise on the part of the claimant, noting that claimant had not undergone physical therapy because he did not have insurance. Claimant was scheduled to return to Dr. Saer

two months following he the November 2, 2004, visit. Regarding the claimant's work status, Dr. Saer testified:

Yes. We talked about the work status, and he apparently could not return to work with restrictions. He doesn't think he'll be able to do the type of work that he was doing before; and after listening to him, I would agree with that. (JX. #2, p. 31).

Claimant noted that while he continued to experience back pain following the July 28, 2004, surgery of Dr. Saer, he experienced an immediate relief of his lower extremity symptom, which he attributes to the surgery. Claimant noted that the back pain has not been as severe, and appears to be continually improving, although he is not physically capable of return to work. Claimant has not been released by Dr. Saer to return to work.

After a thorough consideration of all the evidence in this record, to include the testimony of the witnesses, review of the medical reports, and application of the appropriated statutory provisions, I make the following:

#### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 16, 2004, the relationship of employee-employer existed between the parties.
3. On February 16, 2004, the claimant earned wages sufficient to entitle his to weekly compensation benefits of \$310.00/\$233.00, for temporary total/permanent partial disability.
4. On February 16, 2004, the claimant sustained an injury arising out of and in the course of his employment.

5. The claimant was temporarily totally disabled for the period February 17, 2004, and continuing until such time as he reaches the end of his healing period, or is returned to appropriate work, a date yet to be determined.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of February 16, 2004.

7. The respondent had controverted this claim in its entirety.

### CONCLUSIONS

Claimant commenced his employment with respondent as a part-time employee on June 17, 1974, and became a full time employee two (2) years later in 1976. Claimant was continuously employed by respondent through February 16, 2004. Claimant asserts that he suffered an injury to his lower back within the course and scope of his employment on February 16, 2004, which required medical treatment, to include surgery, and has rendered him temporarily totally disabled. Claimant seeks corresponding medical and indemnity workers' compensation benefits, as well as controverted attorney fees. Respondent denies that claimant suffered a compensable injury while in its employ.

The present claim is one governed by the provisions of Act 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of having sustained subsequent to the effective date of the afore provision. Claimant asserts a gradual onset back injury on February 16, 2004, while discharging employment duties of stacking/lifting cases of Big K soft drinks. The requirements to establish a "gradual onset" injury are codified at Ark. Code Ann. § 11-9-102 (4):

(A) "Compensable injury" means:

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence. . .

(E) (ii) For injuries falling within the definition of compensable injury under subdivision (4) (A) (ii) of this section, the burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

In the instant claim, claimant must establish the compensability of his claim with medical evidence, supported by objective findings. *Patterson v. Frito Lay, Inc.*, 66 Ark. App. 159, 992 S.W. 2d 130 (1999). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102 (16) (B). To be within a reasonable degree of medical certainty, a medical opinion must be more than speculation. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W. 3d 760(2001). Expert opinions based upon “can”, “could”, “may” or “possibly” are not opinions stated within a reasonable degree of medical certainty. *Frances v. Gaylord Container Corporation*, 341 Ark. 527, 20 S.W. 3d 280 (2000).

It is undisputed that claimant suffered a previous low back injury in the employment of respondent for which he underwent surgery and was ultimately assessed with a 10 % permanent physical impairment to the body as a whole. (JX. #1, p. 1-9). Further, claimant experienced occasional back pain subsequent to his December 12, 1994, release by Dr. Robert Dicken, relative to prior injury. Claimant last received medical treatment for his back in the form of trigger point injections of the sacroiliac region, medication, and physical therapy under the care of Dr. Bruce L. Safman. Claimant was last seen by Dr. Safman on September 28, 2001.

On February 16, 2004, claimant worked from 1:00 P.M. until 10:00 P.M. as head clerk for respondent. Among the duties discharged by the claimant during the afore shift was lift and stacking/stocking cases of soft drink and bleach. While performing the afore tasks claimant experienced pain in his lower back, which he initially attributed as a flare-up of the prior back injury for which he had received medical treatment occasionally over the years. Claimant completed his shift. Once he arrived home, claimant had some difficulty getting out of his vehicle due to the pain. Claimant was scheduled to work the following day, February 17, 2004.

When claimant woke the following morning, February 17, 2004, his symptoms were so severe that he was unable to get out of bed. At that juncture claimant realized that rather than experiencing a flare-up he had in fact suffered another injury to his back. Claimant telephoned his supervisor, Mr. Keith Mossman who was the store manager, and informed him of his back injury and his inability to report to work. Claimant was not scheduled to work Wednesday, February 18, 2004, and felt that with rest he would be able to work his next scheduled shift, Thursday, February 19, 2004. While claimant drove to work on February 19, 2004, upon arriving he was physically unable to work due to residuals of his injury. Claimant notified his supervisor

of his status and inform him that he would be going to the doctor.

Claimant's supervisor, Mr. Mossman, had only been assigned to the Newport store since February 2004. While claimant had held a semi-supervisory position since July 2003, he had not undergone formal training relative to respondent's policy and procedures on handling workers' compensation claims by employees. Claimant only knew to report any injury reported to him by an employee to his supervisor. Mr. Mossman was unaware of claimant's lack of training. Mr. Mossman had served as co-manager for six (6) years at a Jonesboro Kroger store before being made manager of the Newport store.

Respondent's designated medical provider for work-related injuries of employees of its Newport store is Dr. Jerry Hunt. The evidence reflects that claimant attempted to schedule an appointment with Dr. Hunt upon his return home on Thursday, February 19, 2004, however Dr. Hunt was out of his office. As a consequence of the afore, claimant scheduled an appointment with his primary care physician, Dr. Clifford Boswell. Claimant was seen by Dr. Boswell on February 20, 2004, and relayed a history of having sustained an injury to his back while lifting cases of soft drink at work.

Claimant was off work for a week following the February 20, 2004, initial visit to Dr. Boswell. Claimant furnished respondent a light duty release from Dr. Boswell of March 2, 2004. Respondent completed a First Report of Injury Form on March 2, 2004. The credible evidence in the record reflects that claimant was summoned to store by supervisory personnel of respondent and directed to complete the workers' compensation claim form subsequent to his initial visit to Dr. Boswell. At the time of the afore, respondent was already aware of the work-related nature of claimant's injury, claimant having first reported same on the morning of February 17, 2004,

when he notified the store manager that he was unable to report to work due to his injury from the previous night.

After respondent filed its initial report relative to the claimant's injury on March 2, 2004, there was no effort to have claimant evaluated/examined or treated by its designated medical provider. Dr. Boswell ordered diagnostic studies which disclosed objective finding of injury. Later, while under the care of Dr. Sear, a Little Rock orthopedic surgeon, to whom claimant was referred claimant underwent additional diagnostic studies. As a result of the additional studies, claimant underwent surgery under the care of Dr. Saer on July 28, 2004.

Dr. Saer noted in his September 9, 2004, correspondence that while the claimant has a congenitally small canal stenosis was probably precipitated by the diagnosed L3-4 central herniation. (JX. #1. p. 38). During the course of his November 16, 2004, deposition, Dr. Sear repeatedly confirmed his opinion regarding the causal nexus of the claimant's February 2004, work related injury to the diagnostic findings of spinal stenosis, and L3-4 disc herniation. (JX. #2, p 14-17) In workers' compensation law, the employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 410, 120 S.W. 3d 150 (2003).

Claimant has sustained his burden of proof by a preponderance of the evidence that he suffered an injury to his back on February 16, 2004, within the course and scope of his employment which was not caused by a specific incident or identifiable by time and place of occurrence. The injury caused physical harm to the claimant's back. Further the claimant's compensable injury was the major cause of his need for medical treatment and disability. Claimant has established the compensability of his claim by medical evidence, supported by

objective findings.

Following the February 16, 2004, compensable injury claimant has remained in his healing period and totally incapacitated from engaging in gainful employment. In order to secure a continued source of income claimant utilized vacation time, and was later able to receive six (6) months of short-term disability benefits through an insurance policy partly funded by respondent. While respondent is entitled to an off-set pursuant to Ark. Code Ann. § 11-9-411 (a) on the amount of benefits the claimant received for the same medical services or period of disability, the same is not the case with claimant's earned vacation utilized the pertinent period. The group health care benefits received by the claimant also included payment of medical benefits, to include surgery under the care of Dr. Saer and treatment had pursuant to the direction of Dr. Boswell subsequent to February 20, 2004.

#### **AWARD**

Respondent is herein ordered and directed to pay to the claimant temporary total disability benefits at the appropriate rate for the period beginning February 17, 2004, and continuing through the end of the claimant's healing period or until such time as claimant has returned to appropriate employment, as a result of the February 16, 2004, compensable injury to his back. Said sums accrued shall be paid in lump without discount. Respondent may claim credit for sums heretofore paid toward the afore obligation pursuant to Ark. Code Ann. § 11-9-411 (a).

Respondent is further to pay all reasonable related medical, nursing, hospital and other apparatus expenses growing out of the claimant's February 16, 2004, compensable injury, to include medical related travel.

Maximum attorney fees are herein awarded to the claimant's attorney, the Honorable

Kenneth A. Olsen, on the controverted portion of this award, pursuant to Ark. Code Ann. § 11-9-715.

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

Matters not addressed are expressly reserved.

**IT IS SO ORDERED.**

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**Andrew L. Blood, Administrative Law Judge**