

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NOS. F107011 & F304582**

<b>CLEVELAND OSBORN, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>ANDERSON ENGINEERING, EMPLOYER</b>	<b>RESPONDENT #1</b>
<b>ONE BEACON INS., CO, CARRIER</b>	<b>RESPONDENT #1</b>
<b>TRANSPORTATION INS. CO, CARRIER</b>	<b>RESPONDENT #2</b>
<b>SECOND INJURY FUND</b>	<b>RESPONDENT #3</b>

**OPINION FILED FEBRUARY 9, 2004**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on October 31, 2003, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE KRISTOFER RICHARDSON, Attorney at Law, Jonesboro, Arkansas.

Respondents #1 represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent #3 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

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

On August 19, 2003, a pre-hearing conference was conducted in these claims, from which a prehearing order of August 21, 2003, was filed. The prehearing order reflects stipulations

entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective positions relative to the issues. The prehearing order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Mr. Cleveland Osborn, the claimant, coupled with medical reports and other documents comprise the record in this claim. In light of the issues before the Commission at this juncture, Respondent #3 waived its appearance and was excused from the hearing.

### **DISCUSSION**

Cleveland Osborn, with a date of birth of February 2, 1948, is a high school graduate with some post-secondary education. Claimant commenced his employment with respondent-employer in September 1992, and ceased his employment with same on or about October 1, 2003. Claimant last discharged employment duties for respondent-carrier on March 11, 2003, when he worked three (3) hours before leaving work due to sever pain and other symptoms in his lower back.

After graduating high school, claimant joined the armed services in 1967 where he remained for a total of fourteen (14) years, excluding the period 1970-72. In 1982, while in the military and working on a bridge, claimant suffered an injury to his back which resulted in low back disc surgery at the L5 level. Following the surgery, claimant resumed regular duties in September/October 1982. After a new battalion commander instituted a more rigorous physical training program, which claimant was unable to do due to residuals of his back injury, claimant was transferred to a new assignment as NCOIC ( non-commissioned office in charge) of the unit. Claimant remained in the new assignment for a period of six (6) months at which time he was medically discharged from the services in 1984.

At the time of his medical discharge from the armed services claimant received a thirty percent service connected disability from the VA, 10% for his back and 20% for his neck. Claimant's testimony reflects that he did not really have any neck problems until a 1986 tractor trailer accident, although the military physicians had told him that there was something that was not right about it.

Approximately four or five months after his 1984 medical discharge from the armed services, claimant was employed for a brief period by his nephew in a landscaping business in Phoenix, Az. Claimant also attended Western Technology in Phoenix, Az., for six months and received a degree in foundation engineering.

In June 1986 claimant begin working for Thomas & Hartig, in Phoenix, Az., doing foundation engineering duties. The job duties performed by the claimant in his employment with Thomas & Hartig were the same type of duties performed in his employment with respondent-employer; general inspection work, concrete inspection, asphalt inspection and soil inspection.

Claimant had been employed by Thomas & Hartig for a period of about three months when he was involved in a motor vehicle accident with a tractor trailer. At the time of the accident, claimant's vehicle slowing due to backed up traffic on the freeway, when he was rear ended by the tractor trailer rig. Claimant suffered injuries primarily to his neck at the time of the 1986 tractor trailer motor vehicle accident.

Claimant under two (2) surgeries relative to the 1986 motor vehicle accident. The first surgery was performed by Dr. Sontag at St. Joseph Hospital in Phoenix, Az. The testimony of the claimant reflects that some bones were taken from his hip and laced with wire in the neck during the first surgery. Thereafter, claimant returned to the employment of Thomas & Hartig

and worked for a couple of months. After the site of the surgery came loose, claimant returned to the doctor. In 1987, Dr. Pittman, who was also at St. Joseph Hospital, in Phoenix, Az., performed the second surgery at the same site. Claimant returned to work for Thomas & Hartig following the second surgery and continued in the employment of same until 1991, when he moved back to Arkansas.

The 1986 tractor trailer motor vehicle accident injuries suffered by the claimant were not treated as workers' compensation claims. The insurance carrier for the tractor trailer driver paid the medical bills incurred by the claimant as well as loss wages, and the cost of the claimant's personal vehicle damaged in the accident. Claimant is unaware whether the treating physicians assigned any permanent impairment as a result of the injuries and surgeries.

Claimant acknowledged that after 1987, he did have neck pain occasionally when he moved his neck the wrong way, or slept the wrong way. Claimant added it was never anything really bad, and he never missed work due to it. Claimant left the employment of Thomas & Hartig in 1991, after both his parents passed away in Phoenix, and he no longer enjoyed living there. Claimant's wife was from Paragould, Ar., so they decided to move back to Arkansas.

Claimant noted that at the time he moved back to Arkansas he was not in a hurry to go back to work. Claimant drew a couple of months of unemployment benefits before receiving a telephone call from Mr. Anderson, the owner of respondent-employer, wanting him to do a couple of jobs. Claimant's testimony reflects that Mr. Anderson had found out about him, and called and asked if he would come down and talk to him. After meeting with Mr. Anderson, claimant was hired as an engineering technician by respondent on September 1, 1992.

Other than stiffness and soreness, claimant's testimony reflects that at the time of his

employment with respondent-employer he was not having any physical problems to hold him back. Claimant occasionally took over the counter medication, Tylenol or aspirin. Claimant testified that his arthritis would bother him according to how the weather was. Claimant noted that when he went back to work he never had a problem with his neck until 1998 when he had a spur in it removed.

The testimony of the claimant reflects that in 1998, while he was employed by respondent-employer, a spur came up on his neck and was causing his left arm to go dead/numb. Surgery was had to remove the spur, and claimant was off work for three (3) weeks following same. Thereafter claimant returned to his regular duties in the employment of respondent.

On June 1, 2001, while discharging employment duties within the course and scope of his employment, claimant suffered injuries at a job site in Dell, Arkansas. At the time of the June 1, 2001, accident, One Beacon Insurance company, respondent #1, provided workers' compensation insurance coverage on behalf of respondent-employer. Workers' compensation insurance coverage was provided for respondent-employer by respondent # 1 until August 2002.

In describing the June 1, 2001, accident, claimant's testimony reflects:

I was monitoring some drillings and I was keeping track of the concrete and depth of borings and stuff on a clipboard and as I was monitoring the clipboard I was writing down what was going on and what was happening and they were getting ready to change from one drilling to the next and when I turned I stepped and I stepped on a piece of plywood that was covering this, the plywood gave way and I fell and I fell nine foot, nine or eight down into this hole. (T. 10).

Claimant's testimony reflects that he landed on his back in the fall:

Yeah, I landed on my back. The helmet I had on was all busted up on the back side. When it did it pushed my

glasses off and popped my glasses back, and both my elbows were black and blue from about here on up, and I had a big ole knot on the back of my head, so it landed on my back. (Resp. #2, Ex. #4, p.24).

Claimant was transported by ambulance from the job site to the emergency room of Baptist Memorial Hospital in Blytheville, Ar., following the accident. After receiving initial medical treatment for complaints growing out of the accident and undergoing preliminary diagnostic studies, claimant was discharge home by the emergency room physician with a diagnosis/impression of acute low back pain; contusion of the lumbar spine; and head contusion.(Resp. #2, Ex. #1, pp. 1-5).

Following his June 1, 2001, discharge from the emergency room of Baptist Memorial Hospital in Blytheville, Ar., claimant went home. Claimant's testimony reflects that the contractor of the Dell, Ar., job site called him on Saturday morning, June 2, 2001, and wanted him to come to work. Claimant noted that he was continuing to experience residual from the accident such that he could not get up and walk. Claimant experienced sever pain in his low back, and testified that he sat around all weekend. Claimant was next seen by his family doctor, Dr. Barry Hendrix, for complaints attributed to the June 1, 2001, accident on June 5, 2001.

Claimant was seen at Arkansas Methodist Hospital in Paragould, Ar., on June 5, 2001. The medical records relative to the claimant's June 5, 2001, hospital visit reflects that claimant gave a history of the June 1, 2001, work injury. The medical records reflect that claimant had bruising to both elbows, back pain, and a compression fracture in the lumbar spine. (Resp. #2, Ex. #1, pp. 6-13). In a June 7, 2001, off-work slip, Dr. Hendrix initially directed the claimant to remain off work for a period of two (2) weeks. Following a June 13, 2001, follow-up visit, Dr.

Hendrix directed the claimant to remain off work an additional week.

On June 15, 2001, claimant was evaluated by Dr. Terence P. Braden, III, D.O., relative to the June 1, 2001, injuries. Injuries identified by the claimant as growing out of the June 1, 2001, accident included; a large swollen knot on the back of his head, black and blue areas up and down his forearms, back pain, arm pain, neck pain, and elbow discomfort. The June 15, 2001, report of Dr. Braden relative to his evaluation of the claimant reflects, in pertinent part:

His chief complaint at this time is low-back pain. It says sometimes it radiates down into his left leg. Sometimes, it does not. It does not go down into his toes or foot. He reports his back feels stiff and sore if he sits for any period of time and then tries to get up and move around. It does not change with coughing or sneezing. No bowel or bladder difficulties are noted. No weakness does he notice in the right or the left leg. He says sometimes the pain goes into the right leg, as well, and goes down to the knee. It does not go past the knee.

\* \* \*

He further reports that he has neck stiffness. He says he has always had neck stiffness since he has had three neck surgeries in the past, but it is more stiff than it was prior to his fall. He reports that he his left arm intermittently feels numb and weak, although it is not localized to any one part of the arm. It just feels like the whole arm is numb and weak, and this does not occur all the time, but it is present intermittently. He cannot give a distinct idea of how often this occurs.

He last gives a history of headaches. He says the headaches seem to start in the temporal area, and they will stay with him for a while. They are relieved by rest and sometimes taking ibuprofen. They do not occur every day. They will occur on and off. He has had no reports of visual changes or auditory changes. No memory loss; no short-term memory difficulties. (Resp. #2, Ex. #1, pp. 17-18).

The claimant underwent further diagnostic studies while under care of Dr. Braden, which

disclosed the presence of compression fractures of T-12 and L-1. Dr. James C. Metcalf, a Memphis neurosurgeon, performed the 1999 surgical removal of the spur from the claimant's neck. Following a July 12, 2001, visit to Dr. Braden, claimant was referred by same to Dr. Metcalf for further medical treatment relative to the injuries growing out of the June 1, 2001, accident.

The medical in the record also reflects that the claimant continued to be seen by his family physician, Dr. Barry Hendrix, relative to complaints associated with the June 1, 2001, accident. A July 19, 2001, clinic note of Dr. Hendrix relative to a visit by the claimant on the same date reflects a chief complaint of problems with both elbows. The examination of the claimant's elbows by Dr. Hendrix disclosed the presence of some erythema and swelling of both elbows. Dr. Hendrix diagnosed bursitis of both elbows, prescribed medication, and directed to claimant to return in two weeks, if needed. (Resp. #2, Ex. #1, p. 34).

On August 6, 2001, claimant was evaluated by Dr. James C. Metcalf, pursuant to the referral of Dr. Braden. Dr. Metcalf noted that he had previously performed a posterior cervical laminectomy on the claimant in 1999. Following his examination of the claimant relative to the June 1, 2001, injuries, Dr. Metcalf's impression of the claimant's complaints were thoracolumbar compression fracture and cervical radiculopathy. The August 6, 2001, report of Dr. Metcalf relative to the claimant, concludes:

PLAN: At this point this gentleman has a component of cervical radiculopathy but his primary problem is that of back pain. He does have a compression fracture at T12-L1 with no significant loss of vertebral body height. I suspect this gentleman will improve with his continued conservative therapy. The only way to evaluate his neck further would be with a cervical myelogram but with his neurological examination being normal I do not feel that is indicated

at this time. It would be my recommendation to continue on his limited duty work restrictions, continue wearing his lumbar corset and I will see him back in 3 weeks for follow-up. If he does not improve further then he may be a candidate for myelographic studies to make sure that he does not have any underlying surgical lesion. (Resp. #2, Ex. #1, p. 36).

Claimant was seen in follow-up by Dr. Metcalf on August 27, 2001, with continued complaints of significant pain in his neck and left arm. As a consequence of the afore, Dr. Metcalf scheduled the claimant for a cervical myelogram on September 6, 2001. The medical reflects that claimant underwent a lumbar myelogram and lumbar CT scan post myelography on September 6, 2001, pursuant to the direction of Dr. Metcalf in addition to the cervical myelogram/cervical CT scan post myelography. (Resp. #2, Ex. #1, pp. 39-41).

Claimant was seen in follow-up by Dr. Metcalf on September 10, 2001, following the diagnostic studies. Dr. Metcalf noted the results of the lumbar myelogram as being normal and the cervical myelogram as showing postoperative changes at C6-7, as well as a component of cervical spondylosis at C5-6. Dr. Metcalf recommended a trial of physical therapy for both the lumbar and cervical spine utilizing multiple modalities. Following a October 4, 2001, visit by the claimant with a primary complaint of pain in his right foot while standing, Dr. Metcalf recommended an orthopedic evaluation. (Resp. #2, Ex. #1, p. 45).

On October 31, 2001, claimant was evaluated by Dr. Samuel E. Murrell, III, at Spine Memphis, pursuant to a referral of respondents #1. (Resp. #2, Ex. #1, pp. 47-51). When seen in follow-up on November 5, 2001, Dr. Murrell noted his impression of the claimant's complaint as degenerative disc disease of the cervical spine—most sever at C5-6, and lumbar degenerative disc disease with a history of T12 and L1 end-plate fractures. The November 5, 2001, report

concludes:

PLAN: I have discussed the findings with the patient. We have discussed possible epidural steroid injection but at this point, he does not wish to proceed with this. The bigger concern appears to be his inability to continue with his work. I have recommended that proceed with a Functional Capacity Evaluation to ascertain any permanent restrictions which may need to be recommended. He will follow-up after this is completed. In the meantime, he will continue on his light-duty status. (Resp. #2, Ex. #1, p. 53).

On November 6, 2001, claimant underwent the FCE at American Physical Therapy Center pursuant to the referral of Dr. Murrell. The FCE concluded that claimant demonstrated that he is only able to perform light classification of work: less than 20 pounds, and minimum stand tolerance. The FCE report noted that the claimant did not meet any of the requirements for his job with respondent-employer, and that he failed all the validity criteria for the exam. (Resp. #2, Ex. #1, pp.56-68).

On November 19, 2001, claimant was again seen by Dr. Murrell to review the results of the FCE. Claimant relayed complaints of neck pain and headaches and symptoms in both his upper and lower extremities during the visit. After reviewing the results of the Function Capacity Evaluation, Dr. Murrell concluded that the claimant had reached maximum medical improvement relative to the June 1, 2001, healed plate compression fracture and assigned an impairment rating of 5%, (Resp. #2, Ex. #1, p. 71).

A November 20, 2001, Progress Report of the nurse case manager, Sandy Couch, retained by respondent #1, reflects that the claimant relayed by November 19, 2001, that he was interested in trying the "block" that had been recommended earlier, however Dr. Murrell did not recommend the procedure based on the FCE. (Resp. #2, Ex. #1, p. 73). The Progress Report

further details contact by the nurse case manager with other providers. (Resp. #2, Ex. #1, pp. 73-74).

On January 21, 2002, claimant was seen in follow-up by Dr. Metcalf. Dr. Metcalf noted that the claimant had been seen by Dr. Murrell for a “second opinion”, and that Dr. Murrell felt that the claimant could return to his work activities, and had referred him for a FCE at American Physical Therapy Center. The January 21, 2002, office note of Dr. Metcalf reflects, in pertinent part:

. . . the FCE from the American Physical Therapy Center Incorporated in Jonesboro was available for review. The FCE basically was significant for the fact that the validation of the test was quite marginal as he appeared to fail 25/30 validity criteria on his study. At this point, this gentleman has had a complete and thorough work up and I certainly do not see anything of a surgical nature to do for him. He is having some residual symptoms and hopefully they will improve with time. . . . From my standpoint, he can return to work on 01-22-02 with no restrictions. I would consider his date of MMI to be 01-22-02. I would concur with the 5% disability rating as given by Dr .Murrell for his diagnosis of a thoracic compression fracture. This was discussed with Sandy Couch his case manager who was in attendance today. (Resp. #2, Ex. #1, p. 75).

The testimony of the claimant reflects that he was off work for a period of approximately three weeks following his June 1, 2001, injury. Thereafter, the claimant testified that although the was continuing to receive medical treatment, as outlined above, he was released to and performed light duty work in the employment of respondent. Claimant’s testimony reflects that he worked light duty work for a period of three (3) months, at which time he was released to regular job duties. Claimant noted that when he returned to his regular job duties the continued to have physical problems.

Claimant’s testimony reflects that the insurance carrier, respondent #1, paid for

everything relative to his compensable June 1, 2001, injury until December 2001. Claimant testified that continued to have problems attributable to the June 1, 2001, accident and that he was in and out of the doctors office for treatment a number of times.

Claimant asserts that between July and August 2002, he was doing some density test and his back went out on him. As a consequence of the afore, claimant maintains that he was off work for almost a month. Further, that when he returned to work he continued to have problems with his back and there were days that he did not go to work because of it. Claimant testified that the doctor, his family physician Dr. Hendrix, kept him off work, however he did not receive any workers' compensation benefits.

During his October 3, 2003, deposition, claimant elaborated with respect to the June 2002, period of total incapacitation:

. . . And then in June of 2002, my back went completely out on me. I was out on a job and by the time I got back into the office I brought a nuke gate back in and I told them, I said, I have got to go home. It was about ten o'clock in the morning. And Dr. Hendrix, when I went home, he put me into like a Healthsouth to see if they could do anything for my back.

• \* \*

Well, it had just been hurting so bad, and then when I was carrying the insular gage around, doing density testing in pipes.(Resp. #2, Ex. #4, pp. 27-28)

Claimant estimates that the gage with the box weighted between 45-75 pounds. Claimant attributes his June 2002, problems to the June 1, 2001, fall. Claimant noted that he had problems throughout the year with the residuals of the June 1, 2001, injury. Regarding the location of the 2002, flare-up, which during the hearing, claimant allowed may have occurred as late a

July/August. (T. 24-28), Claimant testified:

Pretty much the same place, only worse. I couldn't even hardly walk. As a matter of fact, when I climbed out of the ditch the last time they even, some of the guys that was there was helping me do the test because I couldn't hardly do it. (Resp. #2, Ex. #4, p. 28).

Claimant's testimony reflects that Dr. Hendrix sent him for HealthSouth for approximately four (4) weeks, during which time he obtained some relief from his symptoms, though not complete relief. Afterwards, claimant returned to his regular job with respondent-employer.

The medical in the record reflects that on August 1, 2002, claimant was seen by Dr. Barry Hendrix, his family physician, with a chief complaint of his back hurting. The office note reflects that the claimant had a history of back pain and neck pain, which had been going on for some time. Following his examination of the claimant during the visit, Dr. Hendrix's impression of the claimant's complaint was cephalgia and lumbago, for which he scheduled a CT of the lumbar spine and brain at Arkansas Methodist Medical Center. (Resp. #2, Ex. #1, p. 77). A radiology report from Arkansas Methodist Hospital in Paragould, reflects that the claimant underwent CT brain scan on August 5, 2002, pursuant to the direction of Dr. Hendrix. (Resp. #2, Ex. #2, p.4).

On September 6, 2002, claimant was again seen by Dr. Hendrix with a chief complaint of his back hurting. The office note relative to the visit reflects that the claimant relayed that he may have "strained his back about a week or so ago", and denied any other particular problem. The office note further observed, "he appears to be in obvious pain". Dr. Hendrix diagnosed the claimant's complaint during the September 6, 2002, visit as a lumbar strain, and furnished

medication in the treatment of same. (Resp. #2, Ex. #2, p. 4).

The medical reflects that claimant was again seen by Dr. Hendrix on September 9, 2002, relative to his back hurting. Claimant was referred to Dr. Calan Savu, a pain management specialist, for chronic back pain by Dr. Hendrix following the visit. Dr. Savu is located at St. Bernards Pain Management Center in Jonesboro. (Resp. #2, Ex. #2, pp. 4-5). On September 23, 2002, claimant was seen by Dr. Hendrix with complaints of headache and chronic back pain. (Resp. #2, Ex. #2, p. 6).

In an October 23, 2002, letter to claimant's attorney, Dr. Hendrix summarized his contact with the claimant during the month September 2002. The correspondence also reflects a nexus between the September 2002, complaint and June 2001, compensable injury:

. . . As I am sure you are aware, Mr. Osburn was seen in my office on 9/6/02 as well as 9/9/02 for a back strain. I recommended he be off approximately 2 weeks from that time. He was subsequently seen by this office on 9/23/02 for an unrelated problem. I do believe that Mr. Osburn will most likely benefit from chronic pain management. I have asked him to see Dr. Kalan Savu in this regard. (Resp. #2, Ex. #2, p. 7).

Claimant's testimony reflects that following the 2002 incident he received medical treatment under the care of Dr. Hendrix, who put him on steroids and bed rest for two to three weeks. A entry is contained in the medical records of Dr. Hendrix regarding June 2002, and "back pain" relative to the claimant. (Resp. #2, Ex. #2, p. 4). Claimant testified that he was not seen by Dr. Savu for pain management on referral of Dr. Hendrix, although he was seen on several occasions following the 2002 incident. (T. 28).

The testimony of the claimant reflects that after being off work, pursuant to the direction of Dr. Hendrix following the 2002, incident, when he returned to work it was at his regular job:

I just went on back to my regular job. I mean, they kind of, Mr. Allenbaugh kind of tried to keep it down low. If there was any real heavy stuff he tried to get somebody else on it and everything like that. He tried to work with me, but I seemed to be doing fairly good then up until March and I was picking up those cylinders. And the cylinders weigh probably twenty-five to thirty pounds apiece. And I just picked up one, and when I turned to sat it on another table is when it went out the second, that time on me. (Resp. #2, Ex. #4, p. 29).

The claimant's testimony reflects that while he continued to hurt in his back following the 2002 incident until the March 2003 event, sometimes the pain, while always present, would get a little better and sometimes it would be bad.

Claimant attributed his worsen headaches subsequent to June 1, 2001, to residuals of the accidental fall at work. Claimant noted the knot on the back of his head following the accident. Further, a review of the June 15, 2001 initial report of Dr. Terence Braden, reflects that claimant relayed that another worker jumped into the pipe after the claimant fell and was holding the claimant's head up out of rain water that was in the pipe. (Resp. #2, Ex. #1, p. 17).

When claimant made completed the Form AR- C, claim for workers' compensation benefits relative to the June 1, 2001, accident, on July 31, 2001, the form noted he fell "into a foot water" and suffered injuries to "his back, neck, head, elbows, ... and fingers on right hand".(CX. 1).

On February 7, 2003, claimant was seen by Dr. Hendrix with complaints of his right arm going numb, tingles; right shoulder pain; and neck hurting. The office note further reflects that after the claimant's June 2001, fall, he experienced problems for about three months and then got better. The February 7, 2003, note reflects that over a period of four to six weeks prior to the visit, claimant reported that his symptoms had gotten worse. The February 7, 2003, office note

concludes with the entry of an appointment for MRI 2-10-03 at 11:30. (Resp. #2, Ex. #2, p. 8).

Claimant testified regarding the March 2003, incident

I was injured March the 10<sup>th</sup> of 2003. I was moving some concrete cylinders from one table to another, capping the, getting ready to break the cylinders and I picked up one and when I turned I just turned my body and when I did I felt something like fire burning in my back and I went and finished out the day but the next morning I couldn't even hardly walk. I went from - - from there I went to the emergency room. I went to work for three hours, I worked those three hours and I couldn't take it anymore so I went straight from there to the emergency room. (T. 12).

Claimant noted that he actually worked three hours on March 11, 2003, before having to seek medical treatment. Claimant noted that the burning sensation he experienced in his back on March 10, 2003, while lifting the concrete cylinder at work was the first time he had ever experienced it. Claimant's testimony reflects regarding the burning sensation:

I knew I had done something but I wasn't sure, but it really, it didn't really hurt an awful lot the rest of that day. I mean, it hurt me some but not - - I went ahead and finished up the day.(T. 17).

After working the three hours on March 11, 2003, claimant informed office personnel of respondent-employer that he was unable to continue working, and that he was going home. Claimant noted at the time that his supervisor, Bill Allumbaugh, was not present. The testimony of the claimant reflects that Mr. Allumbaugh was finally contacted regarding the March 10, 2003, incident. Claimant has not worked since the March 11, 2003, date.

The claimant was seen at the emergency room of Arkansas Methodist Hospital on March 11, 2003, for back pain. The report noted that the last date of treatment for the claimant at that facility was February 10, 2003. Claimant acknowledged that his complaints at the time of the March 11, 2003, emergency room visit were the same as the complaints he had previously made

to Dr. Hendrix about his back. Claimant maintains, however, that they were a lot worse.

Claimant asserts that the big toe of his left foot lost all control and went numb, as his legs were throbbing in the lifting incident on March 10, 2003. Claimant added that he had sharp pains in the right leg as well.

After receiving medical treatment at the emergency room on March 11, 2003, he was next seen by Dr. Hendrix for complaints growing out of the March 10, 2003, incident. A review of Dr. Hendrix's office records reflects entries of March 4, 2003, wherein claimant complained of neck pain and his right arm going numb; and March 5, 2003, "Talked - needs orthopod?". (Resp. #2, Ex. #2, p. 11). The March 12, 2003, entry in the notes of Dr. Hendrix relative to the claimant noted that the claimant relayed that he had hurt his back; that he felt a sting; and difficulty walking.

The testimony of the claimant reflects that he was admitted to the hospital under the care of Dr. Hendrix the second week he was off work following March 11, 2003, in an effort to get his pain under control. (Resp. #2, Ex. #2, pp. 13-20). Since respondent #1 had denied liability for the payment of any further workers' compensation benefits to the claimant relative to the June 1, 2001, accident, as of December 2001, claimant filed the March 2003, hospitalization on his personal insurance. (Resp. #2, Ex. #2, p. 21).

Claimant was referred to Dr. K. Dewayne Eubanks, a Jonesboro neurosurgeon, by Dr. Hendrix following his March 23, 2003, discharge from the hospital. The March 25, 2003, evaluation report of Dr. Eubanks reflects, in pertinent part:

. . . He has a history of a previous lumbar surgery, which looks like it was probably a right L5-S1 discectomy. He was doing reasonable well with regards to his back until about two weeks

ago. He lifted up a bunch of concrete blocks of some sort and the next day was having extreme pain in his back and down his left lower extremity. This has progressively gotten worse and in fact, he was in the hospital over the weekend for intractable pain. . . . His pain is bad enough that it is hard to test his left.

Ironically, the patient had this appointment to see me for neck pain and some left and right radicular pain that he had been having. That pain had begun several months ago, but he says it has gotten better in the past couple of weeks. It is not really bothering him any more on the left, but on the right it is occasionally going down into his lateral forearm and first three digits, consistent with a C6 dermatome. He says the numbness has pretty much gone away. He noted weakness in his arm.

\* \* \*

**DIAGNOSTIC STUDIES:** A CT scan of the lumbar spine is reviewed, along with some plain films. He has marked degenerative disc disease at L5-S1. It looks like on the CT he probably has a large herniated disc fragment and I think it is large enough to compress not only his L5 root, but the bypassing S1 root.

His C-spine films show a posterior stainless steel wire fusion (by its appearance) of C1-2. There is also one small piece of wire that is loose. **FOR THIS REASON, THIS PATIENT CANNOT HAVE MRI SCAN.**

**IMPRESSION:** Left L5 and S1 radiculopathies with footdrop.

He is in a lot of pain. We are going to try to arrange a myelogram in the morning and possible surgery in the afternoon. He has Tricare insurance and it may not be possible to get permission this fast. If not, I will let him make the decision whether to proceed or not.

I explained to the patient the nature of his foot weakness and if his footdrop gets any worse at all, he is to go to the emergency room because he needs an urgent decompression. (Resp. #2, Ex. #2, pp. 22-23).

On April 7,2003, claimant underwent cervical spine myelogram and lumbar spine myelogram at Regional Medical Center of NEA, relative to his lumbar and cervical spine

complaints, at the direction of Dr. Hendrix. (Resp. #2, Ex. #2, pp. 26-29). Due to the claimant's insurance status, he was referred by Dr. Eubanks to Dr. Robert Abraham, another Jonesboro neurosurgeon.

On April 17, 2003, claimant was initially evaluated by Dr. Abraham pursuant to the referral of Dr. Eubanks. The evaluation report of Dr. Abraham reflects that he had access to the claimant's most recent diagnostic studies and, following a physical examination, recommended surgery relative to the lumbar spine. (Resp. #2, Ex. #3, pp. 6-11). On April 25, 2003, claimant underwent surgery under the care of Dr. Abraham in the form of a left L4-5 microdiscectomy. (Resp. #2, Ex. #3, pp.12-15).

Claimant was seen in follow-up by Dr. Abraham on two (2) separate occasions subsequent to the April 25, 2003, surgery.(Resp. #2, Ex. #3, pp16-19). During July 21, 2003, follow-up visit, Dr. Abraham noted that the claimant could work with limits, 45 pound lifting restriction.(Resp. #2, Ex. #3, p. 19).

The medical in the record reflects that following the July 21, 2003, visit, claimant was next seen by Dr. Abraham on July 31, 2003. Claimant relayed complaints of numbness in his right little finger, problems with his right elbow and right hand during the visit. Following his examination of the claimant during the July 31, 2003, visit, Dr. Abraham's assessment of the claimant's complaint was status post left L4-5 MD, and rule-out right ulnar neuropathy. Dr. Abraham ordered EMG/NCVs of upper extremities of the claimant and directed to claimant to remain of work. (Resp. #2, Ex. #3, pp.20-21).

Dr. Abraham authored a report of August 28, 2003, relative to medical care regarding the claimant:

Cleveland Osborne has been a patient of mine since April 17, 2003. At the time of his first visit I reviewed his MRI films along with his myelogram films. I diagnosed him with having a herniated disk in the L4/5 region of his spine. Mr. Osborne underwent surgery (L4/5 microdiscectomy) for this on April 25, 2003.

This patient has shown signs of improvement, yet will never be fully recovered. He is now having problems with his right hand. He has numbness in his right little finger and has had problems with his right elbow. I am at this time sending the patient for tests to rule out ulnar neuropathy.

In light of all of the patient's problems, I do not suggest that he return to work doing the job that he is presently employed for. I actually suggest that the patient be retired. (Resp. #2, Ex. #3, p. 30).

During the October 3, 2003, deposition, claimant testified that he had undergone surgery on his right elbow under the care of Dr. Abraham on "last Wednesday" for an ulnar nerve. In describing the procedure performed by Dr. Abraham relative to his right elbow, claimant testified:

Dr. Abraham did surgery on me Wednesday. A week ago this past Wednesday. They removed, they took, I guess it was the nerves, I guess it was to the hand, and moved it to the bottom of my elbow, because they said the bottom of my elbow is kind of messed up there. So, they moved it up there where it had more room. He told me, he said, that is not a guaranteed thing. (Resp. #2, Ex. #4, p. 36).

The testimony of the claimant reflects that right elbow procedure was a ulnar transposition. At the time of the October 3, 2003, deposition claimant noted it was too early to determine if he had received any improvement in the elbow as a result of the surgery. Claimant noted that diagnostic studies performed on his left elbow also disclosed nerve damage. Claimant attributes his elbow injuries and need for medical treatment to the fall he suffered on June 1, 2001.

Claimant's testimony reflects that after discussing his job duties with Dr. Abraham, the

surgery relative to his elbows and the prospects of more extensive surgery relative to his lumbar spine if he suffered another injury, he decided to cease his employment with respondent-employer. On October 1, 2003, claimant turned in his beeper, credit cards, and keys relative to his employment to Bill Allenbaugh, the vice-president of respondent-employer. Claimant's testimony reflects, relative to his conversation with Mr. Allenbaugh on or about October 1, 2003:

No, him and I just sat there and talked, and Bill said "it is probably a good thing you don't work, because" he said, "there is nothing really you can do here anymore", and he said, "you are not making enough money here to sacrifice the rest of your use on your back". So, it was kind of an understanding. (Resp. #2, Ex. #4, p. 40).

Claimant's testimony reflects that after respondent #1 refused to pay for medical treatment after December 2001, he filed the claim for such treatment with his health care provider. Claimant noted that when he loss time from work subsequent to December 2001, relative to his back or neck complaints his supervisor was aware of same, and that attributed it to residuals of the June 1, 2001, injury. (T. 36-37).

After a thorough consideration of all the evidence in this record, I make the following:

### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of these claims
2. At all times pertinent, the employee-employer relationship existed between the claimant and the employer.
3. During the period June 1, 2001, through July 31, 2002, Respondent #1 provided workers' compensation coverage on behalf of respondent employer.

4. On June 1, 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$410.00/\$308.00 for temporary total disability/permanent partial disability benefits.

5. On June 1, 2001, the claimant sustained injuries to his low back, elbows, head, and neck, arising out of and in the course of his employment when he fell approximate 9 ft. into a foot of water within a pipe. In 2002, claimant suffered a recurrence of the June 1, 2001, lumbar injury and was rendered temporarily totally incapacitated from engaging in gainful employment for a period of approximately one month, and for which he is entitled to the payment of temporary total disability benefits.

6. Medical treatment rendered to the claimant relative to his neck and elbows subsequent to June 1, 2001, to include diagnostic studies, medication, and surgery, is reasonably necessary medical treatment for the compensable June 1, 2001, injuries sustained in the employment of respondent-employer during the workers' compensation coverage period of respondent #1.

7. The claimant's healing period ended on January 22, 2002, relative to the thoracic compression fracture suffered in the June 1, 2001, compensable accident, and resulted in a permanent physical impairment of 5% to the body as a whole.

8. Respondent #1 has controverted claimant's entitlement to the payment of temporary total disability benefits and medical benefits growing out of the 2002 recurrence of June 1, 2001, lumbar spine injury as well as claimant's entitlement to medical benefits relative to the injuries to his elbows, cervical spine growing out of the June 1, 2001, compensable accident. Respondent #1 controverted the claimant's entitlement to all medical benefits relative to the June

1, 2001, compensable injuries subsequent to December 2001.

9. Commencing August 1, 2002, through July 31, 2003, respondent #2 provided workers' compensation insurance coverage on behalf of respondent-employer.

10. On March 10, 2003, claimant earned wages sufficient to entitle his to weekly compensation benefits at maximum applicable rate for temporary total disability and permanent partial disability benefits.

11. On March 10, 2003, the claimant sustained an injury to his lumbar spine arising out of and in the course of his employment, which required medical treatment that was reasonably necessary in the treatment of the injury, to include medication, diagnostic studies, and surgery, and which rendered the claimant temporary totally disabled from engaging in gainful employment commencing March 11, 2003, and continuing through the end of his healing period, a date yet to be determined.

12. Respondent #2 shall pay all reasonable hospital, and medical expenses arising out of the claimant's injury of March 10, 2003.

13. Respondent #2 has controverted the claimant's March 10, 2003, compensable claim in its entirety.

### **CONCLUSIONS**

The present claims are governed by the provisions of Act. 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of having sustained injuries subsequent to the effective date of the afore provision.

Claimant commenced his employment with respondent-employer on September 1, 1992. Prior to his employment with respondent-employer claimant had suffered service connected

injuries to both his neck and lower back and was receiving veteran disability benefits. Claimant had received service related ratings for his neck and back, and had undergone surgery relative to his low back. Additionally, claimant had suffered an injury to his neck in a 1986 motor vehicle accident and underwent two (2) surgical procedures relative to same. Claimant did return to gainful employment following the 1986 motor vehicle accident.

At the time of his employment by respondent-employer in 1992, claimant's prior injuries were disclosed. In 1999, while in the employment of respondent-employer, claimant underwent a third surgical procedure relative to his neck when Dr. James C. Metcalf, Jr., a Memphis neurosurgeon, performed a posterior cervical laminectomy. The afore surgical procedure was attributable to the claimant's 1986 motor vehicle. Other than the arthritic spur which resulted in the 1999 surgery by Dr. Metcalf, claimant denies experiencing appreciable residuals relative to his neck either from his armed services injury or the 1986 motor vehicle accident prior to his June 1, 2001, compensable accident.

On June 1, 2001, claimant suffered injuries within the course and scope of his employment with respondent-employer when a distance of nine feet down a large pipe and landed on his back. The evidence in the record reflects that had a knot on the back of his head as a result of the fall; that a co-worker got in the hole and held the claimant's head up out of the water that was in the bottom of the hole; that the claimant registered complaint relative to his low back following the accident as well as both elbows; and that the complaints relative to the claimant's low back, head, and elbows were medically documented.

Respondent #1 provided workers' compensation coverage for respondent-employer at the time of the claimant's June 1, 2001, compensable accident. Claimant was paid temporary total

disability benefits during the time he was off work following his June 1, 2001, accident, for medical treatment and pursuant to the directions of his treating physicians. Claimant underwent diagnostic studies relative to complaints associated with injuries growing out of the June 1, 2001, accident. On November 6, 2001, claimant underwent a functional capacities evaluation, pursuant to the directions of Dr. Samuel Murrell, an examining physician selected by respondent #1.

After receiving and reviewing the November 6, 2001, FCE, Dr. Murrell, in a November 19, 2001, concluded that the claimant could return to his work as an engineering technician. The report of Dr. Murrell reflects:

I told him that this was my opinion, based upon his diagnosis of having an end plate compression fracture that had healed. I understand that he does have several other conditions related to his neck and that he has undergone previous back surgeries, but I do not feel that any impairment he may have related to those would be the result of his current injury. . . .(Resp. #2, Ex. #1, p.71).

Dr. Murrell concluded the November 19, 2001, report by rating the claimant with a 5% impairment based upon the end plate compression fracture, and opining that he had reached maximum medical improvement. Dr. Murrell authored a return to work slip for the claimant on November 19, 2001, releasing the claimant to return to full duty with restrictions.(Resp. #2, Ex. #1, p. 72).

When seen by his authorized treating physician, Dr. James C. Metcalf, on January 21, 2002, claimant was released to return to work without restrictions as having reached maximum medical improvement on January 22, 2002, with a 5% permanent physical impairment. The credible testimony of the claimant reflects that respondent #1 refuse to authorize further medical treatment relative to complaints associated with injuries from his June 1, 2001, accident after

December 2001, with the exception of the January 21, 2002, visit to Dr. Metcalf.

Claimant maintains that he had complaint relative to his low back, neck, and elbows, all attributable to the June 1, 2001, accident. Further, claimant noted that after respondent #1 refuse to authorize medical treatment relative to his complaints, when he did obtain medical treatment he filed the claim with his health care provider. The evidence discloses that while performing his regular duties in the employment of respondent-employer, claimant's low back continued to bother him and cause his trouble. In June 2002, while discharging his regular job duties, which included carrying a heavy instrument, 75-pound gage, claimant suffered a period of total incapacitation.

Claimant sought medical treatment relative to his low back during that period in 2002. Medical treatment was rendered by the claimant's family physician, Dr. Barry Hendrix, low back during the afore period. There is no evidence to reflect that claimant suffered another injury to his back, at work or any other place, following the June 1, 2001, accident, prior to March 2003. Claimant also received treatment for headaches pursuant to the direction of his family physician, Dr. Hendrix, subsequent to the June 1, 2001, accident.

Respondent #1 ceased providing workers' compensation coverage for respondent-employer on July 31, 2002. Respondent-employer was aware of the claimant's prior injuries at the time of claimant's employment. An employer takes an employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable under workers' compensation law. *Continental Express, Inc. v. Freeman*, 66 Ark. App. 102, 989 W.W. 2d 538 (1999).

In the instant claim, it is undisputed that claimant had pre-existing cervical and lumbar

injuries for which he had undergone surgeries prior to his employment with respondent-employer. Further, the evidence preponderates that claimant suffered injuries to his low back, head, and elbows, in the June 1, 2001, accident, in addition to his thoracic compression fracture. The medical in the record recites instances of back pain for which claimant receive medical treatment and was taken off work by his treating physician subsequent to July 31, 2002, a point in time that Respondent#1 did not provide workers' compensation coverage for respondent-employer.

The evidence reflects that claimant was discharging his regular job duties in the employment of respondent-employer at the time he sought medical treatment for his low back complaints subsequent to January 22, 2002, including those periods after July 31, 2002. With respect to his low back complaints, the evidence discloses that claimant's pain complaints increased as he performed his job duties for respondent-employer. Claimant did not suffer another injury to his back following his June 1, 2001, accident, until March 10, 2003.

Claimant's low back complaints subsequent to January 22, 2002, which required medical treatment and resulted in periods of temporary total incapacitation prior to March 10, 2003, were recurrences of the June 1, 2001, compensable injury and aggravation of the pre-existing condition. A recurrence is not a new injury, but a period of incapacitation resulting from a previous injury. *Atkins Nursing Home v. Gray*, 54 Ark. App. 125, 923 S. W. 2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S. W. 2d 179 (1996).

There is no evidence in the record to reflect that claimant suffered complaint relative to his elbows prior to his June 1, 2001, compensable accident. Claimant clearly registered

complaints to his low back, neck, head, and elbows as result of the June 1, 2001, accident. Claimant has since received medical treatment relative to his neck, low back, and elbows. The employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508 (a). The preponderance of the evidence reflects that medical treatment received by the claimant relative to his low back, neck, head, elbows and thoracic spine is reasonably necessary in the treatment of the injuries sustained in the June 1, 2001, compensable accident. Respondent #1 has controverted the payment of all medical benefits in this claim subsequent to December 2001, with the exception of January 21, 2002, visit of the claimant to Dr. Metcalf. Respondent #1 has also controverted the payment of temporary total disability benefits to the claimant subsequent to December 2001, as the same relates to claimant's low back and elbow complaints.

On March 10, 2003, while discharging job duties in his employment with respondent-employer, claimant suffered new injury or aggravation of a pre-existing condition relative to his low back. Respondent #2 provided workers' compensation insurance coverage for respondent-employer at the time of the claimant's March 10, 2003, injury. While lifting and stacking concrete cylinders, claimant has an onset of symptoms unlike those previously experienced with respect to his low back. Diagnostic studies disclosed a herniated disk in the L4-5 region of the lumbar spine, for which claimant underwent surgery under the care of Dr. Robert Abraham, a Jonesboro neurosurgeon. Claimant has not discharged employment duties since March 11, 2003, and has been under the care and treatment physicians relative to the March 10, 2003, low back injury and June 1, 2001, elbows since. Respondent #2 has controverted the March 10, 2003, compensable low back injury in its entirety.

The evidence reflects that during the time that respondent #2 provided workers' compensation insurance coverage on behalf of respondent-employer, claimant earned \$11.00 per hour. The testimony of the claimant reflects that he averaged three to four hours weekly in overtime work. Claimant added that he received time and a half for overtime. The testimony in the record reflects that claimant worked on Saturdays. There is no evidence in the record to reflect that the claimant suffered a reduction in his hourly rate of pay between the time that respondent #1 provided workers' compensation coverage and when respondent #2 began providing workers' compensation insurance coverage for respondent-employer. The evidence preponderates that the claimant's average weekly wages were sufficient to entitle him to weekly compensation benefits at rates of \$410.00/308.00 for temporary total disability/permanent partial disability benefits at the time of his March 10, 2003, compensable injury/aggravation of his pre-existing condition.

### **AWARD**

Respondent #1 is hereby ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefits rate of \$410.00, for the periods subsequent to January 22, 2002, during with time claimant was off work relative to recurrence of his June 1, 2001, lumbar spine injury. Said sum accrued shall be paid in lump without discount.

Respondent #1 is further ordered and directed to pay all reasonable related medical benefits relative to the claimant's compensable injury of June 1, 2001, to include medical treatment relative to the claimant's head, neck, elbows and low back injuries in addition to claimant's thoracic spine injury, growing out of the June 1, 2001, compensable accident, to include medical related travel.

Respondent #2 is herein ordered and directed to pay to the claimant, temporary total disability benefits at the weekly compensation benefit rate of \$410.00 for the period commencing March 11, 2003, and continuing until such time as the claimant has reached the end of his healing period, or is released to return to work, as a result of the claimant's compensable injury of March 10, 2003. Said sums accrued shall be paid in lump, without discount.

Respondent #2 is further ordered and directed to pay all reasonable related medical and hospital expenses arising out of the March 10, 2003, compensable injury of the claimant, to include medical related travel.

Respondent #1 is herein directed to pay maximum attorney fees to the claimant's attorney, the Honorable Kristofer Richardson, on the controverted portion 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).

Respondent #2 is herein directed to pay maximum attorney fees to the claimant's attorney, the Honorable Kristofer Richardson, on the controverted portion of this award, pursuant to the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002).

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. § 11-9-802, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

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**ANDREW L. BLOOD, -**  
**ADMINISTRATIVE LAW JUDGE**