

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F306784**

<b>ROGER EUBANKS, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>BAPTIST MEDICAL CENTER, SELF-INSURED EMPLOYER</b>	<b>RESPONDENT</b>
<b>CROCKETT ADJUSTMENT, TPA</b>	<b>RESPONDENT</b>

**OPINION FILED JANUARY 14, 2005**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on November 16, 2004, at Little Rock, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE GAIL PONDER GAINES, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

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

On September 14, 2004, a pre-hearing conference was conducted in this claim, from which Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing and parties's respective contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Roger Eubanks, the claimant; Melissa Eubanks; and JoAnn Crowe,

coupled with medical reports and other documents comprise the record in this claim.

### DISCUSSION

Roger Allen Eubanks, Sr., the claimant, with a date of birth of June 2, 1956, is a high school graduate with some post-secondary education. Claimant commenced his employment with respondent in October 2000, as a tech specialist. The testimony of the claimant reflects that he had back surgery in 1982. Claimant noted that in 1996 he was diagnosed with diabetes.

In describing the mechanics of his job duties in the employment of respondent, claimant testified:

Maintenance personnel. I took care of the 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> floors of the hospital. Of all the patient rooms, air conditioning, maintenance on the beds, electrical, plumbing, just everything that consists of the room. (T. 19).

The testimony reflects that claimant's job entailed the physical demands of bending, lifting, stooping, pushing, pulling, and being on his feet. Claimant testified that he typically worked a 45-hour week in his employment with respondent, at an hourly rate of \$14.80.

Due to his child support obligations, claimant testified that he performed other jobs for additional income:

Well, I helped a friend of mine kind of like put siding up. I carried siding to him and stuff like that. The hospital got me a job at the hotel, you know, because after child support I was only receiving a very small amount in paycheck so the hospital helped me get a job with the hotel across the street, cash. So, I took care of the maintenance at the hospital, and at the hotel there. (T. 20).

Claimant noted that he worked six to seven hours a night after completing his regular shift at respondent-employer. Claimant successfully performed the afore for a period of almost a year prior to his May 19, 2003, compensable injury.

The compensability of the claimant's May 2003, back injury is not disputed. In describing the mechanics of the injury, claimant testified:

Okay. I was on that weekend call. I was the only maintenance personnel there at the hospital. A patient in one of the rooms had problems with a recliner, . . . So, they called me to come fix the chair. I couldn't fix the chair so I had to remove the chair and go get another chair to replace it. Well, I was dragging the chair through the room until I got to the back of the bed and they had kind of like a blood machine at the, you know, the foot of the bed plugged into the wall. So, I had to pick up the chair and put it over the cord. And when I picked up the chair and took a step back, my back just went out. . . . . When I finally got the chair out and I couldn't get another chair in because nobody would help me, housekeeping or nobody so I just left that room, you know, it wasn't finished and all that. So, I stayed in the shop the rest of the day and just did little calls, calls that didn't, you know, that I didn't have to use my back or anything. And then the next morning when I went back to work I informed my boss that I injured my back. (T. 17-18).

A May 5, 2003, Progress Record of respondent reflect that employee health services was notified of the claimant's May 3, 2003, injury. (RX. #1, p. 4).

Claimant continued working following the incident. Claimant's testimony reflects that his supervisor, Steve Wise, accommodated him as he continued trying to discharge his assigned duties. A second incident occurred involving the claimant while discharging assigned job duties.

Claimant testified regarding the afore:

. . . . Well they needed help with a tent. The ER was having their PR day where they had a tent out and a ducking booth and all that. And I was trying to help put the tent up and when I went to help push up the bars that put the tent up, I just lost control. And I had to go back to the ER and that's when they sent me home. (T. 19).

Claimant's testimony reflects that he was seen in the emergency room of respondent by D. Pahls following the May 19, 2003, incident. Thereafter, claimant was seen by Dr. Edward Saer, a Little

Rock orthopedic surgeon, pursuant to the directions of respondent. Claimant maintains that while he was seen a couple of times by Dr. Saer, his condition did not improve. Claimant's testimony reflects that he was referred to Dr. Annette Meador by respondent. Claimant was not pleased with his treatment under the care of Dr. Meador:

Well, I told her that I couldn't take steroids and she gave me steroids in the disc anyway. She was fixing to do it the second time until I told her that I just got out of the hospital and all that. And she said, oh, nobody told me about it. But my blood sugar - - she gave me a bunch of injections of steroids in my disc and the next day my blood sugar is 900 and something. (T. 24).

Prior to his back injury, claimant's testimony reflects regarding his diabetes:

Well, I mean, my blood sugar, you know, it would go high and I would get dizzy and, you know, sometimes I'd almost pass out. I had some chest paint. . . (T. 22).

Claimant asserts that he was hospitalized for four day as a result of the steroid injection by Dr. Meador.

Following a subsequent visit to the emergency room of respondent claimant was referred to Dr. Aiken, a Little Rock neurosurgeon, by the attending emergency physician, Dr. Pahls. Claimant's testimony reflects, with respect to his complaints at the time of the emergency room visit:

My legs just going numb, burning, hurting and my private parts were hurting. I mean, from here down it's just like, you know when you hit your funny bone real hard and you hurt, it just burns, that's how I felt from my waist down.(T. 22).

Claimant asserts that he was referred by Dr. Aiken to Dr. Thomas Hart for a diskogram.

Claimant maintains that he furnished the results of the diskogram to Dr. Aiken. Claimant's testimony reflects that following the diskogram he was still having severe back and leg pain.

Claimant acknowledged that he was released to return to work by Dr. Aiken. Claimant maintains that he tried working for two to three days before he experienced disabling pain while performing a job of changing some filters on the 7<sup>th</sup> floor. Claimant secured a change of physician, through his former attorney, explaining that he was not getting any better. Claimant testified:

I thought I was going to go paralyze. I mean, I thought I was going to lose the function of my legs.(T. 26).

The change of physician was approved such that claimant begin seeing Dr. F. Richard Jordan, a North Little Rock neurosurgeon, effective January 5, 2004.

Claimant acknowledged that he was informed by Dr. Saer and Dr. Aiken that he was not a surgical candidate. Further, claimant acknowledged that before prior to his February 4, 2004, surgery under the care of Dr. Jordan he was aware of the January 26, 2004, correspondence of respondent denying liability for the cost of the surgery.

The testimony of the claimant reflects that during the initial evaluation by Dr. Jordan surgery was recommended. The scheduling of the surgery was delayed for thirty (30) days to allow claimant to stop smoking. The February 4, 2004, surgery was performed by Dr. Jordan with the cost for same being filed with claimant's group healthcare provider in light of respondent's controversion. Claimant's testimony reflects, with respect to the surgery:

Well, the pain, the numbness and the burning stopped right then. I mean as soon as I woke up from recovery. I mean that sensation and all that was gone. I mean, I knew right then that I was better. I mean. (T. 29).

Claimant testified that he was 80 % better following the surgery.

Claimant remained under the care and treatment of Dr. Jordan through May 24, 2004, at

which time he was released. Claimant acknowledge that he did not immediately return to the employment of respondent. Claimant has not worked since his May 24, 2004, release.

Claimant's testimony reflects that his plans are to move to Grandberry, Texas, and begin work as a contractor with Southwestern Bell.

Claimant conceded on cross examination that Dr. Saer and Dr. Aiken recommended physical therapy in the treatment of his back complaint. Claimant also acknowledged that Dr. Meador consulted with his diabetes physicians before undertaking treatment measures relative to his low back injury. Claimant asserts that Dr. Hart recommended surgery during conference he had with him.

Claimant acknowledged that when he was returned to work in December 2003, by Dr. Aiken, he may have worked three to four weeks rather than three to four days, explaining that he was still on "quite a bit of pain pills". (T. 37). Claimant asserts that he performed very little work during the 3-4 week period of his release by Dr. Aiken, noting that because he kept his floors so far up to date that he could have slack time. (T. 44). Further, claimant maintains that when he return to work during the afore period he had to take medications that were so strong that it impaired his ability to walk and talk, however no one ever found him in that situation. Claimant recalled talking with JoAnn Crowe in December 2003, and being cleared to return to work, and informing her that he was doing a lot better.

Claimant acknowledged that he did in fact return to work for respondent "a couple of days" following his release to do so by Dr. Jordan in May 2004. During the of his return to work in June 2004, claimant was still taking pain medication. Claimant concedes that he took some medication that he borrowed from a friend, which was not his prescription. Claimant recalled

having a problem while at work and telling his supervisor, Steve Wise, that he could not walk.

As a consequence of the afore, claimant was sent for a drug screen. Claimant's testimony reflects:

Yes. After I told them I needed help three or four times. I think I even told JoAnn that I had, I thought I had a pain pill problem. (T. 39).

Claimant denies going to stay with a family member because he thought he was taking too much medication, but rather moved in with his mother because he could not pay his bill on worker's compensation indemnity benefits.

Claimant underwent a drug screen test on May 27, 2004. (RX. #1, p. 1-3) Claimant asserts that he was unaware that the drug screen which was performed following his return to work after the release by Dr. Jordan was positive for cocaine. Claimant denies however that he had taken cocaine. Claimant acknowledge that he applied for social security disability at one point in time after the surgery by Dr. Jordan. Claimant denied that he was involved in a motor vehicle accident in October 2003, and does not recall telling Ms. Crowe that he had been in a motor vehicle accident.

Claimant asserts that he did not experience diabetic neuropathy [numbness or tingling in his legs and feet] until after his surgery. Claimant has no explanation for an entry in the records of Dr. Meador relative to diabetic neuropathy prior to the surgery. Claimant acknowledged having problems with his diabetes in the past to the extent that he has had to change the level of his medication.

Claimant exhorted the benefits gained from the surgery performed by Dr. Jordan:

No, ma'am, after the surgery the pain that I had before

the surgery was completely gone. There were days that I had aches and pains and I hurt but there was a lot of days that I felt good. Before the surgery I hurt everyday, seven days, 24 hours a day. There was no let up. There was hardly no sleep. There was hardly no nothing. I hurt constantly. I mean I hurt so bad that I didn't want to live the times that I hurt so bad. You lay there and you hurt so bad you cry like a baby in front of your new wife. No, I was hurting constantly until I had my surgery. (T. 47).

Claimant testified that he was taking the level of pain medication in May 2004 because he had been pills so long that he already had a problem, for which he had gone to respondent-employer and request help for his drug problem:

I told my boss, Steve Wise, that. I told my lead man, Don Cells (phonetic) that. And I said that in front of, I mean I told them I had a drug problem in front of the whole shop.

\* \* \*

That day (May 27, 2004), the bay before and a week before, yes, ma'am. I told him (Steve Wise) quite a bit. I needed some help. (T. 48).

Claimant's testimony reflect that at the time he returned to work following his surgery in May 2007, he felt like he was out of shape and wanted to work himself back into shape. (RX. #1, p.24).

Melissa Ann Eubanks, the claimant's wife, testified that she and claimant had know each other for a year prior to their April, 2002, marriage. Mrs. Eubanks' testimony is corroborative of that of the claimant with respect to his pre-May 2003, physical capabilities. Mrs. Eubanks testified regarding the status of the claimant's condition while under the care of Dr. Aiken in late 2003:

He was getting worse. At one point they had him doing intense physical therapy and each time he had to go to that he was in worse pain. He was having take more and more medication and

the medication, the pain pills and stuff was not taking care of the pain. Nothing would help. And he was hurting bad, hurting very bad. He wanted to die.(T. 12).

With respect to the claimant's condition following his surgery by Dr. Jordan, Mrs. Eubanks testified:

I mean it took a while but I mean you can tell that he was, he had a lot of relief, I mean after the surgery there was relief in his legs and his feet and stuff. He didn't have the intense pain that he had. He had pain from the surgery but - -

Yeah [back]. But the other, you know, things that came along with him being hurt, it eased up. Of course, it's taken awhile to get better but I mean he is more closer back to his normal self now than he has been in the last year and a half. (T. 12-13).

JoAnn Crowe, a registered nurse and workers' comp case manager for respondent-employer, testified regarding the content and accuracy of her nursing notes/progress notes relative to the claimant. Ms. Crowe noted that the claimant had consulted with her at the time he returned to work in December 2003, pursuant to a release by Dr. Aiken. Ms. Crowe testified that claimant had not undergone a second attempt at a discectomy in early December because the first attempt had been unsuccessful; that he relayed he was being careful and doing the recommended exercises; that he was better; and the he was walking more normal. In comparing her observation of the claimant walking in December 2003, to his walking following his return to work after the surgery by Dr. Jordan, Ms. Crowe testified:

He appeared to be uncomfortable. He was walking fairly stooped; had a limp, a pronounced limp. And I asked him how he was and he said that he thought it was just because he was out of shape. (T. 51).

Ms. Crowe testified that claimant did not appear to better following his release by Dr. Jordan

based on her observations and conversations with him.

Regarding the claimant's medical treatment relative to his May 2003, injury, Ms. Crowe testified that claimant was seen initially in the emergency room, which is customary for an on-the-job injury. Claimant was later referred to Dr. Saer:

Because he really appeared to be in a good deal of pain. He was not improving with normal conservative treatment through our work injury clinic and I thought it warranted a specialist looking at him. (T. 52).

Ms. Crowe attended claimant's appointments with Dr. Saer, consulted with Dr. Saer, and reviewed the records of Dr. Saer. Ms. Crowe observed that during the time claimant was seeing Dr. Saer he was not considered a surgical candidate.

Ms. Crowe testified that claimant was evaluated by Dr. Meador pursuant to a recommendation by Dr. Saer that pain management might be beneficial. Regarding any consultation had by Dr. Meador prior to undertaking treatment of the claimant, Ms. Crowe testified:

I know that she requested that because she was concerned about the instability of his diabetes. And she requested that he be evaluated by his primary - - I don't know if it was his primary care physician or his endocrinologist, but Dr. Gray. And she was concerned because she knew that steroid medication can be detrimental to some people with diabetes. (T. 53).

Ms. Crowe's testimony reflects regarding the mechanism of claimant's treatment by Dr.

Eubanks:

When he did not appear to be improving I took it upon myself and had a personal consultation with him to ask him if he wanted to see a different physician. Also, Dr. Pahls from the ER because he had Mr. Eubanks present to the ER on a number of occasions called me and said that we needed to do something else, that he recommended - - I told him

what had preceded this with history of Dr. Saer as well as Dr. Meador. And he recommended that we try and refer him to that. And he said that he knew that Dr. Aiken [a neurosurgeon] was accepting new patients because he was a fairly new physician at Baptist.

While under Dr. Aiken's care and treatment surgery was not recommended for claimant. Ms. Crow testified that Dr. Pahls continued to be involve with claimant after the referrals to Dr. Saer and Dr. Meador, because there were several occasions when claimant presented to the emergency room for complaints of back pain and saying he needed some for pain.

Ms. Crowe testified that the only occasion she recalled the claimant discussing medication with her, which she documented, was August 5, 2003, when he responded to several messages that she had left at his telephone:

If I can read directly from my notes. I advised him that we were having difficulty contacting him. He reports that he was taking too much pain medication and felt he was hooked so he went to stay with a family member and took himself off the pain medication. He is currently just using Flexaril and Vioxx. He reports his pain level was tolerable and he feels better off meds in terms of his medical status. He was advised that he had a followup appointment with Dr. Meador after that.(T. 56).

While Ms. Crowe testified that she did not tell the claimant to stop taking medication, which she never does, she note that a one time clamant presented to the ER and was seen in the fast track part of the ER, and that the physician, Dr. Handloser, refused to give him medication and contacted her.

The evidence in the record reflects that claimant was referred to Dr. Thomas Hart by Dr. Aiken. Dr. Hart performed a diskogram. Following the afore another procedure, percutaneous by needle resection of disc material, was to be performed. While the procedure was initially questioned by respondent, consent was ultimately provided. The attempt to perform the

procedure failed. Ms Crowe testified that while she was the nurse coordinator relative to the claimant's case, there was not a surgical recommendation made by either of the physicians to see and or treat the clamant.

Ms. Crowe's testimony reflects that during a October 28, 2003, conversation with the claimant he relayed that he had a car accident "last week" as the reason he did not attend physical therapy. Claimant also relayed that he did not seek treatment from the emergency room following the accident.

Ms. Crowe confirmed her contact with the claimant, as documented in her progress record, on December 15, 2003, when claimant return to work pursuant to the release of Dr. Aiken, and on December 24, 2003; January 5, 2004; January 12, 2004; and January 13, 2004. There was no other contact with the claimant by Ms. Crowe until May 25, 2004. Ms. Crowe explained the referral to Dr. Jordan and subsequent surgery, the third-party administrator recommended that she have no contact with claimant as nurse case manager. Ms. Crowe acknowledged that she is unaware of what claimant's condition was between the first of January and May 2004.

Ms. Crowe further acknowledged that neither Dr. Meador, Dr. Pahls or Dr. Hart is a surgeon. The only surgeons involved in claimant's medical treatment relative to his May 2003 compensable injury prior to Dr. Jordan were Dr. Saer and Dr. Aiken. Dr. Saer last saw the claimant on July 3, 2003. Prior to returning to work in December 2003, claimant was contemplating a second opinion/evaluation with Dr. Jordan. Dr. Hart deferred to Dr. Jordan relative to possible surgery regarding the claimant.

The management of the claimant's medical treatment relative to the May 2003 injuries

was provided by and coordinated through respondent until a change of physician was had to Dr. F. Richard Jordan. There is not a dispute regarding the order of the claimant's medical providers or the fact that Dr. Jordan became claimant's authorized treating physician pursuant to an order entered by the Medical Cost Containment Department.

Claimant was referred to pain management and physical therapy by both Dr. Edward H. Saer, III, an orthopedic surgeon, and Dr. Eric D. Aiken, a neurosurgeon, relative to his compensable injury. In September 10, 2003, report, Dr. Aiken noted that he would have the claimant undergo a discogram. (CX. #1, p. 37).

Pursuant to the above, on September 27, 2003, claimant was examined and evaluated by Dr. Thomas Hart. The September 27, 2003, narrative report of Dr. Hart relative to reflects the history of the claimant's injury, the results of the examination, and review of available prior medical and diagnostic studies. The report concludes:

**PLAN:** I discussed with Mr. Eubanks the risks, benefits and expectations of the discography performed properly according to national standards. We will use the double needle technique. Basically it is a more sensitive study that either an MRI or CT myelogram, which he has had now. It will allow us to hopefully further delineate his back pain complaints subjectively and reproducing his back, buttock, and lower extremity pain complaints and objectively demonstrate whether or not he has abnormal pressure volumes, abnormal morphological appearance of the disc. If we find an abnormal disc we will inject intradiscal steroids, again, being very careful because of his insulin dependent diabetes and his previous elevated blood sugar with the epidural injection performed, obtain a post CT imaging and have these reports for Dr. Akins as soon as possible. As Dr. Akin mentioned if it does show significant disc disruption he may be a potential surgical candidate. The question is, is he a 1 level or 2 level fusion? There are other technologies now available that are nonsurgical in which we may be able to decrease either the nucleus or performance of an annuloplasty, that is either percutaneous discectomy or IDET, but that is only for very select patients if they are not surgical candidates. . . .(CX. #1, p. 41)

On September 30, 2003, claimant underwent the discogram under the care of Dr. Hart.(CX. #1, 42-44) Claimant also underwent a post diskogram CT scan of the lumbar spine. (CX. #1, p. 45).

The results of the diskogram were relayed to Dr. Aiken by Dr. Hart.

On October 2, 2003, claimant was seen by Dr. Aiken. After noting the results of the discography and physical examination, Akin recommended, as the best option, continued conservative measures and intensive physical therapy. Accordingly, four weeks of physical therapy were prescribed. (CX. #1, p. 46-47).

Claimant was seen in follow-up by Dr. Hart on October 20, 2003. The October 20, 2003, report of Dr. Hart reflects, in pertinent part:

I do have a note from Dr. Akins, in which he had an office visit October 2, 2003. At that time it was mentioned that his discography indicated an abnormal disc at 4-5 and 5-S1 after we demonstrated a reproduction of his chief complaint, i.e., bilateral back, buttock and posterior lateral thigh pain complaints. He indicated to Dr. Akins mainly left sided pain at that time. But Dr. Akins informed him to hold off surgery and pursue conservative measures, as well as some intensive physical therapy. On Mr. Eubanks presentation today we again reviewed his continued back pain complaints. "Let's do something, I have got to get back to work soon. . ." . . . At this time if he is not considered a surgical candidate then I would recommend to a degree of medical certainty and probability percutaneous discectomy. This is a minimally invasive, outpatient, nonsurgical procedure. We have already done the "homework" and demonstrated the abnormal disc at 4-5 and 5-S1. The purpose of this procedure, . . . , is basically debulking the nucleus by reducing his disc protrusion and hopefully reduce his back buttock, as well as his lower radicular pain bilaterally since he complains of both side, just not the left side. We can do two disc at a time and I think it would be appropriate to go ahead and do 4-5 and 5-S1. It may take 8 to 12 weeks for the disc to heal but if he has a substantial reduction in his back pain complaints within a few week, at that point he could probably return to light duty status at work. . . . .

**PLAN:** Basically as I informed Mr. Eubanks overall neurologically he appears intact. He has discogenic pain with intervertebral disc disruption

at 4-5 and 5-S1 disc with perfectly normal control at 3-4. Again, I think he would benefit from a percutaneous discectomy at the 4-5 and 5-S1 since this is minimally invasive. We have had some very good results in properly selected patients. I went ahead and dispensed him some Ultracet samples today for his pain, which again, I think is very legitimate. We will schedule this as soon as possible after his work comp approval. (CX. 1, p. 48-49).

After securing information from Dr. Hart regarding the cost of the procedure and the circumstances under which it would be performed, as well as the opinion of Dr. Aiken, and the results of a peer review, respondent ultimately authorized the procedure. By the time authorization was granted by respondent, an October 29, 2003, Change of Physician Order had been entered by the Medical Cost Containment Department of the Commission authorizing the claimant to initiate treatment under the care of Dr. F. Richard Jordan relative to his compensable injury.

On November 20, 2003, claimant was admitted to respondent under the care of Dr. Hart for the purpose of the percutaneous discectomy. Dr. Hart aborted the procedure due the fact that claimant had a “hyper-excitabile reaction to the propofol and was moving excessively”. Before proceeding with the procedure on November 20, 2003, Dr. Hart was informed that the claimant had requested a “surgical evaluation/second opinion” by Dr. Jordan. The November 20, 2003, Procedure Note Addendum of Dr. Hart reflects, in pertinent part:

. . . . In the meantime, I discussed with the Eubanks I think it would be more appropriate at this time, if they do have an appointment with Dr. Jordan for a second surgical opinion, is hold off any further procedure until he sees Dr. Jordan. At that time if he is considered a surgical candidate, we should head in that direction. If not, then we may pursue a minimally invasive procedure. As I informed them I demonstrated to them the Sony appearance as I did before, the disk at 5-S1, not only does it have intervertebral disk disruption in which he has discogenic pain. This is a previous surgical site. Also of concern to me is this large posterior spur going posteriorly. This may need to be eventually decompressed and

that may be causing some nerve impingement. Again, this is more complex than a simple percutaneous diskectomy. As to the 4-5 disk, he has adequate disk height. No pervious surgical intervention at that level. He also has a contained herniation, i.e. intervertebral disk disruption. (CX. #1, p. 61).

Dr. Hart thereafter outlined possible options for the treatment of the claimant's injury in the event of surgery by Dr. Jordan.

In an October 22, 2003, correspondence, predating the November 20, 2003, percutaneous diskectomy, Dr. Aiken opined that claimant had reached maximum medical improvement and assessed a 7 % impairment. (CX. #1, p.50). On December 12, 2003, Dr. Aiken released the claimant to return to work, regular duties effective December 15, 2003. The November 20, 2003, Procedure Note of Dr. Hart reflects a copy of same was provided to Dr. Aiken, and ,as such, Dr. Aiken should have been aware that the percutaneous diskectomy had not been carried out.(CX. #1, p.60). The record does not reflect a report evidencing the results of a physical examination of the claimant by Dr. Aiken on December 12, 2003, in conjunction with the release to unrestricted duties.

On January 5, 2004, claimant was seen for the first time by Dr. F. Richard Jordan, a North Little Rock neurosurgeon. The January 5, 2004, report of Dr. Jordan reflects that he had access to and review the claimant's prior pertinent medical history. The report reflects, in pertinent part:

He has undergone rather extensive conservative treatment to include various medications trials, trigger point injections, as well as epidural steroid injections. He was off work from June of last year until December 15 before he had to return to work or lose his job. He continues to hurt on a daily basis. He basically goes to bed when he gets home.

He has had an MRI and discography which show an HNP at L4/5 and L5/S1.

\* \* \*

On physical examination he is 5'10" , weight 175, blood pressure 140/92, pulse 94 and regular, respiration 12 and regular. On examination he has marked limitation in lumbar range of motion in all planes. He has palpable muscle spasm in the lumbar paraspinal muscles, particularly on the right.

We reviewed our evaluation and the films with Mr. Eubanks and have decided to proceed with a posterior lumbar interbody fusion with instrumentation at L4/5 and L5/S1 on February 04, 2004 at BH-NLR. We insisted that he quit smoking prior to surgery. He was given Valium 10mg to take 1 t.i.d. for muscle spasms and we also gave him hydrocodone 10-650 (#50) to take 1 q,4h. as needed for pain until surgery. . .(CX. #1, p.64-65)

Claimant underwent the surgery as scheduled. On May 24, 2004, claimant was released to return to regular duties by Dr. Jordan. (CX. #1, p. 67). In an October 26, 2004, correspondence to claimant's attorney Dr. Jordan relayed the basis for his decision to proceed with surgery, and claimant's post-surgical results. (CX. #1, p. 88-89).

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

### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 19, 2003, the relationship of employee-employer existed between the parties.
3. On May 19, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$372.00/\$279.00, for temporary total/permanent partial disability.
4. On May 19, 2003, 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 subsequent to

January 5, 2004, through May 24, 2004, in addition to prior periods of total incapacitation relative to the May 19, 2003, compensable injury.

6. Medical treatment rendered to the claimant under the care of Dr. F. Richard Jordan commencing January 5, 2004, was reasonably necessary and authorized in relation to the claimant's May 19, 2003, compensable injury.

7. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of May 19, 2003.

8. The respondent has controverted claimant's entitlement to temporary total disability benefits subsequent to the point in time he came under the care and treatment of Dr. Jordan, as well as the claimant's medical treatment under the care of Dr. Jordan.

### CONCLUSIONS

\_\_\_\_\_The compensability of the claimant's May 19, 2003, injury is not disputed. Claimant asserts that he is entitled to additional workers' compensation benefits growing out of the compensable injury. Respondent deny that claimant is entitled to additional benefits. 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 an injury having been sustained subsequent to the effective date of the afore provision.

There is no evidence in the record to reflect that claimant required medical treatment relative to his low back during his employment prior to May 2003. In May 2003, claimant suffered two incidents while discharging employment duties for respondent with the last having been sustained on May 19, 2003. Claimant remained symptomatic following the initial incident and required medical treatment following the May 19, 2003, incident.

Ark. Code Ann. §11-9-508 (a) requires employers to provide such medical services as may be reasonably necessary in connection with the employee's injury. *Cox v. Klipsch & Associates*, 71 Ark. App. 433, 30 S.W. 3d 764 (2000). In the instant claim, medical benefits were provided by respondent's designated medical providers, to include referrals therefrom, through December 12, 2003.

Claimant underwent extensive periods of conservative treatment pursuant to the directions of Dr. Edward Saer, an orthopedic surgeon, and Dr. Eric Aiken, a neurosurgeon. Dr. Saer referred claimant to Dr. Annette Meador, a neurologist and pain management physician. The evidence preponderates that claimant did not receive appreciable benefits from the medical treatment provided by Dr. Meador. Dr. Saer last had contact with the claimant on July 3, 2003.

While under the care and treatment of Dr. Aiken additional diagnostic studies were performed relative to the claimant's complaints to include a discogram, which was performed by Dr. Thomas Hart, a Little Rock pain management specialist. Dr. Hart furnished the result of his diagnostic studies to Dr. Aiken and deferred to same as to whether claimant was a surgical candidate. Both Dr. Saer and Dr. Aiken expressed the opinion that claimant was not a surgical candidate.

Dr. Hart recommended that claimant undergo a minimally invasive procedure, percutaneous discectomy, in the treatment of the compensable injury. Dr. Aiken concurred in the recommendation. Ultimately, respondent authorized the procedure. Efforts to perform the procedure on were aborted when the claimant had a hyper-excitable reaction to the propofol and was moving excessively. Claimant remained symptomatic following the effort at the percutaneous discectomy. In short, the fact that claimant was unable to undergo the percutaneous

discectomy did not obviate his need for medical treatment relative to the compensable injury.

Claimant's authorized treating physician relative to his May 2003, compensable injury became Dr. F. Richard Jordan pursuant to a Change of Physician Order entered by the Medical Cost Containment Department of the Commission, in accordance with Ark. Code Ann. § 11-9-514. *Collins v. Lennox Industries, Inc.*, 77 Ark. App. 303, 75 S.W. 3d 204 (2002). At the time of claimant's last contact with Dr. Hart, when informed of the pending appointment with Dr. Jordan, Dr. Hart deferred to Dr. Jordan regarding the claimant's surgical candidacy.

Claimant was evaluated by Dr. Jordan on January 5, 2004, and surgery recommended. On February 5, 2004, claimant underwent the surgical procedural under the care of Dr. Jordan. While claimant continued to experience pain following the surgery, he experienced an immediate appreciation of improvement in his symptoms. Claimant was released to return to work by Dr. Jordan following May 24, 2004, visit, effective May 25, 2004. Whether a medical procedure or device is reasonable and necessary is a question of fact to be decided by the Commission. *Cox, supra*.

The evidence preponderates that the medical treatment rendered to the claimant under the care of Dr. Jordan was reasonably necessary in connect with the May 2003, compensable injury. Claimant had been symptomatic since the May 19, 2003, compensable injury and required medical treatment relative to same. Despite having undergone an extensive period of conservative treatment his condition had not improved. Objective studies disclosed evidence of injury at L4-5 and L5-S1. Following the February 5, 2004, surgery claimant experienced an improvement in his symptoms and condition. There is no evidence to reflect that claimant suffered an intervening event which severed the liability of respondent. Respondent has

controverted the cost of claimant's medical treatment under the care of Dr. F. Richard Jordan.

Claimant was released to return to work effective December 15, 2003, by Dr. Aiken. Claimant discharged employment duties for respondent pursuant to the afore release until he came under the care and treatment on Dr. Jordan on January 5, 2004. Following his evaluation of the claimant Dr. Jordan scheduled surgery to treat the claimant's injury. Claimant's surgery was scheduled for February 5, 2004, in order for him to stop smoking. Claimant ceased work following his January 5, 2004, evaluation by Dr. Jordan.

The healing period is that period for healing of an injury which continues until the claimant is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W. 2d 457 (1994). Conversely, if further treatment will improve the underlying condition causing the disability then the healing has not ended. Whether a healing period has ended is a factual determination to be made by the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W. 2d 25 (1995). Temporary total disability is that period in which a claimant suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

In the instant claim, claimant remained under the care and treatment of Dr. Jordan from January 5, 2004, through May 24, 2004. Claimant was not released by Dr. Jordan to return to work until the May 24, 2004, visit, effective May 25, 2004. The evidence preponderates that claimant was within his healing period and totally incapacitated from engaging in gainful employment during the afore period and correspondingly entitled to the payment of temporary

total disability benefits. Respondent has controverted the afore benefits.

**AWARD**

Respondent is herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly rate of \$372.00 for the period in January 2004, when he incapacitated, and continuing through May 24, 2004, as a result of his May 19, 2003, compensable injury. Said sums accrued shall be paid in lump, without discount.

Respondent is further ordered and directed to pay all reasonably related medical, hospital, nursing, and other apparatus expenses arising out of the May 19, 2003, compensable injury, to include the cost of claimant's treatment under the care of Dr. F. Richard Jordan, as well as medical related travel.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity 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 herein are expressly reserved.

**IT IS SO ORDERED.**

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