

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507500 (07/01/05)

CHARLES GILLIAM, EMPLOYEE

CLAIMANT

BRIDGESTONE/FIRESTONE, EMPLOYER

RESPONDENT

OLD REPUBLIC INS. CO., CARRIER

RESPONDENT

OPINION FILED OCTOBER 9, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on July 13, 2006, at Blytheville, Mississippi County, Arkansas.

Claimant represent by the HONORABLE JAMES W. HARRIS, Attorney at Law, Blytheville, Arkansas.

Respondents represented by the HONORABLE JOSEPH H. PURVIS, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

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

Several pre-hearing conferences were conducted in this claim, and a Pre-hearing Order was filed on January 17, 2006. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Charles Gilliam, Jr., the claimant, Elenia Foley, Dr. Judieth Butler, Dr.

Raymond E. Peeples, coupled with medical reports, other documents and a video, comprise the record in this claim.

DISCUSSION

Charles Gilliam, Jr., the claimant, with a date of birth of January 21, 1971, is a Blytheville, Arkansas resident who commenced his employment with respondent-employer on or about January 20, 2005. Regarding the employment process, claimant completed an application, underwent an interview and a pre-employment physical with Dr. Ronald Smith, a Blytheville physician. Claimant denies that there was any discussion regarding his weight, which was between 287-290 pounds, during his pre-employment physical. Claimant is 5' 8" tall.

Claimant completed the 9th grade before dropping out of school when he was 18 years old. Claimant was employed at Nucor Steel for a period of 1 ½ years when he sustained an injury to his knee. Claimant was employed by the city of Blytheville for a period of 2 ½ years where he worked the incinerator. The testimony of the claimant reflects that for four (4) prior to his employment by respondent-employer he worked for Donnie Alderson at Triple A Auto Sales. Claimant's testimony reflects that for a period of 3 to 4 years he was self-employed performing auto body repair work at his own shop, Gilliam's Paint And Body Shop, in Blytheville. Claimant's employment history also reflects that he worked for his uncle for 15 years hauling cars between Blytheville and St. Louis.

Claimant denied that he had ever injured his back or gone to a doctor relative to his back prior to his July 1, 2005, injury in the employment of respondent. Claimant's testimony reflects that when he injured his knee during his employment at Nucor, he did suffer some residual problem with his back, in the form of a pulled muscle, attributed to his limping and using

assistance devices.

Claimant denies that he was hired by respondent-employer as a janitor. Regarding the discrepancy on the job application and his actual duties, claimant explained that he was informed by his supervisor, Billy Banks, that he was listed as a janitor was the only way he could pay in cash. Claimant's job duties included changing tires and oil on automobiles. Regarding the injury which serves as the basis for the present claim, claimant's testimony reflects, in pertinent part, with respect to the July 1, 2005, accident:

I went in about ten - - I wen in about 8:30, but around 10:30 we was switching some tires on a truck. It's been raining. Off the right rear - - I was taking it off, and when I got it, I lift up on it, and it slipped, and I went to grab it again where it wouldn't drop and hit the ground and mess the rim up. All I know is I felt something in my back that - - it started hurting. I mean, just almost put me on the ground. (T. 14-15).

Claimant described the tire as being seventeen inches and weighing 50-60 pounds. After reporting the injury to appropriate supervisory personnel, claimant was re-assigned from his regular job duties and dispatched to Jonesboro to pick up some tires, and was informed that if his back did not improve in the interim he would be allowed to go home upon his return to Blytheville. Claimant maintains that when he returned to Blytheville he had difficulty getting out of the truck. As a consequence of the afore, the claimant was directed go home by his supervisor.

The injury occurred on Friday, July 1, 2005. Claimant maintains that he went home and laid on the floor for two (2) days before returning to work. Claimant denies that he was offered access to medical treatment by his supervisor. Claimant testified that at approximately 8:30 or 9:00 P.M., on Saturday, July 2, 2005, his pain became so severe that his sister took him to the

emergency room. Claimant's testimony reflects that his emergency room medical treatment included x-rays, an injection for pain, medication and directions to remain off work for three (3) days. Claimant was directed to follow-up with his regular physician if his condition did not improve. Claimant's sister provided the emergency room off-work slip to respondent on Tuesday, July 5, 2005.

Claimant testified that on Thursday or Friday, July 7, or 8, 2005, he sought medical treatment for his injury from his primary care physician, Dr. Butler. Claimant maintains that Dr. Butler arranged for him to undergo a MRI scan at Great River Hospital. Once the MRI scan results were obtained claimant testified that Dr. Butler recommended cortisone shots and therapy for six and a-half weeks with no lifting greater than ten pounds. Claimant noted that while respondent-carrier paid for medication which was prescribed by Dr. Butler it refused to pay for the cortisone shots. Claimant noted that he received pain relief from the epidural injection for five to six hours before the pain returned and he returned to Dr. Butler. While the claimant testified that respondent-employer directed his to Dr. Lovell and Dr. Peeples, he denies that he was ever assigned a primary care physician.

The testimony of the claimant reflects that the claims adjuster for respondent-carrier directed him to Dr. Lovell. Claimant explained:

They called me and asked me would I go to Memphis to see one of their doctors and told me the date and told me how to get there. So I went down and seen him, and then he - - there's a workman's comp agent there. We met right there in the lobby, went back, and he said the same thing Dr. Butler said, therapy and the cortisone shots. So he told me to go back to work for light duty.

So I went back to work that next day and worked until twelve o'clock or one o'clock. I went and did therapy, stayed out there because I had to fill all the paperwork out for therapy at the hospital out there,

and then when I come back, it about - - around 5:30. It was time for me to get - - you know, time to go home. So the next morning I got up and I went to work and worked until - - it was 10:00, 10:30 and it started hurting real bad and asked them could I go home, told them I was hurting, and Billy Banks told me, no, that was abandon workman's comp. I couldn't do it unless I had a doctor's excuse.

So I called my doctor. Dr. Lovell was gone. He was down in Mississippi doing surgery. That's what he does on Thursdays, and my mon just kept on trying to call him, and I called the therapy woman out there and told her, you know, I'm hurting and I want to go home. I mean, I was hurting. I was wanting to lay down, and they wouldn't do it, and then all I know is when I did get off, I want home and Lovells called me about seven o'clock, said that the woman out the therapy place faxed him the invoice on the therapy that she did, that it was a bulged disc, that she didn't think that therapy would help me, and so he told me to come in that next morning, and I went in there - - I think it was 10:30 or 9:30, something like that. I got my sister to drive me back to Memphis. (T. 20-21).

Claimant asserts that the afore occurred on August 5, 2005, three days following the initial visit to Dr. Lovell. Following his examination by Dr. Lovell a myelogram was recommended.

Claimant maintains that Dr. Lovell made a telephone call to respondent-carrier and obtained authorization for the procedure. After obtaining the test results Dr. Lovell recommended surgery.

Claimant's testimony reflects that based on a telephone conversation he had with his former attorney he was under the impression that the surgery had been approved by respondents. As a consequence of the afore he contacted Dr. Lovell's office to relay that the surgery had been approved and schedule it. Claimant was later contacted by Dr. Lovell's office and informed that respondents had declined to authorize the surgery. Claimant testified that approximately a week later he received a telephone call from his attorney and the attorney for respondents directing him to be seen by Dr. Peeples in Little Rock.

The testimony of the claimant reflects that pursuant to the above, on November 2, 2005, he was seen by Dr. Peeples. Regarding the evaluation by Dr. Peeples, the claimant testified:

I go down to Peeples, and he takes me in there and writes everything down from day one, what happened, who I done seen and what's done been said and all that. Well, then he got his nurse to take me - - I put shorts on and take me off in the room around the corner, and she did x-rays on me, and then I come back to the room, and then he come in there, and he called me into the little nurse's station like thing and put them forms up there, and he said something about my back ain't got enough area - - I don't know what you call it, but I mean - - ain't got enough clearance between my back bone. I was born like that. (T. 23-24).

Claimant noted that Dr. Peeples informed him that he was providing a second opinion. Claimant returned to Dr. Lovell a week following his examination by Dr. Peeples. Claimant asserts that in addition to telling him he needed physical therapy and to lose weight, the recommendations of Dr. Peeples were the same that Dr. Butler started him on and the same that Dr. Lovell recommended during the initial visit. Claimant noted that once Dr. Lovell received a copy of Dr. Peeples' report he declined to provide further medical treatment. The report was provided to Dr. Lovell following the claimant February 16, 2006, deposition.

Claimant explained that the reason he wants to undergo the surgery that was recommended by Dr. Lovell is because he is tired of hurting and wants to be fixed. Regarding the video surveillance and his physical activity, claimant testified:

It's been so long. I mean, you've got to toughen up, and you just go on with it. I mean, you can't - - (T. 28).

The surveillance was had on the date of the claimant's visit to Dr. Peeples in Little Rock and the following day. Claimant testified that he was accompanied by an individual that is employed by his father. Regarding the driving responsibilities during the Blytheville to Little Rock trip, claimant's testimony reflects:

I drove all the way down, and then when I went to Peeples and got out of Peeples - - because he can't - - he's scared of traffic.

He ain't never drove in a big city. So I drove out of Little Rock, and we stopped at Lonoke to eat, and that's when he took over and come on in. (T. 29-30).

Claimant asserts that he continues to experience pain and desires to have the surgery as recommended by Dr. Lovell to address his injury. Claimant testified that he had last received a temporary total disability check from respondent three (3) ago.

In a report of July 13, 2005, Dr. Butler, who had the claimant in home therapy program, directed him to avoid bending, stooping or reaching, as well as not lifting greater than 10 pounds. Claimant asserts that the afore restrictions have not been removed. Claimant acknowledged that he was bending over and rolling a tire in the video.

Regarding his activity on November 3, 2005, which was videoed, claimant acknowledged that he was driving his vehicle, a Toyota Corolla. Claimant explained that he took a statement authored by Dr. Peebles which reflected that he could return to work part time/light duty to his supervisor at respondent-employer. Claimant had previously been informed by his supervisor that he could not return to work without a doctor's excuse/statement. The testimony of the claimant reflects that upon being presented with the limited duty release authored by Dr. Peebles his supervisor would not allow him to return to work.

The claimant's deposition was obtained on February 16, 2006, during which time the testified that he was no better physically than he was when he was first injured on July 1, 2005. (RX. #3). Claimant described his pain level at the time of his November 2, 2005, examination by Dr. Peebles as being 8 on the scale of 10, with 10 being the most excruciating pain in the world. Claimant acknowledged that he testified during the February 16, 2006, deposition that he could not do any lifting and that he could not bend over without his back locking up. With respect to

his physical activities and capabilities reflected in the video, claimant asserts that he was on medication, hydrocodone, at the time which made the activities possible.

The testimony of Dr. Judieth Butler reflects that she is licensed in the state of Arkansas and has a DEA number. Dr. Butler testified that she saw the claimant on July 8, 2005, as a patient relative to his back injury. The claimant relayed a history of his work-related back injury and inquired if she accepted workers' compensation patients. Dr. Butler noted that in the course of everyday medical practice she does see such patients, although she does not always receive payment. Dr. Butler has not received any payment from respondents relative to her medical treatment of the claimant in connection to his July 1, 2005, injury.

The claimant was seen by Dr. Butler on July 8, 2005, and again on July 13, 2005, when an MRI scan was ordered. When the claimant returned to Dr. Butler on July 14, 2005, following the MRI scan she diagnosed his injury as a central disc protrusion with probable herination at two levels. As to whether she ever released the claimant to return to work, even light duty, Dr. Butler testified :

I'd have to refer to the record. I would not answer - - I don't know for sure that I ever did without restriction. If it's broke, it's broke, and he had pain, and I think there was a time when his employer wanted him to return to work and I - - after a two-week bed rest and some time off and some improvement, I wouldn't have objected to his to try it, and I'd have to read through that record to look exactly as to when I might have said that. (T. 60-61).

Dr. Butler does not do epidurals but rather intra-joint injections, a steroid injection, which was tried relative to the claimant. Dr. Butler observed that she used the procedure as a diagnostic tool to determine if complaint is a strain or a more permanent injury. Dr. Butler noted that the claimant did receive some pain relief for a brief time.

Dr. Butler, who has been in practice in Blytheville for five years had never treated the claimant for any chronic pain or any chronic ongoing issue prior to July 2005. Dr. Butler testified that she is a family practice doctor that did orthopedics for 20 years in solo practice without an orthopedic doctor. Regarding the nexus between the claimant's back problem and his work accident Dr. Butler's testimony reflects:

With everything that one can tell from history and available history in that he doesn't have any record of ongoing medication, he didn't have any prior x-rays, didn't have any prior medical records of back injury and had no major trauma before, it's reasonable to accept his history that his back was injured and it was in relationship to the activities at work. It's a classic move. It's a classic way it's hurt, and the way he described it, it's classic to cause the herniation. It's a typical description of what they hear and feel, and then the results are the typical. (T. 62).

Regarding the involvement of a surgeon in the claimant's treatment, Dr. Butler testified:

I didn't decide. The insurance company decided. I offered - - I mean, I offered initially for him to do that and offered him that versus some monitoring and conservative treatment to see what happened, and if conservative treatment would let him get better, then - - you know, I could explain it, tell him what that meant in the way of rehab and therapy, et cetera. He was denied the conservative treatment by his insurance company. They would pay for the medicines, wouldn't pay for the injection, wouldn't pay me. (T. 62-63).

Dr. Butler testified that the claimant's case manager called her and informed her that the claimant was being referred to another physician in a different community. Dr. Butler did not have any role in the selection of Dr. Lovell, a Memphis neurosurgeon, undertaking the treatment of the claimant. Dr. Butler did not have any consultation with Dr. Lovell regarding the claimant nor did she receive any copies of his medical records regarding the claimant.

Dr. Butler did not receive any records of Dr. Peeples regarding his examination of the

claimant. In noting the recommendations of Dr. Peebles with respect to nonoperative measures in addressing the claimant's complaint to included epidural steroid injections, Dr. Butler testified that she had discussed epidurals with the claimant and the possibilities of arranging same as well as the difference in what she does and what an epidural is. Regarding the claimant's options of conservative treatment modalities (medications/bed rest) or surgery, Dr. Butler testified:

In my opinion, I was not given any of the information. I do not know what he was presented on a firsthand basis. In other words, I wasn't given information from the doctors or even from the insurance company about what had been recommended. I know what they didn't allow, and that was the conservative sort of things that we wanted to get him through that first two weeks, and then that - - that's what I know - - and what he reports. You know, when he would come failing treatment and in pain and not able to get medication in pain and not able to reach the doctors, that's what I would find out, but I wasn't privy as to what they were thinking or why. (T. 64-65).

Dr. Butler testified that while she was aware that the claimant was seen by Dr. Lovell in Memphis and Dr. Peebles in Little Rock, the information was gained through her conversation with the claimant and not with the case manager. Dr. Butler added that she was never able to get either any information or money from the carrier following her early contact with same in the treatment of the claimant. Dr. Butler concluded that the case manager did not feel that she knew what she was talking about, that she was not a specialist and that she was not a company doctor. (T. 56). With respect to the claimant's access to a company doctor, Dr. Butler's testimony reflects regarding the case manager:

She said they would take care of it, and I think she probably had but not for the ongoing everyday problems. As far as I know, he didn't get much in the way of attention for the day-to-day problems that he was facing. (T. 66).

On cross-examination, Dr. Butler's testimony reflects that in addition to problems in his

back, the claimant also had referred pain and some weakness attributable to his July 1, 2005, accident. Regarding her examination of the claimant, Dr. Butler testified that in her office clinically she checked sensory and reflexes and strength. Dr. Butler did perform, during the physical examination of the claimant a straight-leg raising test, which was positive, and identified as a positive neurologic exam, which is considered an objective finding in medical circles. Dr. Butler also performed the percussion over S-1, which she identified as a neurologic test. (T. 67-68).

Regarding her July 13, 2005, treatment recommendation restricting the claimant to two week of bed rest, Dr. Butler noted that the same is the classic conservative approach to a new disc, which she maintains is normally prescribed by family practitioner, neurologist and orthopedist. The claimant is morbidly obese which was taken into account by Dr. Butler when considering the role that pain and inactivity was going to have on the claimant's metabolic statistics. With respect to the role of exercise and walking as therapy for the claimant's low back injury Dr. Butler's testimony reflects that the same was no advisable initially because the claimant has herniated discs at both levels and that weightbearing in the morbidly obese is more complicating than in thin people. Dr. Butler does not maintain that the claimant's morbid obesity is playing a big role in his problem. Dr. Butler offered that she did not know anyone that would put a patient walking withing the first week or two of an acute disk.

While Dr. Butler's testimony reflects that the loss of weight by the claimant would him improve, she added that its not the only thing noting that he has a ruptured disk which has to be fixed. Regarding the claimant's spinal canal, Dr. Butler testified:

I don't know that it's congenitally small. It is small because he

has central discs protruding causing a central stenosis. That's what the MRI said. (T. 71).

The stenosis in the claimant's back is at L4-L5 and L5-S1. Supportive of her assessment of neurological impingement regarding the claimant, Dr. Butler points to her clinical examination as well as the results of the MRI and a myelogram. (T. 72). Dr. Butler testified that she placed the claimant on the Atkins diet (high protein, high vegetable and no carbohydrate) because the claimant has always had the metabolic problem, which has to do with insulin resistance.

Dr. Butler testified that epidural injections, as a conservative measure, have the potential for providing some relief of swelling and inflammation for six to eight weeks at a time, with a maximum of three injections annually. Dr. Butler estimated that she had seen the claimant between two to three times since July 21, 2005, with the most recent visit having occurred approximately six (6) weeks prior to the July 13, 2006, hearing in this claim. The visits have been due to complaints attributed to the claimant's low back with treatment being rendered in the form of mild muscle relaxants, Xanax and supportive things. Dr. Butler testified regarding her treatment recommendation of the claimant's complaint, based on her most recent contact:

My impression is that he is going to need a surgical repair. I've taken care of orthopedic neurosurgical patients for 25 years, done all the pre and postop and all the diagnostic workup to get them there because I lived in a rural area in Nebraska where we didn't have neurosurgeons or orthopedic doctors and had 7,000 active patients. (T. 83).

Dr. Butler observed that the disc is dynamic, and the central protruding disc does not necessarily provide for a limp or altered gait when walking in patients with same.

Ms. Elenia Foley, a private investigator with Triad Investigations, Ind., of Bentonville, Arkansas, testified that she has been a private investigator for six (6) years and that for 20 years

she was employed an investigator for the state of Arkansas regarding crimes against children. Ms. Foley was assigned to do surveillance on the claimant on November 2-3, 2005. Ms. Foley performed stationary and mobile surveillance on the claimant as well as taped interviews with two of the claimant's co-workers. Ms. Foley videotaped the claimant's movements and submitted a written report along with the videotape regarding her investigation based on her personal observations of November 2 and 3, 2005.

Ms. Foley testified that she begin her surveillance of the claimant in Blytheville, Arkansas on November 2, 2005, between 5:30-6:00 a.m. At 8:31 a.m. November 2, 2005, the claimant left Blytheville and drove to Brinkley where he exited at a Waffle House and went inside at 10:09 a.m. Claimant left the Brinkley Waffle House at 10:42 a.m. and drove to Little Rock, arriving at 11:54 a.m. Ms. Foley noted that the claimant drove the entire trip from Blytheville to Little Rock, having stopped at the Brinkley Waffle House for approximately 30 minutes. Ms. Foley play the videotape of the claimant's activity of November 2, 2005, and November 3, 2005, during her testimony and the same was observed by both Dr. Butler and Dr. Earl Peeples. (T. 89-105) (RX. #2).

Dr. Raymond Earl Peeples, Jr., who has had a Little Rock orthopedic practice since 1979, testified that since developing arthritis in his hands he is no longer an operative surgeon. Dr. Peeples was asked by the respondents to perform an "independent" medical examination relative to the claimant. The claimant was examined by Dr. Peeples on November 2, 2005. Dr. Peeples generated a written report relative to his November 2, 2005, examination of the claimant. In explaining the mechanism of the report, Dr. Peeples' testimony reflects:

I first introduced myself, told Mr. Gilliam the purpose of my

examination was to evaluate his situation and provide a report to a third party. I explained to him that I wanted him to tell me his situation before I reviewed his records. I took his history, which in on Page 1. He gave me an oral recitation of the symptoms he was having. I then reviewed the current symptoms which are on the second page of my report, asked him to rate his pain. I defined the - -

Yes, and I define the pain scale very carefully with one being a barely perceptible pain like a mosquito bite and a ten the most severe pain that any human has ever had anywhere, anytime, that's the worse thing for the whole human race, in all of history for anywhere, and he rated his constant pain as a seven to eight, and I noted in my report that he did not display discomfort as he gave this very high rating. I reviewed his medical history in terms of general health data on Page 3, noting - -

* * *

I review his history, has he been in good health; does he take any medications; had he had previous injuries. He described a previous knee problem that was a worker's comp problem, and he indicated his current medications.

* * *

I then reviewed his medical records and provided a synopsis of the aspects of it I thought were significant for my opinion, reviewed the records of Dr. Butler, Dr. Lovell, reviewed the MRI films and provided a section regarding that. I did not have the myelogram available but did have the other studies.

I then conducted a physical examination, which is recorded starting on Page 5 and then into Page 6. The physical exam revealed that he was obese, morbidly so, but that he revealed no evidence of any neurological deficit. (T. 116-118).

Regarding the lack of evidence of any neurological deficit produced during the examination of the claimant, Dr. Peeples testified:

The question here is whether or not he has an injury to a disc and compression on a nerve. I, by the time I got to this part of the exam, and read Dr. Lovell's report. The controversy was whether or not there was indeed an injury at work causing compression of nerve roots or whether he had a preexisting condition, and so one of the things important in determining

whether there is an injury is is there an abnormal exam over and above what would be expected for a person of age, weight and activity.

* * *

Well, a variety of things would be expected, but you would expect if there was significant compression of a nerve root as opposed to a back strain, to evidence that the nerve was not working properly and that there was a neurological deficit; that is, a reflex change, a positive straight leg raising, a loss of muscle strength, a loss of muscle size since it had been several months since the injury. None of these things were found, and, in fact the straight lazing - - excuse me. The straight leg raising test was contradictory; that is - -

When I indicated to him I was examining him for the purpose of checking the nerve, it was positive. When he was distracted, it was completely negative. If it is a physical finding, it should be positive on both exams. Even if you're distracted, if you have a sacitica or a crushed sciatic nerve, you will react when the exam is done during distraction. That's recorded in my exam. (T. 118-119).

Dr. Peeples concluded, based on the claimant's straight leg raising test, that there is no objective evidence that the nerve is irritated.

With respect to whether the claimant has a legitimate low back problem, Dr. Peeples testified:

Well, there are low back problems such as strains that produce no sciatic irritation. The particular controversy here is whether there is a disc injury requiring surgery as Dr. Lovell so quickly recommended, and in my opinion, there was not evidence of an acute injury. There is evidence of preexisting spinal stenosis, and there is evidence of two levels of disc abnormalities or degeneration consistent with the his age and obesity, but there is not radiographic or objective evidence of compression of the nerves or of significant disc extrusion, as I think is the controversy here. (T. 120).

Dr. Peeples noted that there are several objective problem regarding the claimant, to include spinal stenosis in that the claimant was born with a very small, narrow spinal canal; and the two

lowest discs have some irregularity, which are attributable to the claimant's weight. Dr. Peeples concluded that he did not see evidence of any neurological deficit or major nerve root compression to warrant an indication for surgical intervention due to a disc problem.

The testimony of Dr. Peeples reflects that based on his review of the medical reports, and particular the August 2, 2005, report of Dr. Lovell documents a lack of neurological deficit and a complaint of subjective leg pain on exam. Dr. Peeples continued:

It tells me that there's not a surgical indication. Surgical indication is not a complaint of pain but is an identifiable, objective loss of neurological function. The reason is that three days later, when surgery is discussed, it's kind of an amazing note. He recommends surgery, no exam is recorded, and he states Mr. Gilliam is desiring to go ahead with surgery. There's no comment at all about any findings objectively. There's just comments about severe symptoms. (T. 122).

Dr. Peeples elaborated further regarding the symptoms that would warrant surgery:

Well, low back pain encompasses a lot. We're talking here about a disc. Disc extrusions and pressure of the nerve produce primarily leg pain. It's a characteristic sciatic pain. It is not consistent with his appearance on the videotape. It is objectively reproducible physician to physician.

The indications for elective disc removal or micro discectomy are an established and progressive neurological deficit that fails conservative treatment. The time between August 2nd and August 5th, three days, is not a significant length of conservative treatment. No injections have been tried that I'm aware of. He's not had a weight-loss program. He's not exercised. In fact, he's been placed at bed rest, which is contraindicated for low back strains.

* * *

No. It's contraindicated. Extremely heavy activities are contraindicated. Bed rest leads to de-conditioning. It does not help the healing process. In fact, light levels to moderate levels of activity are the recommended treatment for low back strains and/or minor disc abnormalities. You want to stay active, stay stretched, stay mobile. You do not want to lay in bed and become de-conditioned. (T. 123-124).

Dr. Peeples testified that individuals with a significant disc extrusion with nerve compression would be very symptomatic and have very strong and consistent antalgic gait, and not just one when they leave the doctor's office but rather each time they get up, particularly the first few steps or when there is a change of position. Dr. Peeples noted that bending in and out of an automobile duplicates the straight leg raising in that it is a 90-degree bend with a stretch of the nerve. Dr. Peeples added that it is very difficult for an individual with sciatic nerve compression from a ruptured extruded disc to make the maneuver into the car. Dr. Peeples observed that based on the videotape, the claimant moved with significant agility in and out of a very small car. Dr. Peeples further testified regarding his review of the videotape relative to the claimant:

. . . I did not see one that would be consistent with an individual that has significant nerve root compression that matches up to a need for surgical excision of a disc. Many individuals with low back strains, perhaps you if you'd sat in a car or get up out of a chair, will walk differently for a step or two as you move about. I did not see a consistent pattern.

The only time I saw any real pattern was when he exited the building at my office. I did not see it otherwise. (T. 125).

Dr. Peeples disputes that the medical reports that he reviewed regarding the claimant's medical examination/treatment subsequent to July 1, 2005, reflect any neurological deficit relative to the claimant. (T. 127).

Dr. Peeples testified regarding the nexus between the claimant's diagnosed back strain and the radiological results, to include the MRI scan:

Well, I think many individuals have low back strain problems and have difficulty with their exam shortly after an incident. I don't think there's any question he may have strained his back. That's not what I addressed here, and individuals who have a back strain or have difficulty walking - - heel or toe walking, they're uncomfortable, but they don't have a neurological deficit without compression of a nerve

root. So there is no documented recorded exam the first day. I don't understand even the indications for an MRI. There's no deficit recorded. There's no reason for an MRI on the day of the first visit.

The second encounter records two disc abnormalities, which she [Dr. Butler] calls - - let me look at her terminology. She records correctly bulging, irregular disc, L-4, 5. That's not a disc extrusion or compression. That's expected basically in a large portion of the population of his age and weight.

The radiology report also talks about just a broad-based irregular disc, and there's a central disc. He also comments about the narrow nature of the canal. These discs would be of no interest in terms of their prominence with the exception that he already has this congenitally small canal. So he does not display any extrusion or a free fragment or the typical type of disc material we see in the canal or in the axilla, which is where the nerve exits the canal, pinching the nerve root. There's not sign of that. The radiologist doesn't comment on it, and there's no objective neurological deficit recorded by the doctor here or Dr. Lovell in Memphis. (T. 128).

Regarding the wisdom of performing spinal surgery on an individual without any neurological deficit, Dr. Peeples' testimony reflects:

If you operate on people that have a normal exam and say their back hurts, your results will be terrible, and they will turn out terrible because you've violated their spine and created all sorts of troubles. The selection of individuals for elective disc removal is classically a progress - - not just a neurological deficit, but a progressive neurological deficit. If someone has a slight reflex change and it doesn't progress, it is not necessary to do surgery, and if you'll leave that alone, many of those individuals will resolve spontaneously without surgery. The indications for elective discectomy are recorded nowhere in this [claimant's] chart. (T. 129).

During cross-examination, Dr. Peeples was provided an opportunity to review the April 11, 2006, report of Dr. Lovell wherein the same relayed the bilateral L-4,5 microdiscectomy was recommended as reasonable and necessary relative to the claimant's July 1, 2005, injury, and that the accident was the major cause of the claimant's need for surgery. Dr. Peeples opined with respect to the report of Dr. Lovell:

He uses the word necessary. This operation is not necessary. That is an overstatement. He is incorrect in that in my opinion. The necessity for spinal surgery for the removal of a disc is present only when there's progressive paralysis. Otherwise the procedure isn't an elective operation for the relief of pain. There's no necessity for operating on this man's spine. Had there been, he would be paralyzed or badly damaged from the time he was seen by me in November. He was not. So the word necessary is the word used by Dr. Lovell, and I respectfully disagree with that. . . .

Yeah, we disagree. I think he has not supported his data with an adequate exam that he recorded or with adequate objective data. He does a very brief exam that reveals no neurological deficit and a repeat visit which only states that Mr. Gilliam desired to proceed with surgery and has no recorded exam whatsoever. That's not the standard we use to document the need, let alone the necessity, for a spinal surgical intervention. (T. 136-137).

Dr. Peeples concluded that Dr. Lovell's April 11, 2006, letter does not match up with his office records.

The medical record reflects that the claimant was seen at the emergency room of Great River Medical Center on July 2, 2005, at 11:46 p.m. with complaints of back pain attributable to the July 1, 2005, work accident. X-rays of the lumbar spine obtained during the claimant's emergency room visit showed a straightening of the spine and an impression of early degenerative changes of the spine. The discharge diagnoses of the claimant's complaint are lumbar strain and back pain-not otherwise specified, for which the claimant was prescribed Flexeril, Motrin, and Darvocet-N. Claimant was also to follow-up with his primary care physician if his condition did not improve. (CX. #1, p. 1-3).

On July 8, 2005, claimant was seen by Dr. Judith Butler, a primary care physician, at Butler Family Health in Blytheville relative to his July 1, 2005, accident. In addition to reciting the history of the July 1, 2005, injury and July 2, 2005, emergency room visit, the July 8, 2005, clinic note reflects, in pertinent part:

Work related injury. Called and wanted to know if I would accept workman's comp. Shays that he tried to see a different doctor but denied.

* * *

After the EER visit, he stayed in bed for two days, Tuesday AM went to work, couldn't tolerate the pain, went home; had to have doctors excuse the next day. Over the next few days pain returned to the level of the initial injury.

* * *

. . . . Limping and grunts with walking, or moving. Has to push up with arms to get out of chair. Unable to flex at all. Marked tenderness to palpation and percussioin over s-1, l-5 area. Percussion radiates pain down to both "but cheeks".

* * *

Patient instructed to go to bed rest, wedge under lect waist, pillow between legs, ice massage over back, and tender area, for 20 minutes, then heat. (CX. #1, p. 5).

Dr. Butler prescribed Vistaril, Flexeril, Ultram, Darvocet N, and Stadol nasal spray. Dr. Butler also ordered a MRI of lumbar spine.

The MRI scan of the claimant's lumbar spine was obtained at Great River Medical Center on July 13, 2005, and reflects the impression of likely areas of spinal stenosis L5-S1, L4-L5. (CX. #1, p. 4). Claimant was also seen by Dr. Butler on July 13, 2005. The July 13, 2005, chart note of Dr. Butler relative to the claimant's visit reflects a chief complaint of a spider bite on umbilicus. The chart note further reflects that the claimant had tried to go back to work but was sent home because of back pain. (CX. #1, p. 7). Dr. Butler authored an addenda to the July 13, 2005, chart noted which consisted of restrictions on the claimant's employment activities, to include no bending, stooping, or reaching; no lifting over 10 pounds; no static position for more

than 20 minutes; and no sitting for more than 30 minutes without changing positions. Claimant was released to light duties. (CX. #1, p. 8).

After obtaining the results of the lumbar MRI scan, the claimant was again seen by Dr. Butler on July 14, 2005. Dr. Butler noted that the MRI scan revealed central bulging irregular discs at L-4, and L-5. The chart note further reflects:

Conclusion is the patient did suffer an acute disc nuclear displacement at two levels, resulting in impingement of central nerve structures, and neuropathic pain.

Options for therapy include neurosurgical consult, with possible surgical intervention. He might be a candidate for UAMS Back Center where they are supposedly accumulating world renowned (sic) experts and getting a reputation for having good outcomes.

Failed back surgery is common and the other option for this patient would be bed rest, in a position of comfort, trying to keep any pressure or weight bearing stress off those discs to allow (sic) for healing and strengthening of the cartilage, along with taking chondroitin/glucosamine and calcium, stress B vitamins. Slowly begin bent knee curl ups, as well as resistance training for 20 minutes daily. Two weeks minimum and then another 4 weeks of slowly retraining, walking, etc.

Weight loss is essential. This may require sleep apnea therapy, modification of insulin resistance, and diet. He was instructed with regard to Dr. Adkins type diet, with restricted carbohydrates (sic), . . . ; if he can drop 30 or 40 pounds, and do the curl ups, he could very well avoid surgical intervention. . . . He was given the options and we will also discuss that with his case manager in workman's comp. He certainly cannot push a broom or vacuum putting forward pressure on the nucleus, nor should he get into any twisting, flexed or crouching position. (CX. #1, p11-12).

Claimant was again seen by Dr. Butler on July 18, 2005. The chart note relative to the July 18, 2005, visit reflects, in pertinent part:

Pain seems to have shifted a little, is spending time in bed, has not had the recommended treatment, of depomedrol. That was ordered for two reasons. It is known to help pain and the sensation of pain and the patient

has no access to narcotic pain relief. He was ordered to bed rest, initially 5 days, but the insurance company told him he could go back to work, and he tried, I then suggested a little longer, ie even two weeks of “if it hurts, don’t do it” based on my years of clinical experience and on outcome based studies. This patient has at least a 50 percent recovery chance if allowed to treat properly. I am finding case managers are presuming to know more than I do and apparently have more control than I do, as the patient has none of the medications being allowed by the insurance company or being paid for an the patient just can’t afford it. (CX. #1, p. 14).

The claimant was seen on July 21, 2005, by Dr. Butler. A review of the afore chart note of Dr Butler is very similar to the prior office note of July 14, 2005. (CX. #1, p.16- 17). The July 21, 2005, note of Dr. Butler reflects:

Received a call for his case manager early this AM. Requested I fax his records. Patient reports the case manager told him they would find him a company surgeon. I reviewed the literature for the patient, including an Emory University publication. At this point, my medical opinion, based on this being his first injury, being such a classic positioning and resultant herniation, and this review, is that he maintain medical management for six weeks, work on diet, and get his vitamin, including the chondroitin sulfate/glucosamine. (CX. #1, p. 19).

On August 2, 2005, claimant was seen by Dr. Laverne R. Lovell, a Memphis neurosurgeon, at the request of respondent-carrier. The August 2, 2005, report of Dr. Lovell reflects that he had access to the claimant’s prior diagnostic studies, to include the July 13, 2005, MRI scan of the lumbar spine. The August 2, 2005, reports reflects, in pertinent part:

NEUROLOGICAL EXAM: Gait is very antalgic, favoring the left leg. He has a positive left straight leg raise and a positive right crossed straight leg raise with pain down the left leg on both maneuvers. Sensory exam is normal. Reflexes are not obtainable at the ankles or knees. Strength is full in the lower extremities. He is able to heel and toe walk, although it is painful.

IMPRESSION: Back and left lower extremity pain secondary to L4-5 HNP.

PLAN: I’m going to send him for six visits of physical therapy. I will

place him in a light duty work status, that is sit or stand as tolerated and 10 pound lifting. If they do not have that type of work at his workplace, they will just have to send him home. We will see him in follow-up in three weeks to discuss his progress and whether or not surgery or further steroid injections are indicated. (CX. #1, p 28-29)

Dr. Lovell issued a work-release slip authorizing the claimant to perform light duty from August 3, 2005, to August 23, 2005. (CX. #1, p. 20)

The claimant was next seen by Dr. Lovell on August 5, 2005. The clinic note relative to the August 5, 2005, visit reflects, in pertinent part:

HISTORY: Mr. Gilliam returns today earlier than expected. He tried to go back to work but is unable to stay on his feet to do his job. He went to one visit of physical therapy and this made his symptoms extremely severe, much worse than they were prior to starting therapy. He is back today desiring to go ahead with surgery.

PLAN: I have gone over the left L4-5 microscopic discectomy with the patient using a model including the procedure, risks, complications and recovery. We will go ahead and make a request to proceed with surgical intervention. He is on an off work status at this time. (CX. #1, p. 30).

The claimant was again seen by Dr. Lovell on September 13, 2005, following further diagnostic studies. The September 13, 2005, clinic note reflects, in pertinent part:

HISTORY: Mr. Gilliam returns for follow-up after myelogram and CT CT scan to follow.

Test Review: That study shows a fair-sized L4-5 disc herniation slightly more left-sided, but with bilateral L5 nerve root compression.

The patient is having bilateral symptoms. In fact, he started out with worse left-sided leg pain and now has worse right-sided leg pain.

PLAN: Based on this, I have proposed a bilateral L4-5 microdiscectomy. I have used a model to go over the procedure with the patient today and Includes risks, complications, expected recovery, and return to work issues. We will go ahead and attempt to get him approved to take him to surgery. (CX. #1, p. 31).

On November 2, 2005, claimant was examined by Dr. Earl Peeples, a Little Rock orthopedic physician, at the request of respondents. The November 2, 2005, report of Dr. Peeples reflects, in pertinent part:

SUMMARY:

Mr. Gilliam has significant congenial spinal stenosis affecting multiple lumbar levels. In addition to this, he has some protrusion of the L4-L5 disc that, in combination, produces a narrowed spinal canal. He does not display evidence, on examination, of sciatica, nor does he display neurologic deficit. His obesity would tend to worsen his symptoms, adding to the degenerative disc disease and increasing his lumbar lordosis.

Nonoperative measures, such as epidural steroid injections have not been recommended or attempted. Surprisingly, the neurosurgeon recommended only a disc procedure, not describing the abnormal bony anatomy, and moving very rapidly to surgical recommendation in the absence of neurological deficit, making this recommendation within a few days of initial visit.

It is my opinion that Mr. Gilliam should be under the care of an individual (and my bias is toward an orthopedist) who would address both the pre-existing skeletal abnormality and the disc abnormality. Should any operative procedure be performed, both situations should be addressed simultaneously and I believe this will require a posterior decompression procedure removing bone and ligamentum flavum. I do not believe that bilateral microdiscectomy will fully address the pathology this man displays appropriately.

It is by no means necessary to proceed with surgical intervention at present. An epidural steroid injection, weight loss and modified duty are likely to produce substantial improvement. The necessity for surgical intervention of the lumbar spine is one of progressive neurological deficit. This finding has not been documented on exam by Dr. Lovell. (It is noted that Dr. Lovell provided a brief, objective exam only on the initial visit and did not indicate any evidence of reexamination in her notes afterwards.) My exam demonstrates improvement from her original exam.

It is my opinion that, whatever physician is assigned as his primary treating physician, this physician should perform an objective examination of neurological status and record it clearly every time Mr. Gilliam is evaluated. This is both for the patient's good and to allow an independent physician review the file to have objective data on which to base a review and make

sensible recommendations.

It is my recommendation that Mr. Gilliam see a conservative spine surgeon who would attempt, in this 34-year-old, to avoid surgical intervention. I recommend an initial approach with weight loss, exercise program and lumbar epidural steroid injection. Careful monitoring for signs of neurological deficit and progression should be followed.

Insofar as activities are concerned, bed rest is not helpful. I would recommend moderate levels of activities, with the exclusion of heavy lifting and squatting. Weight loss has been mentioned as a recommended adjunct. Use of non-narcotic analgesics, such as Tylenol, and an anti-inflammatory, such as Aleve or ibuprofen, might be helpful with back symptoms.

I am unable to separate exactly how much of the disc abnormality is related specifically to the lifting incident of July 1 and to preexisting degenerative changes and/or disc changes related to obesity. The structural, stenotic appearance of the lumbar spine is congenital. (CX. #1, p. 43-45).

After receiving a copy of Dr. Peeples' November 2, 2005, report, Dr. Lovell authored a chart note of January 6, 2006, relative to the claimant, which reflects, in pertinent part:

It is readily apparent that Dr. Peeples would prefer that an orthopedic surgeon managed Mr. Gilliam, and I think that's highly appropriate in his case since the patient lives in Arkansas. Dr. Peeples is a member of a large orthopedic group in Little Rock and I think it would be appropriate that they assume care of Mr. Gilliam. Dr. Peeples indicated that he is establishing no physician-patient relationship with the patient, however he goes on to list numerous recommendations regarding his treatment, some of which would require years to complete. By that I am specifically referring to substantial weight-loss in this patient, who is 100 pounds overweight.

Dr. Peeples appears to be consumed with the spinal stenosis that exists in this patient. I agree that it's readily apparent that he has a congenital spinal stenosis. As Dr. Peeples probably is aware, this does cause people to be a lot more symptomatic from a relatively small disc herniation which Mr. Gilliam has. (CX. #1, p. 31).

The January 6, 2006, chart note concluded with Dr. Lovell offering to transfer the claimant's medical care to Dr. Peeples, and releasing the claimant from his care. Dr. Lovell relayed in the

chart note that he would be happy to see the claimant as a second opinion after the claimant's definitive treatment with OthoArkansas group.

Responsive to a April 5, 2006, letter from the claimant's attorney regarding the claimant, Dr. Lovell summarized, in his April 11, 2006, letter:

I consider the bilateral L4-5 microdiscetomy recommended by me as reasonable and necessary treatment in the case of Mr. Gilliam's injuries sustained in his accident on July 1, 2005. I believe that Mr. Gilliam's accident is the major cause of his need for that surgery. I certainly reserve the right to change that opinion if I am supplied with previous medical records denoting prior back problems, injuries or treatment for chronic back problems. My opinions in this case are within a reasonable degree of medical certainty. (CX. #1, p. 34).

In a April 28, 2006, correspondence responsive to a April 27, 2006, letter from the claimant's attorney, Dr. Lovell relayed, in pertinent part:

As Dr. Peeples noted in his lengthy note of November 2, 2005, Mr. Gilliam has a component of congenital spinal stenosis. Dr. Peeples also notes protrusion of the L4-5 disc in combination with that stenosis which causes a neural spinal canal. In my opinion, the combination of those two can certainly cause nerve root compression and this would fit very well with Mr. Gilliam's original presentation of back and left lower extremity pain. Dr. Peeples' notes in his final sentence that "medicine in an inexact science". That is certainly one point to which he and I can both agree.

Mr. Gilliam is currently approaching ten months status post his reported injury date. If he is continuing to be symptomatic and unable to work from his complaints, then I would suggest that possibly something more definitive may very well be necessary to help him. Hopefully, Dr. Peeples has seen this patient again and continues to direct his care.

If the patient is continuing to be symptomatic, then I think it would not be unreasonable to take more definitive action in his case in an attempt to improve his situation. Unfortunately both of his imaging studies are now greater than six months old, so re-imaging in the form of MRI or repeat myelogram would be in the patient's best interest and medically necessary if surgical intervention was going to be considered. (CX. #1, p. 36).

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

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On July 1, 2005, the relationship of employee-employer-carrier existed among the parties.
3. On July 1, 2005, the claimant sustained an injury to his low back arising out of and in the course of his employment with respondents which rendered him temporarily totally disabled for the period commencing August 5, 2005, and continuing through the end of his healing period, a date to be determined.
4. Medical treatment rendered to the claimant under the care of Dr. Judith Butler beginning July 8, 2005, relative to his July 1, 2005, compensable low back injury, as well as referrals therefrom, was reasonable and necessary in connection to the claimant's compensable injury. There claimant was not furnished with a Form AR-N, following the July 1, 2005, compensable injury. Expenses incurred in the afore treatment are the responsibility of respondents pursuant to Ark. Code Ann. §11-9-508.
5. The medical treatment recommended by Dr. Laverne R. Lovell, is reasonable and necessary in connection with the claimant's July 1, 2005, compensable injury.
6. The respondents shall pay all reasonable hospital and medical expenses arising out of the claimant's compensable injury of July 1, 2005.

7. The respondents have controverted the payment of all workers' compensation benefits in this claim subsequent to the November 2005, examination of the claimant by Dr. Earl Peeples.

CONCLUSION

The claimant suffered an injury to his low back on July 1, 2005, within the course and scope of his employment. Claimant asserts that as a result of the injury he required medical treatment and continues to require same. Claimant further asserts that respondents are responsible for the payment of incurred unpaid medical treatment relative to his compensable injury. Additionally, claimant maintains that respondents have refused to pay for the cost of medical treatment recommended by his treating and examining physicians, or to allow him to return to work with the restricted releases authored by his treating/examining physicians. Claimant asserts entitlement to medical and temporary total disability benefits as a result of the compensable injury as well as controverted attorney fees. Respondents assert that they have all sums to which the claimant is entitled and that his current status is not the product of the July 1, 2005, injury but rather his pre-existing condition.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to additional workers' compensation benefits as a result of an injury having been subsequent to the effective date of the afore provision. The compensability of the July 1, 2005, low back injury of the claimant is not disputed.

Claimant commenced his employment with respondent-employer on March 18, 2005, as a maintenance technician. Prior to his employment claimant underwent a pre-employment physical by respondent's designated physician. Claimant successfully discharged his assigned

job duties without restrictions or physical limitations through July 1, 2005. There is no evidence in the record to reflect that the claimant sought or required medical treatment relative to his back prior to July 1, 2005.

There is not a dispute regarding the mechanics of the claimant's July 1, 2005, work-related injury. Claimant reported the July 1, 2005, low back injury to appropriate supervisory personnel of respondents shortly after its occurrence. Supervisory personnel of respondent-employer did not provide the claimant access to medical treatment relative to back injury after the claimant reported same. Claimant was allowed to cease performing his regular job duties. Indeed, the supervisor suggested that the claimant's back complaint might resolve if he rested it and rode to Jonesboro to pick up some tires. Once the claimant returned to Blytheville from Jonesboro with the tires he was allowed to go home because he was continuing to experience pain and symptoms in his back.

On July 2, 2005, claimant's symptoms attributable to the July 1, 2005, injury became so severe that he sought and obtained medical treatment at the emergency room of Great River Medical Center in Blytheville. Following an examination and diagnostic studies (x-rays), claimant's complaint was diagnosed as a lumbar strain and back pain not otherwise specified, for which he was provided Flexeril, Motrin and Darvocet-N, and directed to follow up with his primary care physician within 2-3 days. Respondents were notified by the claimant of his emergency room visit. There is no evidence in the record to reflect that the claimant was directed to a specific physician by supervisory personnel of respondent-employer for medical treatment of his July 1, 2005, compensable injury, nor is there evidence in the record to reflect that the claimant was furnished a Form AR-N, regarding his rights to medical benefits as a result of a compensable

injury, to include a change of treating physician.

Having not been directed to a physician sanctioned by respondents claimant sought medical treatment relative to his July 1, 2005, compensable injury at the emergency room of Great River Medical Center in Blytheville on July 2, 2005. Further, in accordance with the directions of the attending emergency room physician claimant sought follow-up medical treatment from his primary care physician. While there is evidence that claimant contacted several physicians before Dr. Judith Butler, who agreed to see him in connection with his work-related injury, there is also evidence to reflect that respondent-employer was made aware of the July 2, 2005, emergency room visit of the claimant however took no actions in directing him to a physician of its selection.

Claimant was initially seen by Dr. Butler on July 8, 2005, relative to his July 1, 2005, compensable injury. In addition to a physical examination of the claimant during the initial visit, Dr. Butler diagnosed the claimant's complaint as disc displacement and low back pain, for which she directed bed rest, medications (Vistaril, Flexeril, Ultram, Darvocet-N and Stadol nasal spray), and restriction of his employ activities (if it hurts, don't do it). Dr. Butler also arranged for the claimant to undergo a MRI scan of his lumbar spine.

The July 13, 2005, MRI scan was performed at Great River Medical Center and disclosed objective findings. Dr. Butler proposed a conservative course of treatment for the claimant to included physical therapy, medication, bed rest, and diet. Claimant was last seen by Dr. Butler on July 21, 2005. Respondents declined to pay for the cost of the claimant's medical treatment under the care of Dr. Butler. Dr. Butler did perform one injection relative to the claimant lumbar spine injury which alleviated the claimant's pain symptoms for period.

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. Whether a medical procedure or device is reasonable and necessary is a question of fact. *Air Compressor Equipment v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). In the instance claim, the evidence preponderates that the medical treatment rendered to the claimant under the care of Dr. Judith Butler was reasonable and necessary in connection with the July 1, 2005, compensable injury of the claimant. Respondents were fully aware of that the claimant was receiving medical treatment under the care of Dr. Butler relative to the July 1, 2005, compensable injury, having been furnished with off-work/work release from Dr. Butler by the claimant. Respondents have controverted the incurred unpaid cost of the claimant's medical treatment under the care of Dr. Butler as well as referrals therefrom.

The evidence clearly reflects that respondents directed the claimant to Dr. Levarne Lovell, a Memphis neurosurgeon, for medical treatment relative to the July 1, 2005, compensable injury. Claimant was initially seen by Dr. Lovell on August 3, 2005. Claimant's complaint was diagnosed by Dr. Lovell as back and left lower extremity pain secondary to L4-5 HNP. While a conservative treatment was instituted initially to include medication, physical therapy, and restrictions of the claimant's employment activities, once the claimant's symptoms became disabling Dr. Lovell recommended surgery following additional diagnostic studies.

Respondents secured an evaluation of the claimant by Dr. Earl Peebles, a Little Rock orthopedic physician, on November 2, 2005. While Dr. Peebles has recommended against proceeding with surgical intervention at this time in favor of conservative treatment measure, similar to those recommended by Dr. Butler, he has not opined that the claim is no longer in need

of medical treatment relative to the July 1, 2005, compensable injury. Respondents discontinued the claimant's workers' compensation benefits upon receipt of the November 2005, report of Dr. Peebles.

Respondents asserts that the claimant's current status is the product of his pre-existing congenital problem, his morbid obesity and incidents that were subsequent to and intervening to the July 1, 2005, incident. The arguments of respondents are not persuasive. As noted above, there is no evidence in the record to reflect that the claimant sought or required medical treatment relative to his low back/lumbar spine prior to the July 1, 2005, compensable injury. Claimant underwent a pre-employment physical before commencing his employment with respondent on March 18, 2005. Claimant successfully discharged his assigned job duties in the employment of respondent without physical restrictions or limitations prior to his July 1, 2005, compensable injury.

Neither the claimant's morbid obesity or the presence of a congenital spinal stenosis is disputed. A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *St. Vincent Medical Center v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). On July 1, 2005, the claimant suffered a specific incident injury which is identifiable by time and place of occurrence. In workers' compensation law, the employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W.2d 64 (1990).

The evidence in the record preponderates that the claimant's present disability status is

the product of his July 1, 2005, compensable lumbar injury in the employment of respondents. Respondents have controverted the claimant's entitlement to all workers' compensation benefits, both medical and indemnity, relative to the July 1, 2005, compensable injury subsequent to November 2006.

While Dr. Peeples has advocated a more conservative approach to the treatment of the claimant's compensable injury, he does not assert that a surgical intervention is forever foreclosed. Claimant was seen by Dr. Peeples on one occasion. The claimant was seen by Dr. Lovell on numerous occasions following his initial August 3, 2005, visit, which was instituted by respondents. Dr. Lovell has outlined the basis for his treatment recommendations, to include surgical intervention. The evidence preponderates that the claimant sustained a specific incident compensable injury on July 1, 2005, and that he continues to require medical treatment relative to same. Respondents are mandated, pursuant to Ark. Code Ann. §11-9-508, to provide reasonable and necessary medical treatment in connection with the July 1, 2005, compensable injury. Dr. Lovell is a physician who was selected by respondents to provide medical treatment to the claimant regarding the July 1, 2005, compensable injury. Based on his examination of the claimant and review of diagnostic studies, Dr. Lovell has proposed a specific course of medical treatment for the claimant. The evidence in the record preponderates that the medical treatment recommended by Dr. Lovell is reasonable and necessary in connection with the injury received by the claimant on July 1, 2005.

Following his November 2, 2005, examination by Dr. Peeples claimant was furnished with a limited duty release by Dr. Peeples which he provided to respondent-employer. The remains within his healing period and has been so since his July 1, 2005, compensable injury.

Respondents declined to allow the claimant to return to work with the limited/light duty release. The claimant was taken off work by his authorized treating physician, Dr. Lovell on August 5, 2005. While Dr. Lovell indicated that he was releasing the claimant from his care in a January 6, 2006, clinic note due to respondents acceptance on the recommendations of Dr. Peebles, the claimant was not released to return to work. Entitlement to temporary total disability benefits for an unscheduled injury is contingent upon a showing that the claimant is completely incapacitated from earning wages and remains within his healing period. *Superior Industries v. Thomaston*, 72 Ark. App. 7, 32 S.W.3d 52; *Arkansas State Highway Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The evidence preponderates that the claimant remained within his healing period and totally incapacitated from engaging in gainful employment subsequent to November 2005. Respondents have controverted the claimant's entitlement to all workers' compensation benefits, to included medical and temporary total disability, subsequent to November 2005.

AWARD

Respondents are herein ordered and directed to pay to the claimant temporary total disability benefits at the appropriate compensation rate commencing August 5, 2005, and continuing until such time as the claimant reaches the end of his healing period or is returned to appropriated work within his medical restrictions, at date to be determined, as a result of the July 1, 2005, compensable injury. Said sums accrued shall be paid in lump without discount. Respondents may claim credit for sums heretofore paid toward to afore obligation.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing and other apparatus expenses, to include medical related travel, growing out of

the claimant's compensable injury of July 1, 2005. Dr. Laverne Lovell is herein designated the claimant's authorized treating physician relative to the July 1, 2005, compensable injury.

Claimant's attorney is herein awarded maximum attorney fees on the controverted indemnity benefits herein awarded, 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.

Andrew L. Blood, Administrative Law Judge