

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511533

DAVID GOUDEAU	CLAIMANT
SCHWAN'S FOOD COMPANY	NO. 1 RESPONDENT
SPECIALTY RISK SERVICES INSURANCE CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT

OPINION FILED NOVEMBER 30, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by KENNETH OLSEN, Attorney, Little Rock, Arkansas.

Respondents No. 1 represented by ANDY CALDWELL, Attorney, Little Rock, Arkansas.

Respondent No. 2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on September 7, 2006, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on June 21, 2006. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On October 7, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to the maximum compensation rate for 2005.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's injury to his lumbar spine on October 7, 2005.

2. Related medical.

3. The claimant's entitlement to temporary total disability from October 8, 2005, to January 30, 2006, and then temporary partial disability from January 31, 2006, to April 5, 2006.

4. The claimant's entitlement to a 7 percent whole body impairment rating.

5. Attorney's fees.

6. Defense of lack of notice until October 24, 2005.

In regard to the foregoing issues the claimant contends that he sustained a compensable lumbar spine injury arising from and in the course of his employment with respondent employer on October 7, 2005, entitlement to payment of medical expenses, temporary total disability from the date of disability through January 31, 2006, and controversion. Claimant reserves the right to add the issue of permanent partial impairment, in the event the same is addressed by his treating physician prior to a hearing of this case.

In regard to the foregoing issues Respondents No. 1 contend that the claimant's injury did not arise out of or in the course and scope of his employment with the respondent. Claimant reported to Dr. Russell on October 7, 2005, complaining of back pain. Dr.

Russell's note indicates that he has been complaining of back pain for eight months and that he has been going to a chiropractor every day for two weeks. Medical records indicate that the claimant has been treating with Absolute Chiropractic since at least December 2003 and in fact the claimant was treated the day before his alleged incident. According to the initial record from Absolute Chiropractic of December 22, 2003, the claimant was complaining of back pain with a history of three months and an unknown origin. Upon information and belief, Respondents also assert the Shipper's defense in that the claimant made misrepresentations pertaining to his physical conditions in the employment application.

In regard to the foregoing issues Respondent No. 2 will state its contentions when discovery is complete.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and the deposition of Dr. Capocelli marked Claimant's Exhibit No. 2. The respondents submitted medical information marked Respondents' Exhibit No. 1, additional medical information marked Respondents' Exhibit No. 2, the deposition of Erin Paige Jensen marked Respondents' Exhibit No. 3 and additional medical information marked Respondents' Exhibit No. 4. All these exhibits were admitted without objection.

#### DISCUSSION

The claimant testified that he was thirty-four years old and had been working for the respondent for approximately five years.

The claimant testified that he was a salesman selling food products out of a large truck. The claimant remembers that about eight to ten years ago when he was in Sercy, Arkansas, he went to a chiropractor about three times for adjustments for his back. The claimant testified that he does not remember what caused his need for treatment at that time, he just remembers that his back hurt. The claimant testified that after his treatment he did not have any restrictions or limitations as to what he could do nor did it prevent him for any period of time from doing his normal activities. The claimant testified that when he began working for the respondent his back was fine.

The claimant testified that when he was transferred to Arkansas by the respondent he was in route sales. The claimant testified that he was climbing in and out of the back of his truck and his back began hurting. The claimant testified that he began chiropractic treatment for his back on or about December 22, 2003, at which time he reported to the chiropractor that he had had pain for about a three month period. The claimant testified that he could not remember exactly what caused his back to start hurting. The claimant agreed that he has continued to have chiropractic treatment for his back up until the date of his injury. The claimant testified that he cannot recall having any other type of medical treatment for his back prior to October 7, 2005. The claimant testified that he does not believe that he has ever taken time off from work to go see the chiropractor. The claimant testified that to his knowledge, the treatment he received from the

chiropractor were adjustments and he did get some all natural pills. The claimant testified that between December 2003 and October 2005 he would have some good days and some bad days and when his back was hurting more he would see the chiropractor more. The claimant recalls that when he would have back pain, the pain would be in his lower back which would radiate down the back of his left leg to the back of his knee and sometimes a little into his calf. The claimant testified that some of his chiropractic treatment perhaps was not necessary but if he had an appointment he certainly would keep it. The claimant testified that he would estimate that approximately one half of his chiropractic treatments were absolutely necessary. The claimant testified that for his low back pain he would also put ice on his back as instructed by the chiropractor.

The claimant testified that on October 7, 2005, he was at the CV's Family Food Center in Greenwood at approximately 10:00 a.m. The claimant testified that he bent over to pick up a box of frozen pizza which he estimated to be approximately twenty-five pounds and as he was coming back up he felt really bad pain that started in his back and shot straight down his left leg all the way to his foot. The claimant testified that he was working alone that day but did call his sales manager, Mr. Apon, to report that he had hurt his back really bad and that he could not finish his route. The claimant testified that Mr. Apon was aware that he had back problems because he had talked to him about it. The claimant testified that he drove his truck back to the respondent's depot in

Van Buren to pick up his personal vehicle. The claimant testified that he did not speak to anyone at the depot regarding his back incident and noted that Mr. Apon works out of Springdale so he was not around the Van Buren site. The claimant testified that there were possibly supervisor type personnel at the Van Buren site but none were his supervisors.

The claimant testified that he went to a clinic at the Mall on Rogers and was seen by Dr. Russell, a general practitioner. The claimant testified that Dr. Russell referred him to a doctor at the Arkansas River Valley Muscular Skeletal Center and he was seen by Dr. Cheyne. The claimant testified that he underwent an MRI on October 19, 2005. The claimant testified that he was off work from the date of his injury through the end of January 2006. The claimant testified that he eventually came under the care of Dr. Capocelli. The claimant testified that he remembers that after his incident he called in the next day and started taking vacation time. The claimant was again asked who he first reported his back injury to and the claimant responded, "Other than Mr. Apon?" The claimant testified that he believes that he reported his injury to Mr. Apon on October 7, the day of his injury, at around 10:00 in the morning and he again spoke with Mr. Apon after he was seen by Dr. Russell that same day. The claimant could not recall the exact conversation with Mr. Apon just that Mr. Apon would have wanted to know what was going on and that he was sure that he talked with Mr. Apon after October 7 off and on through the period of time that he was off work. The claimant testified that the first time he made

a formal report of his injury was on or about October 21, 2005, to Erin Jensen who works for the respondent in their Minnesota office. The claimant testified that at the time he talked with Ms. Jensen he had been on vacation leave for two weeks and that he had taken off as a result of his injury. The claimant testified that it was not his intention to ever pursue a workers' compensation claim but he had used up all his vacation time and realized that he was not getting any better. The claimant testified that prior to his October 7 incident he had good days and bad days as to his back but after October 7 all the days were bad days. The claimant testified that he talked with Erin Jensen twice, once on the 21<sup>st</sup> and once on the 24<sup>th</sup> of October. The claimant testified that during the October 24 conversation with Mr. Jensen he made it clear that he was wanting to file a workers' compensation claim. The claimant testified that Dr. Capocelli did surgery on him which had a fantastic result. The claimant testified that he underwent surgery on December 22, 2005, and returned to work at light duty approximately January 30, 2006. The claimant testified that when he was returned to light duty, he had the restriction of no bending, no lifting over twenty pounds and no repetitive motion which the respondent complied with. The claimant testified that while on light duty he earned \$7.00 per hour and worked approximately forty hours a week. The claimant agreed that he had earned approximately \$1100 to \$1200 per week prior to his injury. The claimant agreed that on or about April 4, 2006, he requested a full release from his doctor and that the respondent put him back

in his old position but eased him into his schedule. The claimant testified that he is currently working for the respondent and is doing very well and not seeing a chiropractor or receiving any type of medical treatment for his back.

On cross examination, the claimant again agreed that he has been receiving chiropractic care since December 2003. The claimant testified that he is sure that Dr. Clouse, the chiropractor, asked him how his problems began but he cannot recall the exact conversation. The claimant did agreed that his problems initially began due to his bending over working for the respondent. The claimant agreed that since September 2003 he has been having problems with his low back which included being stiff, achy, sharp at times and radiating down his left leg into his calf. The claimant explained that after October 7 his condition had intensified to the point where he could not work anymore plus the pain from his back went all the way down into his foot. The claimant testified that he would not disagree with any of Dr. Clouse's records. The claimant testified that it was possible that he saw Dr. Clouse on October 7 because Dr. Clouse would be the one he would go to if he was hurting. The claimant agreed that on October 7 he had significantly worsened pain with radiation, stabbing pain and he was stiff and achy in his left leg, low back and left buttock. The claimant testified that on October 7 his pain was immediate and intense. The claimant testified that there may have been a time between October 7 and the date of his surgery that he did not have radiating pain. The claimant testified that

when he called Mr. Apon he does not remember the exact conversation but does know that he told Mr. Apon he was hurting really bad and could not finish his day. The claimant agreed that Mr. Apon was aware that he had long-standing back problems but he had never called Mr. Apon and told him that he was going home because he was hurting so bad he could not work. The claimant agreed that he carries with him a hand held computer and at the end of each day he is to log off. The claimant further agreed that one of the questions asked is if he is injured. The claimant was asked if he checked that he had injured himself that day and the claimant responded, "No." The claimant was shown a physical examination report dated May 27, 2005, which indicates that the box that says chronic low back pain is checked no. The claimant agreed that it was his signature on this form. The claimant testified that in May 2005 he was probably having back problems and in fact going to the chiropractor on a regular basis for low back pain.

Gary Apon testified that he is the claimant's supervisor and has been employed in that capacity for the past three years. Mr. Apon testified that on October 7, 2005, he was the claimant's supervisor and would have talked to the claimant on a day to day basis. Mr. Apon testified that there was no secret that the claimant had back problems. Mr. Apon testified that on October 7, 2005, the claimant called him and told him that he was hurt and that he would not be able to finish his route. Mr. Apon testified that the claimant did not get specific as to what happened just that he was letting him know that he was hurt and going home or to

the doctor. Mr. Apou testified that two weeks later when the claimant tried to file for workers' compensation, he was told that he needed a specific date and, therefore, the claimant called him and told him what the date was. Mr. Apou testified that the claimant told him that he was moving a pallet when he hurt himself and this witness agreed that that was different than what he had testified in the hearing this date. Ms. Apou testified that he was aware that the claimant had tried to file for short term disability and he in fact had given the claimant information as to who to call. This witness remembers that this information was given to the claimant around October 21 and at no time before that date had the claimant indicated that he wanted to file a workers' compensation claim. Mr. Apou testified that it was his information that the claimant had not signed up for short term disability benefits, therefore, he was not entitled to file for them. Mr. Apou testified that on October 24, 2005, is when the claimant filed for workers' compensation.

On cross examination, Mr. Apou testified that he has been the claimant's supervisor for three years and has spoken with him by telephone for most of these work days. Mr. Apou testified that in terms of discipline and performance the claimant is one of the best and has never been written up or reprimanded for any reason at work. Mr. Apou testified that to his knowledge around the company the claimant had a reputation for honesty and decency stating further that the claimant is a good person. Mr. Apou was asked, "Do you have any incidences where you felt like he, the claimant,

has been dishonest?" Mr. Apon responded, "No, Sir." Mr. Apon testified that he did not think the claimant was trying to be dishonest as it relates to his hurting himself at work on October 7. Mr. Apon was asked about the Department of Transportation physical form and Mr. Apon responded, "There is really nothing that comes out of that. That is a safety deal that keeps us from being on the road if we are hurt, so it doesn't come to me. I don't see that. I really don't know where that goes." On redirect examination, Mr. Apon was asked if the claimant had not passed his Department of Transportation physical would he be out driving for the respondent. Mr. Apon testified that the claimant would not have been on the job.

Erin Jensen testified by way of telephone deposition stating that she is a workers' compensation administrator for the respondent and has been at this job for approximately one year and a half. Ms. Jensen testified that her office is in Marshall, Minnesota. Ms. Jensen testified that it was her understanding that the claimant filed a claim for disability on October 21, 2005, but it was later discovered that he did not carry disability insurance. Ms. Jensen testified that on October 24 she talked to the claimant by telephone and understood that he was filing a disability claim and later on that day he called in and rescinded that decision and filed under workers' compensation. Ms. Jensen testified that when the claimant first called in on the 21<sup>st</sup> of October, he did not report a specific date of injury but on October 24, he reported that he injured himself on October 7. This witness testified that

she asked if he had prior back problems and the claimant denied having prior back problems. Ms. Jensen testified that it was her understanding after talking with the claimant's supervisor, Gary Apon, that the claimant wanted to get back with his chiropractor to find out a date and time of incident. Ms. Jensen testified that the claimant reported to her that he hurt his back when he bent over to pick up a case of pizza weighing approximately twenty to twenty-five pounds and had back pain. Ms. Jensen testified that it is company policy that all injuries are to be reported immediately and that the claimant did not report his incident the day of the alleged accident.

On cross examination, Ms. Jensen testified that she asked the claimant to describe how his accident occurred and that the claimant responded that he did not have a specific incident and then proceeded to give her a history of lifting a box and bending down to lift a box.

The medical records set forth that the claimant began receiving chiropractic care as least as early as December 22, 2003, where it is reported that he has complaints of low back pain which radiates to his calf with tingling and numbness. It is noted that this pain is stiff, achy and sharp at times. The claimant was seen at Absolute Chiropractic Treatment for these low back complaints several times each month throughout December 2003 then into January, February, March and April 2004 for treatments of side posture lumbar adjustment, electrical stimulation, hydrotherapy and cryotherapy. The claimant saw the chiropractor twice in July 2004,

once in September 2004 and October 2004 with the same type of treatment being administered as before. On November 11, 2004, Dr. Clouse notes that the claimant is significantly better but still is experiencing discomfort with lifting. On this date, a side posture lumbar adjustment was given only. This same treatment was administered to the claimant the following day on November 12, 2004, again noting that he was significantly better. On January 15, 2005, the claimant was seen at Absolute Chiropractic reporting a mild to moderate exacerbation for which a side posture lumbar adjustment was administered. On January 2005 the claimant reports pain with lifting but that he is slightly better and again a side posture lumbar adjustment was made. This same type of treatment was again administered on January 20, 2005, by Dr. Clouse. The claimant was seen for chiropractic treatment on March 3, 2005, noting that he is significantly better and again a side posture lumbar adjustment was made and no other therapy administered. On December 23, 2005, the chiropractor notes that the claimant notes problems with dressing, lifting as well as sitting and with walking and bending. It is also set forth that he is slightly worse and reports being achy on a scale of seven. Two days later, the claimant was seen by Dr. Clouse where it is noted that he is significantly better but still having discomfort with lifting and sitting and reports being achy on a scale of four. The next day on March 26 the claimant reports that he is significantly better and only experiencing discomfort with sitting and being achy on a scale of three. Again an adjustment was made to his lumbar posture. The

claimant was seen twice in April 2005 at the chiropractic clinic with similar treatment as mentioned above. On May 27, 2005, the claimant reports pain with lifting, sitting, bending, driving and with work activities, noting that his pain is significantly worse and he is stiff. A lumbar adjustment was made. On May 28, 2005, the claimant reports that he is slightly better but was given treatment of a lumbar adjustment as well as electrical stimulation and cryotherapy. During the month of June 2005 the claimant was seen eleven times at the chiropractic clinic and on June 8, 2005, he was administered side posture lumbar adjustment as well as traction and similar treatment was administered throughout the month of June. On July 1, 2005, the claimant reports pain with lifting, sitting, bending, driving, work activities and his pain is significantly worse with stabbing pain on a scale of eight and being stiff. On July 2, 2005, the claimant reports that he is slightly better but yet still stiff and was administered a lumbar adjustment as well as given traction. The claimant was seen on the 11<sup>th</sup>, 16<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 25<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup> and the 29<sup>th</sup> of July 2005 for treatment of his lumbar spine with his complaints varying with additional therapy being administered such as electrical stimulation, hydrotherapy and cryotherapy. During the month of August the claimant was seen at the chiropractic clinic on the 1<sup>st</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 26<sup>th</sup> with the same complaints of back pain and treatment being administered as stated previously. It is noted that within a months period of time the claimant's complaints of pain would be noted as varying from being slightly

better to significantly better going down to being significantly worse thus explaining the varying degrees of treatment being administered. The claimant was seen at the chiropractor's office in September 2005 on the 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 26<sup>th</sup>, 29<sup>th</sup> and the 30<sup>th</sup>. Again the complaints of pain varied in their degree of severity or improvement as did the treatment which was administered to the claimant by the chiropractor. The claimant was seen at the chiropractor's office on October 6, 2005, noting a moderate to severe exacerbation and was treated with a lumbar adjustment as well as traction. The claimant was again seen on October 7, 2005, where it is noted that the claimant's pain is significantly worse with radiating and stabbing pain also noting that he is stiff and achy. On October 7 the claimant was administered a lumbar adjustment, traction, electrical stimulation as well as cryotherapy. The claimant was also seen at Sparks Preferred Medical Care on October 7, 2005, where it is noted that he has had low back pain for about eighteen months, noting that it really got worse yesterday and that he has been going to the chiropractor every day for two weeks for the pain in his lumbar area. After examination, the claimant was diagnosed with lumbosacral strain and prescribed Lorcet Plus and Soma. Dr. Russell who saw the claimant on October 7, 2005, also recommended heat as well as gentle stretching exercises. The claimant underwent an MRI of his lumbar spine on October 19, 2005, which revealed a large left para central L5 herniated disc.

Dr. Anthony Capocelli writes on November 30, 2005, that he has seen the claimant, noting that he has a long-standing history of low back difficulty which has been treated by a chiropractor over the years. Dr. Capocelli notes that the claimant had an acute episode on October 7, 2005, to his low back which has lasted for six weeks. The doctor notes that the claimant complains of left posterior lateral leg pain radiating to the bottom of his foot. Dr. Cheyne notes that the claimant's MRI demonstrates an L5-S1 disc rupture to the left side and some degenerative disc disease at L3-4, L4-5 and L5-S1 multilevel mild bulges. After examination, Dr. Capocelli assesses the claimant with having an L5-S1 left sided disc rupture for which he recommended surgery. On December 12, 2005, the claimant underwent a left L5-S1 metrix/pipeline laminectomy with diskectomy performed by Dr. Capocelli. On January 25, 2006, Dr. Capocelli's nurse practitioner, Barbara Durham, writes that the claimant is now four weeks post op for his L5-S1 diskectomy with matrix. Nurse Durham notes that the claimant essentially has no complaints and states he is doing wonderful having no pain, numbness or tingling in the lower extremities. Nurse Durham notes that the claimant asked to be put on light duty starting January 30, 2006, but the claimant was restricted to doing no heavy lifting, bending or twisting. The nurse notes that the claimant does complain of small left mild back muscular skeletal type spasm but not particularly significant. The nurse recommends that in the next six to eight weeks he should add additional none aerobic back strengthening but he needs to be cautious about using

gym equipment due to their weights. It is noted that Dr. Capocelli placed him on light duty for the next six weeks. Nurse Dunham writes again on March 14, 2006, that the claimant has no complaints and is pain free with no reports of problems post operatively. The nurse notes that the claimant is back to work with a very conservative regime with no heavy lifting and he has been working out at the gym but not doing heavy lifting but using the treadmill. Nurse Durham writes that the claimant wants to be released back to work, noting that he has no pain, no swelling, no numbness or tingling and he is taking no medications at this time. Nurse Durham released the claimant with the restriction of no lifting greater than twenty pounds but to cautiously work into the thirty pound lifts. It is also noted that he should do no excessive twisting or bending and the claimant was released from their care at that time. Nurse Dunham signed a return to work slip for the claimant dated April 4, 2006, setting forth that the claimant may return to work on April 5, 2006, without restrictions but was instructed to follow proper body mechanics in lifting.

Respondents No. 1 sent all the claimant's medical records pertaining to his back problems to a neurosurgeon in Louisville, Kentucky for review. Dr. Robert Saxon opined that none of the treatments which he received for his back subsequent to October 7, 2005, including his surgery and follow up were a result of his work relationship with the respondent. Dr. Saxon based his opinion on the claimant's medical records particularly the numerous times the claimant had been treated at the chiropractor's office for low back

problems with reports of pain and radiation. Dr. Saxon also reviewed the claimant's NCV test run in June 2005 which revealed a moderate right S1 radiculopathy as well as the claimant's MRI of October 19, 2005, which revealed a large para central left disc herniation at L5-S1 which also demonstrated degenerative disc disease at L3-4, L4-5 and L5-S1.

Dr. Anthony Capocelli, in his deposition, stated that when he first saw the claimant he understood that the claimant had a long standing history of back problems and had had multiple chiropractic manipulations and treatments over the years but he had had an acute episode on October 7, 2005, that lead to worsening of his symptoms. Dr. Capocelli recalls that when he first saw the claimant the claimant was in severe pain and had actually been brought from one clinic straight into his clinic that same day.

Dr. Anthony Capocelli testified that he first examined the claimant on November 30, 2005. Dr. Capocelli testified that it was his understanding from the claimant's history that the claimant had a long standing history of back problems and had been to the chiropractor multiple time for manipulations. Dr. Capocelli testified that the claimant reported that on October 7, 2005, he had an acute episode that lead to the worsening of his symptoms which ultimately lead him to see him. Dr. Capocelli testified that the claimant was referred by Dr. Cheyne and that the claimant was in quite severe pain at actually being brought from one clinic straight to his clinic. Dr. Capocelli testified that he reviewed the claimant's MRI which demonstrated a disc rupture at L5-S1 on

the left which was consistent with the claimant's complaints of pain. Dr. Capocelli testified that he examined the claimant which demonstrated that he had sciatic pain with positive straight leg raising and distribution which were consistent with a radiculopathy in the L5-S1 distribution to the left side. Dr. Capocelli testified that he recommended surgery. Dr. Capocelli was asked if he knew if any other types of procedures are not invasive types of procedures have been used to treat the claimant's problem and Dr. Capocelli responded, "NO. I think at that point the patient was injured bad enough that he really was not going to tolerate any kind of treatment such as therapy or anything along those lines." Dr. Capocelli agreed that he performed a lumbar discectomy on the claimant on December 22, 2005. Dr. Capocelli testified that he next saw the claimant on January 25 at which time the claimant was improving although reporting a little bit of back spasm around his wound but was back to relatively normal with his leg pain. Dr. Capocelli testified that he released the claimant to return to work on light duty not to involve any heavy lifting. The doctor testified that he next saw the claimant on March 13, 2006, and although he may not have personally examined the claimant, his nurse practitioner did. The doctor testified that the notes indicate that the claimant was continuing to improve on light duty and he wanted to be released back to work so the doctor released him to work with no lifting greater than twenty pounds. Dr. Capocelli testified that the claimant was again seen in the clinic by his nurse practitioner on April 4, 2006, and after examination

by the nurse practitioner and consultation with Dr. Johnson the claimant was released to full duty work with no restrictions. Dr. Capocelli agreed that in correspondence with the claimant's attorney, he opined that the claimant's lifting injury at work on October 7, 2005, either caused or combined with a preexisting condition to cause the claimant's need for surgical intervention. The respondents' attorney went through the claimant's long history of chiropractic treatment which Dr. Capocelli testified that he was aware that the claimant had had chiropractic treatment but not the specific types of treatment or manipulations which the claimant had undergone. Dr. Capocelli was read a note from the Sparks Preferred Medical Care Clinic dated October 7, 2005, pertaining to the claimant setting forth that his symptoms were pain in the left lumbar area that does not radiate. Dr. Capocelli agreed that these symptoms were different than what the claimant had initially complained of to him. Dr. Capocelli testified as to several different incidents which could possibly create the type of symptoms the claimant experienced prior to October 7, 2005. Dr. Capocelli testified that the important thing to remember is that he had a herniated disc on October 19, 2005, as verified by an MRI. Dr. Capocelli agreed that if the claimant was complaining of subjective pains of radiation into his left lower extremity that was similar to the symptoms he was having when he initially saw the claimant. Dr. Capocelli testified that although these were similar symptoms, the claimant was experiencing significantly more symptoms specifically loss of achilleas reflex and numbness that went all

the way into his foot. Dr. Capocelli testified that it was his understanding that the claimant's symptoms were significantly worse further down the leg and the severity was ten times what he had been experiencing before. Dr. Capocelli was asked if it was possible the claimant could have a disc herniation at the same level back in December 22, 2003? Dr. Capocelli testified that due to the lack of symptoms into his leg he would be surprised and that he would not have expected an L5-S1 disc herniation at that time because it did not localize the L5-S1. Dr. Capocelli testified that the claimant has degenerative disc disease at multiple levels noting that the localization of the older problems that he had certainly correlates with other areas in his back that were injured that he was aware of due to the claimant's chronic degenerative changes. Dr. Capocelli testified that based on the history which had been read to him dealing with the claimant's earlier chiropractic treatment, this history would be consistent with problems at higher levels as opposed to the L5-S1. Dr. Capocelli definitively stated that it is his opinion that the work related injury on or about October 7, 2005, was what caused the claimant's need for surgical treatment. Dr. Capocelli testified that it is common to see a herniated disc resulting from a lifting event. Dr. Capocelli did agree that there are other means by which a person could suffer a disc herniation but stated that most disc herniations are typically traumatic and commonly result from lifting or bending. Dr. Capocelli testified that based on the

claimant's surgical procedure, he would assess him with a 7 percent whole body impairment rating based on the AMA Guides.

On cross examination by the Second Injury Fund, Respondent No. 2 in this matter, Dr. Capocelli agreed that a person could have sciatic pain in the absence of having a herniated disc. Dr. Capocelli also agreed that an individual who had a job which involved hauling as much as thirty pounds of pizza boxes at one time twisting, bending and squatting such as the claimant did on his job, it would be reasonable to expect that individual to have muscular skeletal strains while doing this work. Dr. Capocelli agreed that if from time to time this individual had pain which radiated as far down as his knee, this would not necessarily mean that it had anything to do with a herniated disc or any other condition other than muscular skeletal pain. Dr. Capocelli was shown a nerve conduction study test done by Dr. Clouse on June 25, 2005, which indicated that there is no evidence of a left L5 and S1 radiculopathy. Dr. Capocelli agreed that based on this test, if it is accurate, it would suggest that the claimant had no left sided radiculopathy prior to October 7, 2005.

After a complete review of this entire record, I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his back while working for the respondent on October 7, 2005. It is not questioned that this claimant had ongoing treatment for his degenerative back problems some time prior to his injury on October 7, 2005. Dr. Capocelli has clearly stated that the claimant's symptoms were exacerbated,

more extensive and his pain more severe subsequent to October 7, 2005, following a lifting incident. Dr. Capocelli has also explained that it would not be uncommon for a person doing the type of work the claimant does who has multi level degenerative disc disease to have muscular skeletal pain which could radiate into his legs. The doctor has also indicated that the types of symptoms which the claimant was experiencing as well as the evidence set forth in the MRI made on October 19, 2005, clearly set forth that the claimant had a herniation at the L5-S1 level which was different than what he had previously experienced. Based on Erin Jensen's deposition testimony as well as testimony from the claimant, it seems clear that the claimant did not report a workers' compensation injury to the respondent until October 24, 2005. Although the claimant did indicate to Mr. Gary Apon that he was having back problems on October 7, 2005, it was not made clear to Mr. Apon that it was a work related sudden event which brought on an exacerbation of the claimant's symptoms. Therefore, no benefits will be paid prior to October 24, 2005. The respondents shall be responsible for all medical treatment for this claimant's compensable injury subsequent to October 24, 2005. The respondents shall pay temporary total disability to this claimant from October 24, 2005, to January 30, 2006. The respondent shall also pay temporary partial disability to this claimant from January 31, 2006, till he was released to full duty work on April 5, 2006. The claimant has testified that while he was working light duty he was earning \$7.00 per hour and worked approximately forty hours per

week, therefore, temporary partial disability benefits should be provided to this claimant in accordance to Ark. Code Ann. §11-9-520. It is also found that the claimant is entitled to a permanent partial impairment rating of 7 percent to the body as a whole based on Dr. Capocelli's assessment due to his operated disc.

#### FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On October 7, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to the maximum compensation rate for 2005.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back while working for the respondent on October 7, 2005. See discussion above.

5. The claimant did not report a workers' compensation injury until October 24, 2005. See discussion above.

6. The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable injury subsequent to October 24, 2005.

7. The claimant is entitled to temporary total disability from October 24, 2005, to January 30, 2006, and should pay temporary total partial disability to the claimant from January 31, 2006, til April 5, 2006. See discussion above. Also see Ark. Code Ann. §11-9-520.

8. The respondents should pay permanent partial impairment to this claimant in the amount of 7 percent to the body as a whole. See discussion above.

9. The respondents have controverted this claim in its entirety.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

#### ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his back on October 7, 2005, while working for the respondent.

The claimant did not report a workers' compensation work related injury until October 24, 2005.

The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable injury subsequent to October 24, 2005.

The respondents should pay temporary total disability to this claimant from October 24, 2005, to January 30, 2006, and they should then pay temporary partial disability to this claimant from January 31, 2006, to April 5, 2006.

The respondents should pay permanent partial impairment to this claimant in the amount of 7 percent to the body as a whole.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said

attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE