

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400779/F408281

BARRY HARDIN	CLAIMANT
BERRYVILLE SCHOOL DISTRICT	RESPONDENT
RISK MANAGEMENT RESOURCES INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 26, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on December 13, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 20, 2005. 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 August 6, 2003, and January 7, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to the maximum compensation rate for 2003.

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

1. Compensability of the claimant's back and shoulder injuries.
2. Related medical.
3. Temporary total disability from December 3, 2003, to March 22, 2004.
4. Claimant's entitlement to a 12 percent impairment rating to the body as a whole.
5. Attorney's fees.

In regard to the foregoing issues the claimant contends that he sustained a compensable back injury arising out of and in the course of employment with the respondent as a high school football coach on or about August 7, 2003, and January 7, 2004. As a result of this compensable injury, the claimant has been temporarily disabled from December 3, 2003, surgery to August 4, 2004, six months post-op from second surgery, minus a short RTW in January 2004 which date will be supplemented. There may also have been lost time prior to the claimant's first surgery and those dates will be supplemented as well. The claimant has also incurred medical expenses. Claimant contends entitlement to workers' compensation benefits as set forth in the issues response in the pre-hearing information filing, and specifically, reasonable, necessary, and related medical expenses; temporary total disability benefits; permanent partial/total disability benefits (reserved);

and controverted attorney fees. All other benefits are reserved under the Act.

In regard to the foregoing issues the respondents contend that the claimant did not sustain compensable injuries arising out of and in the course of his employment as defined by the Arkansas workers' Compensation Act.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical records marked Claimant's Exhibit No. 1 and the contracts and addendum marked Claimant's Exhibit No. 2. The respondents submitted medical records marked Respondents' Exhibit No. 1 and the deposition of Dr. Raben marked Respondents' Exhibit No. 2. The claimant submitted an abstract of the medical evidence which was objected to and this information was allowed in as Claimant's Proffer No. 1. All other documents were admitted without objection.

DISCUSSION

The claimant testified that he was forty-one years old but would be forty-two the next day. The claimant testified that he is employed by the respondent as a teacher/coach. The claimant testified that at the time of his two injuries he was an assistant football coach, high school and junior high and head baseball coach. The claimant testified that besides his coaching duties he also was a classroom teacher. The claimant testified that currently he is a full time teacher with no coaching duties.

The claimant testified that he has been into heavy weight lifting in the past. The claimant testified that in 1993 while lifting weights he injured his back and went to a chiropractor for treatment. The claimant testified that these problems resolved. The claimant testified that in 1996 he again was weight lifting and sprained his back for which he sought chiropractic treatment again. The claimant testified that after a few adjustments his problems went away. The claimant testified that while he was employed at the DeQueen School System he had chiropractic treatment for headaches. The claimant testified that he continued lifting weights when he moved to the Berryville area and began working for the respondent. The claimant testified that prior to August 2003 his back was quite strong and he was able to do a variety of physical labor including moving furniture as well as doing heavy weight lifting.

The claimant testified that in August 2003 he and some of the other coaches were repairing the football field. The claimant testified that he and two other coaches were lifting rolls of sod off of a pallet, taking them and rolling them out on the bald spots on the football field. The claimant testified that there was a lot of bending, twisting and turning as well as lifting with this activity. The claimant testified that there was lots of piecing the sod together to make some of the repairs and this required lots of lifting, twisting, bending and kneeling in order to complete the task. The claimant testified that at the end of each day he was exhausted, very tired and sore. The claimant testified that after

the second or third day of this type of work he was home and walking through his kitchen when his right knee gave out on him and he had to catch himself on the kitchen table. The claimant testified that at the time he was afraid he had done something to his right knee because he did not realize that his problem was really in his back. The claimant testified that subsequent to these events he has not had to have treatment for his knee. The claimant testified that he assumed that he would be able to work through his soreness and eventually he soreness went out of his arms and legs but the discomfort stayed in his back. The claimant testified that he began a light workout at his home and when he attempted to do a squat he did not even get the entire squat done when he realized that he had an injury rather than just lingering soreness in his back.

The claimant testified that he decided to go to the chiropractor to see if they could work his problem out. The claimant testified that when he first was seen by the chiropractor, Dr. Priest, he told the chiropractor about laying sod on the football field. The claimant testified that he was seen by the chiropractor several times and his goal was to make it through the football season so if his problems did not resolve he would have the basketball season to see if he had something more serious. The claimant testified that as far as his teaching duties were concerning he did fairly well except when he had to sit for long periods of time. The claimant testified that there were times when he would stand up and get a Charlie horse in his gluts. The

claimant noted that he would tighten to the point where he could not move for two or three minutes. The claimant testified that during his conference periods he would go to the chiropractor and get an adjustment which would give him some relief, enough to get through the day and his football practice. The claimant testified that the chiropractor suggested that he be seen by Dr. Raben. The claimant testified that Dr. Raben did surgery on his back for a herniated disc that was putting pressure on a nerve. The claimant testified that when he saw Dr. Raben and filled out his history he had a misunderstanding as to what a workers' compensation injury entailed thinking that it had to be a specific moment that he was injured. The claimant testified that he reported to Dr. Raben the 1993 event when he was doing weight lifting noting that this old injury started bothering him again in August after he had been laying sod and they had been doing a lot of squatting, bending and twisting as well as turning and lifting. The claimant testified that he gave Dr. Raben the year of 1993 and 1996 when he got treatment for his back. The claimant stated that he was unclear as to a specific date of when they were laying sod so he reported that he had began hurting about three months earlier. The claimant testified that following his surgery in December he had follow up treatment with Dr. Raben but he was released to work at regular duty when school started after Christmas break. The claimant was asked if he was released to do regular or light duty and the claimant responded that it was his understanding that he could go back doing full duty.

The claimant testified that following his surgery he was feeling fine and felt that he was not having any pain. The claimant testified that he had been the baseball coach for the past seven years. The claimant testified that it was his practice to work with the pitchers prior to the rest of the team beginning their practices. The claimant testified that one of the player's grandfather let the team use a vacant chicken house to practice pitching. The claimant testified that they had three of the pitchers, Drew Johnson, Henry Adams and Curtis Campbell, working that day along with another volunteer coach. The claimant testified that after the practice he was instructing the young men on some exercises to improve their pitching. The claimant testified that he was going through the pitching motion process demonstrating to the young men what they needed to be practicing at home. The claimant testified that in the last part of the demonstration he was stepping down off the mound and that is when he felt a pop and grabbed his back, walked off the mound and told the boys that it was time to go home. The claimant testified that the motion he was involved in when this pop occurred was a movement from a sideways position to where his body came around and was facing the pitcher at the end of his follow through as he was stepping down off the mound. The claimant explained that he was not actually pitching the ball but he was just simulating what the correct motion of a pitching motion should be. The claimant agreed that when he felt this pop in his back, he was in a twisted position as well as a stepping down motion. The claimant testified

that this popping grinding feeling in his back was in his low back and in the same area where he had his surgery. The claimant testified that when he grabbed his back he walked off that Moses, the volunteer coach, asked him if he was all right and that he had told Moses he hurt his back.

The claimant testified that he went home, got on the floor and had his wife bring an ice pack to put on his back. The claimant testified that the next day which was a Wednesday he went to see his physical therapist, Wade Hill, to get his input as to what he should do. The claimant testified that throughout the week his back just steadily kept getting worse and that by Monday he went to see Dr. Raben. The claimant testified that he underwent another MRI and learned that he would need to undergo a second surgery. The claimant testified that he underwent a second surgery on February 3, 2004, and was able to return to work after spring break which was toward the end of March 2004. The claimant testified that to the best of his memory he had returned to work on a Monday following the Christmas break and that the event with the pitching motion occurred the next day and he did not work the rest of the week and was unable to return to work until after spring break. The claimant testified that now he is teaching the sixth grade and is doing quite well.

On cross examination, the claimant agreed that he had had a workers' compensation claim when he was teaching at Dierks. The claimant testified that when he injured his back doing squats in 1993 this was done on his own time. The claimant testified that in

1996 when he sprained his back he was doing dead lifts again on his own time in the school weight room. The claimant agreed that he got chiropractic treatment for both the 1993 and 1996 injuries. The claimant testified that if Dr. Priest's chiropractic records indicate that he received treatment before August 2003 he would not disagree with it but he does not remember receiving chiropractic treatment. The claimant testified that if he had received any adjustments it would have been for his neck during this period of time. The claimant testified that when he first saw Dr. Priest he told him that he was having back problems and thought it might be related to laying the sod. The claimant testified that he first reported his injury to coach Doug Scheel. The claimant testified that he is not sure what date he reported this to Coach Scheel but does remember that school had already started because he was late coming back from a chiropractic treatment and Coach Scheel had covered for him in the classroom. The claimant testified that when he first was seen by Dr. Raben he did relate to the doctor the 1993 and 1996 back problems and he might have mentioned laying sod on the football field but was not sure. The claimant testified that all of his treatment by Dr. Raben up through January 7, 2004, was turned in on his group health. The claimant testified that he had been under the misconception that in order to have a workers' compensation claim there had to be a specific injury with a specific time and date of injury. The claimant testified that he did not file a claim for workers' compensation benefits until after the pitching incident. The claimant testified that when he

attempted a light workout at his home in hopes of working out some of the soreness in his back, it was at this time that he realized that his soreness was an injury rather than just a temporary discomfort. The claimant testified that when he was demonstrating the correct pitching motion to his students and he felt a sharp pain in his back, he did not cry out in pain and say oh I just hurt my back. The claimant testified that the assistant coach with him did ask if he had hurt himself.

The claimant testified that working with the pitchers after school was part of his coaching duties. The claimant testified that the reason they work out in the chicken house is because the basketball team would be using the gym and it was the only indoor facility they had available to them that was heated.

On recross examination, the claimant testified that he continued to draw his regular salary from the end of the football season in 2003 until he came back from spring break in 2004.

Andrew Johnson testified that he was seventeen years old and a student at the Berryville High School. This witness testified that he is a pitcher for the high school team and remembers an incident in January 2004 when the claimant was teaching them pitching technique. Mr. Johnson testified that he recalls being at the Truelove's farm and that the claimant was going through a pitching demonstration and when he did the follow through he had hurt his back because he was all bent over and holding onto his back. This witness remembers that after this event happened

everyone went home. Mr. Johnson testified that prior to this event the claimant appeared to be fine.

On cross examination, Mr. Johnson testified that he remembers that Curtis Chappell was also present at the chicken house. This witness testified that the claimant was showing him a follow through motion because his follow through was bad and was causing his pitches to go off.

John Goodman testified that he is currently the alternative school director but before that he was a football coach and a science teacher for the respondent. Mr. Goodman testified that he has coached football with the claimant for three or four years. Mr. Goodman testified that he remembers that Coach Scheel had them repairing the football field and that the work was tough, hard work. Mr. Goodman testified that replacing the sod on the field was very demanding physically involving lifting, twisting, bending and carrying. Mr. Goodman testified that he remembers between the first and the second day of working on the football field the claimant seemed to be moving slower the second day and was wearing a white back brace. This witness testified that the claimant was also only picking up small pieces of sod and that he got upset with the claimant for not helping out more. Mr. Goodman testified that the claimant was down in his back and remembers saying something to Coach Larimore that the claimant's work the second day was bothering him. Mr. Goodman testified again that he just remembers the claimant on the last day being real slow and picking up the small pieces.

Penny Hardin testified that she was the claimant's wife and that they had been married for fifteen years. Mrs. Hardin testified that prior to August 2003 her husband's back was good and that after August 2003 he complained a lot about having back aches and this continued to get worse. Mrs. Hardin testified that her husband would go to the chiropractor during his prep periods everyday but after a while his condition was not getting any better. This witness remembers that after the claimant's first surgery and before the pitching incident he was doing much better and seemed to be back to normal. Mrs. Hardin testified that on the day of the pitching incident when her husband came home he reported that he had heard a pop when he was showing a drill to a student, that he was hurting and was concerned about it. Mrs. Hardin testified that the claimant ended up getting medical treatment.

Doug Scheel testified on behalf of the respondents. Coach Scheel testified that he is the athletic director and head football coach for the respondent and has been in this position for approximately three years. Coach Scheel testified that the claimant was on his coaching staff. Coach Scheel was asked if beginning with the two a day football practices up until the end of football season of 2003 if the claimant had ever come to him and made complaints about his back. Coach Scheel responded, "he was having back problems." Coach Scheel testified that the claimant did not specifically tell him where the back problems were coming from. This witness testified that he could not remember if the claimant had ever told him anything about injuring his back while

laying sod. Coach Scheel testified that he was aware that the claimant was seeking chiropractic treatment during the school hours because there were times when he covered for him. Coach Scheel testified that the claimant did return to work in the spring semester or in January 2004 and that he had a discussion with the claimant to take it easy since he was aware that he had had back surgery.

On cross examination, Coach Scheel testified that the claimant was a very good man and that in his dealings with the claimant he had been truthful. Coach Scheel agreed that in August 2003 they had been laying sod. Coach Scheel was asked if the sod laying job was heavy work and he responded, "It was very demanding work. It was ---repetitious and---and it was very hot and, you know, we were doing that after practices and before practices and it was a long day." Coach Scheel testified that he had coaches laying down in the shade and taking water breaks again stating that the work was very physical work but had to be done to protect the students. Coach Scheel testified that the pitching incident in January was part of the claimant's regular duties.

The medical records set forth that the claimant was seen by Wayne Priest, a chiropractor, on August 28, 2003, with complaints of low back pain. Dr. Priest noted that the claimant reports that his problems have existed since laying sod on the football field. After receiving an adjustment it was recommended that the claimant use ice packs, rest and to use a back support. The claimant was seen by Dr. Cyril Raben on November 10, 2003, for complaints of low

back, right hip and right leg pain. The claimant reports to the doctor that his problems began approximately three month earlier. Dr. Raben writes that the claimant injured himself doing squats and that he had a similar injury some two years ago for which he sought chiropractic treatment. Upon examination, Dr. Raben does note besides complaints of pain and tenderness that the claimant has pain and spasm at the extremes. The claimant was diagnosed with having a probable lumbar disc herniation and an MRI was scheduled. Dr. Raben prescribed medication for pain, spasm as well as inflammation. Dr. Raben writes on November 17, 2003, that the claimant's discomfort has increased and that he has now undergone an MRI which shows a very large disc herniation at L5/S1 on the right. Dr. Raben recommended epidural steroid injections and depending on the outcome of these injections, further treatment would be recommended. The claimant underwent back surgery on December 3, 2003, performed by Dr. Raben. On follow up Dr. Raben writes on December 26, 2003, that the claimant's incision is healing nicely and he is doing exceptionally well. Medications were recommended as well as physical therapy. Dr. Raben writes that he will see him back in four to six weeks for his final visit. The claimant was seen by Dr. Raben on January 13, 2004, and reports having sharp pain in the sacrum area and a tingling down his thigh noting that he is 40 percent worse. Dr. Raben notes that the claimant has been working at modified full duty beginning on January 7, 2004. After examination, Dr. Raben notes that he thinks the claimant as reherniated his back, noting that the claimant was

instructing some freshman pitchers on pitching technique and after showing them how to do a follow through drill he noticed the onset of severe low back pain with leg pain as well. An MRI was recommended as well as medications refilled. On January 16, 2004, Dr. Raben writes that the claimant's MRI shows a recurrent disc herniation at L5/S1 noting that the rest of his disc look pristine. Dr. Raben writes that they are most likely going to need to perform an MIS procedure with front and back fusion. The claimant underwent a second back surgery performed by Dr. Raben on February 4, 2004. On March 5, 2004, Dr. Raben writes that the claimant is about 80 percent better than he was at preop. Dr. Raben notes that the claimant is experiencing night sweats and problems with his bowels and bladder. It is also noted that he is undergoing physical therapy and is having no problem with his prescribed medications. Dr. Raben writes that the claimant will need medication for pain, spasm and inflammation but is to the point where he can be weaned off the stronger narcotics. On March 19, 2004, Dr. Raben writes that the claimant is now several weeks post op noting that he has not worked since January 7, 2004. Again the claimant reports that he is 80 percent better than he had been and is able to walk a mile as well as sit for thirty minutes. Dr. Raben writes that the claimant has requested that he be allowed to return to work on Monday noting that he has restrictions which include no bending, lifting and stooping as well as a need to be able to change positions frequently. On April 12, 2004, Dr. Raben writes that the claimant is worse by about 30 percent noting that

he is having an aching sensation in his back with a cramping and burning in his right thigh. Dr. Raben writes that the claimant can sit for about thirty-five minutes, stand for about forty minutes and walk approximately a mile and a half before he has to stop and rest. Dr. Raben recommended that he continue with his present regime. Dr. Raben fills out a physician's report on May 13, 2004, setting forth that the claimant can return to work on March 22, 2004, with the restrictions of no bending, lifting or stooping and a need to change positions frequently. The medical records set forth that Dr. Raben continued to follow the claimant on a three month intervals with the claimant reporting continued improvement. Dr. Raben writes on February 9, 2005, that based on objective medical findings and within a reasonable degree of medical certainty, it is the doctor's opinion that the claimant sustained a work related accidental injury on January 7, 2004. Dr. Raben continues to write that the claimant's injury was the major cause within at least 50 percent or more of the claimant's need for medical treatment and disability. Dr. Raben writes on October 18, 2005, to the claimant's attorney that in accordance with the A.M.A. Guides for the Evaluation of Permanent Impairment he assesses the claimant based on a two level 360-degree fusion with an 11 percent impairment to the body as a whole.

Dr. Raben, in his deposition, testified that he first saw the claimant on November 10, 2003, for complaints of low back, right hip and right leg pain. The doctor testified that the claimant injured himself doing squats noting that he was a football coach at

the high school. Dr. Raben testified that the claimant was doing squats, working out and training with the team, noting that he had a similar injury two years prior and had re exacerbated this old problem. In response to questioning, Dr. Raben testified that he assumed that the claimant was training with the team doing squats but that he did not know that for a fact. Dr. Raben testified that he had no information concerning the claimant being injured doing squats back in 1993. Dr. Raben testified that the first treatment he rendered to the claimant was for a very large disc herniation at the L4-S1 level on the right noting that the claimant underwent a hemilaminectomy diskectomy. Dr. Raben testified that he performed this surgery on December 3, 2003. Dr. Raben testified that the healing period for this type of surgery is four to six weeks at a minimum and could be as long as three months maximum. Dr. Raben indicated that for the claimant to return to teaching school in January 2004 he would have recommended sedentary to light work with limited bending, lifting and stooping with no prolonged standing or sitting. Dr. Raben testified that as a result of the claimant's January 7, 2004, incident he ultimately performed a second back surgery which was more invasive than his first surgery. Dr. Raben opined that just based on the second surgery alone the claimant would be entitled to an impairment rating of somewhere between 10 and 15 percent to the body as a whole.

Dr. Raben testified that it was his opinion that the claimant's second injury was in fact a new injury. Dr. Raben testified that he would not recommend anything more for the

claimant then light to moderate work with a lifting limitation of twenty-five to fifty pounds.

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 while working for the respondent on August 6, 2003, as well as on January 7, 2004. The claimant has testified as had the other coaches that the work being performed on August 6, 2003, was very strenuous requiring extensive bending, lifting and twisting and by at least the second day this claimant was visibly limited as to his activities. I find, however, that the claimant did not report this event as a work related injury until August 2, 2004, when he filed a Form AR-C with the Commission. Therefore, the respondents will not be responsible for any medical treatment or temporary total disability for this claimant until this date. The claimant, however, will be entitled to benefits for his January 7, 2004, compensable injury from January 8, 2004. The claimant has testified that he was working with his high school baseball team demonstrating a pitching technique when he felt a pop in his low back and experienced immediate pain. Dr. Raben has testified and an MRI has revealed that this claimant sustained a recurrent disc at the L5-S1 level which required surgery. The respondents, therefore, should pay for the cost of the medical treatment for this claimant's compensable January 7, 2004, injury. The claimant has testified that during the periods of time he was off as a result of his two compensable injuries, he continued to receive his salary as set forth in his

teacher contract. Arkansas law sets out that if a person draws their full salary during a period of time that they are in a healing period they are not entitled to draw temporary total disability. See Ark. Code Ann. §11-9-807(b). I further find that the claimant has proven by a preponderance of the evidence that he is entitled to a permanent partial impairment rating of 11 percent to the body as a whole as assessed by Dr. Raben in his letter dated October 18, 2005.

FINDINGS & CONCLUSIONS

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

2. On August 6, 2003, and January 7, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to the maximum compensation rate for 2003.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back on August 6, 2003, as well as on January 7, 2004, while working for the respondent. See discussion above.

5. The respondents will not be responsible for the payment of medical treatment for this claimant's low back injury of August 6, 2003, because he did not make the respondents aware that he was claiming a compensable injury until August 4, 2004.

6. The respondents shall pay all medical treatment for this claimant's compensable injury of January 7, 2004.

7. The claimant has testified that he continued to receive his regular salary throughout the fall of 2003 as well as from January 7, 2004, through March 22, 2004. Arkansas law sets forth at Ark. Code Ann. §11-9-807(b) that if an injured employee receives full wages during disability he is not entitled to compensation during that period.

8. The claimant has proven by a preponderance of the evidence that he is entitled to a permanent partial impairment rating of 11 percent to the body as a whole as assessed by Dr. Raben. 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 low back on August 6, 2003, and on January 7, 2004, while working for the respondent.

The claimant did not report a compensable injury to the respondent concerning his August 6, 2003, injury until August 4, 2004, therefore, he will not be entitled to benefits for his compensable injury during this period of time.

The respondents shall pay for the medical treatment for the claimant's January 7, 2004, compensable injury.

The respondents should pay a whole body impairment rating to this claimant in the amount of 11 percent.

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.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE