

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F008615 & F511219

DANIEL BALL, EMPLOYEE	CLAIMANT
CITY OF N.L.R POLICE DEPT., SELF-INSURED EMPLOYER	RESPONDENT
MUNICIPAL LEAGUE WORKERS COMP. TRUST, TPA	RESPONDENT

OPINION FILED MAY 29, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on March 14, 2007, at Little Rock, Pulaski County, Arkansas.

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

Respondent represented by the HONORABLE J. CHRIS BRADLEY, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above style to determine the claimant's entitlement to additional workers' compensation benefits. On February 6, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is here designated a part of the record as Commission Exhibit #1.

The testimony of the claimant, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Daniel Lewis Ball, the claimant, with a date of birth of March 2, 1966, is a 1984 graduate of McCrory High School, who has been employed as a police officer with the North Little Rock Police Department since September 25, 1995. Claimant suffered an injury to his back within the course and scope of his employment on August 1, 2000. In describing the mechanics of the August 1, 2000, accident, claimant testified:

We were doing training, ground fighting training, and it was my turn to be the bad guy, and when you do that you're supposed to land flat, and I didn't land flat, and a guy landed on top of me and tore up my back.(T.9).

Claimant treated with Dr. William Ackerman for the August 1, 2000, injury, however did not under any surgical procedure. Claimant estimates that he was off work for a total period of approximately eight (8) months relative to the August 1, 2000, accident and injury. The injury involved the claimant's neck and mid-back. The claimant ultimately returned to work as a police officer for the North Little Rock Police Department, and continued doing so until September 2005.

On September 29, 2005, the claimant had another work-related accident. In explaining the mechanic of the accident, claimant testified:

I was taking an annual fitness test, and I was running up some steps which is part of the test, and something went out in my lower back. (T. 10).

Claimant concedes that while the August 1, 2000, accident mostly involved his cervical and thoracic spinal area there was also some involvement of the lower back. Claimant's testimony reflects that he never fully recovered from the August 1, 2000, injury, although he did return to his regular job duties and discharged same.

Following the September 29, 2005, claimant described his continuing complaints and physical symptoms:

Well, I had a lot of pain, I guess you would call it my tail bone, and mostly on the right side, some on the left, numbness that goes sometimes as far down as the foot and usually down behind the knee. (T. 12).

Following the September 29, 2005, accident the claimant receive medical treatment under the care of Dr. Sprinkle and Dr. Rosenzweig. Claimant noted that he received some nerve block and other treatment to numb the pain.

On July 5, 2006, claimant came under the care and treatment of Dr. Harold Chakales relative to the September 29, 2005, compensable injury. The testimony of the claimant reflects that Dr. Chakales wanted to do some testing, and that while he was going through the process of trying to get the test approved, he was seen by Dr. Earl Peeples. The claimant ultimately had some of the tests recommended by Dr. Chakales done in July and August 2006.

The claimant received indemnity workers' compensation benefits following his injury of September 29, 2005, through July 28, 2006. The testimony of the claimant reflects that in August 2006, his indemnity benefits were terminated. Claimant was still under the care of Dr. Chakales at the time the indemnity benefits were discontinued. The claimant was initially seen by Dr. Peeples on September 7, 2006.

The testimony of the claimant reflects that while Dr. Chakales recommended surgery, Dr. Peeples was consulted by respondent to determine whether surgery was warranted. Claimant was also seen by Dr. Winston Wilson for a psychological evaluation on September 19, 2006. Claimant testified that he was not aware that Dr. Peeples has sent a letter of September 28, 2006, to the medical management nurse, Shy Cox, reflecting that in his opinion the claimant could

return to work without restrictions.

The testimony of the claimant reflects that he has remained under the care of Dr. Chakales and continued to treat with same since the September 28, 2006, correspondence of Dr. Peeples. Respondent has not paid for the claimant's medical treatment by Dr. Chakales since September 28, 2006. The testimony of the claimant reflects that he underwent surgery on March 1, 2007, as recommended by Dr. Chakales. As of the date of the hearing, March 14, 2007, claimant was continuing to recuperate for the back surgery. Claimant testified regarding the surgery that while it was a bit soon, he nevertheless has high hopes about the outcome.

The testimony of the claimant reflects that between the time he last received workers' compensation benefits in July 2006, and the March 1, 2007, surgery he was in constant pain. Claimant observed that the complaints and symptoms that had prevented him from working immediately following is September 29, 2005, accident had persisted subsequent to the discontinuance of his workers' compensation benefits in July 2006. Claimant described the symptoms as a constant dull gnawing kind of pain in his lower back and tail bone area, as well as numbness down his right leg usually to the area just behind the knee, but occasionally as far as the foot.

Claimant maintains that given his symptoms he does not believe that he could have worked during that period. Claimant explained that he could not get around very quick, an attribute that he maintains is necessary as a police officer. Claimant denies that he was offered any thing in the way of light duty by respondent. Claimant denies that Dr. Chakales released him to return to work during the period of time that his indemnity benefits have been suspended. Claimant disagrees with the assessment of Dr. Peeples that he could return to work without

restriction, explaining that it would be impossible for him to do so in light of the fact that he is unable to get around as he did previously.

Since his March 1, 2007, surgery, the claimant was seen by Dr. Chakales on Friday, March 9, 2007, when his staples were taken out. Claimant is currently taking medication and has an home health nurse. The home health nurse is three time per week and performs of checking and changing the bandages. Claimant's current medication consist of Hydrocodone and Soma. The testimony of the claimant reflects that he was taking the same medication prescribed by Dr. Chakales from July 2006 until his surgery. Claimant noted that he suffered the side effect of drowsiness from the Soma. Claimant takes both medicines three (3) times per day.

Claimant denies he suffered any other injury following his September 29, 2005, compensable accident until his March 1, 2007, surgery. The claimant was never examined by the Kentucky physician, Dr. Sexton, whose report has been entered into the record.

During cross-examination the claimant testified that he was dissatisfied with his medical treatment under the care of Dr. Sprinkle. Claimant explained:

Well, Dr. Sprinkle, he prescribed, if I recall correctly, nerve root blocks and that was about the extent of it, and he didn't have any fresh ideas, and I needed some fresh ideas. (T. 22).

Claimant concedes that while under Dr. Sprinkle's care he underwent a myelogram and a CT scan. The claimant's testimony further reflects:

Well, towards the end of when I was seeing him, I asked him, you know, "Is there any other course we can try or anything like that," and he was pretty much out of ideas, and I'd heard good things about Dr. Chakales, and I'm happy I did change to him. (T. 23).

Claimant denies that he was wanting surgery. Claimant added:

Not particularly. I was scared to death of surgery, but I wanted something definitely done if it could be done. (T. 23).

With respect to Dr. Chakales, claimant's testimony reflects that a friend of his had surgery performed by Dr. Chakales and recommended him.

The claimant reiterated his symptoms, attributable to the September 29, 2005, injury prior to his surgery, to include a dull constant in the center of his low back, radiation of pain down his leg and occasionally into his foot, along with numbness. Claimant denies that he ever sustained a fall due to the numbness. Regarding the mechanism that allow him to cope with his pain September until his March 1, 2007, surgery, the claimant's testimony reflects:

I mean, pain medication helped. Mostly it's just positioning, just try to find a position where I could get some comfort. (T. 24).

The claimant underwent a EMG/NCV study pursuant to the directions of Dr. Chakales on July 24, 2006. Claimant testified that Dr. Chakales performed a laminectomy and fusion on March 1, 2007. The testimony of the claimant reflects that he is "getting better every day" since the surgery by Dr. Chakales. After noting that he was in severe pain prior to the surgery, claimant elaborated on his post-surgical condition/symptoms:

It's gets better every day. I still got some numbness. I asked the doctor about that, and he said it's the nerves growing back together and what have you. In fact, sometimes my right big toe feels like somebody is either electrocuted it, or sometimes it feels somebody's put a cigarette out on it. (T. 26).

Claimant testified that while the underlying pain in his back seems the same since the surgery, he thinks he sees some improvement. Claimant added that over the next couple of weeks he expects to see "a lot of improvement" in his movement.

Claimant asserts that since July 26, 2006, he has not received any payment from

respondent for medication. Claimant paid for the medication prescribed by Dr. Chakales. The Medical Cost Containment Department entered a Change of Physician Order on May 31, 2006, changing the claimant's treating physician from Dr. Sprinkle to Dr. Chakales.

The medical in the record reflects that the claimant was seen at the emergency room of Baptist Health Medical Center on September 29, 2005, relative to his low back injury of the same date. (CX. #1, p. 1-7). Following his discharge from the emergency room, the claimant was seen at Argenta Health Care Services on the same date, September 29, 2005. (CX. #1, p. 8-12). On October 18, 2005, claimant underwent MRI scans of his lumbar and thoracic spine.

The claimant was initially evaluated by Dr. Brent Sprinkle on October 27, 2005, relative to complaints growing out of the September 29, 2005, injury. (CX. #1, p. 19-21). The November 17, 2005, office note of Dr. Sprinkle relative to a visit of the claimant of the same date reflects the impression of the claimant's complaint as bilateral disc herniations at L5-S1 and L4-5. (CX. #1, p. 23-24). While under the primary care and treatment of Dr. Sprinkle claimant underwent three (3) selective nerve root block at L5 on the right by Dr. Kenneth Rosenzweig; December 7, 2005; January 11, 2006; and March 8, 2006. (CX.#1).

The claimant was seen by Dr. Sprinkle on March 29, 2006. The office note relative to the afore visit reflects, in pertinent part:

FOLLOWUP VISIT:

The third nerve root block got rid of his leg pain completely at L5 for 2 weeks and now it has returned. He is still taking the Lyrica.

* * *

IMPRESSION:

1. Lumbar disc herniation at L4-5 and L5-S1.

PLAN:

1. I would like to just go ahead and get a CT myelogram since his pain has recurred to try to get a sense of what contribution is coming from the L4-5 and/or the L5-S1 disc.
2. I will probably get him to see Dr. Saer for a 1-time visit just to get his opinion, with the myelogram data and the nerve block response data, as to whether or not he would recommend surgery.
3. If surgery is not recommend I would recommend that we get an FCE and then he would be at MMI. (CX. #1, p. 36).

On May 10, 2006, the claimant underwent the lumbar CT and myelogram at Radiology Associates, P.A. (CX. #1, p. 37-38).

As noted above, pursuant to a change of physician request, claimant came under the care of Dr. Harold C. Chakales. The July 5, 2006, report of Dr. Chakales regarding his initial examination of the claimant reflects, in pertinent part:

Mr. Daniel Ball is a 40-year-old man who presents with complaints of pain in his neck and back, we well as his left leg. He also complaints of right leg numbness and weakness. Coughing or sneezing does increase the pain. He has not worked at his regular job as a patrolman since September 29, 2005. He initially suffered a cervical spine injury in August 2000 and was treated by Dr. Ackerman for that. He returned to work and then injured his low back on September 29, 2005. He was then seen by Dr. Brent Sprinkle and treat on a nonoperative basis. The patient had some myelograms and CT scans and was told he had a lumbar disc herination at L5-S1 on the right. He has not had an EMG/NCV study. His chief complaint today is chronic low back pain, with pain radiating into his right leg. He is also bothered with chronic neck and shoulder pain. Most of his problems now are in the low back. He states he is unable to perform his job duties as a police officer.

* * *

RADIOGRAPH ROPORT:

X-rays of the cervical spine show straightening of the cervical lordosis with early cervical spondylosis of C5 on C6, and C6 on C7.

X-rays of the lumbar spine show six lumbar vertebrae. He has transitional twelfth thoracic segment, with some degenerative disc disease at the lumbo-

sacral level and facetar arthritis.

His MRI of the lumbar spine was abnormal and showed he had a lumbar disc on the right side at L5-S1.

PHYSICAL EXAMINATION:

Physical examination shows a well developed male. Examination of the neck shows some tightness of the neck of 10-15% in forward flexion/extension, lateral rotation, and lateral bending. Neurologically he is intact in the upper extremities. He complains of pain in the neck and pain in the shoulder blades, as well as radicular symptoms. Examination of the lumbar spine shows the straight leg raising test is negative. Reflexes of the knees and ankle are 2+. Extensors intact. There is a satisfactory range of motion of the back in forward flexion/extension, lateral rotation, and lateral bending. There is no atrophy of the thighs or calves.

DIAGNOSES:

1. Residuals of cervical spine injury with radicular symptoms.
2. Residuals of lumbar spine injury.
3. Lumbar disc syndrome, L5-S1, right.

DISCUSSION:

This gentleman needs to have an EMG/NCV study of his back and both legs, as well as his neck and both arms. (CX. #1, p. 39-40).

In a July 5, 2006, correspondence to respondent, Dr. Chakales provided a copy of his report relative to the claimant, along with the recommendation for the diagnostic studies, which were scheduled for July 24, 2006, at St. Vincent Health System. (CX. #1, p. 41-42). After undergoing the EMG/NCV studies, claimant was again seen by Dr. Chakales on July 26, 2006. The office note relative to the visit reflects that the study showed nerve root irritation of the cervical spine and a normal lumbar spine. Dr. Chakales released the claimant to return to work on a trail basis with a return appointment scheduled in one (1) month. The office note also reflected plans to schedule the claimant for a repeat MRI of the cervical and lumbar spine. (CX. #1, p. 45).

On August 21, 2006, the claimant underwent the repeat MRI of his lumbar spine at Westside Open MRI. (CX. #1, p. 46-47). Claimant was seen in followup by Dr. Chakales on August 23, 2006. In a correspondence of the same date to respondent, Dr. Chakales relayed:

. . . . A repeat MRI of the lumbar spine is abnormal and shows a disc protrusion at L5-S1 on the right, as well as at L4-5. This study was done on August 21, 2006. He has also had an abnormal EMG/NCV with chronic nerve root irritation in the neck. Most of his problems are in his low back. The pain radiates into the right leg, which corresponds with the MRI findings.

DIAGNOSIS:

Lumbar disc protrusion, L4-5, L5-S1, with some evidence of nerve compression on the right.

From a therapeutic standpoint, Mr. Ball can either learn to live with his condition, have an epidural steroid injection, or consider having a provocative discogram to determine the specific level causing the pain. He might then be a surgical candidate. My personal recommendation would be to proceed with the discogram/CT scan. I would also recommend he undergo a functional capacity evaluation. He will return in 3 weeks. (CX. #1, p. 49).

At the time of the August 23, 2006, visit, Dr. Chakales released the claimant to return to his regular work effective August 23, 2006. The release further noted that the claimant “can return to unrestricted work”. (RX. #1, p. 25).

On September 7, 2006, the claimant was evaluated by Dr. Earl Peebles, a Little Rock orthopedic physician, at the request of respondent. The September 7, 2006, report relative to the evaluation reflects, in pertinent part:

SUMMARY:

Mr. Ball continues to complain of significant pain following a peculiar incident, when he was merely running up stairs, and “discs in my lumbar went out.” His multiple MRI and post myelogram CT studies show multilevel degenerative disc changes and small bone spurs, but no evidence of major nerve root compromise. He is found by EMG to have very minor changes in one muscle in the upper extremity and normal findings in the

lower extremities. His failure to improve on repeated, multiple steroid injections suggest some nonanatomic basis to the symptoms. I have, therefore, recommended to Ms. Cox, who accompanied him, that he undergo MMPI testing by Dr. Winston Wilson.

There has been a mention that surgery has been discussed. I do not think that it is appropriate to consider surgical intervention in an individual who has mainly back pain without evidence of any instability. His findings are well within what is often seen in the working population of his age. It is noted that he has been terminated from the employer against whom this workers' compensation claim has been made.

At present I do not see abnormalities which would cause me to place him under physical restrictions. He may resume employment of his choice if he is able to obtain the essentials of work (motivation, determination, effort).

I believe the MMPI will be highly helpful in understanding his current situation and is of major predictive value regarding any possible elective intervention. In general, elective intervention for pain, without clear cut objective findings and associated physical examination defects, is unlikely to be of benefit in Mr. Ball's population group. (CX. #1, p.57-58).

On September 16, 2006, the claimant underwent a psychological evaluation under the directions of Dr. Winston T. Wilson, a clinical psychologist, pursuant to recommendation of Dr. Peeples. The working diagnoses of the claimant generated as a result of the psychological evaluation, as reflected in the September 19, 2006, report of Dr. Wilson are hypochondriasis, adjustment disorder with anxious mood, and adjustment disorder with depressed mood. as well as a prognosis of "guarded". The report concludes:

A trial period on an anti-depressant/anti-anxiety medication might be helpful from his primary physician. I think that further psychological intervention is not appropriate. Since there appears to be significant psychological overlay in this case. I recommend conservative treatment only for Mr. Ball at this time. (CX. #1, p. 61).

The claimant was again seen by Dr. Chakales on September 20, 2006. The office note relative to the visit reflects, in pertinent part:

. . . He is still having trouble and has a lumbar disc syndrome. He has had an independent evaluation by Dr. Earl Peeples. The patient states he was told there was nothing wrong with him. His MRI was abnormal and showed a disc protrusion at L5-S1 and L4-5. He is scheduled for a lumbar discogram. Following that study I will make further recommendations. I still would like for him to have a functional capacity evaluation, but I would recommend that after the discogram. (CX. #1, p. 62).

Dr. Chakales also authored a certificate during in the September 20, 2006, visit of the claimant reflecting that the claimant should “maintain same level of activity pending results of IME/Discogram/FCE”. (CX. #1, p. 63). In his September 20, 2006, correspondence to respondent regarding the claimant, Dr. Chakales relayed:

From a clinical standpoint, he has been scheduled for a lumbar discogram at L3-4, L4-5, L5-S1. Following discography, I would recommend a functional capacity evaluation to determine whether Mr. Ball is able to return to some form of gainful employment. He will return to see me within the next four weeks. (CX. #1, p. 64).

In a September 28, 2006, correspondence to Ms. Shy Cox, the RN medical case manager, Dr. Peeples relayed that he had received the results of the MMPI which explained the claimant’s complaints of pain. Noting Dr. Wilson’s diagnosis of the claimant as one of hypochondriasis, Dr. Peeples opined that elective surgical intervention for pain was incompatible with the test results and that neither discography or a functional capacity evaluation would be helpful. Further, Dr. Peeples’ report reflects that he did not identify a physical abnormality which would cause him to rate the claimant as having physical impairment of function, and that the claimant could resume work without restriction. (CX. #1, p. 65). In an October 1, 2006, correspondence Dr. Peeples reaffirmed the opinion expressed in the September 28, 2006, correspondence. (CX. #1, p. 66-67).

The claimant was again see by Dr. Chakales on October 23, 2006. Dr. Chakales noted

that the claimant had a problem with a lumbar disc syndrome and needed to have a lumbar discogram. After noting the results of the physical examination as well as the radiography report, the October 23, 2006, report reflects a diagnosis of lumbar disc protrusion, L4-5, L5-S1, with some evidence of nerve compression on the right. (CX. #1, p. 68-69). The claimant underwent the afore recommended study on October 26, 2006, at ST. Vincent Infirmary Medical Center. (CX. #1, p. 70-74). A November 10, 2006, office note of Dr. Chakales, relative to the claimant reflects:

Mr. Ball returns. His lumbar discography was abnormal at L4-5, which recreated a lot of his pain. L3-4 was normal. I was unable to penetrate the annulus of L5-S1. He needs decompression and arthrodesis from L4 to the sacrum. I will give him some pain pills and see him in 2 weeks. (CX. #1, p. 75).

The claimant seen by Dr. Chakales on November 21, 2006. In a correspondence to respondent of the same date, Dr. Chakales recited the claimant's history, physical examination results, and the results of the various diagnosis studies. The correspondence concluded:

DIAGNOSIS:

1. Lumbar disc syndrome with internal disc disruption, L4-5, L5-S1, with lumbar instability.

Mr. Ball is disabled. I believe he is a candidate for extensive decompression laminectomy at L4-5, L5-S1, and lumbar arthrodesis from L4 to the sacrum. (CX. #1, p. 76).

In his chart notes relative to the November 21, 2006, visit of the claimant, Dr. Chakales recorded, in pertinent part:

. . . I have written a letter on him and am awaiting response from workers' compensation regarding approval of the surgery. If it is not approved, then we will do the surgery under his private health insurance. I will see him in 3-4 weeks. (CX. #1, p. 77).

The medical records of the claimant were review by Dr. Robert F. Sexton, Jr., a Louisville, Kentucky, neurological surgeon, at the request of respondent. Dr. Sexton's December 14, 2006, report reflects his opinion that the claimant reached MMI as of February 2006, and is need of no additional treatment or diagnostic test relative to the September 29, 2005, claim. Further, Dr. Sexton opined that the claimant had 0% permanent physical impairment relative to the September 29, 2005, claim. The December 14, 2006, report of Dr. Sexton offered that if the claimant underwent the surgical procedure as recommended by Dr. Chakales the same would result in 25% whole person impairment with permanent restrictions of no lifting over 30 pounds, no running or jumping, and no repetitive bending. Dr. Sexton opined that the September 29, 2005, work event produced a rhomboid strain and that all of the claimant's other problems are the results of pre-existing conditions mild cervical spondylosis, mild lumbar spondylosis, and lumbarization of S1 vertebra. Dr. Sexton's report also reflects that the surgery recommended by Dr. Chakales, "is absolutely contraindicated for a number of reasons as related to the work event". (RX #1, p. 1-2).

In a February 19, 2007, correspondence to the claimant's attorney, Dr. Chakales relayed, regarding the claimant:

Mr. Daniel Ball is a patient under my care who has undergone multiple evaluations. I feel he is a suitable candidate for decompression laminectomy and spinal fusion. I have him scheduled for surgery on March 1, 2007. His chief complaint is persistent chronic low back pain and sciatica. He suffers a lumbar disc syndrome, primarily at L4-5, L5-S1, and has an abnormal MRI of the lumbar spine and electromyographics studies, as well as an abnormal discogram. He is markedly symptomatic and is indeed a suitable candidate for surgery. (CX. #2, p. 1).

On March 1, 2007, the claimant under surgery under the care of Dr. Chakales for the diagnosed

lumbar disk syndrome, L4-L5, L5-S1, primarily on the right with lumbar instability. (CX. #3, p. 2-4).

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

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of these claims.
2. On September 29, 2005, the relationship of employee-employer between the parties.
3. On September 29, 2005, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$\$466.00/\$350.00, for temporary total/permanent partial disability.
4. On September 29, 2005, the claimant sustained an injury to his low back arising out of and in the course of his employment with respondent.
5. The claimant was temporarily totally disabled for the periods following his September 29, 2005, accident through July 28, 2006, and from continuing through the end of his healing period, a date to be determined.
6. Dr. Harold H. Chakales has been the claimant's authorized treating physician relative to the September 29, 2005, compensable injury, since May 31, 2006. Medical treatment rendered to the claimant under the care of Dr. Chakales, to include the March 1, 2007, surgical procedure, is reasonably necessary medical treatment in connection with the claimant's

September 29, 2005, compensable injury.

7. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of September 29, 2005.

8. The respondent has controverted the payment of temporary total disability benefits in this claim subsequent to July 28, 2006, and the surgical procedure recommended by Dr. Harold H. Chakales.

CONCLUSIONS

The claimant was employed by respondent as a police officer from September 25, 1995 through September 2005. Claimant last discharged employment duties on September 29, 2005, when he suffered an injury to his low back within the course and scope of his employment with respondent. Claimant received temporary total disability benefits growing out of the September 29, 2005, accident through July 28, 2006. The claimant came under the care and treatment of Dr. Harold H. Chakales, a Little Rock orthopedic surgeon, as his authorized treating physician, pursuant to a Change of Physician Order entered by the Medical Cost Containment Division of the Arkansas Workers' Compensation Commission on May 31, 2006. Claimant contends that he is entitled to continued payment of temporary total disability benefits from the time the benefits were last paid, and that respondent is liable for the payment of the cost of his surgical procedural under the care of Dr. Chakales. Respondent takes the position that the surgical procedure as recommended by Dr. Chakales is not reasonable or necessary, and that the claimant has been released to unrestricted work with no impairment.

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 a work-

related injury having been sustained subsequent to the effective date of the afore provisions.

As previously noted the compensability of the claimant's September 29, 2005, low back injury is not disputed. Prior to the September 29, 2005, injury, claimant had suffered an earlier work-related injury on August 1, 2000, involving his cervical, thoracic, and lumbar spine. While the claimant testified that he never fully recovered from the residuals of the August 2000, injury, the record reflects that he was off work for a total period of eight months.

The claimant received temporary total disability benefits through July 28, 2006, relative to the September 29, 2005, compensable low back injury. While the change of treating physician order was entered on May 31, 2006, designating Dr. Chakales as his authorized treating physician the claimant was not seen by Dr. Chakales until July 5, 2006. During the August 23, 2006, Dr. Chakales released the claimant to return unrestricted work. At the time of a September 20, 2006, visit, Dr. Chakales concluded that the claimant could continue the same level of activity pending the results of planned tests.

Following the results of the October 2006, diagnostic studies, Dr. Chakales recommended surgery to address the claimant's diagnosis of lumbar disc syndrom with internal disc disruption, L4-5, L5-S1, with lumbar instability. In his November 21, 2006, correspondence to respondent, after reciting the history of the claimant's injury, as well as the results of the various diagnostic studies, Dr. Chakales noted that the claimant "is disabled".

In workers' compensation law the employer takes the employee as he finds him, and employment circumstances that aggravated pre-existing conditions are compensable. *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W.2d 64 (1990). It is undisputed that the claimant was capable of, and did perform his assigned job duties from the time of his

employment until the August 1, 2000, compensable accident. Further, following his release to return to work after recovering from the August 1, 2000, accident, claimant continued discharging assigned job duties until the September 29, 2005, compensable injury. 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).

Arkansas Code Annotated §11-9-508 (a) (Repl. 2002), mandates that the employer 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 instant claim, the claimant underwent the recommended surgical procedure on March 1, 2007, and provided testimony regarding the benefits obtained from the procedure although he was in a recuperative posture at the time of the March 14, 2007, hearing. The evidence preponderates that the surgical procedure as recommended by Dr. Chakales, was reasonably necessary in connection with the claimant's September 29, 2005, compensable injury. Respondent has controverted claimant's treatment under the care of Dr. Chakales, to include the surgical procedure.

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 relative to the compensable injury. *Arkansas State Highway Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). In the instant claim,

respondent ceased the payment of temporary total disability benefits to the claimant on July 28, 2006. Dr. Chakales had been the claimant's authorized treating physician since May 31, 2006. The claimant was initially seen by Dr. Chakales on July 5, 2005. During a July 26, 2006, visit, Dr. Chakales released the claimant to return to work on a "trial and error basis". The claimant was not released by Dr. Chakales to return to unrestricted work until August 23, 2006.

While certificate authored by Dr. Chakales regarding the claimant on August 23, 2006, noted that the claimant could return to "unrestricted work" as of that date, the narrative report relative to the visit reflects options for further medical treatment to include epidural steroid injection, a provocative discogram, and possible surgery. Subsequent action by Dr. Chakales relative to the course of claimant's medical treatment under his care substantiates the contention for the claimant he remained within his healing period and totally incapacitated from gainful employment. *Superior Industries v. Thomaston*, 72 Ark App. 7, 32 S.W.3d 53 (2000). The evidence preponderates that the claimant's condition had not stabilized and that he was not as far restored as the permanent nature of his injury would permit as of July 28, 2006. Accordingly, temporary total disability benefits should not have been stopped as of July 28, 2006. *Clairdy v. The Lilly Co.*, 95 Ark. App. 94, ___ S.W.3d ___ (2006). Respondent has controverted the payment of temporary total disability benefits subsequent to July 28, 2006.

AWARD

Respondent is herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly rate of \$466.00, for the period beginning September 30, 2005, and continuing through the end of his healing period, a date to be determined, as a result of his compensable injury of September 29, 2005. Said sums accrued shall be paid in lump without

discount. Respondent may claim credit for sums heretofore paid toward the afore obligation.

Respondent is further ordered and directed to pay all reasonably related hospital, medical, nursing, and other apparatus expenses in connection with the treatment of the claimant's compensable injury of September 29, 2005, to include medical related travel, pursuant to Ark. Code Ann. §11-9-508.

Maximum attorney fees are herein awarded to the claimant's attorney 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