

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F610626 (09/01/06) & F505785 (08/10/00)

ROY E. GREEN, EMPLOYEE	CLAIMANT
ALLEN ENGINEERING CORP., EMPLOYER	RESPONDENT #1
CINCINNATI INSURANCE CO., CARRIER	RESPONDENT #1
FREMONT COMPENSATION/PROPERTY & GUARANTY FUND	RESPONDENT #2
SECOND INJURY FUND	RESPONDENT #3

OPINION FILED OCTOBER 4, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 3, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE JIM R. BURTON, Attorney at Law, Jonesboro, Arkansas.

Respondents #1 represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE JEREMY SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

Respondent #3 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claims to determine the claimant's entitlement to workers' compensation benefits. On June 19, 2007, a pre-hearing conference was conducted in these claims, 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 same. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Roy Green, the claimant, coupled with the deposition testimony of Dr. Wayne L. Bruffett and Dr. Butchaiah Garlapati, along with medical reports and other documents comprise the record in this claim. With the primary issue being one of compensability - aggravation versus recurrence and the issue of wage loss being reserved, the appearance of Respondent #3, the Second Injury Fund, was waived at this stage.

DISCUSSION

Roy E. Green, the claimant, with a date of birth of March 14, 1943, making him 64 years old, commenced his employment with respondents on January 5, 1998. Educationally, the claimant graduated high school in 1961, obtained a Bachelor of Arts Degree from Central Michigan University and Master's Degree in Fine Arts from the University of Hawaii. With the afore degree the claimant became a scene designer and technical director for the Des Moines Community Playhouse where he remained employed for approximately eight (8) years.

Claimant later became self-employed while still in Des Moines, Iowa remodeling and new home construction. Claimant eventually owned a commercial roofing with another individual. Ultimately, claimant owned a commercial class business along with the construction business and property which he rented. In 1990, claimant sold the construction business and moved to Arkansas.

The claimant's wife opened a dance studio in Paragould. Regarding his activities when he moved to Arkansas, the testimony of the claimant reflects that they were confined to

recreational fishing and hunting for five to six years. When his wife's dance studio burned down claimant built her an new one. Claimant lived off the money he made from his businesses. Claimant became acquainted with Dwayne Allen, the owner of respondent-employer, while working with him on a committee to restore the old courthouse in Paragould. He was later offered and accepted employment.

Respondent-employer is a construction company that build buildings, restore courthouses and does some concrete work. Claimant characterized his work with respondents as 80/20 supervisory versus office work. In describing his work in the employment of respondents, claimant testified:

Well, Allen Engineering is actually a manufacturing company and they have a construction division and I ran that construction division. And I ran it as if I was still working for myself. The owner just turned it over to me and said do it. So I bid the jobs and hired the people and supervised the jobs and basically tried to go from one job to another rather than have a whole bunch of jobs stacked up. But I would be actually supervising the men and getting the equipment there and bidding on the jobs. (T.16).

The claimant performed physical manual labor activities along with the men that he supervised in discharging his job duties. Having suffered a compensable back injury in August 2000, which resulted in surgery the credible testimony of the claimant reflects that he performed very little lifting and carrying physical activities once he returned to work following the injury. The evidence in the record reflects that prior to his August 10, 2000, compensable back injury claimant did not experience any limitations or restrictions on his physical activities relative to his employment.

Claimant's testimony reflects, relative to his employment activities for respondent-employer in 1998 when he commenced his employment:

Well, from a physical standpoint, basically I was supervising the job. Once I'd get us the job, I'd be the superintendent or the supervisor of the job. (CX. #1, p. 15).

Claimant was a working superintendent who reported only to the owner of respondent-employer, Dwayne Allen. Claimant continued in the employment of respondent-employer until his termination on September 30, 2006. Claimant explained that his salary was continued through October 7, 2006, however his employment was terminated because he was unable to work. Claimant acknowledged requesting some type of administrative leave.

The claimant sustained the initial work-related injury to his back on August 10, 2000. In the describing the mechanics of the initial injury claimant's testimony reflects:

I lifted at an I-beam like this, picked up and turned and sat it down like that, and I was - - it was just that simple. (CX. #1, p. 26).

Claimant testified that his complaint growing out of the accident was in the front of his right leg down to his foot. Claimant also noted pain in his back.

The claimant ultimately came under the care of Dr. Wayne Bruffett, a Little Rock orthopedic surgeon, relative to his August 10, 2000, low back injury. On October 26, 2000, Dr. Bruffett performed surgery in connection with the August 10, 2000, back injury. Regarding the results of the first surgery claimant testified:

Well, I started off doing really well. I don't know what happened, but I was going to this physical therapist over in Paragould, and I felt like what they were having me do was reinjuring my back. I was trying, you know, the best to do what they told me to do, and finally, "Wait a minute, this really is making me worse rather than better". (CX. #1, p. 30).

Claimant noted that the increased pain following the physical therapy was located in the same place as the initial injury. Claimant underwent a second surgery under the care of Dr. Bruffett on

February 1, 2001. The claimant also underwent another round of physical therapy following the second surgery. Claimant testified that he did not return to work until after the pain pump was in place, estimating he was totally off work for approximately two (2) years from the two low back surgeries.

Claimant's pain pump was put in place on May 17, 2002. Prior to the pain pump claimant experienced excruciating pain in his back, right leg and foot. Claimant noted that with the exception of laying down every activity - - walking standing, sitting - - aggravated the pain. Claimant noted a gradual improvement in his pain complaints following the placement of the pain pump, returning to work part-time almost immediately after he got the pump.

In June 2005, claimant was continuing to work part-time. Claimant received temporary partial disability benefits through November or December 2005. In June 2005, claimant was seen by Dr. Braden and assessed with a 29% permanent physical impairment to the body as a whole. Claimant testified that at the time of the June 2005, visit to Dr. Braden he thought he was doing fine.(CX. #1, p. 45-46).

Claimant asserts that by 2006 he was back to somewhat normal activities:

Oh, by 2006 I was back to normal. That was - - I was back to my normal abilities in 2005. In fact, I think he - - well, he gave me a \$10,000 pay raise for 2006, so - -

* * *

Well, as far - - no, I mean, I never - - you know, I mean, I will have that injury forever, I guess. I just learned to adapt to dealing with it. I'm getting used to the pain and the pain pump medication. After I got off of the Dilaudid, it made a dramatic difference because I had my brain back. When I was - - the Dilaudid only works in your brain, and this new stuff works some other way. When I was on the Dilaudid, I mean, my wife will testify, I'd fall asleep at the stoplight, but after I got off of the Dilaudid

and onto this Prialt, then I really made a dramatic improvement as far as my mental, physical ability to get around. (CX. #1, p. 38-39).

The testimony of the claimant reflects that he was not having any pain in his back before September 2006. Claimant concedes that he still had pain in his right leg in the same area, however “nothing dramatic”. Claimant had his prescriptions filled at City Drug relative to the August 10, 2000, injury. The testimony of the claimant reflects that following the September 1, 2006, incident he had prescriptions associated with that treatment filled at the Walgreens Store, in order to keep them separate. (CX. #1, p. 39-40).

The testimony of the claimant reflects that his numerous visits to Dr. Valentine and Dr. Garlapati following the placement of the pain pump was the product of the efforts of the physicians to adjust the dosage of his pain medicine and not necessarily because he was reporting increase pain symptoms. (CX. #1, p. 41). In explaining why he was reporting an increase in pain in June 2006 in light of the fact that he doing well with the use of the pain pump, claimant testified:

Why was I - - so that they would turn the pain pump up, move The pain medication up, and starting basically in 2005, I mean, I was back to doing what I did when I was - - or was trying to do what I used to do as a young man, and a lot of this pain that you’re talking about is because I was trying to do too much. (CX. #1, p. 43).

In citing examples of the afore, claimant’s testimony reflects:

Well, just finishing the jobs. I mean, I got a lot more active as far as the amount of time I spent on the jobsites. The jobsites were very irregular areas, and I just spent more time doing that, but it caused me a lot more pain while I was doing it. (CX #1, p. 43).

After returning to full-time work status claimant testified that he did not take off work due to pain nor did he consider returning to a part-time status because of the pain. Claimant’s testimony

reflects that at that point, July 2006, he did not do anything except work and go home. Further, claimant acknowledged that a lot of days he would be exhausted by the end of the day because of his pain. Claimant attributes his symptoms in August 2006, of an increase in pain along with nausea, ringing of the ears, and headache as a side effect of the Prialt which was increased too quickly.

Claimant concedes that he never returned to his pre-injury level of work following the August 10, 2000, injury and treatment, however offered that he was “real close to being back to where” he was before he got hurt by September 1, 2006. In describing his level of activity leading up to the September 1, 2006, date, the claimant’s testimony reflects that he was able to go out to the job sites and walk around the sites carefully, and to operate equipment - - sky track, Backhoes, Bobcats. Claimant added:

Right. In fact our manufacturing building burned down and we rebuilt a building that’s I don’t know how many thousands of square feet, 50 foot high. And I was the guy that ran all the equipment to get the steel up there. (T. 23).

Claimant also returned to some climbing activities, thought not tall ladders or roofs.

With respect to the September 1, 2006, date, the testimony of the claimant reflects that he arrived at work at approximately 6:30 a.m. Claimant testified that respondent-employer was bidding on several jobs that week. Claimant added that the was in the office doing paperwork until approximately 11:00 a.m. The testimony of the claimant reflects that he, the owner of the company-Dwayne Allen, and another contractor-Jack Pillow drove to Piggott, Arkansas (CX. #1, p. 47).

Regarding the mechanics of the September 1, 2006, accident, claimant testified:

I was in Piggott, Arkansas. And we were looking at a site to bid on a job for a airport hanger up there. And we were there to meet another subcontractor. And just incidentally the owner of the company is from Piggott, Arkansas so he wanted to go too. So he drove up there and bought us lunch and we met this other contractor out at the site. And I was on my phone and they got out and I went to get out. He had one of those, I don't know how to explain it, a Cadillac SUV that has an extra step. And when you get into it you step on the step and get in the thing but when you get out I know now you don't step on that step. But I did step on that step and my toe fell off and I just landed in a pile on the ground. (T. 24-25).

Claimant testified that he fell a distance of about three feet hard on his buttock onto the asphalt surface. The testimony of the claimant reflects that he was hurting and unable to get up off the surface. Claimant concedes that he was never free from pain following the August 10, 2000, injury.

The testimony of the claimant reflects that prior to September 1, 2006, the primary focus or areas of persistent pain that he lived with was the pain down his right leg. Claimant maintains that prior to the September 1, 2006, date the pain in his right leg was alleviated by the pain pump. Claimant described the change in the focus of his pain following the September 1, 2006, fall:

Yeah. It was massive down my right leg, my left leg and virtually my entire back. It was just, it was like all the bones in my body had gotten rearranged. (T. 26).

Claimant acknowledged that he had some inflammation in his left leg three to four years earlier however it went away after he was given an injection and never returned until after the September 1, 2006, accident. Claimant asserts that his symptoms following the September 1, 2006, incident have included pain in his back and down the back of his right leg. Claimant testified that he also had symptoms in his left leg following the September 1, 2006, accident. Claimant described his left leg symptoms as feeling like it "is waking up or tingling". (CX. #1, p.

72). Claimant noted that the symptoms following the August 2000, injury was primarily pain down the front of his right leg and some initial back pain. During the course of his March 20, 2007, deposition claimant described his symptoms growing out of the September 1, 2006, accident in greater details noting that he landed on surface on “mainly my right side” and that “my back and right hip were just - - I mean, it was just excruciating pain”. (CX. #1, p. 48- 49).

The testimony of the claimant reflects that following the September 1, 2006, fall, the first doctor that he was Dr. Shedd, who assessed his complaint as a back strain. Claimant testified regarding the assessment:

I didn't know what it meant at that point, and he went on and he stressed that same point again later in the conversation, because I said - - he said, “Since your in a supervisory capacity, you can go ahead and go back to work,” and I said, “I could barely walk to get in here. There's no way I could go back to work.” And he said, “okay.” He says, “I'm putting this down here as a back strain, go ahead and take a week off.” So, I did. I didn't know there was any problem with this at all until the company called and said they're going to refuse to pay for the visit to Bruffett's and Garlapati's office. (CX. #1, p. 59).

The testimony of the claimant reflects that there was something about the September 1, 2006, accident that distinguished it from the symptoms relative to the August 10, 2000, injury and treatment. Claimant testified, regarding the afore:

Well, yeah, this was a whole new situation. It was a whole new injury. It wasn't just - - I mean, I guess the only way I can explain it is that before this September 1st injury, I hurt basically in one leg. When this was over with, I hurt in the back of that leg, in my back, and my other leg. Now, I know - - I don't know how to tell you what was causing the pain because I'm not a doctor, but before the injury, I had pain in one place. After the fall, I had severe pains in at least four areas. (CX. #1, p. 73).

Claimant maintains that from a physical capability standpoint since the September 1, 2006, accident he is unable to anything employment-wise. Claimant noted that prior to the September

1, 2006, accident he was running a construction company, and now he can barely walk around the block. Claimant's testimony reflects that he has not sought work since the September 1, 2006, accident because he is not physically able to work.

Prior to the September 1, 2006, accident, the claimant drove a pick-up truck daily everywhere while discharging his employment duties. Since the September 1, 2006, accident claimant does not drive. The testimony of the claimant reflects that prior to the September 1, 2006, he was able to lift 20 to 30 pounds without causing himself any kind of over-exertion. Regarding the amount he would be able to lift since the September 1, 2006, accident, claimant responded, "Probably none. I mean, it about kills me to tie my shoes". (CX. #1, p. 75). In explaining his assessment of having returned to a level of functionally employment-wise in 2005 and 2006, claimant's testimony reflects:

Part of it was that I was back to working 12 hours a day, I guess. I'd run the job for eight hours, and then figure jobs for four hours. I was able to spend a lot more time at it, and I was able to get around the jobsites like I used to. (CX. #1, p. 80-81).

Claimant estimates that he was at 90 percent of his pre-injury physical capabilities at the time of the September 1, 2006, accident. Claimant acknowledged the while working the 12-hour days in 2005 and 2006 he would have to take some of the breakthrough medications maybe once a week after getting home from work.

Regarding further medical treatment, claimant testified the he feels that he has a bad disk in his back, just as he did with the August 10, 2000, injury and that he will require surgery to address it if he going to be able to function. Claimant attributes the afore to the September 1, 2006, accident. (CX. #1, p. 76-77). The testimony of the claimant reflects that since the

September 1, 2006, accident, he has difficulty moving about. Claimant noted that since September 1, 2006, he has basically been watching TV and laying on the couch.

Claimant acknowledged that his first MRI scan in connection with the August 10, 2000, accident disclosed the presence of slight scoliosis. The claimant was seen by Dr. Ron Schechter relative to the August 10, 2000, accident. The medical records reflect that he claimant relayed complaints of pain in both legs. The testimony of the claimant reflects that following the two (2) surgeries under the care of Dr. Bruffett, trial of epidurals, and therapy he was referred to Dr. Valentine. Following Dr. Valentine's departure the claimant came under the care and treatment of Dr. Garlapati. Claimant concedes that Dr. Valentine explained that because of his two (2) surgeries he had chronic L4 nerve root pain that would be present down his right leg for the rest of his life. Claimant noted that the pain was down the front of the right leg.

Regarding the course of his medical treatment under the care of Dr. Valentine, claimant acknowledged that an effort was tried with a spinal cord stimulator. Claimant assessed the afore as a unmitigated disaster. Later, Dr. Valentine recommended the pain pump, which would last for five to six years before having to be replaced. The pump was put in place in 2002. Initially Morphine was the pain medicine used in the pump. The medicine was later changed to Dilaudid, a Hydromophine. Finally, the medicine was change out to Prialt.

The testimony of the claimant reflects that he normally went to the office of Dr. Garlapati to get the pump refilled, at which time the dosage would be increased. Claimant denies that he requested an increase in the dosage administered by the pain pump most every time during the years 2003 and 2004 when he went into the office of Dr. Garlapati:

I wasn't asking for an increase. When the pump is put in, they

put your, they start you out at a very low dose. And they gradually raise the dosage, each time they refill the pump. Or if you're in real bad pain, they'll raise it a little bit more.

When they got to a certain point with the first drug I couldn't urinate anymore. So that's why the pump, that's why it was changed from, I forgot the name of the first drug to the second drug to the Dilaudid. (T. 44).

Claimant pointed out that the medical records regarding his visits Dr. Garlapati do not reflect that he requested an increase in the dosage, but rather that the pump was increased. Claimant explained that he did not have to ask for an increase in the pump:

No, I didn't have to ask because they were trying to get it up to the level - - the initial dosage was supposed to take care of 50% of the pain and then they would gradually raise it until - - (T. 45).

When questioned regarding what may have caused his pain level to increase in April 2004, claimant responded:

Well, somewhere along the line, I'm really bad with dates but the chemicals they put in there to refill the pump are mixed up at the drug store so there are different recipes. And at some point they had doubled the concentration of the chemical and forgot to decrease my dosage. And so I ended up in a whole lot of pain and in the emergency room. So, it's unclear to me when all that happened. (T. 51).

Claimant disputes the testimony of Dr. Garlapati regarding the amount of increase in the dosage of the pain medication from the pain pump as reflected in the deposition of same. (T. 59).

Claimant testified:

Well, first of all it wasn't Dr. Garlapati that said any of this. It was a nurse named Marie. And I know that this Prialt has never been turned up more than 5% before this injury [September 1, 2006]. Now that was my understanding of what was going on. Maybe they were turning it up higher. But they weren't telling me that. (T. 59).

Claimant's testimony reflects that since the pump was turned up 30% following the September 1,

2006, injury, the pain from the first injury disappeared. (T. 60).

After filing for Social Security retirement benefits, claimant was approved and received his first check in July 2007. Claimant noted that he filed for Social Security benefits out of economic necessity. Regarding the impact of his receipt of Social Security retirement benefits on his desire to return to work, claimant testified:

My father retired when he was 76 and that lasted for one day, and he continues to work at 84. I have the same mentality. I will do something again. But it was a matter of financial survival, I guess you would say. (T. 60-61).

Claimant returned to Dr. Wayne L. Bruffett following the September 1, 2006, accident.

Claimant cited errors or omissions in the March 30, 2007, deposition of Dr. Bruffett:

On my initial visit with him and my initial surgeries on the first injury, he would whack my knee with a rubber hammer and my right leg didn't work. On this visit he leaves out the fact that he whacked both knees and neither one of them work now. And somewhere in there it says that my family doctor diagnosed my problem as a back strain. And that's not true either. (T. 61).

Claimant noted the Dr. Shedd, the company doctor, assessed his complaint as a back strain.

Claimant maintains that while he returned to Dr. Garlapati on September 29, 2006, to have the pump refilled, he felt as though he had seen him earlier following the September 1, 2006, accident and received the steroid injection because of the increased pain growing out of the accident. Claimant concedes that the steroid injections were in his lower back. Claimant maintains that the pain level following the September 1, 2006, accident was greater than before the accident.

Claimant testified that he was uncertain why he was seen by Dr. Garlapati in November 2006. Claimant explained:

I can't - - I don't know what it was for. He actually had me come to his office. He was very nervous about his deposition and made me come down there and talk to him that week before that so they didn't do anything that time. (T. 65).

Claimant denies that he was calling Dr. Garlapati's office and asking him to say that the latest injury was an aggravation of the old injury. Claimant testified regarding the afore:

No. I told Marie this. I didn't tell her to keep saying it. I told her that I didn't think it was an aggravation of an old injury. What dose this say? (T. 65).

Claimant attributes the May 2007 recommendation of Dr. Garlapati to have the pain pump replaced to August 10, 2000, injury. During the March 20, 2007, deposition claimant testified regarding his most recent contact with Dr. Garlapati and the assessment of his back complaint:

No. The appointment that I have at the end of the month, I think it's to refill the pump, but at that time we were going to, I guess, have some kind of discussion about - - you know, we were going to see what the effects of these steroids were and see where we're going to go from there. The last time I talked to him, I asked him what we were going to do next if the steroid doesn't work, and he just shook his head like there wasn't anything more he could do. I said, "Why is that?" and he said, "Your back's shot."

Huh-uh, no. That was part of it, but he also told me I was seriously injured again. I mean, he's told me that I was - - had sustained some injuries from falling out of this truck. It wasn't all just - - because we'd gotten to the point with my first injury where I was really doing well. I was back to work. They gave me a pay raise and all that. (CX. #1, p. 23-24).

Regarding his contact with Dr. Bruffett subsequent to the September 1, 2006, accident, and any treatment recommendation claimant's testimony reflects:

Well, he said that - - about the closest thing I could get to an answer out of him was he says that - - well, I can't remember exactly what all he said. Dr. Bruffett was very nervous when I was there, and he was very noncommittal about everything, including I asked him for a note to be off work, and which he initially refused to give me because

he said, "I'm not your treating physician." He didn't have my records, and he acted like, I don't know, "What are you doing here? I've already operated on you twice, and neither one of them worked," and just a little odd kind of conversation we had.

Yes, he said that. He said, "I could operate on you again if you want me to."

The next thing, I asked him flat out, I said, "Have I been injured? Can you tell if I've been injured again?" and he said, "Yeah, I can say that." (CX. #1, p. 24-25).

Claimant maintains that Dr. Bruffett spent most of the time talking about the scoliosis that had developed in his back since the last surgery:

I asked him what needed to be done about it, and he said, "Well, there isn't much we can do about that. It's about as bad as it's ever going to get." And he also told me that the scoliosis probably wasn't affecting the nerve, because when the bone was turned, the holes get bigger so they're not rubbing on the nerve so bad. So, he said the scoliosis is not causing my pain. (CX. #1, p. 25-26).

Claimant maintains that Dr. Bruffett attributed his pain to "damaged nerves". Claimant denies that Dr. Bruffett wanted to perform surgery:

No, he said he could do some surgery to relieve some of the pain. He said it would be very risky especially with the pain pump in there and that he was real reluctant to do it but if I insisted he would do more surgery. (T. 66).

Claimant acknowledged that he continued to work for a short period of time following the September 1, 2006, accident. Specifically, claimant estimates that over the two day period following the accident he worked a total of four hours. (T. 67). During cross-examination claimant described his pain and its location:

It goes across here below my belt and then right down. And the worse pain is right in my rear end right there - -

And then it continues on down my left leg. It gets weaker as it gets over here but then the front of my left leg has pain and tingling in it. It's not nearly as severe as this left leg and hip or whatever you call this is just disabling. The other thing is more of an aggravation than anything else. (T. 68).

On questioning by the attorney for respondent #1 the claimant testified that he underwent two (2) surgeries in connection with the August 10, 2000, injury. The first surgery was performed shortly after the injury and the second surgery on February 1, 2001, at L4-5. Further, claimant confirmed that following the second surgery he experienced pain in his right side, the right side of his hip as well as pain down the front of his right leg down into his foot. Claimant denied having pain down the back of his right leg in connection with the August 10, 2000, injury. Further, claimant denied having any pain symptoms in his left leg in conjunction with the August 10, 2000, injury; however the claimant concedes that while undergoing therapy he relayed complaints of some weakness in his legs. (T. 72). Claimant also denies experiencing low back pain in connection with the August 10, 2000, injury.

Claimant's testimony reflects that within a few months of the second surgery growing out of the August 10, 2000, injury, he returned to the workplace of respondent-employer to try to do some work in some capacity, although he was not successful. There is not a dispute regarding the course of the claimant's medical treatment relative to the August 10, 2000, injury, which included two surgeries, the placement and removal of a stimulator, and finally the surgical placement of a pain pump.

The pain pump was initially filled with Morphine, a narcotic, which resulted in adverse side effects. The medication was later changed to Dilaudid.. With each change over of medication there were corresponding periodic adjustments of medication that had to be made

until a comfortable level of dosage in relation to the claimant's symptoms was reached. The testimony of the claimant reflects that after the placement of the pain pump in 2002, over the years of 2003 and 2004 he was trying to increase his level of functionality at work by doing more and staying longer since he was feeling better due to the effects of the pain pump. Further, claimant acknowledged that occasionally he overdid it and would use prescription medication to address the resulting symptoms:

Yes. They actually give me a prescription and they called it breakthrough pain. And if the pump wasn't, you know, if I was really having some bad pain on a particular day I would take this, I forget what it was, Percocet or Hydrocodone or something, I could take one of them to help me with what they called breakthrough pain. (T. 76).

Claimant did not use the breakthrough medication on a daily or regular basis, explaining:

I didn't, well I didn't want to first of all because I had experienced withdrawal from narcotic. And second of all, I really wanted to get better without that stuff. (T. 76).

The medical records reflect entries of the claimant's dosage, via the pain pump, being increased and decreased over the years.

The claimant's pain pump medication was finally changed over to Prialt, which also required adjustment. Claimant's testimony reflects regarding the afore:

Well, not, well functionally when I first got the Prialt it was such a low level that I was back to being crippled again, practically. But I had my brain back. When you take Dilaudid, you don't realize it until after you get off of it but it had control of your brain and the great relief for me immediately after being on the Prialt was that I had my brain back, but physically I was just really weak. The Dilaudid I was, I was bulletproof on the Dilaudid. (T. 79-80).

The evidence reflects that the Prialt was continuously adjusted over the fall of 2005 and into 2006. The claimant testified that his functional capabilities regarding what he was able to do at

work also improved. Specifically, claimant testified that he was getting better all the time. The testimony of the claimant reflects that by the summer of 2006 he usually worked a 12-hour day and a half day on Saturday.

Claimant denies that he had any other accidents or injuries between August 10, 2000, and September 1, 2006. Claimant's testimony reflects that since the September 1, 2006, accident his pain level has been such that he is physically incapacitated.

The evidence in the record reflects that prior to the September 1, 2006, accident the claimant has last been seen at Dr. Garlapati's office July 28, 2006, for examination of the pain pump and dosage change. The claimant was next seen by Dr. Garlapati on September 28, 2006. The afore visit was a scheduled visit during which there was a refill of the medication.

There is not a dispute regarding the occurrence or the mechanics of the claimant's September 1, 2006, accidental fall. The record reflects abundant testimony regarding the symptoms that the claimant attributes to the September 1, 2006, accident, as well as a distinction of those symptoms from those growing out of the August 10, 2000, accident. (86-87).

Claimant concedes that following the September 1, 2006, accident he went on medical leave and was ultimately laid off by respondent-employer in December 2006. Claimant last received payment from respondent-employer in late September or early October 2006. The testimony of the claimant reflects that he has been physically unable to work since he last work for respondent in September 2006. Claimant testified:

No. In fact my left leg continues, to me, is getting worse to the point where I can barely climb stairs anymore.

* * *

Well, they stopped letting me take care of my grandchildren because what it involved was, they would drop them off and my grandchild would play his game and I would pass out from the narcotics I was on so I wasn't doing much babysitting. (T. 91).

During re-direct examination, claimant noted that the drawings illustrating the presence of pain displayed pain in both legs and the back for the first time after the September 1, 2006, incident/accident. (JX. #1, p. 366). Further, the medical reflects a September 7, 2006, entry in the clinic notes of Dr. Garlapati regarding a telephone call made by the claimant and received by the registered nurse, Marie. (JX. #1, p. 333). Claimant confirmed that in September 2006, when he was seen by Dr. Garlapati following the September 1, 2006, accident he had muscle spasms in his back:

Yeah, it, I don't know how to describe it. My whole lower part of my back was just a maze of pain. And I even, two or three days after that, something swelled up in there and came out the side, came right out of the side here and it went back away. (T. 97-98).

On March 30, 2007, the parties obtained the testimony of Dr. Wayne L. Bruffett by deposition. The evidence in the record reflects that the claimant was seen initially seen by Dr. Bruffett on October 4, 2000, pursuant to a referral of Dr. Ron Schecter, a Paragould orthopedic surgeon, relative to the August 10, 2000, compensable back injury. At the time of the initial October 4, 2000, visit, Dr. Bruffett testified that the claimant had symptoms of pain down the front of his right into his shin along with numbness and tingling with his pain level at 8-9 out of 10. Dr. Bruffett confirmed the claimant's testimony regarding the lack of a reflex in the right knee during the physical examination on October 4, 2000.

The testimony of Dr. Bruffett reflects that during the October 4, 2000, visit x-rays were obtained of the claimant's spine which disclosed the presence of lateral listhesis at L3-4. Dr.

Bruffett explained that the lateral listhesis at L3-4 is where the L3 and the L4 have shifted on each other to the side. Dr. Bruffett testified, regarding the afore, that it was part of the scoliosis.

Regarding the kind of problems caused by the scoliosis, Dr. Bruffett's testimony reflects:

Some people are asymptomatic from it. Some people have back pain from it. If it's encroaching on a nerve or irritating a nerve, it can cause pain in the distribution of the nerve. (JX. #2, p. 9).

On October 26, 2000, claimant underwent surgery for a foraminal disk herniation of L4-5 under the care of Dr. Bruffett, relative to the August 10, 2000, compensable back injury.

Claimant underwent an MRI on December 20, 2000. The radiology report regarding the study disclosed postoperative changes at L5-S1, protrusion of the disk to the right at L4-5, no frank disk herniation

X-rays obtained on January 12, 2001, disclosed some narrowing at L4-5 level, the level of the surgery, as well as some narrowing in the foramen where the nerve exits. In addressing a collapse on the right side, as reflected in the January 12, 2001, x-rays of the claimant, Dr.

Bruffett testified:

Where the two vertebrae now become down closer together and kind of collapse down. It's due to loss of integrity of the disk or the shock absorber between them. (JX. #2, p. 12).

On January 31, 2001, claimant underwent another MRI of his lumbar spine which disclosed degenerative disk disease from L1 through L5-S1. Dr. Bruffett determined from the MRI scan the present of a recurrent disk at L4-5 and stenosis at L5-S1.

On February 1, 2001, the claimant underwent a second surgery under the care of Dr. Bruffett. During the surgery several free fragments of disc material that had herniated and were filling the foramen at L4-5 were located and removed. Further, Dr. Bruffett testified regarding the

presence of scar tissue and its disposition during the February 1, 2001, surgery:

I dissected through that, but I didn't dissect all that off the nerve because that's basically impossible to do. (JX. #2, p. 16).

The claimant was seen in followup by Dr. Bruffett on February 16, 2001. Claimant was provided medication by Dr. Bruffett to address his pain complaints and referred to physical therapy.

The record reflects that during a August 16, 2001, visit to Dr. Bruffett claimant relayed complaints of persistent pain down the right leg and numbness. In addressing the basis for the persistent pain and leg numbness Dr. Bruffett testified:

In this report, I didn't really comment on the cause of those persistent symptoms, I don't think, but I can tell you from experience, the place where his disk herniation was out in the foramen is - -
- - like I said, it's not a traditional sort of place for the disk to herniate. The approach for it is a little different. You have to split the muscle of the back to get to that far lateral part of the foramen, and part of the nerve that comes right through there called the dorsal root ganglion, which is basically the cell body for the nerve, it's like the most sensitive structure probably in your body. So patients that have disk herniations in a far lateral position, that are around that dorsal root ganglion, tend to have more severe pain down their leg. They have a more difficult operative exposure. They have a longer recovery time, and they can have more chronic symptoms just because sometimes the nerve has trouble recovering from that sort of insult, especially when it happens twice. So he just unfortunately had a bad disk herniation, and then it ruptured again, and he had to have two surgeries in a bad spot, and my feeling was that his nerve was probably just irritated from all those things, and it could quite possibly be a chronic sort of problem. (JX. #2, p. 18).

Following a August 16, 2001, visit by the claimant, Dr. Bruffett decided to refer him to Dr. Robert Valentine, a Little Rock pain specialist, due to the claimant's persistent and continuing symptoms of pain. (JX. #2, p. 20).

In his January 12, 2002, to the workers' compensation carrier, Dr. Valentine noted that the claimant had failed two episodes of back surgery, epidural steroid injections, nerve root

injections, opiate pain medications, nonsteroidal anti-inflammatories, anti-epileptic medicines, antidepressants, and physical therapy. Dr. Bruffett concurred with the afore assessment. Dr. Valentine put a morphine pump in the claimant. Dr. Bruffett described the morphine pump as “sort of a last ditch effort to manage” someone with failed back syndrome. In describing the specifics of a morphine pump, Dr. Bruffett’s testimony reflects:

It’s a pump that goes in the thecal sac, like we described earlier, that contains the nerves or the neural structures in the spine, and it’s implanted with a catheter that goes into that sac and runs up a ways. Then there’s basically a reservoir under the nerves, and it’s refilled periodically and monitored. (JX. #2, p. 22).

In September 2002, the medicine in the claimant’s pump was changed from morphine to Dilaudid, a hydromorphone which is a strong narcotic. Dr. Bruffett did not see the claimant in 2002, 2003, and 2004. Dr. Bruffett noted that he does not follow a lot of chronic pain patients.

In June 2005, the claimant was seen by Dr. Terence Braden for a medical evaluation. The medical record relative to the evaluation reflects the claimant’s current medications as OxyContin, Valium, and Trazodone as well as the pain pump. The record also reflects that the claimant walked with an antalgic gait [limp] in the right lower extremity.

The evidence in the record reflects that following the referral to Dr. Valentine in 2001, the claimant was not again seen by Dr. Bruffett until November 15, 2006, which was subsequent to the September 1, 2006, fall. Regarding the November 15, 2006, visit with the claimant, Dr. Bruffett testified:

We just kind of caught up on the fact that he had a pain pump placed. He told me they converted it to a new medication that I wasn’t really familiar with, and that he was following with Dr. Garlapati now, who basically took over Dr. Valentine’s practice. Then, in my words, he said that he was doing - - that he was, quote, “doing reasonably well

until 9/1/2006.” (JX. #2, p. 25-26).

Dr. Bruffett was provided the pump reports of Dr. Garlapati relative to the claimant, and responded to a question by the attorney for respondents #1:

I guess what I was getting to is that in your question you said that he was asking them to increase it. That’s not what this really states. Maybe that’s exactly what was happening, but it looks to me like he was complaining of more pain, I can agree with that, and that his pump was increased. Now, whether that was a patient-driven increase or a doctor-driven increase, this doesn’t really indicate. I just wanted to say that. (JX. #2, p. 26-27).

During the November 15, 2006, visit of the claimant Dr. Bruffett obtained some x-rays with the claimant standing, and then reviewed the claimant’s MRI that he bought with him. The MRI disclosed degenerative disk disease at T12 through L5-S1, “basically . . . wear and tear changes”. Regarding the moderate stenosis at L2-3, L3-4, L4-5, and L5-S1, Dr. Bruffett noted that those were mostly reflective of an increase in degenerative changes, bone spurring, thickened ligaments and could occur over time. Dr. Bruffett did not document any symptoms relative to a small left paracentral disk herniation at T12-L1, that was noted on the MRI.

Dr. Bruffett was asked to compare the last MRI he had perform on the claimant on January 31, 2001, to the October 26, 2006, MRI. Dr. Bruffett testified:

I’ll just tell you as sort of a preference, when you all talk about comparing MRI’s and we’re looking at papers - - -

- - that’s not really in my opinion comparing MRI’s. Basically what I’m comparing is Dr. Alexander’s reading of the MRI in January ‘01 to his reading in October of ‘06, and it is interesting that the same radiologist read both of these. That’s kind of neat, but, anyway, the general difference is it appears that the study done in 10 of ‘06 is much worse as far as all the changes throughout the spine from top to bottom. (JX. #2, p. 29).

Dr. Bruffett testified that he saw nothing in the changes from 2001 to 2006 that he would

attribute to any type of trauma. Dr. Bruffett's testimony reflects that the his impression of the claimant's problem during the November 2006, visit was that of severe degenerative scoliosis or bilateral listhesis, spinal stenosis - a narrowing around the nerves - and previous placement of a intrathecal pain pump. In comparing the claimant's November 15, 2006, physical to the prior examinations of 2001 and 2005, Dr. Bruffett testified:

As far as the neurologic status, yes. He had a bit of edema or some swelling in his legs when I saw him, but I don't think that's reflective of an injury or accident or other such process. (JX. #2, p. 30).

The testimony of Dr. Bruffett is corroborative of that of the claimant with respect to treatment measures discussed during the November 15, 2006, visit. Specifically, Dr. Bruffett testified:

I talked to him about basically treatment for him being either continued non-surgical treatment or consideration of surgery again. To consider surgery for him, what he'd basically have to have would be the stenosis relieved at multiple levels. He's have to have that scoliosis stabilized and try to straighten it out as best possible. He would need instrumentation and a fusion, and it would be a pretty enormous surgical undertaking. I commented with that catheter or that pump in the - - if it's an intrathecal pump, which I'm assuming it is, that can sort of complicate things, because if you dissect about that and open things up, you can have some problems with the catheter coming out - -

- - or leaking spinal fluid around it or whatever. So I told him in general terms if he could manage his pain and, you know, continue on without having any more surgery, that's what I'd recommend. (JX #2, p. 31).

Dr. Bruffett testified that he was unable to pinpoint an exact spot as the culprit of the claimant's complaints during the November 15, 2006, visit that was different from what was previously present, noting that the claimant has such diffuse widespread problems. Dr. Bruffett attributed the claimant's left leg pain to stenosis "at some level in his back". (JX. #2, p. 32). Dr. Bruffett

concluded that from 2001 to 2006, the claimant's degenerative disk disease has progressed from moderate to severe. Dr. Bruffett acknowledged that he is not an expert in chronic pain.

Dr. Bruffett testified that to some extent the degenerative changes present in the claimant's spine existed prior to the first surgery in 2000. The two surgeries performed by Dr. Bruffett, one in 2000 and one in 2001, were performed at the claimant's L4-L5 level. Prior to the November 15, 2006, visit, the claimant was last seen by Dr. Bruffett on September 27, 2001, five years earlier.

Dr. Bruffett was furnished and examined reports of the pain specialist regarding the claimant reflecting a reduction in the level of pain medication during visits of July 13, 22, 29, and September 20, 2005. Dr. Bruffett was also apprized of the change in the claimant's medication in late summer/early fall 2005, and concluded that the same would result in a period of adjustment. After being provided information regarding the level of the claimant's activity and functionality, which was consistent with the information provided by the claimant during the November 15, 2006, visit, Dr. Bruffett's testimony reflects that but for the September 1, 2006, incident he would not have expected to have seen the claimant again on November 15, 2006. (JX. #2, p. 38). Further, Dr. Bruffett testified that in his opinion the September 1, 2006, incident was the precipitating event that prompted the claimant to come see him for evaluation after five years.

A finding on the October 26, 2006, MRI scan of a small left paracentral disk herniation at T12-L1, which was not present on the earlier 2000 MRI scan. Regarding the symptomatology produced by such a finding in a patient, the testimony of Dr. Bruffett reflects:

This may be sort of a simplification, but in general terms, if the

disk herniation is irritating the nerve there, then there would be more symptoms in a nerve distribution. That's where the spinal cord ends at L1, the tip of the spinal cord. It's called the conus. So if you had significant conus symptoms from that, in other words, it's really pushing on the spinal cord, you would have problems with mostly bowel and bladder function and numbness in the perineum or between the legs and that sort of thing. If it's irritating just the L1 nerve, it would be just to the side of whatever the nerve is compressed around the groin and maybe the medial part of the thigh just a little bit. If it's not causing neural problems, it can just cause back pain, you know, just from the disk herniating back. It can make the back hurt in that region or a little bit lower.

* * *

Probably in the mid part of the low back. It's a little bit lower than the actual level typically, but back pain is sort of hard to hang your had on as opposed to a specific - - and that's why I mentioned that in my report. I mean, his scoliosis and degeneration of his disks is so widespread, that I think it would be difficult to point to one thing such as that and say, "Well, this is what's causing your back pain." Certainly, it could, but I don't think, you know, I could say that. (JX. #2, p. 40-41).

Dr. Bruffett acknowledged that the claimant's development of a new onset of pain in the low back after the September 1, 2006, incident would be consistent with the level that is associated with T12-L1.

The radiologist's finding of a T12-L1 disk herniation and the claimant's reporting of back pain in the level that's at the height of the umbilicus are consistent findings. Regarding the afore, the testimony of Dr. Bruffett reflects:

Yes. If it is on the left side, the disk herniation typically pains on the same side as well. So if this pain in the side of his back is around the level of the umbilicus and it's more left-sided, it would, you know - - that would kind of make sense, but it doesn't have to be. I mean, it can cause midline back pain as well. (JX. #2, p. 41).

Dr. Bruffett testified regarding the impact of the September 1, 2006, on the claimant's spine and symptoms:

It's hard for me to point to one structure and say, "This is what was injured with his fall." He injured something. Something made him hurt worse. He didn't come to see me just to catch up, you know. But I base that more on his history, you know. I think he's a pretty honest guy, and if he told me he was functioning pretty well and then he fell, and now he's having all this pain, something is hurting him.

But what's hard for me to say is it's this structure, or this structure, or it's that structure. That's why I've recommended that his pain be managed non-operatively, which sort of covers everything. (JX. #2, p. 44-45).

Dr. Bruffett testified that he would not have expected the claimant's current need for treatment and disability to have been a natural and probable result of the L4-5 injury of 2000. The testimony of Dr. Bruffett reflects that he has found the claimant to be a fairly credible historian of his presenting symptoms.

Dr. Bruffett was questioned regarding the significance of the T12-L1 disk herniation in any of the claimant's symptomatology:

Yes. Basically - - and part of that is the way I look at things as a surgeon. I mean, you know, most disk herniations that are symptomatic, that require surgical treatment, are below the level of the spinal cord. You're talking about the lumbar spine. Now, you can have neck disk herniations that are different, but it's pretty unusual to have a disk herniation at T12-L1, if it's causing back pain, it's going to be treated just like his arthritis at L3-4, and his lateral listhesis at L3-4 and L4-5, and everything else. It's all sort of grouped together. So in my approach to patients, it's not really a significant - - in him, it's not really a significant sort of thing. (JX #2, p. 49-50).

In considering the degenerative changes noted on the MRI's between 2001 and 2006, Dr. Bruffett testified that is just as likely that the small disk herniation at T12-L1 was a result of the claimant's progressive degenerative condition as it was any specific acute injury.

Dr. Bruffett is not recommending surgery for the claimant at this time. The testimony of Dr. Bruffett reflects that if surgery was performed while it would be for the degenerative

condition it would also involve a component of the September 1, 2006, accident:

That's a good question. I wouldn't be addressing an anatomical problem or an objective problem where I'd say, "I'm going to go in and fix what you injured when you fell out of the SUV."

But I would say that his history would probably involve the September 2006 accident. In other words, the reason we would be doing the surgery would be to help relieve the pain that by his history developed after that. If that makes any sense. (JX. #2, p. 52).

Dr. Bruffett opined that the September 1, 2006, incident exacerbated degenerative changes. In his report of November 15, 2006, Dr. Bruffett noted that the claimant would not be able to work for a while. In explaining the basis for the afore assessment, Dr. Bruffett testified:

Yeah, I was saying that the reason he's not going to be able to work for a while is just because of the pain that he's in and from his accident, which I attribute to an exacerbation of these degenerative changes, yes. (JX. #2, p. 55).

Dr. Butchiah Garlapati testified by deposition, which was obtained on April 30, 2007, which is a part of the record as Joint Exhibit #3. Dr. Garlapati, who has been in pain management for four years plus, graduated medical school in India and did his residence in physical medicine and rehabilitation at UAMA, from 1997 to 2001. Dr. Garlapati took over the claimant's treatment when he took over the practice of Dr. Robert Valentine, who had previously treated the claimant.

The testimony of Dr. Garlapati reflects that when a patient, as the claimant, comes in for a check of his pain pump a physical examination was not performed. The testimony of Dr. Garlapati reflects:

Not actually, no, until or unless there is some change in the physical status or pain status. He generally not saw a physician. An assistant will take care of the pain - - filling the pump, but it is becoming

mandatory now to do physical examination by me at least once in a six month, if there is no other complications arises in between. (JX. #3, p. 5).

Dr. Valentine commenced treating the claimant in 2001, and the claimant came under the care of Dr. Garlapati in 2003. Dr. Valentine's assessment of the claimant disclosed two failed episodes of surgery, epidural steroid injections, nerve root injections, opiate pain medicine, and non-steroidal anti-inflammatories, and physical therapy, for which he diagnosed failed back syndrome. Dr. Garlapati concurred in Dr. Valentine's assessment of the claimant.

Dr. Valentine placed a Medtronic SynchroMed Type II implant device in the claimant. In explaining the purpose of the implant, Dr. Garlapati testified:

He stopped taking oral medication in excess and having gastritis esophageal reflux. A pump continuously delivers pain medication in the subarachnoid space.

Like pain medication has a shelf value of three months, so the medication has to be changed within three months, and depending on his pain level, like, you know, zero to ten, the pain pump will be adjusted, or if he is like excessively sedated or kind of drowsiness, it can be decreased. So it is basically science and symptoms of the patient. (JX. #3, p. 6).

The claimant was referred over by Dr. Bruffett for pain management. Dr. Garlapati testified regarding the circumstances that would warrant a physical examination of the claimant:

Not until or unless it becomes - - really getting complicated. Like you increase it once or twice, and the patient still has the same complaints, or patient is having swelling of feet, or condition of the lungs. Otherwise, it will be just adjusted.

* * *

That's just the pump refill notes, and he had not - - like I mentioned before, every time he comes, he's not followed by a physician. He'll be seen by a nurse, and only the problem the nurse feels that one - - he or she has to be seen. That was the practice in the past, but now it has been changed. (JX. #3, p. 7).

The change in the above occurred approximately prior to the 2007 deposition.

Dr. Garlapati was questioned regarding the records of the claimant regarding the pain pump dating October 29, 2002, and forward. Dr. Garlapati testified that such things as physical activities and the weather could result in increase in pain and a corresponding increase in the level of medication delivery in the pain pump:

That's right. Twenty percent of the initial value. Like, you know, when somebody has a rate of 100 milligrams per day, you just don't go and bump 20 percent. (JX. #3, p. 8-9).

By February 2003, the claimant was seeing Dr. Garlapati. As of May 2001, the claimant had been released to part-time work and was so doing. Dr. Garlapati's testimony reflects, regarding the claimant:

His pump is implanted on May 17th, 2002, and like on May 23, 2003, his pump rate was at 1.3 milligrams per day. So it is a very common practice after the implantation of the pump to bring it up, the pump level, medication supplying to the patient, and the patient - - so he takes a number of trials to see where it actually goes. So he's in the process during that period of time. (JX. #3, p. 10).

Dr. Garlapati attributed the swelling in the claimant's lower extremities which was present on December 24, 2003, to fluid retention brought on by the Morphine and hydromorphone.

The claimant's medication, relative to the pain pump, was change on August 9, 2005, to Prialt. Regarding the Prialt, Dr. Garlapati testified:

Prialt is a synthetically manufactured medication from snails, and being a non-sedative medication, most of the insurance companies are failing to have that medication. And also like Mr. Roy Green having swelling of feet and sexual dysfunction, we thought changing hydromorphone to Prialt may be better for him, so that he would be more productive and not taking any narcotics. (JX. #3, p. 17-18).

Following a July 28, 2006, visit to Dr. Garlapati's clinic, the claimant was next seen on

November 27, 2006. The testimony of Dr. Garlapati reflects:

I actually med with him November 27, 2006, when he came to the clinic - - actually, he called the clinic stating that he had a fall on the job on 9/1/06, and since then his pain has increased, so he wanted to come and see. So that was the time I actually did my physical examination on him. (JX. #3, p. 19).

The claimant was in fact seen at the pain clinic of Dr. Garlapati on September 29, 2006. Dr. Garlapati's impression of the claimant's complaint following the November 27, 2006, physical examination was that of post-laminectomy syndrome. Regarding the direction of the claimant's medical treatment subsequent to the November 27, 2007, physical examination, Dr. Garlapati testified:

We wanted to call Dr. Bruffett's office to get - - to obtain records what they come up with, because by looking at his MRI film study, there was not really much I could do other than playing with the pump and doing intervention procedures like lumbar epidurals. So we basically depend on Dr. Bruffett looking in and what he wants us to do. (JX. #3, p. 26).

Dr. Garlapati explained that when he examined the claimant on November 27, 2006, he was focusing primarily on the lumbar area, which he described as the area from T12 to the sacroiliac joints and the sacrum and including the tailbone.

Dr. Garlapati disagreed with the assessment of the physician who diagnosed the claimant's complaint following the September 1, 2006, fall as a lumbar strain. Dr. Garlapati explained:

Lumbar strain is like a headache, so it is just a vague term. Like, you know, i can have a headache with ear problems, tooth problems. So lumbar strain generally is not a medical terminology. It's just a common language.

The terminology could have been used in a different way, like a myofascial pain rather than strain. So, yes, just the work, yes. (JX. #3, p. 34).

Dr. Garlapati testified that during the November 27, 2006, visit of the claimant an adjustment was made in the pain pump:

Oh, we have to go back to the previous level, 2.245 to - -
2.245 to 2.445. That means .20 micrograms increase. (JX. #3, p. 35).

The amount of the increase was 8.2 percent. (JX. #3, p. 35-36). The claimant was next seen by Dr. Garlapati on April 24, 2007. Claimant received three (3) epidurals in the lumbar region, L4-5. Dr. Garlapati acknowledged that occasionally in 2005, claimant was provided an lumbar epidural steroid injection because of irritation or inflammation of having fibrosis - scar tissue around the nerves from the surgery.

Dr. Garlapati testified that he is treating primarily the claimant's chronic condition. The treatment mode for the claimant under Dr. Garlapati's care include lumbar epidurals, oral medication, and possibly some physical therapy. Dr. Garlapati concurred with the claimant's assessment that he would be unable to function without the pain pump. Dr. Garlapati expressed the opinion that the claimant is not back to his pre-September 1, 2006, level of function with the medical treatment he has received since, which includes the epidural steroid injections.

Dr. Garlapati offered that when he last met with the claimant on February 24, 2007, claimant relayed that he was "slightly worse". (JX. #3, p. 40). Dr. Garlapati relayed regarding the claimant that he is "treating the flare-up, plus the chronic state". (JX. #3, p. 40). The testimony of Dr. Garlapati further reflects:

As we progress into the future, we don't know what the technology will bring into anybody's life. If there is a fibrosis increase, there are additional lyses many physicians do perform, like breaking the fibrosis scar and making the nerves more free around to float.

If the chronic condition becomes acute, that means, again, chronic

had become acute. (JX. #3, p. 41).

On cross-examination by counsel for respondent #2, Dr. Garlapati noted that the claimant had called his office to report the September 1, 2006, fall which resulted in a corresponding increase in pain. Claimant had last been seen at Dr. Garlapati's office relative to the pain pump on July 28, 2006, at which time the pump setting was at 1.869 micrograms. During the September 2006, telephone call the claimant asked to come in and have the pump increased due to the increase pain. When the claimant presented on September 29, 2006, the pump dosage rate was increased to 2.245 micrograms per day, or a 17% increase. Regarding the substantial increase in dosage during the September 29, 2006, visit, Dr. Garlapati testified:

First, he's having a new medication in the pump, that is, Prialt. Second, he had a fall, and he's complaining of severe pain, and there is a safety margin you can increase Prialt that much increase, but you cannot able to do that much increase with morphine or hydromorphone because that would cause respiratory depression. So that's the reason one could go and take an aggressive step to do that. (JX. #3, p. 45).

Dr. Garlapati attributes the reduction in the claimant's activity level subsequent to September 1, 2006, to the injury growing out of the claimant's fall on that date:

The fall. And he sustained soft tissue injury related to the fall, and maybe the fall might have brought some chemical changes or some structural changes in the lumbosacral region, maybe. There is fine broken ligaments or tendons which MRI, I think, mentioned, but all these things could be possibilities. (JX. #3, p. 45).

Dr. Garlapati had access to both the October 26, 2006, and December 20, 2000, MRI reports relative to the claimant. The October 26, 2006, MRI report included the area of the claimant's spine between T12-L1 through S1. The October 26, 2006, MRI report reflects a finding relative to T12-L1 of a protrusion. A September 19, 2000, MRI study relative to the claimant also

included the T12-L1 disk level. The afore study did not reference or mention the T12-L1 disk protrusion. Dr. Garlapati was in agreement that as between the September 19, 2000, MRI study obtained prior to the September 1, 2006, fall of the claimant and the October 26, 2006, MRI study obtained subsequent to the September 1, 2006, fall of the claimant that there is a new objective finding at the T12-L1 level. (JX. #3, p. 48-49).

The testimony of Dr. Garlapati reflects that the claimant's complaints of mid back pain around the area of the umbilicus, except on the back, can be construed as consistent with having a disk pathology at T12-L1. Regarding the particular area that is serviced or targeted by pain pump Dr. Garlapati testified:

The concept generally when they put the lead, the catheter lead, people believe that it affects more at the particular site, but in reality, the CSF is circulating all around the brain and spinal cord. So patients should be having some benefit here and there and everywhere, but, yes, it is more at that point. (JX. #3, p. 49-50).

The medication is more effective in the area where the leads or catheter is placed. Items enumerated by Dr. Garlapati evidencing a new injury having been sustained by the claimant in the September 1, 2006, fall include symptoms of increase pain and decrease range of motion plus MRI findings, the T12-L1 disk protrusion. (JX. #3, p. 51).

Dr. Garlapati's testimony reflects that in his treatment of the claimant since September 1, 2006, he has not utilized treatment to target the area of T12-L1:

No, I entered epidural space while doing my lumbar epidural steroid at L5-S1 because above that there is a catheter going into the subarachnoid space. I do not want to do any damage to that, so I didn't even try to go further than that. (JX. #3, p. 52).

Dr. Garlapati testified that the claimant has not returned to the point where he was before the

September 1, 2006, incident medically. Further, in terms of when the claimant would reach a medical plateau of treatment, Dr. Garlapati noted that the same would be difficult for anyone to predict.

Dr. Garlapati testified that he considered the claimant to be an accurate historian of his symptomatology over the years. Dr. Garlapati further testified regarding the claimant:

I know him, Roy Green, for last four years, and I believe that he's a hard-working man. And even with two back surgeries, he went back to work, and he comes to me, and when he come and said that, "Hey, I hurt. I can't do any more," or "I'm really hurting," I believe in him. (JX. #3, p.74).

Dr. Garlapati also observed regarding the claimant's pain prior to September 1, 2006, that the same was within a clinically acceptable range of control:

Yes, and to prove that, he's working. So, yes, he tolerated the pain by increasing and sometimes decreasing, but he was working. That's my expecting. (JX. #3, p. 75).

Regarding the difference in the claimant's pain range subsequent to September 1, 2006, Dr. Garlapati testified:

Now, he's not able to work. One is that is a physical indication, and his complaints, and the person that is used to work saying, "I can't work," means - - I never felt that there was some - - any bad motive behind his statements. I really believe that he wishes he could work, but he says he can't, so - - and this present MRI finding about disk prolapse between T12-L1, which is not seen in the past, it is difficult for me to say the injury might have caused it because there are no films seen between 2004 and 2006. (JX. #3, p. 75).

The testimony of Dr. Garlapati also reflects the presence of "lower thoracic vertebral muscle spasm" at the time of his November 2006, physical examination of the claimant. (JX. #3, p. 76, 79). Dr. Garlapati testified regarding the tightness of the claimant's muscle being an indication of acute truma:

They are in spasm because some chemical process is going on that - - and there's damage to the soft tissue, or the patient has scoliosis stretching. So some stress and strain going on, that's why the muscles are in spasm. (JX. #3, p. 79).

Dr. Garlapati agreed that within a reasonable degree of medical certainty, base on his physical examination of the claimant, the diagnostic history, and the history of imaging that he had review, that the symptoms are likely in part caused by the new injury sustained by the claimant on September 1, 2006. (JX. #3, p. 76).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and 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. At all times pertinent, to include August 10, 2000, and September 1, 2006, the employment relationship existed, and the claimant earned wages sufficient to entitle him to workers' compensation benefits at the maximum applicable rates.
3. On August 10, 2000, respondent #2 provided workers' compensation insurance coverage for respondent-employer.
4. On August 10, 2000, the claimant sustained an injury to his low back which required medical treatment and resulted in a period of temporary total incapacitation. The claimant reached the end of his healing period relative to the August 10, 2000, compensable back in jury on or about June 10, 2005, when he was assessed with a 29% permanent physical

impairment to the body as a whole.

5. Respondent #2 shall pay all reasonable hospital and medical expenses arising out of the claimant's August 10, 2000, compensable back injury.

6. On September 1, 2006, respondent #1 provided workers' compensation insurance coverage for respondent-employer when the claimant sustained either a new injury or aggravation of his pre-existing condition arising out of and in the course of his employment.

7. The claimant was temporarily totally disabled for the period commencing September 30, 2006, and continuing through the end of his healing period, a date to be determined.

8. Respondent #1 shall pay all reasonable hospital and medical expenses arising out of the claimant's injury of September 1, 2006.

9. Respondents #1 have controverted the claimant's September 1, 2006, compensable back injury in its entirety.

CONCLUSIONS

On September 1, 2006, claimant sustained a fall while exiting from a SUV. At the time of the afore the claimant was within the course and scope of his employment. Claimant asserts that as a result of the September 1, 2006, accident he sustained an injury to his back which required medical treatment and rendered him temporarily totally disable until such time as he reached the end of his healing period. The claimant had suffered a prior injury to his back within the course and scope of his employment with respondent-employer on August 10, 2000, for which he continued to receive medical treatment at the time of the September 1, 2006, accident.

While the claimant remained employed by the same employer, workers' compensation

insurance coverage was provided by different insurance carriers at the time of each incident.

Respondent #1 provided insurance coverage at the time of the September 1, 2006, accident. It is the contention of respondent #1 that the claimant did not sustained a compensable injury during the September 1, 2006, incident; that there is a lack of objective findings; and that the claimant's complaints and need for medical treatment subsequent to September 1, 2006, are a continuation of the earlier compensable injury of August 10, 2000, which was sustained at the time that respondent #2 provided workers' compensation insurance coverage for respondent-employer.

Respondent #2 maintains that there are new objective findings of an injury relative to the September 1, 2006, accident suffered b the claimant at the time that workers' compensation insurance coverage was provided by respondent #1. Accordingly, respondent #2 takes the position that liability for workers' compensation benefits associated with the September 1, 2006, accident is the responsibility of respondent #1.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-90102 (16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence.

Ark. Code. Ann. §11-9-102 (4)(A)(i).

It is not disputed that the claimant suffered a compensable injury to his low back on August 10, 2000, which resulted in two (2) surgeries and the ultimate placement of a pain pump to address his continuing symptoms and complaints of pain. Following the May 17, 2002, placement of intrathecal catheter and morphine pump, claimant underwent work hardening and ultimately returned to a full-time employment with respondent. On June 10, 2005, claimant underwent an evaluation by Dr. Terence Braden and was assessed as having reached maximum medical improvement with a residual 29% to the body as a whole.

The credible testimony of the claimant reflects that prior to the September 1, 2006, accident he had returned to 90% of his pre-August 10, 2000, functionality. The occurrence of the September 1, 2006, accident is not disputed. Nor is there a dispute regarding the mechanism of the claimant's fall from the SUV on September 1, 2006, or that he was within the course and scope of his employment at the time of the accident.

Claimant suffered debilitating pain in the September 1, 2006, fall. The injury was reported to appropriate supervisory personnel of respondent. Indeed, the owner of respondent-employer was present at the time of claimant September 1, 2006, accident. Claimant received initial medical treatment following the September 1, 2006, accident of September 5, 2006, under the care of respondent's designated medical provider. It is pertinent to note the medical report relative to the September 5, 2006, visit recites that claimant complained of pain in thoracic spine.

The claimant has provided consistent and credible testimony regarding the symptoms and complaints relative to his back and leg complaints prior to the subsequent to the September 1, 2006, accident, as well as medical treatment received. In workers' compensation law, the employer takes the employee as he finds him. 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). Employment circumstances that aggravate pre-existing conditions are compensable. *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W.2d (1990).

On September 1, 2006, claimant fell from a SUV landing on his back on an asphalt surface. Claimant was within the course and scope of his employment at the time of the September 1, 2006, accident. Medical records generated in connection with complaints registered by the claimant subsequent to the September 1, 2006, accident disclosed the presence of objective finding establishing the injury. Dr. Garlapati note the presence of muscle spasms in the claimant's mid-back. An October 26, 2006, MRI scan disclosed the presence of a herniation at the T12-L1 level of the claimant's spine. Further, following the September 1, 2006, accident the claimant experience symptoms in his left leg as well as the right leg. Claimant's pain level substantially increased following the September 1, 2006, accident, which resulted in a corresponding increase in the level of the dosage of the pain medicine from the pain pump. Finally, the claimant's level of functionally substantially diminished with the September 1, 2006, incident.

An aggravated is a new injury resulting from an independent incident. *Maverick Transportation v Buzzard*, 69Ark. App. 128, 10 S.W.3d 467 (2000). The aggravation of a pre-existing condition by a specific work-related incident need not be the major cause of the claimant's disability in order to be compensable. *Farmland Insurance Company v. Dubois*, 54 Ark. App. 141, 923 S.W. 2d 883 (1996). The evidence preponderates that the claimant sustained

either a new injury or aggravation of his pre-existing condition on September 1, 2006, arising out of and in the course of his employment which required medical treatment and rendered him totally incapacitated from engaging in gainful employment subsequent to September 30, 2006. Respondent #1 has controverted this claim in its entirety.

Ark. Code Ann §11-9-508 (a) mandates that the employer provide such medical services as may be reasonably necessary in connection with an employee's injury. *Cox v. Klipsch & Associates*, 71 Ark. App. 433, 30 S.W.3d 764 (2000). Claimant has distinguished the medical treatment or expenses attributable to the September 1, 2006, injury from the August 10, 2000, injury by having the prescriptions filled at different pharmacies. Respondent #1 is liable for all reasonably necessary and related medical expenses growing out of the claimant's September 1, 2006, compensable injury. Respondent #1 has controverted this claim in its entirety.

An employee is entitled to the payment of temporary total disability benefits as a result of a compensable unscheduled injury so long as he remains within his healing period and is completely incapacitated from earning wages. *Arkansas State Highway Department v. Breshears* 272 Ark. 244, 613 S. W.2d 392 (1981). Ark. Code Ann. §11-9-102 (12) defines the healing period "as that period for the healing of an injury resulting from an accident." If the underlying condition causing the disability has become stable and it noting further in the way of treatment will improve the condition, then the healing period has not ended. The evidence in the record preponderates that the claimant remains within his healing period as a result of the September 1, 2006, compensable injury, and correspondingly entitled to the payment of temporary total disability benefits. Respondent #1 has controverted this claim in its entirety.

AWARD

_____Respondent #1 is herein ordered and directed to pay temporary total disability benefits to the claimant at the weekly compensation benefit rate of \$488.00, for the period commencing September 30, 2006, and continuing until such time as the claimant reached the end of his healing period as a result of the September 1, 2006, compensable injury. Said sums accrued shall be paid in lump without discount.

Respondent #1 is further ordered and directed to pay all reasonably necessary and related medical, hospital, nursing, and other apparatus expenses, to include medical related travel growing out of the September 1, 2006, compensable injury of the claimant.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted portion of the indemnity benefits herein awarded , pursuant to Ark Code. Ann. §11-9-715, to be paid by respondent #1.

This award shall be 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