

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610582

RASTUS JAMES	CLAIMANT
BEKAERT CORPORATION	RESPONDENT
ST. PAUL TRAVELERS INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 17, 2007

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

Claimant represented by KENNETH HIXSON, Attorney, Fayetteville, Arkansas.

Respondent represented by PHILLIP CUFFMAN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on May 24, 2007, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 29, 2007. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

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

2. The employee-employer-carrier relationship existed between the parties on all pertinent dates.

3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$414.00 for temporary total disability benefits and \$311.00 for permanent partial disability benefits.

By agreement of the parties the issues to be litigated are limited to the following:

1. Compensability of injury to the claimant's low back.
2. Related medical.
3. Temporary total disability benefits from March 28, 2005, through a date yet to be determined.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that he has suffered a gradual onset back injury during his employment with respondent which ultimately led to back surgery. He contends he is entitled to temporary total disability benefits from March 28, 2005, through a date yet to be determined, medical expenses, and a controverted attorney fee.

In regard to the foregoing issues the respondents contend that the claimant did not suffer a compensable gradual onset back injury. Respondents further contend that the claim is barred by the statute of limitations in that the claimant describes an onset date of 1999 for his back complaints.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and a letter from Dr. Sills marked Claimant's Exhibit No. 2. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he is 50 years old, married, and did all of his education through high school in the Fort Smith area. The claimant testified that he began working for the respondent in 1993 as a manual laborer. The claimant described work which he did with large spools weighing up to a ton on which he would pull wire. The claimant was asked if he would actually pull the wire and the spool would go around and the claimant responded, "Yes." The claimant agreed that this work was very physically demanding. The claimant testified that on this job his title was that of payoff man and it required using your legs, arms and back constantly pulling the wire. The claimant testified that when pulling the wire if he did not get the full spool up to speed to start up it would usually get too tight and break the wire. The claimant testified that when the wire breaks it necessitates more work because that would create a free spinning spool and the wire would just fall into the floor. The claimant testified that the size of the wire varied depending on the order and some were very very heavy and some was not much bigger than a pen. The claimant testified that during his shift he was constantly pulling wire except for his three breaks including his lunch period. The claimant testified that he did this job for about two years before he was moved up the line to the position called take up man. The claimant described this job as taking the finished wire after it is run through the process of lead, zinc, and acid and as the wire comes off it lays the wire down on carriers which they call

spiders. The claimant testified that once the spider is filled there is an automatic reject stand and he would have to cut the wire, tie it off, and eject the wire and carrier out of the station. The claimant testified that they would use a crane or hoist to pull the wire off. The claimant was asked how much the carriers or spiders weighed and the claimant responded that they were approximately forty-five pounds. The claimant testified that this is also physically demanding. The claimant testified again that there are times when he would have to manually pull wire in order to keep it from burning up and that there was quite a bit of tension on the wires.

The claimant testified that he performed the take up man position for about three years before he was moved to middle man. The claimant testified that with each of these moves there was an increase in his earnings. The claimant explained that the middle man was responsible for keeping zinc in the baths along the whole line. The claimant stated that this job also required taking care of the payoff man when there is a break, he would have to go back and wherever the wire broke manually pull it all the way up through the system through the process of lead baths, zinc baths, and acid baths. The claimant testified that he would have to tie the wires off, keep good tension on them, and take a poker and manually push the wire down into the baths. The claimant then prescribed another procedure which he would do which indicated pulling wire through some cleaning pads which required him being in a squatting position. The description of the work the claimant did, I am sure,

was relevant to him but did not seem to be descriptive as to the exact work required. The claimant did agree that this job required pulling, pushing, lifting, and working in awkward positions such as squatting and bending a lot. The claimant was asked if doing the job of payoff or take off man also put him in awkward positions, the claimant explained that in payoff they would have to clean the zinc bath every week which required him to use a long shovel. The claimant testified that he would skim the top of the bath. The claimant testified that he was working with an eight-foot shovel and he would have to go all the way across the bath and then pull it back and dump it and then go back again. The claimant testified that this process took approximately one hour. The claimant testified that he worked in the middle man position for about three years and then was promoted to gaucho operator. The claimant testified that a gaucho operator runs a machine that makes barbed wire. The claimant testified that working as a gaucho operator he would work with spiders paying off, empty spiders paying off, and full spiders. The claimant testified that he operated the machine that applied the barbs to the wire. The claimant stated that when he would get a full roll, he would have to put cardboard on it as well as the gaucho emblem, staple it together as well as put on a handle, pull it off his machine and stack them. The claimant testified that he would stack three hundred in a night. The claimant estimated that these bundles of barbed wire would weigh from thirty-five to forty pounds each. The claimant testified that he next worked as field fence operator.

The claimant testified that in the field fence operation department there are about fifteen machines and his particular job was that of tight lock operator. The claimant testified that they put out a role of wire which was probably as long as the hearing room was wide. The claimant testified that when something would break, it would usually break in the machine and there was a four-foot space that he had to get under in order to work on the break. The claimant testified that when he worked on the break he would be on his feet bent over turning his head back and forth looking upward. The claimant testified that the twisters in the machine would sometimes go bad and they would break the wire and he would have to get up under the machine to pull the wire up and then rethread the material back up through the machine. The claimant testified that this event might occur as many as twenty times in a shift. The claimant testified that he and another person ran three machines so there could be a problem with any of the machines at any time. The claimant testified that besides this responsibility he also would have to manually cut the wires once the rolls got full. The claimant testified that he would tie it off then a machine would come and sweep it off the bar that it was on and dump it on the floor. The claimant testified that he then would take a crane and pick the wire up and put it on a pallet. The claimant agreed that as of March 2005 he was still on the field fence tight lock job. The claimant testified that one evening in March he did come in complaining about his leg and that his supervisor put him on another machine that was the welded mesh. The claimant

testified that he had run this machine before and had kind of been back and forth because the tight lock job was his main machine. The claimant agreed that his last night at work was March 28, 2005.

The claimant testified that he has never had an accident in which he injured his back. The claimant testified that he has seen Dr. Sills, his family doctor, for his bad back. The claimant testified that he began seeing Dr. Sills in July 1999 with back pain and just feeling kind of worn down. The claimant testified that when he saw Dr. Sills he did not report an injury. The claimant testified that Dr. Sills took him off work for one week and gave him some medication. The claimant testified that after this time off he went back to work for the respondent. The claimant testified that from the time he returned to work until October 29, 2003, he continued to have back problems but he did not feel like he could take off work because he had a family to support. The claimant testified that the pain was there but he just kind of ignored it and went on. The claimant agreed that he took some over the counter medications and that his wife would rub his back and put heat on his back to try and make it as comfortable as possible. The claimant agreed that from 1999 until present he has had pain in his back. The claimant was asked about a medical record from Dr. Sills dated October 29, 2003, where it is noted that the claimant complains of right lower back pain for two days after lifting a lawn mower and that the pain radiates into his right leg. The claimant testified that he does not recall this doctor's visit or making this statement but it would not surprise

him if he picked up a lawn mower. The claimant was then asked about a report from Dr. Sills dated March 28, 2005, where the doctor notes, "Right leg pain for four days, right leg pain shooting, five days ago bent over working on breaks on car." The claimant testified that his daughter had been complaining about the breaks on her car and he had called his friend Luther Nelson over to help him fix the breaks. The claimant testified that he did not do the work that Luther did all the work because Luther knew that he was not able. The claimant testified that he did help by handing Luther tools or whatever he needed. The claimant testified that when he was seen by Dr. Sills on March 28 the doctor took him off work and he has not been able to return to work since. The claimant testified that he was eventually referred to Dr. Standefer who after running tests confirmed that he had a herniated disc and that Dr. Standefer eventually did surgery. The claimant testified that he did not think he had a back injury, he though he had something wrong with his leg because his leg would go numb and if he did not sit down he would almost fall down. The claimant testified that the pain would start in his leg but it would work its way up into the lower part of his back to the point where it would almost put him in tears. The claimant testified that on March 28, 2005, when he went into work his back was hurting so bad he asked for light duty. The claimant testified that he went home early that night because his leg was going numb and he could not stand or do his job. The claimant testified that this pain kept getting worse over time and he eventually underwent surgery in

October 2005. The claimant testified that his discomfort is really about the same since his surgery and there is still many things he cannot do. The claimant testified that he still has pain in his back which radiates down his leg and into his foot. The claimant testified that the tingling in his foot is just occasional. The claimant testified that he has problems sleeping because of his back problems.

The claimant testified that on March 28, 2005, or shortly thereafter he went to the respondent's office to apply for benefits. The claimant testified that Laura advised him to sign some papers so he could get some money while he was off work. The claimant agreed that Laura is Laura Wald who works in the human resources department for the respondent. The claimant testified that he is not sure what kind of benefits he applied for, he just understood it to be so he could get some money while he was off work. The claimant testified that when he was talking with Ms. Wald he believes he asked her about workers' comp benefits but there was a question if there was an on the job injury. The claimant testified that Ms. Wald filled out the forms and he signed them. The claimant agreed that on the form the question which asked if this was an injury that occurred at work, neither yes or no is checked off. The claimant indicated that the first time he ever heard anything about a gradual onset type back injury was when he first visited with his attorney sometime in 2006. The claimant was asked if when he filled out the form while he was at the respondent's HR office had he had an accident and the claimant

responded, "No." The claimant agreed that he relied on Ms. Wald to help him fill out the forms. The claimant further stated that it was his contention now that he has had an on the job injury but not an accident.

On cross examination, the claimant testified that he knew that if an accident occurred at work it was to be reported to a supervisor or to the human resource people. The claimant agreed that he believes that his back problems began sometime in 1999. The claimant also agreed that in 1999 he was having pain down into his legs. The claimant agreed that from 1999 until October 2003 he continued to have back and leg problems and related it to the work which he was doing. The claimant testified that he just kind of shunned it off because he needed to work and that everyone that he was working with had things going on with them because of the difficulty of the job. The claimant was asked about Dr. Sills October 29, 2003, note which mentions that he has right lower back pain after lifting a lawnmower. The claimant responded that he does not know what he would be doing fooling with a lawn mower in October but really just could not remember this statement. The claimant was then asked about Dr. Sills' report dated March 28, 2005, where the doctor has noted that the claimant has right leg pain for four days after bending over working on his car's brakes. The claimant responded that he already had the pain in his back and leg and that he was watching his friend work on the brakes. The claimant stated that he was bending over watching his friend work on the brakes. The claimant was then asked if that was when the

pain began and the claimant responded that no that was not when it began, he already had the pain. The claimant was challenged with the question if after bending over working on the brakes was this the event which caused him to ultimately stop working. The claimant responded that it was the pain that he already had that made him stop working not the bending over because he did not work on the brakes he was watching his friend work on the brakes. The claimant agreed that he was working up until March 28, 2005. The claimant testified that after his surgery by Dr. Standefer he has been released by the doctor. The claimant testified that he was not aware of limitations which the doctor has put on him but he did understand from Dr. Standefer that he could not go back out and do the type of work he had been doing for the respondent. The claimant testified that he did inquire with the respondent about light duty work but was told that they did not have any. The claimant testified that he has applied for social security disability but has not been to a hearing. The claimant testified that there may be some work in the work place available for him but it would have to limit his lifting to thirty to thirty-five pounds and not have too much bending, squatting, or pulling. The claimant testified that when he went in to talk to Laura Wald he asked her if it should be put under workers' compensation and she responded that she did not know. The claimant testified that he did not know where his injury came from and that was the reason he was asking about workers' comp because he did not know where his injury started. The claimant was asked if he told Dr. Sills that he felt

like his problems were related to his work. The claimant responded, "Yes after thirteen years worth of pulling and tugging and squatting." The claimant testified that he did not know that Dr. Sills had indicated on a form that his condition or injury was not related to his employment. The claimant agreed that he drew short term disability for a period of six months and then long term disability for an additional six months. The claimant agreed that he did not file a formal workers' compensation claim until he visited with his attorney sometime in 2006.

Luther Nelson testified that he has known the claimant most of his life and that they were close to the same age. Mr. Nelson testified that he has been working for the respondent for nearly twenty-two years. Mr. Nelson testified that he also has held the jobs of payout man, take up man, and middle man while working for the respondent. Mr. Nelson agreed that these three jobs are all physically demanding jobs. This witness testified that a spool of wire might weigh about 2000 kilos and they would have to pull and tug on these spools. Mr. Nelson was asked if there was a job that required crawling under a platform to help splice or put wires together. Mr. Nelson responded that yes there was and that would be on the P40. This witness testified that the wire went straight up stairs over some wheels and stuff and that they would have to climb up through the machine and pull the wires up and through it. Mr. Nelson testified that in March 2005 he did some brake work for the claimant. This witness testified that the claimant's back was hurting him and he was not getting around very good so he told the

claimant he would come over and fix his daughter's brakes because he knew that he was not able. Mr. Nelson testified that the claimant helped by handing him tools and things but he would not allow the claimant to do anything heavy because he knew his back was hurting. Mr. Nelson testified that he was aware that the claimant had been having back problems for about a year prior to March 2005 and that it had been getting worse and that is why he came over to help with the claimant's daughter's car. Mr. Nelson testified that he and the claimant worked the same shift for the respondent and one day they got off work and the claimant was telling him how he needed to fix his daughter's brakes so he told him that he would come over and do it for him because the claimant would have done the same for him.

Cynthia James testified that she was the claimant's wife and they had been married over twenty years. Ms. James testified that her husband was not a complainer and, if it had not been for her, he would not have gone to see Dr. Sills when he did in March 2005. Ms. James testified that she had grown tired of seeing her husband hurt all the time and watch him going down little by little. This witness testified that it was the claimant's work for the respondent that caused his problems and even though he would not complain she could see the problems in him.

Laura Lee Wald testified that she was the human resource assistant for the respondent but prior to 2006 she was called the benefits coordinator. Ms. Wald testified that she administers the benefits and handles the day to day human resource functions for

the respondent which included workers' compensation claims. Ms. Wald testified that she does not remember discussing anything about workers' compensation with the claimant at the time he filled out his short term disability forms. Ms. Wald testified that if the claimant felt his problems were work related, she would not have encouraged him to fill out the short term disability paperwork. Ms. Wald explained that it would not be in the claimant's best interest because workers' compensation pays better plus it pays all the medical bills. This witness testified that she completed the employer's portion of the short term disability forms and that the claimant or someone else completed the rest of the form. Ms. Wald testified that when the claimant brought the forms back in there was a portion not filled in pertaining to information about the claimant's doctor which she did fill in because she knew that the carrier would not accept it without that information.

Ms. Wald testified that during the original orientation with their employees they do not explain the difference between an accident as defined by Arkansas Workers' Compensation Code and a gradual onset type injury. Ms. Wald testified that prior to the claimant's claim they had never dealt with a gradual onset back injury before. Ms. Wald was asked if the claimant had come in and said his back was hurting would she had explained that he might have a workers' compensation claim due to a gradual onset injury. Ms. Wald responded, "No."

The medical records set forth that the claimant was seen by Dr. Sills on July 22, 1999, for complaints of lower back pain for

several months which is nagging. The doctor notes that the claimant has increased complaints of pain when bending forward further noting that he works for the respondent doing lots of pulling at his job. Dr. Sills notes that there is no history of injury. The doctor prescribed medication, encouraged the claimant to quit smoking, get regular exercise, and to return in one week. The claimant saw Dr. Sills on July 28, 1999, where it is noted that his back is better but has not worked that week. Dr. Sills notes that the claimant works at night and that he has a bad sleeping schedule when off as well as a bad working environment due to favoritism and back stabbing. Dr. Sills recommended medications as well as a good sleep regime and exercise. The claimant was seen by Dr. Sills on October 29, 2003, with complaint of right lower back pain for two days. Dr. Sills notes that the claimant lifted a lawnmower and now has pain which radiates into his right leg. The claimant, after examination, was diagnosed with low back strain and prescribed medication. The claimant was seen by Dr. Sills on March 28, 2005, with complaints of right leg pain for four days noting that he had shooting pain five days ago bending over working on brakes. Three days later the claimant was seen by Dr. Sills where he reports that he still is having back problems. Dr. Sills ordered an MRI. The claimant underwent a CT scan of his lumbar spine on March 30, 2005, which revealed a broad based annular bulge at the L5-S1 level slightly acentric to the patient's right side in combination with hypertrophy of the ligamentous flavum causing moderate spondylothesis. The claimant underwent an MRI of his

lumbar spine on April 8, 2005, which revealed a central and right posterior lateral disc herniation at L5-S1. Dr. Sills writes on April 12, 2005, that the claimant reports that his back pain is no better and that he is having numbness in his right foot as well as tingling in his right hand. The claimant was taken off work by Dr. Sills until he was released by his neurosurgeon. The claimant was seen by Dr. Standefer on June 21, 2005, for his complaints of low back pain. After review of the claimant's test and examination Dr. Standefer recommended physical therapy. Dr. Standefer also recommended the possibility of lumbar epidural steroid injections and lastly surgical intervention. The claimant was seen by Dr. Jerry Lenington on August 16, 2005, for an epidural steroid injection. Dr. Michael Standefer writes on September 26, 2005, that he has seen the claimant who has undergone two epidural lumbar steroid injections which have not provided the claimant with significant relief of his pain. Dr. Standefer again discussed with the claimant conservative care such as physical therapy although it was not thought that this would be of much use to the claimant. Surgical intervention was also discussed by Dr. Standefer. Dr. Standefer writes that regardless of what treatment plan the claimant opts to follow he really does need to look into retraining because he needs to get out of the manual labor market. On October 26, 2005, the claimant underwent a right L5-S1 laminectomy, L5 discectomy, and thorough and complete decompression of dural tube and right S1 root including foraminotomy. Dr. Standefer writes on December 7, 2005, that the claimant is well healed from his surgery

and there is no evidence of infection. Dr. Standefer notes that the claimant still has problems with low back and lower extremity pain and recommended physical therapy and exercise three times per week for the next two months. Dr. Standefer continues to write that the claimant is not working and that he will need to apply for long term disability because in the doctor's opinion he will not be able to resume working in the manual labor market as he had been. The doctor recommended retraining for his claimant. Dr. Standefer writes on January 17, 2006, that the claimant has been attending physical therapy and thinks he may have improved but still has residual back pain and intermittent lower extremity pain. Dr. Standefer recommended that the claimant continue his physical therapy and to pursue a walking program and exercise program. Dr. Standefer released the claimant from his clinic recommending that he not lift more than forty to fifty pounds and then only on an occasional basis. Dr. Sills writes on August 25, 2006, that the claimant reports that his legs still hurt when bending and he has lower back pain. Dr. Sills notes that Dr. Standefer feels that the claimant cannot return to his previous work. Dr. Sills writes that the claimant continues unable to do his job noting that his back pain gradually developed over a number of months and years of doing his job. Dr. Sills writes that the claimant is unable to continue in the type of work which requires bending, squatting, lifting, or pulling. The doctor notes that this problem is 75 percent due to his previous work. Dr. Sills writes on February 26, 2007, in response to the claimant's attorney's letter that after reviewing

his records and discussing with the claimant his job duties, he offers up the following opinion stated within a reasonable degree of medical certainty as it regards the claimant's back injury and medical condition. Dr. Sills notes that the claimant's injury arose out of and in the course of his employment with the respondent, that the claimant's injury is in the form of a central and right posterolateral disc herniation at L5-S1, that the claimant's injury is more than 50 percent the major cause of his need for treatment and surgery on or about October 26, 2005, and that the major cause or greater than 50 percent of the claimant's injury was due to his job performance for the respondent.

After a complete review of this record, I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable gradual injury to his low back while working for the respondent. The claimant has testified that his work is very physical and requires pulling, pushing, bending, squatting, and tugging on materials weighing hundreds and hundreds of pounds throughout his working shift. The claimant has testified that he has worked for the respondent for many years and that he did not sustain a specific injury but over time began to develop pain in his low back even as early as 1999. The claimant was very straightforward in testifying that due to the physical nature of the job, physical complaints were not uncommon and he just tried to work through his discomfort. The evidence has set forth that there were two events set forth by Dr. Sills' medical reports indicating that in October 2003 he was seen for low back problems after

lifting a lawnmower. It is noted that the claimant received conservative treatment and returned to his job doing his regular duties following this event. Dr. Sills again notes that on March 28, 2005, the claimant reports right leg pain for the past four days after working on the brakes of a car. The claimant, in his testimony, stated that he did not work on the brakes but he did assist his friend, Luther, who helped him out by fixing the brakes on his daughter's automobile. The claimant testified that he may have bent over watching his friend work on his daughter's automobile, but he did none of the work and certainly none of the heavy lifting. The claimant has testified that when he reported to work the night of March 28, 2005, he asked for light duty because his discomfort was so great and when no light duty was provided, he went home early and has been unable to work since that time. The claimant has repeated several times in his testimony that he did not have a specific injury and was unaware of a gradual onset type work injury. The human resource person for the respondent, Laura Lee Wald, has even testified that she was unaware of a gradual onset type injury which would be or could be covered by workers' compensation. Based on the description of the claimant's work, the length of time which he has performed heavy physical manual labor for the respondent, and the medical evidence indicating that he had a herniated disc in his low back, I find that this claimant is entitled to have the respondent pay for his medical treatment for his low back problems as well as temporary total disability from March 28, 2005, to a date to be determined. The claimant has

continued to get treatment in the form of physical therapy and his treating physician, Dr. Standefer, has not rated him or indicated that he has reached the end of his healing period.

FINDINGS & CONCLUSIONS

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

2. The employee-employer-carrier relationship existed between the parties on all pertinent dates.

3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$414.00 for temporary total disability benefits and \$311.00 for permanent partial disability benefits.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury in the form of a gradual onset injury to his low back while working for the respondent. See discussion above.

5. The respondents should pay for all reasonable and necessary medical treatment for this claimant's low back and right extremity problems.

6. The respondents should pay temporary total disability to this claimant from March 28, 2005, to a date to be determined less any credit which the respondents would be due for his long term and short term disability benefits.

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

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

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a gradual onset type injury while working for the respondent.

The respondents should pay for all reasonable and necessary medical treatment for this claimant's low back and right extremity problems.

The respondents should pay temporary total disability to this claimant from March 29, 2005, to a date to be determined.

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

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

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

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE