

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606857

RICKEY L. LOGAN, EMPLOYEE	CLAIMANT
NUCOR YAMATO STEEL CO., EMPLOYER	RESPONDENT
ACE AMERICAN INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JULY 2, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on April 27, 2007, at Blytheville, Mississippi County, Arkansas.

Claimant represented by the HONORABLE M. SCOTT WILLHITE, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above style claim to determine the claimant's entitlement to workers' compensation benefits. On March 13, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. Modifications of the Pre-hearing Order included the claimant identifying the period of temporary total disability claimed as May 12, 2006, through September 29, 2006, as well as an agreement to address the issue of the claimant's anatomical impairment. The Pre-hearing Order is herein designated a part of the record as

Commission Exhibit #1.

The testimony of Rickey L. Logan, the claimant, Judy Haynes, Gary Jackson, and Ed Cable, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Rickey Logan, the claimant, with a date of birth of July 26, 1963, is a 1981 graduate of Blytheville high school. From 1981 through 1985, claimant was in the United States Army during which time he performed the duty of an Administrative Specialist which is comparable to an office clerk. Claimant's assigned tasks in the armed services were limited to basic office work. Claimant received an honorable discharge from the Army in 1985.

Following his 1985 honorable discharge from the Army, claimant worked at a job in a small factory in San Antonio, Texas where he was living at the time. The small factory where the claimant worked was a printing company that printed bank checks. Claimant's job duties consisted of loading paper into the printing press and monitoring its operation. The physical demands of the claimant's job entailed picking up a stack of paper a couple of inches thick and loading it into the machine. Claimant performed the job until 1989 when he returned to Blytheville, Arkansas.

Upon returning to Blytheville in 1989 secured employment at Magnitech, a factory, where he operated a standup forklift moving materials from one place to another for the assembly line. Claimant was so employed for three (3) years. Claimant maintains that he Megnitech job did not require any heavy lifting or heavy physical labor. In 1991 claimant obtained employment at Borg Warner Automotive. Claimant worked on an assembly line assembling small switch packs for Chrysler transmission. The work on the assembly line was from a seated position and did not

entail heavy physical labor or lifting involving the back. Claimant remained employed at the automotive parts plant until 1993 at which time he was hired by respondent.

The testimony of the claimant reflects that he commenced his employment with respondents on February 8, 1993. Claimant denies experiencing any significant back pain which warranted either medical or chiropractic care prior to his employment by respondents. Further, claimant denies ever having any condition in the general area of his back which required him to miss time from work prior to his February 8, 1993, employment by respondents.

At the time of his February 8, 1993, employment by respondents claimant was hired as a shipper/loader in the shipping department. Claimant remained in the shipper/loader position for approximately two (2) years, with job duties consisting of loading railcars and truck. In performing the afore, claimant was responsible for throwing boards and 4x4 lumber between the stacks, as well as climbing the railcars to band them up, and assist in guiding the crane which loaded the steel. Claimant explained that all of the wood and all of the separators between the steel was lifted manually by the people working on the ground. Claimant's testimony reflects regarding the manual lifting he performed in the shipper/loader position:

Yes. That's what we lifted. We'd throw the boards - they estimated about 80 pounds. I've never weight one. But, the boards, we would have to throw them, you know, between each layer of steel that we loaded on the car. (T. 13).

At the time of the claimant was hired by respondents he worked 8-hours shifts, however later it was changed to 12-hour shifts. Claimant noted that the shipper/loader position required him to lift 80 pounds of materials pretty constantly throughout the two years that he worked in that position for respondents. Regarding the frequency of his lifting during an 8-hour shift, the

claimant testified:

It'd be extremely hard to say, but, you know, we'd load I guess, maybe on the average, about 50 to 60 boards. You know, you estimate the amount of boards by the length of the steel you put on the car. So you put, basically, one board for every 10 feet. So, if you had, you, know, a 60-foot piece, you'd have at least 5 boards and however many layers high. If you had it 3 or 4 layers high, that's 15 boards for just that one car you's have to throw. (T. 14).

Claimant observed that there was a lot of heavy lifting in the shipper/loader position.

Following the shipper/loader position claimant briefly moved into another position which was operating the overhead crane. Claimant then became an assistant crew leader in the shipping department, from 1992 to 1993. Claimant observed that while the position changed, the work never changed in that he continued to heavy manual labor using his back lifting.

Claimant later transferred from the shipping department to the roll shop of respondent. In describing his job duties in the roll shop, claimant testified:

Well, I was that they call a roll guide builder, for a while. And, actually, what we did was we would go in and do roll changes - change the mills out for the different sides of a building they roll. And turn the chinks - is what they call them - the chinks - tear them apart and rebuilding them back together for the next section. It, basically, was a log of - we used, like, pretty much 16-pound sledge hammer and, you know, big pry bars, and crescent wrenches. You know, it was a lot of, you know, lifting heavy parts and put them on - it was quite a bit of bending and lifting and climbing and stuff like that. (T. 16).

Claimant observed that the heaviest tools lifted were the sledge hammers which ranged for 16 to 20 pounds and used to tighten the parts. Claimant also noted some of the parts that were put on were such that it would take two (2) men to pick up to put them on. Claimant testified that the job required a substantial amount of lifting using his back. In comparing the lifting required in the roll guide builder position with that in the shipping department, claimant's testimony reflects:

Well the roll guide builder was more heavy lifting, because, you know, everything in the shipping department, I could basically do it on my own. The other job, you know, like I said, some of the parts required, you know, two men to pick them up. You couldn't do it by yourself. (T. 17).

Claimant remained in the roll guide builder position for seven to eight years. Claimant acknowledged that there were times while in the shipper/loader position and in the roll guide position when experienced back pain. Claimant concedes that he did not seek medical care up to the point that he left the roll guide position:

Well, no, I just kind of figured it was just, you know, from the work I was doing. My back was just tired and I'd go home and sleep it off and come back tomorrow. I never expected it to be an injury. (T. 18).

As of 2004 claimant had not sought medical or chiropractic care relative to his back. There is evidence in the record to reflect that the claimant had a motorcycle wreck in 2001, and suffered a broken collarbone and a collapsed lung. Claimant maintains that he returned to work after being off for six weeks due to motorcycle accident, and that he did not have any trouble whatsoever as a result of the motorcycle accident.

In 2004 the claimant's job position changed to that of operating a lathe machine.

Claimant testified regarding the physical demands of the lathe machine position:

Well, about the heaviest part of it would be maybe handling the cables. We used, I think, the three-quarter, maybe one-inch cables, at least 50 feet long, we would have to throw between the rolls and, you know, the loading and the unloading of the machine was basically the heaviest work that we would do. (T. 19).

Claimant concedes that the lathe operator position was lighter duty than the roll guide builder.

Claimant noted that there were times in the lathe operator position that he worked harder than usual, though not on a daily basis. Regarding any recreational or extra-curricular activities

outside of work, claimant's testimony reflects:

Well, just, you know. No hobbies, as far as sports or anything. I didn't play any sports or anything like that. The only other thing I've done outside of my job was, well, my father owns a garage and from time to time I would, you know, go down and help him out and stuff like that on my days off. Other than that, I wasn't involved in any kind of sports or things like that. (T. 20).

The testimony of the claimant reflects that at the time he went into the lathe operator position in 2004 he was experiencing occasional back pain. Claimant added:

Well, just becoming more - I really didn't know it was my back. It kind of just felt like I had a pulled muscle or something in my leg. I really thought I had a hamstring pull in my [left] leg, so I really just kind of would just started stretching and just kind of keep myself loose, you know, give myself some relief, and it just started gradually just getting worse and worse as time went on. (T. 20-21).

The testimony of the claimant reflects that when he finally sought treatment for what he thought was a pulled hamstring in his left leg he went to Dr. Michael Oldham, a chiropractic physician. Claimant does not dispute that at the time he sought treatment by Dr. Oldham he was performing the duties of a roll turner at respondent.. Further, claimant concedes that at the time of his visit to Dr. Oldham his major complaints were his lower back and left leg. The testimony of the claimant reflects that he was attempting to gain some relief from his symptom so he could continue to work.

Claimant testified that after three to four visits to Dr. Oldham without any improvements in his symptoms he decided to see another doctor, Dr. Barrett-Tuck. Claimant acknowledged that March 16, 2006, was one of the days that he was seen by Dr. Oldham. The testimony of the claimant reflects that he was not referred to Dr. Tuck, but rather called and made an appointment on his own. Claimant added that he had heard the Dr. Tuck was a good doctor in the treatment of

back pain.

Claimant acknowledged that he never experienced a specific incident or accident at work to serve as the basis for his back pain complaints:

No, I didn't have an accident. It was just - pain would just start small and just grew to the point where I couldn't take it, so I just went to the doctor. (T. 22).

Likewise, claimant denies having an accident or incident outside of work.

Regarding his conversations with supervisory personnel of respondents at the time he began experiencing back pain, the testimony of the claimant reflects:

Well, I - I would just, you know, pretty much just talk to him about it. I didn't really say I need to fill out an accident - I didn't really know what was wrong, you know. And I would just say, you know, man, you know, my back is kinda bothering me, I've been having a little trouble, I think I might go to the doctor about my back. You know, just stuff, just pretty much in conversation. I wasn't really reporting an injury, because I didn't have an injury. I didn't know what it was. (T. 23).

Claimant testified that at one point he was discussing his complaint regarding his back pain with some every day because every day that he worked he was having trouble with his back but he continued to work. Claimant's testimony reflects that at least once or twice he discussed his back complaint with his supervisors, Ed Cable and Gary Jackson, individuals that he talked to daily. Although both individuals were identified as supervisors to whom claimant had been instructed to report work-related accidents, claimant acknowledged that at the time of his conversations with them he was not aware at the time that the same was the product of work-related activities.

Claimant testified that at the time he discussed his back complaint with Mr. Cable and Mr. Jackson it was around the time that he was going to the chiropractor, because it was during

that time that he was in his most pain. Claimant testified regarding the point in time that he related his work to making his symptoms worse:

Well, yes, because it had got to the point where, on my job that I do with roll turner, we do a lot of sitting, and it would get to the point where after I would sit down for a certain amount of time, my leg would just start hurting me and I'd have to get up. I couldn't really sit there for a while and then once the pain started, then I couldn't sit or stand, you know, and it was just real uncomfortable, you know, even in doing no physical labor at all, I couldn't even sit down for a long period of time. (T. 25).

Claimant testified regarding the physical activities and maneuvers he performed while discharging the lathe operating position:

Well, you know, we do a lot in tightening and loading and unloading the machine, you know, we have to tighten - it's a lathe, so you have to like tighten and stuff, where you have to use ratchets and stuff that tightens up and, you know, kind of bounce it on, or maybe pulling - pulling to tighten them up to get it lined up, you know, and that's pretty much what we'd do.

I think like 24-inch ratchets, you know. Sometimes, we'd put a piece of cheater pipe, you know, pipe on the end of it to give it a little more leverage or something like that. (T. 25-26).

Claimant asserts that it was during the lathe operator position when his back started hurting even more, to the point that he sought medical care. The testimony of the claimant reflects that it got to a point where everything he did seem to cause his back to hurt.

The claimant testified that there was no inquiry from his supervisor regarding whether he had injured himself in an accident at home or work or anything:

Well, no, not really. We just discussed, you know, I just discussed, you know, my pain, and, you know, basically, just told me, you know, do what you have to do to get better, you know, just get yourself well. (T. 27).

Claimant testified that he was never directed by his supervisors to a specific doctor or medical

provider.

The medical records reflect that the claimant was initially seen by Dr. Barrett-Tuck on April 12, 2006. Claimant has continued under the care of Dr. Tuck since the initial visit. The testimony of the claimant reflects that following his initial visit to Dr. Barrett-Tuck he was taken off work by her on May 12, 2006. Dr. Barrett-Tuck performed surgery on the claimant's back on May 16, 2006. Claimant's testimony reflects that prior to the May 16, 2006, surgery he advised personnel at respondent that surgery was being recommended:

Well, I told my supervisors that I was going to be going out on sick leave because I was scheduled for surgery. (T. 28).

When questioned about whether he was aware that his need for surgery was related to his work, claimant responded:

No, I just, you know, I just wanted to get relief at that time. I didn't, know, I really wasn't thinking about it, you know. I just felt, you know, I knew that my work is the only thing I was doing. You know, I felt that it was, but I didn't have an accident to say this is what caused it. I just started feeling pain. (T. 28).

Claimant advised both of his supervisors of his pending surgery. Claimant noted that between the April 12, 2006, initial visit to Dr. Barrett-Tuck and the May 12, 2006, followup visit he was in severe pain. Regarding his ability to function at work during the afore period, claimant testified:

Well, I made it through, you know, with the help, you know, of the guys around me, and you know, they really helped me a lot, because everybody knew what kind of pain I was in, so I had some help, but I still did my job. (T. 29).

Following the surgery of May 16, 2006, claimant remained off work. On September 29, 2006, Dr. Barrett-Tuck assigned the claimant a 10% impairment rating. Claimant testified that

he did not work between May 12, 2006, and September 29, 2006, because he was not physically able to do so. Claimant's testimony reflects that following the May 16, 2006, surgery he obtained relief from his symptoms and pain. Specifically, claimant noted that the pain in his leg "totally went away". (T. 29). Claimant underwent physical therapy, pursuant to the directions of Dr. Barrett-Tuck, at Greater River Medical Center.

The testimony of the claimant reflects that he had another incident after the May 16, 2006, surgery that required need a second surgery. In describing the incident, the testimony of the claimant reflects:

Yes, I did. I was actually off, and I just - I was helping a friend of mine. I moved a table, you know, and it just hurt my back. You know, just - with pain. I mean, just, I didn't know it was anything serious. I don't even know if that's what caused me to have the second surgery. I just know that I went to the doctor shortly after that, and she did an MRI to see if I would be able to go back to work or not. When she did the MRI, they saw that I had a ruptured disc. (T. 30).

Claimant's testimony reflect that the table-lifting incident occurred in November 2006. Claimant testified regarding his September release:

From the - yes, because the physical therapist, pretty much, when he released me, he just told me, he said, just do whatever you feel like you can do. Just understand when it starts hurting, stop. (T. 31).

The claimant testified that in September 2006, he was still out on long-term disability. Claimant explained that he initially received sick leave pay for a period of 90 days, and thereafter he was switched over to long-term disability. The testimony in the record reflects that the claimant has received indemnity benefits since he was taken off work on or about May 12, 2006. Claimant testified that he last W-2 Form reflected that he earned \$94,000.00, for the year. The claimant's sick pay was less than 100% of his regular full pay. Claimant long-term disability

benefits equates to 50% of his regular full pay. Claimant's testimony reflects that between May 12, 2006, and September 29, 2006, he was physically unable to work due to his back.

Regarding the benefits realized from the May 16, 2006, surgery, the testimony of the claimant reflects:

Well, almost. I still have pain now, so I'm still being treated for it, you know. The pain from my leg and all that, it worked - it went away. (T. 33).

Claimant testified that he informed his supervisors everything that he knew about his back problem, and that he kept them current on his medical status. The health insurance carrier of the claimant paid the cost of his surgery, less the co-pay or deductible.

Claimant maintains that he discussed his job duties with Dr. Barrett-Tuck on several occasions, and that the discussion pre-dated August 23, 2006. Claimant continued to treat with Dr. Barrett-Tuck, with his next appointment scheduled in June 2007.

On cross-examination claimant testified regarding the circumstances surrounding his decision to file a workers' compensation claim regarding his back complaint:

Well, actually, what happened was about a week after my first surgery, I got a call from the insurance carrier [Blue Cross Blue Shield Health Advantage]

I actually got a call from them and they just had a question - a couple of questions to ask me about my surgery and then they asked me the question, do you feel that, you know, this surgery was work related; do you feel that this injury was work related, and I told them, I said, yes. And at that time, they advised me - well, they didn't advise me, but they just kind of told me that they were going - they were not going to pay my bill and that workman's comp should have to pay my bill. And so - and the doctor's office called me and told me that the insurance company had called and demanded a refund of their money and if workman's comp didn't pay it, then I would be responsible for paying 100% of the bill. (T. 36-37).

Claimant noted that his specific response to the inquiry of the health carrier during the telephone

conversation:

. . . . and I believe my answer to them was, I said, yes, I've been working there for 13 years and yes, I'm sure it is. (T. 37).

Claimant explained his reasoning for having not filed a workers' compensation claim regarding his back complaint prior to the telephone with the health insurance agent:

Because I just took care of it on my own. I didn't have an accident to actually report. I just started feeling pain, it got to the point where I couldn't take it anymore, so I went to the doctor on my own, and the doctor told me what she found, and I decided to have surgery on my own, and I just went forth in what I was doing. (T. 37-38).

Claimant denies that he was frightened into filing a claim by Blue Cross Advantage's refusal to pay for his medical bills relative to the surgery:

No, I wasn't scared into it. I just, you know, I just realized that that was the route I should have taken in the first place. If I would have reported my injury - if I would have made an accident report about me feeling pain before I ever had surgery, this would have never come about. (T. 38).

In describing his belief of the casual nexus between his work activities and the resulting back injury claimant testified:

I mean, I knew that, when I first started feeling pain, my work was the only thing I was doing and, you know . . . (T. 38).

Claimant concedes that he told Dr. Oldham that he was having some pain in his back and his leg and he did not know what was causing it. Claimant explained:

When I say I don't know, I mean, I didn't slip and fall, I didn't get hit, I don't know what caused it. I just know that I started feeling pain and it just started to gradually get worse - that's all I can say. I don't know.

* * *

I did not have one specific accident or I didn't have one thing

that happened to me that caused me to start hurting or anything. Like I said in the beginning, I thought I had a pulled muscle in my leg. That's what it felt like. That's exactly what it started out feeling like. I just thought I had a pulled muscle in my leg. (T. 39-40).

Claimant again identified the lathe operator job as the one he was doing at the time his pain started. The lathe operator job is one performed while sitting at a control panel. Claimant denied that there was anything involved in sitting and watching the control panel that caused him to have back problems. The testimony of the claimant reflects, by way of explanation:

Nothing about the sitting part. That was the uncomfortable part of it. But, that didn't cause it. That's where I felt my most discomfort. That's what I was discussing with the doctor. (T. 40).

Claimant's testimony reflects that once his back pain began he had trouble while sitting everywhere. Claimant noted that sitting did not cause his pain, it was just his most uncomfortable position.

The testimony of the claimant reflects that he turned in paperwork requesting sick leave prior to his scheduled surgery of May 16, 2006. Claimant continue to work until May 12, 2006. Later, claimant completed the necessary documents for long-term disability benefits. Claimant concedes that he never mention or gave notice to respondents that he was filing a workers' compensation claim until after he had undergone surgery on his back.

Claimant acknowledged that he never told Ed Cable, the department head, that he thought that the job was causing his back problems:

I never said it, because I didn't know what - I didn't have a specific incident that happened to me. All I could do is just say, hey, I'm having trouble while I'm working, my back is bothering me while I'm working, and I think I'm gonna go to the doctor. That's all I could say. (T. 42-43).

Regarding the nexus between his job and his back problems, claimant testified:

Well, I mean, I could say - from the very beginning, I could have said the cause of it is my job, but if somebody would ask me what did it, I could still - my answer would still be, I don't know. (T. 43).

Claimant testified that he was unaware that Dr. Barrett-Tuck had indicated in an earlier medical report, July 24, 2006, that in her opinion his back injury did not result from his job at respondent. Claimant maintains that subsequent to the July 24, 2006, date he discussed in more details his work history at respondent with Dr. Barrett-Tuck. The testimony of the claimant reflects regarding the July 24, 2006, correspondence of Dr. Barrett-Tuck:

Well, I think, you know, from the - we would have discussions - I don't know where that came from, but, I mean, we discussed my work history and maybe more in depth after that, I don't know, because after I would see her, she would ask me how my condition was going and I'd say, well, I'm still having a little more pain, still having problems with this, and then we really got more in depth as to what I had been doing over the course of my 13 years. During - when I first went to her, on that first surgery, pretty much all I did was discuss with her the problems that I had been having and the job that I was doing at that present time. And maybe that's based off of that, but then, as we talked and I told her I was still having pain and I was having concerns about, you know, still being in pain and not getting any better, then we just kind of discussed more of what I had done over the course of my employment, and maybe that's why she wrote it, second, I don't know. I don't have any of those, like I said. (T. 44-45).

Claimant acknowledged that by the date of the August 23, 2006, report of Dr. Barrett-Tuck opining a nexus between his back injury and the work he performed for respondent he'd had a conversation with her.

Claimant testified that he had the discussion with the claim adjuster for the health care provider, Blue Advantage, approximately three (3) days following his May 16, 2006, surgery. In explaining the change in Dr. Barrett-Tuck's opinion, claimant offered:

Well, I don't - I guess through me explaining my situation and my work, you know, because as she was trying to get me ready to come back

to work, she would ask me more and more questions about what I actually do, how I do it, what I have been doing in the past. You know, maybe that's what changed her opinion. I don't know what changed her opinion. (T. 45-46).

Claimant asserts that it was unnecessary for him to discuss with Dr. Barrett-Tuck that the health care carrier had declined to pay the bills generated as a result of the May 16, 2006, surgery because they contacted her office and demanded a refund. Claimant was informed of the afore by Dr. Barrett-Tuck's office within a couple of weeks of the telephone call he received from the healthcare carrier. (T. 53). Claimant observed that Dr. Barrett-Tuck had been paid such that it should not matter to her where the money came from.

The claimant has been paid for the entire period he has been off work relative to his back. Claimant received sick pay initially. Claimant is now receiving \$4,012.00, per month in long-term benefits. The testimony of the claimant reflects that the health care carrier paid for the cost of the second surgery. Claimant is responsible for \$800.00, of the second surgical cost. The credible testimony of the claimant reflects that he had not been released to return to work at the time of the table lifting incident.

The testimony of the claimant reflects that in September 2006, Dr. Barrett-Tuck had assessed an impairment rating relative to the injury and May 16, 2006, surgery. In November 2006, claimant helped lift a table and experienced increased pain in his low back. Claimant returned to Dr. Barrett-Tuck in December 2006, for a routine visit. The claimant's testimony reflects regarding the circumstance surrounding the second surgery:

Yes, I hurt - yeah, yes. It really wasn't an incident. What happened, basically, what that was is I went back for a follow-up visit to Dr. Tuck in December. She asked me what had I been doing, had anything been going on - ready to run - gonna run some tests on me, you know, and just in general conversation, you know, I told her, yeah, I'm

still having a little pain, no, actually, I had a little more. I said, actually, I had one incident where I kind of hurt a little more than normal and I discussed it with her. I didn't say that that actually hurt me. I just kind of, in discussing and telling her what I had been doing from my last visit until now. (T. 48).

Claimant explained that the table that he was helping move was a "small-size" pool table, the kind sold at Wal-Mart which was less than six feet long and weighing less than a couch. As of the date of the hearing in this claim, the claimant was not working because he had not been released following the second surgery.

Claimant acknowledge performing routine daily activities involving his back in addition to his work for respondent over the past 13 years. Specifically, claimant mowed his yard using a lawnmower. Claimant described the work he performed at his father's business, Logan Automotive, on his days off:

Well, not what I would do. I mean, I'd just help him out in areas, you know, where he would, you know, maybe like when he was working on a job that was very time consuming, I would just maybe do a break job or, you know, small things like that. I wasn't pulling any motors or nothing like that. (T. 49-50).

Claimant denies that the afore activity caused the injury to his back.

The testimony of the claimant reflects that he did not tell anyone at work, to include his lead man, Gary Jackson, that he injured himself at work. Regarding any assertion that he was given an opportunity at the onset to file the claim relative to his back on either the health insurance or workers' compensation, claimant testified:

Not that I know of. I know one - I know one instance that I spoke with her [Judy Haynes] and they told me that, you know, maybe I should have talked to Woody, who is the medical - I don't know what you call it, you know, but I didn't get a chance to speak with him.

Well, what happened is, when - I went to the office one time to bring some paperwork ro something, and I discussed this situation with them.

I didn't know what happened - I didn't know what caused it. I couldn't pinpoint it, so I didn't have an accident report to fill out, cause I had not way to pinpoint exactly what happened. (T. 51-52).

In describing the circumstances surrounding his initial treatment with Dr. Barrett-Tuck, the testimony of the claimant reflects:

Yes. See, when I first went to Dr. Tuck, I just went to Dr. Tuck with the back pain, and that was it. I told her I'm having problems, I'm in pain, you know, this is what's going on. Dr. Tuck did an MRI and did a myelogram, saw the problem, and we instantly went in for surgery. We didn't have time to discuss what happened. When she saw my problem, she wanted to do surgery the same week, but I scheduled it for a week later. And so we didn't even have time to sit down and discuss what happened. She just saw the problem and fixed it. (T. 53-54).

Claimant testified the he discussed in detail his job duties of heavy physical labor at respondent during the course of his 13-years of employment with Dr. Barrett-Tuck at some time immediately prior to August 23, 2006.

The testimony in the record reflects that during the 90-day period that the claimant received sick pay subsequent to May 12, 2006, he received a total to \$700.00, per week in indemnity benefits. Further, claimant's testimony reflects that between September 29, 2006, and the December 2006, follow-up visit with Dr. Barrett-Tuck he continued to receive medical treatment relative to his back injury and surgery in the form of physical therapy at Great River Medical Center in Blytheville. Claimant had not been released to return work by Dr. Barrett-Tuck following the September 29, 2006, impairment rating.. Regarding the December 2006, visit to Dr. Barrett-Tuck, claimant testified:

Right, that was a scheduled appointment to see if I was ready to go back to work. She was going to - that's when she scheduled a final - another MRI to make sure everything looked okay so I could go back to work. (T. 58).

Ms. Judy Haynes, Human Resources Clerk with respondent-employer, testified that her job duties entailed helping employees when there are problems with the claims not being processed correctly or not at all. Ms Haynes testified that regarding her contact with the claimant in her official capacity after the May 16, 2006, surgery:

He came in and told me that - he was questioning about worker's comp, and the problems that he was having with the insurance.

Well, we have access to claims filed with Blue Cross for our employees, and if the claims were paid by Blue Cross, and so I just simply told him that if he felt like this was worker's comp, that he needed to talk to our plant nurse, which is Dennis Woody, and once they decided and they came up with a decision whether it was work-related or not, one of them needed to let me know. (T. 59-60).

Ms. Haynes testified that she did not hear back from anyone.

The testimony of Ms. Haynes reflects that in order to receive sick pay the employee has to furnish an excuse from the doctor reflecting that the employee will be out for a certain length of time. Ms. Haynes concedes that the fact that the claimant received sick pay is indicative of the fact that the appropriate documents were received. Respondent-employer was aware that the claimant was going to be off for back surgery prior to the surgery.

Ms. Haynes testified that the long-term disability paperwork is also completed in the Human Resources Office, however another clerk in the office has responsibility for handling it. Ms. Haynes testified that she was unaware that Dr. Barrett-Tuck had complete one of the forms on June 19, 2006, indicating that the claimant's condition was work related. (CX. #1, p. 7).

Mr. Gary Jackson, the Roll Shop Leader at respondent-employer, testified that he held the position when the claimant work in the Roll Shop. The testimony of Mr. Jackson confirms that of the claimant in that the claimant never came to him and reported that he had injured his back and wanted to file a workers' compensation claim. Mr. Jackson's testimony reflects that he first learned of the claimant's worker's compensation claim approximately three weeks prior to the hearing. Mr. Jackson testified that when the claimant went out in May 2006, he was aware that it was for his back.

The testimony of Mr. Jackson reflects that he was the claimant's boss that last two year, from 2004 to 2006. Mr. Jackson acknowledged that the claimant job duties required him to do a lot of heavy lifting and physical labor. Further, Mr. Jackson testified that the claimant's position as a lathe operator on occasion required some heavy lifting.

Mr. Ed Cable, Roll Shop Supervisor for respondent-employer, testified that he held the position at the time the claimant worked in the Roll Shop. Mr. Cable testified regarding his conversation he had with the claimant about his back problems:

He told me his back was bothering him and that eventually he was gonna have to leave and have surgery.

No, he, like, Rickey said - he said he didn't know what caused it to hurt, but it was hurting him. (T. 69).

Mr. Cable concedes that a 13-year employees of respondent-employer is pretty good employee.

Mr. Cable's description of the claimant include "a very good employee" and "a hard worker" as well as a credible person. (T. 70).

Regarding the roll guide builder position that the claimant worked in for seven to eight years, Mr. Cable testified that while it was a manual labor position, respondent has cranes

available for the employees to use to help with the weight. Beyond the cranes Mr. Cable acknowledged the position required some manual labor for the workers. Regarding the prospect of someone doing the roll guide builder position for seven or eight years with its heavy manual labor having a back problem, the testimony of Mr. Cable reflects:

We have quite a few gentlemen in that position and I would say that, without a specific injury, okay - that's what I would be talking about - that's what would concern me, a specific injury. (T. 71).

The medical in the record reflects that the claimant was seen by Dr. Michael Oldham, a chiropractic physician, on three (3) occasions in March 2006, for complaints of low back and left leg pain. The Confidential Patient Case History, which was completed by the claimant during the initial visit of March 13, 2006, noted that the claimant was employed in the occupation of "roll turner" at respondent-employer. The document reflects complaints of low back and left leg pain for two (2) months. Further, the document reflects that the claimant had not had the afore or similar complaints in the past. Claimant disclosed that "sitting" made the condition worse, while walking made it better. Finally, the document reflects that the claimant responded that he did not know what caused the condition. (RX. #1, p. 1-4).

The DC Daily Office Notes relative to the March 13, 2006, visit of the claimant to Dr. Oldham reflects, " pt complains of severe lbp - across low back w/ (p) radiating d, leg - radiation 2 months". Claimant rated the pain in his back and leg at 8 each on a scale of 0 to 10. When the claimant was seen on March 14, 2006, he rated his back and leg pain at a 5 each, and reported "minor relief" since his last visit. (RX. #1, p.7).

The claimant's last visit to Dr. Oldham was had on March 16, 2006. The DC Daily Office Notes relative to the March 16, 2006, visit reflects "mod-severe lbp - esp. when bending

or lifting”. Claimant rated his pain during the visit at 6 out of 10 for both his low back and left leg. In addition to pain, the March 16, 2006, note reflected the presence of “spasm”. (RX. #1, p. 5). A Joint Evaluation of the Lumbar Spine conducted by Dr. Oldham on the claimant during the third visit, March 16, 2006, reflects, “pt has inflammation palpable edema & lumbar disc disorder will benefit from adj. & physiotherapy 15 visits”. (RX. #1, p. 6).

There is no evidence in the record to reflect that the claimant was again seen by Dr. Oldham following the March 16, 2006, visit. The credible testimony of the claimant reflects that after he failed to realize improvement in his symptoms he ceased the chiropractic treatment.

The claimant was initially seen by Dr. Rebecca Barrett-Tuck, a Jonesboro neurosurgeon, on April 12, 2006. The April 12, 2006, report of Dr. Barrett-Tuck reflects Dr. Ronald Smith, the claimant’s family physician, as the referring physician. The April 12, 2006, report reflects, in pertinent part:

HPI: Rickey Logan is a very pleasant 42-year-old gentlemen who reports that several months ago he began noticing an aching in the left leg while sitting at work. As time passed, the aching became more severe and then began to feel as though there was a pull in the back of his leg which eventually radiated all the way down into the calf in association with back pain as well. He has not noticed any numbness or tingling. The pain has become so severe that it is almost unbearable for him. At this time he can only get complete relief by lying down flat on his back. He has tried chiropractic treatment, heat, ice, and pain medications; however despite treatments his pain has continued to escalate. (CX. #1, p. 1).

Following the physical examination of the claimant Dr. Barrett-Tuck offered that the symptoms and findings were suggestive of disc rupture with impingement. Dr. Barrett-Tuck arranged for the claimant to undergo a MRI of the lumbar spine and to be seen in followup to review the test results. The office note relative to a April 14, 2006, visit by the claimant to Dr. Barrett-Tuck

reflects, in pertinent part:

. . . He underwent an MRI of the lumbar spine. Mr. Logan is having severe radicular pain involving the left leg. The MRI does show a disc protrusion at L3-L4 on the right. There is degeneration of the disc as well, but I do not see any definite compression on the left side at that level or any other level. His symptoms are so suggestive of radiculopathy I have requested that we proceed with a myelogram and post myelogram CT scan. I will see him back thereafter. It may be if the myelogram is unrevealing that EMG/NCV would be helpful. (CX. #1, p. 3).

A May 8, 2006, Office Visit/Addendum authored by Dr. Barrett-Tuck relative to the claimant

reflects:

Mr. Logan underwent a myelogram and post-myelogram CT scan April 21, 2006. The Myelogram itself demonstrates poor filing of the nerve roots bilaterally at L4-L5 and L5-L6. Mr. Logan has an extra disc space that is being termed L6-S1. The CT scan does not really look terribly severe, but Mr. Logan's pain is very much radicular and the myelogram is convincing. I have offered him a lateral recess decompression on the left L4-L5 and L5-L6. I have discussed risks and possible complication as well as expectations with him. He understands that the biggest risk is probably the risk of incomplete pain relief. (CX. #1, p. 4).

The claimant was again seen by Dr. Barrett-Tuck on May 15, 2006, at which his complaint was assessed as radicular pain on the left which had escalated over time. The May 15, 2006, report also reflects plans to perform L4-L5 and L5-L6 lateral recess decompression on the left. (CX. #1, p. 5-6). Claimant underwent the surgical procedure on May 16, 2006. (CX. #1, p. 9).

The claimant applied for long term disability income benefits in connection with his convalescence from the May 16, 2006, surgery. The application included a portion which was completed by his treating physician, Dr. Barrett-Tuck. That portion of the application completed by Dr. Barrett-Tuck reflects that the claimant's condition was the result of an injury and was work-related. (CX. #1, p. 7-8).

The July 3, 2006, office note of Dr. Barrett-Tuck, relative to a follow-up visit of the claimant reflects, in pertinent part:

. . . He underwent partial hemilaminectomies and diskectomies at L4-L5 and L5-L6 on the left on May 16, 2006. Mr. Logan has experienced excellent relief of his leg pain, but still has quite a bit of back pain. He is slowly increasing his activity and is still working with physical therapy. He works at the steel mill and is very concerned about his future at the steel mill. I am going to keep him off work for another six weeks. I will re-evaluate at that time. (CX. #1, p. 9).

In a July 24, 2006, response to an inquiry from the claimant's attorney, Dr. Barrett-Tuck relayed, relative to the causal nexus of the claimant's injury to his employment:

In reviewing Ricky Logan's chart I note that the onset of his pain does not correlate with any particular event that he can identify. He did notice the pain for the first time when he was sitting at work, but did not mention a particular event that he feels started the pain. Therefore, I would not be able to say with a reasonable degree of medical certainty that an injury at work caused the disc protrusions and lateral recess stenosis that resulted in Mr. Logan's surgery. Therefore it is my opinion to a reasonable degree of medical certainty based on the information presented to me by the patient that Ricky Logan's back injury did not result from his work at Nucor-Yamato Steel. (CX. #1, p. 10).

A subsequent August 23, 2006, response by Dr. Barrett-Tuck to the claimant's attorney reflects:

I understand that Mr. Logan has filed a workman's compensation claim for his back injury. Mr. Logan has worked for Nucor Steel for a period of approximately 13 years. Certainly the activities that one is involved in relates to the wear and tear changes that occur in the lumbar spine. Mr. Logan did have degenerative changes at L4-L5 and L5-L6 with lateral recess stenosis. This occurs as a result of wear and tear over time. He also had a disc rupture on the L5-L6 on the left, which more of an acute injury. Considering the type of work that Mr. Logan does and the number of years that he has worked for Nucor Steel, I believe that it is more likely than not that this gentleman's back problems are related to his work. I think it is more reasonable to say that there is at least a 51% chance that both the disc rupture and the degenerative changes are related to 13 years of heavy physical labor at Nucor Steel. I believe these statements can be made with a reasonable degree of medical certainty. Please let me know if I can

offer any further information. (CX. #1, p. 11).

The medical in the record reflects that the claimant was seen by Dr. Barrett-Tuck in follow-up on August 23, 2006. The office note relative to the visit reflects, in pertinent part:

. . . It has been about three months since his partial hernilaminectomy and diskectomy. His leg pain has resolved nicely. He is mostly having back pain at this point. He is continuing to exercise and try to increase his stamina. He can put in he reports a work day of 4-5 hours. He has been doing some cleaning around his father's house who recently passed away, however he reports that after 4-5 hours of hard work he is pretty much down for a couple of days. Of course, he works for Nucor Steel where he has worked for the last 13 years. It is a very heavy job. I think at this point his work stamina is not to the point that he could return. It seems that it may take some time. It is not clear whether he will be able to return to his job at Nucor Steel, he is hopeful that he can. He is now on the short term disability plan and will have up to 12 months to try to recover before he will have to give up his job. We discussed the possibility of going back to physical therapy versus doing his own therapy at home. He is walking on a daily basis as well as doing repairs and clean up around his own house and his father's house, as well as doing his back exercises. He will continue in this endeavor and hopefully we will see a slow progressive return of strength and endurance and be able to get him back to his previous job with Nucor Steel. I will plan to see him back in about 10-12 weeks. I hope to see significant improvement by that time. (CX. #1, p. 12).

In a September 29, 2006, correspondence to the claimant's attorney Dr. Barrett-Tuck offered that because of the claimant's residual symptoms relative to the lumbar disc rupture which was treated surgically, she "would recommend a 10% impairment rating to the body as whole". Of note it the fact that Dr. Barrett-Tuck does not relay that the claimant is at maximum medical improvement in the September 29, 2006, correspondence. Indeed, there is no evidence in the record to reflects that the claimant was seen or examined by Dr. Barrett-Tuck in connection with the September 29, 2006, correspondence. In her August 23, 2006, office note Dr. Barrett-Tuck relayed plans to again see the claimant in "10-12 weeks", which meant that the

claimant was not again scheduled to be seen by Dr. Barrett-Tuck until December 2006.

The undisputed credible testimony of the claimant reflects that in November 2006, while lifting a table he experience pain in his back. Claimant returned to Dr. Barrett-Tuck in December 2006, in accordance with the previous August 23, 2006, office visit. A subsequent MRI scan lumbar spine disclosed the presence of a herniated disc. Claimant has since undergone a second surgical procedure under the care of Dr. Barrett-Tuck, and remains off work recovering from same.

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 this claim.
2. On or about March 1, 2006, the relationship of employee-employer-carrier existed among the parties.
3. On or about March 1, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$488.00/\$366.00, for temporary total/permanent partial disability.
4. On or about March 1, 2006, the claimant sustained a gradual onset injury to his back arising out of and in the course of his employment.
5. The claimant was temporarily totally disabled for the periods beginning May 12, 2006, through September 29, 2006, and continuing thereafter through the end of his healing period, a date to be determined.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of March 1, 2006.

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

CONCLUSIONS

The claimant maintains that he sustained a gradual onset low back injury in the employment of respondents which required medical treatment and rendered him totally incapacitated from engaging in gainful employment during his recovery period. Claimant asserts entitlement to corresponding temporary total disability and medical benefits as well as the payment of indemnity benefits to correspond with a 10% whole body impairment and controverted attorney fees. Respondents deny the compensability of the claimant's claim.

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. To prove entitlement to compensation for his back injury, claimant is required to prove either that he sustained an injury arising from a specific incident identifiable by time and place of occurrence or that he sustained an injury arising out of and in the course of employment that is the major cause of the disability or need for treatment.

COMPENSABLE GRADUAL ONSET BACK INJURY

The requirements to establish a gradual onset injury are reflected in Ark. Code Ann. §11-9-102 (4):

- (A) "Compensable injury" means:
 - (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not

caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence;

(E) (ii) For injuries falling within the definition of compensable injury under subdivision (4)(A)(ii) of this section, the burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

An employee must establish the compensability of his claim with medical evidence, supported by objective findings. *Patterson v. Frito Lay, Inc.*, 66 Ark. App. 159, 992 S.W.2d 130 (1999).

The credible evidence in the record reflects that the claimant did not have any physical limitations or restriction relative to his back prior to his February 8, 1993, employment by respondent-employer. Further, during his employment with respondent claimant discharged heavy manual labor which entailed frequent lifting weights in excess of 50 to 80 pounds, pulling heavy cables, and using heavy tools, as well as substantial bending and climbing. There is not a dispute regarding the mechanics of the claimant's job duties during the course of his employment by respondents whether in the shipper/loader position, roll guide builder, or lathe operator position.

As reflected in the evidence above, at the time claimant sought treatment regarding his low back and left leg pain on March 13, 2006, he relayed that he was employed by respondent - employer as a roll turner, and that he had been having increasing symptoms for two (2) months. The symptoms were worsen by sitting, were progressively worsening, and were unlike any he had ever previously experienced, to include a motorcycle accident he had suffered years earlier. The claimant was seen by Dr. Oldham, a chiropractor, on at least three (3) occasions commencing

March 13, 2006. The records of Dr. Oldham are corroborative of the claimant's testimony that his condition was not improved by the chiropractic treatment. During the final chiropractic visit of March 16, 2006, the office note reflected the presence of muscle spasm in addition to complaints of moderate to severe pain.

When seen by a medical doctor on April 12, 2006, claimant present the same history of his low back and left leg pain as he had relayed earlier to the chiropractic physician. Specifically, his symptoms were worse while sitting and progressing in severity over time. Subsequent diagnostic studied disclosed objective findings, to include a herniated disc.

The claimant's treating surgeon, Dr. Rebecca Barrett-Tuck, a Jonesboro neurosurgeon, in a June 19, 2006, Application for Long Term Disability Income Benefits, which was completed on behalf of the claimant indicated the claimant's lumbar disc rupture was an injury and relate to the claimant's work. Dr. Barrett-Tuck again confirmed the nexus between the claimant's injury and his work activity in a August 23, 2006, correspondence, which also addresses the major cause requirement. The provisions of Act 796 of 1993 do not require that the claimant prove that his work was the major cause of his back condition, but rather requires that the claimant prove the his compensable injury is the major cause of his disability or need for treatment. *Medlin v. Wal-Mark Stores, Inc.*, 64 Ark. App. 17, 977 S.W.2d 239 (1998).

The claimant has sustained his burden of proof by a preponderance of the evidence that the disc rupture and degenerative changes in his lumbar spine constitute a gradual onset back injury which arose out of and in the course of his employment with respondent. Further, the claimant has sustained his burden of proof by a preponderance of the evidence that the compensable gradual onset back injury is the major cause of his need for medical treatment.

Finally, the claimant has established the compensability of his claim with medical evidence, supported by objective findings. Respondents have controverted the compensability of this claim in its entirety.

NOTICE

Ark. Code Ann. §11-9-701, in pertinent part:

(a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

(b)(1) Failure to give the notices shall not bar any claim:
(A) If the employer had knowledge of the injury or death;
(B) If the employee had no knowledge that the condition or disease arose out of and in the course of the employment; or
(C) If the commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

Respondents assert that the claimant did not provide notice of a work-related claimed injury until after he had undergone surgery relative to same on May 16, 2006. The evidence preponderates that claimant relayed his complaints of low back pain and left leg pain to supervisory personnel of respondent-employer prior to the time he first treatment for same under the care of Dr. Oldham, a chiropractic physician, on March 13, 2006. Likewise, the disclosure was made by the claimant to supervisory personnel of respondent-employer prior to his May 16, 2006, surgery under the care of Dr. Barrett-Tuck.

The claimant was as forthright with supervisory personnel of respondent-employer as he was with each of his medical providers. At the time of his March 13, 2006, visit to Dr. Oldham,

D.C., while noting the onset of his symptoms over a two month period, with the same becoming progressively more severe and aggravated by sitting claimant relayed the he did not know what caused his condition. Claimant provided a similar history to Dr. Barrett-Tuck at the time of his initial April 12, 2006, visit. The afore report of Dr. Barrett-Tuck reflects of the claimant's symptoms, "several months ago he began noticing an aching in the leg while sitting at work". Claimant was unable to attribute his symptoms to being the product of a specific incident identifiable by time and place of occurrence.

The evidence in the record reflects that the claimant labored under the mistaken belief that in order to have a workers' compensation claim, there had to be a specific incident or accidental injury. Likewise, a review of the credible testimony of the claimant's supervisors reflect that they held similar beliefs. While not appreciating the claimant's condition as a gradual onset work-related low back injury, respondent-employer, through its supervisors, had knowledge of the injury prior to the claimant's May 16, 2006, surgery. Indeed, respondent-employer, through its supervisory personnel, was aware that the claimant's condition prior to the March 13, 2006, chiropractic treatments.

While the claimant suspected the condition/symptoms in his back and left leg was cause by his work, he was under the mistaken belief that in order to be compensable it had to be the product of a specific incident or accident. It was only when specifically questioned by the claim adjuster for the healthcare carrier within three days following the surgery did the claimant respond affirmative to his belief that the work cause his back condition. The claimant has provided satisfactory reason and explanation why specific notice of a work-related injury was not given prior to the May 16, 2006, surgery, such that the failure is excused, pursuant to Ark. Code

Ann. §11-9-701 (b)(1) (A)-(C).

TEMPORARY TOTAL DISABILITY BENEFITS

A claimant is entitled to temporary total disability benefits during his healing period if he shows by a preponderance of the evidence that he has a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). The healing period is that period for healing of an injury which continues until the claimant is as far restored as the permanent character of the injury will permit. *Id.* If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

In the instant claim, it is undisputed that the claimant last discharged employment duties for respondents on May 11, 2006. The claimant was taken off work by his treating physician, Dr. Barrett-Tuck, on May 12, 2006, relative to the compensable gradual onset low back injury, and had not been released to return to work to date. The last medical in the record evidencing examination of the claimant by Dr. Barrett-Tuck occurred on August 23, 2006. The claimant was not released by Dr. Barrett-Tuck on August 23, 2006, to return to work or as having reached maximum medical improvement. Indeed, the August 23, 2006, report reflects plans to again see the claimant in “about 10-12 weeks”, and expresses a “hope to see significant improvement by that time”. Additional treatment in the form of home therapy as opposed to formal physical therapy to improve the underlying condition was discussed, and recommended by Dr. Barrett-Tuck subsequent to August 23, 2006. The office note also reflects that the claimant would

“continue” in his endeavor to increase his strength and endurance.

The claimant did not return to Dr. Barrett-Tuck until the scheduled December 2006, appointment in accordance with the August 23, 2006, office note. In the interim Dr. Barrett-Tuck authored a September 29, 2006, correspondence in which she offered that in light of the claimant’s lumbar disc rupture which was surgically treated with residual symptoms, that a 10% impairment rating to the whole body would be recommended. The September 29, 2006, correspondence does not reflect that the claimant had reached maximum medical improvement or the end of his healing period as of that date.

Ark. Code Ann. §11-9-102 (16)(B) provides that medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. *Bingle v. Quality Inn*, CA 04-1142 (10-11-2006). It is clear that Dr. Barrett-Tuck did not examine the claimant on September 29, 2006. Further, the evidence preponderates that at the time the claimant was last seen by Dr. Barrett-Tuck on August 23, 2006, she did not deem him to have reached maximum medical improvement or the end of his healing period in that further treatment to improve the underlying condition causing the disability was provided as well as a follow-up visit 10-12 weeks later. The evidence preponderates that the claimant remained within his healing period subsequent to September 29, 2006, and totally incapacitated to earn wages as a result of the compensable gradual onset back injury.

The credible testimony in the record reflects that at the time of the claimant’s December 2006, scheduled follow-up appointment with Dr. Barrett-Tuck additional diagnostic studies were performed. As a result of the finding disclosed in the afore studies, the claimant underwent a second surgical procedure under the care of Dr. Barrett-Tuck relative to a herniated disc.

Claimant acknowledged helping a friend lift a table in November 2006, and experiencing an increase in pain. The incident did not result in the claimant seeking further medical treatment either at an emergency room or an earlier appointment with Dr. Barrett-Tuck. The August 23, 2006, office note of Dr. Barrett-Tuck reflects that the claimant was encouraged to continue in his endeavors to increase his strength and endurance.

There is no evidence in the record to reflect that the claimant's action in assisting in the moving a small pool table on November 2006, demonstrated negligence, recklessness or unreasonable conduct, such that the same would be deemed an independent intervening cause that would sever the responsibility of respondents relative to the compensable gradual onset low back injury. *Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 20 S.W.3d 326 (2000). When a worker sustains a compensable injury, then every natural consequence of the injury is compensable. *Hublely v. Best Western Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996). The evidence preponderates that the claimant remains within his healing period as a result of the March 2006, compensable gradual onset low back injury. Further, the evidence in the record preponderates that the claimant had been totally incapacitated from engaging in gainful employment since May 12, 2006, and continued until such time as he reaches the end of his healing period or is released to return to appropriated work. Respondents have controverted the claimant's entitlement to temporary total disability benefits.

MEDICAL BENEFITS

Ark. Code Ann. §11-9-508 (a) mandates that employers provide such medical services as may be reasonably necessary in connection with the employee's injury. Whether a medical procedure or device is reasonable and necessary is a question of fact to be decided by the

Commission. *Air Compressor Equipment v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The claimant underwent surgery under the care of Dr. Barrett-Tuck on May 16, 2006, and realized improvement in his pre-surgery symptoms, as a result of same. *Hill v. Baptist Medical Center*, 74 Ark. App. 250, 48 S.W.3d 544 (2001). The evidence further reflects that at the time of the claimant's August 23, 2006, follow-up visit with Dr. Barrett-Tuck he was continuing to recover, and as such was not symptom free. Claimant provides credible testimony regarding his second surgery under care of Dr. Barrett-Tuck in December 2006. Claimant remains under the care of Dr. Barrett-Tuck with a June 2007 scheduled follow-up appointment.

The evidence preponderates that the December 2006, surgery is a compensable consequence of and casually connected to the initial compensable gradual onset back injury of the claimant. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). Accordingly, respondents are liable for the cost of the claimant's December 2006, disc surgery under the care of Dr. Barrett-Tuck, pursuant to Ark. Code Ann. §11-9-508.

CREDIT FOR BENEFITS RECEIVED FROM OTHER SOURCES

In the instant claim, claimant was directed to remain off work effective May 16, 2006, by his treating physician in advance of surgery relative to his compensable gradual onset back injury. When notified of the need for surgery by his treating physician shortly after his initial visit claimant made arrange for same, which included filing a claim for sick leave and corresponding indemnity payments and completing an application for long term disability income benefits.

The testimony presented by the claimant on the issue of sick leave and sick pay reflects that for the first ninety (90) days that he was off work on sick leave and recovering from the low

back surgery he received weekly indemnity benefits totaling approximately \$700.00. Of the \$700.00, in weekly indemnity benefits, \$400.00, was sick pay and the remainder payment pursuant to “a group plan”. Claimant described the “group plan” as one that the employees “pay into for when you’re sick” and “kind of like we donate into, and it pays back”. (T. 57).

Ark. Code Ann. §11-9-411, Effects of Payment by Other Insurers, provide in pertinent part:

(a) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or welfare benefit plan, or a group hospital or medical service contract.

The Commission has held that above statute provides for an offset when the group health care plan pays compensation in contemplation of a work injury. The indemnity payments received by the claimant was had as a result of the claimant filing a claim for sick pay. The period of the payments covered a period of 90 days and was a combination of sick pay and short term disability benefits. Pursuant to the “plan” the claimant received less than his full weekly wages during the 90 day period. While termed “sick pay” the mechanism of indemnity benefits received by the claimant during the first 90 days that he was off work following his May 16, 2006, surgery is indistinguishable from the arrangement identified in *Varnell v. Union Carbide*, 29 Ark App. 185, 779 S.W.2d 543 (1989). See, *Norman v. North Hills Service, Inc*, 2005 AWCC 232, Claim No. F408828 (Full Commission filed November 21, 2005.); *Socha v. Northwest Airlines*, ___ AWCC ___, Claim No. F500085 (Full Commission filed April 7, 2006).

Accordingly, respondents are not entitled to an offset for the indemnity sick payments received by the claimant for the 90 day period following the May 16, 2006, surgery.

The claimant received long-term disability benefits following the 90 day period of short-term benefits, or in mid-to-late August/early September 2006. Long-term indemnity benefits were paid to the claimant at the rate of 50% of his usual weekly earnings.

There is an indication that the claimant, through his attorney, has received notice of a lien from HealthCare Recoveries on behalf of sums expended in this claim by Blue Cross Blue Shield. Regarding the subrogation, respondents take the position that in the event the claim is found to be compensable their obligation is to pay the providers pursuant to Rule 30, and that it is the responsibility of the other insurer to get it back from the provider, whether its more or less.

The Full Commission has interpreted Ark. Code Ann. §11-9-411 as clearly being enacted in part to protect the interests of the third-party payer who is not normally a party to the hearing, and not solely to protect the interest of the claimant or the respondent who are parties to the hearing. Further, the Commission had ruled that respondents are not required to affirmatively plead the issue for the provisions of Ark. Code Ann. §11-9-411 to apply. *See, Dooley v. Automated Conveyor Systems, Inc.* Full Workers' Compensation Commission, Opinion filed January 8, 2003 (F100282); *Turner v. Trane Unitary Products*, Full Workers' Compensation Commission, Opinion filed June 17, 1998 (E616700); *Wilkins v. Van Buren School Dist. #42*, Full Workers' Compensation Commission, Opinion filed February 7, 1999 (E510091).

In the instant claim the respondent is entitled to a dollar-for-dollar offset of those benefits described in Ark. Code Ann. §11-9-411 (a), to include long-term disability payments to the claimant as well as sums expended to medical providers on behalf of the claimant by other

insurers. The respondent is directed to either hold in reserve for a period of five years a sum equal to the potential subrogation claims for any benefits described in Ark. Code Ann. §11-9-411 (a), or to reimburse the third party insurance payer, dollar-for-dollar, the sums expanded to and on behalf of the claimant.

PERMANENT PHYSICAL IMPAIRMENT

The parties have requested that the issue of permanent impairment be addressed in light of the September 29, 2006, correspondence of Dr. Barrett-Tuck. Subsequent to the September 29, 2006, correspondence claimant underwent an additional surgical procedure in December 2006, under the directions of Dr. Barrett-Tuck which has been determined compensable. The claimant has not reached maximum medical improvement or the end of his healing period, and had not reached same at the time of the September 29, 2006, correspondence. The issue of permanent impairment is premature and will be held in abeyance.

AWARD

Respondents are herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$488.00, for the period commencing May 12, 2006, and continuing through the end of his healing period, a date to be determined, as a result of his March 1, 2006, gradual onset compensable back injury in the employment of same. Said sums accrued shall be paid in lump without discount. Respondents may not claim credit or an offset against the sick pay payments made to the claimant. Respondents may either claim credit for long term disability payments made to the claimant pursuant to Ark. Code Ann. §11-9-411 (a), dollar-for-dollar, or reimburse the third party insurance payers for sum expanded to the claimant.

Respondents are further ordered and directed to pay all reasonably necessary medical, hospital, nursing and other apparatus expenses arising out of the claimant's compensable gradual onset back injury of March 1, 2006, to included medical related travel, pursuant to Ark. Code Ann. §11-9-508. Pursuant to Ark. Code Ann. §11-9-411 (a), respondents shall either claim a setoff, dollar-for-dollar, for sums expended by third party insurer on behalf of the claimant, holding the same in reserves, or reimburse the third party payer, dollar-for-dollar, for the sums expended.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein, to include permanent physical impairment, are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE