

BEFORE THE ARKANSAS WORKERS' COMPENSATION

CLAIM NO. F612045

TERRY WITT, EMPLOYEE	CLAIMANT
ALLEN & SON, INC., EMPLOYER	RESPONDENT #1
FIRSTCOMP INSURANCE CO., CARRIER	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED NOVEMBER 20, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on September 21, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE NOYL HOUSTON, Attorney at Law, Jonesboro, Arkansas.

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

Respondent #2 represented by the HONORABLE JUDY W. RUDD, 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 July 10, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit. #1.

Additional stipulations entered by the parties included an averaged weekly wage for the claimant of \$378.96, and that the claim has been controverted by respondents #1. In clarifying their contentions, respondents #1 acknowledge that the claimant sustained a neck injury in the October 3, 2006, accident, however denies compensability on the basis that employment services were not being performed at the time of the accident. Further, respondents #1 assert that the claimant's low back complaint did not manifest itself until a couple of months following the accident. Finally, respondents #1 assert that the claimant's condition stabilized no later than February 20, 2007, and as such the claimant reached the end of his healing period either in January or February 2007.

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

DISCUSSION

Terry Witt, the claimant, with a date of birth of October 17, 1953, has an eleventh grade education. The claimant's work background consist of farm work, factory work, and land leveling work. Claimant noted that all of his work experience has involved manual labor type work. The claimant was employed by respondent-employer as the "finish man" for approximately three (3) years.

Respondent-employer, Allen & Son Farms, Inc., is owned by Michael D. Allen and his father, Herbert Allen. Mr. Michael D. Allen characterized respondent-employer as primarily agricultural "but we have a sub of land leveling". (T. 68). Equipment utilized by respondent-employer included four-wheel drive International tractors, and three service Chevrolet pickup trucks. With respect to the land leveling process in general the evidence reflects that respondent-

employer did land leveling work on a custom basis for farmers in the Northeast Arkansas area. Further, in accomplishing the afore, large four-wheel drive tractors and dirt pans or scrapers were used to level the fields using a laser type system. The evidence reflects that several tractors were in the field at a particular time.

The credible testimony of the claimant reflects that in his employment with respondent-employer he was paid for a 12-hour day, from 7:00 a.m. to 7:00 p.m. In describing the geographical area that he worked in during his employment by respondent-employer, claimant's testimony reflects:

Anywhere from as far east would be West Memphis, Marianna, Forrest City, to the Southeast would be Pine Tree, over in that area, and then north would be probably Lepanto, Blytheville, up in that area.. (T. 17).

Respondent-employer work area also included north to Hoxie and south to Palestine. Claimant noted that the objectives of leveling the fields was to grade where there were no pot-holes, the land would drain better and be irrigated easier.

Claimant described his role/position as the "finishing man" in his employment with respondent-employer:

I'm the man that comes - - it's the last man that crosses the field, if they want to put some finishing touch on it, grades it to the final grade. (T. 19).

In his capacity as finishing man it was the responsibility of the claimant to give final approval when the field was done. Regarding supervisory responsibilities in his capacity of finishing man claimant testified:

I would have to make sure that all the highs is cut out like they should be to the low spots, and then I would put the final grade across the field. (T. 19).

Claimant testified that if he determined that another cut needed to be made or another bucket of soil was needed he would call upon one of the other drivers to either come and cut it or bring in a load of dirt. Claimant testified regarding other responsibilities he had regarding Mr. Michael Allen, his primary boss:

Well, Mike depended on me to communicate with all the other workers, and then I would communicate back with Mike. (T. 20).

Claimant noted that respondent-employer had five to six other workers. Claimant's testimony also reflects that there was a particular routine that he followed each morning in terms of receiving instructions/directions regarding jobs from Mr. Allen:

Well, either Mike would either call me and find out who all was showing up, let me know what the day was going to be like, or I would meet Mike at the Chicken Stop or the EXXON, and me and him would talk. (T. 20).

Both facilities are located in Marked Tree, Arkansas. Claimant testified that Mr. Allen lived in close proximity to the Chicken Stop. Claimant testified regarding the typical conversation during the early morning meetings with Mr. Allen:

What workers was going to show up, because normally they would call me, or if they didn't, they would call Mike sometimes, but normally they would call me. (T. 20).

Claimant noted that the absence of one worker could impact the work that respondent-employer would do on a given day. Claimant testified that he did not consider his morning meeting with Mr. Allen to be optional on his part:

No, sir, not as far as I - - because I pretty well knew the people, you know, I was expecting to meet with him. (T. 21).

On October 3, 2006, the claimant was involved in a serious accident at approximately

7:17 a.m. Claimant's normal time for starting work was 7:00 a.m. Claimant explained that they were running late on the morning of October 3, 2006, because it was "really foggy". Claimant's testimony reflects regarding the events of October 3, 2006, that he was riding with Jimmy Cook, another employee of respondent-employer:

We went to Marked Tree. Mike was sitting at the Chicken Stop in his truck. We pulled up beside him and talked to Mike for ten or fifteen minutes. And then Jimmy got - - me and him got breakfast there, and then we left and headed to the job site. (T. 22-23).

Claimant lived between Payneway and Harrisburg and Mr. Cook lived in Payneway. Marked Tree is approximately two and one-half miles from Payneway. Regarding his discussion with Mr. Allen during the October 3, 2006, meeting, claimant testified:

When we got there, Mike told me which tractor to do, Jimmy, that he wanted Jimmy to drive. He wanted him to raise his poles - - -

His poles, his laser poles on these pans because they hadn't been raised. And then he discussed with me where he wanted the crew to start cutting on the field, which side of the field to start on. And then Mike said he had to go to Lepanto to pick up something there. I can't remember what. And then me and Jimmy got breakfast and left out.

Yes. He asked me if all the crew was going to show, and I told him yes, as far as I knew, everybody was going to be there. (T. 23-24).

Claimant testified that they were headed to work in Dyess, Arkansas on October 3, 2006. The testimony of the claimant reflects that Mr. Cook had never been in the area where they were scheduled to work. Claimant testified that after they finished meeting with Mr. Allen, they got their breakfast, ate, and left out to go to Dyess. (T. 24). Claimant noted the Mr. Allen cautioned them to take their time because it was really, really foggy.

After leaving the Chicken Stop claimant started for Dyess, a distance of approximately 20

to 25 miles. During the ride to Dyess claimant testified regarding his discussion with Mr. Cook:

Well, I was talking to Jimmy about the field, how big the cuts were, where the lows were. I was explaining to him that he couldn't run on automatic or anything like that, that he had to manually cut it.

Well, our rigs are set up to where you can either run on manual to where you could lower them yourself, or you can put it on automatic, and they would work off the laser lot, and they would lower, and they would cut theirself. But if you've go large cuts, you couldn't do that. You have to do it manually. (T. 25).

Claimant testified that during the ride he was attempting to explain the location of the field to Mr. Cook. Claimant had a telephone with him. The testimony of the claimant reflects that he talked with Mr. Allen on the telephone daily - - sometimes two or three time a day - - during which time he received instructions to relay to the other workers. Claimant noted that if while en route to the job site he received a telephone call from Mr. Allen directing him to go to Lepanto with him he would have complied.

Claimant testified regarding the accident on October 3, 2006, while en route to the job site:

Well, we left Marked Tree, because it was really foggy, and we got on this Highway 308 that takes us to Dyess. We got to the end of the 308, there's a gravel road right across, it's kind of like a shortcut that we - - just about all of us took, you know, either in the mornings or in the evenings. We got to the end of the highway, and I suggested to Jimmy, or Jimmy suggested, one or us did, to take the shortcut, and that way we would get off the highway, and there wouldn't be near as much traffic. And we got right almost to the end of the gravel road to the other road, and just out of nowhere a truck appeared and hit us head on. (T. 27).

Claimant estimates that they were approximately 100 yards from the end of the gravel road at the time of the accident, and about 1 ½ to 2 miles from the actual job site. Claimant opined that had he not met with Mr. Allen earlier on October 3, 2006, he would not have been on the road at the

7:10 a.m. time of the accident.

The testimony of the claimant reflects that the duration that they worked a given job site/field varied depending on the size of the field. In a small field that did not require large cuts the job was last 4 to 5 day, while a large field the job could last up to two weeks. On getting to the job site claimant testified:

We usually rode with each other so we could all, you know, save on expenses and stuff.

Sometimes, if we didn't need the service truck out on the job site, and we bought it in, we would normally go by and pick it up, and a couple of us would normally ride in it, or on the way to the job site. (T. 29).

The testimony of the claimant reflects that on October 3, 2006, the service truck had been left over at the job site. Based on his prior experiences and dealings with respondent-employer the evidence reflects that although he was running a little late, on October 3, 2006, had the claimant made it to the field he would have been paid from 7:00 a.m.

Following the October 3, 2006, motor vehicle accident claimant testified regarding his first realization of his injuries:

Well, as soon as we had the wreck, I couldn't move my legs. I couldn't move my arms hardly. I could move my left arm just a little, And I was dazing in and out of consciousness. I can remember that, but I couldn't my body. I couldn't even move, because I remember wanting out of the truck, but I remember I could not move. I just couldn't move. (T. 31).

Claimant was air-lifted from the accident scene to the Regional Trauma Medical Center, the Med, in Memphis. The claimant's initial period of hospitalization was one week. Claimant received a serious injury to his neck in the accident. Additionally, claimant maintains that when he hit the windshield in the accident the force jarred his entire spinal cord resulting in a pinched

nerve in his back as well.

Claimant testified that following the initial hospitalization when he was stabilized and some surgical procedures performed, he later returned to the Med and a fusion of pf C3 through C6 was performed. Bone was harvested from his left hip for use in the fusion. Claimant testified that he remained in the hospital for four or five days in connection with the procedure. Claimant returned on an outpatient basis monthly thereafter. Claimant's testimony reflects that the last at the Med on February 20, 2007. Claimant testified that it was his understanding that he would be contacted and an appointment scheduled by the medical provider. Claimant's testimony further reflects that the appointment could take up to a year. At the time of the September 21, 2007, hearing in this claim, claimant had a scheduled October 2, 2007, follow-up appointment with his treating physician. Claimant initiated the telephone call which resulted in the afore appointment.

Regarding his current restrictions attributable to the October 3, 2006, accidental injuries, claimant's testimony reflects:

I'm not suppose to lift nothing. I'm not supposed to do any kind of work as far as anything, and I'm limited to where, as far as the jarring on me, I can't do nothing that's going to jar me or anything. (T. 34).

Claimant denies that he has been released to return to work or has been informed that he has reached the end of his healing period.

Claimant described his typical day as one in which he gets up, do exercises for his arm, back, and legs, as instructed and recommended by his medical providers. Thereafter, claimant testified that picks up his dirty clothes, watch television, and sometimes go visit his brother in Harrisburg. Claimant is able to drive short distances, noting that the longest distance he has driven is to Jonesboro, which is approximately 15 to 20 miles from his residence. Claimant

explained his reluctance to drive greater distances:

Because my back goes to hurting me and stuff. I just can't stand it, the bouncing. (T. 36).

Claimant provided an inventory of the parts of his body injured in the October 3, 2006, accident, and residual impact:

Well, my neck, I can't turn my neck all the way to my right or my left. I have to turn my whole body. And then my right arm, I haven't got any grip in it. It feels bruised. I've got a tingling sensation all the way up into my shoulders here on my right arm. My left arm, I've got about half the grip in it that I had. I've got bruising and tingling in it up to about my elbow in this arm. (T. 37).

Claimant, who is right hand dominant, testified that the symptoms in his right arm are greater than those in the left arm. Claimant described the sensation of "bruising" as being sore to the touch. In addition to the tingling sensation in his arms, claimant testified that the same is accompanied with corresponding numbness. Claimant further testified regarding the difference in the temperature in his upper extremities:

This one (indicating) stays cold all the time. I just stay cold. I get cold easy. And then my left leg, I haven't got good balance on it. From my knee down, it just, it's cold. It feels cold. It could be sweating on the bottom of my feet, but it feels like it's freezing. And I haven't got any good balance on it. (T. 37).

Claimant describes the sensation he had in his left leg as "a cold, numbness, tingling from the kneecap down", which greatly affects his ability to walk because he is unable to feel where he is stepping. (T. 38). Claimant noted that sometimes the leg will give away resulting in him fall if he is unable to hold on to something. Regarding the impact of the October 3, 2006, accident on his back, claimant testified:

Well, if I turn wrong, or if I lean back too far, I have a sharp pain

right in my mid-back here.

And it just takes my breath sometimes. (T. 38-39).

Claimant testified that he is unable to sit for long periods of time before having to get up and move around in order to loosen his back up. Claimant's testimony reflects that he can stand for 30 to 40 minutes before his leg get "really, really tired" and his back starts hurting, at which time he has to sit back down. Claimant acknowledged that the longest that he has stood since his accident is probably 15 to 20 minutes. (T. 39).

Claimant denies that he had any sort of physical limitations before the October 3, 2006, accident. Claimant's testimony reflects that prior to the October 3, 2006, he was not physically limited from doing anything that anyone else could do.

During cross-examination, claimant disputed the information contained in an October 3, 2006, medical report which reflected the presence of tingling in his hands for two weeks. Claimant has no recollection of providing the afore information to medical personnel on the day of the accident.

Claimant acknowledged that when he was admitted to the emergency room on October 3, 2006, following the accident he did not relay to medical personnel that he was having problems with his back and leg. Claimant credibly testified that on October 3, 2006, following the accident, "I don't remember even talking to the doctors hardly the day of the accident". (T. 44). Claimant acknowledged that while diagnostic studies were performed relative to his neck on October 3, 2006, following the accident, he did not undergo similar studies regarding his low back until later. The testimony reflects that on November 29, 2006, the claimant underwent diagnostic studies relative to his low back.

The evidence in the record reflects that the claimant had two (2) periods of hospitalization before the November 29, 2006, low back diagnostic studies. Claimant was admitted to the Med for approximately ten days at the time of the October 3, 2006, emergency room visit, and again from October 19, 2006, through October 26, 2006.

Claimant asserts that he complained to hospital personnel that his lower leg was staying cold all the time. Regarding the low leg complaints and corresponding medical treatment, claimant testified:

Yes. When I brought it to the doctor's attention that it was getting cold, and it had the tingling feelings and stuff, that's when the doctor set me up for the MRI on my back, on my lower back. (T. 46).

The afore test was scheduled on November 29, 2006.

Claimant is not taking any prescription or over-the-counter medication, and was not taking same at the time of his September 4, 2007, deposition. The claimant now receives \$1122.00, per month in Social Security disability benefits. Claimant estimates that he filed for Social Security disability benefits in January or February 2007, and was awarded same in April 2007.

Claimant acknowledged that the last time he recalled having any improvement in his symptoms following his surgery was January 2007. Claimant elaborated:

I would say around January is when I got a little bit of my grip in my left arm - - in my left hand. But other than that, that's the only improvement I think that I've had myself. (T. 48).

Claimant testified that after the September 4, 2007, deposition he called the doctor's office to find out about an appointment. It was as a result of the afore that the October 2, 2007, appointment was scheduled.

The parties stipulated the amount of the claimant's average weekly wages during his employment with respondent-employer. Claimant explained why his earnings in 2005 were only \$12,000.00:

Well, I would say it's probably because we had a wetter season that year, plus we didn't work 12 months a year. (T. 51).

Claimant estimated that he work nine months a year.

Regarding his routine of meeting with respondent-employer each morning, to include October 3, 2006, claimant testified:

Well, I mean, Mike would normally meet us there at the Chicken Stop or the EXXON, one or the two. If not, he would call me in the morning by phone. I knew to look for Mike, if I hadn't talked to him on the phone, I knew to look for Mike either at the Chicken Stop or the EXXON. (T. 54).

Claimant maintains that if he had not received a telephone call from Mr. Allen, he knew to meet with him personally in the morning either at the Chicken Stop or the EXXON station to go over the job assignment. The testimony of the claimant reflects that if he rode out to the job in respondent's service truck, he would be paid from the time the he left wherever he was leaving from, sometimes. Claimant concedes that respondent did not pay for milage or money for gas.

Claimant maintains that he was paid from 7:00 a.m., which "is when our time started in the mornings". (T. 56). Regarding the Dyess job, claimant's testimony reflects:

We had been there, I think, I'm thinking that we had just moved to this field, and had done some work, a little work on it, and then we had moved back to Payneway to finish the field there. And then we moved back to this field, but Jimmy had not been to that field at all, and, right. (T. 56).

Claimant testified that when the first moved to the field in Dyess, Mr. Allen led them to it.

Claimant concedes that on the morning of October 3, 2006, Mr. Cook offered to drive and that he

may have provided some gas money. The testimony of the claimant reflects regarding the afore:

Well, I might have. I can't remember if I did really or not. But usually if I was riding with one of them, I would offer to help them on their gas, whichever one was driving. (T. 57).

The testimony of the claimant reflects that while the general purpose of riding together was to save on gasoline, that was not the case on October 3, 2006.

The claimant testified that on the morning of October 3, 2006, when he met with Mr. Michael Allen at the Chicken Stop it was in the parking lot of the facility. Claimant's testimony reflects that he and Mr. Cook pulled up along side Mr. Allen's vehicle. Claimant testified that he ate breakfast at the Chicken Stop once or twice a week. On the morning of October 3, 2006, the testimony of the claimant reflects that he arrive at the Chicken Stop at 7:00 a.m. and had the meeting with Mr. Allen. The credible testimony of the claimant reflects that while he and Mr. Cook purchased breakfast at the Chicken Stop they did not eat it there but rather took it with them.

Mr. Michael D. Allen, the owner of respondent-employer with his father, Herbert Allen, resides in Marked Tree, Arkansas. Mr. Allen acknowledged that he is primarily responsible for the land leveling portion of the family business. As previously noted, respondent-employer owned three Chevrolet service pickup trucks in addition to other equipment. Mr. Allen's testimony reflects, regarding the manner in which his employees got to field job sites:

Well, different job sites, different times of the month, a lot of times they would come to my house at Marked Tree. And then my wife started griping so much about the pickups being left and the cars being left in the front of the house, so we had to start leaving them at the Chicken Stop, or the Case Place had a big parking lot. And all Cave did, if I left something, you know, their vehicle was there during the day or something. And a lot of times they would come in from two or three different directions,

and they would get together and come to the field in one. And Terry, I told Terry, you know, a time or two we would have the service truck at my house. And we would bring it in one night and re-stock it, filled it up full of gas, and then somebody would get out and take it back to the field. But that was a very rare occasion. Maybe one time out of two or three weeks, that would happen, but it was necessary to re-stock or re-supply. (T. 69-70).

Further, Mr. Allen testified regarding payment for someone driving the service truck:

If they was in my truck, it would take, oh, like I would give them an extra half-hour on their payroll. I would consider when they came in late at times, I would overlook 15 or 20 minutes here. You know, I was - - I kept a lot of that, you know, kept it in the back of my mind, or wrote down. (T. 70).

Mr. Allen's testimony reflects regarding jobs that were more than 30 miles away:

That's where my other truck becomes involved. It's a four-door crew-cab. And it would carry five to six people comfortably, and we would meet at Marked Tree, and they would all gang into there. We have a policy of one way. And when they got to the truck at Marked Tree, say at 7:00, and we would get them in the truck. And it would take an hour to drive to the job that we would today, that we would quit at 7:00. And that they would drive home, and we would get home by 8:00, but they would get paid from the time they got into the truck until the time we quit at the job. (T. 70).

The testimony reflects that the job in Dyess was 16 miles away.

Mr. Allen's testimony reflects his reasoning for not paying his employees when they would meet at the Chicken Stop:

It's just a - - I live two blocks behind it. I would come out. That's the only little restaurant around in that area that's opened up early enough to get breakfast. And it was a handy spot, and Terry would be there with his son, and the other crew would be there so that's where we would - - I always liked to find out who is going to show, who had probation, who had a doctor's appointment, who got too involved that night before and didn't show up the next day. It was to stay up - - (T. 70-71).

Mr. Allen acknowledged that he had a cell phone and the claimant also had a cell phone. Mr.

Allen testified that a lot times the information about who was showing up for work was obtained over the telephone.

Mr. Allen's testimony reflects that he did not prohibit employees from driving their own vehicle to the job site, however he did not pay any mileage or gas if the job site was under 30 miles away from Marked Tree. Mr. Allen observed, regarding employees driving their own vehicles to the job site:

Well, if they were in their vehicle, sometimes they would have a doctor's appointment, or they had a ball game, or the babysitter was going to leave early, it's just, you know, too numerous things sometimes they come up with. But they would, you know, beneficially they would all - - A lot of time they would all ride in two or three vehicles instead of come out there in four or five. (T. 72).

On October 3, 2006, neither the claimant or Mr. Cook was paid any travel money by respondent-employer. Regarding the point in time that the claimant's work day would start on October 3, 2006, Mr. Allen testified:

If it had been a normal day and got to the job site, it would've started as seven o'clock, but it wasn't a normal day. (T. 72).

Mr. Allen denied that the claimant's work day would start while traveling to the job site. Mr. Allen's testimony reflect, regarding his conversation with the claimant on October 3, 2006, about travel:

I was at the Chicken Stop. We met there. I got some ice and drinks, and I wanted Terry to come with me, and we had some work going on at two different places. And Jimmy was there in his vehicle. And I wanted Terry to come over there and bring a tractor back to Payneway that the customer wanted some more finishing work done. And I already had a bucket already at Payneway. And I wanted Jimmy to stay with him there so they would have two vehicles, I mean, two of my tractors. And Jimmy would have his truck, because he just lived across the road, and it would be convenient. (T. 73).

Mr. Allen explained the Mr. Cook lived across the road from the field that they would be work in at Payneway. Regarding the claimant's response, Mr. Allen testified:

Well, that he asked me how was he going to get back if they needed oil, gas, grease, and some shop supplies, but we've got a little bit of room in the tractors. And normally if somebody was going to a job site like that, we would put it in the cab with them. (T. 73).

The claimant did not ride with Mr. Allen. Mr. Allen maintains that if the claimant was working he would have done "what I asked". (T. 74). When asked if the claimant did what he, Mr. Allen, asked or what claimant wanted to do, Mr. Allen's response is noteworthy:

The reason was that he didn't - - he wanted him to come over there and put the stuff in his truck and let him escort him back from the job site. Which at the time, if he come over and got in the tractor, they would've both been on the payroll come back to the job site, because he would've been doing escort service. (T. 74).

Mr. Allen testified that to the best of his recollection Mr. Cook had been to the field in Dyess, although it had been a while. Mr. Allen's testimony reflects the manner in which he provides directions to his employees regarding the location of job sites (fields):

Well, the roads are numbered, Highway 1, Highway 996, go to the stop sign, turn right. I take flags. They're brightly colored orange and red and green, and I'll put them at the corner or the road. And when they come up on to the road, they'll see the flags. I've got tape similar to that of what police use to mark the crime scene, and I wrap it around the stop sign, which is permissible by the highway department, because I've checked with them. And I have two or three streamers on it, and like ribbons in a woman's hair, and they would see that and know where to turn. (T. 76-77).

Mr. Allen maintains that had the claimant chosen to get in the vehicle with him at the time they departed the Chicken Stop the claimant would have been "on the clock" at that point.

On cross-examination, Mr. Allen testified that on the morning of October 3, 2006, he wanted the claimant to go to Dyess to get the tractor of respondent that the claimant normally

operated, and to bring it back to Payneway. Mr. Allen acknowledged that during his September 4, 2007, deposition he testified that he could not truthfully say one way or the other that Mr. Cook knew the location of the field in Dyess. (T. 78).

Mr. Allen testified that in light of the area that the land leveling business of respondent covers, he does a fair amount of traveling from job site to job site. Mr. Allen concedes that it helps him out for the employees to secure their own way to the job site rather than for him to get them there. (T. 84).

The claimant, as the finishing man, was responsible for final approval of field that respondent leveled. Further, Mr. Allen acknowledged that the claimant, as finishing man, had more responsibilities than any of the other drivers. Mr. Allen testified that the claimant ran the crew in his (Mr. Allen's) absence or that of his father and wife. (T. 85). Mr. Allen confirmed that he ordinarily met with the claimant in the morning before going to field - job site. Additionally, Mr. Allen testified that the claimant would ordinarily know what the other employees were doing. Mr. Allen noted that he would go to the claimant for the afore information rather than going to each individual employee himself. Mr. Allen acknowledged that it served an important purpose for his work for him to be able to meet with the claimant, whether physically at the Chicken Stop or via telephone, at the beginning of the day to find out who was going to be at work that day. Mr. Allen confirmed that he expected to meet with the claimant, either in person or via phone, at the beginning of the before the day begins. (T. 90). Mr. Allen described the claimant as an excellent worker.

Mr. Allen's testimony reflects that on the morning of October 3, 2006, he met with the claimant at the Chicken Stop at approximately 6:00 a.m. The subject during the October 3, 2006,

meeting was to instruct the claimant on how to run the job. Mr. Allen told the claimant the he want him to get his tractor at Dyess and take it to Payneway with some supplies. The testimony of Mr. Allen reflect that while he initially want the claimant to ride with him, the claimant requested and was granted permission to ride with Mr. Cook so the Mr. Cook could bring the supplies, grease, and other supplies back in his truck instead of having it in the cab of the tractor. (T.92). The testimony reflects that Dyess is 16 miles east of Marked Tree and Payneway is a few miles west of Marked Tree. Mr. Allen acknowledged that someone would have to take the claimant to his tractor in Dyess in order for the claimant to get the tractor and move it back to Payneway. (T. 93). Mr. Allen went to Lepanto, which is north and east of Marked Tree, on October 3, 2006.

The testimony of Mr. Allen reflects that it was beneficial to the interest of respondent-employer for the claimant to go with Mr. Cook to get the tractor that was located at Dyess and bring it back to Payneway. Regarding the afore Mr. Allen's testimony reflects:

I wanted Terry at the time to go with me, but Terry made a suggestion that Jimmy go with him so he could escort him back. But with taking into the consideration then that of the weather conditions, I changed my - - and let him - - I said okay. But my first thing was for him to ride with me, to go to Leplanto, pick up the supplies, go to Dyess get his tractor, and let him take out and meet Jimmy at Payneway. (T. 95).

Mr. Allen concedes that either he or someone else would have had to take the claimant to Dyess to get the claimant's tractor. (T. 96). Likewise, Mr. Allen acknowledged that he admonished the claimant to take his time and to be careful the morning of October 3, 2006, because of the fog.

Mr. Allen's testimony reflects that prior to October 3, 2006, claimant discharged his assigned duties without physical limitations or restrictions. Further, Mr. Allen testified that

while the claimant occasionally wore a back brace the same did not prevent him from performing his job duties. Indeed, the testimony of Mr. Allen reflects regarding the claimant, “he could do whatever needed to be done”, and that he was as wiry as anybody. (T. 98).

On re-direct examination, Mr. Allen testified that he met with the claimant on October 3, 2006, at 6:00 a.m. at the Chicken Stop. The motor vehicle accident involving the claimant occurred at 7:10 a.m. When questioned regarding the claimant’s activities of October 3, 2006, between 6:10 a.m. and 7:10 a.m., Mr. Allen offered, “probably being real careful in the fog”. (T. 100).

The Arkansas motor vehicle collision report of the October 3, 2006, accident noted that the drivers and passengers of both vehicles were not wearing seatbelts. The vehicle of Mr. Cook, in which the claimant was a passenger, is identified in the report as vehicle #2. The motor vehicle accident report reflects that the claimant was air lifted to the Med Unit in Memphis, for treatment of his injuries. ((CX. #1).

The October 3, 2006, MediOne Ambulance Trip Report reflects, regarding the claimant, that he was an unrestrained passenger, who burst to windshield. The report also reflects that loss of consciousness noted and that the claimant was unable to maintain consciousness. The report reflects that the claimant was seated in the vehicle and that a bystander was holding a manual c-spine. The report details other injuries observed by emergency medical personnel and the measures taken by same before transporting the claimant. (CX. #2, p. 5).

The medical in the record reflects that when the claimant was initially seen at the Regional Medical Center on October 3, 2006, attention was directed to his cervical spine and thoracic spine. While the thoracic spine was normal, the MR exam of the cervical disclosed

objective findings which were compared to a CT scan of the same day. (CX. #2, p. 6). The Discharge Summary regarding the claimant reflects that following his October 3, 2006 admission he was discharged on October 10, 2006. The Discharge Summary further reflects, in pertinent part:

HISTORY: The patient is a 52-year-old male, status post MVC on 10/03/2006. CT of the spine revealed severe canals stenosis and central cord syndrome. Orthopedic was consulted for spine. They placed a Miami J collar on him and placed on spinal precautions. The patient was admitted to the ICU for further care. On the first day he complained of inability to move his upper extremities and increasing numbness and tingling. The patient was placed on spinal precautions. His sensation remained intact. Throughout his stay he regained function of his upper extremities and hands. . . . The patient was then transferred to the floor. Orthopedics planned for an ACDF this week. On the day of discharge, the patient's strength improved . . . Orthopedics decided to do the ACDF as an outpatient and the patient was discharged home. He will need to wear Miami J at all times until follow up with orthopedic surgery.

FINAL DIAGNOSIS:

1. Status post motor vehicle collision.
2. Central cord syndrome with severe stenosis. (CX. #2, p. 40).

On October 19, 2006, claimant returned to Regional Medical Center at Memphis, was admitted and underwent anterior cervical discectomy and fusion at the level of C3-4 with corpectomy at C5 with fusion. Claimant was ready for discharge on October 23, 2006. Among the claimant's discharge instruction was a follow up with Dr. White, an orthopedic physician, on October 31, 2006. (CX. #2. p. 42). The medical in the record reflects that the claimant was seen in follow-up as directed on October 31, 2006. During the October 31, 2006, visit, claimant was instructed to return to the clinic in two (2) weeks. (CX. #2, p. 43).

In accordance with the above the claimant was again seen relative to the October 3, 2006, injuries on November 14, 2006. The clinic note relative to the November 14, 2006, follow-up

visit reflects the notation of “new onset L4-5 parasthesia”. Further, the November 14, 2006, clinic note reflects plans to work-up the lumbar spine, start the claimant on Neurontin, and schedule a MRI of lumbar spine. Finally, the November 14, 2006, clinic note reflects that the claimant was to return to the clinic in two (2) weeks. (CX #2, p. 44). On November 29, 2006, claimant underwent a MR of the lumbar spine. The radiologist report relative to the afore disclosed degenerative changes and at least mild left L4 root foramen stenosis. (CX. #2, p. 45).

On December 12, 2006, claimant was seen at the Outpatient Clinic of the Med. The note regarding the afore reflects that claimant’s treating physicians were in agreement for a rehabilitation evaluation. (CX. #2, p. 46). On January 18, 2007, claimant underwent a physical therapy evaluation at the Med. (CX. #2, p. 47-48). Claimant was again seen at the Outpatient Clinic of the Med on February 20, 2007, at which additional recommendations were rendered by his treating physicians relative to his complaints attributable to the October 3, 2006, accident. (CX. #2, p. 49). The claimant underwent additional radiology studies on February 20, 2007. (R1X #1, p. 17-18).

After a through consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports, 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 October 3, 2006, the relationship of employee-employer-carrier existed among the parties.
3. On October 3, 2006, the claimant earned wages sufficient to entitle him to weekly

compensation benefits of \$252.00/\$190.00, for temporary total/permanent partial disability.

4. On October 3, 2006, the claimant sustained injuries to his cervical spine, lumbar spine, and others areas in a motor vehicle accident which arose out of and in the coursed of his employment at a time that he was providing employment services to his employer, respondent #1.

5. The claimant was temporarily totally disabled for the period beginning October 4, 2006, and continuing through the end of his healing period, a date to be determined, as a result of the compensable October 3, 2006, accident.

6. Respondents #1 shall pay all reasonably necessary medical, hospital and medical expenses growing out of and in connection with the claimant's injuries of October 3, 2006.

7. Respondents #1 have controverted this claim in its entirety.

CONCLUSIONS

On October 3, 2006, the claimant sustained serious injuries growing out of a motor vehicle accident. The injuries required medical treatment and resulted in the claimant's incapacitation. Claimant maintains that the injuries arouse out of in and in the course of his employment and at a time he performing employment services. Accordingly, claimant seek corresponding temporary total disability and medical benefits. Respondents #1 contend that the claimant was a passenger in a vehicle en route to a job site at the time of the October 3, 2006, accident and that the claim for workers' compensation benefits is barred by the coming and going rule in that the claimant was not performing employment services.

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. The claimant has the burden of proving the compensability of his claim by a preponderance of the evidence. *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). An accidental injury is one caused by a specific incident, identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102 (4)(A) (i).

In order for an accidental injury to be compensable, the claimant must show that he sustained an accidental injury; that the injury caused physical harm to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. Ark. Code Ann. §11-9-102 (A)(i). Further, the claimant must establish a compensable injury by medical evidence, supported by objective finding. Ark. Code Ann. §11-9-102 (4)(D). “Objective findings” are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102 (16). The requirement that a compensable injury be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. *Stephens Truck Line v. Millican* , 58 Ark. App. 275, 950 S.W.2d 472 (1997). Excluded from the definition of “compensable injury” are injuries sustained at a time when employment services were not being performed. Ark. Code Ann. §11-9-102 (4)(B)(iii).

Respondents #1 take the position that the injuries sustained by the claimant in the October 3, 2006, motor vehicle accident occurred at a point in time when the claimant was en route to the job site and not providing employment services. Accordingly, respondents #1 maintain the claim for workers’ compensation benefits growing out October 3, 2006, accident is barred by the going and coming rule.

The test for determining whether an employee was acting within the “course of employment” at the time of the injury require that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer’s purpose or advancing the employer’s interest, directly or indirectly. *Olsten Kimberly Quality Care v. Petty*, 328 Ark. 381, 944 S.W.2d 524 (1997). It is well recognized that an employee is performing “employment services” when he is doing something that is generally required by his employer. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999). The same test is used to determine whether an employee is performing “employment services” as when determining whether and employee was acting within “the course of employment”. *Moncus v. Billingsley Logging*, 366 Ark. 383, ___ S.W.3d ___ (2006). The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer’s purpose or advancing the employer’s interest directly or indirectly. *White, supra*. Additionally, when the injury occurs outside of the time and space boundaries of employment, the critical determination to be made is whether the employee was directly or indirectly advancing the interest of the employer at the time of the injury. *Moncus, supra*.

The particular facts and circumstances of each case will determine whether the claimant was performing employment services. Among the factors which may be considered in determining whether a claimant’s conduct falls within the meaning of “employment services”: whether the accident occurs at a time, place, or under circumstances that facilitate or advance the employer’s interests; whether the accident occurs when the employee is engaged in activity necessarily required in order to perform work; whether the activity constitutes an interruption or departure, known by or permitted by the employer, either temporally or spatially from work

activities. *Matlock v. Ark. Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001).

The facts in the present claim are not unlike those in *Bell v. Tri-Lakes Services*, 76 Ark. App. 42, 61 S.W.3d 867 (2001). In *Bell, supra*, the employee was required to travel to Gillham for the purpose of loading tools. Bell died in a motor vehicle accident while in route to Gillham. The courts have held that employment is not limited to that which the person was hired to do, whatever the normal course of employment may be, the employer and its supervisory staff have it within their power to enlarge the course of the employment by assigning tasks outside the usual scope of the employment. *Arkansas Department of Correction v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Further, whether an employer requires an employee to do something has been dispositive of whether the activity constituted employment services. *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999). In *Bell, supra*, the Court of Appeals held that it was irrelevant whether or not the employee's normal work duties involved travel; on the day of the accident that is what his employer required of him.

In the instant claim, the evidence preponderates that the claimant met with his supervisor, the owner of respondent-employer, at 6:00 a.m., to discuss the work force and job assignments. The duration of the meeting was approximately ten (10) minutes. At the time the meeting ended, claimant was authorized to ride with Jimmy Cook, another employee of respondent-employer, to the Dyess job site in order to get his tractor and take it to a job in Payneway. Whether the claimant rode to the Dyess field with his supervisor or the co-worker, he would have to taken there in order to get his tractor.

The evidence reflects the weather condition on the morning of October 3, 2006, was extremely foggy. The plan in place following the 6:00 a.m. meeting between the claimant and

the owner of respondent-employer was that the claimant would ride with Jimmy Cook, the co-worker to the Dyess job site, retrieve his tractor and be escorted from Dyess to Payneway by Mr. Cook. An escort was even more needful in light of the dense fog that was in place. Mr. Allen, the claimant's employer, attributed the hour elapse between to conclusion of the 6:10 a.m. meeting and the 7:10 a.m. motor vehicle to the claimant traveling very slow and careful in the foggy weather condition.

In addition to having the authorization of the respondent-employer to ride with Mr. Cook to get his tractor which was required at another location of respondent, the evidence reflects that Mr. Cook would serve as an escort for the claimant from the Dyess location to the Payneway location. The afore benefitted respondent-employer directly, in that it provided a means for the claimant's tractor to get to the Payneway location and freed-up respondent-employer to go to Laplanto to obtain supplies.

An employee traveling to and from the workplace is generally held not to be acting within the course of employment. *Olsten, supra*. The going and coming rule, which is asserted by respondents #1 in the present claim, ordinarily precluded recovery for an injury sustained while the employee is going to or coming from his place of employment. One exception to the afore is where the employee must travel from job site to job site, whether or not the employee is paid for that travel time. In the present claim, as in *Moncus, supra*, the travel was a necessary part of the claimant's employment, and, accordingly fits within the job site - to- job site exception to the going and coming rule. Where the injury occurs outside of the time and space boundaries of employment, as in the present claim, the critical determination to be made is whether the employee was directly or indirectly advancing the interests of the employer at the time of the

injury. In the instant claim the evidence preponderates that at the time of the claimant's accidental injury, the interests of the employer were being directly advanced. The evidence preponderates that the claimant was performing employment services at the time of the October 3, 2006, accident. Respondents #1 have controverted this claim in its entirety.

It is not disputed that the claimant sustained severe injuries in motor vehicle accident on October 3, 2006. Further, the evidence in the record preponderates that the claimant's current medical status is the product of the October 3, 2006, accident. The claimant has not been released by his treating physicians relative to the injuries suffered in the October 3, 2006, accident to return to work. Indeed, the evidence preponderates that further surgery is anticipated in the treatment of the claimant's injury. Temporary total disability is that period within the healing period in which a claimant suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark.244, 613 S.W.2d 392 (1981). 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). Conversely, if the underlying condition has not stabilized and further treatment will improve the condition, then the healing period has not ended. Whether an employee's healing period has ended is a factual determination. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.w.2d 25 (1995). Claimant remains under active medical treatment relative to the injuries growing out of the October 3, 2006, accident. The claimant has remained within his healing period since the October 3, 2006, compensable accident.

Ark. Code Ann. §11-9-508 (a) mandates that the employer provide such medical services as are reasonably necessary in connection with the injury received by the employee. *Cox v. Klipsch & Associates*, 71 Ark. App. 433, 30 S.W.3d 764 (2000). Whether a medical procedure or device is reasonable and necessary treatment is a question of fact. Medical treatment intended to reduce or enable an injured worker to cope with chronic pain may constitute reasonably necessary medical treatment. *Billy Chronister v. Lavaca Valt*, Full Workers' Compensation Commission, June 20, 1991 (D704562).

There is no evidence in the record to reflect that the claimant sought or required medical treatment relative to his neck or low back prior to the October 3, 2006, compensable accident. Further, while there is evidence in the record to reflect that the claimant occasionally wore a back brace prior to October 3, 2006, the evidence further reflects that the claimant was able to perform his assigned job duties without physical limitations or restrictions. While it is not disputed that the claimant had degenerative disc disease in his cervical and lumbar spine prior to the October 3, 2006, accident, there is no evidence in the record to reflect that the same was symptomatic to the extent that medical treatment was required, obtained or sought, or that it adversely impacted on his employment. Indeed, the evidence is to the contrary. In workers' compensation, the employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W.2d 64 (1990).

The evidence preponderates that the claimant sustained injuries to his cervical spine and lumbar spine in the October 3, 2006, compensable motor vehicle accident, which required and continue to require medical treatment. Respondents #1 have controverted this claim in its

entirety.

AWARD

Respondents # 1 are herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$253.00, for the period commencing October 4, 2006, and continuing through the end of the claimant's healing period, a date to be determined, as a result of the compensable injuries sustained in the October 3, 2006, motor vehicle accident. Said sums accrued shall be paid in lump without discount.

Respondents #1 are further ordered and directed to pay all reasonably necessary medical, hospital, nursing and other apparatus expenses growing out of and in connection with the claimant's compensable injuries of October 3, 2006, to include medical related travel, pursuant to Ark. Code Ann. §11-9-508 (a).

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted portion of the indemnity benefits herein awarded pursuant to Ark. Code Ann. §11-9-715, and in accordance with Arkansas Workers' Compensation Commission Rule 099.10.

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

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE