BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F607026

HERBERT AYERS, Employee	CLAIMANT
TYSON FOODS, INC., Employer	RESPONDENT #1
TYNET, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #3

OPINION FILED JUNE 16, 2008

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by MARK FREEMAN, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by E. DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

Respondent #2 represented by DAVID SIMMONS, Attorney, Little Rock, Arkansas; excused from hearing.

Respondent #3 represented by JUDY RUDD, Attorney, Little Rock, Arkansas; excused from hearing.

STATEMENT OF THE CASE

On May 21, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 5, 2008, and a pre-hearing order was filed on March 6, 2008. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee-employer relationship existed between the claimant and respondent #1 at all relevant times.

3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of $326.00 for total disability and $245.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's low back on May 6, 2006.

2. Claimant's entitlement to additional medical treatment.

The claimant contends he suffered a compensable injury on or about May 6, 2006 to his low back for which respondent #1 is refusing continued reasonable and necessary medical treatment.

Respondent #1 contends it initially accepted claimant's alleged May 6, 2006 injury as compensable. It provided medical treatment with Dr. Ledbetter, orthopaedic surgeon, and Dr. Danks, neurosurgeon. Claimant requested and received a change of physician to Dr. Spann, his family physician. Claimant has also been evaluated by Dr. Knox, neurosurgeon. Prior to May 6, 2006, claimant was being treated regularly for low back pain and was prescribed muscle relaxants and pain medication. Claimant had a lumbar MRI on November 4, 2004 revealing multiple disc bulges, degenerative disc disease, and an annular tear at L4-5. After May 6, 2006, claimant had another MRI on June 22, 2006 which was very similar to the 2004 MRI. Claimant has no objective findings to support a May 6, 2006 compensable injury. Any objective findings related to his lumbar spine preexisted May 6, 2006. Alternatively, if claimant sustained a compensable injury on May 6, 2006, it was a temporary aggravation of his preexisting condition which has now resolved. Respondent #1 does not seek reimbursement of benefits paid.

Respondents #2 and respondent #3 have been excused from this hearing

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and

conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 5, 2008, and contained in a pre-hearing order filed March 6, 2008, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his lumbar spine while employed by respondent on May 6, 2006.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable lumbar spine injury.

FACTUAL BACKGROUND

______The claimant is a 57-year-old-man with an eleventh grade education who worked for the respondent in its Green Forest processing plant. Claimant testified that in either 2000 or 2001 he was working for the respondent in its quality assurance department when he injured his back as a result of lifting a box. Claimant reported this injury to respondent and he was provided with medical treatment which consisted of medication. Claimant did not miss any work as a result of this injury.

Claimant testified that he suffered a second injury to his low back in May 2002 while working on the respondent's shipping dock. Claimant testified that medical treatment was again provided by the respondent. The medical records indicate that claimant was treated conservatively primarily by Dr. Vowell. X-rays and an MRI scan taken subsequent to that injury revealed various degenerative changes and congenital defects. As a result of that injury the claimant was assigned a permanent lifting restriction of 20 pounds.

Following the May 2002 injury the claimant continued to be evaluated and treated

for low back pain. Claimant was treated conservatively with medication primarily by Dr. Spann, his family physician. Claimant was seen by Dr. Spann on April 11, 2006, for a refill of medication for his chronic low back pain, less than one month before the alleged May 6, 2008 injury.

Claimant testified that on May 6, 2006, he slipped and fell in a hallway at the respondent's plant injuring his low back and hip. Claimant reported the injury to respondent and was sent to Dr. Ledbetter for medical treatment. Dr. Ledbetter ordered x-rays which revealed degenerative disc disease and he prescribed medication and physical therapy. When claimant's condition did not improve, Dr. Ledbetter referred claimant to Dr. Danks, neurosurgeon, for an evaluation.

Claimant's first visit with Dr. Danks occurred on June 13, 2006. In his report of that date Dr. Danks indicates that plain films revealed degenerative changes at the L3-4 level. He diagnosed claimant's condition as degenerative disc disease which resulted in lumbago and ordered an MRI scan. Following the MRI scan claimant was next evaluated by Dr. Danks on June 23, 2006. Dr. Danks' report of that date indicates that the MRI revealed degenerative changes at several levels and osteophytes at L3-4 and L4-5. Dr. Danks indicated that surgery would not correct the claimant's chronic pain and he recommended epidural steroid injections which claimant declined. Dr. Danks indicated that he did not expect the claimant's back pain to improve significantly.

In a letter dated July 11, 2006 Dr. Danks indicated that claimant had reached maximum medical improvement. He noted that claimant had significant degenerative changes and degenerative scoliosis. He also indicated that he did not see anything in the test results that "acutely occurred at the time of his accident." Dr. Danks reiterated this opinion in a subsequent letter dated July 26, 2006.

Even though the claimant was receiving medical treatment from Dr. Danks, he continued to be evaluated by Dr. Spann, his family physician. In fact, claimant filed for

and received a change of physician order approving Dr. Spann as his authorized treating physician. Dr. Spann has continued to treat claimant with medication and has most recently recommended spinal decompression therapy for the claimant's injury.

Claimant has also been evaluated by Dr. Knox. Based upon test results, Dr. Knox recommended surgery on the claimant's lumbar spine. Claimant indicated at the hearing that he does not wish to pursue surgery at this point until alternative treatment recommended by Dr. Spann is attempted.

The respondent initially accepted as compensable an injury to the claimant's back and paid compensation benefits before controverting the claim. As a result, claimant has filed this claim contending that he suffered a compensable injury and requesting additional medical treatment.

ADJUDICATION

The claimant contends that he suffered a compensable injury to his low back when he slipped and fell in a hallway while working for respondent on May 6, 2006. Claimant's claim is for a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

> (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
>
> (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
>
> (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
>
> (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identi-

fiable by time and place of occurrence.

Clearly, the claimant had a significant pre-existing problem with his lumbar spine. According to claimant's testimony he had suffered two prior work-related injuries while working for the respondent. The second of these injuries resulted in a permanent lifting restriction of 20 pounds. In addition, after the second injury the claimant continued to receive medical treatment for chronic back pain in the form of narcotic pain medication. As previously noted, claimant sought refills of that narcotic pain medication on April 11, 2006, less than one month before the injury of May 6, 2006.

Even though the claimant had a significant history of low back pain, under the Arkansas Workers' Compensation law an employer takes an employee as he finds him and employment circumstances that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). In order for an aggravation to be compensable all the requirements for a compensable injury must be proven by the claimant. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W. 5 (1998). I find that claimant has satisfied all the elements of compensability.

First, I find that claimant has met his burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment and that it was caused by a specific incident identifiable by time and place of occurrence. Claimant testified that he suffered the injury to his back when he slipped and fell in a hallway at work on May 6, 2006. Documentary evidence indicates that claimant reported this incident to respondent and that he requested medical treatment. As a result, respondent referred claimant to Dr. Ledbetter for medical treatment. I also note that the medical records indicate a history of an injury having occurred at work when claimant slipped and fell on May 6, 2006. Based upon the claimant's testimony and the documentary evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that his

injury arose out of and in the course of his employment and that it was caused by a specific incident identifiable by time and place of occurrence.

The primary issue in this case is whether the claimant can meet his burden of proving that there are objective findings establishing an injury on May 6, 2006. As previously noted, claimant had an extensive history of low back pain prior to May 6, 2006. Following claimant's report of an injury he was evaluated by Dr. Danks. Dr. Danks ordered an MRI scan of the claimant's lumbar spine which according to his report of June 23, 2006 revealed degenerative changes at the L3-4 and L4-5 levels.

In letters dated July 11, 2006 and July 26, 2006, Dr. Danks noted the claimant's history of chronic back pain and treatment with narcotic medication. He also noted that claimant had significant degenerative changes. After his review of the claimant's November 2004 MRI scan and the June 22, 2006 MRI scan, Dr. Danks stated that he could not see anything that acutely occurred at the time of claimant's accident. Dr. Danks indicated that any permanent disability was pre-existing as were any permanent restrictions.

Claimant was eventually evaluated by Dr. Danks' partner, Dr. Luke Knox, neurosurgeon. In his report of December 19, 2006, Dr. Knox recommended a lumbar myelogram. In a letter dated February 19, 2007, Dr. Knox indicated that a comparison of the November 4, 2004 MRI scan with the MRI scan of June 22, 2006 revealed progressive changes. However, he indicated that he was unable to state whether those changes were the result of a specific injury or claimant's pre-existing medical condition. However, Dr. Knox further stated that he had ordered a myelogram to determine if there was any objective compressive pathology present which might alter Dr. Danks' final analysis.

The myelogram was performed and according to Dr. Knox's report of March 22, 2007 it revealed "rather pronounced neural foraminal encroachment with herniated discs at L4-5, with significant findings at L3-4 as well. As a result of those findings Dr. Knox

recommended surgery on claimant's lumbar spine.

In a letter dated April 5, 2007, Dr. Knox opined that the disc space changes were the result of the fall at work on May 6, 2006 and that the major cause of claimant's current medical problems was his injury.

> As you know, Mr. Ayers was last seen in the Neurosurgery Clinic on March 23, 2007, at which point I had recommended that he consider an L3-4 and L4-5 fusion due to significant disc space changes that were felt to be secondary to the injury occurring at work on May 6, 2006 when he slipped, fell, and landed on his right hip. I believe the major cause of his current medical problems are related to his injury, as described above. (Emphasis added.)

Thus, while Dr. Danks had previously indicated that his review of the MRI scans did not reveal anything that acutely occurred at the time of his accident, Dr. Knox ordered a lumbar myelogram which did reveal changes; changes which in his opinion were related to the fall of May 6, 2006. I find that the opinion of Dr. Knox is credible and entitled to great weight. According to Dr. Knox the claimant's myelogram revealed disc space changes including a neural foraminal encroachment with a herniated disc at the L4-5 level with significant findings also present at L3-4. These findings on the lumbar myelogram are objective findings and according to Dr. Knox these progressive changes are the result of the fall which occurred at work on May 6, 2006.

Based upon the findings of the lumbar myelogram and the opinion of Dr. Knox, I find that claimant has offered medical evidence supported by objective findings establishing an injury to his lumbar spine. I also find based upon that same evidence that the injury caused internal physical harm to his body which required medical services.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his lumbar spine on May 6, 2006.

I also find that claimant has met his burden of proving by a preponderance of the

evidence that he is entitled to additional medical treatment for his compensable low back injury. As previously noted, Dr. Knox has recommended a surgical procedure. Claimant has also continued to be evaluated by his family physician, Dr. Spann, who has recommended spinal decompression therapy. Claimant testified at the hearing that he is not refusing to undergo surgery, but instead wishes to try alternatives first. In my opinion, it is clear from a review of the medical records that claimant is in need of additional medical treatment for his compensable low back injury.

In reaching this decision, I note that at one point Dr. Spann had completed a form for the respondent indicating that the flare up of claimant's condition had healed and that claimant's current problem was the prior pre-existing condition. However, Dr. Spann clarified in his letter of September 25, 2006 that he did not mean to indicate that claimant's condition had resolved or that it had returned to "baseline". Furthermore, I note that the form completed by Dr. Spann was done before the lumbar myelogram was performed at the request of Dr. Knox which revealed the source of claimant's condition resulting from the May 6 injury.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back injury. I believe it is important to note that this decision should not be interpreted as finding that claimant is entitled to perpetual conservative treatment from Dr. Spann. Instead, I am simply finding that as of the time of the hearing claimant is entitled to additional medical treatment from Dr. Spann, his authorized treating physician. This would include the spinal decompression therapy which has been recommended by Dr. Spann.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the

amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his lumbar spine on May 6, 2006. Claimant has also met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back injury. This includes spinal decompression therapy as recommended by Dr. Spann.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of $480.50.

IT IS SO ORDERED.

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GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE