

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704097

JESSIE L. GIST, EMPLOYEE	CLAIMANT
UNITED FARMS, INC., EMPLOYER	RESPONDENT
AG-COMP SIF CLAIMS, INSURANCE CARRIER/TPA	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JULY 14, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on May 30, 2008, at Forrest City, St. Francis County, Arkansas.

Claimant represented by Mr. M. Scott Willhite, Attorney-at-Law, Jonesboro, Arkansas.

Respondents #1 represented by Mr. Neal L. Hart, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 did not appear.

STATEMENT OF THE CASE

A hearing was conducted May 30, 2008, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws.

A prehearing conference was conducted in this claim on April 16, 2008, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order subject to an amended contention by the claimant related to the period of temporary total disability claimed.

It was stipulated that the employment relationship existed between the

parties at all relevant times, including March 28, 2007; that a work-related incident occurred on said date which the claimant timely reported; that respondents paid various medical, as well as some indemnity benefits at the maximum applicable compensation rate of \$504.00 per week for temporary total disability prior to controverting the claim in its entirety.

By agreement of the parties, the primary issue presented for determination concerned compensability of the March 28, 2007, incident. If overcome, claimant's entitlement to associated benefits must be addressed.

Claimant contended, in summary, that he sustained a compensable back injury as the result of a specific incident identifiable in time and place of occurrence on March 28, 2007; that respondents should be held responsible for all outstanding medical and related treatment, together with continued reasonably necessary medical treatment; that he was entitled to temporary total disability benefits for the period beginning March 28, 2007, and continuing through April 14, 2008, at which time the claimant was released with a five percent (5%) whole body impairment (while acknowledging that respondents were entitled to a credit for previously paid benefits); that he was entitled to the five percent (5%) impairment assessed by Dr. Jerry Engelberg; and that a controverted attorney's fee should attach to all benefits paid and/or awarded. The claimant reserved the issue of wage-loss disability, if applicable.

The respondents contended that the claimant did not sustain a compensable

injury within the meaning of the Arkansas workers' compensation laws while maintaining that there was no medical evidence supported by objective findings to establish compensability. As previously pointed out, respondents initially paid benefits prior to controverting the claim in its entirety. Alternatively, in the event compensability was found, respondents maintained that, nevertheless, the claimant would not be entitled to any temporary total disability, contending that it provided the claimant suitable, light-duty employment which the claimant refused. As a further alternative, respondents contended that the claimant cannot meet his burden of proof concerning permanent impairment, maintaining that the minor incident and alleged injury was not the major cause of the claimant's impairment, if any.

Subsequent to the prehearing conference, the parties took the evidentiary deposition of Dr. Jerry Engelberg. Based upon Dr. Engelberg's deposition, the claimant amended his contentions at the hearing to request temporary total disability from the date of the accident until July 28, 2007. (Tr.5)

The record is composed solely of the transcript of the May 30, 2008, hearing containing numerous exhibits, together with the claimant's discovery deposition and the evidentiary deposition of Dr. Jerry Engelberg which were introduced as "Respondents' Exhibit D" and "Joint Exhibit 3," respectively, and retained in the Commission file in bound form.

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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. On March 28, 2007, the claimant sustained a back injury which arose out of and during the course of his employment with United Farms, Inc., and which was the result of a specific incident identifiable in time and place of occurrence on said date, and which caused internal physical harm, specifically a transverse process L2 fracture and which was established by medical evidence supported by objective findings.
4. The claimant earned sufficient wages to entitle him to the maximum applicable compensation rates of \$504.00 per week for temporary total disability and \$378.00 per week for permanent partial disability.
5. Respondents should be held responsible for all outstanding medical and related treatment, together with continued, reasonably necessary medical treatment.
6. The claimant has proven, by a preponderance of the evidence, that he is entitled to temporary total disability benefits for the period beginning March

29, 2007, and continuing through July 28, 2007.

7. The claimant's healing period ended on or before July 28, 2007.
8. Respondents have failed to show, by a preponderance of the credible evidence, that the claimant refused suitable employment offered to him by the employer.
9. Respondents are entitled to a credit for any temporary total disability previously paid, as well as a credit for the days that the claimant worked within his healing period.
10. The claimant has proven, by a preponderance of the evidence, that he is entitled to a five percent (5%) permanent impairment assessed by Dr. Jerry Engelberg which is directly and causally related to the March 28, 2007, admitted incident.
11. Respondents have controverted this claim in its entirety.
12. Claimant's attorney is entitled to the maximum statutory attorney's fee pursuant to, and limited by, Ark. Code Ann. §11-9-715.
13. Claimant's entitlement to wage-loss disability, if any, was specifically reserved.

DISCUSSION

_____The relevant facts in this claim are basically undisputed. Again, the threshold issue presented for determination was whether the claimant sustained a compensable injury as the result of an acknowledged work-related incident on

March 28, 2007. As reflected by the stipulations, respondents paid various medical, as well as some indemnity benefits prior to controverting the claim in its entirety. Apparently, respondents controverted the claim after conducting a surveillance of the claimant's activities for the period beginning May 14, 2007, through May 16, 2007, and, again, beginning August 7, 2007, through August 9, 2007. Although the investigative reports may reflect that the claimant has exaggerated his overall disability, they are of little probative value on the compensability of this claim. Further, respondents' attorney did a masterful job on cross-examination to show that the claimant was an untruthful witness, and that the claimant has greatly exaggerated his disability. The claimant's lack of credibility relates more specifically to his entitlement to wage-loss disability which has been specifically reserved. Respondents have controverted this claim in its entirety, maintaining that there is no medical evidence supported by objective findings to support compensability. Clearly, as will be set out further below, this assertion is without merit. In my opinion, the only real factual disputes concern the date claimant's healing period ended, as well as claimant's entitlement to temporary total disability, and, whether the permanent impairment rating assessed by Dr. Engelberg is supported by objective findings, and whether the claimant's injury is the major cause of Dr. Engelberg's assessment of impairment. The record as a whole supports the findings and conclusions set out above.

COMPENSABILITY

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A. C. A. §11-9-102(4)(A)(i)(Repl. 2002), must be established:

1. Proof by a preponderance of the evidence of an injury arising out of and in the course of 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 medical findings, as defined in A. C. A. §11-9-102(16), establishing the injury; and,
4. proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant has satisfied each and every element necessary to establish compensability. It is undisputed that the claimant was involved in a work-related incident on March 28, 2007, which was witnessed by supervisory personnel and timely reported. In fact, respondents initially exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with prompt, reasonably necessary medical treatment, as well as paying indemnity benefits at the maximum applicable compensation rates. It is unclear from the record when, and on what basis, respondents terminated all benefits; however, the

stated reason for controverting the claim was that there was no medical evidence supported by objective findings to establish compensability. Again, this assertion is without merit.

Respondents have directed all of the claimant's medical treatment. The claimant was initially seen at the Crittenden Regional Hospital emergency room on the day the incident occurred. The claimant's injury occurred as the result of a slip and fall, at which time he landed on his back and right flank. The emergency room records reflect blood in the claimant's urine. The claimant was seen the following day at the Lee County Cooperative Clinic in Marianna, Arkansas, with a diagnosis of musculoskeletal strain, as well as contusion to the back/kidneys. The claimant returned to the Lee County Cooperative Clinic on April 5, 2007, at which time his urine was clear. However, the progress notes reflect moderate muscle spasm. Again, the claimant was diagnosed with a musculoskeletal strain and a right kidney contusion. The claimant received periodic follow-up treatment at the Lee County Clinic through on or about July 11, 2007. In the interim, respondents referred the claimant to Dr. Trent Pierce, a general practitioner in West Memphis, Arkansas. Dr. Pierce initially evaluated the claimant on April 19, 2007. Again, Dr. Pierce specifically noted that the claimant still had muscle spasms on April 30, 2007, at which time he continued the claimant on medications and recommended physical therapy. Clearly, the findings of muscle spasms by both the Lee County Cooperative Clinic, as well as Dr. Pierce are objective findings. Dr. Pierce

subsequently released the claimant on multiple occasions with restrictions while recommending that the claimant be seen by an orthopedic specialist for a second opinion.

The claimant was later referred to Dr. Jerry Engelberg, an orthopedic surgeon with the Semmes-Murphy Clinic in Memphis, Tennessee. Dr. Engelberg initially evaluated the claimant on June 22, 2007. Dr. Engelberg ordered additional diagnostic studies, including a bone scan, and ultimately diagnosed two (2) separate findings, specifically, a transverse process L2 fracture which he attributed to the March 28, 2007, fall, as well as an older compression fracture at L1. Dr. Engelberg also pointed out that the claimant had some disc bulging at L4-5 and S5-1 which caused some concern. (Jt. Ex. 3, p.7)

Rather than conduct an exhaustive analysis of Dr. Engelberg's deposition, suffice it to say that it was his expert opinion that the transverse process fracture was related to the admitted fall and that the compression fracture was much older, and, further, that the compression fracture never acted as the source of impairment and/or disability.

In view of the foregoing, the work-related incident being undisputed, together with medical evidence supported by objective findings in various reports, I find that the claimant has satisfied each and every element necessary to establish compensability of his claim.

TEMPORARY TOTAL DISABILITY

The next issue concerns the claimant's period of disability.

First, I felt compelled to point out that subsequent to the claimant's March 28, 2007, injury, he was diagnosed with having systemic mastocytosis (a form of cancer) with osteoporosis and anemia, and has been referred to an oncologist, Dr. Brent Mullins for this condition. Clearly, the mastocytosis may be a factor in the claimant's overall disability, but it is unrelated to the within claim. Dr. Engelberg's evidentiary deposition was taken May 20, 2008, at which time he was specifically questioned whether, and when, the claimant reached maximum medical improvement. A portion of Dr. Engelberg's deposition is set out below:

Q. . . . Well, I guess I'll ask you, Doctor, when do you think this guy reached MMI?

A. Let me tell you the reason that's very difficult. I don't know how much this mastocytosis is a factor here. If I saw a patient for a transverse process fracture, I would give him three to four months MMPI.

So if his injury was March 28th, 2007, if you wanted to say June 28th or someone said, no, I would give him four months, July, I would say the end of June or the end of July; and, you know, I think that's reasonable.

Q. And again you don't know how much, if any, the mastocytosis combined -

A. See, that is a factor that I just - I don't know that I've ever seen a case of that. You know, I see various hemologic disorders, but I would think that it was in the bone, you know, just common sense will tell you that if it's in the bone and this guy has a transverse process fracture of the bone, you know, it would probably have an effect on its healing and so on, but I don't - to support what you just said, I don't know what the hemologic disorder, what factor that would be in his healing.

Q. I noticed, Doctor, that Dr. Pierce at one point in April of 2007 - do you have his notes in your chart?

A. I think I do. Bear with me one second.

Q. And maybe, Doctor, I can just – we have the records here. At some point in April of 2007, near the end of April, Dr. Pierce indicated that he thought that Mr. Gist could go back to light-duty work, no lifting over 20 pounds. In your opinion, based upon your knowledge of the patient, do you think that was rational for that point in time?

A. The end of April?

Q. Yes.

A. No, I really don't.

Q. You would have had him off work still?

A. I would have kept him off more than a month. That's a painful damn fracture.

Q. Would you have ever had him on light-duty before he reached maximum medical improvement?

A. I probably would have started him on light-duty right toward the end of three months, covered him for a month. That's probably what I would do and try to let him get back into his occupation, because that is a painful fracture, you know.

And again you could argue, well, they said that's an old fracture. You know, I would give him the benefit of the doubt. And I'm not soft on workmen's comp injuries, but I probably would start him at the end of three months, give him a month of light-duty and then try to get him back. So a total of four months and then release him to full-duty and see if he could do it. (Jt. Ex. 3, pp.15-17)

Alternatively, respondents contend that the claimant would not be entitled to any temporary total disability, maintaining that it provided the claimant light-duty employment which the claimant refused. Again, the record does not support respondents' alternative assertion.

Ark. Code Ann. §11-9-526 provides:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal,

unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable. (Emphasis supplied)

The record in this claim indicates that, at various times, the claimant returned to work for the employer herein, worked for short periods of time, and then was advised to go home. The claimant repeatedly stated that his immediate supervisor, Peyton Upton, sent him home each time he attempted to return to work with a restricted release, and that Mr. Upton ultimately terminated his employment on May 21, 2007, as reflected by the following exchange:

Q – Jessie, you can't talk about what someone else said about –

A Okay. All right.

Q – unless it's Mr. Upton, but you haven't gone back other than just those few days, have you?

A No, sir, I went back May 21st, when I got the doctor release from where I can go back to work and try to drive or do whatever possibly –

Q May 21st of this year?

A May 21st of last year.

Q Of last year, okay, and what did they do?

A When I went there, I went down to the – I had punched the clock. I went down to the west shop down there, and he said, "Jessie and them are down there." I said, "Well, I'll go down here and see what he want me to do." He said, "I think they are probably going to load some fish." I went down there, and Jessie said, "How are you doing?" I said, "All right. How are you doing? I said – that's the other driver. He didn't, you know, didn't respond to me. I said, "Well, okay then," and I had some more stuff in the truck right there, and I went around and got it out of it, and he said, "Well, you can take a vacation." I said, "What is it, Jessie, I'm fired or something?" He said – you know, he really didn't reply. I said, "You know, just be, you know, be level with me." He said, "Well, yeah, I think so." So I left. I went back down to the west farm there, and I said, "Well, y'all, I'm fired." I left and went on back home.

Q Haven't been back?

A Oh, I come back the next day and I talked to Mr. Peyton Upton, and I said, "Did you agree with that or is that what you wanted?" He said, "Yeah." He said, "Jessie, you can't perform. Look at you. Look how you are shaking." He said, "And the time that you had maybe wanted off." I said, "Well, sir, I did do what you told us so where I can get back here where I can hold a job."

Q This is before you were treated by Dr. Engelberg?

A That was before I was treated by Dr. Engelberg.

Q Have you been back since being released by Dr. Engelberg?

A Being released by Dr. Engelberg? Like I said, when they told me I was fired.

Q You haven't been back?

A I haven't been back.... (Tr.27-28)

Jessie Morgan, a management employee, testified at the hearing concerning the employer's efforts to provide the claimant with light-duty work. In fact, Mr. Morgan stated that he would have paid the claimant forty (40) hours per week to do nothing but sit in a chair and watch the day pass by if the claimant had returned to work and requested some form of light-duty. Clearly, Mr. Morgan's testimony is inconsistent with the testimony of the claimant. However, the claimant's undisputed testimony is that each time he returned to work, he was sent home by Peyton Upton. Mr. Peyton did not testify. Further, Mr. Morgan did not testify that he offered the claimant a full-time position sitting at a desk. To the contrary, he stated that the claimant attempted to return to work on several occasions and always advised that the work activities aggravated his condition, as reflected below:

Q But did Mr. Gist ever come to you and actually try some of the things that you were wanting him to do on light duty?

A Yes. Like I say, if he brought in a slip from the doctor stating he was on light duty, the done – we asked him to do just whatever he felt comfortable doing. We didn't ask him to do anything that would aggravate his injury or hurt himself.

Q Okay. Do you remember some specific things you asked him to do when he came back and tried to work after March 28?

A Yes. I've asked them just coming back, clean the truck up, you know, his live haul truck. It's sitting there. Clean it out, vacuum it, just whatever you feel comfortable doing to improve the looks of the truck. Also, we have light duty running birds. There's a bad bird problem on our farm in the spring, and I've asked them to run birds with a pickup truck, and he chose not to drive the truck. He chose to drive a Gator that we had. He went out and tried it for a while, and come back and said he was not able to do it and he went home.

Q Okay. How many times did he come back and then try or purport to try to go back to work on light duty?

A There's several times Jessie come back and tried to do different things on the farm. There's very few times I actually sent him home, myself personally. I can't say what the owner of the company done or the general manager, but every time that I had him do something, it's "Jessie, go do it," and he would go try it and he would come back and basically say, "I can't do it. I'm going home."

Q Okay. Had you ever had a problem with Jessie prior to the fall?

A No.

Q Was he a good worker prior to the fall?

A Excellent worker.

Q Okay. Was he always there on time and did what you asked him to do?

A Yes.

Q Was his job predominantly driving a truck transporting fish?

A Yes.

Q Since the accident there's been a constant issue about going back to work, hasn't there?

A Yes.

Q Okay. You never actually asked – I know you said earlier that you could have him to sit by a time clock, if necessary.

A Right.

Q But you never actually asked him just to sit by the time clock and –

A No, I've told them, "Just do whatever you feel comfortable doing, just get your 40 hours in." (Tr.71-73)

The record contains several pages of surveillance reports introduced by respondents reflecting that the claimant was not totally disabled at all times after March 28, 2007. Unfortunately, the surveillance reports are of little value. First, the reports cover two (2) specific periods of time, the first beginning May 14, 2007, through May 16, 2007, and the second beginning August 7, 2007, through August 9, 2007. It must be pointed out that the later investigative reports cover a period of time that the claimant is not seeking temporary total disability. Admittedly, the claimant amended his claim for temporary total disability following the evidentiary deposition of Dr. Engelberg who ended the claimant's healing period on July 28, 2007. Further, I find some obvious inconsistencies in the investigative reports. Specifically, the investigators observed the claimant limping at times and, at other times, walking without a limp. The investigators did not state that the claimant altered his gait because he knew he was being observed. There is no such evidence. It is not unusual for someone with a back problem to be symptomatic at

times and totally non-symptomatic at other times. The investigative reports may have some bearing on the overall extent of the claimant's disability, but as previously pointed out, wage-loss disability has been specifically reserved. In view of the foregoing, I find that the claimant has proven that he is entitled to temporary total disability from March 29, 2007, through July 28, 2007. Respondents are entitled to a credit for any days that the claimant worked or for periods of temporary total disability previously paid.

PERMANENT IMPAIRMENT

On April 14, 2008, Dr. Engelberg issued the following narrative report:

This is a reply to your correspondence dated April 11, 2008 with regard to Jessie L. Gist, a WCC claim which took place March 28, 2007.

Mr. Gist had injuries as a result of a work accident when he slipped and fell on some wet steps. The impairment according to the AMA guidelines for the injury which is a transverse process injury of the lumbar 2 on the right would be page 3/102, section "DRE Lumbosacral Category II: Minor Impairment" in the AMA Guides to the Evaluation of Permanent Impairment Fourth Edition and the impairment there is "5% to the whole person impairment". The work restrictions would be "none" after this period of time which is a year after his injury. (Jt. Ex. p.5)

The evidentiary deposition of Dr. Engelberg was taken May 20, 2008. On cross-examination, he was specifically questioned concerning whether any of the five percent (5%) impairment he assigned was based on anything other than objective findings. Dr. Engelberg was also questioned concerning the claimant's compression fracture which did not feel was related to the March 28, 2007, fall. Portions of his deposition follow:

Q. Let me talk to you real quickly, Doctor – I know your time is very valuable –

about the rating that you gave on April 14, 2008. And when you assign that, you use the Fourth Edition of the A.M.A. Guides; is that correct?

A. Yes.

Q What edition are they on now, Doctor?

A. Six.

Q. Hopefully we'll tumble out of the Stone Age over in Arkansas.

A. Oh no, gracious, I can't look at that book. If you said "I'm going to kill you or tell me what the Sixth Edition says," I'd say, "Just shoot me." I don't understand that at all.

Q. It appears from your letter of that date, Doctor, that you don't have any permanent restrictions on this guy; is that true?

A. That's correct.

Q. When you assign the rating – and I know you've been doing this for a long time, and these are just questions lawyers obviously ask – did you take into account his complaints of pain when you assigned this rating?

A. It was strictly on the basis of the A.M.A. Guidelines. I did not take into account pain.

Q. How about range of motion?

A. Not really.

Q. Not really how, Doctor?

A. The only thing that I took into account – I went to the A.M.A. Guidelines and spent some time, looked up and saw a transverse process fracture, what they assigned to that; and as far as the pain and suffering, I leave that to the courts to make a decision there.

Q. Okay. I just want to confirm that you didn't use any kind of pain or subjective complaints when you did the rating?

A. No, sir, I did not.

Q. And I know you're not – the other condition he has, mastocytosis, do you have any opinion with regard to whether or not that is related to this fall?

A. I don't feel it's related to the fall.

Q. As far as the L2 fracture, is this guy done treating basically? Is there anything else you can do for him?

A. There is no treatment other than bracing. I put him in a TLSO brace. And is that beneficial? We use them. If someone said that isn't worth a damn, you're wasting money – because they are expensive, they cost about \$1,500.00, or the good ones do – and I wouldn't argue that. I did it just because I had nothing else to offer the man.

Q. And I presume, Doctor, you're not going to give patients things that aren't reasonable and necessary, right, as far as in the way of medical care?

A. That's correct.

Q. Fair enough. Did you give the brace to him because he asked for it or was that just a last report?

A. He said he was hurting, and it's two things. The brace hopefully would stop the movement, is my intent. And to say that that's really proving of value, it's not. Someone can argue, well, what did you do that for? I'm just trying to make him more comfortable.

Q. Based again upon what he's telling you, right?

A. Correct.

Q. Fair enough. I guess I opened one more can of worms, Doctor. Is there any way you can retroactively give us a rating for the L1 fracture without having to go to the book?

A. I don't know what that is.

Q. Would it be a ratable impairment under the Guides, a compression fracture?

A. I'm nearly sure, I'm almost positive it is, but I did not look that up. I don't know what a compression fracture – my guess would be it's in the five percent range, but that's strictly a guess, and I don't know.

Q. Hypothetically in the past if you had treated him for the L1 fracture, is that a condition that you would put permanent restrictions on upon release of the patient?

MR. CLARK: Let me interpose an objection here if you don't mind. And I'm sorry to interrupt the flow of things, but I think that the A.M.A. Fourth Edition requires in order to assign an impairment rating that there actually be an impairment of the individual's activities of daily living, and in this case we have absolutely no evidence to substantiate the fact that his activities were in any sense compromised before this injury of 3-28-07.

BY MR. HART:

Q. Any idea, Doctor?

A. I don't really know.

Q. Okay. Do you treat patients with fractured lumbar vertebra, compression fractures?

A. Yes, we frequently see lumbar compression fractures. Around hunting season the deer hunters fall out of deer stands. That's probably the most frequently that I will see. I remember very vividly a fellow from Arkansas that was over here this year.

Q. Do you generally give permanent restrictions for these?

A. Not after three to six months. It depends on – compression fracture is like heart disease. Sometimes someone will squash the vertebral body and push it back into the canal. Sometimes it's a small amount of compression, as this gentleman's was, and probably wouldn't put any restriction on Mr. Gist from his compression fracture of lumbar one. (Jt. Ex. 3, pp.19-23)

CROSS EXAMINATION

BY MR. CLARK:

Q. Dr. Engelberg, thank you for accommodating me today. I'm actually not at the house, I'm under the stack of files, but I have a few questions about Mr. Gist on behalf of the State of Arkansas Second Injury Fund.

Doctor, I've got your records here, your reports and so forth. Is it correct to say that Mr. Gist never related any history of back injuries or problems prior to this particular incident of March 28th, 2007?

A. That's correct, sir.

Q. And is it likewise fair to say, Doctor, that if this L1 compression or deformity fracture predated this incident of March 28th, 2007, that it obviously hadn't manifested itself in the sense of impairing his activities of daily living in any way?

A. I agree with that.

Q. And, Doctor, is it not also true that you obviously have some – maybe more familiarity than you like to admit with the A.M.A. Guides, but isn't it also true, Doctor, that you assign a zero percent impairment rating if you've got a condition that actually does not limit the performance of the activities of daily living?

A. That's correct.

Q. And in that sense, Doctor, if you were asked today to try to assess a rating for a condition that was not impairing this individual, to wit the L1 compression fracture, you would have to assign a zero percent whole person impairment rating?

A. That's correct.

Q. And, Doctor, isn't it a fact also that I think from my reading of your file that someone in your office advised Mr. Gist that he had an old fracture?

A. I told him, you know, he had a compression fracture but I didn't think it was involved in his injury.

Q. Right. Did it in fact come as a surprise to him that he had an old fracture?

A. He didn't show much – I don't think a lot of understanding of where we were with that.

Q. He didn't give you any reason to believe that he knew about it beforehand or that he had had any problems with any kind of fracture before coming to you for this incident?

A. That's correct.

Q. And I think you said, Doctor, that – I'm going to try to pronounce it – systemic mastocytosis?

A. Yes, sir.

Q. I think you said that at the time that you saw him that there were some marrow changes but he was asymptomatic relative to this condition at the time you saw him?

A. This was picked up strictly on bone scan, and I obviously was obligated to pursue this. He did not complain of any symptoms from this.

Q. And, Doctor, you haven't seen any past medical history or documentation that would indicate a course of treatment for any kind of back conditions?

A. That's correct. (Jt. Ex. 3, pp.29-31)

Based upon Dr. Engelberg's testimony, I find that the claimant is entitled to the five percent (5%) whole body impairment previously assessed.

AWARD

Respondent, AG-Comp SIF Claims, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$504.00 per week beginning March 29, 2007, and continuing through July 28, 2007.

All accrued benefits shall be paid in lump, and respondents may claim credit for all benefits previously paid, as well as credit for the dates that the claimant worked.

Respondents are further directed and ordered to pay, to the claimant, permanent impairment benefits at the rate of \$378.00 per week beginning July 29, 2007, and continuing for 22.5 weeks, representing a five percent (5%) whole body impairment.

All benefits having accrued, respondents are, likewise, to pay the impairment in lump sum and without discount.

Respondents are further directed and ordered to pay all outstanding hospital, medical, and related expenses as the result of the claimant's compensable injury, and remain responsible for additional, reasonably necessary medical treatment, if any.

Additionally, claimant's attorney, Mr. M. Scott Willhite, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant, and limited by, Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge