

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708378 (10/03/06)

EDDIE L. HARRIS, EMPLOYEE

CLAIMANT

PETIT JEAN POULTRY INC., EMPLOYER

RESPONDENT

LIBERTY MUTUAL FIRE INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED JULY 21, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on July 16, 2008, at Hope, Hempstead County, Arkansas.

Claimant represented by the HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

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

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine the claimant's entitlement to additional workers' compensation benefits. On May 19, 2008, a pre-hearing conference was conducted in the 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 same. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

In addition to the stipulations set forth in the Pre-hearing Oder, the parties further stipulated the claimant earned an average weekly wage of \$366.00, which generates

compensation benefit rates of \$244.00/\$183.00, for temporary total/permanent partial disability. With respect to contentions, claimant asserts entitlement to temporary total disability benefits subsequent to August 16, 2007. Respondents content that the claimant was released to return to his regular job duties on August 16, 2007, and, as such, is not entitled to any temporary total disability benefits.

The testimony of Eddie L. Harris, the claimant, coupled with the May 14, 2008, deposition of Dr. Harold H. Chakales, along with medical reports and other documents comprise the record in this claim.

DISCUSSION

Eddie L. Harris, the claimant, with a date of birth of February 16, 1954, has an eleventh grade education. Claimant's testimony reflects that the only additional education/training that he has had since leaving school is that in regard to obtaining his CDL (Commercial Driver's License). The claimant's work history reflects extensive heavy manual labor employment to include factory work at Tyson Foods and Weyerhaeuser, as well as long-haul truck driving.

Claimant commenced his employment with respondents in April 2006 in the shipping department. Claimant denies that he experience physical limitation or restriction relative to his back prior to his employment with respondents. Further, claimant denies that he had ever sustained a injury to his back or sought medical treatment relative to his back prior to his employment with respondents. Claimant described the condition of his back at the time of his employment by respondents as good. There is no medical in the record to reflect that the claimant sought or obtained medical treatment relative to is back prior his April 2006, employment by respondents.

The testimony in the record reflects that during his employment by respondent-employer the claimant worked a swing shift which commenced at 4:00 p.m. and ended between 1:30 and 2:00 a.m. The claimant sustained an injury to his back on October 3, 2006, while in the process of constructing a “combo box” when he performed a twisting maneuver as he was putting the box in place. As a result of the twisting maneuver claimant experienced pain his low back which progressively worsen. The claimant reported the injury to appropriated supervisory personnel, to include reporting to the nurse’s station. The evidence reflects the Safety Director, Leo Smith, was also notified.

The claimant continued to discharge his regular employment duties for a period of at least two (2) weeks following the occurrence of the October 3, 2006, injury. During the afore the claimant was under the impression that he was awaiting the scheduling of an appoint by respondent-employer with its designated treating physician. During the course of a conversation with the Safety Director Smith claimant was informed by same that respondent-employer usually waited five (5) to seven (7) days to see if the employee recovered before scheduling an appointment with the respondent designated treating physician.

The testimony of the claimant reflects that while he continued to perform his regular assigned job duties following the October 3, 2006, accidental injury, his symptoms progressive worsen. Claimant described his worsening symptoms as pain in his low back, muscle spasms, and pain radiating into his left leg. Claimant testified that while he was awaiting a scheduled appointment with the company doctor his symptoms reached the point that he sought treatment from his family doctor, Dr. Brian Oge, in Nashville, Arkansas.

The claimant lives in Nashville, Arkansas, and was employed at the respondent’s facility

in Arkadelphia, Arkansas. Claimant testified that Dr. Oge prescribed medication for his low back pain and muscle relaxant for his muscle spasm. Claimant's testimony reflects the he declined an offer by Dr. Oge to be taken off work relative to his back injury, explaining to same that because he was not respondents' designate treating physician the off-work slip would not be honored.

The claimant testified that once an appointment was scheduled by respondent-employer in connection with his October 3, 2006, compensable injury he was seen by Dr. Michael Young in Arkadelphia. Claimant's testimony reflects that by the time he was seen by Dr. Young he continued to experience symptoms of low back pain, muscle spasms, and pain down into his left leg. During the initial visit to Dr. Young claimant testified that he underwent a physical examination by same, was prescribed a re-fill of the ibuprofen and Flexerill, which had been previously prescribed by Dr. Oge, and was released to light duty. The claimant was also prescribed physical therapy by Dr. Young.

The claimant concedes that respondent-employer provided light duty work within the restrictions of Dr. Young. Claimant testified that during the time he was assigned to light duty he performed the job of assembling/constructing the lids for the boxes that he was making at the time of his injury. The testimony of the claimant reflects that the light duty job that he performed was one regularly provided by respondent-employer to employees on light duty as a result of a work-related injury.

The testimony of the claimant reflects that while he attended the physical therapy and took his prescribed medication his symptoms did not abate. Claimant testified that on April 15, 2007, Dr. Young arranged for him to undergo a MRI scan of his lumbar spine. Claimant's

testimony reflects that after Dr. Young received the results of the MRI scan he wanted to refer him to a surgeon, however respondent-carrier referred him to a different doctor, Dr. Brent Sprinkle in Little Rock. Claimant testified that he later learned the Dr. Sprinkle was not a surgeon.

The testimony of the claimant reflects that his medical treatment under the care of Dr. Sprinkle included two (2) epidural steroid injections and later a facet injection. Claimant was continued in a light duty status until his final visit to Dr. Sprinkle on August 16, 2007, when he was released to return to his regular duty job. Claimant maintains that at the time of the August 16, 2007, release by Dr. Sprinkle his condition had not improved. Specifically, claimant noted the he continued to experience the symptoms of low back pain, muscle spasms, and pain into his left leg.

Claimant testified that he was not physically capable of performing his regular job duties at the time of the August 16, 2007, release by Dr. Sprinkle. The testimony of the claimant reflects that during the return trip from Dr. Sprinkle's August 16, 2007, visit, he was accompanied by Safety Director Smith. Claimant testified that he was not capable of returning to regular duty and the Safety Director Smith relayed that when they returned to the plant he would provide the claimant with documents/papers to file for medical leave of absence. Claimant was furnished the necessary documents to file for medical leave of absence, and pursuant to the directions of supervisory personnel provided them to Dr. Young to be completed.

Claimant maintains that the duration of the medical leave was three (3) months, and that at the conclusion of same he reported back for work on a Friday. The testimony of the claimant reflects that during the time he was on medical leave he received a check for six (6) weeks,

which was suppose to be for \$50.00, each, however by the time taxes were taken out each check amounted to slightly more that \$24.00. Claimant testified that at the time he reported back for work he spoke with Ms. Kay Oneal and relayed that since it was late he would rather return to work on Monday, thereby having the weekend to rest up, and that the same was agreeable with Ms. Oneal.

Claimant's testimony reflects that although he reported to work he continued to experience symptoms and complaints attributable to the October 3, 2006, compensable injury. In reporting to work at the expiration of the medical leave, claimant reasoned that when it was determined that he was physically unable to perform his regular job duties he would be return to the doctor and the additional tests mentioned during the last visit would be performed.

After reporting to work on Monday and to his assigned work station claimant was summoned to the office at approximately 4:25 p.m, before performing any work. Once in the office claimant was informed by supervisory personnel that he could not work because he had not been released by a doctor to work. As a consequence of the afore claimant testified that he called the office of Dr. Young and relayed that he needed a release to return to work. The testimony of the claimant reflects that he was informed by Dr. Young that he would have to obtain the release to return to work from Dr. Sprinkle. Claimant testified that he was provided the fax number of Dr. Young. Armed with the afore, the testimony of the claimant reflects that contacted Dr. Sprinkle's office, provided the fax number of Dr. Young, and was informed that the document releasing him to return to work would be faxed to Dr. Young.

The testimony of the claimant reflects that when he followed up at the office of Dr. Young he was informed that the document had not been received. Thereafter, claimant again

contacted Dr. Sprinkle's office and was informed that the document had been faxed. Further, personnel in Dr. Sprinkle's office relayed that the document would be again faxed. When informed by the office of Dr. Young that the document had not been received, claimant contacted Dr. Sprinkle's office and had the document faxed to him at the Nashville library.

Claimant testified that he later received a letter from respondent-employer notifying him that his employment had been terminated due to being off work too many days. Claimant denies that he ever receive any correspondence from respondent-employer prior to the termination letter.

The testimony of the claimant reflects that a change of treating physician was being considered before he was last seen by Dr. Sprinkle. On December 12, 2007, a Change of Physician Order was entered by the Medical Cost Containment Department of the Arkansas Workers' Compensation Commission designating Dr. Harold H. Chakales, a Little Rock orthopedic surgeon, as the authorized treating physician. The claimant was seen by Dr. Chakales on one occasion, during which time additional diagnostic studies, in the form of EMG/NCV studies, were recommended. Respondents refused to authorized the diagnostic procedure.

The claimant was seen by Dr. Clemens E. Soeller, at the Hope Bone and Joint Clinic, pursuant to the directions of respondents. Claimant testified that he was not informed by Dr. Soeller of the results or recommendations following the examination. Claimant's testimony reflects that he lacks confidence in the medical opinions of both Dr. Sprinkle and Dr. Soeller, whom he perceive as "hired guns". Claimant testified that he did not like the manner in which he was treated by Dr. Soeller, which was comparable to the same treatment he receive by Dr. Sprinkle.

The testimony of the claimant reflects that he did not file for unemployment benefits

following the termination of his employment by respondents. Claimant has filed for social security disability benefits. Claimant has not worked since he performed light duty in the employment of respondent-employer prior to his August 16, 2007, full duty release by Dr. Sprinkle.

The claimant has not sought work since the termination of his employment by respondent. Claimant maintains that he is not physically capable of perform the full duty work that he performed in the employment of respondents, nor his he physically capable of perform any of the work the he performed in past employments because of the residual symptoms of his October 3, 2006, compensable injury. Claimant asserts that he desires to have the diagnostic procedure recommended by Dr. Chakales and any resulting recommended treatment, to include surgery.

The medical in the record reflects that the claimant was seen by Dr. Brian Oge, his Nashville family physician, on October 9, 2006, with a chief complaint of low back pain. The October 9, 2006, clinic note relative to the claimant's visit reflects, in pertinent part:

was working and hurt back last Tuesday and states that his employer has not sent him to doctor yet. He works for Peti-jean poultry in Arkadelphia. Was injured making "combo-boxes". He states these weight about 40-50 pounds and he hurt his low back on Tuesday, while placing the boxes on pallates. He states his back was hot and tight starting Tuesday. He continued to work through Friday night, but had to leave then due to pain worsening in the lower back. He was no better Monday, and was still hurting and could not return back to work today due to the pain. Has been taking ibuprofen, and not getting any relief. On Friday and was unable to complete his shift, was told to go home and if hurting Monday they would send him to a doctor, he states that no appointment was made and was told today in order to return to work he must have a medical excuse. Review of system is otherwise negative.

OBJECTIVE:

BJE -tender to right lumbar paraspinous muscle area with minimal spasm, no deformity, or edema, full range of motion. (CX. #1, p. 1).

The October 9, 2006, clinic note of Dr. Oge reflects his assessment of the claimant's complaint as a muscle strain, for which the claimant was provide ibuprofen 600 mg, one three time a day, and Flexreil 10 mg, one at bed time for spasm.

The medical in the record reflects that the claimant was seen by Dr. Michael C. Young on October 12, 2006, relative to his October 3, 2006, work-related injury, pursuant to the directions of respondents. The October 12, 2006, office note of Dr. Young regarding the claimant reflects, in pertinent part:

S: Gentleman from Petit Jean Poultry who injured his back sometime around the 3rd of this month. He went and saw his private physician and declined x-rays at that time. He was started on generic FLEXERIL and IBUPROFEN and is actually getting better. He is here with Leo today.

O: He has a little bit of muscle spasm in his lower back. Apparently, he has been doing a lot of foot planted and twisted upper torso work at the plant. PA & LATERAL of the lumbar spines are normal.

A: I think this is just soft tissue.

P: I think his medicine choices are good. He is to continue his IBUPROFEN and his FLEXERIL. Leo is going to work on finding him a job that does not require him to do quite so much twisting. (CX. #1, p. 3).

The evidence in the record reflects that the claimant was again seen by Dr. Oge on March 13, 2007, for a check-up with complaints of low back pain. The clinic note reflects, "some chronic low back pain from time to time otherwise no problems". The clinic note also reflects that the claimant "denies arthralgia joint stiffness back pain muscle cramps or myalgia". Under the heading of OBJECTIVE in the chart note, the following is reflected: BJE - no edema, full range of motion. (CX. #1, p. 4).

The office notes of Dr. Young reflect that the claimant was next seen by him on March

16, 2007, with continued complaints of back pain. As a consequence of the afore visit, arrangement were made for the claimant to undergo physical therapy commencing March 30, 2007. (CX. #1, p. 3).

The claimant underwent physical therapy at Baptist Health in Arkadelphia. After his initial visit to the physical therapy facility on March 23, 2007, claimant was scheduled for 4-6 weeks of therapy. (CX. #1, p. 6-8). On April 17, 2007, a summary of the claimant's physical therapy was provided Dr. Young by the physical therapist, Robert L. Moore:

Eddie Harris has participated with physical therapy over the past four weeks due to chronic back pain. Initially ROM of the lumbar spine was determined to be WNL's, lower extremity strength was WNL's, but tenderness was present in the left lumbar paraspinals and interspinous spaces of L3-4, and L5-S1. Treatment has consisted of body mechanic training with transversus abdominis stabilization HEP has been instructed and Mr. Harris is independent with this. Currently he complains of 3/10 pain level which seems to be intermittent based on activity. At this time Mr. Harris has a good understanding of the body mechanics required to stabilize his back during activities which may produce back pain and hopefully will be able to continue participating with work. . . (CX. #1, p. 18).

On April 23, 2007, the claimant underwent an MRI of the lumbar spine without contrast pursuant to the directions of Dr. Young. The April 23, 2007, radiology report regarding the afore reflects, in pertinent part:

IMPRESSION:

1. At the L2-3 level the patient has a very slight disc bulge, suggestion of a mild canal stenosis.
2. The patient has disc protrusion paracentral to the left at the L5-S1 level causing some neural foraminal narrowing, nerve root impingement and some indentation on the thecal sac.
3. At the L4-5 level there is a broad-based disc bulge with some degenerative facet changes and this is resulting in a mild to moderate canal stenosis.
4. At the L3-4 level there is a broad-based small disc bulge, this

coupled with degenerative facet changes resulting in a mild canal stenosis. (CX. #1, p. 21).

Following the MRI scan the claimant was seen by Dr. Young on April 25, 2007. The entry in the office notes of Dr. Young regarding the April 25, 2007, visit reflects, in pertinent part:

S: Here today with Leo. Read his MRI to them. He has multilevel disc disease.

P: My recommendation is that he see a surgeon, at least talk to them. They will probably offer him peridural steroid injections as a starting place. (CX. #1, p. 22).

Thereafter the entry in Dr. Young's office notes reflects that on April 30, 2007, an appointment was made with Dr. Sprinkle for May 23, 2007. The final entry in the office notes of Dr. Young is that of August 17, 2007, reflecting "wants medical leave papers filled out". (CX. #1, p. 22).

On June 21, 2007, the claimant was seen by Dr. Brent Sprinkle, D.O., at Arkansas Specialty Care Centers, pursuant to the directions of respondents. The June 21, 2007, initial evaluation report of the claimant by Dr. Sprinkle noted that the x-rays disclosed good asymmetry at L5-S1 and that the MRI scan disclosed disc desiccation with a small annular tear at L5-S1. Further the report reflects Dr. Sprinkle's impression of the claimant's complaints as "lumbar degenerative disc disease which may or may not be pre-existing" and "small annular tear at L5-S1 which in my opinion is not a justification for surgery". The June 21, 2007, report further reflects:

PLAN:

1. We will try an L5-S1 epidural to see if this does not improve his symptoms, but if not then that would prove the annular tear is chronic and not currently in the active anti-inflammatory state, in my opinion.
2. Try Mobic 7.5 mg. Potential risk and benefits of this treatment option were discussed with the patient who demonstrates good comprehension of the discussion.
3. Restrictions include no pushing, pulling or lifting over 15 pounds and

I feel he will be at MMI in six weeks.
4. I will see him back in 3 or 4 weeks to assess his response to the epidural.
(CX. #1, p. 32-33).

The claimant was referred by Dr. Sprinkle to Dr. Carlos Roman for the epidural steroid injection, and underwent the first injection on July 11, 2007. In his July 11, 2007, Procedural Note Dr. Roman recorded that the claimant had complaints of lower back and left leg pain with an L5-S1 disc herniation paracentral on the left. The final diagnosis reflected in the July 11, 2007, Procedural Note relative to the claimant was that of “lumbar radiculopathy”. (CX #1, p. 35).

The claimant was next seen by Dr. Sprinkle on July 19, 2007, during an office visit. In the July 19, 2007, office note, Dr. Sprinkle observed that the epidural steroid injection, which was administered to the claimant by Dr. Roman did not help and that the claimant still had low back pain. During his physical examination of the claimant Dr. Sprinkle recorded “diffuse lumbar paraspinous tenderness”. The July 19, 2007, office note concluded, regarding a treatment plan, to “try some facet blocks”, and “beyond that he is at maximum medical improvement”. (CX. #1, p. 36).

The claimant was again seen by Dr. Roman on July 25, 2007. The July 25, 2007, Procedure Note relative to the claimant reflects, in pertinent part:

This is a 53-year-old gentleman who returns today for repeat epidural steroid injection. We did his other one on July 11. He said he went back to work pretty aggressively and felt like he had some relief, but he continues to complain now of low back pain and pain radiating down his left leg. While he is here, Dr. Sprinkle would also like us to do facet joints at L4-5 and L5-S1 bilaterally so we are going to do both procedures today, a facet joint and epidural steroid injection on the left at L5-S1.

* * *

FINAL DIAGNOSIS: Low back pain, facet syndrome, lumbar radiculopathy. (CX. #1, p. 37).

The claimant was last seen by Dr. Sprinkle on August 16, 2007. The office note relative to the afore visit reflects, in pertinent part:

Facet didn't help. He has had therapy, he had epidurals, he has had facets. He has tried medication and therapies. Nothing has really helped him much. He still has diffuse low back pain. He has not radicular complaints today.

* * *

IMPRESSION:

1. Lumbar degenerative disc disease
2. Lumbar strain

PLAN:

1. He is at maximum medical improvement for his lumbar strain.
2. Lumbar degenerative disc disease is pre-existing and will be chronic and will produce chronic symptoms. I think most of the findings on MRI are consistent with pre-existing lumbar degenerative phenomena therefore do not justify permanent impairment.
3. Recommend he try to work full duty and if he can't tolerate that recommend he get FCE. Any restrictions identified by FCE would be more related to his pre-existing degenerative disc disease than his lumbar strain injury.
4. I have nothing further to offer him at this time.
5. I am not optimistic that a major lumbar surgery would overall change his functional level significantly. (CX. #1, p. 38).

The evidence in the record reflects the presence of a Certification of Health Care Provider Statement regarding the claimant which was completed by Dr. Michael Young on August 17, 2007, sanctioning the claimant's medial leave of absence. (CX. #1, p. 39-40). It is noteworthy that the afore document references the claimant's treatment by Dr. Sprinkle, to include plans to schedule further tests.

Pursuant to the December 12, 2007, Change of Physician Order, the claimant was seen by

Dr. Harold H. Chakales, a Little Rock orthopedic surgeon, on January 2, 2008. After reciting the history of the claimant's October 3, 2006, work-related low back injury, as well as medical treatment received in connection with same, the January 2, 2008, clinic note of Dr. Chakales reflects, in pertinent part:

RADIOGRAPHY REPORT:

He apparently had an MRI of the lumbar spine which showed a disc protrusion at L5-S1 on the left, with a bulging disc at L4-5.

I reviewed the MRI, as well as the report. He has a lumbar disc at L5-S1 on the left, as well as a bulging disc at L4-5, L3-4.

PHYSICAL EXAMINATION:

Physical examination shows a thin, well developed male. Examination of the back shows some restriction of motion of the back in forward flexion/extension, lateral rotation, and lateral bending of 30-40%. Straight leg raising is negative on bilaterally. Reflexes are diminished at the knees and ankles. Extensors intact.

DIAGNOSES:

1. Lumbar disc syndrome by history, L5-S1, left.
2. Bulging HNP at L4-5, L3-4.

DISCUSSION:

He probably needs to have an EMG of his back and both legs. (CX. #1, p. 48-49).

At the request of respondents the claimant was evaluated by Dr. Clemens E. Soeller, at the Hope Bone & Joint Clinic. A review of the June 12, 2008, report of Dr. Soeller reflects that he had access to the claimant's prior pertinent medical records at the time of his evaluation. The evaluation report reflects, in pertinent part:

. . . He was sent to my office by the Liberty Mutual Insurance Co. His chief complaint is of low back pain. He denies any bowel or bladder problems. He denies any numbness to his legs currently but does have occasional numbness into his left leg. This only occurs once or twice per week. He reports, that his pain at present is two to three out of 10 in

intensity. He denies any leg symptoms but reports the pain is in his mid-lower back. He denies ever taking any nonsteroidals (even though he was prescribed Mobic by Dr. Sprinkle).

* * *

Physical exam - - General - - he is a well-developed, well nourished male in no acute distress.

Gait - - he can arise from a chair without apparent difficulty and walks without any limp or gait abnormality. He can forward flex and touch the floor without apparent pain. There is no limitation of forward flexion, lumbar extension, or side to side rotation.

* * *

MRI - - I reviewed the results of his MRI. I do not see any abnormalities which would contradict the report findings

Assessment - - degenerative lumbar arthritis (chronic in nature)

Conclusions

I concur with Dr. Sprinkle's findings that his problems are chronic in nature. Both his past work history and his lumbar MRI suggest he has had a long history of heavy labor which has contributed to the degenerative arthritis of his back. I do not think that the injury that he sustained at Petit-Jean Poultry in any way changed this chronic condition. I also feel that he is amplifying his level of pain since he does not seem to have any significant limitations at present. He also is not taking any medications routinely, which I would expect to see in someone who is in chronic pain of great duration and severity as he explains. Therefore, I would suggest that this patient is amplifying His complaints.

I would suggest that he be returned to work at full duties without limitation. Long-term he probably needs to change into a job which is less demanding on his back but I do not feel that this is due to any injury at Petit-Jean Poultry but due to his long work history of heavy manual labor causing degenerative changes of which have now begun to catch up with him. (RX #1).

Dr. Chakales was furnished a copy of the report of Dr. Soeller. In a June 28, 2008,

correspondence regarding the afore, Dr. Chakales noted:

. . . Dr. Soelier's examination conveniently eliminated the MRI performed on April 23, 2007, which categorically states the patient has a bulging disc at the L2-3 level. The radiologist stated the patient has a disc protrusion at the L5-S1 level causing foraminal stenosis and narrowing at the L5-S1 level on the left. The MRI also showed a broad-based disc bulge at L4-5 with some degenerative facet changes causing canal stenosis.

My rational is that the patient is symptomatic and complains of back pain and is unable to perform work-related duties for a forty hour work week. I cannot understand why Dr. Soelier would not recommend an electromyographic study to see if there is any chronic nerve root irritation in the lumbar spine from a motor standpoint. I believe Mr. Harris is a good candidate for a lumbar discogram to determine the extent of damages to the discs at L4-5, L5-S1. My recommendation would be to obtain the electromyographic study and reevaluate the patient, then schedule him for a lumbar discogram. I see no reason for anyone to be averse to performing the appropriated diagnostic studies. (CX. #1, p. 51).

On May 14, 2008, the parties obtained the deposition of Dr. Harold H. Chakales, a board certified orthopedic surgeon since 1966, who was designated the claimant's authorized treating physician pursuant to a December 12, 2007, Change of Physician Order entered by the Medical Cost Containment Department of the Arkansas Workers' Compensation Commission. Dr. Chakales testified that he saw the claimant on one occasion, January 2, 2008, during which time he obtained a history of the claimant's injury, conducted a physical examination, and obtained x-rays of the lumbar spine. Dr. Chakales also obtained a copy of the claimant's MRI report and actually review the film of same. The testimony of Dr. Chakales reflects that his review of the film disclosed that the claimant had a disk herniation at L5-S1, as well as a couple of bulging disks at L4-5 and L3-4.

Dr. Chakales elaborated on the terminology in the radiology reports, noting that a "disk

bulge” is a protrusion of the disk outside the normal annulus of the ligament, which causes a swelling of the disk, meaning a degenerative phenomena going on in that disk. “Stenosis” is narrowing of the spinal cord. Regarding “nerve root impingement”, Dr. Chakales testified:

Well, that’s what they’re talking about that the spinal canal was narrowed. It was a disk herniation or a bulge causing the root as it comes out through the spinal canal to put pressure on the nerves. (CX #2, p. 6).

With respect to the “annular tear”, Dr. Chakales offered:

Annular tear is with the ligaments around the circle of the disk space itself. It’s a bone that they actually are torn and show some degenerative changes. (CX. #2, p. 7).

The testimony of Dr. Chakales reflects his finding upon conducting a physical examination of the claimant during the January 2, 2008, evaluation:

The physical examination showed a gentleman that was having low pain, and he had negative straight leg raising at that time, but he complained of back - - he had some tightness, and I felt that he had findings compatible with a disk according to his history and what we see on MR. (CX. #2, p. 7).

Objective findings identified by Dr. Chakales during his January 2, 2008, examination of the claimant included “spasm in the low back and tightness”. (CX. #2, p. 8). In assessing the nature of the claimant’s October 3, 2006, injury, Dr. Chakales testified:

Well, if what the man tells me is the truth, I had limited access to records, but with the abnormal physical findings and I felt that he had tightness in his low back with restriction of motion along with the positive MRI that he had, I felt that he suffered a disk herniation most likely. (CX. #2, p. 8).

During the course of his deposition Dr. Chakales offered the following observations regarding the claimant and his course of treatment relative to his injury:

And this [many levels of degenerative disk disease] is the normal aging process. All of us in the world have those problems except that he had an antecedent period where he had a traumatic episode that most likely caused the disk to bulge out more at the lumbosacral level and some at the L4-5 level. And this causes the man pain. His problem was the fact that when he would try to work, he couldn't work on an eight-hour day basis, and I think one of the criteria is the fact that he was unable to work on a 40-hour week, so that tends to technically make him disabled from that standpoint. (CX. #2, p. 9).

As far as the claimant's treatment under the care of Dr. Sprinkle, D.O., who does non-operative treatment of the back, Dr. Chakales testified:

I have no problems with him sending him through him. The trouble is that he never got better, and I think that's the way to do it initially, is to try non-operative treatment. Mr. Harris is disabled, unable to perform what he would consider a normal activities of working. Now, Dr. Sprinkle went to a certain point, and then he didn't get better. (CX. #2, p. 10).

With respect to Dr. Sprinkle's opinion that surgery was not warranted in connection with a small tear at L5-S1, Dr. Chakales testified:

Well, he gave you his own personal interpretation of the MR. The radiologist gave you a different interpretation. Basically, I think the significance of the interpretation is the gentleman has disk which is bulging when you push on the S-1 nerve root as it comes out under the L5-S1 intervertebral disk space. This is causing him to have some leg pain, and at the over levels he has bulging degenerative disk. Now, what do you do for that? Number one, sometimes you treat them without surgery and sometimes you treat them with surgery, and I think that they only went so far with Mr. Harris. They did not conclude what I feel is a complete diagnostic work-up, and that would have consisted of to do an electromyographic study to see whether or not he had nerve root irritation. I requested that and this was not - - they didn't want to do that. And another thing that we often do is provocative diskography where we actually stick a needle into the vertebral disk space to see if we find a pathologic disk, a disk that does cause the pain. If we do, then sometimes we perform surgical intervention. A lot of it had to do with what the patient and how he wants or whether he wants to try to get better with a surgical procedure, or does he want to be treated non-operatively.

But there's no doubt in my mind that this gentleman has problems with his low back and has chronic pain going into his leg, and this probably stops him from being gainfully employed on an active basis for a 40-hour week. (CX. #2, p. 11-12).

Dr. Chakales' testimony reflects, based on his examination and review of diagnostic studies, that in his opinion the claimant has not reached maximum healing. As a result of his one opportunity to see the claimant Dr. Chakales recommended one test, the nerve conduction study, explaining:

What I do is I personally send them to see a medical neurologist. A medical neurologist that I use like Dr. Gibson, Dr. McCoy or Dr. Schultz. These are full-time medical neurologists who do a lot of electromyographic studies and are very competent, and, you know, they'll give you an accurate report. Either he does or he doesn't.

It [EMG] tells you whether there's some motor nerve root irritation. It has nothing to do with pain perception. It will say if the disk is pinching on the nerve and causing some loss of motor function. (CX. #2, p. 14).

The testimony of Dr. Chakales reflect that the results of the EMG would determine the next course of treatment. Dr. Chakales testified that without the recommended test, EMG, he does not feel that he has an adequate amount of information to properly evaluate the claimant. (CX. #2, p. 15).

In addition to recommending/requesting an EMG of the back and both legs, Dr. Chakales also prescribed the claimant pain pills and muscle relaxers during the January 2, 2008, visit. Dr. Chakales noted in his January 2, 2008, report that the claimant remained temporarily disabled, explaining that the claimant was not capable of doing moderately heavy work. The testimony of Dr. Chakales reflects that based on his physical examination of the claimant and review of the MRI, the nature of the claimant's injury would likely interfere with his basic required work activities of sitting, standing, bending, stooping, lifting and carrying.

Regarding a correlation the physical findings on the MRI and the claimant's complaints

of pain the testimony of Dr. Chakales reflects:

There is radiographic evidence of disk protrusion at L5-S1 on the level and stenosis, spinal stenosis at the disk above, and that in itself can be aggravated by a traumatic episode and cause him to have back and hip pain. (CX. #2,p. 16).

Dr. Chakales further testified:

The physical examination is not overwhelming, but taking his history and spending time examining him, along with the radiographic evidence, I think this gentleman does have a legitimate problem and is disabled. (CX #2, p. 16-17).

Dr. Chakales' testimony reflects, regarding his actions following receipt of the results of the recommended EMG:

Whether the EMG was positive or not, I would do a lumbar diskogram, provocative diskogram and CT scan. I use that and I find it very helpful in determining which people are legitimate surgical candidates. (CX. #2, p. 17).

Dr. Chakales testified that if both the nerve conduction study and the diskogram come back normal he would conclude that the claimant was at maximum medical improvement. Dr. Chakales added that while the EMG may be normal, the diskography would not come back normal. Finally, Dr. Chakales disagreed with Dr. Sprinkle regarding permanent impairment, noting that it is premature to discuss it until the recommended tests were performed.

During cross-examination Dr. Chakales responded to whether the diagnostic test were subject to interpretation by the physician viewing them:

No. That's semantics.

Well, medicine is an art, as well as a science.

And the appropriate thing on treating the patient is you have to have an adequate history, you have to have a physical examination, and

then you have ancillary diagnostic tests, and then people like me who have a lot of training in this, put this together and try to give you verifiable opinions. Now, sometimes opinions are made different. (CX. #2, p. 20).

Dr. Chakales testified that he agreed with the radiologist's regarding the MRI scan results noting that a disk protrusion is the same as a herniation. The testimony of Dr. Chakales reflects that he disagrees with Dr. Sprinkle's assessment of the MRI scan reflecting degenerative disk disease. (CX. #2, p. 21). Dr. Chakales concedes that a disk protrusion can be a disk bulge, however added:

Depending - - you can have a bulging disk, but a true disk protrusion is something that's actually protruding out and causing pressure on the extrinsic nerve root. (CX. #2, p. 22).

Dr. Chakales testified that one can have degenerative disk disease and still have a disk protrusion.

In explaining why he had recommended an EMG on both extremities and the lumbar spine Dr. Chakales testified:

You have to compare left and right. You know, he's complaining of left leg pain, you want to see what the right leg looks like because in order to be complete, you've got to do the symmetrical examination of the entire lumbar spine and examine both lower extremities. I think that would be an incomplete test. (CX #2, p. 24).

Dr. Chakales elaborated regarding the usefulness of a diskography as a diagnostic tool:

Oh, I don't think that it would show anything different. Usually diskograms and CT scans, all those studies usually go hand in hand with an MR.

That plus the changes that you see radiographically when you do a CT scan. An abnormal disk or disk protrusion will show degeneration in spreading of the radiographic dye throughout the entire disk space. That's abnormal.

* * *

. . . A diskogram is a very useful tool for me to use to determine whether this gentleman has real pathology in his back, but it can recreate the type of back pain the he has. (CX. #2, p. 25-26).

With regards to the point in time that a functional capacity evaluation would be recommended regarding the claimant, the testimony of Dr. Chakales reflects:

Not necessarily. I'd see him and then I would recommend it. I think it would be legitimate to do an EMG and have him come back, examine him and see how he's doing, see what that shows. Now, if the EMG is completely negative, then I might recommend that he have a discogram because I'd like to see what that shows, and then I would do a functional capacity evaluation, and see whether or not - - because I think the purpose of Workers' Comp is to try to get the injured worker back to work if he can. And if he can perform satisfactorily and do some job without surgery, I think that would be preferable, but you would have to have the help of the patient on that. Some people are so motivated to that, and some are not. (CX #2, p. 28).

Dr. Chakales emphasized that a "electromyographic will help in making the correct diagnosis" of the claimant. Further Dr. Chakales testified:

No. The only thing the EMG will tell me is if there is some evidence of some nerve irritation. Don't get hung up on degenerative disk disease because the question we want to know is why is he hurting and why can't he work. (CX #2, p. 30).

Finally, Dr. Chakales testified in describing the claimant's injury:

I think we should consider that as a herniation at the lumbosacral level due to the fact that it's causing compression of the extrinsic of the S-1 nerve root. I think that's the correct diagnosis. As to what degree of herniation, it varies. (CX. #2, p. 31).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On October 3, 2006, the relationship of employee-employer-carrier existed among the parties, when the claimant sustained an injury to his low back arising out of and in the course of his employment.
3. On October 3, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$244.00/\$183.00, for temporary total/permanent partial disability base on average weekly wage of \$366.00.
4. The claimant was temporarily totally disable for the period beginning August 17, 2007, and continuing through the end of his healing period, a date to be determined.
5. On December 12, 2007, a Change of Physician Order was entered by the Medical Cost Containment Department of the Arkansas Workers' Compensation Commission designating Dr. Harold H. Chakales as the claimant's authorized treating physician relative to the October 3, 2006, compensable low back injury.
6. The diagnostic studies recommended by Dr. Chakales in his January 2, 2008, initial evaluation report regarding the claimant is reasonably necessary treatment in connection with the claimant's October 3, 2006, compensable low back injury.
7. The respondents shall pay all reasonable hospital and medical expenses arising out of the injury of October 3, 2006.
8. The respondents have controverted the claimant's entitlement to medical treatment under the care of Dr. Harold H. Chakales subsequent to the initial visit of January 2, 2008, and the claimant's entitlement to temporary total disability benefits subsequent to August

16, 2007.

CONCLUSIONS

The compensability of the claimant's October 3, 2006, low back injury is not disputed. Claimant contends that as a result of the October 3, 2006, compensable low back injury he has continued to require medical treatment and has been rendered temporarily totally disabled commencing August 17, 2007. Claimant further contends that he is entitled to medical treatment as recommended by his authorized treating physician to include diagnostic studies. Respondents contend that the diagnostic studies recommended by the claimant's treating physician are not reasonably necessary in connection with the compensable injury. Further, the respondents contend that the claimant reached maximum medical improvement and was released to full duty with restriction as of August 16, 2007. As a consequence of the afore, respondents deny that the claimant is entitled to temporary total disability benefits.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to additional workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provisions. The compensability of the claimant's October 3, 2006, low back injury is not disputed. The issues before the Commission at this juncture are the claimant's entitlement to additional medical benefits and temporary total disability benefits as a result of the compensable October 3, 2006, low back injury.

Medical Benefits

Ark. Code Ann. §11-9-508 (a) mandates that the employer provide such medical services as may be reasonably necessary in connection with the employee's injury. What constitutes

reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Engineering Company*, 66 Ark. App. 201, 989 S.W.2d 543 (1999). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003).

The parties stipulated that the claimant sustained a compensable injury to his low back on October 3, 2006. There is no evidence in the record to reflect that the claimant experienced complaints, limitations or physical restrictions relative to his low back prior to sustaining the compensable injury in the employment of respondent on October 3, 2006. The credible evidence in the record reflects that the claimant has been symptomatic and physically restricted relative to his low back continuously since sustaining his injury.

The claimant's sanctioned medical treatment was had at and pursuant to the direction of respondents commencing with the initial visit to Dr. Young on October 12, 2006. The credible evidence reflects the presence of objective findings of the claimant's October 3, 2006, compensable injury. At the time of his August 16, 2007, final visit to Dr. Brent Sprinkle the claimant's symptoms, attributable to the October 3, 2006, compensable injury were not significantly different than they were from the time his treatment was initiated under the care of same. Nevertheless Dr. Sprinkle deemed the claimant at maximum medical improvement and released him to full duty.

The claimant was unable to return to his regular job duties at the time of his release by Dr. Sprinkle on August 16, 2007. Instead, the claimant sought and obtained medical leave of absence from respondent employer. The evidence preponderates that the absence was due to residuals of his October 3, 2006, compensable low back injury.

Pursuant to Ark. Code Ann. §11-9-514 (a)(3)(A)(ii) (Repl. 2002), the claimant obtained a change of treating physician relative to the October 3, 2006, compensable injury. On December 12, 2007, a Change of Physician Order was entered by the Medical Cost Containment Department of the Arkansas Workers' Compensation Commission which designated Dr. Harold H. Chakales, a Little Rock orthopedic surgeon, as the claimant's treating physician relative to the October 3, 2006, compensable injury. The claimant was seen by Dr. Chakales on one occasion, January 2, 2008.

Dr. Chakales, who had access to the claimant's diagnostic studies, performed a physical examination of the claimant and recommended additional diagnostic studies in the form of EMG/nerve conduction studies of the low back and both legs. Respondents refused to authorize the recommended studies. The evidence preponderates that the recommended diagnostic studies advocated by Dr. Chakales relative to the claimant is reasonably necessary in connection with the claimant's October 3, 2006, compensable injury. Respondents have controverted the claimant's entitlement to additional medical treatment subsequent to August 16, 2007.

By virtue of the entry of the December 12, 2007, Change of Physician Order, the nature of the relationship between the claimant and Dr. Chakales is more than a one-time, second opinion consultation visit. The pertinent provision provides for a one-time change of treating physician, not a one-time visit to a physician of the claimant's selection. Dr. Chakales clearly and succinctly explained that the recommended diagnostic study was a part of this evaluation of the claimant. The actions of respondents in denying the recommended EMG/nerve conduction studies as not being reasonably necessary treatment in connection with the October 3, 2006, compensable back injury borders on contempt of the December 12, 2007, Change of Physician

Order entered by the Medical Cost Containment Department of The Arkansas Workers' Compensation Commission.

As an aside, while the claimant has undergone several diagnostic studies under the care of respondents' sanctioned medical provider, he has not undergone a prior EMG/nerve conduction study as recommended by Dr. Chakales. Rather than approving the cost of the diagnostic study recommended by Dr. Chakales respondents have instead directed the claimant to another physician of their selection. As of the entry of the December 12, 2007, Change of Physician Order the claimant has only one authorized treating physician relative to his October 3, 2006, compensable injury. That physician is Dr. Chakales, a well qualified seasoned board certified orthopedic surgeon..

Temporary Total Disability Benefits

The parties stipulated that the claimant sustained a compensable injury to his back on October 3, 2006. Entitlement to temporary total disability benefits for an unscheduled injury is contingent upon a showing that the is completely incapacitated from earning wages and remains within his healing period. The healing period is defined as that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Arkansas Highway & Transportation Department v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). The determination of the end of the healing period is a question of fact for the Commission. *Ketcher Roofing Company v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995). Disability is defined as an incapacity because of a compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. Ark. Code Ann. §11-9-102 (8).

Subsequent to the October 3, 2006, compensable injury the claimant has remained symptomatic. After coming under the care of respondents' designated medical provider, Dr. Young, on October 12, 2006, the claimant was released to limited/restricted duties and remained in such status until August 16, 2007. Respondent-employer accommodated the claimant and provided him with work within the medical restrictions of his treating physicians.

The evidence preponderates that at the time of the August 16, 2007, full duty release of the claimant by Dr. Sprinkle, the claimant remained symptomatic and within his healing period. More importantly, the claimant was not physically capable of performing his regular job duties, a fact not lost on the observation of the Human Resource Manager, Leo Smith. Mr. Smith accompanied the claimant to the August 16, 2007, visit to Dr. Sprinkle. Following the visit Mr. Smith facilitated the claimant's medical leave of absence.

While the claimant made a good faith effort to return to work at the conclusion of his medical leave of absence he was not allowed to do so due to circumstances beyond his control. The claimant was willing to "try" to work for respondents in hopes of obtaining the further test discussed by Dr. Sprinkle at the time of the August 16, 2007, final visit. The claimant credibly testified that he did not feel that he could discharge his regular job duties at any time since his October 3, 2006, compensable injury.

On December 12, 2007, a Change of Physician Order was entered by the Medial Cost Containment Department of the Arkansas Workers' Compensation Commission, designating Dr. Chakales as the claimant's authorized treating physician relative to the October 3, 2006, compensable injury. The claimant was seen by Dr. Chakales on January 2, 2008. The claimant has continued to receive active medical treatment relative to the October 3, 2006, compensable

injury since the occurrence of same. Dr. Chakales has credibly opined that the claimant is disabled relative to the compensable injury having prescribed pain medication and muscle relaxants. The evidence preponderates that the claimant remains within his healing period and totally incapacitated because of the compensable injury to earn the wages that he was receiving at the time of the compensable injury since August 17, 2007. Respondents have controvert the claimant's entitlement to temporary total disability benefits.

AWARD

Respondents are herein ordered and directed to pay to the claimant temporary total disability benefits at the rate of \$244.00, per week for the period commencing August 17, 2008, and continuing through the end of his healing period, a date to be determined, as a result of the compensable October 3, 2006, back injury. Said sums accrued shall be paid in lump without discount. Pursuant to Ark Code Ann. §11-9-411, respondents may claim an off-set against sums paid to the claimant in short term disability benefits.

Respondents are further ordered and directed to pay all reasonably necessary medical, hospital, nursing, and other apparatus expenses in connection with the claimant's compensable injury of October 3, 2006, to include the diagnostics studied recommended by the claimant's authorized treating physician, Dr. Harold H. Chakales, along with medical related travel.

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

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

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE