

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F209888 (08/20/02)**

<b>JESSIE LATIMER, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>ASAP PERSONNEL SERVICES, EMPLOYER</b>	<b>RESPONDENT #1</b>
<b>TRAVELERS INSURANCE CO., CARRIER</b>	<b>RESPONDENT #1</b>
<b>DEATH &amp; PERMANENT TOTAL DISABILITY TRUST FUND</b>	<b>RESPONDENT #2</b>

**OPINION FILED OCTOBER 2, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on July 7, 2008, at Little Rock, Pulaski County, Arkansas.

Claimant appeared pro se.

Respondents #1 represented by the HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE CHRISTY L. KING, 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 20, 2008, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

Respondents #1 take the position that the statute of limitation serves as a bar to the claimant's claim for workers' compensation relative to his lumbar spine.

The testimony of Jesse Latimer - the claimant, and Brittany Dobbs, coupled with medical reports and other documents comprise the record in this claim. Also included in the record, by reference, is the record of the prior hearing and rulings generated therefrom.

Respondents #1 joined the Second Injury Fund as a party to the present claim. The Second Injury Fund was designated as Respondent #3 as a party to the claim. Respondent # 3 filed a motion to be dismissed. Respondent #1 cited as a basis for the joinder of respondent #3, the potential liability growing out of a finding of compensability of the claimant's lumbar spine injury claim. Noting that both the compensable cervical spine injury and potential lumbar spine injury grew out of the same event or occurrence, the Motion of respondent #3 was granted and the Second Injury Fund was ordered dismissed for the claim.

### **DISCUSSION**

Jessie B. Latimer, the claimant, with a date of birth of birth of May 12, 1951, has an eleventh grade education. The claimant commenced his employment with respondent-employer, a temporary employment agency, in May or June 2002.

In August 2002, the claimant was working in the warehouse performing the employment duties of unloading air conditioners and aluminum siding from an 18-wheeler. The occurrence of the August 20, 2002, accident in which the claimant sustained an injury to his cervical spine is not disputed, nor is there a dispute regarding the mechanics of the accident. A long rail had been placed under the overhead garage door by a co-worker of the claimant in order facilitate the entrance of a truck which was to be unloaded. While standing in the doorway the overhead door

came down and hit the claimant on top of the head. The testimony of the claimant reflects that he was not rendered unconscious by the blow:

No, sir. I just dropped to my knees and caught my breath, and I told him I couldn't finish the job with him. So eh taken me back to the office. Then they talked to me at the office there, and I left and went to the house. (T. 11, Sept. 15, 2005, HR).

On September 15, 2005, a hearing was conducted on the issues of appropriate anatomical impairment, permanent total disability, wage loss disability, and attorney fees. The October 27, 2005, Opinion of the Administrative Law Judge, growing out of the September 15, 2005, hearing, found that the claimant was not entitled to additional anatomical impairment in excess of the 15% to the body as a whole relative to the cervical spine injury resulting from the August 20, 2002, accident. Further, the October 27, 2005, Administrative Law Judge ruling found that the claimant was not permanently and totally disabled but had sustained a loss of earning capacity in the amount of 15% to the body as a whole. In an April 13, 2006, Opinion and Order, the Full Arkansas Workers' Compensation Commission affirmed and adopted the ruling and award of the Administrative Law Judge.

At this juncture claimant asserts that he sustained an injury to his lumbar spine at the time of the August 20, 2002, accident, which requires medical treatment and generates entitlement to indemnity benefits. Further, claimant asserts entitlement to additional medical treatment relative to his cervical spine, to include surgery. Claimant maintains entitlement to reasonable and necessary medical treatment under the care of Dr. Burba. The claimant also maintains that respondents #1 have not paid all of the incurred medical bills in connection with the treatment of his compensable injury. Claimant asserts that the overpayment of child support payments from

his award of workers' compensation benefit by respondents #1 has resulted in an underpayment of his workers' compensation benefits. Finally, the claimant asserts that respondents #1 have not complied with the prior rulings of the Commission and he seeks enforcement of same.

Respondents #1 take the position that benefits associated with the claimant's lumbar spine complaint are barred by the statute of limitation.

The evidence in the record reflects that during the September 15, 2005, hearing before the Commission, the claimant testified that the first medical treatment rendered in connection with the August 20, 2002, accident was provided the following day by Dr. Jon Dodson. According to the testimony of the claimant he received treatment to both his cervical spine and lumbar spine under the care of Dr. Dodson through September or October 2002.

The claimant testified that he was directed to see Dr. William F. Blankenship, a Little Rock orthopedic surgeon, by respondent #1, at which time his symptoms consisted of numbness down the left side of his body down to his legs. The claimant was referred by Dr. Blankenship to Dr. Alonzo Burba, at the Arkansas Neurodiagnostic Center. Claimant asserts that for a period of time respondents #1 continued to pay for the cost of his treatment under the care of Dr. Burba, however that there came a point in time that they refused to do so. Further, the claimant maintains that at the time of the afore there were unpaid medical bills for treatment in connection the compensable injury. The claimant last received medical treatment pursuant to the directions of Dr. Blankenship, inclusive of that had under care of Dr. John Wilson, on December 2, 2002.

The claimant requested and was granted a change of physician from Dr. Blankenship to Dr. Harold H. Chakales. The record reflects that the claimant presented to Dr. Chakales, pursuant to the change of physician order, on February 19, 2003. During the September 15,

2005, hearing claimant testified that he was referred by Dr. Chakales to Dr. Burba. (T. 14, Sept. 15, 2005, HR). The parties deposed Dr. Chakales and the April 12, 2004, transcript of the deposition was made a part of the September 15, 2005, hearing record. While he recommended continued conservative management during a May 17, 2004, visit of the claimant, Dr. Chakales also offered that if the claimant's symptoms did not improve he could be considered a potential surgical candidate for surgery of his cervical spine and possibly the lumbar spine. In a June 25, 2004, Dr. Chakales assessed the extent of the claimant's anatomical impairment, which was addressed in the October 27, 2005, Administrative Law Judge ruling.

In March 2005, the claimant sustained a stroke. On April 4, 2005, claimant presented to Dr. Burba, whose examination of same resulted in the impression of acute CVA, closed head injury and chronic low-back pain.

The claimant testified during the September 15, 2005, hearing that he continued to see Dr. Chakales at least once every three (3) weeks, for examination of his complaints relative to neck and leg pain as well as for prescription medication. The claimant was specifically questioned regarding the relationship between his leg complaint and his neck injury, and responded:

Because it's all the way down through my body. Like I said, it tingles in my feet. It's like a burning sensation.

Very seldom after the stroke, I would have pain through the right side of my body. My injuries are in my nerves through my neck and down my spine. (T. 27, Sept. 15, 2005, HR).

The claimant also stressed during the September 15, 2005, hearing that he was a candidate for neck surgery, however respondents had declined to provide written authorization.

Claimant acknowledged awareness of the results/rulings from the September 15, 2005, hearing, to include the adverse ruling regarding the issues of additional anatomical impairment and permanent total disability. Claimant acknowledged being provided medical treatment by Dr. Burba following the March 2005, stroke. Further, claimant acknowledged that the medical providers did not establish a nexus between his compensable injury of August 20, 2002, and March 2005, CVA - stroke.

Claimant asserts that his low back complaints have been present since the occurrence of the August 20, 2002, compensable injury. Further, claimant maintains that he has received treatment for both his neck and low back complaints under the care of Dr. Chakales since initiating treatment under the care of same pursuant to a change of physician request and order. Claimant testimony reflects, regarding needed treatment:

Dr. Chakales, well, what I did was therapy and now I'm just on medication. I am a candidate for surgery. All along we have been trying to get the insurance to agree to the surgery.

Yes sir, for my low back. It's a 50/50 chance my doctor said it could help. But I'm just taking medicine. I'm just ready to get the surgery for my low back complaint. (T. 16).

Claimant described his symptoms, which he attributes to the compensable injury:

There is numbness all through my leg, muscles tightening, trembling in my arm down through my legs. Sometimes it hurts me so bad I can't hardly walk. That's the times that I have to go to the emergency room. Now when I'm hurting I take extra medication so my wife won't see the pain. I just take, you know, hydrocodone pills, you know, I'm supposed to take one every eight hours, I might take two in eight hours. To stop the pain, so I can walk. (T. 17).

Claimant maintains that he relayed a history of his back complaints to both Dr. Blankenship and Dr. Burba, however their medical treatment and attention was directed at his

head complaint - concussion. The claimant testified that the medication for the treatment of his low back complaint, to include hydrocodone for pain and Sonoma for muscle spasm, has been furnished by respondent #1. The testimony of the claimant reflects that the afore medications also benefits his neck complaints.

The claimant testified that he is desirous of proceeding with the recommended surgery on both his neck and back under the care of Dr. Chakales. Claimant was last seen by Dr. Chakales in May 2008, at which time he was provided treatment in the form of two (2) steroid injections in his the cervical spine. Claimant's testimony reflects that his next scheduled appointment with Dr. Chakales was July 15, 2008. The testimony of the claimant reflects that he desires to have both the cervical and low back surgery, noting that neither the insurance company, Medicare or Medicaid will pay for it. (T. 26).

With respect to the unpaid medical bills of Dr. Burba for which he desires payment, claimant's testimony reflects that he has not seen by Dr. Burba since the cancellation of the scheduled hearing prior to that had on September 15, 2005. Claimant asserts that the subject bills were generated prior to the afore. Claimant maintains that the disputed unpaid bills of Dr. Burba were in place and existence prior to the September 15, 2005, hearing. The testimony of the claimant reflects that the unpaid bills of Dr. Burba were not addressed during the September 15, 2005, hearing. In addition to the unpaid bills of Dr. Burba, claimant maintains that there remain unpaid bills relative to two (2) visits to the emergency room of St. Vincent Medical Center. Claimant is uncertain of the dates of service, only that the bill he received was for \$1,300.00.

The testimony of the claimant reflects that at the time he received medical treatment at

the emergency room of St. Vincent he informed hospital personnel that the injury was work-related. Further, the claimant testified that when he received the medical bills relative to the emergency room treatment, “they paid for it with my Medicaid card”. (T. 28). Claimant acknowledged that the emergency room bill has been paid. Regarding the treatment he received during the emergency room visits, the claimant testified that he received diagnostic testing, to include MRI’s and electrodiagnostic nerve studies regarding his head, shoulders, and back. Claimant asserts that he had muscle spasms in his neck and back as well as pain down his leg. Claimant maintains that both emergency room visits were due to symptoms in his low back. (T. 29).

With respect to his claimant that respondents #1 underpaid the workers’ compensation benefits awarded as a result of the September 15, 2005, accident, claimant acknowledged that there was a child support lien filed with the Commission. Claimant attributes the asserted underpayment of awarded benefits to him to the fact that respondents #1 some money to child support. Regarding the amount involved, the testimony of the claimant reflects:

Not exactly. I didn’t pay attention to it until I started getting checks every two weeks, I thought maybe they was just gonna send my check all at one time. The Judge awarded \$8,000.00 and they cut my workmans’ comp check on January of 2001. In August we were supposed to have a hearing. The Judge awarded me \$8,000.00 and the insurance company makes my check. My attorney said I ought to get so much money to child support so they was sending the money to me. I never signed a check to that \$8,000.00 nor the other \$8,000.00 I was awarded. And the child support, they took a payment of \$108.00 a week of my money to pay child support and \$108.00 a week to me. And I was court ordered to pay \$10.00 a week and I was paying that, even when I first started receiving my workmans’ comp money, I was paying that, I was getting \$108.00 a week And they gave child support \$10.00 and so I got \$100.00 \$98.00 a week. (T. 22).

The hearing record of September 15, 2005, does reflect that there was a discussion regarding

child support arrearage reflected in the Commission's file. There was also discussion had regarding the claimant's receipt of social security benefits and the impact of same on the child support arrearage during the September 15, 2005, hearing. Claimant maintains that since his award of workers' compensation indemnity benefits was not the product of a settlement, the payment of child support should have been at the amount ordered, and not 50% of his accrued award of indemnity benefits.

Regarding his claim that the respondents have failed to comply with the prior rulings of the Commission, claimant's testimony reflects:

I didn't accept no award. My lawyer called me and said this is what they are offering you. I told him that they cut my disability from 18% and they aren't going to agree that I can get surgery then I won't accept it. So I asked my attorney, Mr. Wright [Ryan], for an appeal and I ain't heard nothing from the appeal until I decided if I wanted to do something I would need to get in and do it myself. I will just let the judges decide. But I did not accept the money. No, I did not accept that award. Now, the Judge awarded me the money years ago. I knew I was seriously injured and they said my healing period ended April 4<sup>th</sup> I knew there was something wrong. (T. 24).

Though he testified that he "wasn't understanding that" claimant acknowledged that the end of the healing period was addressed during the September 15, 2005, hearing.

During cross-examination the claimant acknowledged that he had not formally file a claim for an injury to his low back prior to the present matter. Further claimant concedes that everything that led up to the September 15, 2005, hearing related to the injury to his neck. Claimant maintains that when he changed doctors to Dr. Chakales he was having complaints with both his neck and lower back. With respect to the onset of he low back complaints, claimant's testimony reflects:

They started when I was seeing Dr. Blankenship. And that's when he told me all I had was a concussion, but Dr. Wilson gave me a work evaluation and somehow or another it didn't go through because of my blood pressure, so I never got the evaluation. (T. 30-31).

Claimant asserts that he was referred to Dr. Burba to evaluate a nerve disorder. Claimant described the symptoms attributed to the nerve disorder:

Well, I didn't know, the symptoms, causing numbness all through the area. I didn't know it was my spine, I just thought it was my nerves. Dr. Chakales said when he examined me and then Dr. Chakales sent me to see another neurologist and they said I don't know how you got that way but before you seen me. . . (T. 31).

Claimant estimates that he was seen by Dr. Burba four to five times and was prescribed Plavax.

Claimant is uncertain if the bills of Dr. Burba were ever submitted to respondent-carrier.

Regarding the two (2) visits to the emergency room of St. Vincent Medical Center, the testimony of the claimant reflects that sought treatment due to complaints with his low back and that the visits were not the product of a referral. Regarding the afore, the claimant testified:

I went there on my own. I couldn't walk. Pain in my legs. I was having so much pain my medicine wasn't helping me, so I went to the emergency room. I didn't even tell my wife. (T. 32).

With respect to the second visit to the emergency room of St. Vincent Medical Center, claimant testified:

Yes. They had done a spine test on me too, the MRI machine. They did the whole thing again, and they told me again that I had a spine injury. (T. 32).

Claimant acknowledged that he still has child support obligations and that there is an arrearage:

I've got arrearage for my son and I'm paying through my social security disability, \$200.00 a month, and I'm paying the arrearage of

\$18.00 a week. (T. 33).

Brittany Dobbs, a claim manager of respondent-carrier, testified that she is responsible for handling the workers' compensation claim involving the claimant. Ms. Dobbs has not handled the present claim from its inception, however has had access to the payment record regarding indemnity benefits paid to the claimant. The payment records of respondent-carrier reflects the payment of permanent indemnity benefits from June 25, 2004 through October 26, 2006, totaling \$10,097.00. Ms. Dobbs testified that the payment records reflect total payment to the Child Support Enforcement Unit during the same period of \$3,422.15. The afore is based on records kept in the usual and ordinary course of respondent-carrier business.

The testimony of Ms. Dobbs reflects that respondents #1 last made a payment for medical benefits in the present claim on June 27, 2008, in the amount of \$212.55, to Dr. Chakales. Ms. Dobbs was unable to find, from the records, any payments made to Dr. Burba. The records do reflect payments to Dr. Blankenship at OrthoArkansas on behalf of the claimant.

The medical evidence in the record reflects that Dr. Chakales first saw the claimant on February 19, 2003, relative to the August 20, 2002, compensable accident, pursuant to a change of physician order. The March 5, 2008, report of Dr. Chakale relative to a visit by the claimant of the same date reflects the claimant, "began undergoing treatment for his chronic neck and low back problems" at the time of the initial February 19, 2003, visit. The report further reflects, in pertinent part:

. . . . He has a chronic intractable pain syndrome with a symptomatic cervical disc syndrome with radicular symptoms, and lumbar degenerative disc disease. The continues to complain of multiple myalgia and arthralgia. The most recent MRI of the cervical spine performed on October 23, 2007 showed multiple levels of cervical spondylosis and spondyloarthropathy.

His anatomical impairment remains the same as stated in my letter of dated June 25, 2004. From a clinical standpoint, Mr. Latimer remains permanently and totally disabled and is a poor candidate for rehabilitation. He requires low dose narcotic analgesics to control his symptoms. It is also my opinion he is a suitable candidate for cervical spine and lumbar spine surgery in the near future. (CX. #1).

In his April 12, 2004, deposition Dr. Chakales testified regarding claimant's complaints during the initial visit:

His complaints were neck pain and low back pain. I thought that he had cervical spinal stenosis, aggravated by a traumatic episode, and that he had cubital tunnel syndrome on the right, which is ulnar nerve entrapment, and a left ulnar neuropathy. (JX. #2, p. 5).

The testimony of Dr. Chakales reflects that at the time of the initial visit, while the claimant has some low back complaints, his primary complaint was neck pain. After noting the absence of low back complaints from the medical records of the claimant's prior treating physician, Dr. Blankenship, Dr. Chakales added that because the claimant started have some low back pain, he included the information in his report. Dr. Chakales further testified, regarding the afore, "I believe that if he suffered an injury, it was primarily to his neck".

Dr. Chakales testified that he referred the claimant to Dr. Mocek, who administered epidural injections for the claimant's neck complaint. It was noted that during the course of the claimant's treatment with Dr. Mocek the medical records regarding same were devoid of any mention of low back pain.

During the course of the April 12, 2004, deposition Dr. Chakales testified regarding the nexus of the claimant's low back complaints to the August 20, 2002, compensable accident:

Well, I don't believe that's related to his original injury. He has trouble but from your standpoint, I can see the reluctance; and I have no quarrel with that. (JX. #2, p. 8).

Dr. Chakales further testified regarding the claimant's medical status, at the time of the April 12, 2004, deposition:

It's two years almost, and he'd basically at the point - with somebody like him, you've got to make a decision. Number one, is he a surgical candidate? If he's a non-operative and you've treated him on a non-operative basis for an adequate period of time, he's at a point that he's basically close to reaching maximum medical improvement.

While being questioned regarding maximum medical improvement of the claimant, Dr. Chakales testified:

Well, I can't say that, but I think - I wrote a letter in February and recommended that they repeat the EMG and see what it showed. I said of his back, but I won't argue with you that he didn't hurt his back because I didn't see him originally. All I can tell you is that he started complaining of his back. (JX #2, p. 9).

At the time of the April 12, 2004, deposition Dr. Chakales testified that the claimant was not a surgical candidate relative to the neck complaint. (JX. #2, p. 10). Regarding the impact of the results of a new MRI and EMG on the afore assessment or opinion relative to surgery, Dr. Chakales' testimony reflects:

Probably not because as he is, he's functioning, not at his optimum, but he is functioning where he can live and do the activities of daily living with some modifications. I don't thin that he has enough symptoms to warrant a surgical intervention, at least not in my hands.

I think the appropriate thing on him would be to do an MR and EMG, get a functional capacity evaluation, rate his anatomical impairment and present that to Travelers so they can reach some final decision. (JX #2, p. 10).

The claimant did undergo the additional diagnostic studies, which were addressed in the October 27, 2005, Administrative Law Judge ruling growing out of the September 15, 2005, hearing. In a May 17, 2004, clinic note, while recommending continued conservative management and a the

use of a TENS unit, Dr. Chakales recorded that the claimant could be considered a potential surgical candidate for surgery to his cervical spine if his symptoms did not improve.

The record does not reflect the presence medical bills relative to the claimant's treatment under the care of Dr. Alonso Burba. Further, there are no medical reports in the record regarding medical treatment received by the claimant as a result of visits to the emergency room of St. Vincent Medical Center, nor does the record reflect the presence of medical bills incurred by the claimant as a result of treatment received in the emergency room of St. Vincent Medical Center.

After a thorough consideration of all to 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 applicable case law, I make the following:

#### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 20, 2002, the relationship of employee-employer-carrier existed among the claimant and respondents #1, at which time he earned wages sufficient to entitle him to weekly compensation benefits of \$108.00, for temporary total/permanent partial disability.
3. On August 20, 2002, the claimant sustained a compensable cervical spine injury, from which he reached the end of his healing period on April 12, 2004.
4. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that he sustained an injury to his lumbar spine arising out of and in the course of his employment on August 20, 2002.
5. The evidence preponderates that the claimant continued to require medical treatment relative to his compensable cervical injury of August 20, 2002, to include surgery as

recommended by his treating physician which is reasonably necessary in connection with treatment of the compensable injury.

6. Respondents have failed to pay the award of indemnity benefits pursuant to the prior rulings of the Commission, and pursuant to Ark. Code Ann. §11-9-802 (c) a 20% penalty is herein assessed on the unpaid installments.

7. Respondents #1 have controverted the claimant's entitlement to additional medical treatment relative to the cervical spine injury, inclusive of the recommended surgical procedure, as well as any indemnity benefit growing out of same.

### **CONCLUSIONS**

It is not disputed that the claimant sustained an injury to his cervical spine within the course and scope of his employment on August 20, 2002. A prior hearing was conducted in this claim, from which a final ruling was entered on April 6, 2006, by the Full Arkansas Workers' Compensation Commission, which affirmed and adopted the October 27, 2005, opinion of the Administrative Law Judge. The prior opinion in this claim is res judicata.

The claimant asserts that in addition to the cervical injury he also sustained an injury to his lumbar spine in the August 20, 2002, compensable accident for which he is entitled to medical and indemnity benefit. Further, claimant asserts entitlement to additional medical treatment relative to his compensable cervical spine injury, to include surgery as recommended by his treating physician. Claimant maintains that respondents have failed to comply with the prior ruling of the Commission and that they have underpaid indemnity benefits previously awarded. Respondents #1 deny the compensability of the claimant's lumbar spine claim and also assert that the claim is barred by the statute of limitation.

The present claim is one governed by the provisions of Act. 796 of 1993 in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

*Lumbar Spine Claim*

As reflected above, the August 20, 2002, compensable accident of the claimant was the product of an overhead coming down and striking the claimant on the head. The afore resulted in the claimant seeking and receiving medical treatment for his head injury and cervical spine region. The cervical spine complaint of the claimant was accepted as compensable by respondents #1 from its inception.

The claimant asserts the sustained an injury to his lumbar spine in the August 20, 2002, accident and that he relayed complaints regarding same to his treating physicians, to include Dr. Blankenship as well as Dr. Chakales. The evidence in the record reflects that Dr. Blankenship served as the claimant's authorized treating physician relative to the injuries growing out the August 20, 2002, accident through December 2002, and as such was responsible for providing and directing the course of the claimant's medical treatment.

The medical reports in the record relative to the claimant's treatment subsequent to the August 20, 2002, accident and prior to his initial February 19, 2003, visit to Dr. Chakales, which was the product of a change of physician order, are devoid of any complaints regarding the lumbar spine. While Dr. Chakales did record the claimant's complaint regarding low back pain, the claimant's chief complaint at the time of the February 19, 2003, visit was pain in his neck, shoulders, and hands. During his April 12, 2004, deposition, Dr. Chakales testified that he did not believe that the claimant's back complaint was related to the original injury.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102 (4)(A)(i) (Repl. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the instant claim, the claimant has failed to sustain his burden of proof by a preponderance of the evidence that he sustained an injury to his lumbar spine at the time of the August 20, 2002, compensable accident. As previously note, there were no documented reporting of complaints relative to his low back between the August 20, 2002, accident and the February 29, 2003, examination by Dr. Chakales. Diagnostic studies disclosed the claimant's lumbar complaint as degenerative disc disease. The claimant's lumbar spine injury claim is respectfully denied and dismissed.

*Additional Medical Treatment.*

The compensability of the claimant's cervical spine injury is not disputed.. The claimant has remained symptomatic relative to his cervical spine since the compensable August 20, 2002, accident when he was struck on the head by a overhead door. Further, the evidence preponderates that since initiating treatment under the care of Dr. Chakales on February 19,

2003, pursuant to a change of physician order, the claimant has continued to received active medical treatment. During his April 12, 2004, deposition Dr. Chakales anticipated obtaining repeat diagnostic studies, and thereafter referring the claimant for a functional capacity evaluation before releasing him. As a result of the subsequent diagnostic studies, Dr. Chakales offered in a May 17, 2004, clinic note that if the claimant's symptoms did not improve he would be considered a potential surgical candidate relative to the cervical spine.

A March 5, 2008, report of Dr. Chakales noted that the claimant had continued to treat with him. The afore noted the results of a recent October 23, 2007, cervical MRI , reflecting multiple levels of cervical spondylosis and spondyloarthropathy. After noting the claimant's chronic intractable pain syndrome with a symptomatic cervical disc syndrom with radicular symptoms, the report concluded that the claimant was a suitable candidate for cervical spine surgery in the near future. Respondents #1 have refused to authorize the surgery.

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. *Cox v. Klipsch & Associates*, 71 Ark. 433, 30 S.W.3d 764 (2000). Whether a medical procedure or device is reasonably and necessary treatment is question of fact to be decided by the Commission. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996).

The is no evidence in the record to reflect that the claimant required or sought medical treatment relative to his neck prior to the August 20, 2002, compensable injury. The claimant has remained symptomatic regarding his cervical spine since sustaining the blow to the head by the overhead door on August 20, 2002. The October 23, 2007, cervical MRI disclosed multiple levels of cervical spondylosis and spondyloarthropathy. Dorland's Illustrated Medical

Dictionary, 26<sup>th</sup> Ed., defined cervical spondylosis as degenerative joint disease affecting the cervical vertebrae, intervertebral disks, and surrounding ligaments and connective tissue, sometimes with pain or paresthesia radiating down the arms as a result of pressure on the nerve root. Spondyloarthropathy is defined as disease of joints of the spine.

A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *St. Vincent Medical Center v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). In workers' compensation law, the employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W.2d 64 (1990).

The evidence preponderates that the medical treatment rendered to the claimant by Dr. Chakales is reasonably necessary in connection with the treatment of the claimant's compensable cervical spine injury. Respondents #1 are liable for the afore treatment, to include cervical disc surgery. Respondents #1 have controverted the claimant's entitlement to the afore recommended treatment.

#### *Unpaid Medical Bills*

Claimant asserts that respondents #2 are liable for unpaid medical bills growing out of his treatment with Dr. Alonzo Burba and visits to the emergency room of St. Vincent Medical Center. It is clear that the claimant was seen by Dr. Burba pursuant to referrals of Dr. Blankenship and also subsequent to his March 2005, CVA. The record does not reflect the presence of unpaid bill of Dr. Burba relative to treatment he provided the claimant pursuant to the referral of Dr. Blankenship. The evidence in the record reflects that the claimant's CVA

[stroke] was not the product or related to the August 20, 2002, compensable injury. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that respondents #1 have failed to pay medical bills of Dr. Burba which were reasonably necessary medical in connection to the treatment of his compensable cervical injury of August 20, 2002.

Claimant acknowledged that the medical treatment he received at the emergency room of St. Vincent Medical Center related to his low back complaints. As noted above, the claimant has failed to prove by a preponderance of the evidence that he sustained an injury to his lumbar spine arising out of and in the course of his employment on August 20, 2002. According, respondents #1 are not liable for the cost of the claimant's treatment relative to his lumbar spine, to include that treatment received at the emergency room of St. Vincent Medical Center. The claimant's claim regarding the afore unpaid medical bills is respectfully denied and dismissed.

#### *Underpayment of Award*

It is undisputed that at the time of the September 15, 2005, hearing before the Commission the claimant acknowledged arrearage of court order child support payment. As a result of the prior hearing the claimant was awarded a 15% anatomical impairment and an additional 15% wage loss disability. The evidence reflects that with the claimant's compensation benefit rate of \$108.00, the afore entitled him to the payment of \$14,580.00, in indemnity benefits.

Ark. Code Ann. §11-9-110 (d), provide for the withholding of 25% from weekly compensation benefits of a claimant for child support payments. Accordingly, of the claimant's total indemnity benefits awarded (\$14,580.00), respondents #1 were required to withhold from same and pay to the Child Support Enforcement Unit of 25% or \$3,645.00. The payment records

of respondents #1, reflect the last payment of indemnity benefits in the claim was October 26, 2006.

The evidence preponderates that as of October 26, 2006, respondents #1 made total payment of indemnity benefits to the claimant in the amount of \$10,097.00 and child support payments totaling \$3,422.50. According, respondents #1 have an underpayment of indemnity benefits to claimant in the amount of \$838.00 ( \$10,935.00 - \$10,097.00) and an underpayment of child support payments of \$222.50 (\$3,645.00 -\$3,422.50).

Respondents #1 has not offered an explanation for the failure to pay indemnity benefits in accordance with the prior ruling of the Commission. Ark. Code Ann. §11-9-802 (c) provides that if any installment payable under the terms of an award is not paid within fifteen (15) days after it become due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof and that the same shall be paid at the same time and in addition to the installment. Respondents #1 are herein ordered and directed to pay a 20% penalty to the claimant on the unpaid installment as reflected above.

*Failure to Comply with Prior Ruling*

Regarding the failure of respondents #1 to comply with the prior ruling, claimant asserts that he did not agree with the prior ruling as the basis of same. There is no evidence in the record to reflects that the claimant took any measures to appeal the April 13, 2006, ruling of the Full Commission which affirmed and adopted the October 27, 2005, ruling of the Administrative Law Judge. According, the afore rulings are final. The claimant has failed to sustain his burden of proof that respondents #1 have been non-compliant with the prior ruling.

**AWARD**

Respondents #1 are herein ordered and directed to provide all reasonably necessary and related medical treatment in connection with the claimant's compensable cervical spine injury of August 20, 2002, to include the recommended surgical procedure of the claimant's treating physician.

Respondents #1 are further ordered and directed to pay to the claimant a 20% penalty on the unpaid installments awarded pursuant to the April 13, 2006, Opinion and Award of the Full Commission, pursuant to Ark. Code Ann. §11-9-802 (c).

This Award shall bear interest pursuant to Ark. Code Ann. §11-9-809, until paid.

**IT SO ORDERED.**

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**Andrew L. Blood, ADMINISTRATIVE LAW JUDGE**