

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F107049 and F211475

TERRY KOONCE, EMPLOYEE	CLAIMANT
CEDARVILLE WATERWORKS, EMPLOYER	RESPONDENT
CUNNINGHAM LINDSEY, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED APRIL 13, 2005

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by HONORABLE LEE MULDROW, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part, modified in part, reversed in part.

**OPINION AND ORDER**

Respondent No. 1 appeals the decision by the Administrative Law Judge making the following findings of fact and conclusions of law.

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties on April 13, 2001.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of

\$379.00 for total disability benefits and \$284.00 for permanent partial disability benefits.

4. Respondent has paid some compensation benefits including permanent partial disability based upon a 13% impairment rating.
5. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back while working for respondent in April 2000.
6. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his thoracic and lumbar spine while employed by respondent on April 13, 2001.
7. Claimant has met his burden of proving by a preponderance of the evidence that the Botox injections recommended by Dr. Fisher are reasonable and necessary for treatment of his compensable injury.
8. As a result of his compensable April 13, 2001 injury, claimant has suffered a permanent physical impairment in an amount equal to 6% to the body as a whole.
9. Claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. Claimant has proven by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

10. The Second Injury Fund is not liable for payment of permanent partial disability benefits.
11. Respondent is liable for a controverted attorney fee on all compensation benefits, including those previously paid by respondent.

Based upon our de novo review of the record, we affirm in part, modify in part, and reverse in part the decision of the Administrative Law Judge. We affirm the following findings: that the claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back in April of 2000; that the claimant has met his burden of proving by a preponderance of the evidence that he sustained a compensable injury on April 13, 2001, to the lumbar region; and, the finding that the claimant failed to prove by a preponderance of the evidence that he was permanently and totally disabled. We modify the finding that the claimant is entitled to a 60% loss in wage earning capacity. We reverse the findings that the claimant proved by a preponderance of the evidence that he sustained an injury to his thoracic spine on April 13, 2001; and, the finding that and that the Second Injury Fund had no liability for these benefits. Based upon our de novo review of the record, we find that the claimant sustained a 30%

loss in wage earning capacity. We further find that wage loss disability benefits are the responsibility of the Second Injury Fund. Further, we reverse the decision of the Administrative Law Judge finding that the Botox injections given by Dr. Fisher were reasonable and necessary medical treatment for the claimant's compensable injury. In our opinion, the claimant has failed to meet his burden of proof on these issues.

The claimant began working for the respondent employer as a back hoe operator in 1986. In 1997, the claimant began visiting with Dr. Elliott Hays, a Chiropractic Physician, for treatment of recurrent lower back pain and lower thoracic pain. In April of 2000, the claimant was diagnosed with a herniated disk at the L5-S1 level. Surgery was discussed, but the claimant did not undergo surgery and continued to work for the respondent employer. The MRI report dated April 24, 2000, indicated that the herniated disk was "very, very obvious" and likely contacting and displacing the left S1 nerve root. When Dr. Thompson, the claimant's neurosurgeon, was asked about whether the condition he treated would have warranted an impairment rating, Dr. Thompson estimated a 7% permanent impairment rating to the body as a whole based upon this

2000 MRI. In a report dated June 7, 2000, Dr. Thompson indicated that "the patient is pretty well compensated, but not fully free of pain." Dr. Thompson went on to indicate that the claimant was going to continue to have additional back pain from time to time, but that the claimant was fairly stable and would hopefully not have to have surgery performed.

The claimant continued to work for the respondent employer until April 13, 2001, when he alleged that he sustained a compensable injury to his back at work as he pulled on a pipe. The claimant testified that he reported this injury to his supervisor on that date. The claimant sought medical treatment from Dr. Hays, his chiropractic physician. It is of note that the claimant had sought medical treatment on April 12, 2001, from Dr. Hays, his chiropractic physician, complaining of low back pain and pain in his left lower extremity.

On April 26, 2001, the claimant sought medical treatment from Dr. Parham. Dr. Parham's medical reports fail to mention a work related injury. Dr. Parham's notes indicate that the claimant stated "back went out on me, slept wrong" on April 13, 2001. However, the evidence shows that claimant tried to seek medical treatment from Dr. Holly

Heaver, on April 21, 2001, but she would not see him because it was a workers' compensation injury. The claimant was referred to Dr. Johnson, a neurosurgeon, who eventually performed surgery on the claimant's lumbar spine on May 11, 2001. On a follow up visit with the claimant on June 27, 2001, Dr. Johnson noted, "[claimant] is actually doing quite well. There's hardly any pain in his lower back and lower left extremity." On January 25, 2002, Dr. Johnson reported that the claimant could return to work performing light duty.

The claimant contended that he was unable to resume work due to his back pain and that he was permanently and totally disabled. The claimant has been treating with Dr. Fisher, who has treated the claimant's pain with narcotics, as well as, the October 9, 2002, implantation of a spine cord stimulator, and injection of Botox into the claimant's right T10-11 area and the left T11-12 area of the claimant's long gisymic thoracic. Both Dr. Standefer and Dr. Schlesinger have indicated that the claimant should be taken off narcotics.

On June 25, 2003, the claimant underwent an independent medical evaluation by Dr. Bradley Short. Dr. Short opined that the claimant had reached maximum

medical improvement and assigned a 13% whole body impairment.

The respondents initially accepted the claimant's April 13, 2001, injury as compensable. The respondents paid temporary total disability benefits, medical benefits, and permanent partial disability benefits, in an amount equal to 13% of the body as a whole, based upon the impairment rating assigned by Dr. Short. The claimant filed this claim requesting a determination as to the extent of his permanent disability. The Second Injury Fund has contested whether or not the claimant even sustained a compensable injury on April 13, 2001, the claimant's entitlement to Botox injections has been questioned, and there is the issue of a controverted attorney fee.

With respect to the controversion of the injury, the respondent's attorney, at the hearing, stated:

[MR. MULDROW:] The respondents have initially accepted Mr. Koonce's claim of disability benefits and of medical treatment. He was a long-time employee. He worked for the company, I believe, since 1996 - or 1986. And he asserted that he injured himself in April of 2001. As a matter of fact, when he ended up turning in his claim and filing out his paperwork he mentioned at the same time that he had injured himself in April of 2000. The insurance carrier accepted that claim and paid benefits on that claim, actually paying benefits on

the second claim, that being the claim of April of 2001.

Mr. Pake has called into question whether or not that in fact is a compensable claim and so respondents find ourselves in a position somewhat unusual and we're going to have to enter stipulations somewhat in the alternative. Our position basically is that we cannot stipulate to compensability because otherwise if you were to find the claim not to be compensable and we had asserted a stipulation of compensability, we would be in an odd position.

But our position really is that we cannot stipulate to compensability, but if there is a compensable claim, there are two claims, one being the injury that occurred and I think is well documented by the medical in April of 2000 and the other being the injury that occurred and is documented by medical in April of 2001. And, so, that's our position. We're not stipulating that there was a compensable injury.

Now, how does that leave the situation with regard to, as an example, Mr. Walker's attorney's fee? I mean, that's a fair question. It was raised by Mr. Walker. I think, because we have withdrawn our stipulation in this regard, that any benefits drawn after today's date would be considered controverted even though we're continuing to pay disability benefits at present and even though we're paying all reasonable and related medical - - sans the Botox injections - - we're paying that medical. I think those benefits would reasonably be considered to be controverted after today's date.

Regardless of your decision, we're not going to ask Mr. Koonce to pay us back for the benefits that have been paid to today's date, and, so, although we are not stipulating to compensability, we will not be asking for repayment of benefits should the claim not be found to be compensable.

Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment refers to the origin or cause of the accident," so the employee was required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly." City of El Dorado v.

Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the claimant must show that he sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. Id. Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i)(Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

However, Act 796 also recognizes certain specified exceptions to the general limitation of compensable injuries to those injuries which are caused by specific incident and which are identifiable by time and place of occurrence, and these exceptions are set forth in Ark. Code Ann. § 11-9-

102(4) (A) (ii) through § 11-9-102(5) (A) (i) (v) (Repl. 2002). Claims involving mental illness, heart, pulmonary, and cardiovascular conditions, and hernias are excepted from the definitiveness rule in Ark. Code Ann. § 11-9-102(4) (A) (iii) through § 11-9-102(4) (v). The requirements necessary to establish the compensability of these conditions are set forth in other sections of the Arkansas Workers' Compensation law. Claims for injuries caused by rapid repetitive motion, for back injuries, and for hearing loss are accepted in Ark. Code Ann. § 11-9-102(4) (A) (ii). To satisfy the definitional requirements for injuries falling under Ark. Code Ann. § 11-9-102(4) (A) (ii), the employee still must satisfy all of the requirements discussed above, with the exception of the definitiveness requirement. Thus, the claimant still must prove by a preponderance of the evidence that he sustained internal or external damage to the body as the result of an injury that arose out of and in the course of employment, and the employee still must establish the compensability of the claim with medical evidence, supported by objective findings. However, in addition to these requirements, if the injury falls under one of the exceptions enumerated under Ark. Code Ann. § 11-9-102(4) (A) (ii), the "resultant condition is compensable

only if the alleged compensable injury is the major cause of the disability or need for treatment." Ark. Code Ann. § 11-9-102(4) (E) (ii) (Repl. 2002).

Initially, the claimant contended that he suffered a compensable injury to his low back while working for the respondent in April of 2000. The claimant testified that during the month of April 2000 he was doing a lot of heavy work which he believed contributed to his back condition. As a result of the claimant's back complaints he sought medical treatment from Dr. Hays. The claimant had seen Dr. Hays on a number of occasions since December 1997. The claimant also sought medical treatment from Dr. Thompson, a neurosurgeon, to determine the cause of his back condition. Dr. Thompson ordered an MRI scan of the claimant's lumbar spine which revealed a herniated disc at the L5-S1 level. The MRI report of April 24, 2000 indicated that this herniation may contact and displace the left S1 nerve root. Dr. Thompson's medical reports indicated that surgery was contemplated but was not performed. In a report dated June 7, 2000, Dr. Thompson indicated that "the patient is pretty well compensated but not fully free of pain." Dr. Thompson went on to indicate that claimant was going to continue to have additional back

pain from time to time but that claimant was fairly stable and would hopefully not have to have surgery performed.

We find that the claimant's claim for a compensable injury in April 2000 is a claim for a gradual onset injury, not a claim for a specific incident identifiable by time and place of occurrence. The claimant did not testify regarding a specific incident identifiable by time and place of occurrence which occurred in April 2000. Instead, the claimant seemed to relate his back complaints in April of 2000 to the general work he was performing during that period of time as opposed to a specific incident. An employee does not have to identify an exact date, but there must be an "identifiable" incident under A.C.A. §11-9-102(4)(A)(i). Edens v. Superior Marble and Glass, 346 Ark. 487, 58 S.W.3d 369 (2001). A generic description of work is not sufficient - - there must be a particular specific incident. Hapney v. Rheem Manufacturing, 342 Ark. 11, 26 S.W. 3d 777 (2000); Thomas Bardrick v. Rheem Manufacturing Co., Full Commission Opinion filed February 21, 2003 (F108263).

A claimant seeking benefits for a gradual onset injury to the back must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course

of his employment; (2) the body that required medical services or resulted in disability or death; and (3) the injury was the major cause of the disability or need for medical treatment. Wal-Mart Stores, Inc. v. Leach, 74 Ark. App. 231, 48 S.W.3d 540 (2001); Freeman v. Con-Agra Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). In addition, objective medical evidence is necessary to establish the existence and extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. Wal-Mart v. Leach, supra; Wal-Mart Stores v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

After conducting a de novo review of the evidence, we find that the claimant has failed to prove by a preponderance of the evidence that he suffered a compensable gradual onset injury to his back while working for respondent in April 2000. Specifically, we find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury which arose out of and in the course of his employment with the respondent.

As previously noted, the claimant attributed his back problems in April 2000 to his work activities with the respondent. The claimant testified that he reported this

belief to his boss, Fred Snipes. As a result of these complaints the claimant sought medical treatment from Dr. Hays, the chiropractic physician, and Dr. Thompson, the neurosurgeon. A review of the medical reports from both Dr. Hays and Dr. Thompson fails to mention any work related injury in April 2000. In fact, beginning in April 2000 claimant sought medical treatment from Dr. Hays on 36 separate occasions between April 2000 and April 13, 2001, the date of the next alleged injury. None of Dr. Hays' medical reports mentions a work related injury.

Andrea Koonce, the claimant's wife, testified at the hearing that she vaguely recalled the claimant having some problems with his back in April 2000 and seeking medical treatment from Dr. Thompson. She stated that in the one year prior to April 13, 2001, the claimant did not specifically say anything about having injured his back while working for the respondent in April 2000.

Specifically, she testified as follows:

Q. Would it be fair to say that during that one-year period of time before the April 13<sup>th</sup> date that he didn't say anything to you about hurting his back at work with this employer, Cedarville Waterworks?

A. Not specifically.

Accordingly, we find that the claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back while working for the respondent in April 2000.

The claimant testified that he suffered a compensable injury to his back as a result of a specific incident identifiable by time and place of occurrence on April 13, 2001. The claimant testified that he felt a sharp pain in his back while pulling on a pipe to repair a water leak.

After reviewing the evidence in this case, we find that the claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his lumbar spine while working for respondent on April 13, 2001. The claimant testified that he suffered the injury to his back while lifting a pipe on April 13, 2001. He testified that he reported this injury to his supervisor on that date. Following this incident, the claimant again returned to Dr. Hays, and attempted to seek medical treatment from Dr. Heaver. The claimant also sought medical treatment from Dr. Parham before he was referred to Dr. Johnson, a neurosurgeon who eventually performed surgery

on claimant's lumbar spine. When the claimant sought medical treatment from Dr. Parham on April 26, Dr. Parham's medical report failed to mention a work-related injury. Dr. Parham's report indicated that the claimant indicated that his back went out on him and that he slept wrong on April 13, 2001. The claimant attempted to seek medical treatment from Dr. Holly Heaver on April 25, 2001, but Dr. Heaver would not see the claimant because it was a workers' compensation claim. The medical reports of Dr. Heaver and Dr. Parham clearly indicate that this was a work related claim. It is also of note that when the claimant sought medical treatment from Dr. Johnson he completed an in-patient medical history on May 7, 2001, and indicated that his accident was work related. Therefore, we find that claimant has met his burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment and that his injury was caused by a specific incident identifiable by time and place of occurrence.

We also find that the claimant has met his burden of proving by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and resulted in disability and that the claimant has offered medical evidence supported by

objective findings establishing an injury. The medical evidence demonstrates that prior to April 13, 2001, the claimant had been diagnosed as suffering from a herniated disc at the L5-S1 level for which surgery was contemplated. After the April 13, 2001, incident, a second MRI scan was performed on May 2, 2001, which also revealed a herniated disc at the L5 level.

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 a disability for which compensation is sought. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Manufacturing Company, 235 Ark. 195, 357 S.W.2d 504 (1962); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

In our opinion, the claimant's pre-existing herniated disc was aggravated by the injury on April 13, 2001. The MRI scan report of May 2, 2001, indicated that the claimant suffers from a herniated disc at the L5 level. However, the report also indicated that the herniation was more prominent than the prior study of April 4, 2001. It appears that the date of the prior study referred to in the

May 2, 2001 report is incorrect and it should reflect the prior MRI study of April 24, 2000. There is no evidence that the claimant underwent an MRI scan or any other type of radiographic study on April 4, 2001. Accordingly, we find that there was an injury to the claimant's lumbar spine that caused internal physical harm to claimant's body which required medical services and resulted in disability and that it is medical evidence supported by objective findings establishing an injury.

The Second Injury Fund was brought in as a party and the Administrative Law Judge found that the Second Injury Fund had no liability. Although the claimant did not sustain a compensable injury in April of 2000, he did sustain a compensable injury in April 2001, and he had a pre-existing condition. Mid-State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988) sets forth the requirements that must be met in order for the Second Injury Fund to have liability. These are as follows:

First, the employee must have suffered a compensable injury at the present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

The last injury "combines" when it, considered with the previous injury, causes a greater disability than the disability produced by the last injury considered alone. See Hawkins Constr. v. Maxell, 52 Ark. App. 116, 915 S.W.2d 302 (1996), *rev'd on other grounds*, 325 Ark. 133, 924 S.W.2d 789 (1996). In other words, if the more recent injury alone would have caused the claimant's current disability status, the Second Injury Fund has no liability. In addition, "where there is medical evidence that the two injuries combined to produce the current disability rating, contradictory evidence that the claimant was able to return to the same type of labor after his first injury is not determinative of [Second Injury Fund's] liability." POM, Inc. v. Taylor, 325 Ark. 334, 337, 925 S.W.2d 790, 791 (1996). Further, an employee's ability to return to the same work following a prior injury is simply not determinative of the Second Injury Fund's liability. POM, Inc. v. Taylor, 325 Ark. 334, 925 S.W.2d 790 (1996).

Clearly, the claimant meets the first element of the Mid-State test. The claimant suffered a compensable injury at his present place of employment. The second element of the Mid-State test is not quite so conclusive. The second hurdle requires that the claimant must have a

prior permanent partial disability or impairment. Clearly, the claimant had a prior permanent partial impairment. The claimant was diagnosed with a herniated disk at L5-S1 in April of 2000, by Dr. Thompson. Dr. Thompson estimated that the claimant's prior impairment was 7% to the body as a whole. The claimant was able to return to work for the respondent employer until April 13, 2001, when he sustained his compensable injury.

This case is closely akin to the case of Hawkins Constr. Co. v. Maxell, 325 Ark. 133, 924 S.W.2d 789 (1996). In the Hawkins case, Mr. Maxell had experienced a prior back injury, but was able to continue with his job, doing the same type of labor. He later reinjured his back on the job in the same area of the spine and had surgery. Mr. Maxell filed a workers' compensation claim. After a period of convalescence, his surgeon assigned 10% permanent impairment, but opined that the majority of the rating (7%) was pre-existing. The Arkansas Supreme Court found the Second Injury Fund liability. The Court observed:

The Fund was created by the General Assembly to see to it that a subsequent employer, such as Hawkins, does not become responsible for disability of an employee when a part of his or her condition results from an injury which occurred in previous employment with a different employer. Ark. Code Ann. §11-

9-525(a)(1) (Repl. 1996). The only evidence before the Commission which might be considered as contrary to the medical testimony is that which showed that, from the 1990 injury, Mr. Maxell suffered no disability or impairment which kept him from continuing to do the same sort of labor he had done previously.

The Court then reviewed the requirements of Mid-State, and concluded by observing that Dr. Standefer's opinion that the earlier injury contributed to the compensable injury was unrebutted. Thus, Second Injury Fund liability was established. In this case, Dr. Thompson concluded that the claimant had a 7% permanent impairment for the prior disc herniation.

A case with nearly congruent facts is Douglas Tobacco Products Co., Inc. v. Gerrald, 68 Ark. App. 304, 8 S.W3d (1999). Ms. Gerrald suffered a job injury in 1994. The injury involved her low back, and ultimately led to surgery. A workers' compensation claim followed. Prior to her job injury, Ms. Gerrald had experienced two back injuries in the early 1990s, each involving the same part of her back. However, at the hearing Ms. Gerrald testified that her previous injuries did not limit or restrict her ability to do her job. Ms. Gerrald's treating surgeon testified that she had 13% impairment, 8% of which was attributable to the

previous back injuries. As in Hawkins, this medical opinion was noted to be un rebutted. The Arkansas Court of Appeals, reversing a Full Commission decision, found Second Injury Fund liability. In reaching its decision, the Court citing with approval its decision in Ellison v. Therma-Tru, 66 Ark. App. 286, 989 S.W.2d 987 (1999), and noted:

...the Commission in this case erred in failing to find that the third element of the Mid-State was not satisfied. The medical evidence revealed that Ms. Gerrald was diagnosed with disk desiccation at the L4-L5 and L5-S1 levels in 1990, and with herniations at these levels in 1992. Significantly, these are the levels that were surgically treated following her 1994 injury. Moreover, Dr. Russell attributed the majority of Ms. Gerrald's permanent impairment rating to conditions that preexisted the compensable injury.

...Given the medical evidence presented in this case, we find that substantial evidence does not support the Commission's determination that the injuries did not combine to produce the permanent impairment...

The facts of these cases mirror the situation involving the claimant in this case presently before us. In April 2000, the claimant experienced significant trouble with his low back. His family physician referred him to Dr. Thompson who ordered an MRI which revealed a herniated disk at L5-S1. Dr. Thompson suggested surgery, but the

timing was not right for the claimant. The claimant continued with his work, but also continued with treatment. In April 2001, the claimant reinjured the same level of his spine. This time he could not avoid surgery. Following surgery and a period of convalescence, an impairment rating of 13% was assigned. Dr. Thompson opined that the majority of the rating, 7% was attributable to his pre-existing back condition.

The claimant was well aware that he had significant low back problems at L5-S1, that he had been advised about the possibility of surgery, that he elected to try to manage his condition conservatively, and that, although he was able to return to work, he did so with some continuing symptoms. In fact, the claimant was seen by his doctor for his low back the day before his work related injury.

Therefore, based upon our de novo review of the record, we find that the claimant's prior impairment has combined with the claimant's compensable injury to produce his current disability status. Therefore, we find that any wage loss disability benefits assigned to the claimant are the responsibility of the Second Injury Fund.

The next step that must be determined is to determine the amount of the claimant's wage loss. The claimant contended that he was permanently and totally disabled and the Administrative Law Judge assigned a 60% loss in wage earning capacity. We find that a preponderance of the evidence fails to support this finding.

The evidence demonstrates that the claimant went for a vocational consultation with Mr. Dale Thomas, a vocational rehabilitation specialist. The claimant also went under a functional capacity evaluation performed by Dr. Robert Fisher on October 1, 2003. The conclusions of the functional evaluator, are as follows:

FUNCTIONAL LIMITATIONS: Mr. Koonce did not demonstrate the ability to material handle over 21 lbs or carry over 11 lbs. Mr. Koonce demonstrates a sitting tolerance up to 30 continuous minutes but was documented standing for only 5-7 continuous minutes. Mr. Koonce also requested to lie down for 10 minutes in the middle of the intake interview due to complaint of pain. Mr. Koonce was also able to walk for a total of 3:55 minutes continuously before asking to sit because of his pain.

CONCLUSIONS: Mr. Koonce underwent functional capacity evaluation this date with unreliable results. Mr. Koonce did demonstrate the ability to perform work at least at the Sedentary Physical Demand Classification as determined through the Department of Labor for an 8-hour day with the above limitations.

To perform work, Mr. Koonce will require frequent changes in postural positions and will need a position that allows him to go from sit to stand at will.

The respondents also offered the vocational consultants testimony and evaluation of Mr. Dale Thomas. Mr. Thomas stated that he did a vocational evaluation and offered appropriate vocational rehabilitation assistance to the claimant. He reviewed the claimant's medical records and he also interviewed the claimant. He stated in his testimony:

Q. And in regard to plans, is it typical in your business that an individual's motivation plays a significant role in how effective rehabilitation efforts will be?

A. Certainly.

Q. Did you have an opportunity to talk with Mr. Koonce with regard to what he thought were his capacities to return to work or be retrained in a different area of work?

A. Yes.

Q. And what were his indications to you?

A. He indicated a number of complaints that he had, and he's talked about those in his testimony today, about his inability to function throughout the day. In terms of his desire to go back to

work, he told me and I reported that he - - lets' see if I can remember his words exactly. They're in my report - - but he gave me the definite impression that he did not intend on going back to work, that he was physically unable to do that. I know, it says he told me that he wanted to "throw in the towel and not work anymore." He just wanted to "crawl into a hole." I think that was his perception of his abilities at that time, so he did not appear to me to be overly motivated to get back into the work force.

Mr. Thomas testified that he is the one that ordered a functional capacity evaluation of the claimant. However, Dr. Fisher actually ordered it. Mr. Thomas testified that retraining would be appropriate for the claimant in this situation.

- Q. Did the supplement provide any clarification with regard to the individual's limitations?
- A. It did a little bit. The supplement basically says that he can alternate - - he needs a job that - - the supplement says he's functionally capable of alternating between sitting and standing an entire eight-hour workday. It does not specifically address the light or sedentary lifting, which is addressed in the FCE.

Q. And if the individual is relegated to sedentary as opposed to light, then there is a smaller universe of jobs available for that individual; is that right?

A. Yes, and the problem there is the amount of sitting required and most sedentary jobs are going to require prolonged sitting and that's the issue in the sedentary jobs.

Q. All right. So he would need a job - - from your observations and from the FCE results and from the results of the medical reports you've indicated, he would need a job of the medical reports you've indicated, he would need a job that really allowed him to get up and sit down as he wishes?

A. That's correct, and not lift more than about 20 pounds at the most.

Q. Would they exist in sufficient number to be considered reasonable vocational options?

A. Oh, I think so. I think that we would find that those jobs not only exist, but they are frequently available.

Q. Did you do some kind of market research to determine what kinds of jobs would be available in this area consistent with those limitations?

A. I did some pretty limited labor market research and the answer is, yes, to your question.

Q. Could you explain to us what kinds of jobs you came up with?

A. Certainly. I can give you examples and I basically surveyed three places. The state employment agency, which is located in this building, has jobs that would be available. They would be such things as security guards, assembly work, cashier jobs, dispatch jobs. In addition, just an easy review of the newspaper also shows retail sales jobs, telemarketing jobs, customer service jobs. And the third place I contacted is an employer and that's The Employment Company, or TEC. They actually do employ people in a variety of jobs, and although they did not stipulate exactly where those jobs were, they said that they certainly would have jobs that would fall within this range of job category.

Q. Okay.

A. These are basically unskilled jobs.

Q. Right. You know, one of the things as a - - and these are the kinds of jobs that you would find that would be available to an individual who was able to do the kinds of

things that were identified on the FCE; is that right?

A. Yes, I think so.

Q. Now, of course, a rehabilitation person could find themselves in a jam if they were trying to pick and choose between which medical providers to believe, and you don't do that, do you?

A. No.

Q. If in fact the assessment of Dr. Arthur Johnson, the operating physician, that this individual could do light duty, no pushing, pulling, or lifting over 15 pounds is accurate, then you would be of the opinion he could work; is that correct?

A. Yes, in that category of jobs I just discussed, which is consistent with the FCE, would fall within those categories.

Q. All right. And if Dr. Fisher, who has opined basically that the person cannot sit or stand more than 10 minutes, if his assessment of his limitations is an accurate appraisal of the individual's limitations, then what would your opinion be with regard to work?

A. There would be no jobs.

Therefore, when we consider the claimant's age, education, skills, his functional capacity evaluation and

the vocational rehabilitation assessment by Mr. Dale Thomas, we find that the claimant is not entitled to a 60% loss in wage earning capacity, much less permanent and total disability benefits. We assess the claimant's wage loss to be 30% loss in wage earning capacity. The claimant is 37 years old, has a high school diploma, has some college credit for water management courses and failed to give his best effort on the FCE. He has also shown a poor attitude towards rehabilitation by expressing the thought that he was just going to "throw in the towel." He's made absolutely no effort to find re-employment or to return to college or any type of re-training program. Dr. Johnson, who performed the claimant's diskectomy, evaluated the claimant on January 25, 2002, and found him fit to return to work and perform light duty tasks. Dr. Johnson also indicated at the time that the claimant would be able to lift up to 15 pounds. Mr. Thomas testified that the claimant would be capable of earning a livelihood in a variety of jobs including security guard, dispatcher, regional salesman, assembly worker, cashier, and customer service representative. Mr. Thomas testified that there were available jobs in the Fort Smith area and discussed entry level wages. Accordingly, we reverse the award of 60% wage loss disability. Based upon our de novo

review of the evidence we find that the claimant sustained wage loss benefits equal 30% to the body.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

After reviewing the evidence in the record, we find that the Botox injections are not reasonable and necessary medical treatment for the claimant's compensable injury. The medical evidence demonstrates that the Botox injections have been administered in the claimant's thoracic

region, not the lumbar region. The injury of 2001 was a lumbar injury and all treatment was focused on that area. The evidence demonstrates that the claimant had been receiving some chiropractic treatment prior to April 2001 for some thoracic spine problems. Dr. Schlesinger, who evaluated the claimant and looked at an MRI scan of the claimant's thoracic spine in January of 2003, concluded that it did not disclose any disk protrusion of any clinical significance. There is no medical evidence of any impairment based on an injury to the claimant's thoracic spine. Therefore, any treatment directed to the thoracic area is not the respondent's responsibility. It is also of interest to note that the claimant stated at the hearing that he received a Botox injection approximately a week prior to his FCE. The claimant stated that the Botox injections helped him. However, the evidence demonstrates that the claimant did not give full effort on the FCE. Accordingly we find the Botox injections are not reasonable and necessary medical treatment and we reverse this finding of the Administrative Law Judge.

Therefore, for all the reasons set forth herein, we affirm in part, reverse in part, and modify in part the decision of the Administrative Law Judge.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part, and dissents in part.

CONCURRING AND DISSENTING OPINION

I concur with the Majority in their affirmance of the Administrative Law Judge's decision as to the claimant's alleged injury in April 2000, that he sustained a compensable injury on April 13, 2001, and the decision that the claimant was not permanently and totally disabled (I note for the record that none of these portions of the Administrative Law Judge's decision were appealed). However, I must dissent from the Majority's decision to deny the claimant certain requested medical treatment and its reduction of the award of wage loss disability made by the Administrative Law Judge.

The medical treatment to which the respondent objects is a series of Botox injections into the claimant's back delivered in an attempt to reduce the frequency and severity of the claimant's painful and debilitating muscle spasms. The claimant testified that these injections were of considerable benefit to him and significantly reduced his dependence on narcotic pain medication. The respondent had appealed an Administrative Law Judge's award of these benefits arguing that these injections were not reasonable and necessary medical treatment. The Majority ruled in the

respondent's favor on this issue based upon their conclusion that the injections were in the claimant's thoracic spine which was not injured when he suffered his compensable injury of April 2001. In reaching this conclusion, the Majority misinterprets the medical evidence.

The Majority Opinion states: "The injury of 2001 was a lumbar injury and all treatment was focused on that area." (Emphasis added). That statement is factually incorrect. A report from Dr. Arthur Johnson, the neurosurgeon who operated on the claimant's back, dated June 27, 2001, notes that the claimant was having muscle spasms in his "lower thoracic spine area for which he is taking his Flexeril and Loracet 10." Likewise, physical therapy reports beginning in May 2001 indicate that the claimant was having "muscle spasms mid-low thoracic." Dr. Robert Fisher, the physician who treated the claimant for chronic pain, noted in a report dated May 19, 2002 that trigger points in the claimant's para-spinal muscle group caused reactions throughout the claimant's back. A consultative report by Dr. Scott Schlesinger, a Little Rock neurosurgeon, also had an interesting finding in regard to the claimant's thoracic muscle spasms. In his report of January 26, 2003, he notes the presence of persistent muscle

spasms in the claimant's back. He also indicates that while the claimant's percutaneous stimulator relieved some of his pain, its placement had caused some new pain in his upper lumbar region.

All of those reports indicate that the claimant has had persistent problems with muscle spasms and pain in his thoraco-lumbar region, a condition which developed after the claimant's compensable aggravations in April 2001. Also, as suggested by Dr. Schlesinger, the severity of these muscle spasms may have been increased as a result of the placement of the spinal cord stimulator which was implanted in this area of the claimant's back.

My review of the Majority's Opinion also indicates that they do not clearly understand the nature of the Botox injections. In their Opinion, the Majority refers to MRI scans of the claimant's thoracic spine and comments that there have not been any opinions regarding permanent impairment to the thoracic spine. However, the Botox injections are not being made into the thoracic region of the claimant's spine. Rather, the injections are being made into the para-spinous muscle group that run along the claimant's back. This is made very clear in Dr. Fisher's reports on June 21, 2002 and July 24, 2002 in which he

describes the injection procedure. In the June 21<sup>st</sup> report, the doctor described a persistent muscle spasm in the left para-spinal muscle group at about T8. He states that this was the injection point of the Botox. In the June 24<sup>th</sup> report, he once again discusses chronic muscle spasms and states that on this occasion, they were in the longissimus thoracis, which he notes were at the upper end of the claimant's laminectomy incision.

The Majority is confusing the muscle arrangement in the back with the spinal vertebrae which are frequently used as reference points. The muscle groupings which Dr. Fisher are referring to run throughout the claimant's back and are not related to specific disco-genic damage. As noted by Dr. Fisher and other physical therapists and physicians who have treated the claimant, the claimant's trigger points caused him to suffer muscles spasms and related pain throughout his back. In fact, the word longissimus used by Dr. Fisher, refers to long muscles. Also, as stated by Dr. Fisher, this muscle group extends to the claimant's laminectomy scar. In my opinion, there is little doubt that the Botox injections are intended for treatment of damage to the claimant's muscles which is the result of his April 2001 injury, the surgical treatment, and the insertion of the

percutaneous spinal cord stimulator. The Majority's denial of this medical treatment is based upon a misunderstanding of the medical terminology and the reason for the injections. Accordingly, I would affirm the Administrative Law Judge's finding that these injections are reasonable and necessary medical treatment.

I also dissent from the Majority's reduction of the claimant's wage loss disability as awarded by the Administrative Law Judge. The Majority's reduction is apparently based upon the functional capacity examination and the opinion of Dale Thomas, a vocational expert who testified at the request of the respondent. However, Mr. Thomas frankly testified that, while there were a number of unskilled jobs with lifting requirements that approach the claimant's minimal restrictions, most of these jobs would not be available to the claimant. When asked by the claimant's attorney whether jobs were available for the claimant considering that he would be required to alternately stand or sit, was taking prescribed narcotic pain medications, had a spinal cord stimulator implanted in his back, and has problems being functional on an everyday basis, the reply was that there would be no jobs available.

In my opinion, the claimant clearly established that he was entitled to at least a 60% impairment to his body as a whole as compensation for his wage loss disability. I find that the claimant's severe job limitations would make it extremely difficult for him to find any gainful employment. For that reason, I dissent from the Majority's reduction and would affirm the Administrative Law Judge's award of wage loss impairment equal to a 60% impairment to the body as whole.

For the reasons set out above, I concur in part and dissent in part from the Commission's Majority Opinion.

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SHELBY W. TURNER, Commissioner