

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F400779 and F408281

BARRY HARDIN,
EMPLOYEE

CLAIMANT

BERRYVILLE SCHOOL DISTRICT,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 7, 2006

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

Claimant represented by the HONORABLE LAURA MCKINNON,
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN,
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and
reversed in part.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals
an administrative law judge's opinion filed January 26,
2006. The administrative law judge found, among other
things, that the claimant proved he sustained compensable
injuries on August 6, 2003 and January 7, 2004. The
administrative law judge found, pursuant to Ark. Code Ann.
§11-9-807(b), that the claimant was not entitled to

temporary total disability compensation. The administrative law judge found that the claimant was entitled to an 11% permanent partial impairment rating.

After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's finding that the claimant proved he sustained a compensable injury on August 6, 2003. We affirm the administrative law judge's finding that the claimant proved he sustained a compensable injury on January 7, 2004, that the claimant was not entitled to temporary total disability compensation. We find that the claimant proved he was entitled to a 2% permanent partial impairment rating as a result of the January 7, 2004 compensable injury.

I. HISTORY

Barry Lee Hardin, age 42, testified that he had worked as a coach for Berryville Public Schools.

The parties stipulated that the employment relationship existed on August 6, 2003. The claimant testified on direct:

Q. Can - tell me a little bit about the two days that you were laying sod. And we've got August 6th and 7th listed, but tell me about that.

A....Coach Goodman, myself and Coach Lairamore were going to pallets, getting some sod from the pallets and taking them over and we would roll them out. They were in rolls. We would roll them out and set them in the bare spots....

Q. How strenuous an activity was that?

A. It was a lot of bending and twisting and turning....And you know, just constantly up and down, twisting and turning, you know, to and fro. And then, we get down (sic) laying sod. We've got practices and, you know, it was just - it was just long - long, hard days.

Q. How did it make you feel?

A. Exhausted; very tired and very sore.

Q. Where were you sore?

A. At first - the first couple of days, you're just kind of sore all over. I noticed more - oh, I guess, about the second or third day, that I was having a lot more soreness around my back.... I decided that since we were in season, I was going to do light weight and high rep and try to work some soreness out.

Q. Out of what?

A. Out of my back. And the first squat I attempted, I - I didn't even get the full squat done, and I realized that there was an injury. I mean, it wasn't just soreness; that there had to be an injury there, you know.

Q. Already or did you do something new?

A. There was something already there. I didn't - I didn't - wasn't even able to do a full squat, so I just put the bar up and it was after that point, that I decided I - I probably need to go to a chiropractor....

Dr. Wayne F. Priest, D.C., examined the claimant on August 28, 2003. The claimant complained of lower back pain, right hip pain, and right leg pain. Dr. Priest appeared to note that the claimant's difficulties had evolved "since laying sod on football field."

On November 3, 2003, the claimant filled out a Medical Examination Report For Commercial Driver Fitness Determination. The claimant indicated on the Report that he had not sustained an illness or injury in the last five years.

Dr. Randal Spurgin noted on November 3, 2003, "He comes in for a bus driver physical exam. We did a D.O.T. equivalent on him since he didn't have the bus driver form from school. He is also having some problems with his back. This has been a longstanding chronic thing. He wants to see Dr. Raben in Fayetteville. We will get him an appointment set up for that."

The claimant visited Dr. Cyril A. Raben on November 10, 2003:

This 39 year old presents to me today with these complaints beginning some 3 months ago. He injured himself doing squats....He had a similar injury some 2 years ago. He went to his chiropractic. He was able to afford him some

relief. He was able to get back at it. He now notices that if he has problems with his back that he can go to his chiropractic....

Exam shows that he has pain and tenderness on palpation of the lower lumbar spine, paraspinous musculature and facets with marked reduction of range of motion due to pain and spasm at the extremes....

The claimant testified, "When I first went in to see Dr. Raben, I - I didn't really consider this as a workmen comp situation because I'd always understood that with workmen comp, you have a specific moment that, you know, the injury has to happen. And, at that time, I was thinking that maybe my injury was from the '93 incident where I did the squats."

Dr. Raben assessed, "Probable lumbar disc herniation."

Dr. Raben noted on November 17, 2003, "He is working full duty. He last worked 11-14-2003....Review of Barry's MRI scan shows that he has a very large disc herniation at L5/S1 on the right. I would like to have him follow up with Dr. Ricciardi for one epidural steroid injection. We will see him back with us in about 2 weeks for re-evaluation."

On December 3, 2003, Dr. Raben performed a decompressive hemilaminotomy of L5-S1. Dr. Raben noted on

December 16, 2003, "Exam today shows that his incision is healing nicely. He is doing exceptionally well."

The claimant agreed on cross-examination that all of Dr. Raben's treatment at that point had been turned in to the claimant's group health insurance.

The parties stipulated that the employment relationship existed on January 7, 2004. The claimant testified that while instructing players on pitching techniques, "I just stepped down the mound. That's when I felt the pop and, at that point, I grabbed my back and walked off the mound and told the boys that it was time to go home."

Drew Johnson, a student, testified that he saw the claimant bent over and holding his back after pitching that day.

The claimant visited Dr. Raben on January 13, 2004:

He is having sharp pain in the sacrum area and a tingling down his thigh....He has been working at modified full duty. He last worked on 1-07-2004....

I think he has reherniated. Apparently, he had a couple of rookie pitchers (a couple of freshman) (sic) that were starting with him. He got on the mound and showed them how to do a follow-through drill. At that point, he started to notice the onset of severe low back pain with leg pain that had followed. We will get him set up for an MRI scan with and without medication....

An MRI of the claimant's lumbar spine was taken on January 14, 2004, with the following impression:

MRI study of the lumbar spine at L5-S1 shows disc space narrowing and desiccation. He has had a right hemilaminotomy. There is a recurrent disc herniation impinging upon the right S1 nerve root. There is moderate annular bulging to the left laterally which abuts but does not obviously impinge upon the left S1 nerve root. At L3-4 and L4-5 there is disc desiccation without disc space narrowing or significant posterior disc protrusion. At T11-12 there is a small focal disc protrusion on the right which abuts and could slightly impinge upon the right ventral thoracic spinal cord.

Dr. Raben noted on January 16, 2004, "He last worked on 1-07-2004....I have MRI scan that shows a recurrent disc herniation at L5/S1. The rest of his discs look pristine. With these findings, mostly (sic) likely we are going to need to perform an MIS procedure with front and back fusion with re-evaluation of the nerve root and distraction of the disc space."

Dr. Spurgin reported on January 16, 2004:

Barry is here on a Workman's Comp visit from the school. On December 3, 2003 he had an L5 partial diskectomy by Dr. Raben. He had been in physical therapy. He had been compliant with all recommendations. He had gone back to school and was teaching his classes. He is a baseball coach and had gone back to practice, but was doing very little other than watching. He had a couple of pitchers who needed some additional instruction

and he was demonstrating a follow-through while standing on the pitching mound. As he moved his arm across his body to show the drill he felt a pain and pop in his right lower back in the area where he had had surgery....Repeat MRI shows a re-herniation and breakdown of the surgical repair....

He is here mainly to establish this as a Workman's Comp injury since it occurred at school. I have told him I do not know if Workman's Comp will cover the injury since he was in the convalescent period following surgery from December 3rd. He will be off work and at near bed rest for the next few weeks and Dr. Raben will be overseeing further operative management of this problem. Estimated time of total disability is uncertain....

Dr. Spurgin assessed, "Recurrent HNP L5."

Dr. Raben noted on January 30, 2004, "He tried to go back to work on 12-2-2003 but he was not able to do that."

On February 4, 2004, Dr. Raben performed "1. Decompressive diskectomy from anterior at L5-S1. 2. Anterior interbody fusion, L5-S1 using allograft, bone dowel instrumentation with reinforcement with Dupuy bow ties and Synthes interference fit screw." Dr. Raben's post-operative diagnosis was "1. Recurrent disk herniation at L5-S1. 2. Disk derangement at L5-S1."

Dr. Raben noted on March 19, 2004, "Mr. Hardin has requested that he be allowed to return to work on Monday. He is aware of his restrictions which include no bending,

lifting and stooping. He needs to be able to change positions frequently. He states he is a teacher and is able to do this with no problem. He is also a coach; however, they have someone else doing the coaching for the rest of the season."

The claimant testified that he returned to work in late March 2004. The colloquy at hearing indicated that the claimant contended he was entitled to temporary total disability from December 3, 2003 until March 22, 2004.

The claimant testified on recross-examination:

Q. From December of 2003 until April 1 of 2004, did you continue to draw your salary pursuant to your contract?

A. From December, 2003 till when?

Q. From the end of football season in 2003, until you came back from spring break in 2004, did you - did you get your pay consistently on your teacher's contract?

A. Yes, sir. I had - at the time, I had accumulated over 50 sick days and then, I believe, the sick bank at school had gave me to get me to March, when I could start back to work.

Dr. Raben noted in July 2004 that the claimant was "90% better" following surgery.

Dr. Raben informed the claimant's attorney on September 17, 2004, "His partial permanent impairment rating according

to his injury would be approximately ten-to-twelve percent (10-12%)."

A pre-hearing order was filed on January 20, 2005. The claimant contended, among other things, that he sustained a compensable back injury "on or about August 7, 2003, and January 7, 2004." The claimant contended that he was entitled to temporary total disability compensation, reasonably necessary medical treatment, and permanent partial disability.

The respondents contended that the claimant did not sustain compensable injuries.

Dr. Raben signed the following on or about February 9, 2005: "Based upon objective medical findings and within a reasonable degree of medical certainty, it is my opinion that this patient sustained a work-related accidental injury on 1/7/2004. This injury was the major cause 51% or more of the patient's need for medical treatment and disability."

Dr. Raben corresponded with the claimant's attorney on April 1, 2005:

Thank you very much for your kind letter of inquiry with regard to my patient/your client, Barry Hardin. As I am sure you will recall as you have his clinic notes, Barry's first evaluation or "intake visit" by myself was on November 10, 2003. At that point, the dictated history (the history

that I dictated in front of the patient) was that he injured himself doing squats and that he had had a similar injury two years prior. Unfortunately, in my dictation, I do not have anything that I can relate to him laying sod for the school.

I then saw him after intervention in December 2003 and then in January 2004 where after he was helping teach rookie pitchers how to follow through with their pitch he sustained re-injury; i.e., re-herniation. Because of this on-the-job injury, he necessitated intervention to include a minimally invasive fusion. From that he seems to have done very well. Our last visit with him was in October 2004.

I understand what you are telling me is that we are trying to lay causation for an on-the-job injury. Please answer me, counselor, is it not possible that activities of a football coach; i.e., teaching and working out with his players doing squats and teaching and working out with his players doing squats and teaching and working with his pitchers doing follow-through drills, do not sound like worker compensation injuries? They do to me. Whether or not he was laying sod seems to me like it would simply be "frosting" and another circumstance of an on-the-job injury.

For me to back up and change my dictation at this point would not assist your client in his credibility; however, if I can be of any other assistance in helping you, please do not hesitate to contact me.

The parties deposed Dr. Raben on September 20, 2005.

Dr. Raben testified that he considered the January 7, 2004 incident to be a "new injury."

Dr. Raben informed the claimant's attorney on October 18, 2005, "According to the *AMA Guidelines for the Evaluation of Permanent Impairment*, a partial permanent impairment rating for a two-level, 360° fusion with no residual would be eleven percent (11%) of his body as a whole."

The administrative law judge found, in pertinent part:

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back on August 6, 2003, as well as on January 7, 2004, while working for the respondent....

5. The respondents will not be responsible for the payment of medical treatment for this claimant's low back injury of August 6, 2003, because he did not make the respondents aware that he was claiming a compensable injury until August 4, 2004.

6. The respondents shall pay all medical treatment for this claimant's compensable injury of January 7, 2004.

7. The claimant has testified that he continued to receive his regular salary throughout the fall of 2003 as well as from January 7, 2004, through March 22, 2004. Arkansas law sets forth at Ark. Code Ann. §11-9-807(b) that if an injured employee receives full wages during disability he is not entitled to compensation during that period.

8. The claimant has proven ... that he is entitled to a permanent partial impairment rating of 11 percent to the body as a whole as assessed by Dr. Raben.

The respondents appeal to the Full Commission; the claimant cross-appeals.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (A) defines "compensable injury":

(i) An 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;

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). The claimant's burden of proof shall be a preponderance of the evidence; or for injuries falling within the definition of compensable injury under subdivision (4) (A) (ii), the burden of proof shall be a preponderance of the evidence, and 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).

1. The Alleged August 6, 2003 Injury

The administrative law judge found that the claimant proved he sustained a compensable injury to his low back on August 6, 2003. The ALJ did not indicate whether the claimant had sustained an accidental injury pursuant to Ark. Code Ann. §11-9-102(4) (A) (i) or a back injury not caused by a specific incident, pursuant to Ark. Code Ann. §11-9-102(4) (A) (ii). The claimant implicitly argues on appeal that he sustained an accidental injury pursuant to Ark. Code Ann. §11-9-102(4) (A) (i).

In any event, both the evidence of record and the claimant's testimony demonstrated that there was not a "specific incident identifiable by time and place of occurrence" on August 6, 2003. The claimant testified that he was laying sod as a part of his employment on August 6, 2003. The claimant testified that the work was strenuous and that he was very sore afterward. The claimant also testified, however, that he was unaware "there was an injury" until later lifting weights at home. Dr. Priest examined the claimant on August 28, 2003 and noted that the claimant's back had begun hurting since laying sod on a football field. Dr. Priest did not report a specific

incident. Additionally, the claimant did not relate a specific incident on the Medical Examination Report he completed on November 3, 2003. Instead, the claimant wrote that he had not sustained an injury during the previous five years. Also on November 3, 2003, Dr. Spurgin reported that the claimant's back condition was "a longstanding chronic thing."

Consequently, there is no evidence of record demonstrating that the claimant sustained an "accidental injury" on August 6, 2003, pursuant to Ark. Code Ann. §11-9-102(4)(A)(i). The Full Commission must therefore determine whether the claimant proved he sustained a back injury which was not caused by a specific incident or which was not identifiable by time and place of occurrence, pursuant to Ark. Code Ann. §11-9-102(4)(A)(ii)(b). The Full Commission finds that the claimant did not prove he sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102(4)(ii)(b). We recognize that the claimant complained of back pain and soreness after laying sod at work beginning August 6, 2003. However, we also recognize Dr. Spurgin's note that the claimant's back pain was "chronic" and not the result of any employment-related activities. Dr. Raben

reported on November 10, 2003 that the claimant had injured his back after lifting weights at home; Dr. Raben did not attribute any of the claimant's back pain to the claimant's employment.

The Full Commission also notes that, through approximately December 3, 2003, the claimant turned in all of Dr. Raben's treatment to the claimant's group health insurance rather than the workers' compensation carrier. Based on the evidence of record, the Full Commission finds that the claimant did not prove he sustained a back injury pursuant to Ark. Code Ann. §11-9-102(4)(A)(ii)(b); that is, the claimant did not prove he sustained an injury causing physical harm to the body and arising out of and in the course of employment.

Nor did the claimant prove that the alleged compensable injury was the major cause of his disability or need for treatment. We again note Dr. Raben's initial opinion that the claimant injured his back as a result of "doing squats," that is, lifting weights, rather than laying sod at work. Nor does the record indicate that the herniated disc at L5-S1, for which Dr. Raben performed surgery in December 2003, was causally related to the alleged compensable injury. Nor

did the claimant prove that the "spasm" reported by Dr. Raben in November 2003 was a causal result of the alleged compensable injury.

The Full Commission therefore reverses the administrative law judge's finding that the claimant sustained a compensable injury on August 6, 2003.

2. The January 7, 2004 Injury

The parties stipulated that the employment relationship existed on January 7, 2004. The claimant contends that he sustained a compensable back injury on that date. The claimant testified that he felt a "pop" in his back while demonstrating a baseball pitching technique as part of his employment. A student testified that he saw the claimant bent over and holding his back immediately after the specific incident. The claimant's account of the incident was corroborated by Dr. Raben's January 13, 2004 clinic note. A subsequent MRI showed a recurrent disc herniation at L5-S1. In February 2004, Dr. Raben performed surgery at L5-S1. Dr. Raben attributed the claimant's need for surgery to the January 7, 2004 specific incident.

The Full Commission affirms the administrative law judge's finding that the claimant proved he sustained a

compensable injury to his low back on January 7, 2004. We find that the claimant proved he sustained an accidental injury on January 7, 2004, which injury caused physical harm to the claimant's body. The accidental injury arose out of and in the course of the claimant's employment with the respondents, and the injury required medical services. The accidental injury was caused by a specific incident and was identifiable by time and place of occurrence. The claimant established the compensable injury by medical evidence supported by objective findings, namely the disc herniation at L5-S1.

Pursuant to Ark. Code Ann. §11-9-508(a), the Full Commission finds that all of the medical treatment of record was reasonably necessary in connection with the compensable injury, including the surgery provided by Dr. Raben on February 4, 2004. The claimant was eventually able to return to work following surgery, and Dr. Raben reported in July 2004 that the claimant was "90% better." Post-surgical improvement is a relevant consideration in determining whether surgery was reasonably necessary. *See, Winslow v. D&B Mech. Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). We therefore affirm the administrative law judge's

finding, "The respondents shall pay all medical treatment for this claimant's compensable injury of January 7, 2004."

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The instant claimant contended that he was entitled to temporary total disability compensation from December 3, 2003 until March 22, 2004. The administrative law judge found, "The claimant has testified that he continued to receive his regular salary through the fall of 2003 as well as from January 7, 2004, through March 22, 2004. Arkansas law sets forth at Ark. Code Ann. §11-9-807(b) that if an injured employee receives full wages during disability he is not entitled to compensation during that period."

We affirm the finding of the administrative law judge. The Full Commission has determined that the claimant did not prove he sustained a compensable injury on or about August 6, 2003, so of course the claimant would not be entitled to any temporary total disability after that date. We have found that the claimant did sustain a compensable injury on

January 7, 2004. However, the claimant agreed at hearing that he continued to draw his full salary from December 2003 until April 1, 2004. The claimant testified that he actually returned to work in March 2004. An injured employee cannot receive temporary total disability if he is still receiving full salary. *Lovelace v. Dollarway School Dist.*, Workers' Compensation Commission F106668 (March 3, 2004).

C. Anatomical Impairment

An injured worker must prove by a preponderance of the evidence that he is entitled to an award for a permanent physical impairment. *Weber v. Best Western of Arkadelphia*, Workers' Compensation Commission F100472 (Nov. 20, 2003). Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the impairment. Ark. Code Ann. §11-9-102(4)(F)(ii)(a). Pursuant to Ark. Code Ann. §11-9-522(g) and Commission Rule 34, the Commission has adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) as an impairment rating guide. Any determination of the existence or extent of physical impairment shall be

supported by objective and measurable physical findings.
Ark. Code Ann. §11-9-704(c) (B).

The administrative law judge found in the present matter that the claimant proved he was entitled to an 11% permanent partial impairment rating. The Full Commission finds that the claimant proved he was entitled to a 2% permanent partial impairment rating. The claimant underwent a decompressive hemilaminotomy at L5-S1 in December 2003. The Full Commission has determined *supra* that this surgery was not the result of a compensable injury. The claimant sustained a compensable injury on January 7, 2004. In February 2004, Dr. Raben performed a decompressive diskectomy and fusion at two levels, L5/S1. We recognize that Dr. Raben assigned an 11% permanent partial impairment rating in October 2005. Nevertheless, it is the duty of the Commission to translate evidence into findings of fact. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001). Table 75 of the Guides, at II.G., assigns a 2% impairment rating for a second operation at multiple levels. In the present matter, the major cause of this 2% impairment rating was the January 7, 2004 compensable injury. The January 7, 2004 compensable injury was not the major cause

of the 9% anatomical impairment rating found in the Guides, which rating resulted from the non-compensable injury and surgery of 2003.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove he sustained a compensable injury on August 6, 2003. This finding by the Full Commission renders moot the administrative law judge's implicit *sua sponte* determination that the claimant failed to give proper notice pursuant to Ark. Code Ann. §11-9-701. We find that the claimant proved he sustained a compensable injury on January 7, 2004, for which the claimant proved he was entitled to reasonably necessary medical treatment, including subsequent surgery performed by Dr. Raben. Pursuant to Ark. Code Ann. §11-9-807(b), the claimant did not prove he was entitled to temporary total disability compensation. Finally, the Full Commission finds that the claimant proved he was entitled to a 2% permanent partial impairment rating as a result of the claimant's January 7, 2004 compensable injury.

The Full Commission therefore reverses in part and affirms as modified in part the opinion of the administrative law judge. For prevailing in part on appeal,

the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority opinion. Specifically, I concur with the portion of the Majority's decision finding that the claimant sustained a compensable injury on January 7, 2004 and awarding him associated medical treatment. However, I must respectfully dissent from the portion of the decision finding that the claimant did not sustain a compensable injury on August 6, 2003, denying temporary total disability benefits, and finding that he is only entitled to a 2% impairment rating.

After a de novo review of the record, I find that the claimant sustained compensable injuries in August 2003 and January 2004. I further find that the claimant should be awarded medical benefits and temporary total disability benefits associated with those injuries. Additionally, the claimant should have been awarded an 11% impairment rating for his 2004 surgery. Finally, I find that the provisions of §11-9-807 do not preclude the claimant from receiving temporary total disability benefits for the time period in question.

The claimant worked as a coach and teacher for the respondents. The claimant testified that at the time he sustained his injuries he was an assistant football coach, junior high and high school and head baseball coach. The claimant testified that he had a history of lifting weights and that in 1993 and 1996 he briefly sought treatment with a chiropractor after straining his back. He testified that on both occasions he sought treatment for a short period of time but then his symptoms resolved. The claimant said that he also received chiropractic treatment in order to treat his headaches. The claimant said that prior to the injuries

in question his back was strong and that he was able to perform physical labor without difficulty.

The claimant testified that in August 2003 he injured his back while laying sod for the respondents. The claimant testified that the work required a great deal of bending, twisting and stooping, and that he was exhausted and sore when he returned home each day. The claimant indicated that at first he was sore all over but that after the second or third day, the soreness was more centrally located in his back. The claimant relayed that one day after work, he was walking in the kitchen when his knee gave way. The claimant did not attribute his back pain to laying sod. Rather, he believed his soreness was nothing unusual because he always experienced some soreness at the beginning of each school year as a result of his increased physical activity. He said that he attempted to work through the soreness, believing that it would resolve.

The claimant also decided to use a home weight bench in an effort to work through his soreness. However, when he attempted to use the bench for the first time, he realized his laying sod had resulted in a back injury. The claimant testified that he attempted to perform a squat, but

that he immediately knew he had been injured. The claimant testified,

And the day that I was going to do my leg workout, I was going to do a squat. I decided that since we were in season, I was going to do light weight and high rep and try to work some of the soreness out.

Q. Out of what?

A. Out of my back. And the first squat that I attempted, I - - I didn't even get a full squat done, and I realized there was an injury. I mean, it wasn't just soreness; that there had to be an injury there, you know.

Q. Already or did you do something new?

A. There was something already there. I didn't - - I didn't - - wasn't even able to do a full squat, so I just put the bar up and it was after that point, that I just decided I - - I probably need to go to a chiropractor. I just thought I needed an adjustment, you know.

The claimant testified that he sought treatment with his chiropractor and relayed that he had injured himself while laying sod. The claimant further indicated that he decided to work through the football season and that he planned to see if his problem was more serious if the condition did not resolve by basketball season. The medical record from the claimant's visit with his chiropractor is

dated August 28, 2003, and indicates that the claimant's injury developed after, "laying sod on football field."

The claimant's chiropractor eventually referred him to see Dr. Raben. On November 10, 2003, the claimant was treated by Dr. Raben for the first time. The claimant complained of low back pain, right hip pain, and right leg pain. The medical report from that date indicates, "This 30 year old presents to me today with these complaints beginning some 3 months ago. He injured himself doing squats." The claimant was referred for an MRI. On November 17, 2003, Dr. Raben opined that the MRI revealed a, "very large disc herniation at L5/S1 on the right."

On December 3, 2003, Dr. Raben gave the claimant an epidural steroid injection and performed a, "Decompressive hemilaminotomy of L5-S1 with discectomy and exploration of respective nerve roots and neural foraminotomy." On December 16, 2003, Dr. Raben treated the claimant, indicating that his last date of work was December 2, 2003. He further indicated that the claimant was able to sit for five minutes, stand for 15 minutes, and walk for 20 minutes. He also placed the claimant on Neurontin and referred him

for physical therapy. Finally, he indicated that the claimant would be seen for a "final visit in 4-6 weeks."

The claimant testified that around January 6 or 7, 2004, he was seen by Dr. Raben and was released to return to work. He indicated that school also began on January 6 or 7. On or around January 6 or 7, 2004, he returned to work and was showing the baseball team pitching drills. During a slow-motion simulation of a pitch, the claimant felt his back pop. He indicated, "And in the last part of the step on the follow through, I just stepped down off the mound. That's when I felt the pop and, at that point, I grabbed my back and walked off the mound and told the boys that it was time to go home."

On January 13, 2004, the claimant returned for treatment due to back pain. Dr. Raben diagnosed the claimant with a re-herniated disc and ordered another MRI. On January 16, 2004, Dr. Raben indicated that the claimant's MRI showed a, "recurrent disc herniation at L5/S1. On February 4, 2004, Dr. Raben performed surgery on the claimant, which consisted of a fusion to level L5/S1. The claimant continued to receive treatment for his back after the surgery. On July 19, 2004, Dr. Raben treated the

claimant, noting he claimant was not undergoing physical therapy or chiropractic treatment. He further noted that the claimant was instructed he could gradually begin to lift weights and that he instructed the claimant to return in three months.

On September 17, 2004, Dr. Raben drafted a letter, providing that the claimant had sustained an impairment rating of 10 to 12%. He further opined that the claimant had no further need for medical or vocational rehabilitation. On October 18, 2005, Dr. Raben assessed the claimant with an 11% impairment rating to the spine for a two level fusion with, "no residual".

John Goodman, who was the football coach at the time of the injury testified that he recalled laying sod in August 2003. He testified regarding the demands of laying the sod indicating,

They were tough. I mean it was hard work. I mean, I was out of shape. I ain't going to lie. I mean, I'm you know, Doug will tell you about it, but it probably would have been easier on a healthy man. But - - but it was hard. I mean, it was - - it was good, physical labor and - - and - - and - - but it - - it was demanding. I mean, it was - - it was - - it was tough.

Goodman further testified that the work required lifting sod and bending over to lay it. He described that it would have to be centered and someone would jump on the sod. Goodman further indicated that he was irritated with the claimant after the first day of laying sod because he was only lifting small pieces of sod. He also said that on the second day of laying the sod the claimant worked much slower and had on what appeared to be a back brace.

Doug Scheel, Athletic Director and Head Football Coach, testified that during the Fall of 2003 he was aware the claimant was having back problems because he had covered the claimant's classrooms for him. He indicated that he did not remember the claimant relating his injury to laying sod. He also testified that he was the claimant's supervisor and that he felt that claimant was truthful and was a "good man." He said, "At best - - every - - every dealing I've had with Berry, he's been truthful." Finally, Scheel testified that he did recall that the claimant had laid sod at the start of the school year. He testified that it was not heavy work but that it was demanding. He testified as follows,

To me, it was not heavy work. It was very demanding work. It was - - it was

repetitious and - - and it was very hot and, you know, we were doing that after practice and before practices and it was a long day. It was a long day.

Q. Did anybody complain about it being hard or strenuous or getting sore?

A. Oh, yeah. We had - - we had coaches laying down in the shade and - - and taking water breaks and - - and - -yes. That was - - you know, the - - like its been stated earlier, it was very physical work.

After reviewing the record, I find that the claimant sustained a compensable injury to his back in August 2003 and that the injury was directly related to his performance of job duties in the form of laying sod.

The Majority opines that the claimant cannot show that his injury occurred as the result of a specific incident or that it occurred during the course and scope of employment. In making these assertions, they argue that the claimant suffered from a pre-existing condition rather than a, "specific incident identifiable by time or place."

I first find that the claimant did, in fact, suffer from an injury due to a, "specific incident identifiable by time or place." In my opinion, the claimant credibly testified that his injury was due to laying sod. The claimant was able to recall exactly when he was laying

sod and this testimony was corroborated. Additionally, the evidence is clear that this work was strenuous in nature and that it was not within the usual parameters of the claimant's work. Though the claimant did not realize the extent of his injury, it is apparent that almost immediately after he began laying sod, he believed that he had at least strained his back. I note in particular that one witness testified the claimant was wearing a back brace after the first day of laying sod. Likewise, when the claimant initially sought treatment he reported that his injury was due to laying sod, indicating that the injury occurred as a direct result of that particular event.

In my opinion, the Majority's assertion that the claimant suffered from a pre-existing condition is unpersuasive. The claimant admits that he had previously suffered from pre-existing injuries to his back. Specifically, the claimant admitted that he had sustained a sprain in 1993 and then again in 1996. The claimant testified that he sustained both injuries while lifting weights and indicated that he received a short period of treatment and then was able to resume working without difficulty. Likewise, the claimant admitted he received

chiropractic treatment for headaches before August of 2003 and that he made complaints of chronic back pain after his injury in August 2003.

Despite the claimant having suffered sprains in the past, the medical records from treatment for those injuries were not included in the record. Likewise, there is no evidence that he had ever sustained a condition other than a sprain prior to August 2003. In contrast, in November 2003, shortly after the alleged incident, the claimant underwent an MRI and a large herniated disc was identified. Accordingly, I find that the claimant did, in fact, sustain a new injury to his back in August 2003.

Likewise, I find that this injury was likely sustained on or around August 6, 2003, and was due to laying sod for the employer rather than due to lifting weights at home. The claimant initially sought treatment for his back on August 28, 2003, from his chiropractor, Wayne F. Priest. The doctor's note from that date indicates, "Patient's diff. has evolved since laying sod on football field." In my opinion, this corroborates the claimant's testimony that the claimant sustained his injury while laying sod and that he

realized that he was injured when he attempted to perform a "squat".

I note that the medical records occurring after that time gave varying reports indicating that the claimant attributed his injury to performing squats at home or due to having a "chronic" back problem. However, in my opinion, the claimant's initial report to the physician is entitled to more weight as it occurred more contemporaneously with his accident. Likewise, I find that the claimant's later reports that his injury was sustained while performing a "squat" at home, were not conclusive of that being the reason for his injury. Instead, they simply show that the claimant relayed the moment that he first realized his injury was more serious than a temporary strain.

Additionally, I find that the claimant's testimony that he told Dr. Raben that he thought the injury might be a continuation of his 1993 injury due to performing squats and that the injury started bothering him in August, "after we started laying sod, and we were doing a lot of squatting and bending and twisting and turning and so forth," to be convincing. It also illustrates that the claimant was forthcoming regarding his medical history. Dr. Raben's

notes indicate that he believed the claimant's injury occurred while weight training with his team and he specifically testified that he concluded the claimant sustained the injury while training his team and performing squats. Dr. Raben went on to say that his conclusions that the claimant sustained the injury while training his team were merely assumptions on his part. Accordingly, since Dr. Raben's reports, by his own admission, included incorrect suppositions on his part, I find that they are entitled to little weight with regard to what the claimant reported with regard to how his injury occurred.

I note the Majority's argument that because the claimant failed to report his injury as work-related, and because he used his own insurance, he did not sustain the injury at work. I reject this argument and find instead that the claimant should not be precluded because of his mistaken belief as to how the injury occurred or when he would have a viable workers' compensation claim.

Additionally, I find the testimony of the claimant's coworker, John Goodman, to be very compelling. Goodman testified that on the second day of laying sod, the claimant showed up with a back brace and was unable to

perform heavy lifting or work as hard as he had the prior day. This is entirely consistent with the claimant's testimony regarding the chronology of the event.

Furthermore, I note that Goodman and Scheel both testified that laying the sod was hard work, lending more credence to the claimant's account of how the injury occurred.

Specifically, Scheel testified that the couches were laying in the shade and that they had complained about the work being strenuous and making them sore. Finally, I note that Scheel, who was responsible for supervising the claimant, testified that he believed the claimant to be a "good man" and to be a truthful person. Accordingly, I find that the claimant has shown by a preponderance of the evidence that he sustained a compensable injury in August 2003 and that he is entitled to medical treatment for that injury.

I also find that the portion of the decision awarding the claimant an 11% impairment rating should have been affirmed. On October 18, 2005, Dr. Raben specifically opined that the claimant was assigned an 11% impairment rating based on his fusion surgery performed in February 2004. There is no evidence that Dr. Raben considered the claimant's first surgery when he assigned the impairment

rating; rather he specifically indicated the rating was because of the fusion performed in 2004. Furthermore, as the claimant had not reached the end of his healing period for the first injury and Dr. Raben asserted that the injury necessitating that surgery was new, I find the claimant is entitled to the 11% impairment rating as previously awarded.

The final issue to be addressed is the claimant's entitlement to temporary and total disability benefits. There appears to be no dispute that the claimant remained in his healing period and that he was unable to work during the time period of December 3, 2003, to March 22, 2004, thus satisfying the requisites for entitlement to receive temporary total disability benefits. However, the Majority finds that pursuant to Ark. Code Ann. §11-9-807, the claimant was precluded from receiving temporary total disability benefits because he continued to receive his full salary.

Arkansas Code Annotated §11-9-807 provides,

(a) If the employer has made advance payments for compensation, the employer shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(b) If the injured employee receives full wages during disability, he or she

shall not be entitled to compensation during the period.

Arkansas Code Annotated §11-9-102 (19) defines wages as follows,

"Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer and includes the amount of tips required to be reported by the employer pursuant to §6053 of the Internal Revenue Code of 1954 and the regulations promulgated pursuant thereto or to the amount of actual tips reported, whichever amount is greater;

When strictly construing the language of the aforementioned statutes, I find that sick pay does not constitute "wages". Rather, I find that the claimant's sick leave and resultant pay was simply a "fringe benefit" and not pay in return for services rendered as provided for by Ark. Code Ann. §11-9-102 (19). Accordingly, I find that the claimant should not have been precluded from receiving temporary total disability benefits for the time period in question.

To my knowledge the Arkansas Court of Appeals has have never considered the application of whether sick pay

precludes a worker from receiving benefits pursuant to Ark. Code Ann. §11-9-807(b). However, they have repeatedly considered the issue of whether sick pay or vacation pay constitute wages for purposes of determining if the employer is entitled to an offset pursuant to Ark. Code Ann. §11-9-807(a). As the provisions of §11-9-807(a) and §11-9-807 (b) are designed to work in conjunction with one another, I find that the rationale used by the Courts regarding the application of wages in regard to offsets to be applicable. Furthermore, to use a different definition of "wages" in the two statutes would be contradictory.

The Arkansas Supreme Court has indicated that when payments made to a claimant are gratuitous in nature rather than for advance payment of compensation, the employer is not entitled to reimbursement. Looney v. Sears Roebuck, 236 Ark. 868, 371 S.W. 2d 6 (1963). Likewise, in Southwestern Bell Telephone Company v. Siegler, 240 Ark. 132, 398 S.W.2d 531 (1966), the Court found that payments made to a claimant equaling their regular wages in accordance with an employer maintained disability plan were, "benefits" and not advance payments of compensation and denied the respondents an offset. In Siegler, the Court indicated that the money

received by the claimant could have either constituted wages, gratuities, benefits, or advance payments of compensation. They went on to express reliance on the case of Looney, See, supra and indicated that unless the company could clearly establish the monies paid to the claimant were tantamount to an advance payment for compensation, then the employee would be entitled to recover for disability. Id. See also, Varnell v. Union Carbide, 29 Ark. App. 185 (1985), (denying the respondents a setoff when the claimant was paid benefits pursuant to an employer disability policy for an injury deemed to be "non-occupational" by the employer).

Furthermore, the Commission has found that sick pay and vacation pay are not "wages". I note in particular the case of Norman v. North Hills Service, Inc., Claim No. F408828 (Full Commission Opinion filed November 21, 2005). In Norman, the claimant was injured while working and was given sick pay and vacation pay. The respondents argued they were entitled to an offset pursuant to the provisions of Ark. Code Ann. §11-9-411 or Ark. Code Ann. §11-9-807. The Commission rejected the argument and opined that the respondents had not shown their payments were "advance

compensation for compensation" or "wages". Specifically, the Commission opined as follows,

In the present case, the claimant testified that she was receiving money from her employer in the form of "banked leave" which was a form of sick leave or vacation pay which she had accumulated during her time while employed with the respondent employer. Since these were clearly not group disability insurance payments, the respondent is only entitled to a credit or offset of these payments if they can establish that it was an advanced payment of compensation or wages pursuant to Ark. Code Ann. § 11-9-807. Under the holdings of Varnell and Siegler, as cited above, the respondent has clearly not met their burden of establishing their entitlement to the credit. In the first place, the claimant's testimony was that the payment she received was for leave time which she had accumulated. They clearly were not wages nor were they intended to be wages at the time she received them. Additionally, the respondent has not offered any evidence that, at the time the claimant received the benefits, they were intended to be advanced payments of compensation. In fact, such a proposition would be impossible to prove since the respondent had controverted the claimant's entitlement to any benefits at that time. (Emphasis added).

In the present case the claimant testified that he had used over 50 days of his own sick leave, and then had received leave from a "sick bank" before returning to work. Though the claimant received monies equivalent to his

regular salary during that time, a strict interpretation of §11-9-102 (19) dictates that the claimant's payment needed to be in return for services rendered in order to constitute wages. It is clear that is not what occurred in this instance because the claimant was unable to work or to perform services. Rather, he continued to receive pay in accordance with the employers' benefits program. The claimant also received days from a "sick bank", and while the details regarding the program are unclear, it appears that the receipt of these days was gratuitous. Accordingly, I find that the claimant should not be precluded from receiving temporary total disability benefits pursuant to Ark. Code Ann. §11-9-807(b) and that the claimant should have been awarded benefits for the time period of December 3, 2003 to March 22, 2004.

For the aforementioned reasons, I respectfully concur in part and dissent in part.

SHELBY W. TURNER, Commissioner