

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610582

RASTUS JAMES,  
EMPLOYEE

CLAIMANT

BEKAERT CORP,  
EMPLOYER

RESPONDENT

TRAVELERS INDEMNITY COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 15, 2008

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

Claimant represented by the HONORABLE KENNETH S. HIXSON,  
Attorney at Law, Fayetteville, Arkansas.

Respondent represented by the HONORABLE PHILLIP CUFFMAN,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed July 17, 2007. The administrative law judge  
found that the claimant proved he sustained a compensable  
injury. The administrative law judge found that the  
claimant proved he was entitled to reasonably necessary  
medical treatment and temporary total disability benefits.

After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion.

I. HISTORY

The testimony of Rastus Charles James, age 50, indicated that his employment history involved primarily factory-type work with some manual labor. Mr. James testified that he began working for Bekaert in 1993. The claimant testified that he first worked in the galvanizing department, transferring wire along industrial spools. The job was physically demanding. The claimant testified that he was "constantly pulling wires." After about two years, the claimant became a "take-up man." This work involved laying wire on 45-pound, six-foot tall carriers known as "spiders." The claimant testified that he advanced to the "middle man" position after approximately three years. The middle man position also required manual labor.

The claimant sought treatment at Parham & Sills Family Medicine on July 22, 1999. A progress note indicated that the claimant had suffered from lower back pain for several months. The note indicated that the claimant worked at Bekaert with "lots of pulling in job. Sedentary except for work." Dr. David Bart Sills' assessment included lower back

pain and fatigue. Dr. Sills noted on July 28, 1999 that the claimant's back was better but that the claimant had not worked that week.

The claimant testified that he became a "gaucho operator" for the respondent-employer, which position required running a machine that made barbed wire. The claimant testified that this position placed stress on his back. The claimant also worked as a field fence operator and tight-lock operator. The claimant testified that these positions required pulling, lifting, and bending. The claimant testified that he felt pain in his back from 1999 until 2003, but "I knew I couldn't take off work, you know. I had a family to support. But the pain was there, and I just kind of ignored it and went on."

The claimant sought medical treatment on October 29, 2003 and reported pain for two days after lifting a lawnmower. The record indicates that Dr. Parham assessed low back strain.

On March 28, 2005, the claimant reported right leg shooting pain which had begun five days earlier after "bending over working on brakes car." Dr. Sills assessed

lumbar radiculopathy with lower back pain. The claimant testified that he did not work after March 28, 2005.

The claimant followed up with Dr. Sills for lower back pain on March 31, 2005. A CT scan of the claimant's lumbar spine was taken on March 30, 2005 with the following impression: "1. Broad based annular bulge at the L5-S1 level slightly eccentric to the patient's right side in combination with hypertrophy of the ligamentum flavum causing moderate spondylosis."

The record indicates that the claimant completed and signed a Weekly Disability Benefits Initial Statement of Claim on April 4, 2005. The claimant indicated on the Statement that he was not receiving or eligible to receive worker's compensation as a result of his disability. Part III of the Initial Statement of Claim was an Attending Physician's Statement. Dr. D. B. Sills indicated that the claimant's condition was not due to an injury or sickness arising from the claimant's employment. Dr. Sills indicated that the claimant was unable to work from March 29, 2005 to April 12, 2005.

The claimant testified with regard to his application for weekly disability benefits, "All I know is just, you know, going to get me some money while I was off."

An MRI of the lumbar spine on April 8, 2005 showed the following: "1. Central and right posterolateral disc herniation at L5-S1." Dr. Sills examined the claimant on April 12, 2005 and assessed "HNP lower back." Dr. Sills planned "No work until released by neurosurgery."

Dr. J. Michael Standefer examined the claimant on June 21, 2005 and noted that the claimant had suffered problems with low back pain and associated pain in the right lower extremity for about one year. Dr. Standefer noted that an MR scan demonstrated "a focal lumbar disc protrusion with lateralization to the right....Overall, his history and exam are consistent with a right S1 radiculopathy secondary to what appears to be a MR proven L5 disc protrusion with lateralization to the right....consideration for surgical intervention in the form of a right L5-S1 hemilaminotomy with L5 discectomy on the right side should provide the patient with a good chance for relief of his pain."

Dr. Standefer performed a right L5-S1 hemilaminotomy and L5 discectomy on October 26, 2005. Dr. Standefer noted

on December 7, 2005, "Overall, he feels improved, but he continues to note focal back pain and intermittent lower extremity pain. If he increases his activity level, his pain worsens." The claimant informed a physical therapist on December 13, 2005 that the claimant's right leg pain was resolving since surgery.

The claimant followed up with Dr. Standefer on January 17, 2006:

In the interim since previous clinic visit, he has attended physical therapy. He thinks he may be a bit improved, but overall, he does have residual back pain and intermittent lower extremity pain. I have advised him to continue with his physical therapy. Long term, he needs to pursue a walking program and exercise program to provide him with his best chance for relief of his symptoms. We are going to release him from clinic as of today. I have advised him to use caution with lifting and bending. Ideally, he should lift no more than 40-50 lbs. and only then on an occasional basis. He should pursue a walking program and exercise program. He is in the process of applying for disability, and hopefully, manipulation of his job environment in concert with a walking program, exercise program and judicious use of anti-inflammatory medication will provide him with a good chance for relief of his pain.

The claimant followed up with Dr. Sills on March 2, 2006. Dr. Sills assessed depression and "2° back disability." Dr. Sills noted after an August 25, 2006 followup visit, "I feel he has continued inability to do his

job. His back pain gradually developed over a number of months - years of doing his job. He is unable to continue in the type of work which requires bending, squatting, lifting or pulling....This problem is >50% previous work related."

A pre-hearing order was filed on January 29, 2007. The claimant contended that he had suffered a gradual-onset back injury which ultimately led to surgery. The claimant contended that he was entitled to temporary total disability benefits from March 28, 2005 through a date yet to be determined; medical expenses; and a controverted attorney's fee. The respondents contended that the claimant did not suffer a compensable injury. The respondents contended that the claim was barred by the statute of limitations "in that the claimant describes an onset date of 1999 for his back complaints."

Dr. Sills wrote to the claimant's attorney on February 26, 2007:

I am the treating physician for Rastus Charles James. From reviewing my records and discussing Mr. James' job duties with him, I offer the following opinions to a reasonable degree of medical certainty regarding his back injury and medical condition.

1. That Mr. James' injury arose out of and in the course of his employment with Bekaert Steel;

2. That the injury caused to Mr. James is in the form of central and right posterolateral disc herniation at L5-S1;
3. That the injury was the major cause (>50%) of Mr. James' treatment and surgery on October 26, 2005; and
4. The major cause (>50%) of his injury was the job he performed at Bekaert Steel.

A hearing was held on May 24, 2007. The claimant testified that his back pain following surgery was "About the same, really, because I can't - you know, like I say, I got a ten-month old granddaughter, and she's pretty healthy, and I can't pick her up." The claimant testified that his leg occasionally went numb.

The administrative law judge found, among other things, that the claimant proved he sustained a compensable injury. The ALJ found that the claimant proved he was entitled to reasonably necessary medical treatment and temporary total disability benefits. The respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Compensability

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

- (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). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). The employee's 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) (ii). "Major cause" means more than fifty percent (50%) of the cause, and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14).

In the present matter, an administrative law judge found that the claimant proved he sustained a compensable gradual-onset low back injury. The Full Commission affirms this finding. The claimant began performing strenuous physical labor for the respondent-employer in 1993. The claimant sought treatment for his back in 1999 and

attributed his symptoms to his work. The claimant did not work after March 2005. (The respondents initially raised the statute of limitations as a defense but they have abandoned this argument on appeal. See, *Long v. Wal-Mart Stores*, CA06-401 (Ark. App. 2-21-07)).

We recognize that the claimant's initial claim for short-term disability, filed in April 2005, seemed to indicate that the claimant's symptoms were not related to his work. Dr. Sills indicated on the form that the claimant's condition was not due to an "injury" arising from the claimant's employment. Yet the claimant testified that he did not know he could file a claim for a gradual-onset injury. By March 2002, Dr. Sills had revised his opinion and expressly indicated that the major cause of the claimant's need for surgery was a workplace (gradual) injury.

Pursuant to the relevant provisions of Act 796 of 1993, the Full Commission finds that the claimant proved he sustained an injury causing physical harm to the body arising out of and in the course of the claimant's employment. The compensable injury was a back injury which was not caused by a specific incident and was not

identifiable by time and place of occurrence. The claimant established a compensable injury by medical evidence supported by objective findings, which objective findings included the lumbar disc protrusion noted by Dr. Standefer. The claimant proved that the compensable injury was the major cause of his disability and need for treatment. The decision of the administrative law judge is affirmed.

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). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12). Whether or not a claimant's healing period has ended is a question of fact for the Commission. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

In the present matter, the Full Commission finds that the claimant proved he was entitled to temporary total disability compensation beginning March 28, 2005 until January 17, 2006. We have determined *ante* that the claimant proved he sustained a compensable injury to his low back.

The claimant testified that he did not work for the respondents after March 28, 2005. Dr. Standefer performed surgery in October 2005. Dr. Standefer noted on January 17, 2006 that the claimant had residual back pain. However, Dr. Standefer released the claimant as of that date and assigned permanent work restrictions. The evidence does not demonstrate that the claimant continued within a healing period for his compensable injury after January 17, 2006. Temporary total disability benefits cannot be awarded after a claimant's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant proved he sustained a compensable injury. We affirm the administrative law judge's finding that the claimant proved he was entitled to reasonably necessary medical treatment; said treatment includes surgery performed by Dr. Standefer. The claimant proved he was entitled to temporary total disability compensation beginning March 28, 2005 until January 17, 2006. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For

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

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable gradual onset back injury while working for the respondent employer. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The medical evidence demonstrates that the claimant first sought treatment for back pain on July

22, 1999. The claimant sought treatment from his family physician, Dr. D.B. Sills. The claimant told Dr. Sills that he was not sure what caused the pain and he gave no history of an injury. Dr. Sills took the claimant off of work for a week. The claimant returned to work after a week.

The claimant again sought medical treatment from Dr. Sills for his back on October 29, 2003. The claimant told Dr. Sills in the four years between this visit and the July 22, 1999, visit, he continued to suffer from back pain. Dr. Sills' notes from that date indicate that the claimant had lifted a lawnmower two days prior to his visit. The claimant was questioned regarding that note but could not recall a lawnmower lifting incident. He stated at the hearing that it would not surprise him if he had picked up a lawnmower.

The claimant did not seek medical attention for his back again until March 28, 2005. The claimant again sought treatment from Dr. Sills. Dr. Sills noted that the claimant was bending over working on the brakes of his car. Upon questioning, the claimant alleged that he did not do any of the work but merely handed his

friend, Mr. Luther Nelson, tools and Mr. Nelson did the actual work. He did finally admit that he was "....bending over, watching my friend work on the brakes....."

The claimant was ultimately referred by Dr. Sills to Dr. Michael Standefer. The claimant was diagnosed with a herniated disc at L5-S1. Dr. Standefer treated the claimant conservatively with therapy and injections. The claimant ultimately had surgery in October, 2005. The claimant has been released from Dr. Standefer's care but he has not looked for any type of work.

The claimant went to Ms. Laura Wald, human resource assistant for the respondent employer, to discuss getting some money while he was off work. Ms. Wald testified that the claimant never indicated to her that his problem was work related. If he had told her it was work related, she would have filed a workers' compensation claim. Instead, the claimant applied for and received both short term and long term disability benefits. Ms. Wald prepared the employer portion of the disability paperwork and the claimant completed the

employee portion. The form asked the question is the injury occurred at work and neither yes nor no is checked. Further, Dr. Sills completed the treating physician portion of that paperwork and checked no to the question "Is condition due to injury or sickness arising from patient's employment." The claimant testified that he did not know about gradual onset injuries until he spoke with his attorney in 2006.

In my opinion, a review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset back injury. The medical evidence clearly shows that the claimant first sought treatment for back pain in 1999. Almost four years later, he seeks treatment again and tells Dr. Sills that he was lifting a lawnmower. The claimant goes another two years without seeking treatment. On March 28, 2005, the claimant again seeks treatment from Dr. Sills and told him he was bending over his car working on brakes. The claimant did not attribute any of those back problems to his work. The only references in the claimant's medical records to back pain specifically

indicate that the pain was caused by non work related incidents. Furthermore, the claimant's disability questionnaire asked if the claimants problems were due to a work injury and the claimant left this section blank. Moreover, Dr. Sills completed a section of the questionnaire as the claimant's treating physician and he indicated that the claimant's injuries were not work related.

Therefore, after considering all of the evidence in the record, I find that the claimant has failed to meet his burden of proof. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner