

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F700109

JIMMY RAY BAXTER, EMPLOYEE	CLAIMANT
RAY BAXTER, P.A., EMPLOYER	RESPONDENT NO. 1
UNION INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 17, 2011

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

Claimant represented by the HONORABLE STEPHEN L. TISDALE,
Attorney at Law, Eudora, Arkansas.

Respondents No. 1 represented by the HONORABLE WILLIAM C.
FRYE, Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID B.
SIMMONS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed December 10, 2010. The administrative law
judge found that the claimant failed to prove he sustained a
compensable injury. After reviewing the entire record *de*
novo, the Full Commission reverses the administrative law

judge's opinion. The Full Commission finds that the claimant proved he sustained a compensable injury on July 17, 2006. We find that the claimant proved statutory notice on or about the date of injury. The claimant proved that the treatment of record provided from the date of the July 17, 2006 compensable injury until May 5, 2008 was reasonably necessary.

I. HISTORY

Jimmy Ray Baxter, now age 58, testified that he first sustained a ruptured disc in his back at age 16. Mr. Baxter testified that he became a practicing attorney in approximately May 1978. The record indicates that the claimant received medical treatment for his back beginning in August 1986: "Lumbar myelogram was done, he has asymmetrical nerve roots at the lumbosacral junction. CT scan reveals a L5-S1 disc on the left....he has elected to go ahead with surgery tomorrow." The claimant agreed on cross-examination that he underwent a laminectomy at L5-S1.

Dr. Richard D. Peek performed a "revision and laminotomy and foraminal decompression" in June 1993. Dr. Peek performed another operation in December 1993: "1) L5-S1 posterior lateral spinal fusion with exploration left

previous laminotomy. 2) Left iliac crest bone graft." Dr. Thomas M. Hart performed a "placement of intrathecal infusion pump" in December 1995.

The claimant saw Dr. Peek in May 1996: "He reports he was involved in an MVA and injured his cervical spine....Review of cervical films from May 11, 1996, reveals a spinous process fracture of C7." Dr. Robert S. Weinstein informed Dr. Peek in January 1998, "he has chronic low back pain and had a laminectomy at L5-S1 in 1986 with a revision in 1993, compression fractures of T10 and T11 in 1982, fracture of the left scapula in 1987 and 1990, fracture of the right rib in the late 1980's and a C-spine fracture in May 1996." Dr. Peek performed surgery in February 1998: "Anterior lumbar discectomy and interbody fusion at L4-5, laparoscopic approach." A physical therapist noted in December 1998, "Palpation indicates severe muscle spasms from the mid-thoracic spine into the lower lumbar spine."

Dr. Peek reported in September 1999, "Future medical care will include regular doctor visits and visits to pain centers. He will need to be treated with episodic epidurals and maintenance of his pain pump. He will require intermittent visits with a surgeon to be evaluated for the

stability of his spine. He does have permanent restrictions of bending, twisting, lifting, prolonged sitting and prolonged standing."

Dr. Peek performed surgery in February 2000: "S1 nerve root decompression, lysis of adhesions, placement of Adcon-L around the S1 nerve root." Dr. F. Richard Jordan operated on the claimant in August 2002: "Implantation of a thoracic epidural electrode via laminotomy and implantation of an epidural stimulator." Dr. Peek reported in March 2003:

I first began to treat Mr. Baxter on or about July 23, 1999, subsequent to the accident which occurred on June 24, 1999....
Because of the accident and injury, Mr. Baxter has had to undergo two surgical procedures and numerous outpatient procedures for pain control. It is my medical opinion that Mr. Baxter will continue to need pain control and medical procedures throughout his lifetime.
It is also my opinion, based upon a reasonable degree of medical probability, that Mr. Baxter's lower back problems were exacerbated to a great extent because of the accident which occurred on June 24, 1999, and past and future medical care mentioned above was the result of the motor vehicle accident mentioned above.

Dr. Peek examined the claimant in September 2003 and noted "Left lumbar L3 spasms." Dr. Peek performed surgery in November 2003: "Decompression, left L3-4 with placement of Duragen patch on the dura to repair CSF leak." Dr. Peek's diagnosis on April 6, 2004 was "1. Compression

fracture T10 and T11. 2. Kyphotic deformity." Dr. Peek performed a "Kyphoplasty." Dr. Peek performed surgery on the claimant in November 2005: "Decompression left L3/4." The post-operative diagnosis was "Spinal stenosis L3/4."

Dr. Thomas M. Ward noted in December 2005, "Ray comes in after having a fall this last week during work in Sheridan, Arkansas, at the courthouse. He slipped falling forward catching himself with his hands....On examination he has palpable spasms in his mid thoracic and upper thoracic spine."

The parties stipulated that "the employee/employer/carrier relationship existed at all relevant times, including July 17, 2006." The parties stipulated that the claimant was involved in a motor vehicle accident on July 17, 2006. The claimant testified that while driving to a client's home to perform legal services, "I heard the loudest screeching of tires and stuff that I've ever heard in my life, and I couldn't figure out where it was coming from. I turned like this to try to look over my shoulder and see what was back there, and about that time, I found out what it was because I got hit."

The claimant was treated at Saline Memorial Hospital on July 17, 2006, at which time the claimant complained of pain in his middle back, lower back, and left hip. A physician's clinical impression was contusion to the back and hip. X-rays were taken on July 17, 2006:

TWO VIEW LEFT HIP

FINDINGS: Two views were obtained. There are some arthritic changes present. No definite acute abnormality is seen. If symptoms are severe or persistent, then followup imaging studies should be performed.

THREE VIEW THORACIC SPINE

FINDINGS: Portions of apparent neurostimulatory devices are noted over the spine. The patient has undergone vertebroplasty procedures at the T10 and T11 levels. There is grossly normal vertebral body height and alignment throughout the thoracic spine and no acute abnormality is seen.

FIVE VIEW LUMBAR SPINE

FINDINGS: Portions of apparent pain pumps and/or neurostimulatory devices are noted. The patient is believed to have undergone fusion procedures at the L4-5 and L5-S1 levels. There is grossly normal vertebral body height and alignment throughout the lumbar spine. No acute abnormality is seen.

IMPRESSION:

**PAIN PUMP/NEUROSTIMULATORY DEVICES IN PLACE.
POSTOPERATIVE CHANGES IN THE LOWER LUMBAR SPINE
ARE NOTED. NO ACUTE ABNORMALITY IS IDENTIFIED.**

The claimant returned to Dr. Peek on July 18, 2006: "He was involved in a motor vehicle accident. He has had dramatic increase in his thoracic and left lumbar pain....AP

and lateral films thoracic and lumbar x-rays were obtained. No fracture or dislocation." Dr. Peek performed a trigger point injection and diagnosed "1. MVA with trauma to spine. 2. L3-4 left herniated nucleus pulposus. 3. Thoracic myofascial injury. 4. Left hip pain." Dr. Peek physically examined the claimant on July 18, 2006 and noted "spasms throughout the thoracic spine....Spasms severe throughout the thoracic and lumbar spine."

Dr. Peek reported on July 31, 2006:

Mr. Baxter had to be admitted to the hospital for severe spasms and pain in the thoracolumbar spine as well as lumbar spine with increasing straight-leg-raise pain. He required two days of steroids and IV Demerol. Diagnostic studies in the hospital revealed facet changes on the left side at L3-4 as a result of his injuries when he was rear-ended. He had severe spasms in the thoracolumbar spine. Bone scan revealed that he had rib injuries where attached to the spine. He had severe trauma....For further treatment, he was referred to Dr. Thomas Hart for diagnostic as well as therapeutic injections....

Dr. Peek informed the claimant on July 31, 2006, "Enclosed are the results of the bone scan. Luckily, the vertebral body is intact, but the reason you had all the thoracic pain is where the ribs, especially on the right side, were injured. If the facet rhizotomies do not give you relief, we can have Tom inject your rib head. With the

ribs, there is no surgery to perform. You kind of have to wear that out."

Dr. Hart performed an injection procedure on August 9, 2006. The claimant also began undergoing physical therapy on August 9, 2006. Dr. Peek performed a trigger point injection on August 18, 2006. The claimant also continued follow-up visits with Dr. Hart. Dr. Peek stated on October 19, 2006, "He has not really gotten over his motor vehicle accident. He has significant problems with the thoracic spine. The lumbosacral rhizotomies have been helpful. We will try a different brace and get Dr. Hart to evaluate him further. Topamax helped with the headaches and possibly can use the side effects of weight loss. We will see about getting rhizotomies at T9-10, T10-11 and T11-12. Rhizotomies of the L3-4 area have improved his pain." Dr. Peek diagnosed "1. Status post MVA with trauma to spine. 2. L3-4 left herniated nucleus pulposus. 3. Thoracic myofascial injury."

Dr. Peek noted on December 14, 2006, "Ray Baxter has developed a postlaminectomy syndrome at T9-10 with facet inflammation. This is the area where he had laminectomy to place a spinal cord stimulator. He has developed increased

activity involving the lower thoracic vertebrae, with positive bone scan in this region and also increased activity at the ribs from previous bone scan right after the motor vehicle accident. CT scan shows postlaminectomy changes."

The record contains a First Report Of Injury Or Illness indicating that an injury occurred on July 17, 2006. It was written on the First Report Of Injury, "clmt was on his way to work." The First Report indicated that the Date Administrator Notified was December 27, 2006. The respondents' attorney stated at hearing that "notice was filed and provided to us on December 27, '06. So as of that date, I think that notice defense would end." The claimant signed a Form AR-C, Claim For Compensation, on December 28, 2006. It was written on the Form AR-C that the date of accident was July 17, 2006: "Back and spine/auto accident."

Dr. Peek reported in part on January 8, 2007, "Mr. Baxter was involved in a motor vehicle accident. He had severe trauma of the thoracolumbar spine....He had trauma to the ribs in the T8 through T10 area and then developed increased activity in the junction above the prior fusion....He has laminectomy and postlaminectomy changes

around the facets at T10-11. Prior to the accident, he did not have any problems in this region. The injury to the thoracolumbar spine is requiring a fusion at this region...."

Dr. Peek reported on January 18, 2007:

Ray Baxter came in to see me on July 18, 2006, having been injured in an automobile collision the day before....When I saw him, he was suffering from complaints in his thoracic, lumbar and left hip areas and his left leg. Although I had seen Mr. Baxter many times in the past and was aware of the preexisting compression fractures at T10 and T11, he has never had muscle spasms in his thoracic spine this severe. In fact, the muscle spasms could not only be detected by physical examination but were evident visibly. The spasms were much more severe than we had encountered in the past. We admitted him to the hospital primarily to get his pain under control and for a CT scan and a bone scan.

The CT scan showed new irritation at the facets at L3-4. I elected to refer him to Dr. Thomas Hart for a nerve block at that level and to see if radiofrequency rhizotomies would be of benefit in treating the pain. The nerve block was successful, and Mr. Baxter did have the radiofrequency rhizotomies performed bilaterally by Dr. Hart. These were repeated when the nerves regenerated. At the present time, he is having left hip and left leg pain, but his chief complaint is the muscle spasms in his thoracic spine, which have continued to worsen and increase his pain level....

Since the accident of July 17, 2006, Mr. Baxter has been suffering from post-laminectomy syndrome at the T9-10 area. It is understandable that the

spasms are as intense as they are and the degree of pain, since these nerves have nothing to protect them. We have to stabilize the area.

Mr. Baxter and I both wish to avoid the use of metallic implants because of adjacent segment problems. We will use bone product to fuse the facet joints at the T9-10 area. He has been through a lumbar spinal fusion previously and is well aware of the various risks and benefits of this type of surgery. The fusion will help decrease the spasm and irritation in the other facets and decrease the inflammation of the thoracolumbar junction with increased stability. Kyphoplasty previously performed added anterior column support but nothing for the facet posteriorly. He does respond to facet blocks in the thoracolumbar junction, which also supports this as the cause of his pain.

There is no question that Mr. Baxter suffered an injury in the collision of July 17, 2006, which dramatically aggravated a preexisting condition, and, in fact, precipitated a new injury as well. This was all verified by the CT scans and bone scans which have been performed....

Dr. Peek performed surgery on January 19, 2007: "1. Posterior spinal fusion, T9-10. 2. Removal of spinal cord stimulator with laminectomy." The post-operative diagnosis was "1. Post laminectomy syndrome. 2. Post traumatic T9-10. 3. Retained spinal cord stimulator." The claimant testified regarding this surgery, "It reduced my thoracic pain significantly when he did that."

The claimant continued follow-up visits with Dr. Peek and Dr. Hart. Dr. Peek informed the claimant on April 17,

2007, "As I stated during your hospitalization and with review of bone scans and CT scans, the motor vehicle accident of 07/17/06 caused injury to your thoracic laminectomy site and caused you to have thoracic postlaminectomy syndrome that you never suffered from before the accident. This was a new injury. It is within reasonable medical certainty this was caused by the motor vehicle accident."

Dr. Peek performed a "Decompressive laminectomy revision, L3-4" on May 20, 2007. The post-operative diagnosis was "Spinal stenosis, L3-4." Dr. Peek performed an "Anterior lumbar interbody fusion" on June 13, 2007. The post-operative diagnosis was "Post-laminectomy syndrome with stenosis L3-4." The claimant testified, "He did that surgery and two days after the surgery I was feeling a lot better, you know, I was really feeling good, and I talked him into letting me loose and go home."

The parties deposed Dr. Peek on December 12, 2007. The claimant's attorney questioned Dr. Peek:

Q. Can you look at your notes and tell me when you saw Mr. Baxter after the July 17, '06 auto accident?

A. Yes. I saw him on July the 18th in my office, and he was in excruciating pain and spasms at left

L4, radiculopathy in his leg. He was in so much - he had these horrible spasms between his shoulder blades.

Q. Are you talking about muscle spasms?

A. Yes....He had these unbelievable spasms like ripples going up and down around the thoracolumbar junction, around the T9 region in the spine, and his rib cage was extremely tender....

Q. You told me about some of the objective findings, and you said you did some radiographic examinations and CT scans and that type of thing. What did those show?

A. They showed that he had a positive bone scan and had some rib fractures on the right around the area where he was injured. The CAT scan showed he had some fluid in his facet joints in the L3-4 region and showed that he had a previous laminectomy in the T9 region. It showed he had previous fusions at L4, L5 and cement in T10 and T11.

Q. What, specifically, Dr. Peek, can you tell us what the various tests, including the radiographic images, showed on Mr. Baxter that you thought were, you know, new injuries or aggravations to preexisting conditions?

A. Well, he had injured the joints around the L3-4 region in the accident, and he fractured the ribs at T9, T10. He injured where the ribs hook into the facet joints where he had a previous laminectomy and subsequently developed instabilities at both those regions of injury....

Q. And was all this, the rib fractures and the ligament problems that you're talking about, was that in your opinion caused by the automobile accident of July 17, 2006?

A. That's the - yes, that's the first time I had treated him for the T9 region....

Q. Do you believe that the auto accident of July 17, '06 was the major cause of the injuries present in Mr. Baxter and the reason that you performed surgery on January 19, 2007?

A. That's my opinion....

Q. And, again, is it your opinion, within a reasonable degree of medical certainty, that the major cause of Mr. Baxter's need for surgery and the resulting impairments that you've given us here today was the auto accident of July 17, 2006?

A. That's my opinion.

The claimant received emergency medical treatment on May 5, 2008: "Mid & lower back pain after being hit front passenger side by truck." It was noted that the claimant complained of "lumbar & thoracic pain." The respondents' attorney cross-examined the claimant:

Q. Then May 5th, 2008, you had another accident and you had lumbar and thoracic pain, didn't you?

A. Yeah....And it was straightened out with some medical treatment.

Q. Well, about \$70,000 worth of medical treatment.

A. Yeah. I was -

Q. All right. And you said or told me that the claim was somewhere between \$75,000 and \$100,000, and you settled for \$70,000, right?

A. Yeah. They didn't even pay me all my medical, but I didn't want to mess with them.

Q. Would you agree with me that after May 5th, 2008 that you were making a claim for whatever was going on with your lumbar and thoracic area against Fairway Lawns that had the accident with you?

A. Yeah, I made a claim against them.

Q. Okay. Would you agree with me, though, that all of your medical after May 5th, '08 you were claiming against them?

A. No, no, it wasn't.

Q. Okay, well, what medical were you not claiming against them if you were claiming 70 -

A. All right. I'll tell you exactly what I was claiming against them. Dr. Peek found that my fusion at L3-4 had come loose, the one that he did as a result of this other wreck, and he thought that that had come loose and that he needed to operate on me. At that time I had no medical insurance, and by the time I waited the length of time so I could have preexisting condition coverage and all that, by the time I got to the point where he could do something, it had already fused on its own and we didn't have to do that. I just waited it out, in other words.

Q. Okay. What I asked you, though, was what medical after May 5th, 2008 were you not claiming against Fairway Lawns and Cincinnati?

A. The only medical I claimed against them was Dr. Peek put me in the hospital twice. I claimed that. Dr. Hart, at Dr. Peek's suggestion, Dr. Hart did a double series of rhizotomies. And I say double series, he would do it on one side one day, wait two weeks and do the other side. And that's all the medical treatment I had, but that

amounted to \$75,000, and I did not include any prescription drugs.

Q. What medical are you claiming after May 5th, 2008 that's related to your motor vehicle accident?

A. None right now....Except what's in the packet is all.

The record indicates that the claimant saw Dr. Peek on May 13, 2008: "Mr. Baxter was involved in a motor vehicle accident one week prior, went to the emergency room, he was rear-ended. He pulled up and stopped and a long truck backed over him....Initially, he did not have as much pain and then went into severe pain, went to pain management who did some treatments on him." Dr. Peek's impression was "1. Recent motor vehicle accident. 2. Increased lower back pain."

The claimant was admitted to the hospital, and was discharged on May 15, 2008. Dr. Peek noted on or about May 15, 2008, "The patient was admitted to the hospital in excruciating pain, started on analgesic medication and steroids. He had an L3 radiculitis in the left leg, L3-4. Epidural was performed by Radiology. He had improvement in his symptoms, was able to be stabilized, independent with ambulation and a regular diet prior to discharge." The

Final Diagnosis was "Status post motor vehicle accident, trauma to lumbar spine, increased back pain."

Dr. Peek saw the claimant on June 9, 2008 and diagnosed the following: "1. Sciatica, left. 2. Status post decompressive laminectomy, L3-4. 3. Status post T9-10 posterior spinal fusion. 4. Status post removal of spinal cord stimulator. 5. New T6-7 Schmorl's node. 6. L3-4 stenosis. 7. Sacroiliac inflammation, left." Dr. Peek wrote on June 9, 2008, "Mr. Baxter is incapable of participating in any meetings until August 2008, due to extreme left sciatica and a recent motor vehicle accident."

The claimant saw Dr. Peek on August 4, 2008:

Mr. Baxter returns in followup, stating that his back feels worse. His left leg does feel better. He has thoracic and lumbar pain. Bedrest does help. He states that this past weekend was "bad." He has constant, aching, burning pain in his back which is worse. His pain is worse with standing and walking and better with using a hot tub and pain medication. He is not working....

He has had a hard time since the accident. Now, both sides, thoracic, are bothering him. His leg is better with a nerve root block, but he has thoracic and lumbar trigger points which we injected. We will continue to work on therapy. We will to (sic) hydromorphone and consult pain management, Dr. Hart, concerning therapies and use of his pump....

Dr. Peek's diagnosis on August 4, 2008 was "1. Sciatica, left. 2. Status post decompressive laminectomy, L3-4. 3. Status post T9-10 posterior spinal fusion. 4. Status post removal of spinal cord stimulator. 5. New T6-7 Schmorl's node. 6. L3-4 stenosis. 7. Sacroiliac inflammation, left."

An MRI of the claimant's lumbar spine was done on November 14, 2008:

COMPARISON: May 13, 2008.

HISTORY: Recent motor vehicle accident. The patient has multiple prior surgeries with low back pain which radiates into left leg....

IMPRESSION:

As compared to a prior study dated May 13, 2008 there is interval resolution of a seroma which had been present in the soft tissues overlying the spine at the L3-L4 level. There is evidence for a prior anterior interbody fusion at the L3-L4 and L4-L5 levels with mild retrolisthesis of L3 on L4 and bony osteophyte in formation with mild bilateral L3 foraminal narrowing. There is evidence for old vertebroplasty at the T11 level. There is also evidence for arachnoiditis.

The claimant followed up with Dr. Peek on November 14, 2008: "He has developed an L4 radiculopathy. We will need to decompress the L3 neuroforamina on the left. His greatest symptoms are from L3-4 with root impingement. We will need to do lysis of adhesions and supplement his

fusion. It should be noted that his back was doing fine until he was in a car accident which dislodged his fusion."

It was noted at Saline Memorial Hospital on December 3, 2008, "c/o lower back pain and L leg pain. States surgery in 2007. Accident May 2008. Needs to have further surgery."

It was noted at Saline Memorial on February 2, 2010, "Patient fell on a rock several days ago and has pain in his right shoulder and right ribs....Right rib detail films show displaced fractures involving T5, T6, and possibly T7." The claimant saw Dr. Peek on March 5, 2010:

Continues to have back problems. Injury at work 05/08/08. Thoracic and lumbar spine. Effects the left side of the back and buttocks. Went to the ER on 05/08/08. Has had back trouble since he was 16 but had a new injury with his last car wreck. Pain is moderate, dull, throbbing, constant with swelling. Pain is getting worse. Worse with standing, walking, bending, twisting. Dr. Hart has been doing radiofrequency rhizotomies. Had a recent fusion. It looks like it is incorporating on AP and lateral lumbar films....

DISCUSSION:

1. Continues to have ongoing problems with his back brought on most recently by his last trauma.
2. He did have some rib fractures since the last visit and has had increased thoracic pain. Need current MRI scan.
3. A trigger point injection was performed because the patient had enthesopathy of the thoracic and lumbar spine....This was of medical

necessity to decrease pain, aid with rehabilitation, and increase function.

A pre-hearing order was filed on July 28, 2010. The claimant contended that he sustained "a compensable spinal injury as a result of the July 17, 2006, motor vehicle accident." The claimant contended that the respondents "should be held responsible for all hospital, medical, and related expenses, including, but not limited to two surgeries that the claimant underwent following the accident." The claimant contended that he was entitled to temporary disability benefits and a controverted attorney's fee. The claimant reserved entitlement to permanent partial disability benefits.

The respondents contended, among other things, that the claimant "did not report the accident to Union Standard Insurance Company until December 26, 2006, when an AR-C was filed....The claimant has had long-standing thoracic and lumbar problems...."

The pre-hearing order indicated that "the primary issue to be presented for determination concerns compensability. If overcome, the claimant's entitlement to associated benefits must be addressed. The respondents have also raised a notice defense to the claim."

After a hearing, an administrative law judge filed an opinion on December 10, 2010. The administrative law judge found that the claimant failed to prove he sustained a compensable injury. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (Repl. 2002) provides:

(A) "Compensable injury" means:

(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[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D) (Repl. 2002). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i) (Repl. 2002).

The claimant has the burden of proving by a preponderance of the evidence that he sustained a compensable injury. Ark. Code Ann. §11-9-102(4) (E) (i) (Repl. 2002). Preponderance of the evidence means the evidence

having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

An administrative law judge found in the present matter, "3) The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable spinal injury as a result of a specific incident identifiable by time and place of occurrence on or about July 17, 2006. Specifically, the claimant has failed to prove by a preponderance of the evidence that his spinal injuries arose out of and in the course of employment."

The Full Commission does not affirm this finding. As we have noted, the parties stipulated that "the employee/employer/carrier relationship existed at all relevant times, including July 17, 2006." The parties also stipulated that the claimant was involved in a motor vehicle accident on July 17, 2006. The claimant testified that he was involved in a motor vehicle accident on July 17, 2006, while driving to a client's home to perform legal services. The claimant received emergency medical treatment on July 17, 2006, at which time the claimant complained of pain in his middle back, lower back, and left hip. Dr. Peek examined the claimant on July 18, 2006 and noted "spasms

throughout the thoracic spine....Spasms severe throughout the thoracic and lumbar spine." Dr. Peek averred in correspondence dated July 31, 2006 that the claimant had "severe spasms in the thoracolumbar spine. Bone scan revealed that he had rib injuries where attached to the spine."

It is well-settled that muscle spasms reported by a physician can constitute objective medical findings. *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (1999); *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002). The Full Commission recognizes that the claimant was first assessed with muscle spasms by a physical therapist no later than December 1998. Dr. Peek reported muscle spasms in the claimant's lumbar spine no later than September 2003. Nevertheless, after the July 17, 2006 motor vehicle accident, Dr. Peek stated on January 18, 2007, "he has never had muscle spasms in his thoracic spine this severe." Dr. Peek asserted at deposition, "He had these unbelievable spasms like ripples going up and down around the thoracolumbar junction, around the T9 region in the spine, and his rib cage was extremely tender."

The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on July 17, 2006. The claimant proved that he sustained an accidental injury causing physical harm to his middle back, thoracic spine, ribs, lower back, and lumbar spine. The claimant proved that the accidental injury arose out of and in the course of employment and required medical services. The injury was caused by a specific incident, identifiable by time and place of occurrence on July 17, 2006. The claimant established a compensable injury by medical evidence supported by objective findings, including the spasms in the claimant's thoracic and lumbar spine which Dr. Peek asserted were more severe than before the July 17, 2006 accidental injury. The claimant established a compensable injury to his ribs as demonstrated by the bone scan reported by Dr. Peek. The claimant proved that these objective medical findings were caused by the July 17, 2006 accidental injury rather than the claimant's pre-existing condition.

B. Notice of injury

Ark. Code Ann. §11-9-701(Repl. 2002) provides:

(a) (1) Unless an injury either renders the employee physically or mentally unable

to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury....

(b) (1) Failure to give the notice shall not bar any claim:

(A) If the employer had knowledge of the injury or death[.]

In the present matter, the respondents contend that the claimant did not report the July 17, 2006 accidental injury until December 27, 2006, when the claimant filed a First Report Of Injury Or Illness. The Full Commission notes that the respondent-employer in this case is Ray Baxter, P.A. Linda L. Hardin, a claims adjuster for the claimant's workers' compensation carrier, testified on direct examination:

Q. Back to July 17, 2006, did you get a call from Mr. Baxter to your office?

A. July what?

Q. July 17, 2006.

A. Is that the date the loss occurred?

Q. Yes.

A. I got a call on July 18th.

Q. Okay, and who was that from?

A. Mr. Baxter.

Q. And what was reported to you at that point?

A. That he had been involved in an automobile accident and was taken to the hospital, and just got the details of the accident and then I turned around and did what I do....

Q. Did you make any claim for workers' comp at that point?

A. I did not.

Q. And why is that?

A. I did not have information that it was a workers' comp claim....

The claimant's attorney cross-examined Ms. Hardin:

Q. Do you know the interworkings of Baxter, P.A.?

A. You mean what that business does?

Q. Yes, ma'am.

A. All I know is that it's a law firm. I do not know what they do within their business.

Q. But the law firm is Ray Baxter's law firm?

A. Correct....

Q. What I'm getting at is, if Mr. Baxter is the boss, he was also the employee, correct?

A. I would assume so.

Q. So if he was the one that was involved in the accident, obviously the employer knew of the accident if it involved himself, correct?

A. I would say so.

The record in the present matter demonstrates that the respondent-employer, Ray Baxter, P.A., had knowledge of the accidental injury immediately after its occurrence. Therefore, the Full Commission finds that the respondents are responsible for medical benefits beginning July 17, 2006.

C. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. Ark. Code Ann. §11-9-508(a) (Repl. 2002). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (2005).

In the present matter, the Full Commission has found that the claimant proved he sustained a compensable injury on July 17, 2006. The claimant proved by a preponderance of the evidence that the treatment of record beginning July 17, 2006, for the injuries to the claimant's thoracic spine,

middle back, lumbar spine, lower back, and ribs, was reasonably necessary in connection with the claimant's compensable injury. The claimant proved that the treatment of record provided by Dr. Peek and Dr. Hart on and after July 17, 2006 was reasonably necessary. The claimant testified that he benefitted from surgeries performed by Dr. Peek on January 19, 2007 and May 20, 2007. Post-surgical improvement is a relevant consideration in determining whether surgery was reasonably necessary. *Winslow v. D&B Mech. Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). The instant claimant proved that the surgeries performed by Dr. Peek on January 19, 2007 and May 20, 2007 were reasonably necessary.

D. Medical Treatment beginning May 5, 2008

When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury, and the basic test is whether there is a causal connection between the injury and the consequences of such. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002), citing *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001). A nonwork-related independent

intervening cause does not require negligence or recklessness, but if the claimant is engaged in unreasonable conduct, the result may be an independent intervening cause. *Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 20 S.W.3d 326 (2000); see Ark. Code Ann. §11-9-102(4)(F)(iii)(Repl. 2002).

In the present matter, the parties deposed Dr. Peek on December 12, 2007. Dr. Peek testified that the claimant had sustained a permanent anatomical impairment as a result of the January 19, 2007 surgery to the claimant's thoracic spine. Dr. Peek also testified that the claimant had sustained a permanent anatomical impairment as a result of the June 13, 2007 surgery to the claimant's lumbar spine. Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). The record therefore indicates that the claimant reached the end of the healing period for his July 17, 2006 compensable injuries no later than December 12, 2007.

The claimant was involved in another motor vehicle accident on May 5, 2008. Neither the claimant's testimony

nor the evidence of record demonstrates that the May 5, 2008 accident was related to the claimant's work for the respondent-employer. The claimant did not file a claim with his workers' compensation insurance carrier on or about May 5, 2008. Instead, the record indicates that the claimant filed a claim with United Health Care. Dr. Peek saw the claimant on May 13, 2008 and reported "increased back pain" as a result of the May 5, 2008 motor vehicle accident. Dr. Peek's diagnosis on June 9, 2008 included "sacroiliac inflammation," which condition had not been reported prior to May 5, 2008. Dr. Peek reported on August 4, 2008 that the claimant had "had a hard time since the accident" of May 5, 2008. Dr. Peek reported on November 14, 2008, "It should be noted that his back was doing fine until he was in a car accident which dislodged his fusion." The preponderance of evidence indicates that Dr. Peek was referring to the May 5, 2008 motor vehicle accident. It was noted at Saline Memorial on December 3, 2008, "Accident May 2008. Needs to have further surgery." The preponderance of evidence does not corroborate Dr. Peek's notation on March 5, 2010, "Injury at work 05/08/08." Dr. Peek in any event noted on

March 5, 2010, "1. Continues to have ongoing problems with his back brought on most recently by his last trauma."

The evidence before the Commission does not demonstrate that the claimant's need for medical treatment beginning May 5, 2008 was a natural consequence of the July 17, 2006 compensable injury or was causally connected to the July 17, 2006 compensable injury. The Full Commission therefore finds that the respondents are not liable for any medical treatment provided to the claimant on and after May 5, 2008.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained a compensable injury on July 17, 2006. We reverse the administrative law judge's finding that the claimant failed to prove he sustained a compensable injury. In accordance with Ark. Code Ann. §11-9-701, the Full Commission finds that the employer had knowledge of the compensable injury on or about July 17, 2006. The claimant proved that all of the medical treatment of record following the July 17, 2006 compensable injury, including surgery performed by Dr. Peek, was reasonably necessary. However, the claimant did not prove that any of the medical treatment provided beginning May 5, 2008 was a natural consequence or was causally

connected to the July 17, 2006 compensable injury. The claimant therefore did not prove that any of the medical treatment provided on and after May 5, 2008 was reasonably necessary or the responsibility of the respondents. The claimant on appeal has reserved the issue of temporary disability or permanent disability. The claimant expressly informs the Full Commission, "The only issue before this Commission is that of compensability. Any determination of the length of temporary disability and the beginning of permanent disability is for another day."

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur in the majority's finding that the medical treatment beginning May 5, 2008, was not for a work related incident and was not the natural consequence of the claimant's July 17, 2006 motor

vehicle accident. However, I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury that required surgical intervention on July 17, 2006. I also dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he satisfied the provisions of Ark. Code Ann. § 11-9-701(repl. 2002). In my opinion, the claimant has failed to meet his burden of proof.

With respect to the compensability of the problems the claimant had at T9, I cannot find that the claimant sustained anything more than a temporary aggravation of a pre-existing condition and the surgery was not reasonable and necessary treatment. The evidence demonstrates that the claimant, prior to the July 17, 2006 automobile accident, had problems in his thoracic spine at T9-10. The other area he had problems with was L3-4. It is of note that on August 26, 2002, Dr. Richard Jordan performed an operation on the claimant in which the T9 spinus process and laminate were removed. On July 21, 2004, Dr. Hart performed extensive radiofrequency denervation/rhizotomies on the left thoracic T9-10. The medical records demonstrate that the claimant

continued to have problems at the T9-10 level even in May of 2006. The claimant was in Dr. Hart's office in May of 2006, complaining that he had been bed bound for a few weeks because of back pain. The claimant requested radiofrequency and denervation of the T9-10 level at that time. This was just two months prior to the July 17, 2006 motor vehicle accident.

The claimant's testimony regarding the problems he had at the T9-10 level prior to July 17, 2006 motor vehicle accident is suspect at best. The claimant testified at the hearing that he had never had problems to his knowledge at T9. Clearly, the medical records show that the claimant had extensive problems at T9-10 prior to that accident.

Further, Dr. Peek, as far back at 2003, stated that it was his opinion that the claimant would continue to need pain control and medical procedures for his back problems throughout the claimant's lifetime. Dr. Hart diagnosed the claimant in 2003 with failed back surgical syndrome and multi-level moderate to severe disc disease. Multiple doctors have stated that the claimant would need continuing back procedures and pain management due to his pre-existing conditions.

When I consider all the evidence of record, I cannot find that the claimant's need for medical treatment for his T9 level was related to his motor vehicle accident of July 17, 2006. The claimant's spinal injuries pre-existed the July 17, 2006 incident and at the most, the claimant sustained a temporary aggravation of his pre-existing condition. Therefore, the respondents should not be responsible for the claimant's back surgery performed by Dr. Peek on January 19, 2007. Additionally the respondents should not be responsible for any medical treatment past January 19, 2007. Accordingly, I must dissent from the majority's award of benefits.

With regard to the notice provision, the majority has found that the respondents were notified of the claimant's injuries and had knowledge of the injury immediately after it occurred. The respondents contended that they did not receive notification of the injury until the claimant filed a First Report of Injury or Illness with the respondent carrier on December 27, 2006. I must agree with the respondent.

First of all, I concede that the statute states that notice to the employer is the same as notice to the

carrier. However, in the case presently before us, the claimant is also the respondent employer. With regard to notice to the carrier, the respondent employer is responsible for notifying the respondent carrier of the injury. In this case, the claimant, because he is one and the same as the respondent employer, received notice at the time of the incident. However, the respondent employer failed to notify the respondent carrier until December 27, 2006. It is patently unfair for the claimant/respondent employer to argue that the carrier received notification on the date of the injury when the respondent employer, being one and the same as the claimant, did not notify the respondent carrier until December 27, 2006. It was at that point, that the respondent carrier was giving notice that the claimant had sustained injuries due to a motor vehicle accident. It is inherently unfair and enures to the claimant's benefit when the claimant and the respondent employer are the same person and the respondent employer has failed to notify the respondent carrier timely. Therefore, I find that the claimant failed to notify the carrier until December 26, 2006, when the respondent carrier received the filed first report of injury or illness. Therefore, I must

respectfully dissent from the majority's finding that the respondent carrier received notification on July 17, 2006.

Accordingly, for all the reasons set forth herein, I must dissent in part and concur in part in the majority's opinion.

KAREN H. MCKINNEY, Commissioner