

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F306421**

<b>BRADY FOWLER, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>BLYTHEVILLE COUNTRY CLUB, EMPLOYER</b>	<b>RESPONDENT</b>
<b>ARGONAUT INSURANCE COMPANY, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED FEBRUARY 27, 2004**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on December 5, 2003, at Jonesboro, Craighead County, Arkansas.

The claimant appeared pro se.

Respondents represented by the HONORABLE ANDY CALDWELL, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to workers' compensation benefits.

On September 23, 2003, a prehearing conference was conducted in this claim from which a prehearing order of September 24, 2003 was filed. The prehearing order reflects the stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as the Commission's Exhibit No. 1.

The testimony of Brady Fowler, the claimant, coupled with the deposition testimony of Dr. Ruth Thomas, along with medical reports and other documents comprise the record in this claim. Subsequent to the hearing, the respondent obtained medical reports of the claimant which had previously been requested from the claimant's physicians and requested that the same be made a part of the record. In a December 29, 2003 response, the claimant objected to inclusion of the medical

records submitted by respondents. The medical records are herein designated a part of the record as Respondents' Supplemental Exhibit No. 1. The claimant's December 29, 2003 response and objection to inclusion of the records is herein designated a part of this record as Claimant's Supplemental Exhibit No. 1. The ruling regarding the medical records is herein designated Commission's Exhibit No. 2.

### **DISCUSSION**

Brady D. Fowler, the claimant, with a date of birth of June 18, 1963, is a high school graduate. The claimant has been employed by respondent since 1982.

While the claimant currently discharges employment duties as a waiter in his employment with respondent, in March 2003 he worked as a cook. The testimony of the claimant reflects that when he worked as a cook for respondent he commenced his shift at 8:00 A.M. and worked until 2:00 P.M. Thereafter, the claimant would return at 5:00 P.M. and work until close, 9:00 P.M. or 10:00 P.M. The claimant elaborated with respect to his assigned job duties as a cook in the employment of respondent:

During the day, my title was a cook but I did more than cook. We didn't have a maintenance man so I did that work, too, because they didn't hire a maintenance man at the time. So, I cooked and when I wasn't cooking I was in there moving the tables and things around for them. I didn't have a certain job. The title was cook but whatever needed did, I have to do. (T. 9-10)

While the testimony of the claimant reflects that among the array of tasks he performed during the pertinent time period, March 2003, included moving chairs and tables, and setting up a dance floor on occasions, he did not engage in any of those activities on March 31, 2003, when he

experienced the onset of his symptoms which serves as the basis of the present claim. The claimant testified:

I was standing by the grill, cooking, and all of a sudden I felt a sharp pain and I grabbed my foot and I was getting ready to get off so I said, I went in the office and I told the boss lady, . . .(T. 10)

The testimony of the claimant reflects that the surface of the floor in the kitchen was one of a concrete tile. The claimant denies that he slipped or made any sudden movement or exertion to bring on the onset of pain.

The testimony of the claimant reflects that after reporting the pain in his right lower extremity to his supervisor, Virginia Pugh, the manager of respondent-employer, he advised her that he was going to a doctor for treatment. The claimant acknowledged that he was not directed by respondents to a specific physician for treatment of the right lower extremity complaint. Claimant added that the respondent did not have a designated medical provider.

Claimant was seen by Dr. Merrill Osborne, a Blytheville general practitioner, who was also his family physician. The claimant's testimony reflects that this treatment under the care of Dr. Osborne during the March 31, 2003 visit, included an examination of the foot, x-rays, and a prescription for medication. The claimant returned to respondent following his initial visit with Dr. Osborne, and resumed performing his employment duties.

The testimony of the claimant reflects that after his pain complaints did not improve he returned to Dr. Osborne for further treatment. Thereafter, the testimony of the claimant reflects that he was referred by Dr. Osborne to Dr. Joseph Yao, a Blytheville orthopedic physician. The claimant testified that Dr. Yao authored a off-work slip, performed additional diagnostic studies, and provided

medication for the treatment of his pain complaints. The claimant testified that he was seen by Dr. Yao on approximately four occasions before being referred by same to Dr. Ruth Thomas, a Little Rock orthopedic physician, after the results of an MRI was had.

The testimony of the claimant reflects that he was initially seen by Dr. Thomas on or about May 28, 2003, pursuant to the referral of Dr. Yao. Claimant was seen by Dr. Thomas on numerous occasions, and, as of the date of the hearing in this claim, had not been fully released from the care and treatment of same. On June 9, 2003, claimant underwent surgery under the care of Dr. Thomas. Claimant was released to return to work by Dr. Thomas on September 9, 2003, and thereafter returned to the employment of respondent.

A review of the medical in the record reflects that the claimant was seen by Dr. Merrill Osborne on March 31, 2003 with a complaint of right heel pain. Dr. Osborne's clinic note relative to the visit reflects that the claimant denied any trauma and noted that he was at work when the heel started to hurting to even stand on it. (CX1, p. 1) The medical further reflects that the claimant was initially seen by Dr. Joseph Yao on April 9, 2003, pursuant to a referral by Dr. Osborne relative to a complaint of right ankle and foot pain. Dr. Yao's April 9, 2003 office note reflects that claimant related a history of pain beginning Wednesday, March 26, 2003, gradual in nature with no precipitating factor which was aggravated by walking. Dr. Yao's assessment of the claimant's complaint following the April 9, 2003, visit was that of right Achilles' tendinitis. (CX1, p. 2-3) A April 30, 2003, document of Dr. Yao, relative to the claimant, reflects that the claimant was seen on April 17, 2003, to recheck on his right ankle/heel and that the pain was worse. The document further reflects that the claimant was again seen on April 30, 2003, and that there had been no change in his symptoms. (CX1, p. 4-6)

A May 6, 2003, chart note of Dr. Yao, relative to the claimant reflects a referral to Dr. Ruth Thomas, a foot and ankle specialist at UAMS. The claimant was directed to take his MRI film to the scheduled May 28, 2003, evaluation by Dr. Thomas. Further, the record reflects a May 6, 2003, note from Dr. Yao relative to the claimant, which reflects, in pertinent part:

Mr. Fowler has recent MRI evidence of right Achilles tendinitis with abnormal structural changes present within the tendon and adjacent heel bone (the calcaneus). He inquired if this problem developed as a result of his work. He described his work as frequently involving moving/pushing tables, chairs, and stages during times when he is not performing his primary job cooking. He said that he does not engage in any physical activity such as sports outside of work. Achilles tendinitis is an overuse problem. He said he has worked at his present place of employment since the age of 18 years. Given his lack of exertional activities outside of work, the right Achilles tendinitis problem is most probably related to his work activities (CX1, p. 8).

On May 28, 2003, the claimant was evaluated by Dr. Ruth Thomas, an orthopedic physician who specializes in foot and ankle treatment at the University Hospital, UAMS, pursuant to referral of Dr. Joseph Yao. During the course of her evaluation of the claimant on May 28, 2003, Dr. Thomas conducted a physical examination and reviewed prior pertinent medical records, to include the MRI film obtained relative to the claimant's right lower extremity pursuant to the direction of Dr. Yao. The May 28, 2003, outpatient note of Dr. Thomas reflects her assessment of the claimant's complaint as right Achilles tendinitis with partial tendon tear. Further, with respect to recommendations, the May 28, 2003, outpatient note observed that since the claimant had failed conservative measures after two months it was appropriate to move to surgical intervention. (CX1, p. 10) In a May 28, 2003, correspondence to Dr. Yao, relative to the claimant, Dr. Thomas related:

. . .He has an Achilles tenon tear at the insertion of the Achilles and obvious signs of symptoms of disease surrounding this tear.

My recommendation is repair of the tear, along with removal of any spur or calcification within the tendon and removal of the posterior superior aspect of the right calcaneus. (CX1, p. 11)

On June 9, 2003, the claimant underwent surgery under the care of Dr. Thomas.

The deposition of Dr. Thomas was obtained on December 9, 2003, subsequent to the hearing in the claim. During the course of the deposition information was shared with Dr. Thomas regarding the history related by the claimant to Dr. Osborne on March 31, 2003, relative to the onset of his right heel pain, in which he denied any trauma and relayed that he was at work and his heel started hurting to even stand on it. Further, Dr. Thomas was provided information contained in the April 9, 2003 initial visit of the claimant to Dr. Yao. Dr. Thomas testified that the Achilles tendinitis as assessed by Dr. Yao during the April 9, 2003, visit of the claimant was consistent with her findings upon examining the claimant on May 28, 2003. With respect to the entry in the April 9, 2003, office note of Dr. Yao regarding the claimant reporting the initial onset of pain being March 26, 2003, five days prior to his initial visit for medical treatment on March 31, 2003 and with a gradual onset, Dr. Thomas testified:

It can be consistent. It can – I mean this type of problem can come on very gradually, or it can come on rather rapidly, when you haven't had a problem in the past. (RX1, p. 7)

Dr. Thomas testified regarding the abnormal structural changes relative to the MRI of the claimant's right lower extremity:

Essentially, there was a tear in the area of the

insertion. There was surrounding fibrous tissue, which is the body's attempt to try to heal it. Just changes that we commonly see with a tendon that has experienced some kind of tear and is in the process of trying to repair itself. (RX1, p. 9)

Dr. Thomas testified that most commonly Achilles tendinitis presents itself as an overuse problem.

Regarding other sources of the ailment or complaint Dr. Thomas testified:

Well, the primary cause is overuse. It's an aging phenomenon. And, of course, you take an aging phenomenon, and you have something suddenly puts pressure on the tendon, and you can end up with an exaggeration of the existing problem. (RX1, p. 10)

Dr. Thomas testified regarding her observation of the diagnostic report and MRI film:

Well, certainly, the report was abnormal because it showed a diseased tendon with a tear, and there was also a suggestion of a cyst down in the area of the calcaneus. All of these findings are abnormal.

\* \* \*

If you're referring to the spur, yes, and if you're referring to the Haglund's deformity, yes. Essentially, he did have a spur in the area where the Achilles inserts into bone, and he also had a very prominent calcaneus, at least in the posterior area, which we commonly refer to as a Haglund's deformity. (RX1, p. 10)

Dr. Thomas' testimony reflects, regarding her opinion of whether the claimant's Achilles problem was degenerative in nature:

There was certainly a component of degenerative changes involved in this problem, and as I mentioned, I most commonly see this as a degenerative problem, but there was also a tear in the insertion of the Achilles tendon which may have been something new on top of something old. (RX1, p. 11)

As previously noted, in his May 6, 2003 report Dr. Yao concluded that given the lack of exertional activities outside of work on the part of the claimant, the claimant's right Achilles problem was most probably related to the claimant's work activities. Dr. Thomas testified regarding the opinion contained in the May 6, 2003 report of Dr. Yao:

I'm very uncomfortable with an opinion because I feel that this could be a longstanding degenerative problem, but I cannot say with any certainty that there was not something on top of this degenerative problem associated with his work, and not having seen him when the problem initially developed, I'm very uncomfortable being asked to make a statement on that. (RX 1, p. 11-12)

After being provided with information regarding the claimant's testimony during the hearing in this claim as well as during his deposition with respect to the onset of his symptoms and the ultimate diagnosis of an Achilles tear or rupture, Dr. Thomas' testimony reflects:

With no history of a sudden movement or sudden fall or a sudden jerk, I don't think that you can state that that incident of pain was related to the tear in his Achilles. The tear may have been developing gradually. It may have, you know, it may have been developing over many months. It may have developed suddenly. It's hard to say. I think the only statement that can be made is that that's when he became aware of his pain. I think that's the only thing you can say.

\* \* \*

Well, he already had a predisposing condition in that he had a Haglund's deformity, and the spur obviously took many, many months, maybe years to form. So he has a preexisting Achilles insertional tendinitis. Even if it was asymptomatic, it's been there for a while. And then something could have aggravated it, and he suddenly became aware of the pain, but in terms of,

you know, correlating the x-ray findings with his complaints, all I can say is that a Haglund's deformity is something you're born with, an Achilles spur is something that gradually develops over time. It may or may not be symptomatic in any given individual. (RX1, p. 12-13)

At another point, when questioned regarding the nexus of the claimant's Achilles problem with his employment, Dr. Thomas testified:

What I can say is that he had a predisposing problem. He had a Haglund's deformity. He had an obvious Achilles tendinitis that was probably asymptomatic, and then something caused him to become asymptomatic. It doesn't necessarily have to be a big fall or a big jolt. If you have a preexisting condition, then something that we might think of as being relatively atraumatic could lead to the development of the tear, because all the preexisting conditions were there. (RX. 1, p. 14)

Finally, Dr. Thomas responded when questioned whether or not the claimant's problem is most probably related to his work activities:

I cannot say that his work duties caused it in any way. He's a big man who had a preexisting problem, and I believe that the work activities at most would have exaggerated it, but not have caused it. (RX1, p. 15)

Dr. Thomas testified regarding her findings during the June 9, 2003 surgery of the claimant:

The surgery went well. We did find a large area of cystic change down in the heel bone itself which had to be cleaned out, and this made the debridement more extensive than we usually do.

\* \* \*

It's [cystic change] part of the degenerative complex, the Achilles tendinitis and inflammation going on at the insertion. It's unusual. You don't usually see a

cyst associated with this, but it is a degenerative change, and, therefore, it's part of the entire complex.

\* \* \*

That the tendon was thickened. There was evidence of an attempt by the body to repair the area of the tear, a rather thickened diseased tendon and a spur. (RX1, p. 19)

The claimant asserts that as a result of the onset of his symptoms on March 31, 2003 and resulting surgery, all of which he attributes to his employment duties with respondent, he is entitled to the payment of temporary total disability and medical benefits. The claimant noted that initially a claim was filed with the group health care provider, and that while some medical benefits were paid, he was subsequently informed that because it was a workers' compensation claim the health care provider would not be liable for benefits.

Respondents have denied compensability of the claim in its entirety.

After a thorough consideration of all the evidence in this record, to include the testimony of the claimant and Dr. Thomas, along with a review of the medical reports and other documents, I make the following:

#### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 31, 2003 the relationship of employee-employer-carrier existed among the parties.
3. On March 31, 2003 the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$211.00/\$158.20 for temporary total disability/permanent partial disability benefits.

4. On March 31, 2003 the claimant sustained an injury arising out of and in the course of his employment.

5. The claimant was temporarily totally disabled for the period beginning April 9, 2003 and continuing through September 9, 2003.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of March 31, 2003.

7. The respondents have controverted this claim in its entirety.

### **CONCLUSIONS**

Grady D. Fowler, the claimant, has been employed by respondent since 1982. On March 31, 2003, while discharging employment duties as a cook in his employment with respondent, the claimant experienced an onset of severe debilitating pain in his right heel area. The claimant notified appropriate supervisory personnel of respondent of the problem with his right heel and his need for medical treatment. The claimant was granted permission to obtain medical treatment relative to the right heel complaint by his supervisor, Ms. Virginia Pugh, the manager of respondent-employer.

The claimant sought and obtained medical treatment relative to his right heel complaint under the care of his family physician, Dr. Merrill Osborne, a Blytheville family practitioner. After a period of treatment under the care of Dr. Osborne the claimant was referred by same to a Blytheville orthopedic physician, Dr. Joseph Yao, for his right heel complaint. The claimant was taken off work by Dr. Yao during the initial April 9, 2003 visit, underwent medical treatment and diagnostic studies, and was ultimately referred to Dr. Ruth Thomas, a Little Rock orthopedic physician and foot and ankle specialist. The claimant underwent surgery in the care of Dr. Thomas on June 9, 2003, for a diagnosed right Achilles tendon tear, and was released to return to work on September 9, 2003.

The claimant asserts entitlement to medical and temporary total disability benefits relative to the March 31, 2003 right heel injury. Respondents denied the compensability of the claimant's claim. The present claim is one governed by the provisions of 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of a work-related injury sustained subsequent to the effective date of the afore provision.

Arkansas Code Annotated §11-9-102(4)(A) defines compensable injury to mean:

(i)An accidental injury causing internal or external physical harm to the body. . . arising out of and in the course of employment 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.

The compensable injury must be proved by medical evidence, supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). The claimant must prove that there is a causal connection between the work-related accident and the injury. Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000).

In Mickel v. Engineer Specialty Plastics, Inc., 56 Ark. App. 126, 938 S.W.2d 876 (1997) the Arkansas Court of Appeals set forth the elements which the claimant must establish by a preponderance of the evidence in order to establish a compensable injury as a result of a specific incident identifiable by time and place of occurrence. Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim and compensation must be denied.

In the instant claim it is undisputed that the claimant has been employed by respondents since

1982. Further, the evidence discloses that on March 31, 2003, the claimant was discharging employment duties for respondent at the time he experienced an onset of symptoms in his right heel which required medical treatment. The claimant in turn sought and obtained medical treatment relative to his right heel complaint under the care of Dr. Merrill Osborne on March 31, 2003. The claimant's complaint was ultimately diagnosed as an Achilles tendon tear with insertion of the Achilles and obvious signs and symptoms of disease surrounding the tear, for which he underwent surgery under the care of Dr. Ruth Thomas.

At the outset it is noticed that a preexisting disability or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. St. Vincent Infirmary Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996); Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 64 (1990). In workers' compensation law the employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. Arkansas Power & Light Company v. Scroggins, 230 Ark. 936, 328 S.W.2d 97 (1959).

In the instant claim it is undisputed that the claimant had a longstanding degenerative problem, relative to the right Achilles complaint, at least from Dr. Thomas' perspective:

There was certainly a component of degenerative changes involved in this problem, and as I mentioned, I most commonly see this as a degenerative problem, but there was also a tear in the insertion of the Achilles tendon which may have been something new on top of something old. (RX1, p. 11)

Nevertheless, the evidence discloses that at the time of the surgery there was a tear in the claimant's Achilles tendon. Dr. Thomas offered that the tear may have developed gradually or it may have

developed suddenly, however with the development of the tear is when the claimant became aware of his pain. (RX1, p. 12) Dr. Thomas further noted that the claimant had predisposing problems, a Haglund's deformity, and that he had obvious Achilles tendinitis that was probably asymptomatic until something happened to cause it to become symptomatic. With respect to the contributing factor Dr. Thomas noted that the same need not be a big fall or a big jolt:

...If you have a preexisting condition, then something that we might think of as being relatively atraumatic could lead to the development of the tear, because all the preexisting conditions were there. (RX1, p. 14)

In the instant claim the medical records reflects that when the claimant initially sought treatment for his debilitating pain, the same was sought from his family physician, Dr. Merrill Osborne, on March 31, 2003. A review of the medical records of Dr. Osborne relative to the claimant does not reflect similar complaints to those registered by the claimant on March 31, 2003, prior to that date. It was only after the claimant had been initially seen by Dr. Joseph Yao, a Blytheville orthopedic physician, pursuant to a referral of Dr. Osborne, on April 9, 2003, that there is reference to pain in the affected extremity beginning Wednesday, March 26, 2003, and gradual in nature.

The fact that the claimant may have had a gradual onset of pain on March 26, 2003, does not render his claim as noncompensable. As previously noted, Dr. Thomas testified that the tear found in the claimant's Achilles tendon could be gradual or sudden and further that the tear may have been developing over a period of time and that the event that finalized the tear need not have been a big fall or big jolt but something relative atraumatic. In Edens v. Superior Marble and Glass, 346 Ark. 487, 58 S.W.3d 369 (2001), the Arkansas Supreme Court noted with respect to Arkansas Code

Annotated §11-9-102(4)(A)(i) that it was not a prerequisite to compensability that the claimant identify the precise date upon which an accidental injury occurred, but rather must only prove that the occurrence of the injury is capable of being identified.

In the instant claim following the severe onset of pain on March 31, 2003, the claimant reported a need for medical treatment to supervisory personnel of respondent and sought and obtained treatment under the care of his family physician. There is no evidence in the record to reflect that the claimant suffered a injury to the right Achilles tendon subsequent to March 31, 2003 by engaging in activities outside of his employment. Indeed, the credible evidence of record reflects that the claimant did not engage in any physical activities that would aggravate his right lower extremity pain outside of work after he experienced the same on March 31, 2003 and continued working thereafter until taken off work by Dr. Yao on April 9, 2003. In May 6, 2003 office report Dr. Yao noted that the claimant had undergone an MRI which reflected objective medical findings of injury relative to the right Achilles tendon.

The evidence preponderates that the claimant's tear to his right Achilles tendon was caused by a specific incident identifiable by time and place of occurrence at work on March 31, 2003 while discharging employment duties for respondent. Dr. Yao has offered an opinion relative to the nexus of the claimant's injury and need for treatment to the claimant's employment activity. Dr. Thomas presents credible testimony regarding the fact that the injury suffered by the claimant in the employment with respondent was the major cause for the need for treatment received by the claimant and the claimant's period of total incapacitation. In the present claim, since the claimant has established a injury identifiable by time and place of occurrence the burden of proof to establish such a injury is by a preponderance of the evidence. Since the claimant is not asserting a gradual onset

injury there is not a requirement to prove that the resulting condition is the major cause of the disability or need for treatment.

The claimant has sustained his burden of proof by a preponderance of the credible evidence that he sustained a compensable injury to his right Achilles tendon on March 31, 2003, arising out of and in the course of his employment with respondent which required medical treatment, as proved by objective medical evidence, as a result of a specific incident identifiable by time and place of occurrence. Respondents have controverted this claim in its entirety.

The medical in the record reflects that the claimant received treatment under the care of his family physician, Dr. Merrill Osborne on March 31, 2003, relative to his right Achilles injury, after reporting same to appropriate supervisory personnel of respondent. Further, the evidence preponderates that treatment rendered to the claimant under the care of Dr. Osborne, Dr. Yao, and Dr. Thomas, was reasonable, necessary, and related to the claimant's compensable injury. The respondents are liable for the cost of claimant's medical treatment under the care of the afore physicians as well as medical related travel growing out of the injury.

The claimant underwent surgery under the care of Dr. Ruth Thomas on June 9, 2003. Prior to undergoing the surgery, the claimant had received treatment under the care of Dr. Yao, and had in fact been taken off work by Dr. Yao on April 9, 2003. The claimant did not return to the employment of respondent nor was he released to return to work until September 9, 2003. The claimant was totally incapacitated from engaging in gainful employment from April 9, 2003, through September 9, 2003, relative to his compensable injury. Respondents have controverted the claimant's entitlement to temporary total disability benefits.

**AWARD**

Respondents are hereby ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$211.00 for the period beginning April 9, 2003, and continuing through September 9, 2003, as a result of the claimant's compensable injury of March 31, 2003. Said sums accrued shall be paid in a lump without discount.

Respondents are further directed and ordered to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to include medical related travel, growing out of the claimant's compensable injury of March 31, 2003.

This award shall bear interest at the legal rate pursuant to Arkansas Code Annotated §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

**IT IS SO ORDERED.**

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**ANDREW L. BLOOD**  
**Administrative Law Judge**