

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F303436**

<b>MORGAN D. BALLARD, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>CONAGRA POULTRY CO., SELF-INSURED EMPLOYER</b>	<b>RESPONDENT NO. 1</b>
<b>GALLAGHER BASSETT SERVICES, INC., TPA</b>	<b>RESPONDENT NO. 1</b>
<b>SECOND INJURY FUND</b>	<b>RESPONDENT NO. 2</b>
<b>DEATH &amp; PERM. TOT. DISABILITY TRUST FUND</b>	<b>RESPONDENT NO. 3</b>

**OPINION FILED JULY 11, 2005**

Hearing before Administrative Law Judge J. Mark White on May 26, 2005, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. R. Theodor Stricker, Attorney at Law, Jonesboro, Arkansas.

Respondents No. 1 represented by Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 & 3 represented by Mr. Terry Pence, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On May 26, 2005, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on March 7, 2005, and a Prehearing Order was entered that same day. A copy of the March 7, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the

stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/self-insured employer relationship existed at all relevant times, including December 13, 2002; that respondent initially accepted the December 13, 2002, injury as compensable and paid some benefits; and that respondent no. 1 now controverts this claim in its entirety. At the hearing, the parties further stipulated that respondent no. 1 paid benefits to the claimant through November 3, 2004; that the claimant earned wages sufficient to entitle him to the maximum compensation rates; and that the claimant has reached the end of his healing period.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury; whether the claimant is entitled to temporary total disability benefits; whether the claimant is entitled to permanent partial disability benefits; whether the claimant is permanently and totally disabled; in the alternative, whether the claimant has sustained wage loss in excess of his assigned permanent anatomical impairment rating; the extent of liability, if any, of the Second Injury Fund; the extent of liability, if any, of the Death & Permanent Total Disability Trust Fund; whether the medical treatment received by the claimant after December

13, 2002, was reasonably necessary in connection with a compensable injury; whether future medical treatment remains reasonably necessary in connection with a compensable injury; and controversion and attorney's fees. At the hearing the claimant chose to waive the issue of rehabilitation.

The claimant contends that he sustained a compensable injury while in the employ of respondent no. 1; that he sustained a compensable consequence in the form of meningitis; that as a direct result of his compensable injury, he was treated by his physicians with the prescription drug Rofecoxib (also known as Vioxx or Bextra) which is a Cox 2 (cyclo-oxygenase 2) inhibitor selective non-steroidal anti-inflammatory drug (NSAID) which is known to cause sudden cardiovascular events such as heart attacks and strokes of which the claimant suffered; that such cardiovascular event was a direct result of his compensable injury and subsequent treatment; that he is entitled to temporary total disability benefits from his last date of work, February 18, 2003, to an indeterminate future date; that he is entitled to permanent partial disability benefits; that he is entitled to permanent total disability benefits, or in the alternative wage-loss disability benefits; that he is entitled to medical benefits and other relief to which he may be entitled; and that he is entitled to attorney's fees.

Respondents contend that the claimant did not sustain a compensable injury;

that any wage-loss disability suffered by the claimant is the result of the combination of his alleged December 13, 2002, injury and the previous back injuries sustained by the claimant, and is the legal responsibility of the Second Injury Fund; that the claimant did not sustain any degree of permanent partial impairment as a result of his alleged injury of December 13, 2002; and that the medical expenses incurred by the claimant were not proximately caused by the alleged injury of December 13, 2002.

The Second Injury Fund contends that the extent of claimant's disability is an issue that cannot be determined until rehabilitation has been completed; that the claimant has waived his right to rehabilitation benefits; and that the claimant is not entitled to any permanent disability benefits as a result.

The Death & Permanent Total Disability Trust Fund contends that if the Second Injury Fund is found to not have liability and the claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with Ark. Code Ann. § 11-9-502; that the Trust Fund therefore has not controverted the claimant's entitlement to benefits; that respondent no. 1 must first pay permanent partial disability in the form of the anatomical ratings for the claimant's alleged compensable injury before payment of permanent total disability benefits; and that respondent no. 1 is not entitled to credit

against its \$75,000 maximum for payment of the claimant's permanent partial anatomical ratings for the alleged compensable injury.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that his injury is established by medical evidence supported by objective findings.
4. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury.
5. The respondents have controverted this claim in its entirety.

## DISCUSSION

### I. History

The claimant has a long-standing history of low back problems. He first sought treatment for his back in 1990 after a work injury. In 1992 he sustained a compensable injury with another employer, resulting in herniated discs at L4-5 on the left and at L5-S1 on the right. He underwent surgery that year, and he continued to treat through 1995 for recurring pain and problems. In 2000 he sustained a herniated disc at L5-S1, this time on the left, and again underwent surgery. He testified that he recovered from this injury and was able to return to work with the respondent-employer at his old job. He testified that he had no difficulties with his back after the 2000 surgery until December 2002.

On December 13, 2002, in the course and scope of his employment with the respondent-employer the claimant fell from a ladder “approximately 13 feet and landed on a concrete floor.” The claimant testified that he injured his shoulder, buttocks, and back when he fell, and that he promptly reported these injuries. However, the Form AR-N report of injury signed that day by the claimant identifies only a left shoulder injury. He did not seek medical treatment at that time.

The claimant testified that his arm, shoulder and buttocks hurt for another two weeks, but that his back “never quit hurting.” Two months later, on February

13, 2003, he sought treatment for his back from his family physician, Dr. Jerry Grant. Dr. Grant recorded in his notes that the claimant "woke up this AM" with pain and limited mobility, and that he "began hurting yest." He wrote that the claimant denied having any new job duties, and that he experienced exacerbations infrequently. Dr. Grant noted tenderness and spasms and diagnosed degenerative disc disease. Nothing in Dr. Grant's notes mentions the December 2002 ladder incident. The claimant returned to Dr. Grant on February 19 complaining of pain radiating into both legs. Dr. Grant noted that the claimant was not working due to his pain, and he ordered an MRI exam.

Dr. Grant notified the claimant on February 21 that the MRI exam revealed a herniated disc at L1-2. The claimant requested, and Dr. Grant provided, a referral to neurosurgeon Dr. Anthony Russell, as the claimant was acquainted with Dr. Russell's family. An appointment was scheduled for February 28. On February 24, according to the injury report filed by the respondent-employer, the claimant finally reported his alleged back injury and tied it to the ladder incident of two months before. The respondents sent the claimant to Dr. Greg Smart that day. Dr. Smart recorded the history as follows:

Mr. Morgan Ballard is seen in clinic with complaints of back pain. He states that he fell off a ladder approximately two months ago while working at ConAgra. He apparently was seen by the nursing

personnel (EMT) on 12/13/02. Mr. Ballard states that he has had recent severe back pain which has worsened over the past several days. He apparently has been off work from his family doctor. Mr. Ballard states that he has a disc herniation, and subsequently he is referred to me for evaluation, as the worker's compensation physician for ConAgra. Mr. Ballard states that he has had some back pain off and on since that fall from the ladder. He states that the ladder actually gave way, at least one side of it, and he fell approximately 12 to 15 ft. The main complaint is persistent back pain that began last Thursday, 2/20/03.

Below the typed date "2/20/03" is a handwritten notation that reads, "This date still in question, please verify." I have no way of knowing who wrote this notation. In any event, Dr. Smart diagnosed "Back pain" and concurred with the referral to Dr. Russell.

Dr. Russell saw the claimant on February 28. He wrote to Dr. Smart:

Morgan Ballard presented to the neurosurgery clinic today per your referral. He presents giving a history of primarily low back pain. He notes that the pain is fairly intense near the midline with a component of non dermatomal radiating pain as well. The pain has worsened recently. He notes that it is intensified by his current job description. He denies any major dermatomal numbness or tingling in the lower extremities. He does not hae [sic] a clearcut area of weakness.

Dr. Russell noted that the MRI exam revealed "a markedly deteriorated L5-S1 disc with what appears to be a 'bone-to-bone' configuration. The primary back pain

would appear to indicate a discogenic source of the pain.” Dr. Russell suggested that the claimant undergo surgery, given the “longstanding nature of his pain,” and the claimant agreed. On April 1, Dr. Russell performed a fusion surgery at L5-S1. Subsequent MRI exams revealed a “nerve compression lesion adjacent to the fusion site,” and Dr. Russell recommended a second surgery. On August 19 Dr. Russell performed a left L5-S1 foraminotomy and a right L5-S1 decompression.

On January 8, 2004, Dr. Russell performed a third back surgery, a partial hemilaminectomy and diskectomy at L4-5. Within a week the claimant developed a post-surgical wound infection and spinal meningitis, for which he was hospitalized. The infection eventually resolved, and by March 15 the claimant’s back had improved. Dr. Russell indicated at the time that the majority of the claimant’s pain was confined to the small of his back. Dr. Russell also noted weakness in the form of a “functional foot drop,” an inability to flex the foot upwards. In April the claimant’s care switched to Dr. Michael Calhoun, as Dr. Russell retired from his practice. When the parties took Dr. Calhoun’s deposition in November 2004, Dr. Calhoun appeared to agree that the claimant’s condition had mostly stabilized, though he intended to treat the claimant for a few more months to see if the foot drop improved.

## II. Adjudication

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

An employer takes an employee as he finds him, and the aggravation of a preexisting non-compensable condition by a compensable injury is, itself, compensable. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). A pre-existing disease or infirmity of an employee does not disqualify a claim under the arising out of employment requirement if the employment aggravated, accelerated,

or combined with the disease or infirmity to produce the death or disability for which compensation is sought. *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). However, to be compensable, a claim must be established by medical evidence supported by objective findings, and the claimant must also show a causal connection between these objective findings and his alleged injury. *Ford v. Chemipulp Process, Inc.*, *supra*. This is true even where the alleged injury is an aggravation of a preexisting condition. *Id.*

It is obvious that the claimant has, and has had for some time, serious back problems. Whether his back problems are related to the alleged injury of December 13, 2002, is a question I can answer only by speculation and conjecture. Such can never substitute for credible evidence. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002).

The claimant testified he injured his back in a fall from a ladder on December 13, 2002. The claimant promptly reported this incident, but the Form AR-N report of injury signed by the claimant mentions only a shoulder injury, with no mention of the back. The claimant did not seek treatment for his back until two months later, on February 13, 2003. In that visit, according to Dr. Grant, the claimant said he “woke up this AM” with pain, and that he “began hurting yest.”

When he saw Dr. Smart on February 24 – apparently the same day he

reported the alleged back injury to the respondent-employer – he did tell Dr. Smart of the ladder incident, but Dr. Smart also quoted him as saying he “has had recent severe back pain which has worsened over the past several days.” Dr. Smart later said that the claimant “has had some back pain off and on since that fall from the ladder,” and that “the main complaint is persistent back pain that began last Thursday, 2/20/03.”

When the claimant saw Dr. Russell on February 28, Dr. Russell recorded a history of “primarily low back pain” that “has worsened recently.” Dr. Russell testified in his deposition that the claimant mentioned no traumatic incident, and that the claimant’s back problems might or might not have been caused by such an incident. He also testified that when he indicated in his February 28 letter that the claimant’s pain was of “longstanding nature,” he defined “longstanding” as “over 12 months.”

Though Dr. Grant did mention the existence of spasms during that first visit of February 13, this first objective finding came two months after the alleged injury. The claimant’s MRI exams contain multiple findings of back problems, but the changes from his 2000 MRI exams appear to be mostly minimal. The only significant change between the 2000 and 2003 MRI exams I note is the herniated disc at L1-2, yet all of the claimant’s subsequent treatment has been directed at L4-5 and L5-S1,

leading me to conclude that none of the claimant's doctors think the L1-2 herniation is a factor in his post-injury back problems.

Given the two-month delay before seeking treatment, the conflicting evidence as to whether he reported a back injury originally, and the similarities between his 2000 and 2003 MRI exams, I can find a causal connection between the claimant's alleged injury and the objective findings of injury only by speculation and conjecture. I must find that the claimant has failed to prove by a preponderance of the evidence that his injury is established by medical evidence supported by objective findings. I therefore conclude that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. Because I so find, the remaining issues are moot and need not be addressed.

#### **AWARD**

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge