

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F705243 (01/05/07)**

<b>JOHNNY PAUL MARSHALL, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>SOUTHERN RICE &amp; COTTON, LLC., SELF-INSURED EMPLOYER</b>	<b>RESPONDENT</b>
<b>AG-COMP SIF, TPA</b>	<b>RESPONDENT</b>

**OPINION FILED FEBRUARY 13, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on December 7, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE JOHN BARTTELT, Attorney at Law, Jonesboro, Arkansas.

Respondent represented by the HONORABLE GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted in the above style claim to determine the claimant's entitlement to workers' compensation benefits. On July 24, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Johnny P. Marshall, Freddie Adams, Harry James Farmer and Cary Groves, coupled with medical reports and other documents comprise the record in this claim. At

the conclusion of the hearing an issue developed concerning contact with a witness by the opposing party. The parties were permitted to submit brief on the afore issue. The Post Hearing Briefs along with the Reply Briefs of the parties have been bluebacked and are herein designated a part of the record as Supplemental Exhibits.

### **DISCUSSION**

Johnny Paul Marshall, the claimant, with a date of birth of April 21, 1954, is a highschool graduate, who commenced his employment with respondent-employer in 1999. Claimant resides at 304 Cove Street, in Harrisburg, Ark. Prior to his employment by respondent claimant worked as a farmer for a period of time, farming 256 acres which was his share of the family's farm for 23 years. Claimant has also worked as a duck-hunting guide for periods of time.

The claimant has leased out his part of the family farm land to his brother. In 1994 the claimant gave his farm equipment to his brother to cover some tax debts. The claimant also worked for his brother for approximately five (5) years. Thereafter, claimant commenced his employment with respondent. The testimony in the record reflects that for a few years the claimant owned junk business.

After commencing his employment with respondent in 1999, the claimant became a supervisor in 2000. Regarding the location of respondent-employer, a granary, the testimony of the claimant reflects that it surround his house in the back yard and that he actually walks to work in that by opening his gate he is at work.

In explaining his job duties for respondent, claimant's testimony reflects:

I help keeping the granary running, do everything, trucks, weighing in, sweeping, shoveling, digging, you know, done everything. (T. 40).

Claimant testified that he has worked for respondent for seven (7) years. The testimony of the claimant reflects that while he had suffered a couple of injuries to his ankle or knee, prior to January 5, 2007, he had never been seriously injured.

Claimant testified that he arrived for work at 7:00 a.m. on January 5, 2007. Claimant noted that he was in good health and not under the care of a physician for any injuries of conditions. January 5, 2007, was a Friday. Claimant had not worked either Wednesday or Thursday, January 3, and 4, 2007, explaining that he was addressing personal family problems. On Friday morning, January 5, 2007, claimant returned to work. Regarding his work activities on January 5, 2007, claimant testified that he spent the first hour-and-a-half or two helping another employee, Kenny Miller, fix the wrench that pulls the trains up the tracks. Thereafter, claimant testified:

Well, I knew the bin was next to do, so I gathered up a broom and a raincoat, and I went up on the bin, and I started doing my job. (T. 43).

Claimant testified that Freddie Adams, another employee, knew that he was going up on the bin. Regarding whether he was directed to go up and clean the vents on January 5, 2007, the testimony of the claimant reflects:

It had been mentioned earlier in the week that Harry had wanted that bin cleaned off and wanted it done by Friday, by the end of the week. So we just got around to it Friday morning. (T. 44).

Claimant described his actions once he got to the bin:

I had climbed down on the air ducts. That's where all the dust and the trash is.

You just turn around on your butt and you slide down. You slide on your butt, and you slide in on your butt.

And you get on the air ducts, and you put one foot on the air duct and put one foot on this air duct. So it's up about this tall, and you're spread eagle, and you rake the rice between your legs, and, you know, throw it on a stack. (T. 44-45).

Claimant noted that the air ducts are as wide as you can stretch your legs. Further, the testimony of the claimant reflects that the weather was a hard misty rain, such that he had to put on a raincoat in order to keep his walkie-talkie dry. Claimant testified that when Mr. Adams arrived he instructed him to get one side and he would continue on the side he was working on.

Claimant asserts that in the seven (7) years that he has been employed by respondent he had cleaned the vents in a similar fashion as he was on January 5, 2007, "hundreds of times" (T. 45). Further, claimant maintains that he had never been told to use a rope or harness prior to January 5, 2007.

Regarding the mechanics of the accident of January 5, 2007, the testimony of the claimant reflects:

My gloves were wet, and I had my broom in my hand, and I put my broom up on the iron beam across as a stabilizer and took off my gloves. And all I had to do was take one step, and I was on the rail. My left foot slipped off the air duct, and I landed on my butt. And I kind of hesitated, because I've fallen off before. And it seemed like an hour there, but it was just a few seconds. I didn't want - - I wanted to land straight instead of crooked.

And as I was falling down, I pushed off the side of the shed, and I landed straight on my right foot.

I had just heard all my bones in my foot break that moment. I won't ever forget that. (T. 46-47).

Claimant recalled that Freddie Adams and Adam Farmer arrived at his location at about the same time and began administering first aid to him. Claimant's testimony reflects that Harry Farmer

arrived in his truck a short time later. Claimant testified regarding his contact with Mr. Harry Farmer:

He said, "You need to go to the hospital," and so Freddie and Adam got by me, and they took me up, and he put me in the front seat of Harry's truck. And I got my boot upon the dashboard, fastened my belt, and locked the door, and we took off to the hospital.(T. 47).

Claimant maintains that he was driven from Harrisburg to Jonesboro to the hospital.

Prior to the morning of the accident, January 5, 2007, claimant asserts that he had last used any alcohol on Wednesday, January 3, 2007, when he drank a half-pint of whiskey.

Claimant maintains that he normally drink "about sundown" after he gets off work. Claimant denies that he was under the influence of alcohol, legal drugs or any illegal drugs when he went to work on the morning of January 5, 2007. Further, the claimant denies that he was impaired in any way at the time of his January 5, 2007, accident. Explaining the reason for the his January 5, 2007, accidental fall, claimant testified:

It was slippery, and I was in a bad way with my legs spread out, and I just slipped. My foot just slipped, because it was wet on the surface. (T. 49).

During cross-examination, claimant acknowledged that he was a supervisor over Freddie Adams on January 5, 2007. The claimant's immediate supervisor was Harry Farmer. Claimant acknowledged that Harry Farmer is the individual that hired him to work for respondent. The testimony of the claimant reflects that Cary Groves is the supervisor of Harry Farmer. Claimant testified that he knew to report an injury to Harry Farmer if it occurred at work and allow him to take care of it. The testimony reflects that the claimant had done the afore with respect to one of the individuals that he supervised.

Claimant testified that he was aware that if he was injured on the job that he would have to take a drug test. The afore was company policy. Claimant concedes that a few time a week he drank a half paint of whiskey after work. Further, claimant testified that following the January 5, 2007, accidental fall he was aware that he was going to have to take a drug test if he reported the injury as a work-related injury.

The claimant was taken to the hospital in Jonesboro by Harry Farmer on January 5, 2007, following his accidental fall. Claimant acknowledged that Cary Groves was present before he was transported to the hospital. Claimant testified that he believed that he had health insurance through the family farm.

While conceding that he has used drugs in the past, claimant denies that he was using any drugs in January 2007. Claimant denies that he had been smoking marijuana in January 2007. Claimant testified that he had taken prescription pain pills on occasion for aches, pains, sore muscles, feet and ankles prior to January 5, 2007. The prescription pain medicine was obtained from the claimant's mother. Claimant noted that he would get one or two as he needed them. Claimant testified that "years ago" he used crystal meth and cocaine.

Claimant denies that he reported to hospital personnel at the time of the January 5, 2007, emergency room visit that he had sustained his injury falling off a ladder while climbing on his camper. Claimant acknowledged drinking a half-paint of sour mash whiskey per day to hospital emergency room personnel. Claimant was directed to follow-up with Dr. Dickson by emergency medical personnel relative to his injury.

Claimant testified that when he was seen by Dr. Dickson he told him how he was injured. The January 12, 2007, office note of Dr. Dickson recited a similar history regarding the

claimant's injury as the emergency room report. Claimant disputed the accuracy of the history as reflected in the emergency room record, in that he denies that he relayed same to anyone.

Claimant denies that he told hospital personnel that he takes "black market drugs". Claimant also disputes the entry in the January 5, 2007, hospital record, "patient stated he takes black market drugs and took six five-milligram Valiums yesterday and didn't remember how many Xanax. Also, drinks whiskey". (RX #1, p. 18).

Claimant insist that all of the medical personnel were aware the he had sustained his injury falling from the grain bin. Claimant attributes the erroneous information in the medical records as having been relayed by his supervisor, Mr. Farmer. Claimant acknowledge that the only day that Mr. Farmer was present at the hospital was during the January 5, 2007, emergency room visit. Claimant is unable to explain the entries in the medical records of Dr. Dickson with respect to his visits of January 26, 2007, and January 31, 2007, and the history reflected therein.

Freddie Adams, a two year employee of respondent, testified that his duties included loading railcars and trucks as well as labor. Mr. Adams estimated that respondent employed between seven (7) and eight (8) employees. The testimony of Mr. Adams reflects that on the morning of January 5, 2007, he was directed by Harry Farmer to go over and help clean off around the bins- under the bins. Mr. Adams testified that cleaning around the bins is usually done one or twice a month. The testimony of Mr. Adams reflects, regarding the events of the morning of January 5, 2007:

It was in the morning. I was told to go over there and help Johnny Paul clean up the top of the bin and clean up the vents. I went over there and climbed up. And I told Johnny, "I'm up here to help you clean them off." (T. 10).

Mr. Adams is uncertain of the height of the bin, which is construct of tin, however he climbed to the top of it through the use of a ladder which is attached to the side of it. The top of the bin has steps or a ladder which goes up to the top where a lid is located. The lid is the location of the load-out, which Mr. Adams describes as being like a auger on top of the bin with a catwalk. In describing the site from which cleaning is performed, Mr. Adams testified:

No, you're standing on top of the bin itself, but it's got steps that are bolted on around it. Down further is where the vents are. (T. 11).

The top of the bin is a slanted surface. Mr. Adams noted that the degree or angle of the slope of the top of the bin makes it difficult to walk on when it is wet.

Mr. Adams' testimony reflects that when he arrived on the top of the bin the claimant was already on the bin roof. Mr. Adams testified that the catwalk is above the bin, approximately five foot up where it goes across it, affording enough clearance to take the lid off. According to Mr. Adams the claimant was located on the side of the catwalk cleaning off around the vents. Mr. Adams testified that there are eight vents on the bin. In describing the vents, Mr. Adams' testimony reflects:

I does have a screen, yes, but it's kind of narrow like this (indicating), and it kind of cones over to outside the bin, and then it cups up underneath there where the vent, the screen is.

That's about the size of the vent of you're looking at it standing on the bin, it's about like that right there (indicating). And you've got to clean off the back and around the sides of it.

Yes, it on the edge of the roof kind of.

It's positioned where water will not go in the vent. (T. 14).

In further describing the vent area on the bin, Mr. Adams testified:

Yes, that's what it is. It goes from the bin up and then curves over, and then up underneath it is flat. (T. 15).

Regarding the manner in which the vents are usually cleaned, Mr. Adams testified:

We usually either slide down, I mean, from where we're at and that little step is, we slide down and take something and scrape it and clean it off.

Yes, they've got ridges where you can slide down, and turn and kind of position yourself where you can clean them off.

Well, the vent, the angles are up top toward the top of the bin.

But when you slide down, you slide down a good, I guess, five or ten feet down to where the vents are and clean them off.

You kind of brace your feet on it. I mean that's the way he did that morning. (T. 15-16).

Mr. Adams acknowledged that prior to the claimant's January 5, 2007, accident, when cleaning the vent he had done so in a similar fashion. Mr. Adams noted that once he was down at the vent and bracing himself with his foot, the cleaning process entailed cleaning the rust, digging it off or pushing it off the edge of the vent, usually bare-handed or with gloves on. Mr. Adams estimated that cleaning a vent usually took about five (5) minutes.

The testimony of Mr. Adams reflects that when he first walked up on the top of the bin on January 5, 2007, he observed the claimant cleaning off the vent towards the hopper tank and the dump shed. Mr. Adams testified that the claimant was sitting down on the roof, reaching on top raking the rice and pushing it off to the sides. The testimony of Mr. Adams reflects that he was on the opposite side of the ladder going up on top of the vent. Mr. Adams testified that he did not see anything unusual when he arrived on top of the bin to help the claimant:

I climbed the ladder. I told Johnny Paul I was up there to help him clean up the vents. I went to the other vent on this side of the ladder going up on the top of the bin. He said he had to stand up and take his gloves off, because they were wet.

As I told him to be careful, I went on the other side to clean off that vent. (T. 19).

Mr. Adams note that he told the claimant to be careful because it was wet and it was “a little slippery up on top of the vent”. (T. 19). The testimony of Mr. Adams reflects:

I mean, you’re right there at the vent and trying to clean it off, right below it, there’s really nothing. (T. 20).

Mr. Adams estimated the distance from the location of the vent to the ground to be 30 feet.

Regarding the claimant’s accident of January 5, 2007, Mr. Adams testified:

The he said, “I’ve got to take my gloves off, because they’re wet and they’re slippery.” So, and he stood up and put the push-broom down, and he took off his gloves.

Yes, he’s holding on to a beam, an I-beam there to where he can take his gloves off. And as eh did, his gloves slipped.

His glove and his footing slipped.

No, I just heard him say something, and then I turned and looked back, and then he was sliding off the bin, and that’s when I hollered on the radio. (T. 20-21).

Mr. Adams turned around after he heard the claimant yell out:

I seen him try to do - - whenever like he slid off, and he was trying to catch the edge of that bin that we was on.

Yeah, to pull hisself (sic) back up or hold hisself (sic) up on that bin.

Yes, he’s trying to grab the vent and the bin.

And then when he slid off, he grabbed the dump shed instead,

because it had, I guess, a gutter, an old gutter and stuff on the dump shed, and he was trying to pull himself up on the dump shed instead. (T. 21).

The dump shed is described as a separate structure that covers a site where rice is dumped out, approximately one to two feet from the bin.

Continuing his description of the claimant's January 5, 2007, accident, Mr. Adams testified:

As soon as he lost his grip or whatever and he fell and hit the concrete there, that's when I hollered on the radio and kept on hollering on the radio and said, "Johnny has fallen off the vent." (T. 22).

\* \* \*

Well, he fell after, I mean, he couldn't grip no more, he fell and landed, I guess, landed on his feet on the concrete.

I seen him fall off the dump shed, yes.

I hollered on the radio and told them that Johnny Paul just fell off the bin. I got down, and Harry Farmer's son, Adam Farmer, helped me sit him up against the dump shed there to see if he was all right.

And he [Adam Farmer] ran over there, and me and Adam picked him up and set him against the dump shed and took his boot off and took his sock off. His foot was swelling up. (T. 22-24).

Mr. Adams testified that the next individuals to arrive at the claimant's location were Harry Farmer and Cary Groves. Mr. Adams continued:

I seen Harry pull up, and then I seen Cary, and we picked him up and put him inside the truck there and instead of, you know, sit on something better than the ground.

And I went on doing my regular routine, my job, what I was supposed to be doing. (T. 24).

Mr. Adams testified that while he remained with the claimant from the time he got down to the

ground until he was placed in Harry Farmer's truck, he did not overhear any conversation between the claimant and Mr. Cary Groves. Mr. Adams' testimony reflects, regarding subsequent events on the morning of January 5, 2007:

Well, they asked how did he fall, and I was like, "Well, he was trying to clean off the vent. And as he did, when he stood up to take his gloves off, he lost his footing and his grip with his hand trying to hold on to the I-beam, and that's when he fell." (T. 25).

In describing the claimant's condition at the time of the above, Mr. Adams testified:

To me, he looked, I mean, fine to me. I've worked with him for a long time, and I mean, I've never seen him - - anything unusual. (T.25).

Mr. Adams noted that the claimant appeared to be in pain following the accident:

All I know is he said his ankle or his foot was broke, and he couldn't hardly move it. He said, "I need to get my boot off." So me and Adam took his boot off and took his sock off and propped it underneath his boot, his foot on top of his boot there. I can't remember what had been said that day and stuff. I mean, it's been a while. (T. 25-26).

Mr. Adams testified that he was with the claimant for ten (10) to fifteen (15) minutes on January 5, 2007. The testimony of Mr. Adams reflects that he did not see anything unusual about the claimant, or that would cause him to have any concerns whatsoever.

Regarding his cooperation in disclosing his knowledge of the January 5, 2007, accident, Mr. Adams testified:

And I told Johnny Paul I really didn't want to discuss anything, but he said to talk to him and let him know, you know, your side of the story. I said, "Well," and I just told him what I seen. (T. 31).

Regarding any prohibition against the claimant being in the area where he was working at the time of the accident, Mr. Adams' testimony reflects:

Unless you have a safety harness on or a rope, I mean, which we

didn't have either. We was told to get up there and kind of clean them off like we usually do. (T. 31).

Mr. Adams acknowledge that the claimant normally smells of alcohol. With respect to the smell of alcohol on the claimant on the day of the accident, Mr. Adams testified:

No. I wasn't, I mean, I wasn't next to him. I was on the other side of the ladder going up on the bin. (T. 32).

Mr. Adams' testimony reflects that he has seen the claimant smoke a marijuana cigarette.

During redirect, Mr. Adams acknowledged that he was not using either a harness or rope on January 5, 2007. Further, Mr. Adams testified that to his knowledge, he had not seen a harness on the job site before the accident. Mr. Adams testified that he had only done the job of cleaning the vents once or twice prior to January 5, 2007. Likewise, Mr. Adams' testimony reflects that on other occasions prior to January 5, 2007, when he had seen other employees perform the cleaning job ropes were used. (T. 36). The testimony of Mr. Adams reflects that he witness the claimant smoking a marijuana at the claimant's home and one time at work during the 30-minute dinner break several months prior to the January 5, 2007, accident.

Mr. Adams testified that while there were ropes present on the premises of respondent, on the morning of the accident, January 5, 2007, he could not find one and the claimant did not have one up on the bin with him. The testimony of Mr. Adams reflects that the shift begin at 7:00 a.m on January 5, 2007, and the claimant's accident occurred between 10:00 a.m. and 11:00 a.m.

Harry James Farmer, the plant manager for respondent, testified that he has worked at the Harrisburg location of respondent for eleven (11) years, and that he had known the claimant for ten and one-half (10 ½) years. Mr. Farmer has always been the claimant's supervisor. Mr. Farmer became aware of the claimant's accidental fall on January 5, 2007, when he heard it on

the radio. The testimony of Mr. Farmer reflects that at the time of the afore he was very close so he sped to the location in his pickup. Regarding his observations upon arriving at the accident location Mr. Farmer testified:

He [the claimant] was trying to sit up. He was trying to sit up when I pulled up to him, just trying to get up off the ground. (T. 64).

Mr. Farmer testified that he did not notice or smell anything when he initially arrived, noting:

No, I didn't - - I wasn't ever even thinking of something like that at that time. I was just trying to get him up off the wet ground, make sure he was okay. You know, just at that particular time, I was just trying to get him to a truck to get him off the ground. (T. 64).

The testimony of Mr. Farmer reflects that he and his son, Adam Farmer, placed the claimant in his truck. After getting the claimant in his truck, Mr. Farmer testified:

Well, of course, I was asking was he, you know, where was he hurt at, and it was his foot. And I told him we needed to get that shoe off or boot off, whichever it was, because I figured it would be swelling. And we pulled it off, and he was sitting in the truck there, and it had done turned blue. So I told him, you know, "We need to get you to the doctor, Johnny."

He said, "I can't go to the doctor, Harry." He said, "I can't go to your doctor." He said, "You'll have to take me to my doctor."

Well, Johnny told me, said he had done been drinking some whiskey and smoked a joint and had taken some pills the night before, and he wouldn't be able to pass a drug test if he went to our doctor. (T. 65-66).

Mr. Farmer was uncertain if the claimant had worked the preceding day of January 4, 2007. After being informed by the claimant that he has drink whiskey, smoked a marijuana joint and taken some pills, all the night before, which would prevent him from passing a drug test, Mr. Farmer testified:

Well, at that time, Cary had come up, and I told him the same thing that Johnny told me. And I told him I was going to take him to his doctor, St. Barnard's Hospital.

That's where he asked to be taken to.

Yeah, he said he was going to put it on his farm insurance. (T. 67).

Mr. Farmer and the claimant proceeded from Harrisburg to Jonesboro for medical treatment pursuant to the claimant's request. While en route to the Jonesboro Mr. Farmer testified:

Well, we talked about him drinking the whiskey. I told him, I said, "Johnny, if they smell that whiskey on you," because I could smell it then in the enclosed truck, I said, "If they smell whiskey on you, Johnny, they not going to give you pain killers for that foot." I said, "They probably not going to do much to you at all when they smell the alcohol." And at that time, you know, you can't cover that up, so I said - - he said, "Well, you know, I will go to the doctor, and I'm going to use my doctor." He said, "I'm going to tell them I fell off my roof," and take it that way. (T. 68).

Mr. Farmer testified that if the claimant disclosed to medical personnel that he sustained his injury in a fall off the grain bin at work, hospital personnel would have "done the workmen's comp and done a drug test". (T. 68).

Mr. Farmer denies that he provide any history to emergency room medical personnel regarding the claimant's injury at the time of the January 5, 2007, visit:

No, I took old Johnny in there and introduced him to the triage nurse, and they wheeled him right on out, and Johnny told me, said, "Call my brother." (T. 68-69).

Thereafter, Mr. Farmer testified that he called the claimant's brother, Eddie, as requested. There is no credible testimony in the record that Mr. Farmer returned to the hospital to discuss the claimant's injury with hospital personnel or that he had any communications with the office of Dr. Dickson regarding the claimant's injury.

The testimony of Mr. Farmer reflects that until the point in time that he and the claimant were in the enclosed truck en route to the hospital he has not smelled anything on the claimant:

No, I never had no indication anything was wrong with Johnny till we got in the truck, well, till he told me. You know, he told me when I loaded him up what his problem was. And then on the way up there, I told him, I said, "You know, if they smell alcohol on you, Johnny, you know, you're not going - - they're not going to give you no pain medicine. They're not going to do too much for you." And that was just a conversation we had had. There wasn't nothing he could do about that, you know. (T. 69-70).

Mr. Farmer testified that he has cleaned the top of the bins, however it is something he would not do while intoxicated:

Okay. I probably wouldn't go up there if I was drunk, no. I probably wouldn't go up there, you know, if I was in my right mind. That's a big chance that something might would've happened to you. You know, that's not smart thinking. I wouldn't have done that. (T. 70-71).

The testimony of Mr. Farmer reflects that he has seen the claimant a number of times since the January 5, 2007, accident, noting that he would go by and visit with him every once in a while.

The testimony of Mr. Farmer reflects, regarding his observations of the claimant:

Well, he's improved a whole bunch. I seen him at the liquor store like a block over. I see Johnny every day going over, you know, going over to the liquor store, you know. He walks over there and back. I figure, you know, he does pretty good.

Most all the time he's got it [his cane]. I ain't going to say he's always using it, but I see him with it a whole bunch. But, you know, if you're asking me have I ever seen him walk without it, I've seen him in his backyard walking without it. His backyard borders our property right there, so I see him anytime he's in the yard and holler at him or wave at him or whatever. I see him on the front porch, go to his mailbox and stuff without it. I've seen him with it, too. (T.71).

Mr. Farmer testified regarding whether the claimant was in the proper location at the time

of his accidental January 5, 2007, fall:

Well, supposed to is one thing. He ain't supposed to be off of the guarded catwalk, but I know Johnny Paul. If there was something to clean off there, if he could get to it, he would do as good a job as he could to clean it.

Now, he wouldn't be no slouch about it. But as far as getting off the protected walkways, it's a company policy that you don't do that.

Yeah, if you was to take yourself off the guardrails there, if you crawled under the guardrails, you're supposed to be tied in with the safety rope and stuff. And, you know, all the rules that OSHA has, somebody with you and all that. It's not something you're supposed to just take on your own and just go and do. (T. 72).

Regarding the availability of ropes and other safety equipment in January 2007, Mr. Farmer testified:

We would've had to scratch them up. I mean, when you say available, they weren't laying there on that job, because he wasn't supposed to be going into that area. He would've had to come to me and said, "I need to go and do this particular job right here," and then I would've put men working with him. Most likely, I would've just said, "No, don't do it. We ain't going to fool with that." But if he had just been wanting to go out there on that, then I would've taken him the manpower and equipment to have done the job. (T. 72-73).

Mr. Farmer's testimony reflects regarding the claimant's job assignment:

Not to go out in that, not that particular area. I sent him up to the bin to clean out the walkway. Just to go into a little detail here so everybody knows - - that walkway goes up to the bin and it catches rice, and when it catches rice, it catches water. The door that goes into the bin then will let water run into the bin and get the rice wet. So on a regular basis, we have to clean that little area out under the catwalk, which you're standing on. It's just about that high (indicating), and you reach underneath it and rake it all down so that the water will run on off the bin and not get into the bin. (T. 73).

Mr. Farmer maintains that the claimant was not supposed to have been off the catwalk:

You don't go in no area that goes against company policy, and everybody, through our safety meetings and all of our information we provide, everybody knows you don't go wandering around the top of the bin. That's not what you do. (T. 73-74).

During cross-examination Mr. Farmer testified that he first saw the claimant on January 5, 2007, following the claimant's accident:

I don't think I seen him until he fell. Now, I may be wrong, but I generally pass out orders over the radio the first thing in the morning. I think this happened like the very first thing in the morning maybe around - - I mean, with the time, it's going to be real close after 7:00. (T. 75).

Mr. Farmer maintains that his instructions to the claimant was to go up and clean the bin lid off.

Mr. Farmer denies instructing the claimant to clean vents on the bin:

No, you don't clean the vents.

No. They protrude up in the air. There's nothing on top of the vents.

Those vents don't need cleaning.

Well, there's no vent cleaning, but in a period of time you could accumulate so much rice and buildup behind the vents, behind them, that you would have to go up there and clean that off. That's where the safety procedures come in at. (T. 75-76).

Mr. Farmer's testimony reflects that cleaning underneath that particular catwalk was almost a weekly task. Cleaning the vents, according to Mr. Farmer, was not done on a regular basis, noting that some may go a year and not get cleaned. Mr. Farmer acknowledged that he has seen employees slide on the seat of their pants down to the vents and clean them off without the use of ropes or safety harnesses. Mr. Farmer concedes that he has done the afore himself, adding:

Not regularly. I've done that in an emergency situation myself, because I wouldn't put - - I wouldn't say to an employee, "You're going to do that." I've done it myself just to get something done that I thought

needed to get done real quick.

I've seen it done before, yes, but, no it's not a regular thing. It's against the rules. As a matter of fact, every time I've seen it done, I have, what you call, chastised the person doing it.

Because people are lazy. They don't want to go to the shop, get the rope, get the harness, go get somebody to go help them to do it, and take a bunch of time. When it's just three foot away from them, they just step out there and do it and be done with it. So if I see them doing that, they get in trouble for it. (T. 77-78).

Mr. Farmer maintains that his instruction to Freddie Adams was "to go up there and help Johnny clean that catwalk off". (T. 78). Mr. Farmer testified that he has never seen Freddie Adams clean the vents, noting the Mr. Adams does not like to go up off the ground.

Mr. Farmer acknowledged that he did not complete any forms in connection with the claimant's January 5, 2007, accidental fall:

No, sir. I broke every rule there ever was for Johnny's sake and this procedure here. (T. 79).

Mr. Farmer's testimony reflects that there is no doubt that the claimant suffered a fall while at work on January 5, 2007. Further, Mr Farmer denies that the claimant was in an unauthorized area, in general, at the time of his accident:

Not stepping from a bin to bin. He was in an unauthorized area, but he wasn't stepping from one bin to the next. I believe what Johnny Paul told me was, "Harry, I got out there on that bin, and I was going to step over to the shed like I've seen you do before, and I missed my step and fell." Now, there's a particular area. I do all the maintenance work there. I am the maintenance man. So any maintenance job that had required me getting up in the air and climbing and doing, I'm the one that does all the high steel work. Johnny has always been my partner in that. Me and him worked all the high steel jobs. We did everything, hanging the metal, welding, and everything, me and him worked side by side in that. And anything high, he was the best climbing man I ever had, so we worked together. And the said, "I've seen you do that same thing and

stand there and put your other foot on the other ledge over there. And I went to do what you did, and I missed and fell.” He wasn’t supposed to be in that area. (T. 80-81).

Mr. Farmer testified that the he did not speak to Freddie Adams at the accident scene. Further, Mr. Farmer testified that he had no recollection of the claimant telling him that he was taking off his gloves, and in the process just slipped thereby resulting in his fall.

Mr. Farmer testified that while he does not actually complete paper work or workers’ compensation form, it is his responsibility to go tell the secretary to fill out a report. Regarding his responsibility, as a supervisor in handling a work-related injury, Mr. Farmer testified:

The proper way to have done this - - and I’ve worked for this facility for 11 years with four different companies. I did know the proper way of doing it. I chose to do it wrong. I know how to do it right. I know to take him to a file a workmen’s comp that minute, to taken him to a doctor, and tell them that he got hurt on the job, and let the cards fall where they may. I know to do that. He’s been my friend for almost 11 years, and I know his financial situation. I know he just went through a divorce. I knew he didn’t need no more agony in his life that what he had, so I tried to help him. We just didn’t know it was going to come this far. That’s all. (T. 83-84).

The testimony of Mr. Farmer reflects that respondent’s designated medical provider for work-related injuries is Dr. Vonda Houchin. Dr. Houchin is located in Harrisburg, approximately two to three blocks respondent. Jonesboro is approximately 23 miles from Harrisburg.

Cary D. Groves, vice-president of operations for respondent, testified that he is the supervisor of Mr. Farmer. Mr. Groves has worked at the Harrisburg location for approximately two (2) years. Mr. Groves’ testimony reflects regarding respondent’s policy for handling work-related injuries:

What should have happened is that we should have taken him to the doctor. We should have filed the workmen’s comp papers.

And like Harry said, there would've have been a drug test administered, and then whatever happened with that. (T. 87).

Mr. Groves testified that he first learned of the claimant's accident shortly after it occurred.

Thereafter he walked out to the vehicle where the claimant was located. Mr. Groves does not recall having a direct conversation with the claimant, however did hear the conversation between the claimant and Mr. Farmer:

They were - - when I walked up, they were talking about drug tests and workmen's comp.

Johnny Paul said, "I'll go ahead and file all this on my insurance, because I don't want to take a drug test." (T. 87-88).

During cross-examination, Mr. Groves testified that he concurred in the testimony of Mr. Farmer with regard to job duties. The testimony of Mr. Groves reflects:

I agree with what he [Mr. Farmer] said that those vent are very rarely cleaned. I have no idea who told Johnny Paul to go upon top of the bin, if he was told specifically to go upon top of the bin, or what he was told. I wasn't there. (T. 89).

Mr. Groves concedes that he allowed Mr. Farmer to take the claimant to hospital in Jonesboro so that he "would not have to do the drug test and involve workmen's comp." (T. 89). The testimony of Mr. Groves further reflects:

I was okay with that. Like Harry mentioned, at the time we didn't know how bad Johnny Paul was hurt. I had no idea that he was injured to this extent. Yeah, I was okay with that at the time. (T. 89-90).

The testimony in the record reflects that Mr. Groves is the top manager and co-owner of the Harrisburg facility. Mr. Groves acknowledged that he took no actions toward filing a workers' compensation claim on behalf of the claimant on January 5, 2007:

There was paperwork filled out in the office, but it was just filed in Johnny Paul's whatever his record is, employment record. And we did not turn it in to anybody, and I'm not defending that as being right. I made a mistake. I realize that. (T. 91-92).

The medical in the record reflects that the claimant was seen at the emergency room of St. Bernards Medical Center on January 5, 2007, at 12:15 P.M. The emergency room records, relative to the afore visit, reflect:

HPI: 52 yo wm presents to ed (sic) with complaints of falling from ladder today while fixing his camper. pt now complains of severe lower right ankle pain no loc or chest pain no abdomen pain no upper ext pain. pt rates pain at 10/10 throbbing. (CX. #1, p. 5).

Following examination and diagnostic studies, the claimant's injury was diagnosed as a comminuted fracture of the calcaneus. The claimant was referred by the attending emergency room physician to Dr. Brian G. Dickson, a Jonesboro orthopedic surgeon, for follow-up treatment of his right heel injury.

The claimant was seen at the office of Dr. Dickson pursuant to the above on January 12, 2007. The office note relative to the afore visit reflects, in pertinent part:

This is a 52-year-old male who fell off a ladder onto his right heel one week ago and saw him in the ER for his calcaneus fracture and put him into a posterior splint. He stayed overnight and is now at home and doing okay although he stepped on it and ruptured a fracture blister and had some drainage and he come in early.

**Social History:**

Patient uses tobacco-1 pack daily x 30 years.

Patient uses drugs- marijuana occasionally.

Patient uses alcohol- whiskey ½ pint daily. (CX. #1, p. 16).

The claimant was again seen by Dr. Dickson on January 25, 2007. The afore office note reflects, regarding the claimant's injury and treatment plan:

**PHYSICAL EXAMINATION:** He medically has some irritation in his skin. I am going to put him on some Bactrim for this. He also has been complaining of significant flank pain on both sides and pain in his shoulder.

**PLAN:** I called Dr. McAlexander to discuss this with him and he recommended obtaining a CT of his chest, abdomen, and pelvis. We are going to go ahead and do this. He says it has been hurting pretty much since his injury. His back is not really hurting. He is non-tender in that area. He has good range of motion of his shoulders. His lungs seem to expand well with inspiration. His abdomen is non-tender. I am going to give him a muscle relaxer and a refill of Xanax. We placed him in a splint. I am going to schedule him for ORIF of his calcaneus for next week. (CX. #1, p. 23).

On January 31, 2007, claimant was admitted to St. Bernards Medical Center under the care of Dr. Dickson and underwent an open reduction internal fixation of his right calcaneus. (CX. #1, p. 26-27). Claimant was seen in follow-up by Dr. Dickson on February 12, 2007, and on February 26, 2007. Dr. Dickson noted during the February 26, 2007, visit that the claimant was aware that he would have some pos-traumatic arthritis and other difficulties as a result of the injury. (CX. #1, p. 31).

A April 30, 2007, office note, relative to a visit by the claimant to Dr. Dickson reflects, in pertinent part:

**PHYSICAL EXAMINATION:** There is a little bit of swelling and mild erythema. There is no drainage. His incision looks good. There is no real increased tenderness from last time.

\* \* \*

**PLAN:** I am a little bit worried about infection. I am going to go ahead and put him on antibiotic. I will see him back in one week. He is also going to take it easy and elevate it and not try to walk on it as much. Apparently he has been walking on it quite a bit and riding his bike. I am going to see if we can get the swelling and the redness down. We'll go from there. (CX. #1, p. 35).

The last medical report contained in the record is that of a October 18, 2007, office note regarding a visit by the claimant to Dr. Dickson. The October 18, 2007, office note reflects, in pertinent part:

He is continuing to have pain in his foot and heel and ankle. He can only wear one type of shoe and he has his orthotic. He uses a cane. He doesn't get around much because of the pain. He rides his exercise bike on the porch.

\* \* \*

**PHYSICAL EXAM:** He is tender laterally over his incision. He is working on his Social Security and he's interested in surgery. He might be a candidate for a subtalar fusion or a pantalar fusion. (CX. #1, p. 42-43).

The record does reflect the presence of a Form AR-N, which was completed on January 5, 2007, regarding the claimant. In addition to reciting the claimant's injury as to his right ankle and foot, the document also reflects the claimant was in an unauthorized area at the time of his fall and the entry, "Refused Workman's Compensation". (RX. #1, p. 26).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

#### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 5, 2007, the relationship of employee-employer existed between the parties.
3. On January 5, 2007, the claimant sustained injuries as a result of an accidental fall at work while within the course and scope of his employment. The evidence preponderates that

the claimant's January 5, 2007, accident was substantially occasioned by the use of alcohol, and, as such, he is not entitled to the payment of workers' compensation benefits, pursuant to Ark. Code Ann. §11-9-102 (4)(B)(iv).

### CONCLUSIONS

\_\_\_\_\_ On January 5, 2007, claimant sustained injuries to his right foot and ankle as a result of falling from the top of a grain bin while discharging employment duties for respondent.

Claimant asserts entitlement to temporary total disability and medical benefits, as well as controverted attorney fees as a result of the January 5, 2007, accident. Respondent contends that the claimant was intoxicated at the time of the accidental fall, and that he declined to document his injury as work-related when confronted with the requirement to undergo a drug test.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

#### Witness Contact:

During the course of the hearing claimant's counsel disclosed during the course of his investigation/preparation of the claim that he had contacted a witness who was also an employee of respondent. Respondent asserts that the contact with the employee was improper and should be excluded from the record. At issue is the contact with and testimony of Freddie Adams, an employee of respondent. The parties were directed to prepare post-hearing simultaneous briefs on this issue as well a given an opportunity to submit reply brief. The post hearing briefs and reply briefs have been appropriately blue backed and made a part of the record.

After reviewing Arkansas Rules of Professional Conduct, Rule 4.2, and the applicable

comments, specifically comment [2] to the Rules, as well as the recent ruling of the United States District Court in *Paris v. Union Pacific Railroad Co.*, 450 F. Supp. 2d 913 (2006), I find that the contact by claimant's attorney with Freddie Adams was not prohibited or inappropriate. Mr. Adams, while an employee of respondent was not a supervisory employee or one in a position to bind respondent civilly or criminally through his actions. Indeed, the credible testimony in the record reflects that the claimant with the supervisor of Mr. Adams. The motion of respondent to exclude the testimony of Mr. Adams and to impose sanctions against claimant's attorney is respectfully denied.

**Compensability:**

It is undisputed that the claimant sustained injuries to his right foot and ankle on January 5, 2007, as a result of a fall from the top of a grain bin. Further, the evidence preponderates that the claimant was discharging employment duties at the time of the afore. At issue is whether the claimant's accidental was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

Ark. Code Ann. §11-9-102 (4)(B)(iv)(a), provides that a compensable injury does not include an injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs use in contravention of a physician's orders. Ark. Code Ann. §11-9-102 (4)(B)(iv), further provides:

(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(c) Every employee is deemed by his or her performance of services

to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.

(d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

In the instant claim, the credible evidence preponderates that the claimant "short-circuited" the customary procedure of respondent relative to work-related accidental injuries. While it is clear the afore could not have been accomplished without the acquiescence, if not consent, of supervisory personnel of respondent, the claimant may not be a beneficiary of his duplicity.

The credible evidence in the record reflects that claimant informed his immediate supervisor, Harry James Farmer, following the January 5, 2007, accident that he could not pass a drug test, explaining that he had consumed whiskey, illegal drugs and prescription medication of his mother the previous night. While the claimant resides in Harrisburg, the location of the accident was on respondent's facility in Harrisburg, and respondent's designated medical provider for work-related injuries is in Harrisburg, claimant asked to be taken to the emergency room in Jonesboro, a distance of approximately 23 miles away. Once in the enclosed vehicle en route to Jonesboro Mr. Farmer detected the strong odor of alcohol on the claimant, such that he warned the claimant that the same could result in limiting his medical treatment at the emergency room.

The emergency room admission records corroborate the credibility of the testimony of Mr. Farmer. The claimant was under the impression that he had health insurance available to

him through the family farm business. In reciting the history of his injury, claimant did not disclose that the injury to his right ankle and foot was the product of falling from the top of a grain bin while working, but rather reported that he had fallen from a ladder while fixing his camper.(CX. #1, p. 5). The January 5, 2007, St. Bernards Medical Center emergency room record further reflects of the claimant, “patient stated the he takes black market drugs and took 6, 5mg valiums yesterday and didn’t remember how many xanax. Also drinks whiskey”. (RX. #1, p. 18).

The only time that supervisory personnel of respondent was present at a time that the claimant was receiving medical treatment relative to his January 5, 2007, injury was when Mr. Farmer transported the claimant during the initial emergency room visit. There is no credible evidence in the record to reflect that Mr. Farmer had any discussion with hospital personnel regarding the claimant’s social activities or the mechanics of the claimant’s injury. The claimant was referred by emergency medical personnel to Dr. Brian G. Dickson, a Jonesboro orthopedic physician, for follow-up treatment of his right ankle and foot injury.

Claimant concedes that supervisory personnel of respondent did not accompany him to either of his visits to Dr. Dickson. Nevertheless the office note relative to the claimant’s initial visit of January 12, 2007, recites a history of the claimant having sustained his injury as a result of a fall off a ladder. (CX. #1, p. 16).

Mr. Freddie Adams, an employee of respondent, was in close proximity to the claimant on the top of the grain bin at the time of the accidental fall. Mr. Adams acknowledged that he did not see the claimant’s footing slip, but rather, “just heard him say something”, and that when he turned and looked back the claimant, “was sliding off the bin”. (T. 20). After getting the

claimant situated in the pick-up truck of Harry Farmer Mr. Adams resumed his regular duties. While en route to the emergency room claimant gave an account of the mechanics of his January 5, 2007, accidental fall to Mr. Farmer. (T. 80). The evidence preponderates that the claimant's January 5, 2007, accident was substantially occasioned by the use of alcohol, illegal drugs, and prescription drugs used in contravention of a physician's order. The greater weight of the credible evidence establishes that the claimant's accident was attributable to his impaired judgment as a results of afore substances. *Woodall vs. Hunnicutt Construction*, 340 Ark. 377, 12 S.W.3d 630 (2000). This claim is respectfully denied and dismissed.

**IT IS SO ORDERED.**

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**Andrew L. Blood, ADMINISTRATIVE LAW JUDGE**