

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. F810375

JERRY BARHAM, EMPLOYEE CLAIMANT

TYSON FOODS, SELF-INSURED EMPLOYER RESPONDENT

OPINION FILED SEPTEMBER 29, 2010

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

Claimant represented by the HONORABLE MICHAEL HAMBY,  
Attorney at Law, Greenwood, Arkansas.

Respondents represented by the HONORABLE DIANE GRAHAM,  
Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the  
Administrative Law Judge filed April 1, 2010.

The Administrative Law Judge entered the following  
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On December 9, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On December 9, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$218.00 for total disability and \$163.00 for permanent partial disability.
4. On December 9, 2006, the claimant sustained compensable injuries to his left shoulder and left elbow.
5. The claimant has failed to prove by the greater weight of the credible evidence that he also sustained compensable injuries to his neck and back in the employment-related fall on December 9, 2006. Specifically, he has failed to prove by the greater weight of the credible evidence that this employment related fall caused or aggravated any of the objectively established physical damage or defects that involve the claimant's cervical, thoracic, or lumbar spines so as to result in any of the symptoms or difficulties that the claimant may have experienced.
6. The respondent remains liable for any reasonably necessary medical services required by the claimant for his compensable left shoulder and left elbow injury or any other appropriate benefits, under the Act, for these injuries.
7. The respondent has controverted the claimant's entitlement to any benefits for his alleged neck and back injuries.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies

the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

**CONCURRING & DISSENTING OPINION**

I must respectfully concur, in part, and dissent, in part, from the majority opinion. After a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence that he sustained compensable

injuries to his neck and thoracic spine. I agree with the majority regarding the lumbar spine.

The 56-year-old claimant had been employed at the respondent for 22 years. On December 9, 2006, while dumping an ice tote, he slipped on some ice cubes and fell. Initially, the doctors treated the claimant for complaints of left elbow and left shoulder injuries. The respondent has accepted the left elbow and left shoulder injuries as compensable.

The claimant testified that, after approximately three months, the left shoulder and left elbow pain eased up, and he began to notice pain radiating from his upper back. He testified that there were three spots that burned and hurt all the time, and simple movements such as walking would cause the pain to radiate from his low back into his left shoulder. He testified that he reported these findings to Dr. Bebout. Dr. Bebout attempted to refer the claimant to a neurosurgeon, but the respondents controverted. The claimant testified that he did not experience any pain nor did he receive any treatment to that particular area of his back prior to December of 2006. He did acknowledge that he had been treated for low back problems on prior occasions.

The record reveals that, prior to December 9, 2006, the claimant had experienced prior employment-related injuries, most involving his low back. Prior to his employment with the respondent, he had an employment-related injury to his low back that required surgical intervention at the L5-S1 level. In 1993, the claimant experienced an employment-related fall while employed by the respondent. This fall resulted in complaints involving his low back, left hip, and left lower extremity. In 2000, the claimant sought medical treatment for weakness in his leg, but the etiology of the same was never pinpointed. As the Administrative Law Judge noted, the medical evidence corroborates the claimant's testimony that he did not experience any difficulties with his neck or upper back until several months after his employment-related fall on December 9, 2006.

On June 8, 2007, Dr. Bebout noted that, "he still complains of symptoms with a little bit of triceps burning pain, but primarily neurological symptoms from his neck following this fall, as well". It is apparent from this statement that, although not documented, the claimant had been discussing these symptoms with Dr. Bebout. Otherwise,

why would Dr. Bebout state, "he still complains..."? Furthermore, Dr. Bebout goes on to state, "he may have had a neck injury from this fall, as well, that needs to be evaluated". It was at this point that Dr. Bebout attempted to make the referral of the claimant to a neurosurgeon, which was controverted by the respondents. Dr. Bebout, in his June 8, 2007 report, specifically noted that the neck injury "needs to be evaluated. We do not do spine and neck injuries here. I have told him that he may need to go back to his workers' compensation carrier so that he can be sent to a neurologist or a neurosurgeon for further evaluation."

Once again, on August 28, 2007, Dr. Bebout noted, "he continues to have a lot of pain in the upper extremity and burning pain in the scapular region in the upper arm and anterior aspect of the chest....I think that we need to evaluate his neck, as well because of his present symptoms of the burning scapular pain. We are going to order an MRI of his neck and then see him back following that...." The respondents again controverted Dr. Bebout's recommendations and ultimately referred the claimant to an IME with Dr. Brad Thomas. On October 4, 2007, Dr. Thomas conducted an MRI which revealed:

C3-C4 displays a mild broad base posterior bulge with associated posterolateral spurring. Mild effacement of the subarachnoid space is seen, but no contact with the cord. There is some uncovertebral hypertrophy contributing to moderate right-sided neural foraminal narrowing. C4-C5 also displays a mild broad-based posterior bulge mildly effacing the subarachnoid space. There is no contact with the cord. The neural foramen are patent bilaterally.

The same findings were also present at C5-C6 and C6-C7. Dr. Thomas, in his October 4, 2007 progress note, reflects that in his review of the MRI, "there is evidence of some degenerative disease with some spurs and mild broad-based bulges." It is not disputed that the claimant had no problems with his upper back prior to the December 9, 2006 fall while employed by the respondents and, subsequent thereto, these problems arose. It is also uncontroverted that, based upon the findings on the MRI, there are objective findings showing problems with the cervical spine.

Thereafter, the claimant's condition continued to deteriorate. In December of 2007, he reported to Dr. Bebout increasing pain in his neck, across his upper back, and into both shoulders. He also reported similar findings to his primary care physician, Dr. Nathan Bennett. On December 17,

2007, an MRI was performed on the claimant's thoracic spine, which revealed some thoracic kyphosis and widespread arthritis spurring and degenerative disc bulges throughout the mid to lower thoracic spine, but with no focal disc protrusions or herniations. On January 15, 2008, Dr. Bebout recorded further complaints of pain in the claimant's upper back and shoulder blade and further noted a loss of range of motion in the claimant's neck. He further commented that x-rays taken on that date showed some arthritic changes of degenerative scoliosis at the apex at T6 and what could possibly be a mild compression fracture at T9. This fracture was ruled out by a triple phase bone scan on March 25, 2008.

On October 29, 2008, the claimant was examined by Dr. John Kareus, a neurologist, who noted that the claimant's history of problems with his neck, shoulders, and scapula began at the time of his employment-related fall and had progressively worsened thereafter. Dr. Kareus diagnosed the claimant with a possible cervical and thoracic cord compression. He further noted that his examination indicated hyperflexia at the biceps and below. Dr. Kareus ordered a supplemental thoracic and claimant cervical MRI,

which were completed on October 28. The cervical MRI was interpreted as showing mild degenerative disc bulges and mild degenerative arthritic changes at the C3-7 level of the spine, with no evidence of stenosis or neurological impingement. The MRI of the thoracic spine was interpreted as showing degenerative disc bulging of the discs from the T7-T11 levels, without any stenosis or neurological compromise. However, the thoracic MRI also interpreted the same as showing a disc protrusion or herniation of the C6-7 disc.

Contrary to the majority, I do not find that the claimant's current need for treatment pre-existed the December 9, 2006 specific incident. The employer takes the employee as it finds him, and employment circumstances that aggravate pre-existing conditions are compensable. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W. 3d 150 (2003); Pearline Williams v. L&W Janitorial, Inc. 85 Ark. App. 1, 145 S.W. 3d 383 (2004). Here, there is no evidence that the claimant received treatment to his neck or thoracic spine before the December 9, 2006 specific incident. Furthermore, before the incident, the claimant was able to work without interruption. After the incident, the

claimant, a 22-year employee, was unable to work at all. For the majority, by affirming and adopting the decision of the Administrative Law Judge, to conclude that the claimant's need for treatment was due to a pre-existing condition and did not stem from the fall at work is simply not supported by the evidence of record.

For the aforementioned reasons I must respectfully concur, in part, and dissent, in part.

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PHILIP A. HOOD, Commissioner