

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F711206

THEODORE HOLMES, EMPLOYEE	CLAIMANT
TYSON POULTRY, INC., EMPLOYER	RESPONDENT
TYNET CORPORATION, CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 16, 2011

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

Claimant appeared *pro se*.

Respondents represented by the HONORABLE E. 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 August 8, 2011.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-insurance carrier relationship existed at all relevant times, including September 19, 2006, when the claimant sustained a compensable back injury at L4-5 level.
3. The claimant earned sufficient wages to entitle

him to the maximum compensation rates for 2006 (\$488.00/\$366.00).

4. The claimant's healing period ended on or before March 31, 2008 for this compensable back injury at L4-L5 level.
5. The respondents have paid medical expenses, temporary total disability benefits, and permanent partial disability benefits equal to 8% to the body as a whole in the amount of \$13,176.00.
6. This claim for benefits at the L2-3 level has been controverted in its entirety.
7. The parties agree to stipulate that Arkansas Code Ann. §11-9-411 applies in this matter.
8. The claimant failed to prove by a preponderance of the evidence that he sustained a compensable consequence back injury or/gradual onset injury at the L2-3 level.
9. The claimant failed to prove by a preponderance of the that additional medical treatment is reasonably necessary for his compensable back injury at the L4-L5 level.

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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

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

CONCURRING AND DISSENTING OPINION

After a de novo review of the record, I must respectfully concur, in part, and dissent, in part, from the majority opinion. The majority has affirmed and adopted the Administrative Law Judge's August 8, 2011 opinion finding that the claimant is not entitled to any further medical treatment for his admittedly compensable back injury at the L4-5 level. I agree on this issue and specifically concur. However, the majority has also affirmed and adopted the Administrative Law Judge's finding that the back problems and need for treatment the claimant is experiencing at the L2-3 level is not compensable. I disagree, and must respectfully dissent from this finding.

The claimant initially injured his back at the L4-5 level while working to repair the line. Dr. Rutherford performed some tests, and then referred the claimant to Dr. Bruffett. Dr.

Bruffett did some conservative treatment, but wound up performing surgery at the L4-5 level on October 17, 2007. According to the claimant, the surgery did not help at all. The claimant had physical therapy before and after the surgery, and he stated this also did not help. The claimant had some injections before and after surgery, but these did not help him either.

According to the claimant, after his surgery, he was off work for a short period of time, and then Dr. Bruffett returned him back to work with some restrictions. The claimant then worked for the respondent-employer another six to eight months partially at light duty and partially at regular duty. The claimant stated that at one point after this surgery, Dr. Bruffett released him to return to work at his regular job.

At the end of March of 2008, Dr. Bruffett gave the claimant a permanent impairment rating. Dr. Bruffett also had another MRI performed, which showed a herniation at the L2-3 level.

A review of the medical evidence demonstrates that on May 26, 2006, before the compensable injury, the claimant saw Dr. Kevin Roberts for refills on his medications. He assessed the claimant with "Hypertension and Lumbago", for which he prescribed Hydrocodone and Lisinopril.

This medical record seems to be the main reason why the Administrative Law Judge, affirmed and adopted by the majority,

denied the claim for benefits at the L2-3 level. The Administrative Law Judge found that the claimant is not a credible witness because he initially did not testify about back treatment before the work injury. I believe there is a problem with the Administrative Law Judge's logic. How does the fact that the claimant failed to testify about some pre-existing back treatment make the claimant not credible regarding the L2-3 injury, which, as it did not show up on the MRI relating to the L4-5 treatment, the claimant obviously did not have on May 26, 2006? Contrary to the Administrative Law Judge and the majority, I find the claimant to be a credible witness, who consistently testified about the nature and the extent of his injuries.

Furthermore, I find that the majority should not have affirmed and adopted the Administrative Law Judge's opinion because it does not analyze the elements of a compensable injury. The claimant has alleged a gradual onset back injury or a compensable consequence. The Administrative Law Judge does not analyze either theory, merely stating that the claimant is not a credible witness and it would require conjecture and speculation to find a compensable injury. This is not enough. The Administrative Law Judge has to analyze the elements of a compensable injury, not merely state that the claimant does not have such an injury.

Here, the claimant worked for the respondent for six to

eight months after his compensable L4-5 injury. Due to the nature of his work, there is a real possibility that the claimant's injury at the L2-3 and L3-4 levels is a compensable consequence of the L4-5 injury or a new gradual onset back injury. Both theories must be analyzed, not merely rejected.

Arkansas Courts have on several occasions considered claims for benefits for alleged "compensable consequences" in cases subject to Act 796 of 1993, and in each case, the Court has essentially indicated that:

When the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury; the basic test is whether there is a causal connection between the two episodes.

See generally Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998).

It is my belief that the claimant, moving differently due to the L4-5 back injury, as a compensable consequence of the L4-5 injury, sustained a new gradual onset injury to the L2-3 and L3-4 levels. While Ark. Code Ann. §11-9-102 (4) (A) states that an injury must be "accidental" i.e., caused by a specific incident and is identifiable by time and place of occurrence to be compensable, Ark. Code Ann. §11-9-102(4) (A) (ii) (b) states that

back injuries not caused by a specific incident and not identifiable by time and place of occurrence, are specifically included in the definition of a compensable injury. Ark. Code Ann. §11-9-102(4)(E)(ii) states that the burden of proof for a "gradual onset" back injury is by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

The correct analysis for a gradual onset back injury is whether or not the claimant can prove by a preponderance of the evidence that her back injury (1) is an injury arising in and out of the course of employment; (2) the injury caused internal or external physical harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) the back injury is the major cause of the disability or need for treatment. Wal-Mart Stores v. Leach, 74 Ark. App. 231, 48 S.W. 3d 540 (2001).

Here, the claimant meets all of the elements of a compensable gradual onset back injury to the L2-3 level. He was able to perform his job after the L4-5 injury. There is no evidence of record that the claimant was injured anywhere other than work. Due to the L4-5 injury, it is already known that the claimant's job duties were of the type that would cause a back injury. The claimant's treating physician has stated that his

need for treatment is for the L2-3 injury, not the L4-5 injury; therefore, the major cause requirement is met. I would award the claimant benefits for a compensable consequence gradual onset back injury.

For the aforementioned reasons I must concur, in part, and dissent, in part, from the majority opinion.

PHILIP A. HOOD, Commissioner