

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. G807027**

DAVID L. BURKHOLDER, Employee	CLAIMANT
ACME BRICK COMPANY, Employer	RESPONDENT #1
TRAVELERS INSURANCE COMPANY, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

**OPINION FILED FEBRUARY 15, 2022**

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent #1 represented by GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas; although not participating in hearing.

**STATEMENT OF THE CASE**

On November 18, 2021, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on September 1, 2021, and a Pre-hearing Order was filed on September 2, 2021. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 20, 2018 the relationship of employee-employer-carrier existed between the claimant and respondent #1.
3. The claimant sustained a compensable injury to his low back on March 20, 2018.

4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$673.00 for temporary total disability benefits and \$505.00 for permanent partial disability benefits.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether the claimant sustained a compensable cervical spine injury, thoracic spine fracture, and left shoulder injury as a compensable consequence of his March 20, 2018 compensable injury.
2. Whether the claimant is entitled to medical benefits in regard to the cervical spine, thoracic spine, and left shoulder injuries.
3. Respondent #1 raises the statute of limitations.

Claimant's contentions are as follows:

“The claimant sustained injury to his cervical spine and his shoulder as compensable consequences of his compensable lumbar spine injury since his lumbar spine injury has caused him to fall on several occasions. The claimant contends that he is entitled to reasonable necessary medical treatment regarding his cervical spine and his left shoulder. The claimant contends that his attorney is entitled to a fee on any disability benefits arising out of the injury to his cervical spine or his shoulder.”

At the time of the pre-hearing conference, the claimant also contended that he is entitled to a lumbar spine MRI as recently recommended. He further alleged a compensable thoracic spine fracture as a compensable consequence of his March 20, 2018 compensable injury.”

Respondent #1's contentions are as follows:

“Claimant's claimed neck and shoulder complaints are barred by the statute of limitations and/or did not occur in the course and scope of his employment.”

Respondent #2 defers to the outcome of litigation and waives its right to attend the hearing.

The claimant in this matter is a 67-year-old man who suffered a compensable injury to his low back on March 20, 2018. The claimant described the mechanism of his low back injury in direct examination testimony as follows:

Q Mr. Burkholder, will you briefly explain how you got injured on March the 20<sup>th</sup> of 2018 while in the employment of Acme Brick.

A I was putting in a burner block and it was up above my head and it had a bunch of bolts around there. It probably weighed about 300 pounds and I was twisting on it trying to line it up and push in and when I twisted on it, I went to push in, that is when my back got a real sharp pain and I just hit the ground.

The claimant was treated for his low back injury and eventually underwent a multilevel lumbar fusion that was performed by Dr. James Blankenship on May 15, 2019. The claimant continues to treat for his compensable lumbar injury.

The central issue before the Commission in this matter is whether the claimant sustained a compensable cervical spine injury, thoracic spine fracture, and left shoulder injury as a compensable consequence of his compensable low back injury of March 20, 2018.

The claimant gave direct examination testimony at the hearing regarding his unsteadiness on his feet and a fall he had on November 27, 2020 as follows:

Q The records indicate that in addition to back pain after this March 20, 2018 incident, you complained of pain and weakness in your legs. Tell us about that.

A I would be walking, getting up or walking anywhere and might get a real sharp pain and it would just - - my legs would just give out.

Q Now, you are using a cane today; is that correct?

A Yes, sir.

Q Why are you using that cane?

A Because if I get up and if I ain't got something to

hang onto, I am liable to go down because that is when it's the worst is when I get up and down.

Q Your wife talked about an episode in November of 2020 when you fell, but she was not present, so tell us what happened. November 27<sup>th</sup> I believe was the date.

A Yes. I was moving around. I was outside and I turned around and I was walking back into the house and I got one of them real sharp pains and my legs gave out from underneath me and I hit the ground.

Q Did you slip on anything?

A No, sir.

Q When you went to the emergency room, did you tell the emergency room people that you fell?

A Yes, sir.

The claimant's wife, Cynthia Burkholder, also testified about the claimant falling after his compensable low back injury of March 2018. She gave direct examination testimony as follows:

Q On the occasions that you have seen him fall, did he appear to trip over anything?

A No.

Q Did he appear to slip on anything?

A No.

Q Based on your observation of seeing him fall, what did you see?

A I would be hanging onto him because he was not stable and he would hang onto the handrail and I - - he would just have trouble trying to walk. And I could feel him slip, like his feet would just, you know, he would - - I am sorry. I don't know how to explain it, but ...

Q So if he didn't trip or he didn't slip, did it just look like he collapsed or what?

A Yes. It was more like a collapse.

Q And has that happened on more than one occasion?

A Yes, sir.

A medical record authored by Dr. Terry Sites dated March 23, 2020 shows the claimant complained of “RLE giving way when sharp pain hits.” Emergency department records from the day of the claimant’s alleged fall also report that the claimant fell. I do find the claimant to be credible in that he fell on November 27, 2020, and that his leg weakness/pain caused him to fall as a natural consequence of his compensable March 20, 2018 low back injury.

It is the claimant’s allegation that his November 27, 2020 fall caused him to suffer a cervical spine injury, thoracic spine fracture, and left shoulder injury. The claimant’s emergency department report from Washington Regional Medical Center dated November 27, 2020 in part states: “Chief Complaint: pt reports low back pain s/p fall today. felt like he heard something pop. no head trauma, no loc.” I find no evidence in the emergency department report that the claimant ever complained to medical providers of cervical spine injury or left shoulder injury. In fact, the physical exam portion of the emergency department report states, “NECK: No midline C-spine tenderness. Normal range of motion, Trachea midline, No meningeal signs.... UPPER EXT: No gross deformities, Range of motion normal, Motor strength normal, Sensation intact, Distal pulses equal and normal bilaterally.”

The claimant did report back pain and a CT of the lumbar spine was performed. That diagnostic test found the claimant to have mild acute superior endplate compression fracture of the T12 vertebral body.

The claimant was also seen at Trinity Rehabilitation in Springdale, Arkansas on December 2, 2020. Following are portions of the progress note from that visit only a few days after his fall:

12/2/20 temp 98.0. David fell at home in his yard yesterday. States had sharp pain in his R LB and fell. He went to the ER and x-rays showed T12 fracture. He is in TLSO. He spoke to Dr. Blankenship office and was told to try to come to PT.

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12/2/20 Aquatic therapy x 30 min. David attempted all

activities. Difficulty with all. Trouble getting out of pool. I had to assist him out and to changing room. His wife helped him change. No US or etsim today.

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12/2/20 Hold PT until orders from Dr. Blankenship following fall at home.

Again, there is no mention in the medical record of complaints or difficulties with the claimant's left shoulder or cervical spine.

The claimant was seen by Dr. Blankenship on February 4, 2020, at which time the claimant does complain of increased pain in his neck that radiates pain into his shoulders bilaterally. Following is a portion of that medical record:

**HPI:**

The patient is in today for follow up. The patient fell the day after Thanksgiving and he has had significantly increased pain in his neck, mid back, and low back. He is having neck pain that radiates to the bilateral shoulders, left worst than right, and goes down the left upper extremity. He is also having mid back pain and thoracolumbar pain and was told he fractured T12. He is wearing a brace that he was put in after he went to the emergency room. He is also having low back pain that radiates to the bilateral hips and bilateral buttocks. He is having bilateral posterior lower extremity pain. He rates his overall pain about 80% toward the worst pain imaginable. He tried gabapentin and Lyrica, but he had to stop them both because he was having side effects from these. They were making him as he states, Fall.

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**Impression:**

Mr. Burkholder is a year and half out from his anterior lumbar interbody arthrodesis. He was doing pretty good up until falling around Thanksgiving. He suffered a T12 compression fracture.

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**Recommendations:**

**REFER TO:**

Cannon, David (479-582-2800).

First of all I told him his fracture is stable. Although it is stable I have operated on fractures of this magnitude before but in this situation I have recommended we get him into an aggressive active therapeutic program with Steve, get him back on his Celebrex, and get him in to see Dr. David Cannon to see if he thinks any

injections around the area of the compression fracture would afford him any relief that could buy some more time to get him better. He agrees with the game plan.

On May 6, 2021, the claimant was again seen by Dr. Blankenship. Following is a portion of that medical record:

**HPI:**

The patient is in today for follow up. The patient had a thoracic epidural injection and states this did not afford him any relief. He was trying to get into some physical therapy but he and the physical therapist determined that it was best to just lay off the physical therapy and do home exercises and stretches because he was having such a significant amount of pain. The greatest pain complaint he has is the thoracolumbar pain and it does down to the low back pain. His low back pain radiates into the bilateral hips, bilateral buttocks, and goes down the bilateral lower extremities. He has decreased strength in both legs. He is also having neck pain that radiates into the left shoulder, bilateral scapulae, and subscapulae. He is having decreased balance and states that he is falling frequently.

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**Impression:**

The patient returns o [sic] the office today. He did a couple of visits to physical therapy but said it caused him too much pain. He is basically hurting all over. He states that he has fallen. We did an MRI on the patient's neck in July of 2020. The patient had anterolisthesis at C5-C6 with foraminal narrowing. He had some right-sided foraminal narrowing at C3-C4. He did not have any canal stenosis, o [sic] I think his decreased strength and balance problems are probably pain related.

**Recommendations:**

I told him we need to get a new MRI of his cervical spine. We have offered him surgery before on his neck, but his Workers Comp carrier will not cover this despite the fact that I think it is work related. With the multifactorial location of his pain and the fact that I do not feel like there is anything else to do on his lower back, I recommended to him that we get him in to see a pain management specialist. It would be good if he had a rheumatologic evaluation, but David does not have any private insurance, and I am certain his Workers Comp carrier would not allow this.

The thoracic fracture he has is stable and certainly not

surgical. I told him that until his Workers Comp carrier allows us to further treat his neck, I am really at a stand-still as to what to do. I recommended we refer him to see Dr. Whatcott for further evaluation and treatment. I recommended that he have a new cervical MRI and return to see me for consideration of surgical intervention. We will contact his Workers Comp carrier and see if we can get this authorized and get him back in. If they will not authorize further treatment on his neck, it is absolutely worthless to get an MRI. David understands all the limitations that his Workers Compensation carrier has placed on us, but I told him we will keep trying to fight for him.

On October 28, 2021, Dr. Blankenship authored a letter to the claimant's attorney. Following is the body of that letter:

I received your letter concerning Mr. Burkholder. The gentleman is having a progression of myelopathy. As you know when he presented to me his lower back pain was so severe that I do think this superseded any complaints he had concerning his neck. As best I can tell from my records, the gentleman never has seen a physician in the past for his neck. Even if he had, with his gross increase in pain, it is still my opinion based on a reasonable degree of medical certainty that the reason the gentleman needs treatment for his neck is based on his work injury. His workers comp people have paid for an MRI for his cervical spine before so it appears at least sometime during his care they accepted responsibility for his neck.

The gentleman is having a progression of myelopathy and needs surgical treatment. Again, it is my opinion that the need for this surgical treatment is much greater than 50% if not wholly related to his work-related injury based on the information that I have. His cervical MRI is very old and he is getting progressively worse with weakness in his legs. The recommendation is a very urgent MRI of his cervical spine and possible surgical treatment depending on what I see. I would be happy to see the gentleman. I would be happy to even read the MRI for him and wait and see how this turns out but unfortunately I have no control over the hospital anymore since I am not an owner. I cannot ask them to do it for free. Even if I did, they would not.



I do find that the claimant suffered a fall on November 27, 2020 that was a natural consequence of his compensable March 20, 2018 low back injury which caused him lower extremity weakness/pain. However, I find the only injury he sustained from that compensable consequence was a mild acute superior endplate compression fracture of the T12 vertebral body. The claimant is unable to prove by a preponderance of the evidence that he suffered a left shoulder injury or a cervical spine injury in that November 27, 2020 fall. While the claimant testified to increased pain to those body parts, the emergency department and physical therapy notes shortly after that fall do not support his testimony.

It is clear that the claimant does have left shoulder and cervical spine difficulties. However, these conditions predated his November 27, 2020 fall. From Dr. Blankenship's letter to the claimant's attorney, it is certain that he believes the claimant's left shoulder and cervical spine conditions to be related to the claimant's original March 20, 2018 injury.

In fact, the medical records introduced by both parties clearly show left shoulder and cervical spine difficulties after March 20, 2018 and prior to November 27, 2020. The claimant was seen by Dr. Terry Sites four days before his November 27, 2020 fall for left shoulder difficulties. In October of 2020 the claimant was seen by Dr. Blankenship where he complained of both neck and shoulder difficulties. At that time it is Dr. Blankenship's referral to Dr. Sites at which he was seen four days before his fall for left shoulder difficulties. I do believe the claimant has left shoulder and cervical difficulties, but those issues were not a result of his November 27, 2020 fall. Instead, those problems are a continuation of the same problems that he had prior to his November 27, 2020 fall.

Respondent #1 raised the issue of the Statute of Limitations. However, the claimant only requested benefits in this matter resulting from the November 27, 2020 fall which was a compensable consequence of his March 20, 2018 low back injury. The claimant filed an AR-C with the Commission on May 24, 2021 regarding his allegation of injuries from his November 27, 2020 fall that was a compensable consequence of his compensable low back injury. Respondent #1 is unable to prove that the

Statute of Limitations has run as it relates to the claimant's compensable consequence fall of November 27, 2020.

From a review of 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on September 1, 2021, and contained in a Pre-hearing Order filed September 2, 2021, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that he sustained a thoracic spine fracture on November 27, 2020 as a compensable consequence of his March 20, 2018 compensable low back injury.

3. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable cervical spine injury and left shoulder injury on November 27, 2020 as a compensable consequence of his March 20, 2018 compensable low back injury.

4. The claimant is able to prove his entitlement to medical benefits regarding his thoracic spine fracture.

5. The claimant is unable to prove his entitlement to medical benefits regarding his cervical spine and left shoulder injuries.

6. Respondent #1 has raised the statute of limitations defense; however, that defense is moot in that the claimant has not claimed any injury in the current matter dating prior to the November 27, 2020 fall which is a compensable consequence of his compensable injury. Respondent #1 is unable to

prove that the Statute of Limitations has run as it relates to the claimant's compensable consequence fall of November 27, 2020.

**ORDER**

Respondent #1 shall pay the costs associated with the medical treatment regarding the claimant's thoracic compression fracture at T12 injury sustained in his November 27, 2020 fall.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

**IT IS SO ORDERED.**

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**HONORABLE ERIC PAUL WELLS  
ADMINISTRATIVE LAW JUDGE**