

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F601574

BOBBIE BARNES, EMPLOYEE

CLAIMANT

RIVERSIDE FURNITURE CORPORATION,  
A SELF-INSURED EMPLOYER

RESPONDENT

**OPINION FILED MAY 30, 2007**

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

Claimant represented by HONORABLE J. RANDOLPH SHOCK,  
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE E. DIANE GRAHAM,  
Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the  
Administrative Law Judge filed September 21, 2006.

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 September 19, 2005, the  
relationship of employee-self insured  
employer existed between the parties.

3. On September 19, 2005, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$217.00 for total disability and \$163.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove that she sustained a "compensable injury" to her low back or lumbar spine, on September 19, 2005. Specifically, she has failed to prove by the greater weight of the credible evidence that she sustained a physical injury to her low back or lumbar spine, on that date, that arose out of and occurred in the course of her employment, that was caused by a specific incident, and that is identifiable by time and place of occurrence.

5. The respondents have denied the occurrence of a compensable injury to the claimant's low back on September 19, 2005, and have controverted this claim in its entirety.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the

elements necessary to prove a compensable injury by a preponderance of the evidence.

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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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

\_\_\_\_\_I must respectfully dissent from the Majority opinion, finding that the claimant did not sustain a compensable injury. On September 21, 2006, an Administrative Law Judge issued an opinion finding that the claimant did not sustain a compensable injury. Specifically, the Administrative Law Judge concluded that the record did not establish the claimant had shown objective findings that she sustained an injury related to a work-related injury. He further opined that he did not find the claimant's testimony regarding the occurrence of her injury to be credible. The Majority now affirms and adopts the decision as their own.

On appeal, the claimant contends that she sustained a compensable injury as shown by the objective findings reflected by MRI and by the corroborative evidence indicating that she sustained an injury while lifting a board at work on September 19, 2005. After reviewing the record, I agree with the claimant's assertions. Specifically, I find that the claimant was acting in the

course and scope of employment when she was lifting boards prior to the beginning of her shift. Additionally, while I recognize the claimant had pre-existing back problems, I note that there was no evidence of a fracture until shortly after her injury. I also found the claimant's testimony regarding the injury to be more credible than that of the respondents' witnesses. Finally, I find that the evidence shows that the claimant is entitled to receive temporary total disability and medical benefits from the time of her injury forward. Therefore, I would have reversed the decision of the Administrative Law Judge.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the injury; and

(4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i)(Repl. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineering Speciality Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The Majority denies benefits, in part, based on the finding that they do not believe the claimant's testimony regarding the occurrence of the injury to be credible. They rely on the testimony of Garrison and Mulkey that they did not see the claimant working prior to her shift on any other incident. Additionally, they note that Mulkey denied the claimant reported her injury was due to lifting boards and relied on the testimony of Breedlove that the claimant did not report a work-related injury until she had questions regarding the receipt of her short term and long term disability. Finally, they seem to find it of great importance that the claimant did not go to the "company

doctor" immediately after the injury and noted Garrison's testimony that he had previously heard the claimant complain of back pain. However, after reviewing the record, I find that the Majority errs in relying on the testimony of the respondents' witnesses. Instead, I found that the testimony of the claimant was credible and was supported by corroborative evidence in the form of testimony from Lore, the telephone logs from the date of the accident, and from the medical reports indicating that she had sustained a work-related injury.

I first find that the preponderance of the evidence shows that the claimant was at work prior to the time of her scheduled shift and that she was lifting boards when she sustained an injury. The claimant consistently and credibly testified that she was injured while lifting a board at work. Her testimony regarding working prior to the start of her shift was corroborated by Lore. I found the testimony of Lore to be particularly convincing. In making this finding, I note that Lore is retired and therefore has no reason to be biased in any particular direction. In

contrast, Garrison, Breedlove, and Mulkey, each remain in the employment of the respondents. Lore testified that she was unaware of any policy prohibiting the performance of work before the beginning of a shift, which is consistent with the claimant's denial of knowledge of such a policy. Additionally, Lore testified that she had worked before clocking in while employed by the respondents and had personally witnessed the claimant working prior to the start of her shift on numerous occasions. As Lore no longer works for the respondent, I find that her testimony is the most reliable that is available.

Additionally, with respect to the testimony of Garrison and Mulkey, I note that Mulkey testified that he worked in the finishing department, which was not located in the same area as the claimant. I note that even if Garrison had never seen the claimant working while "off the clock" that does not mean it never occurred. I also note that while Mulkey denied the claimant reporting her injury was due to working, what is significant is that he witnessed the claimant behaving as though she was in an extraordinary

amount of pain. Additionally, he denied having knowledge that the claimant had prior back problems, which would support the claimant's testimony that she suffered an acute onset of back pain on the morning of September 19, 2005.

I further find that the telephone logs support the claimant's testimony that she injured her back on September 19, 2005. The claimant placed some seven telephone calls to her husband between 4:43 and 5:01 a.m. The frequency of these calls strongly supports the claimant's testimony that she was in severe pain and asked her husband to come and assist her. Furthermore, it is undisputed the claimant repeatedly contacted her physician's office multiple times that morning, which also evidences that there was a change in her condition.

Finally, I note that the medical records consistently and continually provide that the claimant suffered an exacerbation of her condition due to lifting boards at work. While seeking treatment, the claimant was forthright about her pre-existing back pain; however, she repeatedly indicated that she had a dramatic increase in

pain due to lifting boards at work on the morning of September 19, 2005. Given the claimant's ongoing reports that she injured herself due to work, and the findings of the MRI indicating that the edema would be consistent with an acute injury due to hyperflexion, I find that the claimant's testimony regarding how her injury occurred is credible.

The Majority next opines that the claimant was not credible with regard to whether she reported her injury. I find that this conclusion is also erroneous. As previously mentioned, the claimant contacted her husband some seven times after lifting the boards. The telephone records indicate that the claimant contacted Mary King at 8:38 and 8:58 a.m. I find that the only logical reason for those calls would be to report her injury. Likewise, the claimant explicitly testified that she contacted King and reported the injury and there is no firsthand testimony from King to dispute that claim. Furthermore, when considering the claimant's testimony that she was repeatedly told that if she was not clocked in she could not receive workers'

compensation benefits, it is apparent that the claimant did, in fact, report her injury was work-related.

I note Breedlove's testimony that King denied the claimant reported her injury. However, I note that this was hearsay testimony. As such, I find that it should be given no weight. Additionally, I simply did not find Breedlove to be credible. I found it particularly curious that Breedlove was adamant that the claimant could not have spoken to his assistant rather than being transferred to his direct telephone line. I find it difficult to believe that Breedlove's assistant never transferred calls to him. Likewise, I note that Breedlove, by his own admission violated company policy when he did not complete an accident report at the first report of the incident as required by company policy.

Finally, I address the Majority's assertion that because the claimant drew short and long term disability benefits, that is evidence she did not sustain a work-related injury. The claimant testified she did not believe she was entitled to benefits because she was "off the

clock". As such, I do not find it curious that she would apply for and draw disability benefits. Furthermore, I note that on the application for disability benefits the claimant explicitly indicated that she injured her back while stacking parts. Finally, I am greatly disturbed that the Majority equates the application for disability benefits to be inconsistent with having sustained a workers' compensation injury. Certainly this Commission frequently sees claims in which workers have sustained an admittedly compensable injury and are simultaneously receiving short or long term disability benefits for which the respondents receive a credit. I also note that it is not uncommon for the prudent claimant who has planned for unforeseen disastrous events to carry enough insurance to receive disability benefits in an amount that is greater than that which they receive from their workers' compensation claim. I find that those employees who plan ahead should not be penalized simply because they have enough foresight to carry short or long term disability benefits. In fact, it is simply disingenuous to now surmise that the mere application

for receipt of short or long term disability benefits is somehow proof that a claimant did not sustain an injury at work.

I next find the medical records corroborate the claimant's testimony and show the claimant has met her burden of proof in showing she sustained a compensable aggravation. A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. See, Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Conway Convalescent Center v. Murphree, 266 Ark. 985, 585 S.W.2d 462 (Ark.App. 1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). The employer takes the employee as he finds him. Murphree, supra. In such cases, the test is not whether the injury causes the condition, but rather the test is whether the injury aggravates, accelerates, or combines with the condition. However, although a disabling symptom of a pre-existing condition may be compensable if it is brought

on by an accident arising out of and in the course of employment, the employee's entitlement to compensation ends when his condition is restored to the condition that existed before the injury unless the injury contributes to the condition by accelerating or combining with the pre-existing condition. See, Arkansas Power & Light Co. v. Scroggins, 230 Ark. 936, 328 S.W.2d 97 (1959).

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a preexisting non-compensable condition by a compensable injury is, itself, compensable. Id. An aggravation is a new injury resulting from an independent incident. Id. An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation.

The Majority finds that the claimant had no objective findings that were consistent with an acute

injury. In my opinion this arbitrarily ignores the MRI indicating that the claimant had swelling that was consistent with an acute injury.

In this instance, the claimant was observed as having muscle spasms and her MRI specifically indicated that the claimant had findings that were consistent with an acute finding. Specifically, the report indicates,

Small area adjacent to the superior endplate of the L4 vertebral body which demonstrates subtle increased signal on T2 weighted images which is consistent with bone marrow edema and suggests an acute finding. If there is a history of recent hypertension injury, then this most likely represents a subtle avulsion injury. If no history of acute trauma, then a limbus body, which is a normal variant, is most likely.

Additionally, the physician, on the next visit, specifically indicated that the claimant suffered from a fracture, which is consistent with the reading provided by the radiologist performing the MRI. After the MRI the claimant was repeatedly diagnosed with a fracture. Furthermore, I note that while the claimant had received treatment for back pain

in the past, she had never been diagnosed with a fracture. When the MRI findings are considered with the claimant's testimony regarding how the event occurred and with the medical reports providing she injured herself at work lifting a board, the only logical conclusion is that the claimant's swelling and fracture were a direct result of the work injury. Accordingly, her claim should have been found to be compensable and she should have been awarded related medial benefits.

I further find that the claimant is entitled to temporary total disability benefits for the time period of September 20, 2005 to a date yet to be determined. Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that

condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

A claimant who has been released to light duty work but has not returned to work may be entitled temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274 (1984).

The claimant credibly testified that she has been off work pursuant to doctor's orders since the time of the injury. While there are no doctor's notes in the record, I note that such is not required to be entitled to receive temporary total disability benefits. Farmers Coop. v. Biles, 77 Ark. App. 1, 69 S.W. 3d 899 (2002). The claimant also credibly testified that she had such slips, but that they had been submitted with her requests for short and long term disability benefits. As the claimant, in fact, was approved for such benefits, one can only conclude that she claimant was unable to return to work. Also, the claimant credibly

testified that she remains on light duty work and that she would not be able to perform her job given her restrictions. Finally, as there is no evidence the claimant has been placed at MMI or that she has been released to return to work, the evidence preponderates that she is still in her healing period and unable to work.

For the aforementioned reasons, I respectfully dissent.

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PHILIP A. HOOD, Commissioner