

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F707864

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|---------------------------------------|------------|
| BOBBY AYERS, EMPLOYEE | CLAIMANT |
| DOMTAR INDUSTRIES , EMPLOYER | RESPONDENT |
| LIBERTY MUTUAL INSURANCE CO., CARRIER | RESPONDENT |

OPINION FILED JUNE 22, 2009

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

Claimant represented by HONORABLE KENNETH A. OLSEN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed October 3, 2008.

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

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable injury to his lumbar spine as a result of a specific incident identifiable in time and place of occurrence at the workplace on

July 30, 2007. Specifically, the claimant has failed to prove by a preponderance of the evidence that his lumbar spine injury arose out of and in the course of his employment.

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.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent 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 all of the elements required of a compensable specific incident aggravation injury. I would reverse the findings of the Administrative Law Judge and award medical treatment for the claimant's lumbar spine injury, as well as temporary total disability benefits from November 5, 2007, to a date yet to be determined, and therefore, I must respectfully dissent.

In workers' compensation law, an employer takes the employee as he 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). An aggravation of a pre-existing non-compensable condition by a compensable injury is itself

compensable. Oliver v. Guardsmark, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W. 3d 900 (2000). 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. Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W. 2d 883 (1996).

Ark. Code Ann. §11-9-102(4) (A) (Repl. 2002) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body...arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (a) (i).

Contrary to the finding of the Administrative Law Judge, affirmed and adopted by the majority, the claimant has carried his burden of proof. He sustained a compensable

injury at work when his back popped while pushing a heavy roll of paper into a machine. There is no argument that the claimant had a pre-existing lumbar spine condition as he was diagnosed with a bulging disc as early as during his time in the Marine Corps some ten years earlier. However, despite the fact that the claimant received a service-related disability from the Veterans' Administration for this injury, it was not a disabling condition, as evidenced by the fact that he worked at a heavy labor job at Domtar from 2002 through the date of injury, July 30, 2007, doing heavy labor.

While the claimant had sought medical attention prior to his July 30, 2007 injury, he was not recommended any treatment and was not taken off from work. He had only back pain, and returned to work following examination and diagnostic testing. However, following his injury of July 30, 2007, he experienced radicular pain branching into his right leg, which is a new finding not previously present. The claimant had an MRI on November 28, 2007, at the VA Hospital, and the interpreter noted a posterior central extrusion at L5-S1, which is different from, or at least a worsening of, his prior diagnosis of bulging disc. The doctor reading the MRI stated that the extrusion was "downward migrating and impinging the (thecal) sac." This is

a new objective finding, which was not previously present. Likewise, the claimant's subjective complaints worsened after this pushing incident at work, with a new finding of radiculopathy into his right leg, where he had previously had only nagging low back pain.

The claimant received moderate relief of his radicular pain symptoms following the January 22, 2008 laminectomy and discectomy; however, eventually, the pain returned. In March, 2008, he underwent another enhanced MRI scan, which revealed a persistent midline disc seriating at L5-S1, for which Dr. McDonnell recommended fusion surgery on the right at this level. He continues to be disabled from his job due to the work-related injury.

The Administrative Law Judge emphasizes in his opinion that, due to the presence of a pre-existing condition of bulging disc at L5-S1, he does not find that the claimant had objective findings of injury. I find that the Administrative Law Judge did not examine the record thoroughly as evidenced by his failure to appreciate the progression of both objective findings and subjective complaints apparent therein. While the Commission has the authority to resolve conflicting evidence, including medical testimony, Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996), the Commission may not arbitrarily

disregard medical evidence or the testimony of any witness. Coleman v. Pro-transportation, 97 Ark. App. 338, 249 S.W.3d 149 (2007).

I find that the evidence of record clearly shows that the claimant's back popped on July 30, 2007, while pushing a heavy roll of paper. The action of pushing the heavy roll of paper caused the previously damaged disc to herniate and a fragment of disc material to break off and lodge up against the thecal sac, causing impingement. Until the paper-roll pushing incident, the claimant had not been diagnosed with an extruded disc fragment at L5-S1. Until this incident the claimant did not have loss of ankle reflex on the right side, did not have radicular pain down his right leg, and was not disabled from working. The presence of a pre-existing condition is not a sufficient basis to deny the compensability of the claimant's work injury, when he has otherwise satisfied the requirements of Ark. Code Ann. §11-9102(4)(A)(i).

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner