

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F707171

KAREN COOPER,
EMPLOYEE

CLAIMANT

MOUNT MAGAZINE STATE PARK,
EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 12, 2009

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

Claimant represented by the HONORABLE DUSTI L. MILLER,
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE RICHARD SMITH,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed June 24, 2008. The administrative law judge
found, among other things, that the claimant proved she
sustained a compensable injury to her lower lumbar spine.
After reviewing the entire record *de novo*, the Full
Commission reverses the administrative law judge's opinion.

The Full Commission finds that the claimant did not prove she sustained a compensable injury.

I. HISTORY

The record indicates that Karen Cooper, age 42, was hired by the respondent-employer in November 2006. The parties stipulated that the employment relationship existed at all pertinent times, including July 2, 2007. The claimant testified that she worked in housekeeping. The claimant testified, "I went into the bathroom to change the shower curtain. We didn't have any stepstool, so I stepped up onto the tub and I put one foot on one side of the tub and one foot on the other side of the tub so I didn't fall and I changed the shower curtain. I went to step down and I was turned in such a way that when I stepped down, I heard my back pop. And I worked in pain for the rest of the day....It felt like someone was shoving a knife in my spine."

The claimant sought medical treatment on July 3, 2007. A physician's report indicated that the claimant was hanging shower curtains at work, was standing on the edge of tub, stepped down, and felt a pop causing severe lower back pain. The physician's report included "Hx of 'pinched nerve' in

back 2 yrs ago." The physician prescribed medication and took the claimant off work for three days.

The record indicates that an x-ray of the claimant's lumbar spine was taken on July 3, 2007, with the following findings: "Mild rightward curvature upper aspect of five lumbar vertebral bodies. SI joints are unremarkable. Mild interspace narrowing L5, S1 with about 9 mm of anterolisthesis of 5 on 1 and probable L5 spondylolisthesis, although it might be better seen on oblique views." The impression was "1. Degenerative change L5, S1 with probable spondylolisthesis and spondylolysis."

Dr. James Schmitz, D.O., saw the claimant on July 9, 2007 and diagnosed low back pain with radiculopathy right leg. Dr. Schmitz signed a Certificate To Return To work indicating that the claimant was unable to return to work until July 23, 2007.

An MRI of the claimant's lumbar spine was taken on July 24, 2007:

CLINICAL HISTORY: Low back pain radiating to the right lower extremity with right leg numbness. Patient states history of fall. No history of previous back surgery....

REPORT: The lumbar vertebral bodies maintain their normal height. There are early degenerative changes of the lower lumbar spine with mild

intervertebral disc space narrowing at the level of L5-S1. Other degenerative changes at this level include signal abnormalities along the vertebral body endplates consistent with degenerative process as well as desiccation of the discs. There is bilateral spondylolysis at L5-S1. There is no edema appreciated to suggest acute process. There is no associated spondylolisthesis. The conus medullaris terminates normally at the level of L1.

L5-S1: There are early degenerative changes at the level of L5-S1 including mild diffuse disc bulge. There is bilateral spondylolysis at L5-S1 with no edema present to suggest acute or subacute process. The spinal canal and bilateral neuroforamina are patent.

The remainder of the discs are of normal configuration. There are no focal disc herniations. The spinal canal and neuroforamina are patent throughout the lumbar spine....

1. There are degenerative changes at the level of L5-S1 as described. There is also the appearance of bilateral spondylolysis. There is no edema present to suggest acute/subacute process. Recommend clinical correlation. There is no associated spondylolisthesis identified on this study. Flexion and extension maneuvers may be helpful for further characterization as clinically indicated.
2. Otherwise negative MRI of lumbar spine.

The assessment of Dr. Schmitz on July 31, 2007 was low back pain/spondylolysis L5/S1 and right hip pain. The claimant's employment was terminated on July 31, 2007, for the reason, "Unable to work per doctor's order." The notification document indicated that the claimant was

eligible for rehire. The claimant testified that she returned to light-duty work for the respondents on September 5, 2007.

A pre-hearing order was filed on February 8, 2008. The claimant contended, among other things, that she suffered a compensable injury to her back on July 7, 2007. The claimant contended that she was entitled to medical treatment and additional temporary total disability benefits. The respondents contended that the claim was not compensable, "because the medical evidence we have seen does not document objective clinical findings of injury."

An administrative law judge found, among other things, that the claimant "sustained a compensable injury to her lower lumbar spine in the form of an aggravation of a pre-existing condition."

The respondents appeal to the Full Commission.

II. ADJUDICATION

The claimant contends that she sustained a compensable injury when she "aggravated a pre-existing condition." In workers' compensation law, an employer takes the employee as she finds her, 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 noncompensable 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).

An administrative law judge found in the present matter, "4. On July 2, 2007, the claimant sustained a compensable injury to her lower lumbar spine in the form of an aggravation of a pre-existing condition." The Full Commission reverses this finding. The claimant testified that she heard and felt a pop in her back while working for the respondents on July 2, 2007. The claimant testified that she afterward felt severe pain in her back. A physician's report on July 3, 2007 corroborated the claimant's testimony. An x-ray of the claimant's lumbar spine on July 3, 2007 showed "Mild rightward curvature upper aspect of five lumbar vertebral bodies. SI joints are unremarkable. Mild interspace narrowing L5, S1 with about 9 mm of anterolisthesis of 5 on 1 and probable L5 spondylolisthesis, although it might be better seen on oblique views." The impression following the x-ray was degenerative change at L5-S1 with probable spondylolisthesis and spondylolysis. The claimant does not argue that the condition described on this x-ray was caused by the July 2, 2007 accident, and the record does not show that the accidental injury was the cause of the degenerative changes

or any of the findings reported on the July 3, 2007 x-ray of the claimant's lumbar spine.

An MRI of the claimant's lumbar spine was done on July 24, 2007. The findings at L5-S1 were "degenerative changes at the level of L5-S1 including mild diffuse disc bulge." The claimant contends that "degenerative changes at the level of L5-S1 including mild diffuse disc bulge" are objective medical findings establishing a compensable injury. We disagree. The MRI of the claimant's lumbar spine clearly showed a degenerative condition which was not caused by the July 2, 2007 incident at work. The MRI findings showed "no edema appreciated to suggest acute process." The impression was "degenerative changes at the level of L5-S1 as described. There is also the appearance of bilateral spondylolysis. There is no edema present to suggest acute/subacute process." There are no reports or findings in the record of bruising in the claimant's back, erythema, spasm, abnormal lordosis, an acute herniated disc, or any other objective finding. In fact, the July 3, 2007 handwritten notes by the treating physician appeared to specifically report "no spasm." The evidence does not demonstrate that the mild diffuse disc bulge at L5-S1 was

caused by an accident at work. Nor did any treating physician attribute the degenerative bulging to an accident at work.

The Workers' Compensation Commission must strictly construe the provisions of Act 796 of 1993. See Ark. Code Ann. §11-9-704(c) (3) (Repl. 2002); *Hapney v. Rheem Mfg. Co.*, 341 Ark. 548, 26 S.W.3d 771 (2000). Based on our *de novo* review in the present matter, the Full Commission finds that the claimant did not establish a compensable injury by medical evidence supported by objective findings. The record in the present matter demonstrates that the claimant suffers from pre-existing degenerative changes in the lumbar spine. There are no objective medical findings establishing a compensable accidental injury on July 2, 2007. Any assertion to the contrary is not consistent with the evidence of record, strict construction of the law, or with the legislative declaration stated in Ark. Code Ann. §11-9-1001(Repl. 2002). The Full Commission therefore reverses the administrative law judge's finding that the claimant proved she sustained a compensable injury to her lower lumbar spine.

IT IS SO ORDERED.

OLAN W. REEVES, 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 that she sustained a compensable specific incident aggravation of a pre-existing condition injury on July 2, 2007, 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).

Here, the claimant has met her burden of proving by a preponderance of the evidence all of the elements of a compensable specific incident aggravation

of a pre-existing condition. The claimant testified that while working for the respondent as a maid on July 2, 2007, she entered a bathroom to change a shower curtain in one of the guest rooms. The claimant testified that she did not have a step stool, so she stepped onto the tub and put one foot on one side of the tub and one foot on the other side of the tub so that she would not fall. She then testified that she changed the shower curtain and went to step down and turned in such a way that her back popped. She testified that the pain was concentrated in the lower part of her back. The claimant testified that although she was in pain, she continued to work for the remainder of the day. The claimant stated that remembers telling Deborah Jones, her work partner, that she hurt her back on July 2, 2007, but cannot remember telling anyone else about the incident.

The claimant testified that she returned to work on July 3, 2007, and that her back was worse. On July 3, 2007, she was coming out of a guest room to get supplies and go back into the room when she turned, her legs gave out, and she hit the floor. The claimant

testified that after this incident, she went to the lodge superintendent's office, where she filled out paperwork so that she could be sent to the doctor.

There is no question that the claimant had a pre-existing lower back condition. Prior to her fall on July 2, 2007, the claimant had degenerative changes at the level of L5-S1. However, this fact does not prevent a finding that the claimant experienced a compensable injury, albeit an aggravation injury, in the employment-related fall of July 2, 2007. The claimant credibly testified that she experienced the sudden onset of pain in her lumbar area symptoms contemporaneous with the shower-slip incident at work. The claimant's credible testimony is completely corroborated by the medical record, which provides, in various locations, consistent reports not only of the work-related incidents, but also of her contemporaneous symptoms. Furthermore, the claimant's testimony coincides with the history that she related to her employer when she filled out the required forms on July 3, 2007. Therefore, based on the claimant's credible testimony, the corroborating medical records and the respondent's paperwork, I find that the

claimant has proved by a preponderance of the evidence that she sustained a compensable specific incident aggravation of a pre-existing condition injury on July 2, 2007.

I would note that the majority's analysis, which confuses the "objective finding" element with the "causal connection" element, in addition to being erroneous as a matter of law, actually precludes not only this claimant, but any claimant from ever meeting their burden of proof for a compensable aggravation injury. As aggravation injuries are clearly a type of compensable injury recognized by Arkansas workers' compensation law, the majority's analysis violates not only statute, but also ignores all of the case law cited above, and should not be allowed to stand.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner