

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F702281

HOMER MOONEY, EMPLOYEE	CLAIMANT
AT&T FORMERLY d/b/a SBC SERVICES, EMPLOYER	RESPONDENT NO. 1
AMERICAN HOME ASSURANCE CO. C/O SEDGWICK CLAIMS MANAGEMENT SERVICES, INC. INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3
JAMES STANLEY	INTERVENOR

OPINION FILED DECEMBER 15, 2009

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

Claimant represented by HONORABLE SHEILA F. CAMPBELL,
Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by HONORABLE DAVID C. JONES,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID PAKE,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 waived appearance.

Intervenor was pro se.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed February 13, 2009.

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. The employee/employer relationship existed in September of 2006.
3. Respondents No. 1 have controverted this claim in its entirety.
4. The claimant's average weekly wage was \$856 entitling him to compensation rates of \$488/366.
5. The claimant reached the end of his healing period on June 12, 2008.
6. The claimant received an anatomical impairment rating of 7% to the body as a whole provided by Dr. Bruffett.
7. The claimant failed to prove by a preponderance of the evidence that he sustained a compensable back injury. Specifically, the claimant has failed to establish by a preponderance of the evidence that he sustained a back injury or aggravation arising out of his employment at SBC Services. The claimant has also failed to establish by a preponderance of the evidence that any of the objective medical findings in the record support an aggravation or new injury allegedly arising out of his employment with SBC Services.

8. Because the claimant has failed to establish that he sustained a compensable injury, the remaining issues identified prior to the November 8, 2008 hearing are moot.

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.

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.

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. The majority has affirmed and adopted the opinion of an Administrative Law Judge finding that the claimant failed to prove by a preponderance of the evidence that he sustained a back injury or aggravation arising out of his employment at SBS Services. Based on 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 gradual onset aggravation injury 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).

A claimant can have a gradual onset back injury. Ark. Code Ann. §11-9-102(4) (A) (ii) (b). An injured employee seeking benefits for a gradual onset back injury must prove by a preponderance of the evidence that (1) the injury arose out of and in the course of his employment, (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death, and (3) the injury was the major cause of the disability or need for medical treatment. Wal Mart Stores, Inc. v. Leach, 74 Ark. App. 231, 234, 48 S.W. 3d 540, 542 (2001).

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).

There is no argument that the claimant had a pre-existing lumbar spine condition. 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 a disability for which compensation is sought. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Manf. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

The claimant was diagnosed with a lumbar spine injury while in the military in 1973. He later received a 10% disability rating for the military injury in 1987 and by 2000 the military's disability rating had gradually increased to 60%. 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 for the respondent from 2001 through November 2005.

The Administrative Law Judge, affirmed and adopted by the majority, erroneously found that the claimant did not provide objective findings of an aggravation injury, stating

that the medical record shows that the claimant did not provide evidence of muscle spasms during 2005, the time period when the gradual onset aggravation injury occurred. This statement, upon which the Administrative Law Judge's conclusion is almost entirely based, is simply incorrect. The November 29, 2005 VA report which the Administrative Law Judge spends four pages discussing regarding an evidentiary objection, clearly shows that on that date the claimant was suffering from "LBP/PARASPINOUS MM SPASM" and was prescribed Skelaxin, a muscle relaxer.

The requirement that a compensable injury be established by medical evidence supported by objective findings applies only to the existence and extent of the injury, not the causal connection. Stephens Truck Lines v. Millican, 58 Ark. App. 275, S.W. 2d (1997). The test is not whether the injury caused the condition, but rather the test is whether the injury aggravates, accelerates or combines with the condition. See Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (Ark. App. 1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). Here, the

claimant has proved the existence and extent of his injury with objective findings of muscle spasm in the November 29, 2005 VA report. The claimant has proved the causal connection by testimony, undisputed by the respondent, about the nature of his job lifting heavy boxes all day.

In summary, the evidence presented indicates that the claimant had a pre-existing back condition. But the evidence also shows that while the claimant had sought medical attention prior to November 2005, he was not recommended any treatment and was able to work. On November 29, 2005 the claimant presented with "LBP/PARASPINOUS MM SPASM" and has been unable to work ever since. Simply stated, the presence of the pre-existing condition is not sufficient basis on which to deny the claimant's benefits for the work injury, when he otherwise satisfies the requirements of A.C.A. §11-9-102(4)(A)(ii)(b).

The majority, by affirming and adopting the opinion of the Administrative Law Judge has incorrectly stated that there is no evidence of muscle spasm before January 2007, when, in fact, the evidence of record clearly shows that the claimant was suffering from muscle spasm on November 29, 2005, during the exact time period when the compensable gradual onset aggravation injury occurred.

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For the aforementioned reasons I must respectfully
dissent.

PHILIP A. HOOD, Commissioner