

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F702813

GARY W. PETERS,
EMPLOYEE

CLAIMANT

TOBY DOYLE,
EMPLOYER

RESPONDENT

COMPANION PROPERTY & CASUALTY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 14, 2009

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

Claimant represented by the HONORABLE CHIP LEIBOVICH,
Attorney at Law, Benton, Arkansas.

Respondent represented by the HONORABLE ANDY CALDWELL,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part,
reversed in part.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal
an administrative law judge's opinion filed May 28, 2008.
The administrative law judge found that the claimant was an
employee of the respondent-employer, but that the claimant
was not performing employment services at the time of a
motor vehicle accident. After reviewing the entire record
de novo, the Full Commission affirms the administrative law

judge's finding that the claimant was an employee. The Full Commission reverses the administrative law judge's finding that the claimant was not performing employment services, but we find that the claimant did not prove he sustained a compensable injury.

I. HISTORY

The record indicates that Gary Wayne Peters, age 47, was treated for "Trauma" in October 1990 after reporting a blow to the back of his head. The claimant appears to have also reported pain in his low back. The claimant complained of pain in both legs after reporting being caught between two car bumpers in July 1992. The claimant reported in July 1999 that he had developed severe back pain after picking up a crate of bleach. The impression following an MRI of the claimant's cervical spine was "Negative examination. Very mild degenerative changes in the disc interspaces as noted above." The impression following an MRI of the claimant's lumbar spine was "1. Mild-to-moderate facet osteoarthritis at L4-5 and L5-S1. 2. Mild discogenic changes at L3-4 and L4-5, but no evidence of disc herniation." A physician diagnosed lumbar strain in July 1999.

A physical therapist noted decreased muscle spasm during the weeks of July 22, 1999 through August 5, 1999. The therapist also noted minimal muscle spasm during the treatment weeks of August 6, 1999 through August 20, 1999. A physical therapist informed a treating physician in October 1999, "When last seen, Mr. Peters was showing essentially full ROM. He was moving without guarding and there was minimal to no muscle spasm present to palpation. He was reporting minimal pain."

The claimant testified that he began performing concrete work for the respondent-employer, Toby Doyle, in about 2002: "I started out as a laborer, and I went up to being a finisher." The claimant described his laborer duties as "Just picking up tools and washing them and cleaning them; doing just whatever he said to do." The claimant testified that he did not bring any equipment or tools to the job, and to get to work, "He would come and pick me up, or either Dorothy would bring me." Dorothy Walls, the claimant's girlfriend, testified regarding the claimant, "He was doing concrete work. He took a few like hand tools, and Mr. Doyle provided the rest. I know this

because a lot of times Mr. Doyle picked him up and a lot of times I took him to work."

The claimant complained of lower back pain after a motor vehicle accident in October 2002. The impression from an x-ray was "Normal lumbar spine series." The claimant sought emergency treatment for back pain in March 2003. Dr. Michael Sung noted on March 25, 2003, "Mr. Peters presents on November 4, 2002 following a motor vehicle accident two weeks ago. He states the vehicle he was a passenger in rear ended another vehicle. He noted some acute lower back pain. At the time of this evaluation Mr. Peters is wearing a back brace he notes pain in the lower lumbar area and pain radiates to both lower part of thigh, associated with numbness and a tingling sensation. On exam, he revealed moderate to vertibular lumbar muscle spasm with a flexion of 60 degree, extension of 30 degree, lateral bend at 45 degree." Dr. Sung assessed "Low back pain secondary to motor vehicle accident with symptoms and signs of bilateral lumbar radiculopathy." Dr. Sung further noted, "On December 6, 2002 he returned for a follow up exam after the MRI scan of the lumbar sacral spine which showed some degenerative changes and disc bulging but no acute ruptured or herniated

disc or a nerve impingement....After a lengthy discussion with Mr. Peters we decided to seek a second opinion from either an orthopedist or neurosurgeon to further speed up his recovery and potential other procedures such as epidural injections, a Tens unit or other orthopedic remedies."

Respondents' Exhibit 3 shows a Non-Coverage Certificate for Gary Peters, post date February 11, 2005. The Effective Date was February 11, 2005 and the Expiration Date was February 11, 2007. Toby Patrick Doyle testified that the claimant provided him with a certificate of non-coverage, and that he considered the claimant to be an independent contractor.

The claimant testified on direct examination:

Q. By the time of the accident, what were you being paid?

A. \$125 a day.

Q. And you weren't being paid by the hour, were you?

A. No.

Q. Was he withholding taxes?

A. He said he was.

Q. To your knowledge, were taxes withheld?

A. No.

Q. How would he pay you?

A. Sometimes cash; sometimes a check.

Q. By the time of your accident, if you averaged, how many days a week were you working for Mr. Doyle?

A. Well, I'd say probably three - three or four a week.

Q. And, by the time of the accident, did you have any tools that you brought with you to these job sites?

A. Yes, I had got some....I had what's called a float, a marking trowel, an edger. I believe that was about it.

Q. Did you provide all the equipment and materials for construction?

A. No....Toby did.

The parties stipulated that there was an October 5, 2006 motor vehicle accident. The claimant testified on direct:

Q. And I understand this happened in Mr. Doyle's truck?

A. Yes, sir.

Q. Why were you in his truck that day?

A. He came to pick me up to go to work....

Q. Tell us in your own words what happened when you had this accident.

A. Well, he came and picked me up, and we was on our way to work. And we made it to Kanis.

Traffic was kind of congested a little bit. A constable pulled out in front of him, and he swerved to keep from hitting the constable and slammed on his brakes. And, when he slammed on his brakes, my head flew forward and hit the hand grip on his glove box. And that's when I hurt my neck and my back snapped....

Q. Did you make it to the construction site that day?

A. Yes, I did.

Q. What did you do that day?

A. We was finishing up, and he had me to try to bull float a certain area. And I was trying my best, and I really couldn't do it. You know, he knew I was just in a wreck. So I just couldn't do it, so I quit doing it....

Q. Did you express to anyone that you needed to go to the hospital or ask to be taken to the hospital?

A. I asked him to take me, and he told me that he couldn't leave because he had mud on the ground and he didn't want it to get hard. He said he can't leave right now.

Q. When you say "him," you're referring to Toby Doyle?

A. Toby, yes, sir.

The claimant testified that he sought medical treatment the next day. An admission record at Southwest Regional Medical Center, dated October 6, 2006, indicated that the claimant was diagnosed with "MVA - minor injury." The "Responsible Party Employer" on the admission record was

listed as "Unemployment." Physical examination showed tenderness in the lumbar paraspinous muscles. It was noted, "Off work today," and a physician's diagnosis was "low back pain s/p MVA."

An x-ray of the claimant's lumbar spine was taken on October 6, 2006, with the following findings:

Normal alignment is noted within the lumbar vertebral bodies with no evidence of fracture or dislocation. There is maintenance of vertebral body heights. Mild disc space narrowing is noted at L4-5 and L5-S1. Facets are normally aligned. There is calcification within the aorta.

The impression was "No evidence of fracture or dislocation. Mild degenerative disc disease, as described above."

The testimony indicated that a personal injury lawyer referred the claimant to Dr. William Rutledge, Forest Park Medical Chiropractic Clinic, who examined the claimant on October 11, 2006:

This 45-year-old male was injured in a MVA on 10/05/06. He was a front seat passenger and was restrained when he was rear-ended by SUV. He has sustained injuries to his lower back. He has since had continuous severe pain in the lower back radiating to the posterior right leg. The patient was evaluated at Southwest Regional Hospital Emergency Department where he was prescribed medications and advised to see us in follow-up....

The lumbar area reveals tense spasms bilaterally with trigger point tenderness in several areas on the right and left....X-rays of the LS-spine reveals normal density of the vertebral bodies. There is a straightening of the normal lordosis consistent with muscular spasms. There is some mild rotation of L4 and L5.

Dr. Rutledge diagnosed: "1. Lumbar strain/sprain rule out herniated nucleus pulposus, lumbar segmental dysfunction. 2. Mild cervical strain....The patient is unable to work and I expect this to be true for the next 2-4 weeks. He will need intensive physical therapy daily to the lumbar area."

The following conclusion resulted from an MRI of the claimant's lumbar spine taken October 26, 2006:

1. Mild retrolisthesis and mixed broad-based bulges along with mild facet arthropathy and capsulosynovitis are noted at the L2-3, L3-4 and L4-5 levels. This results in abutment of the exiting left L2 nerve root laterally and bilateral exiting L4 nerve roots.
2. There is a suggestion of mild increased bone marrow cellularity in this patient. Does this patient suffer from anemia?

Dr. Rutledge's impression on November 14, 2006 was "1. Degenerative disc disease. 2. Herniated nucleus pulposus at L2-L3, L3-L4, and L4-L5. 3. Radicular symptoms of the lower extremity." Dr. Rutledge stated, "This patient remains unable to work. The patient works as a concrete

finisher and has only done manual labor throughout his work life. This may be a problematic in that his prognosis is poor with this degree of degenerative disc disease. He will not be able to work for the next 12 months and it is likely that Mr. Peters has a permanent total disability."

Dr. Rutledge stated on December 5, 2006, "He is still having chronic lower back pain as a consequence of vehicular trauma. This patient has some chronic low back pain, but this was worsened with the collision in October. He has documented degenerative disc disease and herniated disc at L2-L3, L3-L4, and L4-L5. There are radicular symptoms in both lower extremities....This patient is nearing upon a maximum benefit. I am going to order a TENS unit for chronic pain and spasms."

Dr. Rutledge authored a Final Report on January 2, 2007 and stated in part:

The prognosis in this patient is poor. This patient is permanently totally physical impaired due lumbar disc disease. These injuries resulted with Mr. Peters having a DRE lumbar category V physical impairment of 28% of the whole person. Half of this is attributed to preexistent disease and half to the resulting trauma of his accident of 10/05/06. The patient is unemployable. This is because Mr. Peters level of education and training is only in manual labor. Prior to the accident the patient worked as a concrete finisher. He will no longer be able to do this

type work. With this, this patient is unemployable. Mr. Peters will incur future medical expenses of approximately \$1,500 to \$3,000 over the next twenty four months for periodic office visits, medications, and likely brief courses of physical therapy. He has been so advised.

The claimant's attorney stipulated at hearing that the claimant's healing period ended January 2, 2007.

A pre-hearing order was filed on January 15, 2008. The claimant's contentions were listed as follows: "1. Claimant contends he was employed by respondent at the time of his motor vehicle accident and contends he sustained a compensable injury. 2. Entitlement to medical benefits. 3. Entitlement to temporary partial disability benefits from October 5, 2006, to January 2, 2007. 4. Entitlement to the cost of respondent's deposition. 5. Entitlement to attorney's fees. 6. The issue of permanent impairment is specifically reserved."

The respondents' contentions were listed as follows: "1. Respondents contend claimant was an independent contractor; therefore, there was no employer-employee relationship. 2. Respondents contend the claimant did not sustain a compensable injury arising out of and in the course and scope of his employment. 3. Respondents further

contend claimant was en route to work; therefore, the going and coming rule would prevent the claimant from receiving benefits if he was an employee. 4. Respondents also, alternatively, contend the claimant had a pre-existing back condition and any problems he is currently having are related to his pre-existing condition. 5. Respondents also present an alternative contention that the claimant did not provide notice of a work injury until March 17, 2007. 6. Respondents have joined the Second Injury Fund. 7. The claim has been controverted in its entirety."

The pre-hearing order listed the following issues to be litigated: "1. Employer-employee relationship. 2. Whether the claimant is an independent contractor. 3. Compensability. 4. Employment services. 5. Notice. 6. Medical benefits. 7. TPD benefits. 8. Cost of respondent employer's deposition. 9. Attorney's fee."

A hearing was held on April 16, 2008. Toby Patrick Doyle testified for the respondents that he was a concrete finisher:

Q. Do you have your own business?

A. Yes, sir.

Q. Is it incorporated?

A. No.

Q. Are you just a sole proprietor?

A. (Nodding head)

Q. Is that a yes?

A. Yes.

Q. In the course of your work, do you hire out independent contractors?

A. Mostly.

Q. Do you have any employees?

A. No....Everybody carries a waiver....

Q. Tell me what happened the date of this accident - whatever date that was.

A. I had concrete at 9:00 o'clock. I was approximately twenty minutes from the job. Right at 8:00 o'clock, at the intersection of Kanis and Kanis, a constable pulled out in front of me into a turn lane....I was hit from behind....

Q. Did you get out of the vehicle?

A. Yes, sir.

Q. Did Mr. Peters get out of the vehicle?

A. Eventually he did.

Q. Did you ask him if he was injured?

A. Yes, sir.

Q. What was his response?

A. He said he was okay to go to work.

Q. Did he ever indicate to you that day that he hurt himself in that automobile accident?

A. He said his back hurt but no different than any other day. I mean he's always experienced back pain....In the line of work that we do, we all hurt. It's a lot of bending over and a lot of pulling weight. Everybody's back hurts....

Q. Did he ever indicate to you that he had injured himself at the scene or as a result of this accident?

A. I contributed it to bull floating, being at an angle, which is hard on any back. But everybody that tried doing it - bull floating up hill - has the same problem. Unless you're skilled, it's going to hurt your back.

Q. But he never told you that he got hurt in that accident; right?

A. No.

The administrative law judge found, in pertinent part:

2. There was an October 5, 2006, motor vehicle accident.

3. The end of the healing period is January 2, 2007.

4. The claim has been controverted in its entirety.

5. The preponderance of the evidence provides that the filing of an application and issuance of a Certificate of Non-Coverage did not automatically bar the claimant from receiving benefits against his employer.

6. The preponderance of the evidence provides that the claimant was not an independent contractor but was an employee of the respondent employer.

7. The preponderance of the evidence provides the claimant was not performing employment services at the time of the minor motor vehicle accident.

8. The claim for benefits is respectfully denied and dismissed.

The claimant appeals to the Full Commission and the respondents cross-appeal.

II. ADJUDICATION

A. Coverage

Ark. Code Ann. §11-9-402(c)(1)(B) (Repl. 2002) provides:

(i) A sole proprietor or the partners of a partnership who do not elect to be covered by this chapter and be deemed employees thereunder and who deliver to the prime contractor a current certification of noncoverage issued by the Workers' Compensation Commission shall be conclusively presumed not to be covered by the law or to be employees of the prime contractor during the term of his or her certification or any renewals thereof.

In addition, Ark. Code Ann. §11-9-102(9)(D) (Repl. 2002) provides:

Any individual receiving a certification of noncoverage under this chapter shall thereafter, or until he elects otherwise, be conclusively presumed not to be an employee for purposes of this chapter or otherwise.

An administrative law judge found in the present matter that the Certificate of Non-coverage did not bar the claimant from receiving benefits, and that the claimant was in fact an employee rather than an independent contractor. The Full Commission affirms the administrative law judge's

finding that the claimant was an employee. Ark. Code Ann. §11-9-108(a) (Repl. 2002) provides:

No agreement by an employee to waive his or her right to compensation shall be valid, and no contract, regulation, or device whatsoever shall operate to relieve the employer or carrier, in whole or in part, from any liability created by this chapter, except as specifically provided elsewhere in this chapter.

An independent contractor is one who contracts to do a job according to his own method and without being subject to the control of the other party, except as to the result of the work. *Ark. Transit Homes, Inc. v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000). The issue of whether one is an employee or an independent contractor is analyzed under two separate tests: (1) the control test; and (2) the relative nature of the work test. On the issue of control, the Arkansas Supreme Court has stated:

The governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant necessarily follows. But if control of the means be lacking, and the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists.

See *Massey v. Poteau Trucking Co.*, 221 Ark. 589, 254 S.W.2d 959 (1953). The ultimate question is not whether the

employer actually exercises control over the doing of the work, but whether he has the right to control. *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989).

The following factors are to be considered in determining whether one is an employee or independent contractor:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

See Aloha Pools & Spas, Inc. v. Employer's Ins. of Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000).

The record in the present matter demonstrates that Toby Doyle owned a concrete finishing business, and that the

claimant and Mr. Doyle clearly believed they were creating the relation of master and servant in the employment context. The claimant's work was relatively unskilled and Mr. Doyle exercised the sole right to control as well as actual control. The claimant was not aware of what he was doing when the claimant signed the certificate of non-coverage and the record does not show that the claimant was a sole proprietor or independent contractor. The preponderance of evidence in the present matter demonstrates that the claimant was an employee rather than a sole proprietor or independent contractor. See *Cloverleaf Express v. Fouts*, 91 Ark. App. 4, 207 S.W.3d 576 (2005). B. Compensability

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

(A) (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[.]

(B) "Compensable injury" does not include:

(iii) Injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated[.]

The test for determining whether an employee was acting within the "course of employment" at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer's purpose or advancing the employer's interests directly or indirectly. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997), citing *Pilgrim's Pride Corp. v. Caldarera*, 54 Ark. App. 92, 923 S.W.2d 290 (1996). Conversely, an employee is generally said not to be acting within the course of employment when he is traveling to and from the workplace. This "going and coming" rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from his place of employment. *Pettey, supra*, citing *Lepard v. West Memphis Mach. & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995). The rationale behind this rule is that an employee is not within the course of his employment while traveling to or from his job. *Id.* There are, however, exceptions to this rule. One exception is where the employer furnishes transportation to and from work. *Lepard, supra*, citing *Jane Traylor, Inc. v. Cooksey*, 31 Ark. App. 245, 792 S.W.2d 351 (1990).

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). Objective medical evidence is necessary to establish the existence and extent of an injury but not essential to establish the causal relationship between the injury and a work-related accident. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999).

The employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i).

An administrative law judge found in the present matter, "7. The preponderance of the evidence provides that the claimant was not performing employment services at the time of the minor motor vehicle accident." The Full Commission finds that the claimant was performing employment services at the time of the October 5, 2006 motor vehicle accident. The appellate case law shows that, if the employer furnishes transportation to the job site, then the claimant is performing employment services if an accident occurs during said transportation. See *Lepard and Cooksey*,

supra. Transportation in the present matter was not "furnished solely as a gratuity," as was the case in *Lepard*. The claimant in *Lepard* was not performing employment services at the time of an accident, whereas the instant claimant was riding in transportation furnished by his employer and was traveling to the work site at the time of the accident.

Nevertheless, the Full Commission finds that the instant claimant did not prove he sustained a compensable injury. The claimant did not prove that he sustained an accidental injury causing internal or external physical harm to his low back or lumbar spine. The record shows that the claimant has complained of low back pain since at least 1990 and certainly no later than 1999. A lumbar MRI in July 1999 showed osteoarthritis and discogenic changes in the claimant's lumbar spine, and the claimant was diagnosed with lumbar strain. A physical therapist noted muscle spasms in July 1999 and following. The claimant reported renewed back pain after a motor vehicle accident in October 2002. A physician reported muscle spasm beginning in November 2002. Dr. Sung also noted in December 2002 that a lumbar MRI showed degenerative changes and disc bulging.

The parties stipulated that a motor vehicle accident occurred on October 5, 2006. The claimant testified that, while riding to work with Toby Doyle, "A constable pulled out in front of him, and he swerved to keep from hitting the constable and slammed on his brakes. And, when he slammed on his brakes, my head flew forward and hit the hand grip on his glove box. And that's when I hurt my neck and my back snapped." The claimant testified, "I had pain everywhere - all over my back; all down my legs; everywhere." The claimant sought hospital treatment the next day, October 6, 2006. Physical examination that day showed tenderness in the claimant's lumbar paraspinous muscles but there were no reports of spasm. A physician diagnosed "low back pain s/p MVA." A lumbar x-ray on October 6, 2006 showed normal alignment in the vertebral bodies with no evidence of fracture or dislocation. Mild disc space narrowing was also shown at L4-5 and L5-S1. The record does not demonstrate that the October 5, 2006 motor vehicle accident was the cause of the claimant's disc space narrowing.

The claimant began treating with Dr. Rutledge on October 11, 2006. Dr. Rutledge reported, "The lumbar area reveals tense spasms bilaterally with trigger point

tenderness in several areas on the right and left....X-rays of the LS-spine reveals normal density of the vertebral bodies. There is a straightening of the normal lordosis consistent with muscular spasms." The Arkansas Supreme Court has held that "straightening" of the lumbar spine can be objective evidence of an injury if there is no evidence to the contrary. See *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.2d 167 (2000). In the present matter, however, the evidence does not demonstrate that the straightened lordosis or muscle spasms noted by Dr. Rutledge beginning October 11, 2006 were in any way the causal result of the October 5, 2006 motor vehicle accident. We again note that the claimant had been suffering from muscle spasms documented no later than July 1999. The muscle spasms reported by Dr. Rutledge beginning October 11, 2006 are not causal proof of objective medical findings establishing an injury on October 5, 2006. See *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). The conclusion from a lumbar MRI performed October 26, 2006 included mild retrolisthesis and broad-based bulges at L2-3, L3-4, and L4-5. Dr. Rutledge read the MRI as showing degenerative disc disease and herniated nucleus pulposus at L2-L3, L3-L4, and

L4-L5. Any assertion that the findings shown on the October 26, 2006 MRI were causally related to the October 5, 2006 motor vehicle accident would not be based on a credible analysis or interpretation of the record.

The instant claimant did not prove that he sustained an accidental injury on October 5, 2006 causing internal or external physical harm to his low back or lumbar spine. The claimant did not prove that he sustained an accidental injury to his low back or lumbar spine which arose out of and in the course of employment, required medical services, or resulted in disability. The claimant did not establish a compensable injury to his low back or lumbar spine by medical evidence supported by objective findings.

The parties assert that the Administrative Law Judge failed to address the issue of the deposition costs of Toby Doyle. Pursuant to Arkansas Workers' Compensation Commission Rule 099320(c), the respondent shall be liable for the deposition costs when said depositions "are to be made a part of the record." The prehearing order specifically stated: "Respondents will pay the employer's deposition, if it is introduced and made a part of the hearing." Accordingly, this issue has been resolved. The

deposition was not introduced into evidence therefore the cost of said deposition is not the respondent's liability.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant was an employee of the respondent-employer. The evidence does not demonstrate that the claimant was a sole proprietor or independent contractor. We do not affirm the administrative law judge's finding that the claimant was not performing employment services at the time of the October 5, 2006 motor vehicle accident. However, the Full Commission otherwise finds that the claimant did not prove he sustained a compensable injury pursuant to the relevant statutory provisions of Act 796 of 1993.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I agree with the majority opinion finding that the claimant was an employee and not an independent contractor, that the Certificate of Non-Coverage did not bar recovery, that the "going and coming" rule did not apply to the facts of this case, and that the claimant was performing employment services at the time of his injury. I must respectfully dissent from the majority opinion finding that there were no objective findings of injury which were causally related to the claimant's October 5, 2006 accident and denying the compensability of this claim on that basis.

HISTORY

The facts of this case are simple and not in dispute. The claimant was employed as an unskilled laborer training to become a concrete finisher. He worked for a sole proprietor, Toby Doyle, who owned a small business engaged in concrete work. On October 5, 2006, Toby Doyle picked the claimant up for work in the company truck and was transporting him to the work site when they were rear-ended by another vehicle.

The claimant sustained a back injury in this collision and was treated the next day in the emergency room at Southwest Regional Medical Center. The claimant was referred to William Rutledge, M.D. Dr. Rutledge recorded the following history:

This 45-year-old male was injured in a MVA on 10/05/06. He was a front seat passenger and was restrained when he was rear-ended by SUV. He has sustained injuries to his lower back. He has since had continuous severe pain in the lower back radiating to the posterior right leg. The patient was evaluated at Southwest Regional Hospital Emergency Department where he was prescribed medications and advised to see us in followup. The patient has a history of lower back pain also secondary to a motor vehicle accident some three years ago. He suffered injuries to his lower back and has had off and on pain since that time. He was treated at that time by Dr. Michael Song and has occasionally required ibuprofen prescribed at the Veterans Administration Hospital. He was doing well,

however, until the day of this collision. This patient was on his way to work, riding with his boss Mr. Toby Doyle when the accident occurred. He works as a concrete finisher and has been unable to work since the injury.

Dr. Rutledge's findings were as follows:

X-rays of the LS-spine reveals normal density of the vertebral bodies. There is a straightening of the normal lordosis consistent with muscular spasms. There is some mild rotation of L4 and L5.

Initially, Dr. Rutledge diagnosed a lumbar and cervical strain/sprain and said that it would be necessary to rule out a lumbar herniated nucleus pulposus. Dr. Rutledge prescribed muscle relaxants, pain medication, and physical therapy. He said that the claimant was unable to work.

In a follow-up visit on October 25, 2006, Dr. Rutledge indicated that the cervical strain had improved, but that the claimant continued to have "distressing symptoms in his lower back" and that was he

was "having difficulty standing because of right leg weakness". Examination findings revealed the following:

On exam, there is exquisite tenderness in the lumbar area particularly at L4-L5. Straight leg lift is positive on the right and the right deep tendon reflex of the patella is diminished.

Because of the above-mentioned findings, Dr. Rutledge ordered an MRI scan which was performed on October 26, 2006, and showed:

Mild retrolisthesis and mixed broad-based bulges along with mild facet arthropathy and capsulosisynovitis are noted at the L2-3, L3-4 and L4-5 levels. This results in abutment of the exiting left L2 nerve root laterally and bilateral existing L4 nerve roots.

Following the MRI, the claimant was seen by Dr. Rutledge on November 14, 2006. At that time, Dr. Rutledge indicated that the claimant continued to suffer from severe pain in his lower back which radiated into his foot. The physical examination was essentially the

same, except that the claimant now had positive straight leg raising and a diminished patella reflex in both legs. Dr. Rutledge's diagnosis was as follows:

1. Degenerative disc disease.
2. Herniated nucleus pulposus at L2-L3, L3-L4, and L4-L5.
3. Radicular symptoms of the lower extremity.

Dr. Rutledge treated the claimant with myofascial trigger point injections, muscle relaxants, pain medication, and physical therapy. Dr. Rutledge said that his prognosis was poor because of the degree of degenerative disc disease present. Dr. Rutledge said that the claimant would be unable to work for the next twelve months and that he was likely permanently totally disabled.

On December 5, 2006, Dr. Rutledge re-examined the claimant and indicated that he was "still having chronic lower back pain as a consequence of vehicular trauma" and that there were "radicular symptoms in both lower extremities". He said that the claimant "has documented degenerative disc disease and herniated disc at L2-L3, L3-L4, and L4-L5". At this time, Dr. Rutledge

noted that "This patient has some chronic low back pain, but this was worsened with the collision in October".

On January 2, 2007, the claimant had his last reported visit with Dr. Rutledge. Dr. Rutledge summed up the claimant's situation, as follows:

The prognosis in this patient is poor. This patient is permanently totally physical (sic) impaired due (sic) lumbar disc disease. These injuries resulted with Mr. Peters having a DRE lumbar category V physical impairment of 20% of the whole person. Half of this is attributed to preexistent disease and half to the resulting trauma of his accident of 10/05/06. The patient is unemployable. This is because Mr. Peters level of education and training is only in manual labor. Prior to the accident the patient worked as a concrete finisher. He will no longer be able to do this type work.

With this, this patient is unemployable. Mr. Peters will incur future medical expenses of approximately \$1,500 to \$3,000 over the next twenty four months for periodic office

visits, medications, and likely brief courses of physical therapy.

With regard to pre-existing conditions, the record indicates that the claimant has suffered from back pain in the past. However, there are no indications of muscle spasms in the medical records any later than November 18, 2002, almost four years before the accident in question. Over seven years before the accident, there was one pre-injury MRI scan performed. This study, dated July 16, 1999, showed only "mild discogenic changes at L3-L4 and L4-L5, but no evidence of disc herniation".

ANALYSIS

A finding of compensability in this case calls for proof, by a preponderance of the evidence, of a specific incident, identifiable by time and place of occurrence, arising out of and in the course of employment, causing physical harm to the body, requiring medical treatment or resulting in disability, which is established by medical evidence and supported by objective findings. Ark. Code Ann. §11-9-102(4)(E)(i); §11-9-102(4)(A)(i); and §11-9-102(4)(D).

The majority opinion acknowledges that there was a specific incident on October 5, 2006, which occurred in the course of the claimant's employment and which required medical treatment. Further, the majority concedes that the medical records contain objective findings of physical abnormalities evidenced by Dr. Rutledge's physical examinations, an MRI, and X-rays showing damaged discs and muscle spasms. However, the majority opinion finds that the claimant failed to prove that the objective findings, which were documented after his injury, were causally related to his October 5, 2006 accident. Reasonable minds could not have come to this conclusion after an impartial consideration of the evidence.

It is axiomatic that the employer takes the employee as he finds him and that when a compensable injury aggravates, accelerates, or combines with pre-existing conditions to produce disability or need for treatment, then the resulting disability and treatment is compensable. 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 (1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

The number of cases involving aggravation, acceleration and combination of pre-existing degenerative conditions in back and neck injuries was explained in the testimony of Dr. C. C. Alkire, orthopedic surgeon, in General Elec. Railcar Repair Servs. v. Hardin, 62 Ark. App. 120 (1998), as follows:

As I'm sure you're well aware having dealt with workers' compensation insurance claims for years, most workers' compensation injuries, particularly those in the cervical spine and lumbar spine are always related to some degenerative process, regardless of the type of injury a patient may have. (emphasis added.)

Under the above mentioned facts, it is obvious that the claimant established a causal relationship between the objective findings (existence not disputed) and the October 5, 2006 accident. In negating causation, the majority opinion erroneously relies upon two factual

allegations. Firstly, the majority notes that the claimant had documented degenerative disc problems before the October 5, 2006 accident. Based on this fact, the majority concludes that the MRI findings of October 26, 2006, were not related to the claimant's accident. While it may be true that the claimant had pre-existing problems with his lumbar spine, the medical evidence of record clearly establishes that the claimant aggravated these conditions during the accident. This fact is evident, both in the opinion of the claimant's only treating physician, and by a review of the two MRI scans. There is no medical opinion or evidence to the contrary.

Secondly, the majority concludes that the muscle spasms, which were documented in numerous physical examinations by Dr. Rutledge and by X-ray, were not shown to have been related to the accident and were pre-existing. The only support for this conclusion, offered by the majority, was the fact the claimant previously experienced muscle spasms almost four years before the accident in question. Dr. Rutledge unequivocally related these muscle spasms to the October 5, 2006 injury, and there is not one scintilla of medical evidence to the contrary. Under these

circumstances, the majority's conclusion that the muscle spasms, which appeared immediately following the claimant's accident, were attributable to a condition occurring years before the injury, finds no evidentiary support.

In conclusion, I must respectfully dissent from the majority opinion finding that there were no objective findings of injury which were causally related to the claimant's October 5, 2006 accident. I, wholeheartedly, concur with the majority's findings that the claimant was an employee and not an independent contractor, that the Certificate of Non-coverage did not bar recovery, that the "going and coming" rule did not apply to the facts of this case, and that the claimant was performing employment services at the time of his injury.

For the aforementioned reasons I must respectfully concur, in part, and dissent, in part.

PHILIP A. HOOD, Commissioner