

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 FEBRUARY 2, 2010

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

Claimant represented by the HONORABLE J. MARK WHITE,
Attorney at Law, Bryant, Arkansas.

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed and remanded
in the above-styled matter for the Commission to make
adequate findings. *Peters v. Doyle*, CA09-369 (Nov. 4,
2009). After reviewing the entire record *de novo*, the Full
Commission finds that the claimant proved he sustained a
compensable injury. The Full Commission finds that the
claimant proved he was entitled to temporary partial

disability benefits and reasonably necessary medical treatment.

I. HISTORY

Gary Wayne Peters, age 48, was diagnosed with lumbar strain and back pain on July 6, 1999 after reporting that he twisted his neck and back while employed with Affiliated Foods. An MRI of the claimant's lumbar spine was done on July 16, 1999, with the impression, "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 physical therapist noted on July 22, 1999, "Patient states he injured his back on 7/6/99 while at work. He states he was loading cases of bleach when he lifting (sic) and twisting and heard a pop in his back....Muscle spasm is noted in the iliocostalis and posterior serratus musculature." The physical therapist noted on or about August 5, 1999, "Muscle spasm is grade I now." "Minimal spasm" was noted by the therapist for the dates of August 6-13, 1999, August 13-20, 1999, and August 23-30, 1999. The therapist reported on October 6, 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 was diagnosed with Low Back Pain on October 18, 2002 after reporting being involved in a motor vehicle accident. The impression from an x-ray on October 18, 2002 was "normal lumbar spine series."

Dr. Michael Sung provided a Narrative Summary dated March 25, 2003:

Mr. Peters presents on November 4, 2002 following a motor vehicle accident two weeks ago. He states the vehicle he was 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....

Assessment: Low back pain secondary to motor vehicle accident with symptoms and signs of bilateral lumbar radiculopathy....

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.

The claimant testified that he began working for Toby Doyle in approximately 2002. "I started out as a laborer," the claimant testified, "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 Toby Doyle taught him how to perform concrete work, and "Sometimes he would supervise; sometimes he was not."

The record contains what the parties identified as a Certificate of Non-Coverage for Gary Peters, effective date February 11, 2005, expiration date February 11, 2007. The respondents' attorney cross-examined the claimant:

Q. You did, in fact, apply for and receive a certificate of non-coverage, did you not?

A. Yes.

Q. And you've indicated on there that you were a sole proprietor. Is that correct?

A. I don't understand the question, sir.

Q. Would you agree with me that the non-coverage certificate indicates that you are a sole proprietor, or were a sole proprietor?

A. I don't understand what a sole proprietor is. I don't know what it is.

Q. But you'll at least admit for me that, on this sheet of paper, it indicates that you are one?

A. Yes.

Toby Patrick Doyle testified that he was a concrete finisher and that he owned his own business. Toby Doyle testified for the respondents:

Q. How often did Mr. Peters actually work for you in 2006?

A. Of 2006?

Q. Yes, sir.

A. Probably less than ten times.

Q. How was he paid?

A. He was paid by checks or cash.

Q. And how much?

A. When he first started, he started out at \$80 a day. He went to \$100 a day. That was about, for his skill, all I could pay. And I used him on an as-needed basis, being desperate for help, because he asked for more money....

Q. Did he provide you with a certificate of non-coverage?

A. Yes, sir.

Q. Did you consider him an independent contractor?

A. Yes.

Q. Did you withhold any taxes from his pay?

A. No.

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

Q. And as 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. What does that mean, to bull float?

A. There's a big long rod, about from here to the wall, pushing it uphill with a big wide -

Q. This is involved in finishing the concrete?

A. Yes.

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. Did you eventually go to the hospital?

A. Yes....I believe it was the following day.

The claimant was seen at Southwest Regional Medical Center on October 6, 2006, at which time it was indicated, "MVA yesterday (woke up with pain today)." A physical examination revealed "tenderness in paraspinous muscles." The physical examination did not indicate that there was ecchymosis, swelling, abrasion, laceration, or muscle spasms. A lumbar spine x-ray was normal. The claimant was taken off work "today," and he was prescribed Ibuprofen, Lortab, and Flexeril. The physician's impression/diagnosis was "Low Back Pain s/p MVA."

Dr. William Rutledge saw 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 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.... 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....

The lumbar spine 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."

An MR of the claimant's lumbar spine was taken on October 26, 2006, with the following conclusion:

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. 2. Radicular symptoms of the lower extremity." Dr. Rutledge planned conservative treatment and stated, "This patient remains unable to work. The patient works as a concrete finisher and has only done manual labor throughout his work life....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 noted on December 5, 2006, "There is spasms and tenderness with restricted motion in flexion, extension, lateral bending, and rotation....This patient is nearing upon a maximum benefit. I am going to order a TENS unit for chronic pain and spasms." The claimant testified with regard to the TENS unit, "It shoots electrodes into your back, and it really helps."

Dr. Rutledge provided a Final Report on January 2, 2007:

This is a 45-year-old male injured in MVA. He was a front seat passenger of a vehicle that was rear-

ended by SUV. The patient sustained injuries to his lower back....The patient works as a concrete finisher and has been unable to work since the injury....

LOWER BACK: Revealed tense spasms bilaterally with trigger point tenderness throughout the lumbar region....

This patient has reached upon a maximum benefit by 01/02/07....

The prognosis in this patient is poor. This patient is permanently totally physically 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.

Dr. Rutledge's diagnoses were "1. Lumbar strain/sprain. 2. Rule out herniated nucleus pulposus. 3. Lumbar segmental dysfunction. 4. Mild cervical strain."

The claimant's attorney stipulated at hearing that the claimant reached the end of healing period on January 2, 2007.

The parties deposed Buford Blackwell, owner of Blackwell Antiques, on November 26, 2007. Buford Blackwell testified that the claimant had assisted in unloading trucks of furniture at Blackwell Antiques. Mr. Blackwell testified that the claimant had "been here within the last year."

A pre-hearing order was filed on January 15, 2008. The claimant's contentions were, "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 contended, "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."

After a hearing, an administrative law judge filed an order and opinion on May 28, 2008. 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 appealed to the Full Commission, and the claimant cross-appealed. The Full Commission filed an

opinion on January 14, 2009. We affirmed the administrative law judge's finding that the claimant was an employee but reversed the administrative law judge's finding that the claimant was not performing employment services at the time of the accident. However, the Full Commission found that the claimant did not prove he sustained a compensable injury. The Court of Appeals has reversed and remanded for adequate findings.

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.

However, Ark. Code Ann. §11-9-108(Repl. 2002) provides:

(a) 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).

An administrative law judge found in the present matter, "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." The Full Commission affirms these findings. As we previously determined, the record demonstrates that Toby Doyle owned a concrete finishing

business, and that the claimant and Mr. Doyle believed they were creating the relationship of master and servant in the employment context. The claimant's work was relatively unskilled and Toby Doyle exercised the sole right to control the claimant's work as well as actual control. The record does not show that the claimant was aware what he was doing when the claimant signed the certificate of non-coverage. Nor does the evidence demonstrate that the instant claimant was a sole proprietor or independent contractor. No agreement by an employee to waive his right to compensation shall be valid. See Ark. Code Ann. §11-9-108(a), *supra*.

B. Compensability

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (Repl. 2002), provides:

(A) "Compensable injury" means:

(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[.]

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). The requirement that a compensable injury must be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

The employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4)(E)(i). Preponderance of the evidence means evidence of greater convincing force and implies an overbalancing in weight. *Barre v. Hoffman*, 2009 Ark. 373, ___ S.W.3d. ___.

In the present matter, the Full Commission finds that the claimant proved he sustained a compensable injury to his low back. We find that the claimant proved he was performing employment services at the time of the October 5, 2006 motor vehicle accident. 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). Transportation in the present matter was not "furnished solely as a gratuity," as was the situation 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 motor vehicle accident.

The Full Commission finds that the claimant proved he sustained a compensable injury to his low back on October 5, 2006. The claimant proved he was performing employment services at the time of the accident. The record indicates, in accordance with Ark. Code Ann. §11-9-701(b), that the employer had knowledge of the injury on October 5, 2006. The claimant proved that he sustained an accidental injury to his low back which caused physical harm and which arose out of and in the course of employment. The injury was caused by a specific incident, identifiable by time and place of occurrence on October 5, 2006. The injury required medical services and resulted in disability. The claimant established a compensable injury by medical evidence supported by objective findings not within the claimant's voluntary control. The objective findings in the present matter where the reports of muscle spasms which Dr. Rutledge said he observed. The claimant proved the existence and extent of a compensable injury pursuant to Dr. Rutledge's report of muscle spasms.

C. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages, whereas temporary partial disability is that period within the healing period in which the employee suffers only a decrease in his capacity to earn the wages he was receiving at the time of the injury. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

The Full Commission has determined in the present matter that the claimant proved he sustained a compensable injury on October 5, 2006. A physician saw the claimant on October 6, 2006, diagnosed low back pain status-post motor vehicle accident, and took the claimant off work. Dr. Rutledge opined on October 11, 2006 that the claimant was unable to work. The record indicates that the claimant was able to perform at least some limited work. The respondents introduced testimony from Buford Blackwell indicating that the claimant was able to perform manual labor on a part-time basis. The claimant contended that he was entitled to temporary partial disability benefits from October 5, 2006 until January 2, 2007. The claimant stipulated that he reached the end of his healing period on January 2, 2007. The Full Commission finds that the claimant proved he was

entitled to temporary partial disability benefits from October 5, 2006 through January 2, 2007.

Based on our *de novo* review of the entire record, and pursuant to the remand from the Arkansas Court of Appeals, the Full Commission finds that the claimant proved he sustained a compensable injury on October 5, 2006. The record does not show that the claimant was a sole proprietor or independent contractor at the time of the October 5, 2006 motor vehicle accident. The claimant proved he was performing employment services at the time of the motor vehicle accident. The claimant established a compensable injury to his low back by medical evidence supported by objective findings, namely, the muscle spasms reported by Dr. Rutledge beginning October 11, 2006. The Full Commission reverses the administrative law judge's finding that the claimant did not prove he was performing employment services at the time of the accident. The claimant proved that the medical treatment of record he received for his low back was reasonably necessary in connection with the compensable injury.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715 (Repl. 2002). For prevailing on appeal to the Full Commission, the

claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury as a result of his minor motor vehicle on October 5, 2006. Even assuming that the claimant was an employee and that riding to work constituted employment services, I cannot find that the claimant has proven by a preponderance of the evidence that he sustained a an injury that arose out of and in the course of his employment.

The claimant's injury occurred after July 1, 1993, thus, this claim is governed by the provisions of Act 796 of 1993. The Full Commission has held that in order to establish compensability of an injury, a claimant must satisfy all the requirements set forth in Ark. Code Ann. §

11-9-102 as amended by Act 796. Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). When a claimant alleges that he sustained an injury as a result of a specific incident, identifiable by time and place of occurrence, he must prove by a preponderance of the evidence (1) the injury arose out of and in the course of his employment; and (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death. See Ark. Code Ann. § 11-9-102(4) (A) (i) and § 11-9-102(4) (E) (i) (Repl. 2002). He must also prove (3) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. See Ark. Code Ann. § 11-9-102(4) (A) (i). Moreover, the claimant must establish (4) that the compensable injury is supported by 'objective findings' as defined in § 11-9-102(16)." Ark. Code Ann. § 11-9-102(4) (D); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 31 Ark. App. 804, 20 S.W.3d 900 (2000). If the claimant fails to establish by a preponderance of the credible evidence any of the requirements for establishing the compensability of the

injury, he fails to establish the compensability of the claim, and compensation must be denied. Jerry D. Reed, supra.

The claimant has presented objective medical evidence of muscle spasms and degenerative disc disease; however these objective medical findings pre-existed the claimant's motor vehicle accident. Accordingly, I cannot find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury that resulted in internal or external harm to the body which required medical services or resulted in disability. The claimant obtained medical treatment for low back pain and muscle spasms as early as 1999 and again in 2002 following a motor vehicle accident. Diagnostic testing revealed degenerative changes and bulging discs as of 2002. Claimant presented to the emergency room on October 6, 2006, the day after the work related motor vehicle accident giving rise to this claim, at which time normal disc alignment was noted on x-ray and no notation of muscle spasms was noted. It was not until after the claimant was referred to a chiropractor on October 11, 2006, by a personal injury lawyer that muscle spasms were first detected following this accident. Given that the diagnostic findings of degenerative disc disease

pre-existed the claimant's October 5, 2006 motor vehicle accident and the absence of any findings of muscle spasms on October 6, 2006, I cannot find by a preponderance of the evidence that the muscle spasms detected by the attorney referred chiropractor one week later are causally related to the claimant's October 5, 2006, accident. Accordingly, I must dissent.

KAREN H. MCKINNEY, COMMISSIONER