

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. G000837

DAVID BARBER, EMPLOYEE	CLAIMANT
THE PORK GROUP, INC., SELF-INSURED, EMPLOYER	RESPONDENT
TYNET CORPORATION, CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 17, 2011

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE E. DIANE GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed January 26, 2011.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 20, 2010, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his low back while working for respondent on October 27, 2009.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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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 met all of the elements necessary for a compensable

aggravation injury and I would award benefits accordingly.

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 testified that on October 27, 2009, he was in the process of moving a sow into a crate with the use of a moving board and, as he was attempting to pick up the back latch rail for the crate, the sow came out of the crate backwards, striking his moving board and causing him to twist. The claimant testified that he felt a slight pop in the left side of his low back and reported the injury immediately. The claimant was treated conservatively by Dr. Konstantin Berestnev with little success and was eventually sent for an MRI. The January 6, 2010 MRI report states:

FINDINGS: There are no old studies for comparison....There is desiccation at L4-5 and L5-S1 with moderate loss of vertical height at each of these levels. There is very mild diffuse annular disc bulging at L4-5 and L5-S1....

The January 6, 2010 MRI supports the existence of a compensable injury with objective findings. It showed diffuse annular disc bulging at L4-5 and L5-S1. These are acute, not degenerative, findings. The respondent's doctor, Dr. Berestnev, opined that the low back pain was a result of degenerative disc disease that was aggravated by the injury at work. Findings of degeneration are not surprising in a 52-year-old man; but the MRI reflects more than degeneration, it shows there was clearly an

injury to his back at work. The work injury clearly aggravated the degenerative disc disease; but, had there been no accident, there would have been no problems with the back or any pain.

The claimant had no problem doing his job before the work-related injury. He testified that, after this injury, he could not even work, "I'm not physically fit right at this time to go back to work. I still have excruciating pains in my lower left side of my back. I can't do the things that I used to could do in a half a day, takes me anywhere from two days to three days to do." The claimant had no problems with his back prior to his work injury, except a minor back sprain he experienced in 2008 from moving something heavy. Claimant testified that it was a minor sprain, and the pain had only lasted three days. Medical records confirm this was a minor sprain. The claimant did not see a specialist, nor did he even go back for additional treatment. His supervisor, Leno Sanchez, testified that the claimant had been a good employee, and had never had any problems with doing his job.

The Administrative Law Judge, affirmed and adopted by the majority, based his opinion on his belief that there were no objective findings of an aggravation of a pre-existing condition or a compensable injury. There were clearly objective findings in the form of bulging discs. When considering the bulging discs found on the MRI, and the fact that the claimant had no prior

problems working, the Administrative Law Judge's opinion is not supported by a preponderance of the evidence. The need for treatment for the back injury was caused by the work-related accident. It is not simply claimant's degeneration which caused the need for treatment, and such a conclusion is not supported by the preponderance of the evidence. While degeneration was present, it was asymptomatic until this injury. He had no pain before the injury. He had no problems doing his work before the injury. He had no need for medical treatment. He had the immediate onset of pain at the time of the injury. After his injury at work, he had pain, he had problems doing his work, and a need for treatment was created.

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).

Here, the claimant has presented objective findings of his injury: bulging disks. 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. Stephens Truck Lines v. Millican, 58 Ark. App. 275, S.W. 2d

(1997). Here, the claimant has proved the existence and extent of his injury with objective findings of muscular hypertrophy and spondylosis. The majority's erroneous analysis confuses the "objective finding" element with the "causal connection" element. In Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999), the Arkansas Supreme Court held that objective medical evidence was not essential to establish a causal relationship between the injury and the claimant's work. The presence of a degenerative condition does not preclude the claimant from meeting the objective medical finding requirement. The claimant's credible testimony, corroborated by the medical records, clearly establishes a causal connection between the at-work incident and the claimant's need for treatment. Specifically, the claimant credibly testified he had never had these types of back problems before his injury, and that he specifically had never had pain like this before his injury.

Furthermore, I would note that the Administrative Law Judge's analysis, affirmed and adopted by the majority, in addition to being erroneous as a matter of fact, 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 Administrative Law Judge's analysis violates not only

statute, but also ignores all of the case law cited above, and should not be allowed to stand.

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PHILIP A. HOOD, Commissioner