

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G005066

RAYMOND BARBER,  
EMPLOYEE

CLAIMANT

McDONALD FENCE COMPANY,  
EMPLOYER

RESPONDENT

AUTO-OWNERS INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 30, 2011

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

Claimant represented by the HONORABLE TERENCE C. JENSEN,  
Attorney at Law, Benton, Arkansas.

Respondents represented by the HONORABLE ANDREW IVEY,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Claimant appeals an opinion and order of the  
Administrative Law Judge filed April 19, 2011. In said  
order, the Administrative Law Judge made the following  
findings of fact and conclusions of law:

1. The employee-employer relationship existed on  
or about April 15, 2010.
2. The Arkansas Workers' Compensation Commission  
has jurisdiction over this claim.
3. The respondents have controverted this claim  
in its entirety.

4. The claimant's average weekly wage of \$520 entitles him to compensation rates of \$347 per week for temporary total disability and \$260 per week for permanent partial disability.
5. The claimant failed to prove by a preponderance of the credible evidence that he sustained a compensable injury.

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 compensable injuries that are governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injuries are, indeed, injuries that are covered by the Act; however, the claimant has failed to establish the elements necessary to prove these compensable injuries by a preponderance of the evidence.

Therefore we affirm and adopt the April 19, 2011 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 the claimant sustained a compensable specific-incident aggravation injury to the right wrist on April 15, 2010, 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 began working for the respondent in approximately December of 2005 as a fence builder. On April 15, 2010, the claimant testified that

he injured his right wrist in the course and scope of his employment with the respondent when an 8-foot 2x4 piece of lumber hit the claimant on the right wrist. The claimant testified that he had immediate pain in his right wrist, but continued to work for approximately 30 minutes to finish the job. The claimant reported the injury to his boss, Mr. Pete Hardin, when he returned to the shop; however, no request was made by the claimant to go to the doctor at that time. In fact, the claimant testified that, at that time, he planned to come back the following day and continue work. The claimant thought his wrist would probably feel better the next day. The claimant returned to work April 16, 2010, which was a Friday, and worked the rest of the day, although his wrist continued to bother him.

The claimant continued to hurt the entire following weekend. On the following Monday, the claimant called Mr. Hardin, and informed him that he could not work because of wrist pain. The claimant informed Mr. Hardin that he was going to have to see a doctor. The claimant then went to Dr. Scott Walsh, an orthopaedic surgeon, that same morning.

When the claimant saw Dr. Walsh on April 19, 2010, he filled out a registration questionnaire. In

said questionnaire, the claimant indicated that he had a problem with his right wrist for about one week, which was caused by an injury or accident. The claimant saw Dr. Walsh approximately three times and was referred to a hand specialist at UAMS, Dr. Robert Lumsden. The claimant first saw Dr. Lumsden on May 24, 2010, and filled out a medical history form. On said form, the claimant indicated what his problem was and how it began as "right wrist at work". The claimant indicated that it began "about one and one-half months ago". On August 27, 2010, Dr. Lumsden indicated in his outpatient note as follows:

"There is no question in my mind that the patient had traumatic arthritis of which was forming in his wrist since his original injury in 1992.

There is also no question that the injury which he sustained very recently from a heavy blow from a beam which fell on his wrist precipitated his need to have the wrist fusion. He clearly had been working for seventeen or eighteen years with his problem which was exacerbated by the blow from the beam.

This is known as an exacerbation of a pre-existing condition."

Mr. Billy Kumpe was called as a witness. On cross-examination, Mr. Kumpe admitted that, on April 15, 2010, the claimant stated, "I hurt my elbow" or "I hurt my arm." Mr. Kumpe stated that he thought that the claimant had hurt his elbow because that was what he was holding. Mr. Kumpe agreed that he did not really know what part of his arm the claimant had hurt, but he did know that the claimant had hurt his arm. Mr. Kumpe was well aware that the claimant had hurt himself on April 15, 2010; however, Mr. Kumpe thought that the claimant had hurt himself while tying down lumber. Mr. Kumpe stated that you can definitely jamb your elbow or jamb your wrist while tying down lumber, and that was how Mr. Kumpe thought that the claimant had hurt himself. Mr. Kumpe stated that he was definitely told by the claimant that he had hurt himself on April 15, 2010.

While it is true that the claimant had injured his right wrist in 1992, the claimant had not sought any medical treatment for his right wrist until his injury of April 15, 2010, some 18 years later. Further, the claimant had worked continuously for those 18 years.

In conclusion, Mr. Kumpe was well aware that the claimant was hurt on April 15, 2010. Mr. Kumpe simply thought that the claimant had injured himself

tying lumber, rather than by being hit on the wrist by a piece of lumber. Under either scenario, both the claimant and his co-worker agree that the claimant was injured. There is simply some confusion with regard to just how the injury occurred. The claimant reported to Dr. Walsh on April 19, 2010, that he was hurt at work the prior week. Dr. Lumsden has stated, without reservation, that the blow to the claimant's wrist caused an aggravation of the claimant's pre-existing condition. I find the claimant's testimony as to how the injury occurred to be credible. Based on the claimant's credible testimony and the medical record, I find the claimant sustained a compensable specific-incident aggravation injury to the right wrist on April 15, 2010, and I would award benefits accordingly.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner