

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. G003229 & G006659

TOMMY MOORE, EMPLOYEE	CLAIMANT
FARM SERVICES, INC., EMPLOYER	RESPONDENT
AGRI GROUP COMP SI FUND, CARRIER/TPA	RESPONDENT

OPINION FILED OCTOBER 10, 2011

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

Claimant represented by the HONORABLE M. SCOTT WILLHITE, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE BETTY HARDY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed June 21, 2011.

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

1. There was an employer/employee relationship on April 10, 2010, and July 26, 2010.
2. The compensation rate is based on an average weekly wage of \$520, making the Temporary Total Disability and Permanent Partial Disability rates \$361/271.

3. The claimant has failed to prove by a preponderance of the evidence that he has sustained a compensable injury supported by objective findings.

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.

A. WATSON BELL, Chairman

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 proved by a preponderance of the evidence that he sustained a compensable specific incident cervical aggravation injury on July 26, 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).

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 began working for the respondent in June of 2009, and his job duties primarily involved working with tires, including changing flats and balancing the tires. These duties sometimes involved heavy lifting. According to the claimant's boss, prior to July of 2010, the claimant was able to perform his normal lifting duties at work. The claimant's co-employees concurred that he was able to perform normal lifting duties prior to July of 2010. On July 26, 2010, the claimant was lifting a tire which weighed between 35 and 40 pounds in an attempt to balance the tire, and immediately felt a sharp pain from just above his shoulder blades down to his mid-back. The incident caused the claimant to have such severe pain that he

could not walk or move very well. Although the claimant had experienced chronic pain in his spine prior to July 26, 2010, which he described as moderate and based upon his level of activity, the pain he experienced on the day of this incident was definitely different and more severe than his prior pain.

The incident was witnessed by two co-employees, Mr. Allen Simms and Mr. Douglas Moore, who testified at the hearing and confirmed the details of the incident alleged by the claimant. The respondent was also properly notified of the incident and an incident report was generated. Following the incident, the claimant was taken to the local emergency room, but the claimant was unable to obtain medical care because he could not afford to pay the co-pay required by his health insurance provider. It is not clear why the respondent did not authorize any medical treatment for the claimant pursuant to A.C.A. §11-9-508. The claimant then traveled approximately 20 miles to Jonesboro to seek medical care at St. Bernards Hospital, where he was seen at approximately 11:49 a.m.

Following his evaluation, the claimant was referred to Dr. Terry Lichtor, a Jonesboro neurosurgeon, who determined that the claimant needed surgery based upon an aggravation of a pre-existing condition which included a bone spur and a disc problem. In his deposition testimony, Dr. Lichtor retreated somewhat from his original position by stating that without an MRI prior to the

July 26, 2010 incident, it would be impossible to tell if the work accident was the primary cause of the disc problem.

However, it was clear that, following the incident, the claimant did suffer from a cervical disc problem.

The Administrative Law Judge, affirmed and adopted by the majority, heard the evidence and determined that the claimant failed to meet his burden of proof to show that his problems resulted from the July 26, 2010 incident, and she further found that there were no objective findings of an injury. The denial of benefits appears to have been, in large part, based upon the incorrect conclusion that all of the claimant's problematic findings pre-dated the work accident. Dr. Lichtor was questioned in his deposition on this issue, and he would not express a specific opinion as to whether he believed the disc problem resulted from the July 26, 2010 work accident. However, he was very clear in establishing two important points: (1) the claimant did have objective findings of an injury which resulted in the need for surgery and which could be attributed to the accident; and (2) the disc and nerve root where the claimant's bulge was located, C5-6 disc and C6 nerve root, would produce a very specific result in the index finger when the problem occurred. Therefore, the most relevant inquiry is when did the claimant begin to experience the index finger symptoms specifically identified by Dr. Lichtor? The claimant provided undisputed

testimony that, prior to the July 26, 2010 incident, he had no numbness in his left index or trigger finger, but, after the accident, he did have these symptoms.

Furthermore, I would note that the Administrative Law Judge's finding is wrong on its face. The September 2, 2010 MRI provided objective findings of an injury. The workers' compensation statutes provide that "[a] compensable injury must be established by medical evidence supported by objective findings...." Ark. Code Ann. 11-9-102(4) (D) (Supp. 2007). "Objective findings" are defined as "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. §11-9-102 (16) (A) (i) (Supp. 2007). A claimant must prove a causal connection between his employment and the injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). While objective medical evidence is necessary to establish the existence and extent of an injury, it is not essential to establish the causal relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522, 524 (1999); Horticulture Landscape Management v. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002). The Workers' Compensation Act does not require the claimant to provide new objective findings for an aggravation injury. By its very definition, an aggravation is an "old" injury that has been aggravated. If a claimant has "new" objective findings, the

claimant has a "new" injury. The Administrative Law Judge, affirmed and adopted by the majority, appears to have confused the elements of causal connection and objective findings. Here, the claimant has objective findings provided by the medical record. The causal connection is provided by the claimant's credible testimony bolstered by the medical record.

In conclusion, I find that the claimant did prove by a preponderance of the evidence that he sustained a compensable cervical aggravation injury on July 26, 2010 and I would award benefits accordingly.

PHILIP A. HOOD, Commissioner