

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA 09-1083

BERTHA OSBORNE

APPELLANT

V.

BOONEVILLE HUMAN
DEVELOPMENT CENTER and
PUBLIC EMPLOYEE CLAIMS
DIVISION

APPELLEES

Opinion Delivered April 14, 2010

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F708055]

AFFIRMED

M. MICHAEL KINARD, Judge

Appellant Bertha Osborne appeals from the Arkansas Workers' Compensation Commission's determination that she failed to prove by a preponderance of the evidence that she sustained a compensable injury when she fell at work on August 6, 2007. We affirm.

Appellant was working for appellee Booneville Human Development Center on August 6, 2007, when she fell while attempting to restrain an unruly resident. When she fell, appellant struck her left elbow. She testified that when it happened she heard her back "pop." On that day, appellant went to the Booneville Community Hospital, where Dr. William Daniel x-rayed her right hip and left elbow. Her hip x-ray revealed only mild degenerative changes. Dr. Daniel diagnosed appellant with a muscle tear or strain of

the lower anterior abdomen and thigh. Appellant was seen at the Booneville Family Clinic again on August 14, this time by Dr. Andrew Daniel, and appellant complained of pain in her right lumbar area extending down her right leg. She also reported tingling and sensory changes in this area.

On August 22, 2007, appellant saw Dr. Tonya Phillips, a neurologist, who assessed her as follows:

A patient with a history of L4 radiculopathy now with recurrent back pain without any clear evidence of radiculopathy. She has some symmetric reflex loss symptoms [that] could be related to diabetic neuropathy. I think this is hard to ferret out. With her underlying problems I think it would be difficult to clearly relate if there are some new findings going on.

Dr. Phillips believed that, depending on the results of an MRI, a neurosurgical referral might be appropriate. The MRI performed on August 31 revealed a mild disc bulge at L4-5,¹ a mild disc bulge at L2-3 without spinal or foraminal stenosis, degenerative facet changes from L2-S1, incidental hemangiomas in the L1 and L2 vertebral bodies, and degenerative end plate changes at L2-3, L4-5, and L5-S1.

Appellant consulted Dr. Anthony Capocelli, a neurosurgeon, on November 9, 2007. Dr. Capocelli diagnosed appellant as having lumbago, sciatica, a right-sided radiculopathy, degenerative disc disease, epidural fibrosis, and post-discectomy/laminectomy. He recommended a trial of conservative treatment, and if there was not significant improvement, he believed a lumbar myelogram might be necessary. In

¹ The report noted that appellant had had a laminectomy on the left at L4-5, and there was enhancing scar/granulation around the thecal sac. The disc bulge combined with facet hypertrophy to cause bilateral foraminal stenosis worse on the left than the right.

a letter to appellant's attorney, Dr. Capocelli stated that in his expert medical opinion appellant's current problems were most likely the result of her fall "exacerbating" her underlying degenerative disease and prior surgical areas.

The administrative law judge (ALJ) found appellant's injury compensable and awarded medical benefits and temporary total disability benefits for the period beginning August 7, 2007, and continuing through a date yet to be determined. The ALJ reasoned that the close temporal relationship between the fall and the appearance of appellant's lumbar-spine difficulties, combined with the fact that she was not having any difficulties with her lumbar spine for a significant period prior to the fall on August 6, 2007, was sufficient to prove a causal connection between the fall and her injury.

The Commission reversed the ALJ in a 2-1 decision. The Commission found that appellant did not prove by a preponderance of the evidence that she sustained a compensable injury. The Commission pointed to the following: appellant's history of injury and degenerative disc disease in her low back; that she sought treatment three days before her fall and was diagnosed with groin strain at that time; Dr. Phillips assessed her with "recurrent back pain without any clear evidence of radiculopathy," "some symmetric reflex loss symptoms [that] could be related to diabetic neuropathy," and concluded that "it would be difficult to clearly relate if there are some new findings going on"; a lumbar MRI ordered by Dr. Phillips showed mild disc bulges at L2 and L4-5, as well as degenerative changes and post-surgical changes. The Commission wrote that, after

reviewing all of the evidence in the record, it simply could not conclude that appellant proved by a preponderance of the evidence that she sustained a compensable injury.

On appeal, the appellate court views the evidence in the light most favorable to the Commission's decision and affirms when that decision is supported by substantial evidence. *Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 20 S.W.3d 326 (2000). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* We will not reverse the Commission's decision unless fair-minded persons could not have reached the same conclusion when considering the same facts. *Id.* Where, as here, the Commission denies benefits because it determines that the claimant has failed to meet his burden of proof, the substantial-evidence standard of review requires us to affirm if the Commission's decision displays a substantial basis for the denial of relief. *Id.*

A compensable injury is defined as “[a]n 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[.]” Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2009). A compensable injury must be established by medical evidence supported by objective findings, which are findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(4)(D) and (16) (Supp. 2009).

Regarding an aggravation, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable.

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Hickman v. Kellogg, Brown & Root, 372 Ark. 501, 277 S.W.3d 591 (2008). A preexisting disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which workers' compensation is sought. *Id.* An aggravation is a new injury resulting from an independent incident, and being a new injury with an independent cause, it must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Id.*

Appellant argues that the Commission erred in determining that she failed to prove by a preponderance of the evidence that she sustained a job-related injury because “the only medical opinion that specifically addressed causation supports compensability and the administrative law judge specifically found [her] to be credible.” Only causation is at issue in this case. It is clear that the Commission gave greater weight to Dr. Phillips's opinion (that appellant's current problems could not be tied to her fall) than to Dr. Capocelli's opinion (that her current problems were related to her fall at work). The Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Jones v. Wal-Mart Stores, Inc.*, 100 Ark. App. 17, 262 S.W.3d 630 (2007). As appellees point out in their brief, even Dr. Capocelli does not point to any new objective findings. On this record, we cannot say that the Commission's decision lacks a substantial basis for the denial of relief.

Affirmed.

GLADWIN and GLOVER, JJ., agree.