NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. G902742

BENJAMIN HOOVER, EMPLOYEE	CLAIMANT
LENTZ CARRIER COMPANY, EMPLOYER	RESPONDENT NO. 1
ACCIDENT FUND INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED MARCH 16, 2021

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

Claimant represented by the HONORABLE KOLTON JONES, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L. PAKE, 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 November 18, 2020. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. That an employer/employee relationship existed on March 10, 2019, the date of the claimed injury.

3. That the claimant failed to prove by a preponderance of the credible evidence that he sustained a compensable work-related injury to his lower back on March 10, 2019.

4. That all remaining issues are moot.

5. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

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.

Therefore, we affirm and adopt the November 18, 2020 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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SCOTTY DALE DOUTHIT, Chairman

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CHRISTOPHER L. PALMER, Commissioner

Commissioner Willhite dissents

DISSENTING OPINION

After my *de novo* review of the record in this claim, I dissent from the majority opinion, finding that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable work-related injury to his lower back on March 10, 2019.

The claimant was involved in a work accident on March 10, 2019. The claimant offered the following testimony as to how the injury occurred:

> Q All right. So you alleged a work injury on March 10, 2019. Can you tell us what happened on that day?
>
> A Well, I was unloading my trailer, and during the course of unloading it there was too much pressure or what-have-you versus the load coming out the bottom of the cones, meaning there's three cones in the trailer. Sometimes they'll stop up, and procedure, from what I was taught, is first to shut it down and try to lift on the hose and kind of knock it around to try to free it up a little.
>
> That's the way I was trained to do it and that's what I was doing. And if doesn't work, you gotta unhook the hose from the truck and the unloading bin and you've gotta work it out of there.
>
> Q Okay. And how did you injure yourself in that process?
>
> A Kind of slamming the hose around while it was unhooked, and of course it created a mess

> that had to be cleaned up also, which is standard in the situation I've got.
>
> Q Okay. And did you notice right away that you were injured?
>
> A Well, I remember thinking that I had a catch or a tweak in my back.

The claimant initially treated with his primary care physician, Dr. William Freeman, who prescribed Cyclobenzaprine for muscle spasm. Dr. Freeman recommended that the claimant see a "back doctor" and referred him to Dr. Daniel Judkins.

Dr. Judkins treated the claimant with conservative modalities, including prescribing Flexeril and Gabapentin; administering a Caudal Epidural Steroid Injection; ordering physical therapy; and administering a Transforaminal ESI. The claimant underwent a lumbar MRI on August 6, 2019, which revealed the following:

> IMPRESSION:
> 1. Remote prior bilateral laminotomy defects are identified at L4-5.
> 2. Degenerative disc desiccation is seen from L3-4 through L5-S1 with shallow central protrusion at the L4-5 level.
> 3. No focal disc extrusion, canal stenosis or nerve root compression is identified.

On July 19, 1999, the claimant underwent a surgical procedure which was performed at the L4-5 level. An MRI taken on May

19, 2000 showed a “pseudomeningocele in the left laminectomy defect” and a “very minimal disc bulge” at the L4-5 level.

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i) (Repl. 2012), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4)(D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant’s low back injury meets the requirements for compensability. The claimant sustained an injury while performing employment services on March 10, 2019. There were objective findings of the injury in the form of a shallow central protrusion at the L4-5 level as shown on an MRI taken on August 2, 2019. In addition, this injury required medical treatment in the form of prescription medication, epidural steroid injections, and physical therapy.

The prevailing issue in this matter is whether the claimant's injury was caused by his workplace incident. It is undisputed that the claimant suffered from a prior back injury in 1998 or 1999. However, 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 the disability for which compensation is sought. See, *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990); *Conway Convalescent Center v. Murphree*, 266 Ark. 985, 585 S.W.2d 462 (Ark. App. 1979); *St. Vincent Medical Center v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). The employer takes the employee as he finds him. *Murphree*, *supra*. In such cases, the test is not whether the injury causes the condition, but rather the test is whether the injury aggravates, accelerates, or combines with the condition.

The objective findings of the claimant's back condition changed after the workplace accident in comparison to his 2000 MRI findings. The August 2, 2019 MRI showed a "shallow broad-based central disc protrusion" at the L4-L5 level; whereas, the claimant's May 19, 2000 MRI revealed a "very minimal disc bulge" at that level.

In addition to the objective findings showing a change in the claimant's condition, there are subjective facts that support a finding that the claimant's back condition worsened. The claimant offered testimony that he stopped receiving treatment for his low back injury in 2005 and was

not having problems with his low back between 2005 and 2019. Prior to the workplace incident, the claimant was working a heavy labor job on a daily basis without limitations or restrictions. After this incident occurred, the claimant was prescribed Gabapentin and Flexeril and removed from work by Dr. Daniel Judkins. The claimant also received additional treatment for his back injury as described above.

Upon consideration of all of these factors, I find that the claimant has established by a preponderance of the evidence that he sustained a compensable back injury.

The respondents contend that the claimant failed to give notice of his work accident. However, the claimant testified that he reported the incident to his immediate supervisor, Doug Parker, on March 10, 2019. Doug Parker was not called as a witness to rebut the claimant's testimony and there is no other reason to question the veracity of the claimant's testimony. Where a witness is available to a party and by reason of his employment subject to the party's direction and control, a failure to call that witness, with reference to any fact in issue, creates a presumption that his testimony would be adverse to the party who could have called him. See *Rutherford v. Casey*, 190 Ark. 79, 77 S.W.2d 58 (1934); *Ark. State Hwy. Comm. v. Phillips*, 252 Ark. 206, 478 S.W.2d 27 (1972). Therefore, the evidence preponderates that the claimant gave notice of his workplace accident on March 10, 2019.

For the foregoing reason, I dissent from the majority opinion.

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M. Scott Willhite, Commissioner