NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G808328

CARL WATSON, EMPLOYEE	CLAIMANT
HIGHLAND PELLETS, LLC, EMPLOYER	RESPONDENT
LIBERTY MUTUAL GROUP, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 25, 2021

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

Claimant represented by the HONORABLE LAURA BETH YORK, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE CHRISTY L. KING, 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 October 5, 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 of the within claim.

2. I hereby accept the aforementioned stipulations as fact.

3. The Claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury to his thoracic spine as a result of his accidental work-related fall of December 7, 2018.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's October 5, 2020 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 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 entire record, I dissent from the majority opinion finding that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury to his thoracic spine as a result of his accidental work-related fall of December 7, 2018.

Factual and Medical Background

The claimant, now 55 years old, worked for the respondent-employer as a maintenance technician. The claimant testified that as a maintenance technician he was responsible for "all the aspects of the maintenance field in the plant, whether it be the electrical side or the control side or the instrumentation side or any structural fabrication that had to be added on to the plant or anything of that nature." According to the claimant, in his position he may have to lift objects that weighed up to 75 pounds without assistance.

The claimant testified that on December 7, 2018, he was involved in a workplace accident. The claimant explained that the work accident occurred as follows:

> Q Okay. What happened on December 7, 2018?
>
> A I was working on a piece of mobile equipment that is in an area outside the

main plant area out in a field where we keep a long, large pile of material. …

I was given a work order and told to investigate why [a] system was malfunctioning …. When I got there I discovered that there was a float switch that tells the computer system when that reservoir has oil in it or it doesn't. And that float switch had malfunctioned.

There's an operator that sits in a cab where he can see – we call it a dog house – where he can see all of the operation from where he's at and that cab is elevated another – I believe it's around 9 feet higher than the main platform. And you have a set of stairs that you have to use to access that operator's cab. I went up the stairs, knocked on the door, the operator turned around in his operator's chair and opened the door, and I told him, you know, what I was working on, what I had discovered, told him that it was not going to have any affect on his operation, he could do whatever he needed to do, but that I needed to go back to the plant in order to get a part to come back and fix this problem.

Now, it was about 40 degrees and had been drizzling rain all morning, and where this piece of equipment is located out in the field, you have to go through a muddy field to get to it. I had on steel toe, rubber, Muck brand boots that day

> because of the mud and the water that I had to go through to get there. After my brief discussion with him, I closed the door myself on the cab and turned to go down the stairs. As I started to step off the top step, I went airborne. Both feet came out from under me. I tried to reach and grab the handrail, but where I was at, I tried to go to my right to grab the handrail and I didn't reach it and I landed at the bottom of the staircase with my upper back on the bottom two steps of the staircase with my feet folded up over my head. I was inverted in the air when I landed.

The claimant was initially treated in the Jefferson Regional Medical Center Emergency Department. Chest and rib x-rays revealed "[f]ractures of the posterior lateral right seventh, eighth, ninth, and 10th ribs". The claimant was treated with prescriptions of Vicoprofen and Flexeril. The claimant was excused from work for three days and was instructed to follow up with his primary care physician.

The claimant received follow-up care from Dr. Lester Alexander at Healthcare Plus for continuing complaints of right rib pain and discomfort. The claimant was first see by Dr. Alexander on December 20, 2018.

On January 22, 2019, the claimant was seen by Dr. John Taylor at UAMS to evaluate the need for surgical intervention. However, after examining the claimant and reviewing his x-rays, Dr. Taylor noted, "[p]atient is approximately 10 weeks from injury, no operative intervention indicated. Will refer to pain management for possible nerve block."

The claimant received pain treatment from Dr. Heather Whaley at the Pain Treatment Centers of America. Dr. Whaley's treatment included the prescription medications, Gabapentin, Tramadol, and Meloxicam. In her February 26, 2019 medical record, Dr. Whaley noted, "[o]nce patient is considered a chronic pain patient, we will then discuss injections."

On March 28, 2019, Dr. Alexander noted that the claimant could return to light duty work. Dr. Alexander added physical therapy to the claimant's treatment plan on April 29, 2019.

During a follow-up visit on May 24, 2019, Dr. Alexander ordered a chest CT. This CT revealed the following:

> IMPRESSION:
> 1. Nonunited fractures of the right seventh, eight, ninth, and 10th ribs.
> 2. Anterior wedge compression fracture of T7 vertebra.
> 3. Small noncalcified 3 mm pulmonary nodule in the lateral right lower lobe.

Dr. Alexander recommended that the claimant be referred to a spine specialist. The claimant initially saw Alicia Bell, NP, at OrthoArkansas on June 13, 2019. Nurse Practitioner Bell ordered an MRI which the claimant underwent on July 8, 2019. The MRI showed the following:

> FINDINGS: There is compression deformity of the T7 vertebral body with approximately 60% vertebral body height loss. There is normal marrow signal in the T7 vertebral body. Intraosseous hemangiomas are noted at T6 and T7. Vertebral body height and marrow signal are otherwise normal.
>
> Vertebral body alignment is normal. There is slight exaggeration of the normal thoracic kyphosis centered at T7. There is generalized desiccation of the thoracic intervertebral discs. There is a small central disc protrusion at T5-6 which contacts the ventral surface of the cord, no displacement or cord compression. Facet joints are normally aligned. Normal marrow signal in the posterior elements. No significant narrowing of spinal canal or neural foramen. Visualized intrathoracic soft tissues are unremarkable. Soft tissues in the upper abdomen are unremarkable.
>
> IMPRESSION:
> 1. Compression deformity of T7 vertebral body with approximately 60% vertebral body height loss. Marrow signal at T7 is normal suggesting fracture deformity is chronic. No abnormal marrow signal.

Based on these findings, Bell noted the following plan:

> On CT chest, he has several right-sided rib fractures. There is also wedging, T7 vertebra. We received a message in regards to comment on whether this fracture was sustained by the injury, address acuity prior to his initial visit.
>
> We recommended thoracic MRI to further assess this further. There is no abnormal marrow signal at T7, suggesting this is a chronic T7 fracture.
>
> We would not recommend any surgical intervention.
>
> Prior to his initial visit, he was on light duty with restrictions. We continued those restrictions at his initial appointment. Today he reports that about 2 weeks ago they took him off work because his employer was concerned he would hurt himself.
>
> From a spine standpoint, he may return to work with no restrictions.
>
> He is more than welcome to continue with Pain Center treatments of America for any interventional treatment that they have to offer.
>
> Patient was advised to avoid bedrest longer than 3 days, proceed to ambulation, and continue normal activities as tolerated. …

Dr. Ikemefuna Onyekwelu noted the following in his October 10, 2019 notes:

> The patient is experiencing axial back pain since the incident of his accident at work. …
>
> The above related injury may have contributed to the patient's compression fracture. The imaging study that was obtained was greater than 6 months after the onset of the patient's symptoms. The natural history/studies show that bone tends to heal in approximately 3 months. As such there is a high likelihood that by 6 months following the initial insult that the fracture would have healed and not show signs of acuity of injury.
>
> The patient's MRI does show evidence of an age indeterminate compression fracture in the thoracic spine. There are signs of thoracic spondylosis and degenerative disc disease which are pre-existing. Although acuity cannot be determined at this time given that the current imaging study was performed up to 6 months after the insult and unlikely to reveal signs of acuteness because 6 months [is] well over the time it typically takes 4 bones to heal. However, the patient's symptoms began on and after the work injury. The patient has no history of pain in the upper or lower back or down the leg prior to the work injury. Therefore[,] it is within a certain [sic] degree of medical certainty that at least 51% of the patient's current symptoms are directly related to their work injury.
>
> Consideration to reopen the case should be considered given that there are signs of a compression fracture that is otherwise unexplained and the patient's current

> symptomatology is persistent and started only after the work-related accident.

A Physician's Disability Statement completed by Dr. Alexander on November 6, 2019 noted a diagnosis of "fracture of thoracic spine". Dr. Alexander indicated that the claimant had "no work capacity" with limitations being, "no pushing, pulling, stooping, or raising hands above chest". Dr. Alexander placed the following restrictions on the claimant: "[n]o standing for more than 0.25 hours, no sitting for more than 0.25 hours, no lifting more than 5 pounds, no bending, no prolonged walking". Dr. Alexander also noted that the claimant could not resume his full duties when he returned to work.

The claimant presented to Dr. Scott Schlesinger on November 12, 2019 for a neurological consult. Dr. Schlesinger ordered a thoracic MRI which the claimant underwent on November 12, 2019. The MRI revealed the following:

> CONCLUSION:
> 1. Moderate to severe remote anterior wedge compression deformity of T7.
> 2. A central protrusion at T5-6 level contributes to contouring of the ventral cord.
> 3. Retrolisthesis and a shallow disc displacement result in contouring of the cord at the T7-8 level.

Based on those findings, Dr. Schlesinger offered the following opinion and treatment recommendation:

> This 53-year-old male says he had no issues until a[n] injury at work on 12/7/2018. The first MRI that I have seen is from July of 2019 and the current study now. The studies revealed chronic compression deformity of T7 without any signal change indicating at least 4 to 5 months of age or longer. There is absolutely no way to know how long that compression deformity has been present if the MRI of July 2019 is the first study of the thoracic spine. I therefore cannot make any opinion regarding the relationship between his injury and that thoracic abnormality at T7. However, the patient states his pain began in this area with the fall and the rib fractures associated with it therefore I can state with a reasonable degree of medical certainty that if in fact the history is accurate that the pain in his mid-thoracic and lower thoracic region is undoubtedly related to the accident. I would state this with greater than 51% certainty if the history is all accurate and consistent.
>
> There is absolutely nothing that can be done surgically nor any kyphoplasty treatments for this chronic deformity. However, perhaps he could improve his pain level with injections into this region. I do not know if this will help at all but it is worth a try. Therefore, I would recommend lower thoracic epidural injections be tried.

The claimant received two epidural injections but reported no improvement from these injections. On March 5, 2020, the claimant was seen by Caroline Tingquist, APRN at Legacy Spine & Neurological Specialists. Nurse Tingquist noted, "[p]er Dr. Schlesinger's recommendations, we have tried all that we are able to offer the patient. We will refer him to pain management with Dr. Becker or Dr. Roman."

An Independent Medical Evaluation was conducted on December 17, 2018 by Dr. Carlos Roman. Dr. Roman opined that no further interventional procedures are indicated and that the claimant had reached maximum medical improvement. Dr. Roman recommended that the claimant undergo an FCE to "address his work capacity".

An FCE was performed on July 10, 2020. The FCE, which was determined to be unreliable, placed the claimant in the LIGHT classification of work. In his July 15, 2020 medical record, Dr. Roman indicated that he would "put him back to work under a medium classification of work per the U.S. Department of Labor".

Opinion

Compensability

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 thoracic spine injury meets the requirements for establishing compensability. The claimant sustained an injury while performing employment services on December 7, 2018. There were objective findings of the injury in the form of moderate to severe remote anterior wedge compression deformity of T7 as shown on an MRI taken on November 12, 2019. In addition, this injury required medical treatment in the form of epidural injections.

The prevailing issue in this matter is whether the claimant's injury was caused by his workplace accident. The compression fracture is noted by Drs. Onyekwelu and Schlesinger as being chronic. 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 Courts have held in several cases that an increase in symptoms following a work-related accident is sufficient proof to establish compensability. In *Parker v. Atlantic Research Corp.*, 87 Ark. App. 145, 189 S.W.3d 449, the Court of Appeals reversed the Commission's denial of benefits finding that job-related activity which resulted in an increase in symptoms of a pre-existing degenerative condition was sufficient to establish a compensable injury. The *Parker* case involved a non-specific injury where the claimant had to establish the major cause of her symptoms was the job-related activity. The Court specifically held that the increased symptoms alone were sufficient to meet that high standard. In the present

claim, the claimant sustained a specific incident injury which only requires him to establish a causal connection between the injury and his symptoms. Clearly, the same factors that went to establishing a higher standard can be used to satisfy the standard in the present claim.

A similar case is *Leach v. Cooper Tire and Rubber Co.*, 2011 Ark. App. 571 (2011). The *Leach* Court found an aggravation of a previously asymptomatic degenerative condition was a compensable injury itself and granted the claimant workers' compensation benefits. The court noted that the employer takes the employee as he finds him and employment circumstances which aggravate a pre-existing condition is compensable. The court held that a supporting MRI scan and a finding of muscle spasms was sufficient to establish the compensability of the claim.

An additional case on point is *Wright v. St. Vincent Doctors Hospital*, 2012 Ark. App. 153, 390 S.W.3d 779 (2012). In this case, the issue was whether an aggravation of a pre-existing degenerative condition could support the award of permanent impairment benefits. The standard to be met in this case was major cause. Again, the Court held that objective evidence of increased symptoms satisfied that high standard.

Applying this same analysis to the case at bar, it is clear that the claimant sustained a compensable injury. There was clearly a change

in the condition of the claimant's thoracic spine after the December 7, 2018 work accident. The claimant testified that despite performing heavy maintenance work for the last few decades, prior to his work accident he had never experienced back pain like what he has experienced since his December 7, 2018 accident. Prior to this accident the claimant was able to perform all his work duties. However, the claimant was no longer able to perform his duties after sustaining this work injury. Additionally, the claimant did not have any restrictions or limitations before his work accident. Following the accident, the claimant's FCE listed limitations for walking, stooping, kneeling, climbing stairs, pushing and pulling. Also, Dr. Roman opined that the claimant should work in medium work classification positions as opposed to the heavy labor positions he usually worked. Thus, the evidence preponderates that the claimant's degenerative thoracic spine condition was at least aggravated by the workplace accident.

The ALJ "attached minimal weight to Drs. Onyekwelu and Schlesinger's expert opinions wherein they attributed the claimant's thoracic symptoms and/or thoracic injury to his work-related accident of December 7, 2018". However, I find that it is not appropriate to discount the opinions of these doctors. Despite the appearance of being a chronic injury, Drs. Onyekwelu and Schlesinger both stated to a reasonable degree of medical

certainty that the claimant's thoracic spine injury was related to his work accident.

For the foregoing reasons, I find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his thoracic spine and is entitled to workers' compensation benefits.

Temporary Total Disability Benefits

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. *Ark. State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. *Breshears*, *supra*; *J.A. Riggs Tractor Co. v. Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

The claimant's thoracic spine injury is an unscheduled injury; thus his healing period does not end until the compression fracture has become stable and nothing further in the way of treatment will improve that condition. The claimant received temporary total disability benefits until

September 6, 2019; however, the claimant continued to receive treatment for his thoracic spine after that date.

Therefore, I find that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning on September 7, 2019 and continuing to July 15, 2020 when Dr. Roman placed the claimant at maximum medical improvement.

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

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M. SCOTT WILLHITE, Commissioner