

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA11-929

DAVID L. BARBER

APPELLANT

V.

PORK GROUP, INC., and TYNET
CORPORATION

APPELLEES

Opinion Delivered February 15, 2012APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[No. G000837]

AFFIRMED

LARRY D. VAUGHT, Chief Judge

Appellant David Barber appeals the decision of the Arkansas Workers' Compensation Commission finding that he failed to prove by a preponderance of the evidence that he suffered a compensable low-back injury while working for appellee, the Pork Group, Inc. Barber argues on appeal that substantial evidence fails to support the Commission's decision. We affirm.

Barber, now fifty-three years old, was employed with the Pork Group as a caretaker of a hog farm. On October 27, 2009, Barber was herding a sow into a crate, with the use of a moving board, when the sow moved backward into the board, which struck Barber and caused him to twist. Barber felt a pop in his low back and experienced pain. He reported the incident to his supervisor and farm manager. The following day, he received medical treatment for his low-back pain from Dr. Konstantin Berestnev. X-rays revealed no fractures or dislocations, but did reveal degenerative changes at the L4-5 level of the spine. Dr.

Berestnev diagnosed Barber with low-back pain, prescribed pain medication, and restricted him from lifting over twenty pounds. Barber returned to Dr. Berestnev on December 2, 2009, with continued complaints of pain. The diagnosis remained unchanged—“low[-]back pain, overexertion from sudden strenuous movement.” Dr. Berestnev continued the pain medication, recommended physical therapy, and ordered Barber not to lift more than forty pounds.

On December 16, 2009, Barber returned to Dr. Berestnev with continued complaints of pain. Dr. Berestnev noted that Barber had “no evidence of muscle spasms on examination of the paraspinous musculature.” Nevertheless, Dr. Berestnev ordered an MRI that was performed on January 6, 2010. The MRI results reflected:

2. MODERATE DEGENERATIVE DISC DISEASE WITH DESICCATION AND LOSS OF VERTICAL HEIGHT AT L4-5 AND L5-S1.
3. MILD DIFFUSE ANNULAR DISC BULGING AT L4-5 AND L5-S1 BUT NO DEMONSTRATION OF FOCAL DISC PROTRUSION, EXTRUDED DISC FRAGMENT, CENTRAL CANAL STENOSIS, NEURAL EXIT FORAMINAL STENOSIS OR BONY LATERAL RECESS STENOSIS.
4. MILD TO MODERATE DEGENERATIVE FACET ARTHROPATHY AT EACH LEVEL.
5. THE CONUS MEDULLARIS IS NOT ENLARGED. THERE IS NO PATHOLOGICAL MARROW SIGNAL INTENSITY ARISING FROM THE VERTEBRAL BODIES THAT WOULD SUGGEST BONY METASTATIC DISEASE OR HEALING TRAUMA.

On January 13, 2010, Dr. Berestnev wrote a letter interpreting the MRI findings: “For all practical purposes the findings on this MRI are degenerative in nature and cannot be explained by an acute injury on 10-27-09. The patient’s low[-]back pain is a result of degenerative disc disease at [the] L4-5, L5-S1 level which was reaggravated by the injury in 10-27-09.” Dr. Berestnev released Barber, recommending that he continue medication and

stretching exercises.

Barber filed a claim for workers' compensation benefits claiming that he suffered a compensable injury to his low back on October 27, 2009. He sought medical treatment and temporary-total-disability benefits. At the hearing before the administrative law judge, Barber conceded that he had sought medical treatment for low-back pain in December 2008, stating that the treatment was an isolated incident for "back stress." He further testified that he was able to work after that incident without any problems and that he had never seen a back specialist. However, after his injury at the Pork Group, Barber testified that he was unable to work, to perform chores around the house, or to participate in his hobbies. Leno Sanchez, Barber's supervisor, testified that Barber was a good employee and that he did not have any physical complaints or problems performing his work.

The ALJ issued an opinion finding that Barber failed to prove by a preponderance of the evidence that he suffered a compensable low-back injury. The ALJ found that Barber had a preexisting low-back condition and that there were no objective findings to support an aggravation of that condition. The Commission affirmed and adopted the ALJ's decision. Barber timely appealed.

In appeals involving claims for workers' compensation, we view the evidence in a light most favorable to the Commission's decision and affirm the decision if it is supported by substantial evidence. *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 506, 277 S.W.3d 591, 596 (2008). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Hickman*, 372 Ark. at 506, 277 S.W.3d at 596. The issue is not whether we might have reached a different result from the Commission; if reasonable minds

could reach the result found by the Commission, we must affirm the decision. *Id.*, 277 S.W.3d at 596. Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial-evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Id.*, 277 S.W.3d at 596.

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Id.*, 277 S.W.3d at 596. When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Id.*, 277 S.W.3d at 596. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*, 277 S.W.3d at 596. Thus, we are foreclosed from determining the credibility and weight to be accorded to each witness's testimony. *Id.*, 277 S.W.3d at 596.

Barber contends that there is a lack of substantial evidence supporting the Commission's decision that he failed to prove that he suffered an aggravation of a preexisting low-back injury. An employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. *Hickman*, 372 Ark. at 511, 277 S.W.3d at 600. 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.*, 277 S.W.3d at 600. 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.* at 511–12, 277 S.W.3d at 600.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing the injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs & More v. Reid*, 2011 Ark. App. 450, at 4–5, ___ S.W.3d ___, ___ (citing Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2009)).

The Commission found that Barber failed to prove objective findings supporting the existence of an aggravation injury to his low back. “Objective findings” are defined as findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i) (Supp. 2011). The Commission found that the objective findings in this case established that Barber suffered from a degenerative condition in his low back—not an aggravation or new injury. The objective findings identified by the Commission included the January 2008 medical report documenting Barber’s prior history of back complaints; x-rays taken the day after the October 27, 2009 incident that demonstrated degenerative changes at the L4-5 level; the MRI results that, according to Dr. Berestnev, showed only degenerative conditions; and Dr. Berestnev’s reports that failed to note muscle spasms and one particular report that expressly stated that Barber “had no evidence of muscle spasms.” Based on this evidence, the Commission found, “In this particular case, all of the objective findings are of a preexisting condition, not objective findings of a new injury.” We hold that substantial

evidence supports this conclusion.

Barber argues, the “Commission based its opinion on the mistaken belief that there were no objective findings of an aggravation of a preexisting condition or a compensable injury. There were clearly objective findings in [the] form of bulging discs.” The bulging discs to which Barber refers are included in the third finding listed by the radiologist in the MRI results: “MILD DIFFUSE ANNULAR DISC BULGING AT L4-5 AND L5-S1” While this is an objective finding, Dr. Berestnev’s independent interpretation of the MRI results were that the “findings on the MRI are degenerative in nature and cannot be explained by an acute injury on 10-27-09.” The Commission, in its discretion, weighed this medical evidence in favor of the Pork Group. 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. *Cossey v. Gary A. Thomas Racing Stable*, 2009 Ark. App. 666, at 7–8, 344 S.W.3d 684, 688.

Accordingly, we hold that there is substantial evidence supporting the Commission’s decision that objective findings failed to support Barber’s claim that he suffered a compensable injury and affirm.

Affirmed.

GRUBER and GLOVER, JJ., agree.