

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F012404 & F410267

ALFRED HILL,
EMPLOYEE

CLAIMANT

COOPER STANDARD AUTOMOTIVE INC.,
EMPLOYER

RESPONDENT

CONSTITUTION STATE SERVICES,
TPA

RESPONDENT

OPINION FILED JANUARY 15, 2008

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

Claimant represented by the HONORABLE AARON L. MARTIN,
Attorney at Law, Fayetteville, Arkansas.

Respondent represented by the HONORABLE MICHAEL J. DENNIS,
Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed March 14, 2007. The administrative law judge
found that the claimant did not prove he was entitled to
additional benefits. After reviewing the entire record *de*
novo, the Full Commission affirms the administrative law
judge's opinion.

I. HISTORY

Al Hill, age 39, testified that he graduated from high school and had attended college for three years, majoring in finance and banking. The parties stipulated that the employment relationship existed on October 1, 2000 and that the claimant sustained a compensable injury on that date. The parties stipulated that the claimant received a 7% anatomical impairment rating on June 22, 2001, and that the rating was paid in full on May 16, 2002. The claimant testified that he returned to work for Cooper following the October 1, 2000 compensable injury. The claimant agreed on cross-examination that he earned "the same money" as before the compensable injury.

The parties stipulated that the claimant sustained a compensable lower back and lumbar spine injury on September 21, 2004. The claimant testified that he was loading inserts into a press, and "When I reached over to load the inserts in the machine, my back popped. Tremendous pain proceeded to go down my left leg." The claimant testified that he did not work after September 21, 2004.

The claimant began treating with Dr. D'Orsay D. Bryant, III on October 7, 2004:

The patient is a 36 year old male with a complaint of severe low back pain. The patient stated his date of injury was September 21, 2004. He stated that he was bending to load when his back "popped" and his low back became painful and radiated down the lower extremities....The patient stated he was unable to walk effectively and perform his job as an injection press operator. The patient did have an MRI which did reveal the presence of disc disease. The patient has seen both Dr. Dickens and Dr. Cathey in the past for neurosurgical evaluation. He has also seen me on several occasions, as I initially saw him four years ago for his low back condition. The patient stated that he has had treatment without relief.

PHYSICAL EXAMINATION: Tenderness and spasm in the right, left and midline of the low back; full straight leg raises, lower extremity reflexes and neurovascular status intact.

X-RAY EXAMINATION: Lumbar spine negative for acute bony injury.

Dr. Bryant gave the following impression: "Lumbar strain with degenerative disc disease and disc herniation as per the MRI." Dr. Bryant planned conservative treatment and scheduled follow-up visits. Dr. Bryant noted on October 28, 2004, "He has spasm in the right and left low back. The patient has been seen previously by two neurosurgeons in previous years. He is not interested in surgical intervention. He will continue on conservative management....He was given light duty restrictions." Dr. Bryant noted on November 11, 2004 that the claimant was slowly improving in physical therapy. Dr. Bryant gave the

claimant a left SI joint injection in the back, "with good relief." Dr. Bryant continued conservative management.

Dr. Bryant re-evaluated the claimant on February 7, 2005: "He has spasm in the right, left and midline of the low back. He had an FCE which did place him on restrictions in the light medium physical demand level. He stated that he was offered a disability pension, and he is pondering this."

Dr. Bryant reported on April 28, 2005:

The patient comes today for evaluation of his back. He has persistent low back pain. He has not been able to return to work because there is no job for him. He has worked at Cooper for 14 years. He is also a pastor of a church which he has undertaken for the past six months....He has spasm in the right and left low back.

The patient has applied for benefits of the disability pension at the Cooper program.

FOLLOW-UP: As needed.

The claimant testified, "One morning I was brushing my - Getting ready to go - I laid some clothes on my bed and I went to the bathroom to brush my teeth. When I bent over, it just went out and so I had some concerns so I went back to Doctor Bryant."

The claimant returned to Dr. Bryant on September 1, 2005: "The patient admits to persistent severe low back pain

which is increasing in intensity. He is a minister. He is currently not working. The patient has not yet reached MMI. He does have lumbar disc disease and disc herniations as per his history. An MRI was ordered as he has lower extremity paresthesias. He was given medication. He has not worked for a great deal of time and is currently doing his pastoral/ministerial duties."

An MRI study of the claimant's lumbar spine was done on September 21, 2005:

The sagittal images reveal prominent posterior disc bulging or protrusion at L4-5. Milder disc protrusion is seen at L2-3 and to a lesser extent at L1-2 and L5-S1.

This impression was also corroborated on a transaxial T1 and T2 weighted sequences showing mild posterocentral disc bulging at L5-S1 indenting the thecal sac. This can be interpreted as mild disc herniation.

Sections through the L4-5 discs reveal prominent posterior disc bulging probably indenting the thecal sac with narrowing of the neural foramina. Sections through L3-4 discs reveal no disc herniation. Sections through the L2-3 discs reveal posterocentral and medial disc herniation slightly to the left of the midline.

Sections through the L1-2 discs reveal mild posterior disc bulging barely seen to indent the thecal sac. Comparison was made to the 19th of October 2000 study and these changes on the later study seems (sic) to have worsened significantly as compared to the earlier studies. The posterior disc herniation or disc bulging was also seen at the L4-5 disc on the 2000 study. The L2-3 disc

herniation is seen to be worse. The posterocentral disc herniation at L5-S1 is also new and not seen on the prior study.

The claimant returned to Dr. Bryant on October 12, 2005: "The patient was informed of his MRI results. He has persistent low back pain with lower extremity paresthesias. In comparison with his former MRI, his herniated disc disease has worsened. The patient previously saw Dr. Cathey some years ago for his low back and decided not to proceed with operative management. The patient is a suitable candidate for reevaluation by Dr. Cathey. He was given medication and he will followup with me on an as needed basis."

Dr. Bryant noted on November 3, 2005, "The patient does complain of low back pain with left lower extremity paresthesias. The EMG/NCS study was normal. However, the patient does have lumbar disc disease. Dr. Cathey did recommend epidural injections to the lumbar spine. As per Dr. Cathey's recommendations, an appointment was made at the Medical Center of South Arkansas to receive the injection from the anesthesiology department."

Dr. Liviu Anca examined the claimant on November 10, 2005 and diagnosed, "1. Left lumbar radiculopathy. 2.

Lower back pain. 3. Myofascial pain." Dr. Anca performed trigger point injections.

The claimant followed up with Dr. Bryant on December 29, 2005: "He does have herniated discs as per the MRI of his lumbar spine. He has been under the care of Dr. Anca and he has received three epidural steroid injections by Dr. Anca, anesthesiologist at the Medical Center of South Arkansas. He is currently not working. He does have a previous FCE evaluation which has determined that he is not able to perform at his former job."

The claimant followed up with Dr. Bryant on February 27, 2006:

The patient has persistent low back pain, increased with the cold weather. He has tenderness and spasm in the left low back. The patient had epidural injections with some relief. They were basically successful but the effects are wearing off. The patient does have a herniated disc in his back as per the MRI but is not a surgical candidate. The patient was given medications. Conservative management is indicated and he will followup with me on an as needed basis.

Dr. Bryant noted on April 4, 2006, "The patient has persistent low back pain. He has increased spasm in the left low back. He has spasm in the right low back. He has lumbar disc disease. The patient was given

medications....He will followup with me on an as needed basis."

The last medical report of record from Dr. Bryant was dated June 8, 2006:

The patient complains of left heel pain and numbness. It radiates from the back. He has pain on weightbearing. He is considering undergoing epidural injections. He has chronic spasm of the low back. X-rays of the left foot are negative for acute bony injury. He has tenderness at the plantar fascia.

Dr. Bryant planned conservative treatment. The claimant testified that he had seen Dr. Bryant after the June 8, 2006 visit and that Dr. Bryant had prescribed medication.

A pre-hearing order was filed on November 1, 2006. According to the pre-hearing order, the claimant contended, among other things, that he was entitled to temporary total disability benefits from September 1, 2005 to a date yet to be determined. The claimant contended that although he received an impairment rating in 2001, he "entered a new healing period on September 21, 2005 when he suffered a recurrence/ aggravation of his previous back injury." The claimant contended that he was entitled to "additional permanent partial disability benefits in the form of wage loss....The claimant has not received any *bona fide* offers

to return to work earning the same or greater wages he was earning prior to his compensable injury."

The respondents contended that the claimant was not entitled to additional temporary total disability benefits or additional wage-loss disability.

According to the November 1, 2006 pre-hearing order, the claimant listed the following issues for litigation: "1. Whether the claimant is entitled to additional temporary and total disability benefits from September 1, 2005 to a date yet to be determined. 2. Whether the claimant is entitled to additional permanent partial disability benefits in the form of wage loss. 3. Whether the claimant is entitled to a controverted attorney's fee for the indemnity benefits sought."

The respondents listed the following issues for litigation: "1. Entitlement to additional temporary total disability benefits and additional permanent partial disability benefits (wage loss). 2. Statute of limitations for additional benefits for the October 1, 2000 injury."

A hearing was held on December 21, 2006. The claimant testified that he had been serving as a pastor for about two years and that he earned two-hundred dollars a message. The claimant testified that he had begun working as a part-time

bus driver for a local school district. The claimant testified on cross-examination that he had worked as an elementary teacher's aide beginning in August 2006. The claimant testified on cross that he had retired from Cooper, "Officially I think it was March 1st."

The administrative law judge found, among other things, that the statute of limitations barred a request for additional benefits for the October 1, 2000 injury. The ALJ found that the claimant did not prove he was entitled to any temporary total or temporary partial disability for any period on or after September 1, 2005. The ALJ found that the claimant did not prove he had sustained any anatomical impairment or wage-loss disability. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Statute of limitations

Ark. Code Ann. §11-9-702(b) provides:

(1) In cases where any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation or two (2) years from the date of the injury, whichever is greater.

In the present matter, the parties stipulated that the claimant sustained a compensable injury on October 1, 2000. The parties stipulated that a subsequent anatomical impairment rating was paid in full on May 16, 2002. The claimant did not file a claim for additional compensation within one (1) year of the last payment on May 16, 2002 or two (2) years after the October 1, 2000 compensable injury. The Full Commission therefore affirms the administrative law judge's finding that the statute of limitations bars a request for additional benefits for the claimant's October 1, 2000 compensable injury.

B. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

In the present matter, the parties stipulated that the claimant sustained a compensable lower back and lumbar spine injury on September 21, 2004. Dr. Bryant examined the claimant on October 7, 2004 and noted that an x-ray of the lumbar spine was negative for an acute bony injury. Dr. Bryant noted that an MRI showed "the presence of disc disease." Dr. Bryant's impression was "Lumbar strain with degenerative disc disease and disc herniation as per the MRI." Dr. Bryant did not opine that any herniation shown on MRI was the result of the September 21, 2004 lumbar strain.

Dr. Bryant noted on April 28, 2005 that the claimant had persistent low back pain. Dr. Bryant noted back spasm but released the claimant to follow up "as needed." The Full Commission finds that the claimant did not continue in a healing period for his compensable lumbar strain beyond April 28, 2005. The record does not demonstrate, and Dr. Bryant did not opine, that the back spasm noted on April 28, 2005 was causally related to the September 21, 2004 compensable lumbar strain. The instant claimant did not prove that any medical treatment rendered after April 28, 2005 was reasonably necessary in connection with the September 21, 2004 compensable injury.

C. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages, whereas temporary partial disability is that period within the healing period in which the employee suffers only a decrease in his capacity to earn the wages he was receiving at the time of the injury. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12). Whether a claimant's healing period has ended is a question of fact for the Commission. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

In the present matter, the administrative law judge found that the claimant did not prove he was entitled to temporary total or temporary partial disability benefits after September 1, 2005. The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury on September 21, 2004. As we have noted, the record demonstrates that the compensable injury was diagnosed as a lumbar strain, and there is no evidence showing that the claimant sustained an acute herniated disc as a result of the compensable lumbar strain. The Full Commission has determined *ante* that the claimant did not

remain within a healing period for his lumbar strain after Dr. Bryant's release on April 28, 2005. The claimant did not seek additional medical treatment until he returned to Dr. Bryant on September 1, 2005. Although the claimant testified that his back "went out" at home while bending over to brush his teeth, Dr. Bryant's September 1, 2005 note did not describe any such event. We recognize Dr. Bryant's statement on September 1, 2005, that is, "The patient has not yet reached MMI." The Commission has the authority to accept or reject a medical opinion and the authority to determine its probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). The weight of evidence in the present case does not show that the claimant remained in a healing period on September 1, 2005 or re-entered a healing period on that date for his September 21, 2004 compensable lumbar strain. Dr. Bryant's lone notation on September 1, 2005 that the claimant had not reached maximum medical improvement is entitled to minimal weight.

An MRI of the claimant's lumbar spine was performed on September 21, 2005. This MRI study generally showed bulging at L4-5; a protrusion at L2-3, L1-2, and L5-S1; bulging at L5-S1; herniation at L2-3; bulging at L1-2; and herniation

at L5-S1. The evidence does not show that any of these abnormalities were causally related to the September 21, 2004 compensable lumbar strain. Dr. Bryant opined on October 12, 2005 that the claimant's "herniated disc disease has worsened." The record does not demonstrate that worsening of the claimant's disc disease was caused by the September 21, 2004 compensable injury or by another other workplace event. Nor were any of these abnormalities causally related to the claimant's back "going out" while he was brushing his teeth at home.

The record does not show that the instant claimant re-entered a healing period for his compensable injury on September 1, 2005 or any other date. The Full Commission therefore affirms the administrative law judge's finding that the claimant did not prove he was entitled to temporary total or temporary partial disability benefits after September 1, 2005. The evidence does not demonstrate that the "chronic spasm" in the claimant's low back noted by Dr. Bryant on June 8, 2006 was in any way causally related to the September 21, 2004 compensable injury. Nor does the claimant's chronic spasm show that the claimant remained in a healing period for his compensable injury.

D. Permanent Disability

The Workers' Compensation Commission has adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993), published by the American Medical Association, as an impairment rating guide. Workers' Compensation Laws And Rules, Rule 099.34; Ark. Code Ann. §11-9-522(g). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-704(c)(1)(B). Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(F)(ii)(a). "Major cause" means more than fifty percent (50%) of the cause, and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14).

In the present matter, the administrative law judge found that the claimant did not prove that he had sustained any permanent physical impairment as a result of the September 21, 2004 compensable injury. The Full Commission affirms this finding. There is simply no evidence demonstrating that the claimant sustained a herniated disc as a result of the September 21, 2004 accident. Dr. Bryant did not opine that the claimant herniated a disc and of

course Dr. Bryant did not assign a permanent rating. Nor is there any relevant provision in the Guides which would enable the Commission to assess a permanent anatomical impairment rating for the instant claimant. Since the instant claimant did not prove that he had sustained any degree of permanent physical impairment as a result of his September 21, 2004 lumbar strain, the claimant's claim for wage-loss is moot. See, *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000).

Based on our *de novo* review of the entire record, the Full Commission finds that the applicable statute of limitations bars the claimant's request for benefits related to the October 1, 2000 compensable injury. The claimant did not prove that additional medical treatment after April 28, 2005 was reasonably necessary in connection with the September 21, 2004 compensable injury. The claimant did not prove that he was entitled to temporary total disability or temporary partial disability benefits after the end of his healing period on April 28, 2005. The record does not demonstrate that the claimant re-entered a healing period at any time after April 28, 2005. The claimant did not prove that he had sustained any permanent anatomical impairment as a result of his September 21, 2004 compensable injury.

Because the record does not demonstrate that the claimant sustained any degree of permanent anatomical impairment, the claimant's claim for wage-loss disability is moot. The Full Commission affirms the administrative law judge's denial of additional benefits, and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority's opinion. Specifically, I agree that the statute of limitations bars the claimant from receiving additional medical benefits from his 2000 compensable injury. However, I respectfully dissent from the Majority's finding that the claimant's healing period ended on April 28, 2005 and that any medical treatment after this date was not reasonable and necessary. As such, the Majority erroneously determined

that the claimant is not entitled to temporary total disability after April 28, 2005.

Based upon a de novo review of the record in its entirety, I find the claimant suffered an aggravation of a pre-existing condition on September 21, 2004 while in the employment of the respondents. Specifically, the respondents stipulated that the claimant sustained a compensable injury to his low back on September 21, 2004. Furthermore, I find that the claimant suffered a recurrence of his September 21, 2004, admittedly compensable injury on September 1, 2005. As such, I find that the claimant is entitled to additional medical and temporary total disability benefits. Additionally, I find that the claimant has not yet reached the end of his healing period, and therefore, the issues of wage loss and permanent impairment were properly reserved. Therefore, I must respectfully dissent.

The claimant sustained an admittedly compensable injury to the lower back on October 1, 2000. It was accepted by the respondents and the claimant was given a 7% impairment rating to the body as a whole. The

respondents made their last payment to the claimant on May 7, 2002. The claimant did not seek any medical treatment for his lower back in 2003.

On September 21, 2004, the claimant testified that he injured his lower back again while in the employment of the respondents. The claimant testified:

I was working at Cooper Tire & Rubber of Cooper Standard Automotive, and we run machines called presses. You know, you just open them up to make a long story short, you open them up, but we have to load inserts in them to make a part. When I reached over to load the inserts in the machine, my back popped. Tremendous pain proceeded to go down my left leg.

The claimant testified that he reported the injury and was receiving medical treatment for his back and had not returned to work since September 21, 2004. The claimant testified that he had not obtained a full release by the doctor and the respondents did not have any light duty work available to him.

The claimant testified that on September 1, 2005, he was getting ready to go when he went into the bathroom to brush his teeth. The claimant testified that when he bent over, his back just went out, and he went

to Dr. Bryant for treatment. The claimant testified that he now has weakness and tingling in his left leg and tremendous back pain. The claimant also testified that he limps to get around, and that he is on Hydrocodone and Skelaxin for the pain. The claimant testified that on a "bad day" all that he can do is lay around on the floor and elevate his legs.

The claimant testified that he cannot hold down a regular job due to the pain. However, the claimant testified that he does serve as a pastor at his church. The claimant testified that he currently delivers approximately two to three sermons a month and is compensated \$200 per sermon. The claimant testified that he has been doing this work for about two years. Additionally, he has served as a substitute bus driver for Union Parish School Board in Farmerville since November 9, 2006, and he earns approximately \$100 a week at that job. The claimant testified that he does not perform this job every day, and sometimes he only works in the morning or only in the evening. Additionally, the claimant testified that he works as a Pre-K teacher's aid in the Union Parish School, where he earns

approximately \$891.62 per month. He testified that he has been performing this job since August of 2006. Accordingly, the claimant earns approximately \$1600 per month in addition to \$891 in retirement benefits.

The claimant reported the injury and was referred by the respondents to SAMA Healthcare Services, where it was noted that the claimant suffered from back pain, paraspinous muscle spasms, and numbness in his left leg. On October 1, 2004 an MRI was ordered. The MRI revealed that the claimant had bulging at L2-3 and herniated discs at L1-2 and L4-5. Specifically, the MRI revealed that the mild to moderate omnidirectional herniation of the nucleus pulposus was encroaching on the thecal sac at L4-5. The claimant was then referred to Dr. D'Orsay Bryant, an orthopaedic surgeon.

The claimant was first seen by Dr. Bryant on October 7, 2004. Dr. Bryant's medical notes report:

The patient is a 36 year old male with a complaint of severe low back pain. The patient stated his date of injury was September 21, 2004. He stated that he was bending to load when his back "popped" and his low back became painful and radiated down the lower extremities. The patient then saw Marsha Ford, the nurse practitioner, who issued

medication which the patient stated was unsuccessful. The patient stated that he was unable to walk effectively and perform his job as an injection press operator. The patient did have an MRI which did reveal the presence of disc disease. The patient has seen both Dr. Dickens and Dr. Cathey in the past for neurosurgical evaluation. He has also seen me on several occasions, as I initially saw him four years ago for his low back condition. The patient stated that he has had treatment without relief.

Dr. Bryant also noted that the claimant suffered from tenderness and spasms in the right, left, and midline of the low back. Dr. Bryant's impression was that the claimant had a lumbar strain with degenerative disc disease and disc herniation as per the MRI.

The claimant continued treating with Dr. Bryant, receiving physical therapy and conservative treatment. The claimant saw Dr. Bryant on October 14, 2004, October 28, 2004, November 11, 2004, and December 2, 2004. The medical reports indicate that the claimant continued suffering spasms in his back, but that physical therapy did help.

On February 7, 2005, the claimant again treated with Dr. Byrant, whose medical notes state:

The patient comes today for re-evaluation of his low back pain. He has spasm in the right, left and midline of the low back. He had an FCE which did place him on restrictions in the light medium physical demand level. He stated that he was offered a disability pension, and he is pondering this.

On April 28, 2005, Dr. Bryant's medical records reveal that the claimant had not yet returned to work because there was no job for him. Additionally, Dr. Bryant noted that the claimant suffered spasms in the left and low back. Dr. Bryant did not place the claimant at MMI.

On September 1, 2005, the claimant again saw Dr. Bryant. Dr. Bryant's medical records state:

The patient admits to persistent severe low back pain which is increasing in intensity. He is a minister. He is currently not working. The patient has not yet reached MMI. He does have a lumbar disc disease and herniations as per his history. An MRI was ordered as he has lower extremity parathesias. He was given medication. He has not worked for a great deal of time and is currently doing his pastoral/ministerial duties.

An MRI was preformed on September 21, 2005, which revealed:

...showing mild posterocentral disc bulging at L5-S1 indenting the thecal sac. This can be interpreted as mild disc herniation.

Sections through L4-5 discs reveal prominent posterior disc bulging probably indenting the thecal sac with narrowing of the neural foramina. Sections through L3-4 discs reveal no disc herniation. Sections through the L2-3 discs reveal posterocentral and medial disc herniation slightly to the left of the midline.

Sections through the L1-2 discs reveal mild posterior disc bulging barely seen to indent the thecal sac. Comparison was made to the 19th of October 2000 study and these changes on the later study seems to have worsened significantly as compared to the earlier studies. The posterior disc herniation or disc bulging was also seen at the L4-5 disc on the 2000 study. The L2-3 disc herniation is seen to be worse. The posterocentral disc herniation at L5-S1 is also new and not seen on the prior study.

Dr. Bryant reviewed the MRI and on October 12, 2005, he opined:

[The claimant] has persistent low back pain with lower extremity paresthesias. In comparison with his former MRI, his herniated disc disease has worsened.

Dr. Bryant referred the claimant back to Dr. Cathey for reevaluation.

On November 3, 2005, Dr. Bryant noted that the claimant had seen Dr. Cathey and was receiving epidural injections to the lower spine. Dr. Bryant also noted that the claimant's EMG/NCS study was normal.

The claimant treated with Dr. Anca on November 10, 2005. Dr. Anca noted that in 2000 the claimant had suffered a previous lower back injury with left lumbar radiculopathy. Dr. Anca noted that the claimant had been worse for approximately two months. Dr. Anca noted that the claimant's pain started in the lower lumbar area and radiated to the posterior aspect of his left thigh and calf. Dr. Anca noted that the claimant's pain level was brought down with hydrocodone and anti-inflammatories as well as Skelaxin.

Dr. Anca also reviewed the claimant's MRI, which had been performed on September 21, 2005. Dr. Anca's notes state:

On 9/21/05, MRI demonstrated prominent posterior disc bulging or protrusion at L4-L5. Milder disc protrusion is seen at L2-L3 and to a lesser extent at L1-L2 and L5-S1 indicating the thecal sac that can

be interpreted as mild disc herniation. Sections through the L4-L5 disc reveal prominent posterior disc bulging probably indenting the thecal sac with narrowing of the neural foramina. Sections through the L1-L2 discs reveal mild posterior disc bulging barely seen to indent the thecal sac. Comparison was made to 10/19/00 study and these changes on the latest study seem to have worsened significantly as compared to earlier studies. The L2-L3 disc herniation is seen to be worse over the posterior central disc herniation at L5-S1. It is new and not seen on the prior study. The posterior disc herniation or disc bulging as also seen at the L4-L5 disc on the 2000 study.

Dr. Anca's notes reveal that the claimant suffered not only a worsening of his original condition, but that he also suffered a new herniation.

On December 29, 2005, Dr. Bryant noted that the FCE determined that the claimant was not able to perform at his former job. The claimant continued to treat with Dr. Bryant February 27, 2006, April 4, 2006, and June 8, 2006.

The claimant sustained an aggravation of a pre-existing condition on September 21, 2004. There is no question that the claimant previously sustained a compensable low back injury on October 1, 2000, for

which the claimant last received treatment in 2002. However, the respondents stipulated that the claimant sustained an admittedly compensable low back injury on September 21, 2004. As such, the respondents should be held to be liable for the medical treatment that the claimant is entitled to pursuant to the compensable injury.

First, in 2004 the claimant suffered an aggravation to his original injury. 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. Robinson, 82 Ark. App. 46, 120 S.W.3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is, itself, compensable. Id. 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.

The claimant's 2004 injury is an aggravation of his original injury. The claimant had reached MMI for the initial 2000 injury and was given a 7% impairment

rating to the body as a whole. The claimant was able to continue working after this incident and did not continue to seek medical treatment. The claimant's last known treatment for this injury was in 2002.

The claimant testified that on September 21, 2004, while working on a machine press, he reached over to load the inserts in the machine, and his back popped. The claimant testified that tremendous pain proceeded to go down his left leg. The claimant did not have back pain prior to September 21, 2004. The claimant was treated at SAMA Healthcare Services, where it was noted that the claimant suffered from back pain, paraspinous muscle spasms, and numbness in his left leg. On October 1, 2004, an MRI revealed that the claimant had bulging at L2-3 and herniated discs at L1-2 and L4-5. Specifically, the MRI revealed that the mild to moderate omnidirectional herniation of the nucleus pulposus was encroaching on the thecal sac at L4-5.

The claimant was then referred to Dr. D'Orsay Bryant, an orthopaedic surgeon. The claimant was first seen by Dr. Bryant on October 7, 2004. Dr. Bryant's medical notes report that the claimant was unable to

walk effectively and perform his job as an injection press operator. Dr. Bryant also noted that the claimant suffered from tenderness and spasms in the right, left, and midline of the low back. Dr. Bryant's impression was that the claimant had a lumbar strain with degenerative disc disease and disc herniation as per the MRI.

The claimant continued treating with Dr. Bryant, receiving physical therapy and conservative treatment. The claimant saw Dr. Bryant on October 14, 2004, October 28, 2004, November 11, 2004, December 2, 2004, and February 7, 2005. The medical reports indicate that the claimant continued suffering spasms in his back, but that physical therapy did help. On April 28, 2005, Dr. Bryant noted that the claimant suffered spasms in the left and low back. Dr. Bryant did not place the claimant at MMI.

The respondents stipulated that the September 21, 2004, injury was compensable. Generally speaking, a stipulation is a voluntary agreement between opposing parties that is the equivalent of undisputed proof that leaves nothing for the fact finder to decide regarding the stipulated fact. Jesse Tedder v. Fluor Corporation,

___ Ark. App. ___, ___ S.W.3d ___ (2007); citing, Death & Permanent Total Disability Fund v. Legacy Ins. Servs., 95 Ark. App. 189, ___ S.W.3d ___ (2006). Accordingly, the claimant sustained an injury in 2000, then reached MMI and had not experienced pain in his lower back since 2002. On September 21, 2004, the claimant's pre-existing condition was aggravated by the admittedly compensable injury. The respondents stipulated that the claimant sustained a compensable injury on this date.

Furthermore, this is when the claimant's symptoms began, and Dr. Bryant specifically pointed out that the claimant suffered spasms in his low back. As such, the claimant sustained an aggravation of a pre-existing condition on September 21, 2004. As it is indisputable that the claimant sustained a compensable injury on September 21, 2004, I find that the claimant is entitled to medical treatment in connection with this admittedly compensable injury.

The claimant then suffered a recurrence on September 1, 2005. The claimant had still not reached MMI when he suffered a recurrence of his 2004 injury. In fact, the claimant was still treating with Dr. Bryant

for his September 2004 injury when he suffered a recurrence on September 1, 2005. A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

The test to determine whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984), Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), Davis v. Old Dominion Freight Line, Inc. 341 Ark. 751, 20 S.W.3d 326 (2000).

Dr. Bryant's April 28, 2005, medical records reveal that the claimant still suffered spasms in the

left and low back. Accordingly, Dr. Bryant had not placed the claimant at MMI. On September 1, 2005, the claimant was simply bending over at the sink when his back went out. This is clearly a case where the September 1, 2005 injury is the natural and probable result of the September 21, 2004 injury. There was simply not an independent intervening cause. No treating physician had instructed the claimant not to perform such an everyday function. No physician had instructed the claimant not to bend at the waist. Therefore, the claimant's actions were reasonable under the circumstances. The claimant had not even reached MMI from his September 21, 2004 admittedly compensable injury. The claimant continued receiving consistent medical treatment from Dr. Bryant after the September 21, 2004 injury. Dr. Bryant noted nearly every time he examined the claimant that the claimant continued suffering muscle spasms in the right and left low back. He had not placed the claimant at MMI.

The Majority erroneously determined that Dr. Bryant's notation on September 1, 2005, that, "The patient has not yet reached MMI," does not really mean

that the claimant has not reached MMI. The Commission is authorized to accept or reject medical opinion and is authorized to determine its medical soundness and probative force. McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2002), citing Howell v. Scroll Tech., 343 Ark. 297, 35 S.W.3d 800 (2001). However, the Commission is not free to arbitrarily disregard any expert medical opinion. Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Moreover, the Commission not authorized to arbitrarily disregard the testimony of any witness. Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994). It is evident that the Majority arbitrarily disregarded Dr. Bryant's note that the claimant had not reached MMI in order to find on the respondent's behalf, as there is not a single other doctor who has placed the claimant at MMI. Additionally, the Majority erroneously determined that

the claimant was at MMI on April 28, 2005, though the medical evidence does not support this finding.

Furthermore the Majority finds that the abnormalities in the September 21, 2005, MRI were not caused by the 2004 admittedly compensable injury. Additionally, the Majority erroneously determined that the low back spasms that Dr. Bryant observed on June 8, 2006 were causally related to the 2004 compensable injury. The Majority's findings are inconsistent with the medical records. It was not until after the 2004 compensable injury that muscle spasms were noted by Dr. Bryant, who continued to observe muscle spasms in the claimants back. Dr. Bryant even noted that these were chronic spasms. The evidence that the claimant continued to suffer muscle spasms is proof that the claimant had not exited his healing period.

As such, the claimant sustained an admittedly compensable injury in the form of an aggravation of a pre-existing condition on September 21, 2004, for which he has yet to reach MMI. On September 1, 2005, the claimant sustained a recurrence of this injury when he was simply bending over to brush his teeth and his back

gave out. As such, the evidence establishes that the claimant suffered a recurrence of his September 21, 2004 admittedly compensable injury on September 1, 2005.

As the respondents admitted that the claimant sustained a compensable injury on September 21, 2004 and the claimant has proven by a preponderance of the evidence that his September 1, 2005 injury is a recurrence of the September 21, 2004 injury, I find that the claimant is entitled to reasonably necessary medical services. Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a) (3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); and See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d The Court of Appeals has noted that even if the healing period has

ended, a claimant may be entitled to ongoing medical treatment if the treatment is geared toward management of the claimant's compensable injury. See, Patchell v. Wal-Mart Stores, Inc., 86 Ark App. 230; 184 S.W. 3d 31, (2004), citing Pippin, supra. Furthermore, this Commission has found that, treatment intended to help a claimant cope with chronic pain attributable to a compensable injury may be reasonable and necessary. See, Maynard v. Belden Wire & Cable Company, Full Workers' Compensation Commission Opinion filed April 28, 1998 (E502002); See also, Billy Chronister v. Lavaca Vault, Full Workers' Compensation Commission opinion filed June 20, 1991 (Claim No. 704562). 845 (1983). Additionally, a claimant does not have to support a continued need for medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997).

The claimant continued receiving consistent medical treatment after his September 21, 2004 injury. The respondents paid for this treatment. However, the respondents controverted the medical treatment that the claimant received after the recurrence on September 1,

2005. It is, however, evident that the medical treatment that the claimant received subsequent to the recurrence is reasonable and necessary ongoing medical treatment that is geared toward management of the claimant's admittedly compensable injury.

Furthermore, the claimant continued treating with Dr. Bryant. Dr. Bryant's April 28, 2005, medical records reveal that the claimant still suffered spasms in the left and low back. On September 1, 2005, Dr. Bryant noted that the claimant complained of "persistent low back pain which is increasing in intensity." Dr. Bryant also noted that the claimant had not yet reached MMI. It is evident that Dr. Bryant was still treating the claimant for the September 21, 2004 injury. In fact, Dr. Bryant reviewed the claimant's MRI and on October 12, 2005, he opined:

[The claimant] has persistent low back pain with lower extremity parathesias. In comparison with his former MRI, his herniated disc disease has worsened.

It is evident that Dr. Bryant continued to treat the claimant for the September 21, 2004 compensable injury. In fact, the claimant treated with

Dr. Bryant on September 1, 2005, October 12, 2005, November 3, 2005, December 29, 2005, February 27, 2006, April 4, 2006, and June 8, 2006, all in connection with the September 21, 2004 injury.

As both Dr. Bryant and Dr. Anca treated the claimant's admittedly compensable injury to the low back, the claimant is entitled to receive the reasonably necessary medical treatment which was geared toward management of the claimant's compensable injury. Furthermore, the treatment intended to help a claimant cope with chronic pain attributable to his compensable injury is reasonable and necessary. Therefore, the claimant is entitled to medical benefits associated with the admittedly compensable injury.

As the claimant sustained an admittedly compensable injury on September 21, 2004, and a recurrence of that injury on September 1, 2005, the claimant is entitled to receive temporary total disability from September 1, 2005 until a date yet to be determined. 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).

In the present matter, the claimant has not yet reached maximum medical improvement. In fact, on September 1, 2005, Dr. Bryant's medical notes specifically state, "The patient has not yet reached MMI." Furthermore, Dr. Bryant continued treating the claimant for his September 21, 2004 compensable injury and the September 1, 2005 recurrence. It is evident that the claimant has not yet reached the end of his healing period. As such, the Majority erred in determining that the claimant should not be awarded temporary total disability benefits.

A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where there is insufficient evidence that the claimant had the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274, (1984). In Sowell v. Conagra Poultry Company, Full Commission Opinion Filed March 15, 2005 (F304735), the claimant testified that while he had been released to return to light duty work, his employers did not return him to work. As such, the Commission found that there was insufficient evidence that the claimant had the capacity to earn the same or any part of the wages that he was receiving at the time of the injury, and was granted temporary total disability. Id.

In the present matter, it is clear from both the medical records and the claimant's testimony that he was released to light duty. However, the respondents did not provide any light duty work for the claimant. Able to perform light duty and unable to find work with the respondents, the claimant sought employment elsewhere.

However, the claimant testified that he cannot hold down a regular job due to the pain.

The claimant testified that he does serve as a pastor at his church. The claimant testified that he currently delivers approximately two to three sermons a month and is compensated \$200 per sermon. The claimant testified that he has been doing this work for about two years. Additionally, he has served as a substitute bus driver for Union Parish School Board in Farmerville since November 9, 2006, and he earns approximately \$100 a week at that job. The claimant testified that he does not perform this job every day, and sometimes he only works in the morning or only in the evening.

Additionally, the claimant testified that he works as a Pre-K teachers aid in the Union Parish School, where he earns approximately \$891.62 per month. He testified that he has been performing this job since August of 2006. Accordingly, the claimant earns approximately \$1600 per month in addition to \$891 in retirement benefits. The parties stipulated that the claimant had earned an average weekly wage of \$822.62 while working for the respondents. As such, even though the claimant is

currently earning \$2491 per month, he had been earning \$3290.48 while working for the respondents. The claimant's average monthly income has severely decreased by nearly \$800.00 per month.

As such, the claimant has not reached the end of his healing period, and even though the claimant has been released to perform light duty, the respondents did not provide light duty work. Therefore, the claimant opted to retire and earn money elsewhere. However, as his ability to hold down a regular job were drastically diminished due to his injury, the claimant has not been able to earn the same wages as he was prior to the 2004 injury. As such, there is insufficient evidence that the claimant has the capacity to earn the similar wages that he was receiving at the time of the injury, and he is therefore entitled to receive temporary total disability.

The Majority has found that the claimant did not sustain a permanent physical impairment as a result of the September 21, 2004 compensable injury. Although I find that the claimant has not reached MMI, I feel compelled to address faults with the Majority's opinion.

First, the Majority finds that there is no evidence demonstrating that the claimant sustained a herniated disc as a result of the September 21, 2004 compensable injury. Additionally, the Majority found that Dr. Bryant did not opine that the claimant had herniated a disc.

On October 7, 2004, Dr. Bryant's medical records note that the claimant had a lumbar strain with degenerative disc disease and disc herniation as per the MRI. The MRI which Dr. Bryant was specifically referring to was performed on October 1, 2004, and revealed that the claimant had bulging at L2-3 and herniated discs at L1-2 and L4-5.

The Majority further argues that an impairment rating cannot be given because Dr. Bryant did not assign one. The reason behind why Dr. Bryant had not assigned an impairment rating was due to the fact that he specifically had not placed the claimant at MMI. Therefore, to assign an impairment rating before the healing period had ended would have been premature.

The Majority also erred when they found that there is no relevant provision of the Guides which would allow the Commission to assess a permanent anatomical

impairment rating. I disagree. Table 75(II)(C) assigns a 7% impairment rating for a herniate discs in the lumbar spine, and an additional 1% for each additional herniation. The claimant's MRI revealed that he had bugling disc at L2-3 and herniated discs at L1-2 and L4-5. Despite the fact that the claimant had received a 7% impairment rating for the 2000 compensable injury, the claimant would be entitled to at least a 2% impairment rating for the additional levels of injury noted by the 2004 MRI. As such, I find that even though addressing the issue of permanent impairment is not ripe for the Commission as the claimant has not reached the end of his healing period, the Majority erred in its interpretation of the facts and the application of the Guides.

In conclusion, I find the claimant suffered an aggravation of a pre-existing condition on September 21, 2004 while in the employment of the respondents. Specifically, the respondents stipulated that the claimant sustained a compensable injury to his low back on September 21, 2004. Furthermore, I find that the claimant suffered a recurrence of his September 21,

2004, admittedly compensable injury on September 1, 2005. Therefore, I find that the claimant is entitled to additional medical and temporary total disability benefits. However, as the claimant had not yet reached the end of his healing period, I find that the Majority erred in addressing the issue of a permanent anatomical impairment rating.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner