

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409140, F509580 & F611070

MELVIN SAMS, EMPLOYEE	CLAIMANT
CRABTREE RV CENTER, INC., EMPLOYER	RESPONDENT NO. 1
AIG CLAIM SERVICES, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED AUGUST 14, 2008

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

Claimant represented by the HONORABLE MATTHEW J. KETCHAM,  
Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE CAROL LOCKARD  
WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY RUDD,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 1 appeals and the claimant cross-appeals  
an administrative law judge's opinion filed March 12, 2007.

The administrative law judge found that the claimant proved he was entitled to additional medical treatment, temporary total disability, anatomical impairment, and wage-loss disability. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the claimant did not prove he was entitled to additional benefits.

I. HISTORY

Melvin Don Sams, age 49, testified that he reached the 11<sup>th</sup> grade in school. The claimant obtained a GED in 1985. The claimant testified that he then received vocational training in "fire fighting and law enforcement, arson investigations, domestic violence, inspector, life safety codes for the State of Arkansas, and EMS." The claimant testified, "My main job for years was in the auto body collision repair, and then I went into securities and I cooked in various restaurants and then fire chief of a small city." The claimant testified that he first injured his back while working in auto collision repair.

Dr. Ronald N. Williams treated the claimant for back and left leg pain in December 1998. Dr. Williams noted that the claimant injured his back at work in March 1996. A

post-myelogram CT scan of the claimant's lumbar spine in December 1998 showed the following: "1. Moderate-sized central herniated disc, L4-5 and L5-S1. 2. Mild bulging disc, L3-4." Dr. Williams performed a laminectomy, L4-5 left on December 28, 1998.

The claimant testified that he became employed with Crabtree RV Center as a security guard in about November 2003. The parties stipulated that the claimant sustained a compensable injury to his back on April 1, 2004. The claimant testified that he slipped and fell "on my butt." The claimant testified, "I didn't feel I needed to go to the doctor then. I waited until June and went to the family doctor." A progress note dated June 28, 2004 indicated that the claimant was complaining of pain in his lower back with spasm. The handwritten assessment appeared to show degenerative disc disease and lumbar radiculitis. The claimant testified, "I didn't turn it in on workers' comp at first because I didn't want - I didn't want this. I reported - I used my own health insurance and went ahead and paid my deductible and my medicines."

The claimant testified that he was involved in another workplace accident on July 14, 2004, while installing PVC in

a trailer unit: "I did not realize the floor was rotted out in this motorized unit. It was just like all the way down to the waist with my leg stop - one leg stopping me. And it was like just that quick off and down, through the floor, waist deep, with almost like cheerleader splits, like I believe I had said before, just that quick." The claimant testified that he was involved in another accident while moving furniture at work on July 21, 2004: "My foot got tangled up in the cable and I had the weight of the desk and I just all of a sudden spun around and went down."

The claimant sought treatment on August 15, 2004 for recurring low back pain. An MRI of the claimant's lumbar spine was taken on August 16, 2004, with the following impression:

Disk desiccation at L3-4 with enhancing scar of granulation tissue overlying the posterior aspect of the disk at this level. There is a mild disk bulge with no spinal or foraminal stenosis.

At L4-5, there is a circumferential disk bulge with a central disk protrusion and an annular tear. There is enhancing scar of granulation tissue along the posterior aspect of the disk space at this level.

At L5-S1, there is a posterior disk herniation more prominent to the left of midline with bilateral foraminal stenosis and left lateral recess stenosis. There is, also, enhancing scar

Sams - F409140, F509580            5  
& F611070

or granulation tissue along the posterior aspect of the disk space at this level.

The impression of Dr. Stephen E. Carney on August 19, 2004 was "Lumbar disc disease."

Dr. J. Michael Standefer evaluated the claimant on October 6, 2004:

Patient is a 45 year old white male who injured himself in a series of job related mishaps while working for Crabtree RV Sales. This problem began around April or May and as outlined previously, he has had three separate episodes where he injured himself working and aggravated his pain. His most recent injury was in August. Since that time he has had persistent low back and associated left lower extremity pain....He is not working at this time because of escalation of pain. He has had an outpatient MR scan which has demonstrated multilevel degenerative disc disease with attendant disc bulging and posterior disc herniation at L5-S1 and also at L3-4 and L4-5. This patient has a past medical history of lumbar disc surgery, this having been performed in Little Rock in 1998....

Radiographic studies have been reviewed. MR scan of the lumbar spine is of reasonably good quality and demonstrated disc bulging at L3-4, L4-5 and L5-S1 with an annular rent in the disc bulge at L4-5. There is moderate canal stenosis at L4-5. The L5 disc bulge/protrusion tends to lateralize to the left.

IMPRESSION:

1. Multilevel degenerative disc disease with attendant disc bulging at L3-4, L4-5 and L5-S1.

An annular rent at L4-5 and lateralization of the disc bulge/protrusion at L5-S1 to the left are pertinent findings that are suspicious for these

particular discs being symptomatic. I am inclined to anticipate that the disc bulge at L4-5 is probably the underlying source for his pain as there is moderate canal stenosis at this level. At present I would recommend further evaluation to include myelography and post myelo CT scanning to more fully and completely evaluate this problem....

ADDENDUM: It should be noted that the Workman's Comp case manager has inquired as to whether or not the current injury and/or diagnosis is related to the mechanism of injury, i.e., the job. In talking with the patient, it certainly sounds as though his job related mishaps were sufficiently severe to account for his pain. I suspect we are dealing with a symptomatic focal disc protrusion with mild to moderate canal stenosis as the primary cause of his pain. The disc protrusion at L5-S1 is of questionable significance. The disc protrusion at L3-4 is of dubious significance. Myelography should clarify this situation in more detail.

The impression from lumbar myelography on October 11, 2004 was "Some extradural defect 3-4, 4-5 and 5-1 levels as described. Additional assessment by CT will be performed." CT post-myelography was performed on October 11, 2004, with the following impression:

1. Diffuse disc bulge at 3-4, moderate in severity.
2. More pronounced disc bulge diffusely at 4-5 with a right lateral prominence of the extradural defect with effacement of the right side of the thecal sac and there may be a focal protrusion of disc to the right superimposed on the disc bulge as well.
3. Central protrusion or bulge of disc at 5-1 also noted.

Sams - F409140, F509580            7  
& F611070

Dr. Standefer reported on October 26, 2004:

In comparing our current findings on the radiographic studies to records of lumbar spine films conducted as far back as 1996, there does not appear to be any significant change apart from the postop changes at the L4-5 level. I advised the patient of this. I really do not see anything that I would recommend surgical treatment for at this point in time. Diffuse disc bulging at L3-4 and L4-5 are identifiable but, once again, these are really not much different than that noted in the past. I believe the mainstay of therapy for him should consist of physical therapy and perhaps consideration for lumbar epidural steroid injection....

ADDENDUM: My office nurse has advised me that Mr. Sams' steroid injection was scheduled for some time in early December. Apparently, this made his wife very angry and she subsequently yelled at my office nurse and they left the office. As such, I am assuming that they are opting not to have this study done. At any rate, we will not plan to see the patient again as it is our policy not to provide medical care to individuals that are disruptive to our office staff. We will notify the Workers' Compensation representatives and they can arrange for Mr. Sams to be evaluated by others.

The claimant began treating with Dr. Gary L. Moffitt on November 12, 2004: "Mr. Sams is a gentleman that sustained an injury to his lower back on the 1<sup>st</sup> of April. At that time he was working as a security officer and was trying to apprehend a suspect, and whenever he did he fell and landed on his back....In talking with Mr. Sams at this time, pain seems to be his biggest problem....He may return to work.

He should not lift, push or pull with more than ten pounds of force. He will need to limit bending and twisting at the waist. He will need to go from sitting, standing to walking on an as needed basis. He will also need narcotic precautions. He is be seen again in two weeks."

Dr. Moffitt reported on November 12, 2004 that he diagnosed "lumbar strain superimposed on DDD."

The claimant testified that he was given work duties which did not comply with his light-duty restrictions. Kelly Kimes, business manager for Crabtree R.V., testified for the respondents:

Q. Do you understand that his doctor gave Melvin some restrictions?

A. Yes.

Q. Okay. And I've looked at the medicals, and those show that he had restrictions of not lifting, pushing, pulling, over ten pounds, also some restrictions about moving and twisting. Do those sound familiar?

A. Yes.

Q. Okay. Did you have any light duty available for him within those restrictions?

A. We did.

Q. Why don't you tell me about those?

A. What we had him doing, we had given him access to a golf cart, and he was going around starting

motor homes. He took a clipboard with him to write down any damages that might be inside or outside a motor home, or anything broken that needed to be fixed....

Q. Once he got his restrictions, did he have to do any lifting?

A. No.

Q. Did he have to change any batteries?

A. No.

Dr. Moffitt reported on November 26, 2004, "Mr. Sams is seen today for recheck for a lumbar strain superimposed on degenerative disc disease and status post laminectomy. He has been in physical therapy and he is starting to make some progress. He says that he is feeling a little bit better and that he feels this is a definite improvement. There is less pain in the lower back area....He may continue to work with the same restrictions." Dr. Moffitt indicated on a Physician's Report dated November 26, 2004 that the claimant had suffered no permanent impairment due to his work-related injury. A Medical Treatment Report dated December 13, 2004 indicated that the claimant was released to restricted light duty but that the claimant had not reached maximum medical improvement.

Sams - F409140, F509580            10  
& F611070

Dr. Moffitt corresponded with the respondent-carrier on  
December 23, 2004:

Mr. Sams is seen today for recheck. He says he is doing much worse. He says he was actually getting somewhat better, but that he had to go back to work doing modified duty. He states that the tasks that he is having to do at work are really more strenuous than the restrictions he has been given. He said he had to change a battery in a vehicle the other day that weighed 40 pounds. He had to bend over to do this. He is also walking on uneven surfaces which he says hurts his back. He is having trouble going up and down stairs. He says the lot where he works is 15 acres and he has to walk it up to 20 times a day. He is also concerned that working as a security officer that he may be attacked by somebody trying to break into one of the recreational vehicles....

At this point in time, I still think most of the issues he is dealing with are muscular in nature, although there is scarring of a nerve based on his imaging studies. I suspect this is from his previous surgery. At this time I would recommend that he continue with an aggressive exercise program. I think he may continue to work at the same restrictions, but he should definitely be limiting how much bending he is doing at the waist and walking on uneven surfaces. He will need to observe narcotic precautions....

Dr. Moffitt saw the claimant on January 6, 2005 and reported, "He has gone back to work at modified duty, but he states that the employer is not following his restrictions. He states he has to pull himself up into trailers as he climbs the stairs and that that is a 200 pound pull. This causes his back to hurt. He said that his legs are not

working well and as he is going down stairs that he will fall against trailers. He has hit his right knee and said that he hurt his knee because of this. Also, he says that he is taking narcotics, but he is having to carry a gun and he is concerned about this....The restrictions he has been given in the past I think area (sic) appropriate for his condition so they are maintained." Dr. Moffitt diagnosed "Lumbar strain superimposed on DDD" and returned the claimant to work with the same restrictions on January 6, 2005.

The claimant testified that he did not work for the respondent-employer after January 7, 2005: "I went in that day and I just couldn't work no more. I was just hurting too bad." The claimant testified that he was told to turn in his work-related items, so "I went home and got all my uniforms, keys, and everything and took back over there and turned them in." The claimant testified that he did not quit.

Kelly Kimes testified for the respondents:

Q. Was Mr. Sims (sic) terminated, or did he quit?

A. He did quit on his own....

Q. Were you there when he quit?

A. I was. He had come into us several times over probably a month's time period before he left, had told us that he could not handle the work that we were giving him, that he just didn't think he could do it. We told him that, you know, if he left, it was on his own, that we did have light duty work available for him at all times. And that if he left, he was just choosing not to do the light duty work that we gave to him.

Q. And so he determined not to come back, is that correct?

A. Yes.

The record contains a Phone Message dated January 7, 2005: "tell Dr. M - Pt does not carry a gun at work - also he quit his job 1-7-05."

The parties stipulated that temporary total disability was paid until January 7, 2005. The claimant testified that he had not worked anywhere since January 7, 2005.

Dr. Moffitt reported on January 20, 2005, "He is having a burning pain at the bottom of his right foot from time to time. He is mostly having pain in his lower back....He is thought to have a lumbar strain superimposed on degenerative disc disease and status post laminectomy. He is having some signs of a radiculopathy today. I don't see any reason to do reimaging on him today. He states he no longer works for Crabtree RV. He seemed to do a lot better after his initial physical therapy treatment here. I think there is a chance

Sams - F409140, F509580      13  
& F611070

that he might improve with more therapy. I would recommend this be started again. He may continue to work with the same restrictions."

Dr. Moffitt saw the claimant on February 17, 2005 and diagnosed lumbar strain superimposed on degenerative disc disease, status-post laminectomy. Dr. Moffitt indicated that the claimant could return to work with the same restrictions.

An MRI of the claimant's lumbar spine on April 13, 2005 gave the following impression: "1. MRI findings are consistent with severe canal stenosis and recurrent disc herniation at the L4-L5 level in the right posterolateral aspect. 2. Central disc herniations are also seen at the L3-L4 and L5-S1 levels."

Dr. Moffitt reported on April 18, 2005, "MRI reveals a high grade canal stenosis at L4-5 on the right. This would correlate with his symptoms. This is a surgical lesion in my opinion....he is referred to Dr. Luke Knox."

Dr. Moffitt corresponded with a representative of CompChoice on May 19, 2005 and stated in part:

It seems at this time that one of the main questions with Mr. Sams is what is the cause of his symptoms at this time. I think it is the canal stenosis that was found on the MRI. When

this occurred, I can't say for sure. He first noted it was worsening approximately two weeks prior to his visit on 03-24-05. At that time he was not engaged in any type of work activities, from what I understand. He did not have any other precipitating incidences that I recall him telling me. Therefore, at this point in time it is impossible for me to say the exact cause of the change. Regardless of the cause, I still feel that Mr. Sams needs to be evaluated by a neurosurgeon for possible surgical intervention.

The parties stipulated that medical expenses were paid until May 19, 2005.

A CompChoice case manager asked Dr. Moffitt in a May 25, 2005 letter, "Can you state with any reasonable degree of medical certainty that the severe canal stenosis with which Melvin Sams has been diagnosed was caused by or is the result of his work related injury?" Dr. Moffitt indicated, "no."

The claimant was seen at UAMS Medical Center on August 18, 2005: "He is a very pleasant, 46-year-old, white male with a history of reported L4-L5 herniated nucleus pulposus with surgery on the left by an outside neurosurgeon in 1995. He states that he has done very well since that time, but over the past few months has been having lower back pain radiating to both legs....We reviewed a 4/13/05 MRI from an outside facility: this showed evidence of recurrent disk at

Sams - F409140, F509580            15  
& F611070

L4-5 level on the right and evidence of an old L4-L5 laminectomy on the left side....We presented different treatment options including continued observation, physical therapy and surgery. He opted for surgical management and stated that he understood the risks. We plan to schedule him for surgery next Monday for an L4-L5 redo micro lumbar discectomy, though new (sic) on the right....Dr. Fox also interviewed and examined the patient and answered all questions and reviewed radiological studies and discussed findings and plan."

Dr. John L. Fox noted on August 22, 2005:

Mr. Sams was seen by Dr. Ali Raja and me in the Thursday General Neurosurgery Clinic on 08/18/05. The patient was a middle-aged male who had been in good general health. In 1995 he had a left L4-5 disc surgery and did well after that. Over the past several months he has had low back pain with pain and numbness radiating into both legs. The outside MRI scan shows a prominent disc rupture with spondylosis at L4-5 on the right side. There appears to be considerable displacement of the caudal sac. Contrast does not cause the mass to light up very much.

The patient has been working both for the fire department and police department. He has not worked since last December because of his present situation. He has had extensive conservative therapy and physical therapy but has not improved....

The patient is scheduled for right L4-5 microlumbar discectomy on Monday, 08/22/05....

The claimant underwent a "Microscopic L4-5 diskectomy, right" on August 22, 2005.

Dr. Fox provided a discharge note on August 25, 2005: "He underwent a microlumbar discectomy for a ruptured disc at L4-5 on the right side. There was some scar in the area secondary to his previous surgery on the left side at that level and secondary to the long-term presence of the disc rupture...."

Dr. Moffitt noted on November 25, 2005, "He is continuing to have severe pain in his lower back. It is going down into his right leg. He has a neurologic type of pain. He was seen at UAMS and advised that there was not much else they could do for him at this time. He is scheduled for an MRI....I am concerned that Melvin may be developing a failed back syndrome."

Another lumbar MRI was done on March 9, 2006, with the following impression: "1. Postoperative changes with a right-sided discectomy at L4-5 with enhancement of the tract extending to the L4-5 disc interspace. 2. Central disc protrusion at L3-4. 3. Diffuse disc osteophyte complex at L5-S1."

Dr. Moffitt testified that his last visit with the claimant took place on March 17, 2006.

A pre-hearing order was filed on October 12, 2006. The claimant contended that "he injured his back when he fell on the property while in the course and scope of his employment on April 4, 2004, on property owned and operated by Crabtree RV Center in Fort Smith, Sebastian County, Arkansas. He subsequently returned to 'light duty' at Crabtree's new facility in Alma, Crawford County, Arkansas, and on July 14, 2004, he fell from a piece of equipment while in the course and scope of his employment for Crabtree RV Center, worsening his already-injured back."

Respondent No. 1 contended, among other things, that the claimant "was released to return to work in a light-duty capacity on or about November 12, 2004. Respondent-employer has made light duty available for the claimant. The claimant self-terminated on January 7, 2005. Therefore, it is respondents' position that TTD benefits are not due and owing with regard to the matter. No impairment has been assigned in this claim."

Respondent No. 2, Second Injury Fund, contended that the claimant could not prove he was entitled to any



Respondent No. 1 appeals to the Full Commission and the claimant cross-appeals.

II. ADJUDICATION

A. 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) (Repl. 2002). 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 injury to his back on April 1, 2004. The parties stipulated that medical expenses were paid until May 19, 2005. An administrative law judge found that the claimant proved he was entitled to additional medical treatment, at the respondents' expense, subsequent to May 19, 2005. The Full Commission does not affirm this finding. Dr. Moffitt opined on May 19, 2005 that "canal

stenosis" was the cause of the claimant's pain symptoms but Dr. Moffitt could not state when this condition occurred. Dr. Moffitt informed a CompChoice representative that he could not state with any reasonable degree of medical certainty that the claimant's canal stenosis was caused by or resulted from a work-related injury.

The claimant began treating at UAMS Medical Center in August 2005. Dr. Fox noted at that time, "The outside MRI scan shows a prominent disc rupture with spondylosis at L4-5 on the right side." However, Dr. Fox did not opine that the rupture at L4-5 was caused by a workplace accident or injury. It is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, the Commission finds Dr. Standefer's expert opinion to be credible and entitled to significant probative weight. Dr. Standefer reviewed an August 2004 MRI which showed desiccation, bulging, and an annular tear in the claimant's lumbar spine. Dr. Standefer opined on October 26, 2004, "there does not appear to be any significant change apart from the postop changes at the L4-5 level....I really do not see anything that I would recommend

surgical treatment for at this point in time. Diffuse disc bulging at L3-4 and L4-5 are identifiable but, once again, these are really not much different than that noted in the past."

The Full Commission explicitly finds that the claimant did not sustain a herniated disc as the result of slipping and falling in April 2004, stepping through a floor in July 2004, or moving furniture in July 2004. Nor did any of these incidents aggravate a pre-existing condition which required surgery at UAMS Medical Center. The claimant sustained a lumbar strain superimposed on degenerative disc disease as diagnosed by Dr. Moffitt. The claimant's lumbar strain did not require surgery. The claimant did not prove that the surgery he underwent at UAMS from Dr. Fox was reasonably necessary in connection with the claimant's lumbar strain. Dr. Moffitt testified that the claimant's bulging disc at L4-5 was a degenerative condition.

Dr. Moffitt testified at deposition that he diagnosed the claimant as having "failed back syndrome" following surgery in August 2005. Dr. Moffitt testified that surgery did not work in relieving or resolving the claimant's symptoms. The claimant testified in December 2006 that he

had not returned to work following surgery and that he was receiving social security disability. Post-surgical improvement is a relevant consideration in determining whether or not surgery was reasonably necessary. *Winslow v. D&B Mech. Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). The record in the instant matter shows that the claimant's condition did not improve following surgery from Dr. Fox in August 2005.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *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). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition, the healing period has ended. *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998).

In the present matter, an administrative law judge found on March 12, 2007, "The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from January 8, 2005, to the date of this opinion to be paid by Respondents No. 1." The Full Commission does not affirm this finding. The parties stipulated that the claimant sustained a compensable injury to his back on April 1, 2004. The claimant continued to work and testified that two more work-related incidents occurred in July 2004. Dr. Moffitt began treating the claimant on November 12, 2004 and diagnosed lumbar strain superimposed on degenerative disc disease. Dr. Moffitt stated that the claimant could return to restricted work duties. The claimant testified that the respondent-employer did not comply with the claimant's work restrictions. The Full Commission finds the testimony of Kelly Kimes to be more credible than the testimony of the claimant. Ms. Kimes testified that the respondents assigned the claimant appropriate light work, which work included inspecting motor homes with the assistance of a golf cart. Ms. Kimes testified that the claimant was not required to do any lifting. Ms. Kimes credibly testified that the claimant

self-terminated his light duty employment on or about January 7, 2005. Whether or not the claimant remained within a healing period for his compensable lumbar strain, the record demonstrates that the claimant was not totally incapacitated from earning wages. We therefore reverse the administrative law judge's award of temporary total disability compensation beginning January 8, 2005.

C. Anatomical Impairment

The Commission has adopted the Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> ed. 1993) to be used in assessing anatomical impairment. See Commission Rule 099.34; Ark. Code Ann. §11-9-519(g) (1) (a) (Repl. 2002). 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) (Repl. 2002). 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(4) (F) (ii) (Repl. 2002).

In the present matter, the administrative law judge found that the claimant proved he was entitled to a 2% percent whole-body impairment rating. The Full Commission

does not affirm this finding. The parties deposed Dr. Moffitt on January 12, 2007. Dr. Moffitt opined that the claimant's condition was permanent and that he would assign the claimant a rating, but Dr. Moffitt stated he would assign the claimant a rating after reviewing the Guides. In correspondence to the respondents' attorney dated January 22, 2007, Dr. Moffitt assigned the claimant a 5% whole person impairment rating. Dr. Moffitt corresponded with the claimant's attorney on March 8, 2007 and assigned a 15% whole person impairment rating. The claimant's attorney filed a motion to supplement the record to include the two impairment ratings assigned by Dr. Moffitt. In an order filed July 23, 2007, the Full Commission allowed the claimant to proffer the evidence.

The Commission shall not be bound by technical rules of evidence but may make such investigation in a manner as will best ascertain the rights of the parties. Ark. Code Ann. §11-9-705(a) (Repl. 2002). The Commission should be more liberal with the admission of evidence rather than more stringent. See, *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001). In the present matter, Dr. Moffitt was the claimant's long-time, authorized treating physician.

The administrative law judge left the record open for the parties to depose Dr. Moffitt, and the claimant's entitlement to a permanent impairment rating was clearly a subject raised by the parties during deposition. The Full Commission grants the claimant's motion, and we find that Dr. Moffitt's post-hearing correspondence addressing permanent impairment should be admitted into the record.

Nevertheless, the claimant did not prove by a preponderance of the evidence that he is entitled to a permanent anatomical impairment rating. The Full Commission has found that the claimant did not prove he sustained a herniated disc as a result of the described accidental injuries in 2004. We have also found that surgery performed in August 2005 was not reasonably necessary in connection with the claimant's lumbar strain. Even if Dr. Moffitt's letters addressing permanent anatomical impairment were based on objective medical findings, the claimant did not prove that a compensable injury was the major cause of any anatomical impairment. Wage-loss disability benefits cannot be awarded in the absence of a compensable anatomical impairment rating. *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 claimant did not prove he was entitled to additional benefits. The claimant did not prove he was incapacitated to earn wages beginning January 7, 2005 and following, so the claimant did not prove he was entitled to additional temporary total disability compensation. The claimant did not prove that low back surgery performed in August 2005 was reasonably necessary in connection with the compensable lumbar strain. The claimant did not prove by a preponderance of the evidence that he sustained an acute herniated disc at any level as a result of an accidental injury arising out of or during the course of his employment with the respondents. Nor was the lumbar strain a compensable aggravation which caused surgery to become reasonably necessary in August 2005. The claimant did not prove that he was entitled to an anatomical impairment rating or wage-loss disability. The Full Commission therefore reverses the opinion of the administrative law judge, and this claim is denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion reversing the Administrative Law Judge's finding that the claimant proved that he is entitled to additional medical treatment subsequent to May 19, 2005, including back surgery on August 22, 2005. I must also dissent from the majority's reversal of the Administrative Law Judge's award of temporary total disability and permanent disability benefits associated with the claimant's back injuries and surgery.

The claimant sustained three separate back injuries in the employment of the respondent, Crabtree RV Center, slipping and falling in April 2004, stepping through a floor in July 2004, and moving furniture in July 2004. These injuries were accepted as compensable by the respondents and medical benefits paid through May 19, 2005, the day the claimant was referred to a neurosurgeon in anticipation of back surgery. The claimant had back surgery on August 22, 2005. The controversy, herein, centers around whether the claimant's surgery was casually related to his compensable injuries or the result of some independent intervening cause. Further, if the surgery was related, then was it reasonably necessary for the treatment of his injuries?

Sams - F409140, F509580, 29  
& F611070

The claimant first sought treatment for his injuries with his family physician, Dr. Stephen E. Carney, who arranged for an MRI scan to be performed on August 16, 2004. The MRI showed disc herniations at L4-L5 and L5-S1. Dr. Carney recommended that the claimant be evaluated by a surgeon. The claimant was referred by the workers' compensation carrier to Dr. Michael Standefer, a neurosurgeon, who first saw the claimant on October 6, 2004. After reviewing the MRI, Dr. Standefer concluded:

I am inclined to anticipate that the disc bulge at L4-5 is probably the underlying source for his pain as there is moderate canal stenosis at this level. At present I would recommend further evaluation to include myelography and post myelo CT scanning to more fully and completely evaluate this problem. (emphasis added)

The more sophisticated post-myelogram CT scan, which Dr. Standefer said would "more fully and completely evaluate this problem", showed a bulging and protruded (herniated) disc at L4-L5 on the right, as follows:

More pronounced disc bulge diffusely at 4-5 with a right lateral prominence of the extradural defect with effacement of the right side of the thecal sac and there may be a focal protrusion of disc to the right superimposed

Sams - F409140, F509580, 30  
& F611070

on the disc bulge as well.  
(emphasis added)

On October 6, 2004, Dr. Standefer confirmed the causal relationship between the compensable injuries and the herniated disc, as follows:

It should be noted that the Workman's Comp case manager has inquired as to whether or not the current injury and/or diagnosis is related to the mechanism of injury, i.e. the job. In talking with the patient, it certainly sounds as though his job related mishaps were sufficiently severe to account for his pain.

On September 2, 2004, the worker's compensation case manager asked the following question, and received the following answer, from Dr. Standefer on October 7, 2004:

Causation: Is this injury and/or diagnosis related to the mechanism of injury? Yes (emphasis added)

After seeing the claimant on two occasions, Dr. Standefer refused to treat the claimant because the claimant's wife yelled at a nurse and created a ruckus in Dr. Standefer's office. In his "farewell" report of October 26, 2004, Dr. Standefer said that he did not see any significant change in the current findings when compared to studies performed as far back as 1996. Dr. Standefer said that he saw no need for surgery and that

Sams - F409140, F509580, 31  
& F611070

the workers' compensation representative should arrange for the claimant to be treated by another doctor.

The workers' compensation carrier arranged for the claimant to be treated by the company doctor, Dr. Gary L. Moffitt, a family medicine and occupational medicine physician. Dr. Moffitt treated the claimant conservatively with some benefit until March of 2005, when the claimant's condition worsened. On April 13, 2005, Dr. Moffitt had a second MRI scan performed which showed a herniated disc at L4-L5 on the right. This was the same finding which had been generated from the post myelogram CT scan of October 11, 2004. After getting a call from the radiologist saying that he was very concerned about the findings on the MRI, Dr. Moffitt began to worry that permanent nerve damage would result if the claimant did not have surgery to remove the herniated disc which was pinching the nerve. He referred the claimant to a neurosurgeon, Dr. John Fox, at the University of Arkansas for Medical Sciences, Spine and Neurosciences Institute. Dr. Fox performed surgery for the treatment of a herniated disc at L4-L5 on the right. This was the same herniated disc which had appeared in the initial post myelogram CT scan and the second MRI scan.

In anticipation of this litigation, Dr. Moffitt sat for a deposition and was questioned, at

Sams - F409140, F509580, 32  
& F611070

length, regarding the proper diagnosis of the claimant's condition, the causal connection between the compensable injuries and his back problems, and the necessity for back surgery.

In the beginning, there was some question as to whether the claimant suffered from a herniated disc immediately following his compensable injury or whether that disc developed many months later. In his deposition testimony, Dr. Moffitt confirmed that the claimant suffered from a herniated disc from the very beginning, as follows:

Q. Did you review the MRI that was taken on 8/16 of '04?

A. I didn't review the actual MRI. I believe I reviewed the report.

Q. And would you agree with me that the report indicated that he had a disc bulge at L4 and L5 with disc protrusion and an annular tear?

A. Yes.

\* \* \*

Q. Were you aware that Dr. Carney had diagnosed him with a herniated lumbar disc?

A. No, I wasn't aware. I was mostly going on what Dr. Standefer had said. He diagnosed him with a herniated disc as well.

Q. So that would be consistent, then, to your knowledge, with what Dr. Standefer had said and what Carney had said?

A. Yes. Many people - a herniated disc, ruptured disc, and disc protrusion are the same things.

Q. Synonymous terms?

A. Yes.

Q. For purposes of this, can I go ahead and refer to them as just a herniation so that we use the same term?

A. Yes, sir.

Q. So when you saw Dr. Standefer's records and the MRI results - or not specifically the MRI itself, but the results, do you agree with the diagnosis that he had herniated discs?

A. Yes.

Q. Do you believe that was the cause of the pain that was radiating down into his lower extremities?

A. Yes. (emphasis added)

In his medical reports, Dr. Moffitt had repeatedly indicated that the claimant's diagnosis was "a lumbar strain superimposed on degenerative disc disease" as opposed to a herniated disc. This statement caused the respondents to resist payment of the surgery

Sams - F409140, F509580, 34  
& F611070

for the herniated disc. In his deposition, he admitted that the lumbar strain diagnosis was not supported by the medical evidence and that the diagnosis of a herniated disc was validated by the findings, as follows:

Q. What would the symptoms be of a muscle strain?

A. You would have pain in the area of the muscle. And that would be pretty much it.

Q. Would you have radiating pain into your buttocks and legs and down in to your lower extremities?

A. You can have radiating into the lower extremity, but it usually will not radiate below the knee.

Q. Was Mr. Sams having pain radiating down below the knee?

A. Yes. From what I remember, he was.

\* \* \*

Q. December the 10<sup>th</sup> of '04 you have a medical note that indicates that there was pain radiating down the left leg to the toes.

A. Correct.

Q. And what dermatome pattern would that fit?

Sams - F409140, F509580, 35  
& F611070

A. Well, it could be  
either L4 or L5, depending  
on which toes.

Prior to the date of his deposition, Dr. Moffitt had written a letter to the nurse case manager indicating that "canal stenosis" was the cause of the claimant's pain symptoms. This statement was taken by the respondents to mean that the claimant's condition was degenerative in nature as opposed to traumatic in origin. In his deposition, Dr. Moffitt explained that the stenosis, in this particular case, was a direct consequence of the herniated disc and not some pre-existing degenerative condition, as follows:

Q. You also wrote a letter  
to the nurse case manager  
on May 19<sup>th</sup>, 2005 -

A. Yes.

Q. - indicating that the  
cause of his symptoms was  
the canal stenosis found  
on the MRI; is that  
correct?

A. That's correct.

Q. Would you just tell us  
what the canal stenosis -  
what that finding means?

A. What that means, where  
the nerve exits in that  
area, it goes through  
something called a  
foramen, F-O-R-A-M-E-N.  
And whenever there's a  
stenosis present, it means  
that the amount of space  
available for the nerve to

Sams - F409140, F509580, 36  
& F611070

go through there has become much smaller so that the nerve is pinched.

Q. Is that something that you would say is from his degenerative problems or would it be an acute finding?

A. It can be both. There can be an acute finding, but it can also be associated with degenerative. Let me give some examples. If you have a young person who has had no back issues and had a sudden onset of these types of symptoms, you do an MRI and you find an acutely ruptured disc with some pinching of the nerve, then that's an acute issue.

However, whenever we see this, we often see other things, such as hypertrophy of the ligamentum flava, facet arthropathy, and either disc bulging or protrusions. And that triad or parts of that triad can cause narrowing of the neuroforamen. And that's called stenosis as well.

Q. What about Mr. Sams?

A. It appeared that his was mostly due to disc problems. There's no mention of ligament hypertrophy or facet arthropathy. It appears his was actually from disc problems.

Sams - F409140, F509580, 37  
& F611070

And, indeed, when Dr. Fox operated on him, he found a free fragment, meaning part of the disc had actually broken off and pinched the nerve. And he felt that that was the cause of his pinched nerve. (emphasis added)

During his deposition, Dr. Moffitt was read the previously quoted statement from Dr. Standefer saying that the claimant's condition was work related. Dr. Moffitt unequivocally agreed with Dr. Standefer, as follows:

Q. And then in the addendum he writes, (As read): "It should be noted that the Workers' Comp case manager has inquired as to whether or not the current injury and/or diagnosis is related to the mechanism of his injury; i.e., on the job, the fall. In talking with the patient, it certainly sounds as though his job-related mishaps were sufficiently severe to account for his pain. I suspect we're dealing with a symptomatic disc protrusion as mild to moderate canal stenosis as the primary cause of his pain."

Do you agree with that statement?

A. Yes.

And finally, on the question of the claimant's need for surgery, Dr. Moffitt explained the urgency involved in this particular case, as follows:

Q. Did you have any concerns prior to his surgery about the permanency of nerve damage?

A. Yes.

Q. What were your concerns?

A. As much trouble as he was having and with these MRI findings, I was worried that if something wasn't done, that he could wind up with permanent nerve damage.

Q. Is that why you were making referrals to the neurosurgeons?

A. Yes. I felt he had a surgical need at this time. In fact, the radiologist in Fort Smith had called me very concerned about the findings on his MRI.  
(emphasis added)

The respondents took the position that the medical expenses incurred after May 19, 2005, particularly the back surgery, were the result of "new symptoms and new objective findings" which "would not be related to his compensable injury" and which spontaneously appeared in March of 2005. The majority opinion did not embrace the respondents' argument that the herniated disc spontaneously appeared in March of 2005, but formulated an alternative theory of the case. In denying and dismissing this claim in its entirety, the majority made the following findings of fact: (1)

Sams - F409140, F509580, 39  
& F611070

the claimant did not sustain a herniated disc as a result of his compensable injuries but suffered, instead, from a lumbar strain superimposed on degenerative disc disease which did not require surgery; (2) the claimant did not aggravate a pre-existing condition which required surgery; (3) the claimant's back surgery was not reasonably necessary for the treatment of his injuries because his condition did not improve following surgery.

**COMPENSABILITY OF THE HERNIATED DISC AND RESULTING SURGERY**

When a second period of medical complications follows an acknowledged compensable injury, the employer will continue to be responsible for the payment of benefits if the second complication is found to be "a natural and probable result of the first injury". Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). Stated another way, the claimant must prove a causal connection between the second complication and the original compensable injury. Elk Roofing Co. v. Pinson, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

Firstly, did the claimant's compensable injuries result in a herniated disc or a lumbar strain? A review of the medical evidence of record answers this question quite easily. The initial post myelogram CT scan showed a herniated disc at L4-L5 on the right. The MRI performed immediately before surgery showed the

Sams - F409140, F509580, 40  
& F611070

exact same finding of a herniated disc at L4-L5 on the right. Dr. Standefer said that the claimant's back problems were caused by his job-related mishaps and Dr. Moffitt agreed. No other doctor gave an opinion on the issue. From the time of his injuries until the day of the hearing, the claimant continued to suffer from, and receive treatment for, the effects of his work-related accidents. There was no evidence presented, or even arguments made, that any subsequent intervening incident, injury, or insult of any kind occurred which could be responsible for the claimant's back surgery.

The majority finds that "the claimant sustained a lumbar strain superimposed on degenerative disc disease as diagnosed by Dr. Moffitt". While Dr. Moffitt repeatedly listed this as his diagnosis, his detailed deposition testimony indicates that it was his opinion that the claimant suffered from a herniated disc and that this condition was work related. In his deposition, Dr. Moffitt was questioned in detail with regard to whether the claimant suffered from a sprain or a herniated disc. He said that a sprain would have been manifested by back pain with pain extending into the leg, no further than the knee. He said that the claimant had pain down the leg which extended all the way to his toes. Dr. Moffitt said that the disc herniation was the cause of the claimant's pain and the

Sams - F409140, F509580, 41  
& F611070

reason he had surgery. Dr. Moffitt said that Dr. Standefer was of the opinion that the claimant suffered from a work-related herniated disc and the he agreed with these propositions. Therefore, the majority's reliance on Dr. Moffitt's diagnosis of a lumbar sprain is unsound.

Also, the majority relies on statements by Dr. Moffitt, made on May 19 and May 25, 2005, which state that "canal stenosis" was the cause of the claimant's pain symptoms and that he could not say when this condition occurred or that it was work related. Dr. Moffitt was thoroughly questioned in his deposition about these statements. With regard to stenosis, Dr. Moffitt said that stenosis is a narrowing of the space where the nerve exits the spinal cord. When that space is narrowed, the nerve can become pinched. Stenosis can be created by degenerative changes or it can be caused by a disc bulge or protrusion. Dr. Moffitt testified that the stenosis, in this case, was caused by the herniated disc. Therefore, it was Dr. Moffitt's testimony that the stenosis was caused by the herniated disc and that this herniation was job-related, even though notes written previous to his deposition might have indicated otherwise. Under these circumstances, the majority's reliance on the statements made by Dr. Moffitt on May 19 and May 25, 2005 was erroneous.

Sams - F409140, F509580, 42  
& F611070

The majority points out that Dr. Fox, who performed the claimant's surgery, did not opine that the rupture at L4-L5 was caused by a workplace accident or injury. All Dr. Fox did, or was asked to do, was perform the operation, more than a year after the claimant's injuries. Dr. Fox was never even asked to give his opinion on the subject of causation. It is specious to insinuate that his silence on this issue somehow tends to prove that the herniated disc was not work related.

In conclusion, the objective diagnostic studies demonstrate that the claimant suffered from a herniated disk at L4-L5 on the right from the very beginning and had surgery for that identical problem on August 22, 2005. The claimant continuously suffered from, and was treated for, these problems from the date of his back injury until he underwent surgery. Both doctors who commented on the subject opined that the claimant's herniated disc was related to his compensable injuries. There was no intervening injury or insult of any kind. Therefore, the overwhelming weight of the evidence establishes that the surgery of August 22, 2005, as well as the resulting disability and medical expenses, were related to the claimant's compensable back injuries.

Sams - F409140, F509580, 43  
& F611070

The Commission has a duty to use its experience and expertise in translating the testimony of medical experts into findings of fact. Williams v. Brown Sheet Metal, 81 Ark. App. 459, 105 S.W.3d 382 (2003). However, findings cannot be based on an expert's opinion which is speculative and opposed to physical facts, common knowledge, or the dictates of common sense. Easton v. H. Boker & Co. et al., 226 Ark. 687, 292 S.W.2d 257 (1956), citing U.S. v. Thornburgh, 111 F.2d 278 (8th Cir. 1940); Karen Bohannon v. Walmart Stores, Inc., \_\_Ark. App.\_\_, \_\_S.W.3d\_\_ (2008). The majority denied this claim based primarily on statements by Dr. Moffitt that the claimant suffered from a sprain, as opposed to a herniated disc, and that he suffered from degenerative stenosis. However, Dr. Moffitt later, in detailed deposition testimony, recanted these statements because they were not supported by his own findings and the independent objective diagnostic studies. To base its decision on the above mentioned statements by Dr. Moffitt violates the Commission's duty to conduct a de novo review of the record and formulate findings supported by expert testimony which is internally consistent and which is not founded on conclusions which are contradicted by other indisputable facts of record.

**AGGRAVATION OF PRE-EXISTING CONDITIONS**

Sams - F409140, F509580, 44  
& F611070

Even if the facts of this case did not support the conclusion that the claimant' herniated disc resulted directly from the compensable injuries, which they do, the inescapable alternative observation would be that the compensable injuries aggravated the underlying conditions in the claimant's back, resulting in surgery.

In Hall v. Pittman Construction Co., 235 Ark. 104, 357 S.W.2d 263 (1962), the Arkansas Supreme Court said:

If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award.

In Williams v. L&W Janitorial, Inc, 85 Ark. App. 1, 145 S.W.3d 383 (2004), the Arkansas Court of Appeals addressed a claim for temporary total disability benefits and medical expenses involving the aggravation of pre-existing conditions. In Williams, the claimant suffered a compensable knee injury superimposed upon significant pre-existing degenerative conditions. While the respondent initially accepted the responsibility for medical treatment, additional treatment was denied based

Sams - F409140, F509580, 45  
& F611070

on the allegation that the additional medical treatment requested was for pre-existing conditions, as opposed to the compensable injury. In Williams, the doctors agreed that the degenerative changes were not the "major reason" for the need for additional treatment and disability and that "most of the cause" pre-existed the injury. However, the medical opinions established that the compensable injury was "a factor" in the claimant's need for surgery. The Court of Appeals reversed the Commission's denial of benefits and remanded the case for an award, stating:

Both doctors can be fairly said to have testified that appellant's fall at work was not the major cause, but that it was, at least, a factor in her resulting inability to work and need for knee-replacement surgery...the Commission had found that appellant had failed to prove a causal connection between her compensable injury and her need for total-knee-replacement surgery. Moreover, the Commission concluded that '[t]here is no evidence that the degenerative disease was worsened by the work-related injury.' Even reviewing the evidence in the light most favorable to the Commission's findings, we conclude that they are not supported by substantial evidence. Appellees had to take appellant as they

Sams - F409140, F509580, 46  
& F611070

found her, and the  
compensable injury that  
she suffered was a factor  
in her need for the  
additional surgery.  
(emphasis added)

In addition to finding that the claimant's injuries did not result in the herniated disc, the majority finds that the claimant's injuries did not aggravate a pre-existing condition which required surgery. However, the opinion offers no factual analysis to support this decision. The Commission must make findings of fact which are more than mere conclusions. A simple narration of the testimony followed by a conclusion is insufficient. The Commission must detail or analyze the facts upon which the findings are based. Otherwise, a meaningful review is not possible. Lowe v. Car Care Marketing, 53 Ark. App. 100, 919 S.W.2d 520 (1996).

The obvious explanation for the majority's failure to identify the evidence supporting the conclusion that there was no aggravation of a pre-existing condition is that there was no such evidence to relate. Even the testimony of Dr. Moffitt and Dr. Standefer concerning pre-existing conditions, most favorable to this position, does not substantiate this finding. The claimant sought medical treatment for his back injuries immediately following the injuries and

Sams - F409140, F509580, 47  
& F611070

continued to suffer from and receive treatment for these difficulties from the date of the injuries until surgery, with no intervening cause. While there is certainly evidence that the claimant suffered from pre-existing back problems, both Dr. Standefer and Dr. Moffitt opined that the treatment being rendered was the result of the compensable injuries. Even if the herniated disc was not directly caused by the compensable injuries, it was certainly aggravated by the injuries to the point of necessitating surgery. This makes the compensable injuries a factor in the claimant's need for surgery and requires a finding of compensability for the resulting medical treatment and disability under Williams v. L&W Janitorial, Inc, supra.

**REASONABLY NECESSARY MEDICAL TREATMENT**

Ark. Code Ann. §11-9-508(a) (Repl. 2002)) provides that the employer shall promptly provide such medical and surgical services to an injured employee as may be reasonably necessary in connection with the injury. The majority finds that the claimant's back surgery was not reasonably necessary for the treatment of his injury because he did not improve following surgery. In so finding, the majority relies on Winslow v. D&B Mech. Contractors, 69 Ark App. 285, 13 S.W.3d 180 (2000). In that case, the claimant saw several physicians, but all of the physicians, save one,

Sams - F409140, F509580, 48  
& F611070

concluded that he was not a candidate for back surgery. The one physician who did recommend surgery, performed a fusion at L4-L5, but characterized his decision to do so as a reluctant one made after appellant implored him to do so, and testified that the attempt to improve appellant's condition by additional surgery was "heroic" and ultimately ineffective. The surgeon stated that, in retrospect, the spinal fusion was not necessary because appellant did not have a condition that it would benefit.

The facts which supported the denial of surgical expenses in Winslow simply do not exist in this case. In Winslow, all of the doctors expressed reluctance in advocating surgery, even the operating physician. And the surgeon who performed the surgery said that, in retrospect, the surgery was not an appropriate one for the claimant's condition. In this particular case, the company doctor and the radiologist who read the last MRI were extremely concerned that if the claimant did not have surgery, then the nerve compression from the herniated disc would eventually result in permanent nerve damage if that disc was not removed from the nerve root immediately. And, of course, the neurosurgeon at UAMS obviously considered the surgery appropriate or he would not have recommended and performed it. In short, the medical evidence

Sams - F409140, F509580, 49  
& F611070

indicated that the claimant was in urgent need of surgery and there was no disagreement, in this regard, between the physicians who were treating the claimant at that time.

The only evidence which calls into question the claimant's need for surgery can be found in the medical report of Dr. Standefer, authored on October 16, 2004. In that report, Dr. Standefer said, "I really do not see anything that I would recommend surgical treatment for at this point in time". At that point in time, it may have been premature to consider surgery. However, the claimant's condition deteriorated dramatically after he last saw Dr. Standefer. During a period of less than ten (10) months, between October 26, 2004, when Dr. Standefer made the statement about surgery and August 18, 2005, when the claimant went under the treatment of Dr. Fox for surgery, the record contains medical reports covering thirty (30) appointments in Dr. Moffitt's office for physical therapy and narcotic medication. Dr. Standefer saw the claimant twice over a twenty (20) day period. Under these circumstances, Dr. Standefer's viewpoint, in October of 2004, would not be particularly germane. It should also be noted that the claimant was being fired as a patient by Dr. Standefer at the time the physician wrote the report in question. This may have affected

Sams - F409140, F509580, 50  
& F611070

his attitude toward the claimant and his future needs. At any rate, the antiquated report from Dr. Standefer, covering a short period of treatment, would not form a sufficient basis for the denial of medical benefits in light of the subsequent worsening of the claimant's condition and the more recent and opposing opinions of Dr. Moffitt, Dr. Fox, and the radiologist.

Also, the majority points out that Dr. Standefer said that he did not see any significant change in the post-injury studies from previous studies conducted as far back as 1996. Such a statement is totally contradicted by a comparison of the post myelogram CT scans of December 15, 1998 and October 11, 2004. The previous study shows a herniated disc at L4-L5 on the left, and the later study shows a right-sided herniation at that level. And even though Dr. Standefer commented on the similarities in the diagnostic studies performed before and after the injuries in question, he never said that the claimant's current condition was related to pre-existing conditions. In fact, he repeatedly opined that the claimant's condition was work related (see previous quotes from Dr. Standefer's reports of October 6, 2004 and his reply to the case manager's letter of September 2, 2004).

Sams - F409140, F509580, 51  
& F611070

In conclusion, the evidence does not support the majority's finding that the claimant's back surgery was not reasonably necessary for the treatment of his injury. The majority's opinion rests on the reasoning of Winslow v. D&B Mech. Contractors, supra. However, this case is not analogous to Winslow because all of the physicians who rendered opinions in this case, during the relevant period of time when the claimant's condition had progressed to the point where he needed surgery, supported the claimant's need for surgery, while all of the doctors in Winslow opposed his surgery, even the surgeon who performed the operation. In fact, the claimant's surgery herein had some degree of urgency to it, while the surgery in the Winslow case was obviously an entirely optional procedure.

#### **CONCLUSION**

The majority's finding that the claimant's compensable injuries did not cause a herniated disc resulting in surgery on August 22, 2005 is not supported by the evidence. And even if the evidence did not establish that the herniated disc was caused by the compensable injuries, all of the evidence supports the conclusion that the compensable injuries, at the very least, constituted an aggravation of a pre-existing condition which lead to surgery on August 22, 2005. Finally, the evidence establishes that the claimant's

Sams - F409140, F509580, 52  
& F611070

surgery was reasonably necessary for the treatment of his injuries, even though he did not show improvement following the procedure.

For the reasons stated above, I must respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner