

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F903387

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| JODIE M. (VAUGHN) KUMMER, EMPLOYEE | CLAIMANT |
| MIDLAND SCHOOL DISTRICT, EMPLOYER | RESPONDENT |
| ARKANSAS SCHOOL BOARDS ASSOC. WCT., INSURANCE CARRIER | RESPONDENT |

OPINION FILED SEPTEMBER 12, 2011

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

Claimant represented by the HONORABLE JOHN BARTTELT,
Attorney at Law, Jonesboro, Arkansas.

Respondent represented by the HONORABLE BETTY J. HARDY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed February 8, 2011. The administrative law
judge found that the claimant did not prove she sustained a
compensable injury to her neck or back. After reviewing the
entire record *de novo*, the Full Commission affirms the
administrative law judge's opinion. The Full Commission
finds that the claimant did not prove by a preponderance of

the evidence that she sustained a compensable injury to her neck or back.

I. HISTORY

The testimony of Jodie Marie Kummer, age 36, indicated that she became a public school music teacher in about 1998. Ms. Kummer testified that she had sustained a previous injury to her lower back: "The first injury was when I taught at Westside....I was moving a music stand cart and ruptured a disk." An MRI of the claimant's lumbar spine was taken on May 21, 2002:

Patient with low back pain since 5-10-02. Patient hurt back while lifting. Pain extends into both legs. Patient has had no surgery. There is decreased signal of disc material at L3-L4, L4-L5, and L5-S1 consistent with loss of water content and degenerative disc disease. The signal of vertebral bodies is well maintained. Conus is unremarkable. There is broad based disc protrusion at L4-L5 effacing the anterior aspect of the thecal sac. There is minimal narrowing of each superior lateral recess and perhaps very minimal compromise of the superior aspect of each L5 root. There is very mild caudal extension of disc material at this level. L5-S1 shows a large disc extrusion/herniation posterolaterally on the left with some caudal extension of disc material. There is compromise of the left S1 root.

The record indicates that Dr. Rebecca Barrett-Tuck performed a laminotomy and decompression to the claimant's lumbar spine on June 25, 2002.

The claimant testified that she had never been treated for pain in her cervical spine. According to the record, however, the claimant was involved in a motor vehicle accident on or about September 12, 2002 and was diagnosed with neck sprain and lumbar sprain. An x-ray was taken on September 12, 2002:

LUMBAR SPINE: Alignment of lumbar spine good. There is narrowing of the L5-S1 disc space.
CERVICAL SPINE: Some reversal of the normal lordotic curvature consistent with positioning or spasm. Good maintenance of vertebral body height. Narrowing of the C3-C4 disc space as well as the C5-C6 disc space. Head tilted a bit to the right suggesting that some of the reversal of curvature of the cervical spine is probably due to spasm. Odontoid process normal relative to lateral masses of C1.

IMPRESSION:

1. Findings consistent with spasm of the cervical spine with some narrowing of disc spaces, as described.

Dr. Rodney Routsong performed surgery on the claimant on October 4, 2005: "Repeat left L5 microlaminectomy with microdissection, lysis of cicatrix, and removal of herniated disk material of L5-S1 for nerve decompression." The post-

operative diagnosis was "Recurrent left S1 radiculopathy, secondary to cicatrix and herniated disk material of L5-S1."

Dr. W. S. Zeegers examined the claimant at a clinic in Munich, Germany on August 24, 2007. Dr. Zeegers reported, "MRI total spine: C-spine: moderate central bulging C5-C6....L-spine DDD L3-L4, L4-L5, L5-S1." Dr. Zeegers performed "Implantation Artificial Disc Prosthesis" at L5-S1, L4-L5, and L3-L4. Dr. Zeegers instructed the claimant following surgery, "Take care: the incidence of recurrent or new back complaints is the same or even more as for other 'healthy' people in your age, and we have to discuss your cervical C5-C6 problem!"

The claimant's testimony indicated that she began working for the respondent-employer, Midland School District, in about August 2008. The parties stipulated that an employment relationship existed on or about April 3, 2009. The claimant testified on direct examination:

Q. Going back to April 3, 2009, you were teaching for the Midland School District, is that correct?

A. Yes....

Q. If you will tell the Judge what happened.

A. The classes were changing and I could hear my next class running to come to music class and I opened the door to get classroom control and a

student ran into me and pushed me - slammed me back into the door facing and that's what happened.

Q. Did you experience pain at that point in time?

A. Yes....I hurt all over....

Q. What part of your body struck - struck the door?

A. My back....

Q. And did you finish out the school day?

A. Yes, I did.

The claimant signed a Form AR-N, Employee's Notice Of Injury, on Friday, April 3, 2009. The claimant reported on the Form AR-N that she had injured her "hip and back (right side hip)....A student ran and pushed me against the door & wall." The claimant agreed on cross-examination that she did not report any neck pain on the Form AR-N. The claimant testified, "When I went home and laid down my neck started to hurt so bad....I couldn't hardly turn my neck. It was just a very intense, horrible pain in my neck and it did not stop."

The record contains a Form AR-3, Physician's Report, signed by Dr. Michael E. Crawley on April 6, 2009: "Fourth grader charging in room pushed patient, hit door facing - 4/3/09 @ 12:30 c/o neck, L hip & back pain." A handwritten

diagnosis on the Form AR-3 appeared to indicate, "X-ray - C spine - loss of lordosis concur" in addition to "Prior cervical spinal muscle spasm."

An MRI of the claimant's cervical spine was taken on April 18, 2009:

FINDINGS: There is mild reversal of normal cervical lordosis centered at the C5 level with no fracture or subluxation. Cervical spinal cord is normal in size and signal intensity. At C2-C3, no focal disc herniation and no canal or foraminal narrowing. At C3-C4, mild disc bulging effaces the anterior dural sac but does not cause significant canal or foraminal narrowing. At C4-C5, maybe a tiny central disc herniation without significant canal or foraminal narrowing. At C5-C6, there is a moderate size central disc herniation which does cause at least a mild to moderate canal stenosis with some flattening of the cord but no abnormal cord signal. This is slightly more prominent on the left than right. The neuroforamina are not narrowed. At C6-C7, tiny central disc herniation also seen effacing the anterior dural sac but not causing significant canal or foraminal narrowing. At C7-T1, no focal disc herniation and no canal or foraminal narrowing.

IMPRESSION:
DISC HERNIATIONS AT SEVERAL LEVELS BUT MOST PROMINENT AT C5-C6 WHERE THERE IS CANAL STENOSIS AS DESCRIBED ABOVE.

An MRI of the claimant's lumbar spine was also done on April 18, 2009, with the following impression:

STUDY IS LIMITED BY THE METALLIC ARTIFACT FROM ARTIFICIAL DISCS. MILD FACET HYPERTROPHY SEEN AT THE UPPER TWO LEVELS WITH NO FOCAL DISC

HERNIATION. NO DEFINITE ABNORMALITY IN THE LOWER LUMBAR SPINE.

Dr. Crawley examined the claimant on April 22, 2009 but did not report any objective medical findings. Dr. Crawley assessed "cervical pain." Dr. Barrett-Tuck saw the claimant on May 19, 2009:

Jodie Vaughn Kummer is a very pleasant 34-year-old lady referred by Dr. Michael Crawley for evaluation of severe neck pain. Ms. Kummer indicates that about a month to six weeks ago while at her teaching job one of her students ran through her door slamming into her and knocking her up against a door resulting in immediate severe neck pain. The pain has been severe since that time so severe that she has been unable to work and, in fact, has had her mother assisting her personal care. She complains that the pain is located in the posterior neck radiating to the left a bit more than the right but that the pain is diffuse involving her entire neck. She has not responded to conservative treatment. Her past history is significant for lumbar disc disease. She underwent a lumbar laminectomy in June of 2002 and a second disc surgery in October of 2005. She made a trip to Germany for artificial disc replacements at three levels, L3-L4, L4-L5, and L5-S1. She indicates that she has done very well after that procedure. It was completed in August of 2007. She has never had difficulty with her neck prior to this incident....

Physical examination is of a well-developed, well-nourished morbidly obese lady who is 287 pounds....Examination of the neck shows marked decreased range of motion. Primarily, this is going to be due to muscular spasm and poor efforts in attempting to move the neck....

MRI of the cervical spine shows a central disc rupture at C5-C6 effacing the thecal sac and touching the midline of the spinal cord. There is no nerve root compromise. There is, however, narrowing of the spinal canal. At C6-C7, there is a tiny central disc rupture that does not appear to be significant. Minor changes are noted at C4-C5.

Dr. Barrett-Tuck assessed "1. Soft disc rupture C5-C6 secondary to injury. 2. Morbid obesity." Dr. Barrett-Tuck stated, "In general, her cervical spine anatomy looks very good. She has a central soft disc rupture at C5-C6....As soon as we have received approval from her insurance company, we will place her on the surgery schedule."

Dr. Crawley saw the claimant on June 11, 2009 and assessed "cervical pain." Dr. Crawley did not report any objective medical findings on June 11, 2009. Dr. Barrett-Tuck performed surgery on June 22, 2009: "Anterior cervical discectomy and fusion, C5-C6, using machined allograft and anterior Providence plate." The pre- and post-operative diagnosis was "Disk rupture, C5-C6."

The claimant followed up with Dr. Barrett-Tuck on August 4, 2009: "She underwent ACDF at C5-C6 on 6/22/09. Jodie has complained quite a lot of pain....She complains of muscular type suboccipital pain and some pain into the neck. I think all of this is entirely normal. She has been very

sedentary. I have encouraged her to increase her activities. She is a music teacher. I do think she can return to work in two weeks as she had previously anticipated. We are going to approve her, however, for only half a day at work. I think she will need some time to regain her stamina and allow further healing."

Dr. Barrett-Tuck noted on September 15, 2009, "Today, she complains of a lot of pain in the left shoulder and symptoms of fatigue, numbness, and tingling in what seems to be the ulnar nerve distribution....I have asked for an MRI of the neck and of the left shoulder as well as nerve conduction studies of the left arm due to her continued symptoms."

An MRI of the claimant's cervical spine was performed on October 7, 2009, with the impression, "Post surgical changes as described at C5-C6. No evidence of recurrent disc herniation. No significant canal stenosis or foraminal narrowing." An MRI of the claimant's left upper extremity was done on October 7, 2009, with the impression, "There is some very mild fraying of the undersurface of the distal supraspinatus tendon. No evidence of rotator cuff or labral tear by MR."

Dr. Barrett-Tuck informed the claimant on October 12, 2009, "The MRI of the cervical spine shows no evidence of new ruptures or other significant abnormalities. Minor bulges are noted. This is considered a normal finding. The MRI of the shoulder did show some fraying of one of the tendons of the shoulder but no full thickness rotator cuff tear. It may be that we would wish to consider orthopedic evaluation of your shoulder." (The claimant does not contend that she sustained a compensable injury to her left shoulder or left upper extremity, and the evidence does not demonstrate that the claimant sustained a compensable injury to her left shoulder or left upper extremity.)

The parties deposed Dr. Barrett-Tuck on January 12, 2010. The respondents' attorney questioned Dr. Barrett-Tuck:

Q. What was your impression after reviewing [the April 18, 2009 cervical MRI] and doing a physical examination on Ms. Vaughn?

A. The MRI did show a central disc rupture at C5-C6. I felt that the - I called it just minor tiny central disc abnormalities at 4-5 and 6-7. I did not feel that those were significant. But that her rupture at C5-C6 was significant, and I felt was secondary to her injury....

Q. What led you to believe that it was related to her injury that she described to you where the student had pushed her into the -

A. Her history.

Q. Was there anything on the MRI report that would indicate how long this disc herniation had been there at the C5-6 level?

A. No, other than the fact that it did appear to be a soft disc rupture. It wasn't calcified. It didn't have associated bone spurs, or anything that would indicate that it was a chronic condition....

Q. So as I understand, based on your report, you feel that the ruptured disc at the C5-6 level where you did the surgery was due to the incident that she described to you occurring with the student and the door?

A. Yes.

Q. You said that was based on history. Do you have any other objective findings that relates the complaints at the C5-6 level of her spine to that incident?

A. No....

Q. You mentioned in your reports that Ms. Vaughn went to Germany for some surgery on her lumbar spine -

A. Right.

Q. - prior to coming to see you. Have you reviewed any of those reports?

A. No....

Q. Looking under the imaging section on the report on Page Two, and again looking at the front of this report, it was dated August the 24th, 2007, it looks like under the imaging section, she actually had an MRI of the total spine. Is that your understanding of reviewing the report?

A. Yes.

Q. And specifically on the C spine it showed a moderate central bulging at the C5-6?

A. Uh-huh, I see that.

Q. And it sounds like that the moderate central bulging at the C5-6 level is the same type of bulging/herniation that she had showing up on her April 2009 report and was the condition which you performed surgery for in June of 2009. Is that consistent with your review?

A. Well, no, the report says she has a central bulge. She had a herniation at the time I saw her, and I would like very much to see these two studies to compare. But usually a bulge is not a herniation....

Q. Based upon the fact that she was getting some consultation, or at least some review, and problems indicated at the C5-6 level of the cervical spine, would this change your opinion that the treatment that you rendered to her at the C5-6 level was due to the incident with the student in April of 2009 versus something that was already going on with her cervical spine back in August of 2007 when she had these studies performed?

A. That's very difficult since we don't have images. Obviously, the physicians in Germany felt that there were some issues at C5-C6. On one hand, they called it a bulge, which should mean that it's not a very significant abnormality. But on the other hand, apparently they felt that it deserved some follow up....

Q. So to fully address this issue, what we need to do is try to obtain a copy of the actual images from Germany for the cervical spine?

A. That would be perfect.

Dr. Barrett-Tuck corresponded with the respondents' attorney on April 22, 2010:

I have had the opportunity to review the images that have been obtained from Alpha Spine Center in Germany, the date of this study being 8/23/07. I have reviewed those images and compared them directly to the MRI images of the cervical spine taken at NEA Baptist on April 18, 2009. I have compared these two studies side by side. The sagittal images are of comparable quality. Indeed the study from 2007 shows a significant disc protrusion at C5-C6 with effacement of the CSF space and slight effect upon the spinal cord. These sagittal images appear identical to the sagittal T2 images of April 18, 2009. I have also attempted to compare the axial images obtained in Germany in August of 2007 with the sagittal images obtained here at NEA Baptist on April 18, 2009. The quality and clarity of the images from Germany are not nearly as sharp as those obtained at NEA Baptist. Regardless, I believe that the comparison is sufficiently accurate. Indeed the central disc rupture is seen on the 2007 study and appears very similar, if not identical, to the abnormalities seen April 18, 2009. Therefore, this would appear to be an exacerbation of a pre-existing condition rather than an entirely new injury.

The claimant's attorney corresponded with Dr. Barrett-Tuck on May 13, 2010 and stated in part, "I need to know if your use and definition of the word 'exacerbation' is the same as the 'aggravation.' Are those two words interchangeable in your report?" Dr. Barrett-Tuck replied on June 1, 2010: "I consider 'exacerbation' and 'aggravation' to be interchangeable words, so certainly an

aggravation of her pre-existing condition would be an accurate description of the symptoms that she suffered in relation to the disc rupture or protrusion that she sought to fix that required surgical intervention."

The parties deposed Dr. Barrett-Tuck on September 22, 2010. The respondents' attorney questioned Dr. Barrett-Tuck:

Q. As you may recall, she had gone to Germany in the past for some surgery related to her lumbar spine. And during that time, she had some tests performed that was either a CT, or a myelogram, or an MRI of her cervical spine?

A. Yes.

Q. Then during the [January 12, 2010] deposition, you had indicated that in order to make a determination or to state the difference, if there was any, between the August 2007 study and the one that was done in April of '09, you would need to see the films.

A. Right....

Q. And then also, it looks like the 2007 films showed a central disc rupture. And it was very similar if not identical to the abnormalities that were seen in April of '09?

A. That's correct....

Q. And you also indicated based upon the fact that they were either very similar or identical that it would appear that there was an exacerbation of her pre-existing condition rather than an entirely new injury?

A. Right.

Q. And I believe Mr. Barttelt sent you a letter inquiring about exacerbation versus aggravation. But if you would, just for the judge, what was your basis for indicating that there was an exacerbation of a pre-existing condition?

A. The fact that Ms. Vaughn told me that she had never had difficulty with pain in her neck. And that the pain began immediately at the time that, if I understand correctly, the student came through a door, and she was hit forcefully with that door.

Q. Were there any objective findings either on your physical examination and surgery that you performed or in the diagnostic test that you reviewed that would indicate a specific injury or a mechanism that would show an exacerbation?

A. No.

Q. So it's strictly on her complaints?

A. Exactly....

Q. So as far as the surgery to the C5-6 level, you were repairing something that was already present in August of 2007, is that correct?

A. It appeared very similar, if not the same, radiographically as it did in 2007....

Q. The report also indicates complex pain syndrome, strong suspicion of cervical syndrome C5 and 6. Would that indicate that she might be having some pain in the cervical spine area?

A. Yes.

Q. So I guess then her history was incorrect to you that she hadn't had any problems with her cervical spine before April of 2009 if the report

from August of '07 is indicating that she does have a complex pain syndrome related to the C5-6 level, is that right?

A. Yes....

The claimant's attorney questioned Dr. Barrett-Tuck:

Q. And you had already given your opinion that in fact it was your opinion to a reasonable degree of medical certainty that it's more likely than not that the incident that happened at the school did in fact aggravate the underlying condition and cause her symptoms, is that correct?

A. That's correct.

Q. You wrote me a letter on June 1st, 2010. Have you reviewed that letter?

A. Yes.

Q. And is that still your opinion in this case, Dr. Tuck?

A. Yes. We were discussing the difference between the words exacerbation and aggravation, and I consider those two words to basically mean the same thing. And according to Jodie's history, the injury that she described resulted in an aggravation of her condition....

The respondents' attorney followed up with Dr. Barrett-Tuck:

Q. What objective findings are there in the records to support that there was an exacerbation or an aggravation of the pre-existing condition?

A. History, her history....

Q. The only information you have about the event occurring is what Ms. Vaughn described to you, is that correct?

A. That's right.

Q. But from an objective medical standpoint, there's nothing in the records to show an injury, is that correct?

A. Right. We don't have a video tape of what happened, and we don't have any way to measure the forces that occurred or - all I have to go on is what she tells me.

A pre-hearing order was filed on October 25, 2010. The claimant contended that she "suffered a compensable injury to her neck and back on or about April 3, 2009, when a fourth-grade student ran into her, pushing her into a steel door facing. The claimant is entitled to worker's compensation benefits including medical treatment."

The respondents contended that the claimant "did not sustain an injury arising out of and in the course and scope of her employment on April 3, 2009. Specifically, the respondents assert that any complaints the claimant may have would be due to a pre-existing condition and not causally related to her employment at Midland High School District or any incident that may have happened on April 3, 2009."

The parties agreed to litigate the following issues:

1. Whether the claimant sustained a compensable injury to her neck and back.
2. Whether the claimant is entitled to reasonably necessary medical treatment.
3. Whether claimant is entitled to temporary total disability benefits.
4. Whether the claimant is entitled to a controverted attorney's fee.

After a hearing, an administrative law judge filed an opinion on February 8, 2011. The administrative law judge found that the claimant did not prove she sustained a compensable injury to her neck or back.

The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Compensability

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (Repl. 2002), provides:

- (A) "Compensable injury" means:
- (i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D) (Repl. 2002). "Objective findings" are those findings which cannot come under the voluntary control of

the patient. Ark. Code Ann. §11-9-102(16)(A)(i)(Repl. 2002). The requirement that a compensable injury must be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

The claimant has the burden of proving by a preponderance of the evidence that she sustained a compensable injury. Ark. Code Ann. §11-9-102(4)(E)(i)(Repl. 2002). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

An administrative law judge found in the present matter, "3. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury either to her neck or to back." The Full Commission affirms this finding.

1. Neck

The parties stipulated that an employment relationship existed on or about April 3, 2009. The claimant testified that a student ran into her on April 3, 2009 and "slammed" her into a door facing. The claimant testified that only

her back struck the door but that she "hurt all over." The claimant signed an Employee's Notice Of Injury on Friday, April 3, 2009 and reported that she had injured her "hip and back (right side hip)." The claimant did not report on the Notice of Injury that she felt any neck pain as a result of the alleged accident. The claimant testified that she gradually began experiencing intense pain in her neck after she had gone home for the weekend. Dr. Crawley reported on April 6, 2009 that a fourth grader had pushed the claimant into a door facing, and that the claimant complained of pain in her neck, left hip, and back.

An MRI of the claimant's cervical spine was performed on April 18, 2009. Findings from the April 18, 2009 MRI included "mild reversal of normal cervical lordosis centered at the C5 level with no fracture or subluxation." The Full Commission recognizes that "loss of lordosis," which has been defined as "abnormally increased curvature of the spine," can be interpreted as medical evidence supported by objective findings establishing a compensable injury. *King v. Peopleworks*, 97 Ark. App. 105, 244 S.W.3d 729 (2006), citing *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000). In the present matter, however, we note that

"reversal of the normal lordotic curvature" in the claimant's cervical spine had already been shown in an x-ray taken September 12, 2002, following the claimant's involvement in a motor vehicle accident with a resulting diagnosis of neck sprain. There is no evidence in the present matter connecting the "mild reversal of normal cervical lordosis" shown on April 18, 2009 to the alleged accident of April 3, 2009. In *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998), the Arkansas Court of Appeals affirmed the Commission's finding that the claimant did not sustain a compensable injury when there was no evidence connecting objective medical findings (muscle spasms) to an alleged specific incident. In the present matter, the evidence does not demonstrate that "mild reversal of normal cervical lordosis" reported on April 18, 2009 was causally related to the accidental injury allegedly occurring on April 3, 2009. The April 18, 2009 MRI also showed mild disc bulging at C3-C4, "maybe a tiny disc herniation" at C4-C5, and a "tiny disc herniation" at C6-C7. The record in the present matter does not show that these findings were "acute" in nature, and the evidence does not demonstrate that these findings were the result of the

claimant allegedly being pushed against a door facing on April 3, 2009. *See Ford, supra.*

The claimant argues that the primary issue on appeal to the Full Commission is "compensability of the claimant's C5/C6 cervical disk injury." An MRI of the claimant's cervical spine in August 2007 already showed "moderate central bulging C5-C6." Dr. Zeegers informed the claimant in August 2007, "we have to discuss your cervical C5-C6 problem!" As we have noted, the claimant contends that she sustained a compensable accidental injury to her neck on April 3, 2009, when a fourth-grade student allegedly pushed the claimant into a door facing. An MRI on April 18, 2009 showed a "moderate size central disc herniation" at C5-C6. Dr. Barrett-Tuck began treating the claimant in May 2009 and at first assessed "1. Soft disc rupture C5-C6 secondary to injury." Dr. Barrett-Tuck subsequently performed a discectomy and fusion at C5-C6. Dr. Barrett-Tuck was deposed on January 12, 2010 and opined, based on the claimant's history given to her, that there had been a "central disk rupture at C5-C6." Dr. Barrett-Tuck testified at the first deposition that she had not reviewed the

diagnostic testing of the claimant's cervical spine performed in August 2007.

After having the opportunity to review the results of the cervical MRI administered in August 2007, Dr. Barrett-Tuck corresponded with counsel on April 22, 2010 and stated in part, "the central disk rupture is seen on the 2007 study and appears very similar, if not identical, to the abnormalities seen April 18, 2009." Dr. Barrett-Tuck then testified at another deposition, taken September 22, 2010. Dr. Barrett-Tuck confirmed at the second deposition that the diagnostic testing of the claimant's cervical spine performed before and after the alleged injury of April 3, 2009 was "very similar or identical." Dr. Barrett-Tuck agreed that there were no objective medical findings establishing an injury to the claimant's neck occurring on April 3, 2009.

An employer takes the employee as he finds her, and employment circumstances that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple v. Robinson*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a preexisting noncompensable condition by a compensable injury itself is compensable. *Oliver v.*

Guardsmark, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. *Ford v. Chemipulp Process, Inc.*, *supra*. Therefore, to be compensable, the claimant's alleged injury to her cervical spine at C5-C6 must itself have been a compensable injury, established by medical evidence supported by objective findings. See *Grothaus v. Vista Health*, 2011 Ark. App. 130, ___ S.W.3d ___. In the present matter, Dr. Barrett-Tuck testified on September 22, 2010 that the diagnostic films taken in 2007 and the MRI taken after the alleged accident in 2009 were very similar if not identical. Dr. Barrett-Tuck testified that she did not see any objective medical findings during her physical examination of the claimant or in the diagnostic testing performed after the alleged specific incident. 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). Dr. Barrett-Tuck testified in the September 22, 2010 deposition that there were no new objective medical findings establishing a compensable injury. The Full Commission in

the present matter finds that Dr. Barrett-Tuck's opinion is entitled to significant probative weight and value. The Full Commission also notes the decision of the Court of Appeals in *Mooney v. AT&T*, 2010 Ark. App. 600, ___ S.W.3d ___. In *Mooney*, the Court affirmed the Commission's denial of a claim when there were no significant changes between an MRI taken before the alleged work-related accident and an MRI taken after the alleged accident. The record in the present matter also demonstrates that Dr. Barrett-Tuck did not have the full picture of the claimant's back problems when Dr. Barrett-Tuck first opined that there was "a soft disc rupture" at C5-6 which was the result of the alleged April 3, 2009 accidental injury.

The instant claimant did not prove by a preponderance of the evidence that she sustained a compensable injury to her neck. The claimant did not prove that she sustained an accidental injury causing internal or external physical harm to her neck on April 3, 2009. The claimant did not prove that she sustained an injury to her neck which arose out of and in the course of employment, required medical services, or resulted in disability. The claimant also did not establish a compensable injury to her neck by medical

evidence supported by objective findings not within the claimant's voluntary control. We therefore affirm the administrative law judge's finding that the claimant did not prove she sustained a compensable injury to her neck.

2. Back

The administrative law judge also found that the claimant did not prove by a preponderance of the evidence that she sustained a compensable injury to her back. The Full Commission has described at length the claimant's testimony that she injured her neck as the result of being pushed into a door facing on April 3, 2009. We reiterate that the claimant initially reported, on April 3, 2009, that she had injured her back and right hip. Dr. Crawley noted on April 6, 2009 that the claimant was complaining of pain in her neck, left hip, and back. There were no objective medical findings in the record establishing a compensable injury to the claimant's back (*i.e.*, muscle spasm, swelling, bruising). An MRI of the claimant's back on April 18, 2009 showed mild facet hypertrophy with no focal disc herniation, and "no definite abnormality in the lower lumbar spine." The mild facet hypertrophy shown on April 18, 2009 was not

objective medical evidence establishing a compensable injury to the claimant's back on April 3, 2009.

The instant claimant did not prove by a preponderance of the evidence that she sustained a compensable injury to her back. The claimant did not prove that she sustained an accidental injury causing internal or external physical harm to her back which arose out of and in the course of employment, required medical services, or resulted in disability. The claimant did not establish a compensable injury to her back by medical evidence supported by objective findings not within the claimant's voluntary control.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant did not prove she sustained a compensable injury to her neck or back. This claim is therefore denied and dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After my de novo review of the entire record, I find the claimant sustained compensable aggravation injuries to her neck and back, and I would award benefits accordingly.

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. Robison, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is itself compensable. Oliver v. Guardsmark, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W. 3d 900 (2000). 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. Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W. 2d 883 (1996).

Ark. Code Ann. §11-9-102(4) (A) (Repl. 2002) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body...arising out of and in the course of employment and which requires medical services or results in

disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(a)(i).

Here, the claimant, a school music teacher, had a history of lumbar injuries, which were resolved with a 2007 disc replacement surgery at three levels. The claimant was involved in a car accident in 2002 in which she suffered a cervical strain, but since that time, the claimant has had no cervical issues. On April 3, 2009, a student shoved her into a door frame, causing immediate and severe pain throughout her body. Her lumbar and cervical spine were evaluated, and within 15 days, the claimant underwent cervical surgery. Her cervical symptoms were somewhat, but not completely resolved by this surgery, and her lumbar symptoms still require medication.

The majority has misapplied the law. The Act requires "medical evidence supported by objective findings ... establishing the injury." Ark. Code Ann. §11-9-102(4)(A)(i). There is no requirement that the injury be

established by objective evidence alone. The claimant has degenerative findings in her lumbar spine as well as surgical artifacts at three other lumbar levels, which satisfy the element of objective findings. The claimant was injured in a specific incident while performing employment services. The claimant was treated promptly for this incident, including MRI scans of her lumbar spine. The claimant has presented evidence, in the form of the medical records memorializing the subjective and objective examinations of her, and her own testimony, which show that the claimant's lumbar spine was not painful after her 2007 surgeries, but that on April 3, 2009, she experienced significant pain all over her body, which then localized primarily to her neck. Since that time, she had required narcotic pain medication to manage her lumbar pain, pain that she did not have in the time between recovery from her 2007 surgery and the 2009 incident.

The record supports a causal relationship between the claimant's lumbar condition and her April 3, 2009 incident. The fact that the claimant had prior lumbar issues does not bar her recovery here. She was able to work and was not symptomatic before the incident, but upon that occurrence, she became symptomatic.

The Act does not require objective findings to prove causation. Objective findings are required to support the medical evidence of injury. The medical record contains MRI evidence that the claimant had cervical spasms, disc bulging, and herniations. When considered with the other evidence concerning the mechanism of injury, the claimant's complaints, the medical examinations, the results of conservative care, and the fact that the claimant did not have neck problems prior to her April 3, 2009 incident, but had significant problems immediately upon that incident, support the conclusion that the claimant sustained an injury to her cervical spine on that date. She was asymptomatic the day before and symptomatic immediately upon the incident. A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce a disability for which compensation is sought. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Manf. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

Furthermore, I would note that the majority's analysis actually precludes not only this claimant, but any claimant from ever meeting their burden of proof for a

compensable aggravation injury. Requiring "new" objective findings for an aggravation injury flies in the face of common sense, as it completely ignores the fact that an aggravation injury is based on the fact that the claimant has a pre-existing injury that has been aggravated. Of course the objective findings are going to be of the pre-existing condition. That is the very definition of an aggravation injury. It is so basic a concept that I am at a loss as to why I have to spell it out. Concerning comparing pre-aggravation and post-aggravation MRIs looking for "new" objective findings: any "new" objective finding does not show an aggravation, it shows a new injury. The absence of "new" objective findings on an MRI does not mean that the claimant does not have an aggravation injury; it simply means that the claimant does not have a new injury. While objective medical evidence is necessary to establish the existence and extent of an injury, it is not essential to establish the causal relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522, 524 (1999); Horticare Landscape Management v. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002). With aggravation injuries, the causation element is established by evidence other than "objective findings." It is my opinion that the majority's denial of

this claim is based on a confusion, seen here and at the Court of Appeals level, between "objective findings" and "causation." This trend is very disturbing because a whole class of injuries, aggravation injuries, is being affected by this confusion.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner