

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G407176

OSCAR J. SMITH, EMPLOYEE	CLAIMANT
TRULOVE DIRTWORKS, EMPLOYER	RESPONDENT
CNA INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 21, 2016

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

Claimant represented by the HONORABLE JASON M. HATFIELD, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed January 13, 2016. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 4, 2015, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$661.00 which would entitle him to compensation at the rate of \$441.00 for total disability benefits and

\$331.00 for permanent partial disability benefits is also hereby accepted as fact.

3. The parties' stipulation that respondent paid claimant temporary total disability benefits through June 25, 2015, is also hereby accepted as fact.

4. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury in the form of lumbar fusion surgery as recommended by his treating physician, Dr. Cunningham.

5. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional temporary total disability benefits beginning June 26, 2015 and continuing through a date yet to be determined.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the January 13, 2016 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the

opinion as the decision of the Full Commission on appeal.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715 (Repl. 2012). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion affirming and adopting the Administrative Law Judge's opinion. Based upon my *de novo* review of the record, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury in the form of a

herniated disc at L5/S1 for which he is entitled to fusion surgery.

The parties stipulated that the claimant sustained a compensable injury in the form of bruising and other superficial injuries to his lumbar spine on August 28, 2014. Claimant has since been diagnosed with a broad based protrusion and annular tear at L5-S1 for which fusion surgery has been recommended. Prior to his compensable injury, the claimant suffered from low back pain for which he underwent an MRI and was treated with narcotic pain medication. This pre-injury MRI, together with the post-injury MRI were sent to Dr. Wayne Bruffett for comparison. In an office note dated June 1, 2015, Dr. Bruffett stated:

I have been asked by Mr. Frank Newell of the Barber Law Firm to review MRI scans on Mr. Oscar Smith. 1 study was done on April 8, 2011. Series 2 Image 11 shows spondylolisthesis at L5-S1 with disc herniation in the neuroforamen on the left side. However, the MRI study of September 2, series 3 image 9 shows the same condition at L5-S1 with the same disc herniation causing abutment or compression of L5 nerve root. I would say with a reasonable degree of medical certainty that there is no objective change in these 2 imaging studies with regards to the problem at L5-S1. Therefore, I cannot define an objective injury that occurred in August of last year.

The law is clear that "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. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 464, 120 S.W. 3d 150, 152 (2003). A claimant must, therefore, establish the existence and extent of an alleged aggravation or new injury by objective findings of the new injury. A claimant cannot carry this burden of proof merely through objective findings of a pre-existing condition which became more painful after an incident at work. *Liaromatis v. Baxter County*, 95 Ark. App. 296, 236 S.W.3d 524 (2006). Furthermore, a claimant must establish a causal connection between any objective medical findings in the record and the alleged compensable injury, even if the alleged compensable injury is an aggravation of a preexisting condition. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

In *Vaughn v. Midland School Dist.*, 2012 Ark. App. 344 (2012), a school teacher claimed to have sustained a cervical spine injury. Pre and post injury MRIs were compared by her treating neurosurgeon, Dr. Rebecca Barrett-Tuck, who testified in her deposition that "images appeared to be very similar if not

identical." Nevertheless, Dr. Barrett-Tuck stated that it was her belief that the claimant was suffering an exacerbation or aggravation of a pre-existing condition based upon the claimant's complaints of severe neck pain. The Court of Appeals affirmed the Full Commission opinion finding that the claimant failed to prove a compensable injury with new objective medical findings. In so finding, the Court stated:

On appeal, appellant argues that Arkansas Code Annotated section 11-9-104(4) has been misinterpreted to require "new" objective medical findings to establish a new injury when the claimant seeks benefits for an aggravation of a preexisting condition. We cannot agree. We have interpreted the Arkansas Workers' Compensation statutes in precisely that manner. See *Hickman, supra*; *Barber v. Pork Group, Inc., supra*; *Grothaus v. Vista Health, LLC, supra*; *Moony v. AT&T*, 210 Ark. App. 600, ___ S.W.3d ___; *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App., 70, 250 S.W.3d 263 (2007); *King v. Peopleworks*, 97 Ark. App. 105, 244 S.W.3d 729 (2006); *Liaromatis v. Baxter Cnty. Reg'l Hosp.*, 95 Ark. App. 296, 236 S.W.3d 524 (2006). The legislature has not seen fit to amend the workers' compensation statute to alter or reverse this interpretation.

Vaughn v. Midland School Dist., is squarely on point. Respondents accepted as compensable minor injuries of bruising and superficial injuries to the claimant's lumbar spine. Respondent did not accept

claimant's disc herniation as compensable. The minor injuries accepted by respondents were not and are not the cause of claimant's need for a fusion at L5-S1. The overwhelming weight of evidence proves that the claimant's disc herniation and annular tear at L5-S1 was in existence prior to the claimant's minor compensable injury. Dr. Bruffett's opinion in this regard should be entitled to great weight as he is the only physician to have reviewed the pre and post MRI scans. Dr. Bruffett unequivocally opined that there were no objective medical findings of a compensable injury at L5-S1 as there was no change at this level between the pre and post injury MRIs.

Therefore, based upon the record before the Commission, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury at L5-S1 that is supported by objective medical findings. Accordingly, I dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner