REL: September 17, 2021

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

2200122

United-Johnson Brothers of Alabama, LLC

v.

Luther Billups; Employer's Claim Management, Inc.; and Alabama Self-Insured Worker's Compensation Fund

Appeal from Jefferson Circuit Court, Bessemer Division (CV-19-900764)

EDWARDS, Judge.

United-Johnson Brothers of Alabama, LLC ("the employer"), appeals from an October 1, 2020, judgment entered against it and in favor of Luther Billups by the Bessemer Division of the Jefferson Circuit Court

("the trial court") regarding Billups's claim under the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq. The October 2020 judgment was based on the trial court's determination that a back injury suffered by Billups on February 12, 2019, was an aggravation of a back injury that he had suffered on October 18, 2016, while working for the employer and not a recurrence of the October 2016 injury. The October 2020 judgment also denied the employer's third-party claim against Employer's Claim Management, Inc. ("ECM"), and the Alabama Self-Insured Worker's Compensation Fund ("the ASIWCF"). The employer was a member of the ASIWCF when Billups's October 2016 injury occurred, and ECM administered workers' compensation claims for the ASIWCF. The employer was not a member of the ASIWCF when Billups's February 2019 injury occurred.

Billups, who was a delivery-truck driver, injured his lower back in October 2016, while working for the employer, which is a beer and wine distributor. Billups received treatment for his October 2016 injury and returned to work, with light-duty restrictions. However, he continued to complain of back pain and eventually had back surgery on March 17,

2017. Martin P. Jones, an orthopedic surgeon, performed the surgery, which was an L4-L5 microdiskectomy. After the surgery, Billups did not return to work until after he had attained maximum medical improvement, which was on June 29, 2017. Billups's job for the employer involved repetitive lifting, but he was able to return to his full-time position, without restrictions. After returning to work, Billups continued to be treated by Dr. Jones and regularly complained of back pain, but Billups apparently never missed work for any back-related issues.

On December 13, 2017, after a hearing at which Billups testified, the trial court approved a settlement between him and the employer regarding the October 2016 injury.[1] Billups appeared pro se at the settlement proceedings. The settlement regarding Billups's October 2016 injury reflected that Billups had received $9,387.37 from the ASIWCF in temporary-total-disability benefits and that the ASIWCF had paid $39,322.85 in medical benefits. The parties acknowledged that Billups

[1]The record includes only a limited portion of the filings associated with Billups's claim against the employer regarding the October 2016 injury, specifically, those associated with the trial court's approval of their joint petition for approval of the settlement.

had received a 10% permanent-partial-disability rating to his body as a whole and that he had attained maximum medical improvement on June 29, 2017. Billups received an additional lump-sum payment of $13,862.13 from the ASIWCF "to settle any an all claims for compensation benefits due pursuant to the ... Act." Billups's "rights to vocational benefits and future medical benefits" were to remain open, but Billups released the employer, ECM, and the ASIWCF from any further liability for compensation under the Act.

Billups continued to work for the employer after the December 2017 settlement, and he continued to be treated by Dr. Jones for occasional pain. Dr. Jones also referred Billups to Dr. Michelle Turnley, who became Billups's pain-management physician. Billups continued to complain of back pain, and, eventually, he considered having a second back surgery. As to that surgery, he decided not to proceed at one point but then began reconsidering that decision. Messages that Billups left on Dr. Turnley's electronic patient portal before his February 2019 injury reflect that he had been complaining of pain, which he sometimes described as

excruciating, since at least May 2018. Nevertheless, Billups continued to perform his job.

On December 21, 2018, Billups left a message on Dr. Turnley's patient portal that stated: "I need to make an appointment ASAP because I'm in a lot of pain the pain is in my back and both legs ...." He had also been seeking renewal of a pain prescription, but the office visit for that renewal had not yet been approved. On January 1, 2019, Billups left a message on the portal that stated: "I would like to schedule a [magnetic resonance imaging scan] for my back to see what is going on because I'm in a lot of pain. I'm still trying to work, but its hurting me when I'm lifting, sitting, and driving, just want to know what's going on with my back before I decide to have another surgery." Dr. Turnley responded to that message by indicating that a magnetic resonance imaging scan ("MRI") could be ordered if Billups's pain had changed. On January 30, 2019, Billups posted the following message on the portal: "Yes my pain have changed it has gotten worse so I would like to have the MRI so I can proceed with surgery." A request was made for approval of the MRI, and, on February 11, 2019, Billups left the following message on the portal: "I

was checking to see has the order for the new MRI been approved because I'm still working and in pain when lifting, driving, bending, sitting, also in pain when laying down in bed."

The MRI was scheduled for and conducted on February 19, 2019. However, in the interim, Billups again injured his back on February 12, 2019. The injury occurred when he was lifting the 200-pound lift gate on his delivery truck. According to Billups's allegations, he felt a pop in his back and "a lot of pain. Sharp pain." It is undisputed that Billups notified the employer of his February 2019 injury.

Dr. Jones again examined and treated Billups after the February 2019 injury, and Billups apparently worked in a light-duty position for the employer until May 20, 2019. The employer then asked him not to return to work until he was "a hundred percent." Billups allegedly could not return to his full-duty position, and he did not return to work for the employer.

On September 3, 2019, Billups filed a complaint against the employer in the trial court. Billups alleged that his February 2019 injury might have been a new injury or an aggravation of the lower back injury

he had suffered in October 2016. He also alleged that disputes existed regarding whether he was entitled to temporary-total-disability benefits under the Act, which workers' compensation insurer was responsible for his medical benefits, and whether he had suffered additional permanent partial disability or permanent total disability. Billups sought all benefits to which he was entitled under the Act.

After Billups filed his complaint, the employer filed a third-party complaint against ECM and the ASIWCF. See Kohler Co. v. Miller, 921 So. 2d 436, 438 (Ala. Civ. App. 2005). The employer alleged that Billups's February 2019 injury was a recurrence of his October 2016 injury and that ECM and the ASIWCF were responsible for all workers' compensation benefits that Billups was entitled to under the Act for his February 2019 injury. ECM and the ASIWCF filed an answer denying that the February 2019 injury was a recurrence of Billups's October 2016 injury.

The parties filed pretrial briefs arguing their respective positions regarding whether the February 2019 injury was a recurrence or an aggravation of Billups's October 2016 injury. On May 27, 2020, the trial court held an ore tenus, virtual hearing regarding Billups's complaint and

the employer's third-party complaint. Billups testified at that hearing, and the trial court also received into evidence Dr. Jones's deposition testimony and documentary evidence, including medical records, pharmacy records, and e-mail discussions from the electronic patient portal of Dr. Turnley. The following facts were also stipulated by the parties. Billups was injured in work-related accidents in October 2016 and February 2019 while working for the employer, which is subject to the Act. Billups's average weekly wage at the time of the February 2019 accident was $845 plus $123.70 in health-care benefits. The employer continued to provide fringe benefits to Billups until December 31, 2019, at which time Billups's employer-provided health-care benefits were terminated. Billups's average weekly wage for purposes of calculating the compensation rate after December 31, 2019, was $968.70. The parties further stipulated that ECM and the ASIWCF had entered into a settlement agreement with Billups following the October 2016 accident, that they would be responsible for any workers' compensation benefits owed to Billups if his February 2019 injury was a recurrence of his October 2016 injury, but that the employer, through its workers'

compensation insurance provider, would be responsible for all workers' compensation benefits owed to Billups if his February 2019 injury was an aggravation of his October 2016 injury or a new injury. It was likewise stipulated that, based on the settlement agreement, ECM and the ASIWCF remained responsible "for all medical benefits arising from the October [2016] injury."

The parties filed posttrial briefs, again arguing their respective positions regarding whether the February 2019 injury was a recurrence or an aggravation of Billups's October 2016 injury. On October 1, 2020, the trial court entered a judgment determining that Billups's February 2019 injury was an aggravation of his October 2016 injury and that the employer was liable for all benefits to which Billups was entitled under the Act for the February 2019 injury, including medical benefits and temporary-total-disability benefits. The October 2020 judgment also dismissed all claims against ECM and the ASIWCF regarding the February 2019 injury. In addition to the facts stipulated by the parties, the trial court determined that Billups was a credible witness and that he had been

> "sent home from paid 'light duty' on May 21, 2019, he has been paid no compensation benefits since that time, and his average weekly wage for the remainder of 2019 was $845.00 (with a corresponding compensation rate of 66 2/3% of that amount, or $563.33), and his average weekly wage beginning January 1, 2020, was $968.70 with a corresponding compensation rate of $645.80.
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> "....
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> "... Billups's formal education ended in the 11th grade. He has worked continuously for [the employer] and its predecessor company for 23 consecutive years. He spent the first three as a loader in the warehouse, and the next 20 as a delivery driver. In addition, over the last 5 or 6 years, [the employer] entrusted him with supervisory authority over some other delivery drivers. His job requires unloading 300 to 600 cases of wine, beer, or other beverages daily, and each such case weighs 30 to 40 pounds. He made his deliveries on a route by way of a 24-foot delivery truck. Some trucks had ramps that pulled out from underneath the cargo box of the truck, and others had hydraulic lift-gates. A lift-gate weighs about 200 pounds, and raises and lowers through hydraulic controls. After use, it is manually folded, requiring two 'flips,' and then raised up to sit on the hydraulic lift-arms when not in use."

The trial court stated that, after Billups's surgery in March 2017 following his October 2016 injury,

> "Dr. Jones released ... Billups to return to work, without any restrictions whatsoever, to full duty. ... On July 5, 2017, ... Billups resumed work with the [employer], doing his same job. He did full-duty work, full time, and resumed all of the

duties he had prior to his injury. He continued in that capacity for approximately the next nineteen months, until February 12, 2019. The parties, at trial, referred to that as the '19-month period' and the Court will hereinafter refer to that time period as such.

"... testified that he was never free from pain after the surgery performed by Dr. Jones. That notwithstanding, the pain never prohibited him from doing the full spectrum of work activity required by [the employer], and the pain did not keep him from working as he was neither late arriving, early departing, or missing work.

"... Billups testified that his pain, while it never disabled him from work, led him to continue to periodically see Dr. Jones for consultation, and that Dr. Jones also referred him to Dr. Turnley, a physiatrist, to address the pain. In mid-2018, ... Billups and Dr. Jones discussed another possible surgery (a lumbar fusion); ... Billups chose not to go forward. By October 2018, they again discussed surgery, and after some confusion as to whether the [ASIWCF] would pay for it, ... Billups was assured that the [ASIWCF] would authorize that surgery if he elected to go forward; ... Billups elected not to. By early 2019, ... Billups testified that he had asked Dr. Turnley to schedule an MRI to find out what was going on with his back and that he wanted to have surgery; that notwithstanding, after having received a letter from the [ASIWCF] to sign and return if he wished to proceed with surgery, ... Billups elected to not sign and return that form.

"Throughout the entire '19-month period,' including during the various times that surgery was considered and rejected by ... Billups, [he] was working full-duty, full-time, and doing every one of the tasks required of him by [the employer]. ... Billups testified that he had good days and bad

days, and that his pain was something of a 'roller coaster.' He further testified that his discussions with the medical providers were generally at times that the pain was stronger, and that he would 'weigh his options' about having the surgery on the one hand, or simply continuing to work a very physical job on the other. As is clear, ... Billups not only chose the latter, he was fully able to perform all the requirements of the work throughout the '19-month period,' with no evidence of any disruptions, slacking off, or physical inability to do any task required by his job.

"During a part of that '19-month period,' ... Billups used a TENS unit, which he described as a 'stimulator,' for his back pain on an infrequent basis, which diminished in the time closely preceding the February 12, 2019, accident. And throughout the 'rollercoaster' of pain, which he said he was 'tired of' and thus considering surgery to see whether that might level out his symptoms, he never sought or received from any medical provider time off work or restrictions on his activities.

"On February 12, 2019, ... Billups was on a delivery in Tuscaloosa, Alabama. Upon completion of that delivery, when he went to secure the lift-gate into position for travel, he felt a 'pop' in his back which caused sudden and immediate pain. The only other 'pop' he had ever felt in his back was at the time of the October 2016 injury, and this one was worse, he said.

"Following the February 2019 accident, but for a brief ... stint of paid light duty through May 20, 2019, [Billups] has not been able to work since. [The employer] sent him home and told him not to return to work until he could do full duty. By the end of 2019, his employment apparently may have ended. At no time since February 19, 2019 [sic], has ... Billups been

> returned to full duty work by any medical care provider, and ... Billups's own testimony that he could not perform full duty work even today was undisputed."

The trial court then discussed the deposition testimony of Dr. Jones regarding whether the February 2019 injury was an aggravation of the October 2016 injury. According to the trial court, Dr. Jones stated that, after the February 2019 injury, Billups " 'presented to me that his back was worse after he lifted the gate, so I think we can assume that it did aggravate his condition' " and that it was reasonable to expect that based on the nature of what Billups had described. The trial court noted that "Dr. Jones documented and assigned a new disability finding that had been gone for the entirety of the 19-month period, when he cut ... Billups's work capacity down to light duty," and that Dr. Jones testified that he thought Billups's February 2019 injury " 'aggravated his underlying condition. I wanted him to get back to baseline, but I just do not think that is going to be possible at this point. He was working fully duty up to this injury.' " The trial court continued by noting that Dr. Jones indicated that there were several diagnostic differences in comparing the October 2016 injury and the February 2019 injury:

> "The February 12, 2019, [accident] caused a full-duty worker to be medically restricted to light-duty, with the surgeon opining that return to 'baseline' was unlikely. The accident caused a physician-noted decrease in range-of-motion that a board-certified treating orthopedic surgeon attributed to worsening pain, which was not the case during the '19-month period.' The accident caused a medically-recorded spread of symptoms of tingling into the left foot that had not pre-existed, according to ... Billups, and which was suggestive of further nerve-root impingement according to Dr. Jones. The accident caused a previously undiagnosed left leg symptomatology of 'giving way' presenting a fall risk. The accident caused an equivocal straight-leg raising test, when there is no evidence of equivocal results at any time during the '19-month period.' The accident caused an orthopedically-diagnosed drop from the 'baseline' of pain that had endured for the '19-month period' until February 12, 2019, followed by Dr. Jones's doubts of ever being able to re-achieve that baseline."

The trial court then discussed its conclusions:

> "Whether the February 2019 injury was a 'recurrence,' or a new injury or 'aggravation,' will determine the outcome of this case.
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> > " 'A court finds a recurrence when "the second [injury] does not contribute even slightly to the causation of the [disability]." 4 A. Larson, The Law of Workmen's Compensation § 95.2.3 at 17-142 (1989). "[T]his group also includes the kind of case in which a worker has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of

> disability precipitated by some lift or exertion." 4 A. Larson, [§] 95.23 at 17-152. A court finds an "aggravation of an injury" when the "second [injury] contributed independently to the final disability." 4 A. Larson, [§] 95.22 at 17-141.'

"Kohler Co., Inc. v. Miller, 921 So. 2d 436, 445 (Ala. Civ. App. 2005) (further citations omitted). In Kohler, the claimant was precluded from recovery of benefits from Cinram: 'The worker explained that while she worked at Cinram her pain increased but that, when she left Cinram, her pain subsided to the "baseline" level.' 921 So. 2d at 445.

"In the present case, ... Billups's pain from the 2019 new injury never returned to the baseline level where it had been since the occurrence of the 2016 old injury or the 19-month period of his return to work thereafter; indeed, in the testimony of the only source of sworn medical evidence before this Court, Dr. Jones testified, 'A: I wanted to get him back to baseline, but just do not think that is going to be possible at this point. He was working full duty up to this injury.' ... This Court can, and should, find that testimony convincing on whether the new injury, as the law requires, [is] 'an "aggravation of an injury" when the "second [injury] contributed independently to the final disability." ' Kohler, supra at 445.

"Moreover, 'no preexisting condition is deemed to exist for the purposes of a workers' compensation award if the employee was able to perform the duties of his job prior to the subject injury.' Taylor v. Mobile Pulley & Mach. Work., 714 So. 2d 300, 302 (Ala. Civ. App. 1997); Hooker Constr., Inc. v. Walker, 825 So. 2d 838, 845 (Ala. Civ. App. 2001). Although ... Billups had a work injury in 2016, followed by surgery and a recuperative period, by 2017 he began a l9-month period of

> working full duty at a strenuous job, without interruption and without any medical restriction, all of which endured until the occurrence in 2019 of the new injury. If the law does not fairly deem as a 'preexisting condition' one which leaves 'the employee ... able to perform the duties of his job prior to the subject injury,' Hooker [Constr., Inc. v. Walker, 825 So. 2d 838, 845 (Ala. Civ. App. 2001)], then penalizing ... Billups's claim for compensation benefits by labeling the February 2019 injury as a 'recurrence' is unwarranted."[2]

The trial court then discussed the last-injurious-exposure rule, including the distinctions between the recurrence of an injury, the aggravation of an injury, and a new injury, and stated:

> "Here, as set forth above, the [February 2019] injury 'bear[s] a causal relation to the disability,' because the undisputed evidence is that ... Billups could do -- and was doing -- his job until that ... injury occurred, and that he has been unable to do so ever since. ... Billups testified credibly to that end, as well as. Dr. Jones. No evidence was introduced that ... Billups has not been disabled since the occurrence of the February 2019 injury."

On November 9, 2020, the employer filed a notice of appeal to this court.[3]

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[2]As discussed, infra, Hooker Construction, Inc. V. Walker, 825 So. 2d 838 (Ala. Civ. App. 2001), involved the application of the last-injurious-exposure rule.

[3]In his pretrial brief, Billups stated that he was seeking temporary-total-disability benefits until he "reaches maximum medical improvement," and nothing in the record suggests that he had reached maximum medical improvement before trial. Also, the record reflects that

The sole issue that the employer raises on appeal is whether the trial court correctly concluded that Billups's February 2019 injury was an aggravation of his October 2016 injury resulting in the employer's being liable for all benefits due Billups under the Act.

> "The standard of review in a workers' compensation case was stated by our supreme court in Ex parte Trinity Indus., Inc., 680 So. 2d 262 (Ala.1996): '[W]e will not reverse the trial court's finding of fact if that finding is supported by substantial evidence -- if that finding is supported by "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." ' 680 So. 2d at 268-69 (quoting West v. Founders Life Assurance Co., 547 So. 2d 870, 871 (Ala. 1989)). Our review of legal issues shall be

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there was no dispute regarding the amount of the medical benefits or of the temporary-total-disability benefits to which Billups was entitled as of the time of trial. In fact, the employer did not seek a postjudgment stay regarding the payment of Billups's medical benefits, and it scheduled Billups for an evaluation by Dr. Jones in connection with a preapproved surgery. The employer did pay $96,312.38 into court for purposes of obtaining a stay as to the payment of temporary-total-disability benefits. Thus, the sole issue in dispute was whether Billups's February 2019 injury was a recurrence or an aggravation of his October 2016 injury, and which insurer was responsible for paying the benefits and compensation to which Billups was entitled under the Act. The October 2020 judgment appears to be a final judgment for purposes of appeal. See, e.g., Fluor Enters., Inc. v. Lawshe, 16 So. 3d 96, 99 (Ala. Civ. App. 2009); BE & K, Inc. v. Weaver, 743 So. 2d 476, 480 (Ala. Civ. App. 1999).

> without a presumption of correctness. Ala. Code 1975, § 25-5-81(e)(1)."

Hooker Constr., Inc. v. Walker, 825 So. 2d 838, 841-42 (Ala. Civ. App. 2001); see also Ala. Code 1975, § 25-5-81(e).

In North River Insurance Co. v. Purser, 608 So. 2d 1379, 1382 (Ala. Civ. App. 1992), this court stated that, pursuant to the last-injurious-exposure rule,

> "liability falls upon the carrier covering risk at the time of the most recent injury bearing a causal relation to the disability. The characterization of the second injury as a new injury, an aggravation of a prior injury, or a recurrence of an old injury determines which insurer is liable."

See also Ex parte Pike Cnty. Comm'n, 740 So. 2d 1080, 1083 (Ala. 1999).

> "Because the terms 'aggravation' and 'recurrence' themselves are not self-explanatory, our cases have endeavored to clarify the difference between the two.
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> > " 'A court finds a recurrence when "the second [injury] does not contribute even slightly to the causation of the [disability]." 4 A. Larson, The Law of Workmen's Compensation, § 95.23 at 17-142 (1989). "[T]his group also includes the kind of case in which a worker has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion." 4

> A. Larson, § 95.23 at 17-152. A court finds an "aggravation of an injury" when the "second [injury] contributed independently to the final disability." 4 A. Larson, § 95.22 at 17-141.'
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> "United States Fid. & Guar. Co. v. Stepp, 642 So. 2d 712, 715 (Ala. Civ. App. 1994)."

Stein Mart, Inc. v. Delashaw, 64 So. 3d 1101, 1105 (Ala. Civ. App. 2010).

The legal determination whether an injury is a recurrence or an aggravation of a previous injury is for the trial court, not a physician. See Delashaw, 64 So. 3d at 1105-06. Generally, there must be some evidence indicating that a subsequent accident caused some new damage to the physical structure of the employee's body to establish that the employee suffered an aggravation of an injury that resulted from his or her previous accident, rather than a recurrence. See Hokes Bluff Welding & Fabrication v. Cox, 33 So. 3d 592, 604 (Ala. Civ. App. 2008); see also Ala. Code 1975, § 25-5-1(7) (defining "accident"). As this court stated in Total Fire Protection, Inc. v. Jean, 160 So. 3d 795, 800 (Ala. Civ. App. 2014):

> "[W]hen an employee experiences expected ongoing symptoms from an original compensable injury as a result of routine physical activities in subsequent employment, in the absence of evidence of some additional harmful change to the underlying anatomical condition of the employee, those

> expected ongoing symptoms will be treated under Alabama law as a recurrence of the symptoms from the original injury and not as an aggravation of the original injury."

However, we also have concluded that it was proper to apply the rule that "no preexisting condition is deemed to exist for the purposes of a workers' compensation award if the employee was able to perform the duties of his job prior to the subject injury.' Taylor v. Mobile Pulley & Mach. Works, 714 So. 2d 300, 302 (Ala. Civ. App.1997)." Hooker Constr., 825 So. 2d at 845; see also North River Ins. Co., 608 So. 2d at 1382 (stating one of the public-policy reasons for the adoption of the last-injurious-exposure rule: "[I]t is more consistent with Alabama's normal rule for pre-existing injuries, i.e., that the employer (and the employer's insurance carrier) 'takes an employee as he finds him at the time of employment.' Patterson v. Clarke County Motors, Inc., 551 So. 2d 412, 416 (Ala. Civ. App. 1989)."). In Hooker Construction, this court upheld a determination that the employee's injury was an aggravation of a previous work-related injury, noting that, although the employee had continued to experience pain after he returned to work from the previous injury, he had not gone to his doctor for almost a year before the subsequent injury, had been able to

perform his duties while working, and had received a higher disability rating after the subsequent injury. 825 So. 2d at 845.

As the present case demonstrates, differentiating between whether an employee has suffered an aggravation of an injury or a recurrence of an injury is a fact-based inquiry and can be a difficult task. However, as Billups and ECM and the ASIWCF note in their respective appellate briefs, no transcript was made of Billups's testimony at the May 2020 hearing and no party has submitted a statement of the evidence pursuant to Rule 10(d), Ala. R. App. P. "Under such circumstances, we are bound to presume that there was evidence to support the trial court's order." Breeden v. Alabama Power Co., 689 So. 2d 170, 171 (Ala. Civ. App. 1997). That presumption is conclusive, in part, because this court has no way to determine what the missing evidence included or whether any objections were made as to the admissibility of testimony that might otherwise be inadmissible. See Crest Homeowners Ass'n v. Onsite Wastewater Maint., LLC, 290 So. 3d 826, 829 (Ala. Civ. App. 2019); Elliott v. Bud's Truck & Auto Repair, 656 So. 2d 837, 838 (Ala. Civ. App. 1995); see also Ex parte Neal, 423 So. 2d 850, 852 (Ala.1982) ("The trial court is not in error if

inadmissible [evidence] comes in without objection and without a ruling thereon appearing in the record. The [evidence] is thus generally admissible and not limited as to weight or purpose."). Thus, to the extent that the employer raises any issue as to which Billups's testimony might have been relevant, we must affirm the findings in the trial court's October 2020 judgment. See, e.g., Winn-Dixie Montgomery, LLC v. Purser, 154 So. 3d 1025, 1027 (Ala. Civ. App. 2014) ("[T]his court must assume that the evidence that is not contained in the record on appeal is sufficient to support the trial court's order."). Nevertheless, this court may consider legal arguments that are not dependent on missing evidence that was presented to the trial court. See id. at 1028 ("Out of an abundance of caution, we note that we have considered whether some of the arguments Winn-Dixie has asserted on appeal could be said to be legal arguments, therefore making the absence of a transcript of the hearing below immaterial.").

The employer couches its argument as being one of a matter of law by contending that Billups's testimony would not be relevant to its argument, by stating that the employer does not dispute any of the

findings of the trial court relating to Billups's testimony, and by focusing on a comparison of Billups's two most recent MRIs and certain parts of Dr. Jones's deposition testimony. The employer further appears to confuse the idea that the evidence might have supported a finding of a recurrence of the October 2016 injury, see, e.g., AMEC Foster Wheeler Kamtech, Inc. v. Chandler, 295 So. 3d 672, 678 (Ala. Civ. App. 2019), with the idea that the trial court was required to conclude that a recurrence occurred because Billups had continued to experience pain symptoms from his October 2016 injury up to the time of his February 2019 injury. However, an employee could aggravate a previous injury even while continuing to suffer pain associated with that injury. In other words, continuing pain does not preclude an employee from proving he or she has suffered an aggravation of a previous injury; that symptom merely supports the conclusion that a recurrence might have occurred. See, e.g., Office Max, Inc. v. Academy, Ltd., 129 So. 3d 300, 304 (Ala. Civ. App. 2013); Jackson v. Delphi Auto. Sys., 42 So. 3d 1264, 1269 (Ala. Civ. App. 2010) (stating that new symptoms might "indicate either a new injury or an aggravation of the original injury"); see also Rich v. Warren Mfg., Inc., 634 So. 2d 1015,

1017 (Ala. Civ. App. 1994) (acknowledging that, although myelogram and CT scans performed before and after the successive injury might appear to be the same, such evidence "does not necessarily mean that the symptoms experienced by the employee were the same," particularly in light of testimony indicating that such "tests are not always sensitive enough to detect" all damage that was exacerbating the employee's pain).

In any event, the problem in this case is that we have no way of knowing what Billups stated at trial regarding his pain, his other symptoms, or their extent and location, and that missing testimony, coupled with the deposition testimony of Dr. Jones and relevant medical records, could have supported the conclusion that the February 2019 accident caused some new damage to the physical structure of Billups's body that might not have been reflected on his MRIs, particularly in light of the fact that Billups had been able to work full-time, without restrictions, before that accident. As far as the distinctions between the February 2019 injury and the October 2016 injury, Billups felt a "pop" in his back in February 2019 that was worse than the "pop" he had felt in October 2016; he suffered symptoms that were greater in degree than he

had suffered since the surgical repair to his back in March 2017; he was unable to continue working as he had been doing since he had reached maximum medical improvement after the October 2016 injury; Dr. Jones did not believe it would be possible to return Billups to the condition he was in before the February 2019 injury; Billups's range of motion had decreased and his left leg was giving way in a manner that it had not after the October 2016 injury, at least based on the medical records; and Billups suffered tingling in his foot that was different than that which he had suffered before.[4]

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[4]The employer notes that Billups had previously complained of tingling in his foot. However, the trial court stated that "[t]he accident caused a medically-recorded spread of symptoms of tingling into the left foot that had not pre-existed, according to ... Billups ...." Without Billups's testimony, we have no way of determining whether that finding was unsupported by the evidence.

The employer also notes that the trial court determined that the tingling "was suggestive of further nerve-root impingement according to Dr. Jones." According to the employer, Dr. Jones's testimony as to such a possibility would not constitute substantial evidence regarding a change to the physical structure of the back. See Ex parte Southern Energy Homes, Inc., 873 So. 2d 1116, 1122 (Ala. 2003) (quoting Hammons v. Ross Stores, Inc., 547 So. 2d 883, 885 (Ala. Civ. App. 1989)) (" 'It is a well established principle that evidence presented by a [workers'] compensation claimant must be more than evidence of mere possibilities

As Billups notes in his appellate brief, the symptoms he suffered after the February 2019 injury were not the same as the "expected ongoing symptoms" he had suffered during his "routine physical activities in subsequent employment" after the October 2016 injury. Total Fire Protection, 160 So. 3d at 800. Also, Dr. Jones's notes from his March 14, 2019, examination of Billups stated that Dr. Jones thought that, "at this point in time[,] this represents an aggravation of a preexisting condition that [Billups] already had." Although it is true that, during his deposition, Dr. Jones admitted that the February 2019 injury would be consistent with a recurrence of Billups's October 2016 injury in that Billups had suffered a previous back injury, had had continuing symptoms, and had had a second period of disability precipitated by some lift or exertion, Dr. Jones did not state that such matters were inconsistent with an aggravation of the October 2016 injury or contradict

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that would only serve to "guess" the employer into liability.' "). The employer's argument misses the point that the trial court was making, however. Dr. Jones essentially testified that the worsened tingling Billups had experienced would be consistent with further nerve-root impingement.

the statements he had made in his post-February 2019 examination notes indicating that an aggravation had occurred. Dr. Jones also admitted that a comparison of the most recent two MRIs reflected "no significant change in the actual physical structure of the back." However, counsel made no attempt to clarify what the term "significant change" might mean. A comparison of the reports from Billups's past MRIs with his February 2019 MRI indicates that he had some additional stenosis (narrowing of spaces within the spine that can put pressure on the nerve) in his L5-S1 region and that there was some "contact with the exiting left L5 nerve root" in the L4-L5 region indicated on the February 2019 MRI; that contact had not been noted on Billups's most recent MRI in June 2018, although some disk/L5 nerve-root contact "within the spinal canal" had been noted on an MRI in September 2017. Likewise, a February 21, 2019, note from Dr. Turnley indicates that Billups's February 2019 MRI "did not have any big changes from [his] previous MRI," not that there were no changes.

Dr. Jones further stated:

> "I'd say that there is a part of it that kind of goes back to his original problem and injury and whatever, so I guess that's part of him.
>
> "There -- there may have been some degree of aggravation or recurrence, and I'm not the legal scholar on that, related to lifting the gate, and -- and -- and that may be some portion of it, but it's hard to for me to say and give you all a 'That's 5 percent, 10 percent, 15 percent' 'cause it's really hard to know, you know, but he clearly was having issues -- to this point was clearly having issues up and to the point that he had this new injury to the point that he was ready to lie down and have another operation.
>
> "So I -- I mean I -- it's -- we can go here -- around here a thousand times, but we're never going to completely resolve that 'cause it's hard to know for sure, but I think there's a little bit of truth, maybe, in all of that."

Dr. Jones admitted that he did not know Billups's physical condition in early 2019 "when [Billups] called Dr. Turnley's office" regarding his pain and potentially scheduling a new MRI and surgery. However, it was undisputed that Billups was able to continue working in that condition because he did so. The colloquy between Dr. Jones and Billups's counsel continued:

> "Q. All you know is what you know, and what you know is in March and in April, and in March and April, you know his range of motion is lower than it ever had been and that his

> symptoms are extended further than they ever had been and that he had reported to you that lifting something on -- a gate ... had put him in that shape.
>
> "A. Yes.
>
> "Q. And you find him to be a believable guy, you've told us.
>
> "A. Yes.
>
> "Q. Okay. So if he's telling the truth, then the February [2019 injury] ... put him at a different level than he'd been at before with regard to his symptoms.
>
> "A. That was his testimony. That's what he said.
>
> "Q. Okay. And if you believe him, then you would ratify what he said. It makes sense medically?
>
> "A. Yeah, it does."

Based on the foregoing, and in the absence of Billups's testimony, we cannot conclude that Billups had suffered no additional damage to his back from the February 2019 accident or, specifically, that that accident had not at least contributed slightly to the causation of his disability following that accident. Accordingly, the October 2020 judgment is affirmed.

AFFIRMED.

Thompson, P.J., and Moore, Hanson, and Fridy, JJ., concur.