

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA06-1388

June 6, 2007

RONALD HICKMAN
APPELLANT

AN APPEAL FROM ARKANSAS
WORKERS' COMPENSATION
COMMISSION [F204936]

V.

KELLOGG, BROWN & ROOT
APPELLEE

AFFIRMED IN PART;
REVERSED AND REMANDED IN PART

Ronald Hickman appeals from the denial of workers' compensation benefits. He raises four points, arguing that the Arkansas Workers' Compensation Commission (Commission) erred in finding that his admittedly compensable knee injury was not the major cause of his knee-replacement surgery and resultant impairment rating; that he was entitled to temporary-total disability benefits from only September 29, 2004, through May 5, 2005; that he is not permanently and totally disabled; and that his back injury was not compensable.

We hold that the Commission erred in disregarding the effect of the parties' stipulations concerning the compensability of Hickman's knee injury and knee surgery. Accordingly, we reverse the Commission's findings denying permanent-partial-disability benefits, temporary-total-disability benefits, and permanent-total-disability benefits, and remand for the Commission to analyze Hickman's entitlement to those benefits in light of the parties' stipulations. We further hold that the Commission did not err in finding that Hickman failed to prove that he suffered a compensable back injury; thus, we affirm that finding.

Background Facts

Hickman has had numerous back surgeries and prior knee surgery; he also has preexisting degenerative conditions in his back and left knee. Hickman's work-related back and left-knee injuries in the instant case occurred on April 26, 2002, while he was employed with appellee Kellogg, Brown, and Root (Kellogg or the employer) as a precision millwright. This position required him to align the gear mechanisms on machinery. It is undisputed that Hickman was injured on the job when he slipped in some oil and fell six to eight feet into in a "hole," striking his knee on the base of a platform, twisting his knee between pipes, and landing on his back. He was treated at the emergency room, but returned to light duty, which he described as "sitting on a bucket" and adjusting gears. He said that two days after the fall, he reinjured himself as he jumped off the bucket to avoid getting "run over" by another gearbox that was being transported. Afterward, Hickman never returned to work for Kellogg and was approved to receive Social Security benefits. The employer paid workers' compensation benefits through October 28, 2003.

The Administrative Law Judge (ALJ) awarded benefits for Hickman's knee, finding that he proved a compensable 30% impairment to his knee; that he proved entitlement to permanent-partial disability benefits of 30% for his knee; that his healing period for his knee began on October 28, 2003, and ended on May 4, 2005¹; that he failed to prove his compensable injury was the major cause of his permanent disability²; and that he failed to prove he sustained a

¹ The parties stipulated that the period from March 12, 2004, through May 25, 2004, was not part of Hickman's healing period. On March 12, 2004, Hickman was involved in car accident in which his wife was killed. He sustained a serious head injury that left him in a coma for thirty-two days.

²The ALJ found that neither the Second Injury Fund nor the Death and Permanent Total Disability Trust Fund had any liability because Hickman failed to prove that prior to his compensable knee injury, he had any permanent-partial disability or impairment of his right knee or that any prior disability or impairment combined with his recent compensable injury

compensable back injury. The Commission affirmed in part, modified in part, and reversed in part.

Standard of Review

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *See Whitlach v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Id.* When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Id.* The Commission is not required to believe the testimony of any witness, and it may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Holloway v. Ray White Lumber Co.*, 337 Ark. 524, 990 S.W.2d 526 (1999). The Commission may accept or reject medical opinions and determine their medical soundness and probative force. *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999). Here, we reverse and remand with regard to the Commission's findings related to Hickman's knee injury but affirm the Commission's finding that Hickman failed to prove his back injury is compensable.

I. Knee Injury

The parties stipulated that Hickman's April 2002 knee injury was compensable, that his healing period ended no later than May 4, 2005, and that the employer paid temporary-total disability benefits through October 28, 2003. The Commission determined that Hickman failed

to produce his current disability status.

to prove the April 2002 work-related accident was the major cause of the 30% permanent impairment rating assigned by Dr. Sidney Bailey. The Commission also determined that Hickman failed to prove he is totally and permanently disabled as a result of any compensable injury.

The Commission noted that Hickman had not been assigned an impairment rating for his preexisting knee condition, which, by his own admission, required surgery. It further reasoned that the 30% impairment rating assigned by Dr. Bailey was solely attributable to the condition of Hickman's right knee following his knee-replacement surgery. Thus, it determined that the dispositive issue was whether Hickman's April 2002 "compensable aggravation" was the major cause of his right-knee replacement, and determined that it was not.

The Commission reasoned that Hickman did not prove the compensable injury was the major cause of the impairment because: 1) Hickman's knee was symptomatic before the April 26, 2002 injury, and the medical evidence supports that the major cause of his need for knee-replacement surgery, and thus, the major cause of his surgery-related knee impairment, was his preexisting degenerative condition and the condition of his knee caused by his prior knee surgery; 2) the only injuries proved by objective findings at the time of the April 26, 2002 work-related accident, a contusion and swelling, had resolved before the surgery was performed; 3) the medical evidence supported that the surgery would have been inevitable even if Hickman had not suffered the April 26, 2002 injury. In sum, the Commission concluded that Hickman failed to prove the major cause of his need for knee-replacement surgery was the April 2002 incident because he failed to prove that "but for his knee injury of April 2002, he would not have required total knee-replacement surgery."

We reverse the Commission's findings that Hickman was precluded from receiving permanent-partial and permanent-total disability benefits because the Commission denied those

benefits notwithstanding the parties' stipulations that the April 2002 knee injury and the September 2004 total right-knee replacement were compensable. The Commission did not reject these stipulations, which were expressly delineated in the ALJ's order; thus, it must be said to have accepted those same stipulations. In addition, the Commission determined that "the entirety of the claimant's impairment rating is attributed solely to his total-knee replacement surgery." Accordingly, we remand for the Commission to consider Hickman's claim in light of these stipulations.

While the Commission may certainly determine that a compensable injury is not the major cause of an impairment where the evidence in that regard is in *dispute*, here the evidence is *not* in dispute due to the parties' stipulations. Because the stipulations satisfied Hickman's burden to prove the causal connection between his employment-related injury and his need for the surgery, the Commission erred in attempting to "go behind" the stipulations and examine the evidence supporting the impairment rating, which the Commission attributed solely to the compensable surgery.

Similarly, the Commission conceded that the compensability of the surgery and its corresponding period of disability are not at issue, yet erroneously determined that Hickman's healing period ended on October 28, 2003. To the contrary, the medical evidence shows that Hickman's situation did not resolve or stabilize and that continued treatment was necessary between October 28, 2003, and September 29, 2004. In fact, Hickman's medical condition continued to deteriorate to the point that the surgery that had been postponed for nearly two years was ultimately performed. Thus, his condition did not plateau, as the Commission found. Therefore, we reverse the Commission's finding that Hickman's healing period ended on October 28, 2003, and remand for the Commission to address this issue, considering the foregoing facts and stipulations.

In short, the employer accepted the knee injury and knee surgery as compensable. As the knee impairment was undisputedly based on the surgery, the employer is bound by the legal effect of the stipulations it made and the Commission is bound by the stipulations that it accepted. Thus, we reverse that portion of the Commission's order denying permanent-partial-disability, temporary-total-disability, and permanent-total-disability benefits, and remand for further proceedings in light of the parties' stipulations and this opinion.

II. Back Injury

However, we affirm the Commission's determination that Hickman failed to prove that he suffered a compensable back injury on April 26, 2002, because substantial evidence demonstrated that appellant's back condition was the result of his prior back surgeries and degenerative conditions, rather than his compensable injury.

It is not necessary to recount in detail the extensive surgeries that Hickman had on his back prior to April 2002. It suffices to say the record is replete with proof that Hickman suffered from both degenerative conditions in his back and also had prior back surgery that affected the same area of his back for which he now seeks benefits. In fact, one doctor described the degenerative condition of Hickman's lumbar spine as "some of the most severe I have ever seen."

Dr. McHugh performed a lumbar decompression surgery at L2-3 on May 28, 2003. His operative report noted facet hypertrophy and ligamentous hypertrophy and compression of the dural sac and the foramen at L2 and L3, caused by continued degeneration of the facets and the ligament at the caudal (bottom) end of the discs.

Hickman claims the April 2002 injury aggravated his preexisting conditions and caused him additional back injury that necessitated the additional surgery. In order to prove a specific incident injury is compensable, a claimant must prove by a preponderance of the evidence that:

1) the injury arose out of and in the course of employment; 2) the injury caused the physical harm to the body resulting in the need for treatment; 3) the injury was caused by a specific incident and is identifiable by a time and place of occurrence. In addition, any medical evidence used to establish the existence of the injury must be supported by objective findings. Ark. Code Ann. § 11-9-102(4)(A)(i) & (D) (Supp. 2005).

Regarding an aggravation, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. *See Parker v. Atlantic Research Corp.*, 87 Ark. App. 145, 189 S.W.3d 449 (2004). An aggravation of a preexisting noncompensable condition by a compensable injury is, itself, compensable. *Id.* An aggravation is a new injury resulting from an independent incident. *Id.* An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Id.*

We affirm the Commission's determination that Hickman failed to prove that he suffered a compensable back injury on April 26, 2002. Substantial evidence supports a finding that appellant's back condition was the result of his prior back surgeries and degenerative conditions. Both Dr. McHugh and Dr. Peeples opined that there was no evidence of a back injury based on the April 2002 work-related injury. To the contrary, both doctors opined that Hickman's back condition was based on his degenerative conditions and prior back surgeries.

Hickman claims that there is evidence of a new injury at the L1-2 and L2-3 levels in the form of herniations and that, prior to his April 2002 injury, no doctor identified any problem at the L1-2 and L2-3 levels. However, there is medical evidence to the contrary. In August 1986, Dr. Razza performed a bilateral laminectomy at the L2 level. Further, the May 1997 myelogram report shows disc bulging and ligamentous hypertrophy at the L2-3 level, a condition that Dr. McHugh said would worsen over time with medium to heavy work. In

addition, the record shows that Hickman was receiving medications for pain and muscle spasms in his lower back shortly before his April 2002 work-related injury – clearly, his back was symptomatic before that injury. Finally, as Dr. McHugh explained, Hickman’s prior back surgery would damage the L-3 levels because the spinal fusion transfers the stress and strain responsibilities to the next first movable level. On these facts, reasonable minds could have easily concluded, as the Commission did, that Hickman failed to prove that he suffered a compensable back injury.

Affirmed in part; reversed and remanded in part.

GLOVER, J., agrees.

HART, J., concurs.