Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 30, 2013

CLAIM NO. 200879685

REX CUNIGAN PETITIONER

VS. **APPEAL FROM HON.CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

KUHLMAN ELECTRIC CORP.
HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Rex Cunigan ("Cunigan") appeals from the January 10, 2013, opinion and order of Hon. Chris Davis, Administrative Law Judge ("ALJ Davis") "dismissing" his motion to reopen his claim against Kuhlman Electric Corp. ("Kuhlman") since it is barred by *res judicata*. Cunigan also appeals from the February 25, 2013, order denying his

petition for reconsideration and amended petition for reconsideration.

On appeal, Cunigan asserts the ALJ erred in determining the doctrine of *res judicata* bars the reopening of his claim pursuant to KRS 342.125.

On April 22, 2009, Cunigan, *pro se*, filed a Form 101 alleging an April 24, 2008, injury to his left leg while working for Kuhlman when he "slipped on concrete floor after coming off steps." Cunigan attached a portion of Dr. Michael Best's June 2, 2008, report to his Form 101.[1] Prior to filing his claim, Cunigan also underwent an evaluation on July 3, 2008, by Dr. Bart J. Goldman at the request of Kuhlman. After Cunigan filed his Form 101, Kuhlman introduced the reports of Drs. Goldman and Best.

On May 26, 2009, Kuhlman filed a Form 112, medical fee dispute, regarding a lumbar MRI recommended by Dr. J. Rick Lyon and a motion to join Dr. Lyon as a party.

In the Form 112, Kuhlman states as follows:

> The requested lumbar MRI has been denied on the grounds that it is not medically necessary or reasonable. This is a continuing objection to future statements, services or treatment of

[1] It is apparent that prior to filing the claim, Kuhlman sent Cunigan to Dr. Best, who performed an independent medical evaluation ("IME") on May 28, 2008.

> the same nature or for the same condition.

Kuhlman attached the June 23, 2008, letter of Dr. Best in which he noted Cunigan had normal deep tendon reflexes, no gross motor or sensory deficit, and straight leg raising "reproduces leg pain." Dr. Best stated Dr. Lyon opined Cunigan's injury was a hamstring tear which would produce pain on straight leg raising. Dr. Best further stated his examination as well as Dr. Lyon's note revealed no evidence of radiculopathy. He believed there was no myelopathy. Dr. Best stated an MRI of the lumbosacral spine requested by Dr. Lyon was not medically reasonable or necessary.

Kuhlman also introduced the July 24, 2008, letter of Dr. Goldman in which he stated he had reviewed Cunigan's records and Cunigan was now three months out from the injury and there was no evidence of radiculopathy. He believed Cunigan had a hamstring strain. Therefore, Cunigan should be placed in physical therapy for strengthening of his hamstring as suggested by Dr. Best. He recommended Cunigan continue working under Dr. Best's restrictions until he completes three weeks of physical therapy three times per week. Upon completion of physical

therapy, Dr. Goldman believed Cunigan could return to work without restrictions.

Kuhlman introduced the July 17, 2008, Nerve Conduction Studies ("NCV") and Electromyography ("EMG") report of Dr. Kenneth Mook which reflects the following impression: "there is no electrodiagnostic evidence of left or right peroneal or tibial neuropathy, peripheral polyneuropathy, or L2-S2 radiculopathy." The recommendation was: "Based on today's evaluation, I suggest that the patient be treated for musculoskeletal pain as there is no evidence of a radiculopathy or peripheral neuropathy."

Cunigan's June 29, 2009, deposition was introduced. Cunigan recounted the injury, and when asked what hurt stated as follows: "the left cheek of my butt all the way down the back of my leg, left leg." Cunigan was eventually referred to Dr. Lyon, who informed him he pulled a hamstring and indicated the pull was unusual because it was deep. Dr. Lyon sent him to physical therapy for two or three months. Because Cunigan was still complaining of pain in the same location, Dr. Lyon requested an MRI which was denied. Cunigan testified he desires the MRI be performed. He stated Dr. Lyon "would not bring [him] back in until [he] got an MRI test." Cunigan testified he had

not seen Dr. Lyon in two to three months and no appointment would be scheduled until he obtained an MRI. Cunigan stated he hurts constantly from his buttocks into his left calf.

Kuhlman introduced Dr. Goldman's August 27, 2009, letter in which he indicated he reviewed his independent medical evaluation ("IME") report, two letters previously written, and additional medical records. Dr. Goldman noted he previously opined he had no idea how a diagnosis of pelvic strain was made based on an essentially normal examination and could not understand how the diagnosis of restless leg syndrome was made based on the available examination. However, he noted if Cunigan has restless leg syndrome it would be unrelated to the April 24, 2008, hamstring injury. Dr. Goldman also noted Cunigan no longer had significant findings related to the hamstring strain and had attained maximum medical improvement ("MMI"). He stated placing Cunigan at MMI implied he requires no further treatment related to this injury.

Kuhlman also introduced the deposition of Rick McCoy, a private investigator, who conducted surveillance of Cunigan.[2]

[2] McCoy's deposition was taken later and introduced into evidence. Cunigan did not attend the deposition.

On October 21, 2009, Kuhlman filed a “Motion For Ruling in Favor of the Defendant” requesting entry of an order resolving the claim in its favor. It maintained Cunigan had introduced no proof and therefore failed in his burden and the claim should be dismissed. Kuhlman stated Cunigan was proceeding *pro se* and appeared at the hearing and over its objection was allowed to seek counsel. Kuhlman asserted Cunigan had not complied with the ALJ’s September 24, 2009, order and an attorney had not entered an appearance on his behalf. Kuhlman also argued since Cunigan had not secured an attorney, the claim should be dismissed.

On October 27, 2009, Cunigan submitted a letter requesting an extension of time in order to find an attorney to which Kuhlman filed an objection on October 29, 2009.

On December 7, 2009, Hon. Joseph W. Justice, Administrative Law Judge (“ALJ Justice”) entered an order indicating he had previously given Cunigan time to obtain an attorney, and Cunigan had responded that an attorney had reviewed the claim and had not returned the file until after his time had expired. ALJ Justice stated he reviewed the record and noted Dr. Lyon diagnosed a hamstring sprain and had requested a lumbosacral MRI which was denied on

utilization review. He stated the private investigator's surveillance notes indicate Cunigan had entered Dr. Lyon's office with a limp. ALJ Justice stated he was "of the opinion [Cunigan] has not had a definitive work-up of whether he has any permanent impairment from the injury." He also noted Cunigan had been "dismissed from his employment because of missed time purportedly because all disability from the injury." Concluding a university evaluation would assist him in determining Cunigan's medical condition, ALJ Justice passed all motions and ordered a university evaluation.

On December 14, 2009, Kuhlman filed a petition for reconsideration pointing out Cunigan claimed an injury to his left leg. Kuhlman noted it had filed multiple reports of Drs. Best and Goldman, and also filed a medical fee dispute disputing Dr. Lyon's request for an MRI of the lumbosacral spine. Further, the EMG test results reveal no evidence of radiculopathy or peripheral neuropathy. Kuhlman pointed out Cunigan did not attend the benefit review conference ("BRC") but attended the final hearing, and asked for additional time to seek an attorney which ALJ Justice granted over its objection. Kuhlman noted Cunigan later asked for another extension of time to find an attorney to which it objected and "once again" its

objection was overruled by ALJ Justice and Cunigan was granted an additional thirty days. Kuhlman asserted the fact two named attorneys declined to represent Cunigan was "telling."

Kuhlman asserted KRS 342.315 is utilized when there is a medical question which the ALJ cannot determine from the record or when an occupational disease claim has been filed. Kuhlman argued a university evaluation is not intended to provide an independent medical evaluation ("IME") for the claimant which was the purpose of ALJ Justice's order. Similarly, it argued KRS 342.315 should not be used to finance Cunigan's claim.

Kuhlman concluded by arguing while the ALJ may feel the evaluation is helpful to determine Cunigan's medical condition, he was ignoring the fact Cunigan had not borne his burden of proof, had repeatedly ignored the litigation process, and should be held to the same standard as an attorney. Therefore, the order should be withdrawn and a final hearing set.

On January 20, 2010, ALJ Justice entered an order rejecting Kuhlman's narrow interpretation of KRS 342.315 and its assertion the refusal of two attorneys to represent Cunigan was indicative of his true physical condition. He concluded granting extensions of time to allow Cunigan to

secure counsel was not an abuse of discretion and Kuhlman had not been unduly burdened or prejudiced. However, ALJ Justice determined as follows:

> The ALJ has determined that he was in error in seeking an evaluation by a University Evaluator in not adequately considering the EMG test results which were negative for radiculopathy or peripheral neuropathy.

The ALJ also addressed Kuhlman's complaint regarding Cunigan's alleged *ex parte* pleadings.[3]

Significantly, Kuhlman also filed a medical fee dispute regarding Dr. Lyon's bill even though its physicians agreed with his diagnosis.[4]

Cunigan filed the medical records of Dr. Lyon. Of those records, four are significant. The June 16, 2008, record reveals Dr. Lyon recommended an MRI of the lumbar spine. The June 28, 2008, record reveals Dr. Lyon reviewed Cunigan's EMG/NCV of a bilateral lower extremity which was negative; therefore, he believed an MRI was not warranted. He recommended resuming physical therapy and diagnosed a hamstring strain. The February 9, 2009, note reflects the following: "Pt has seen Dr. Goldman who has declared pt to

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[3] Cunigan filed various correspondence throughout these proceedings which were addressed to ALJ Justice. As a result, Kuhlman filed motions to strike. However, because the motions and orders are not relevant to the issues we will not address them.

[4] ALJ Justice previously entered an order joining Dr. Lyon as a party to the action.

have no problems. W/C has denied treatment. I have repeatedly ordered MRI woth [sic] no success. Pt continues to c/o of pain." The most recent note dated November 18, 2009, reflects the following: "MRI without contrast. Thigh and post pelvis to evaluate hamstring I am still concerned with correct diagnosis and long term sequale [sic] for injury." He diagnosed restless leg syndrome and pelvic sprain.

On May 21 2010, a hearing was conducted and Cunigan testified as follows:

> A: All I want is to get the MRI, find out why a little old hamstring tear, I'm still hurting in the center, not in my, right below my belt, my butt, my leg swells. I stay up on it all day long. All I want is the MRI. They have done [sic] blown enough money to send me to get the MRI and be done with it. A lawyer told me they don't want me to have the MRI because they are afraid there is something wrong.

In response to a question from ALJ Justice, Cunigan testified as follows:

> I don't know what else to say. All I'm wanting is to try to get an MRI. I understand a hamstring tear hurts for a little while but not for no [sic] two years. And on this hearsay that was sent, they was [sic] talking about hearsay of money offered. They wanted this drug out.

On August 23, 2010, ALJ Justice entered the following analysis, findings of fact, and conclusions of law:

> This has been a very difficult case for this ALJ. Plaintiff attempted to represent himself after being unable to retain an attorney. The ALJ has attempted to walk a fine line in being lenient with Plaintiff, but yet not unduly prejudicing Defendant's position.
>
> With all that said, the ALJ is constrained to find that Plaintiff has introduced evidence of a hamstring strain, from which by the evidence filed herein, he has recovered. Plaintiff's treating physician, when Plaintiff still complained of problems after the original diagnosis, requested an MRI and an EMG. The EMG was approved, but the MRI was denied by Defendant. The EMG came back negative for any radicular symptoms, and the reviewing physicians concluded that an MRI was not reasonable or necessary.
>
> The ALJ was included to find Plaintiff credible in his complaints of continuing problems in just listening to his testimony, but he testimony of a private investigator and a video filed herein, was very troubling in that the video showed Plaintiff enter and exit Dr. Lyons [sic] office with a cane and noticeable limp, but that in other scenes, he walked without his cane and without much, if any limp, or noticeable problem walking.
>
> The ALJ ultimately was persuaded by the testimony of Drs. Best and Goldman that Plaintiff had a hamstring strain or tear, and that he recovered

> from this injury. The ALJ was persuaded by Dr. Best that an MRI was not warranted under the evidence, as there did not appear to be any objective findings of radiculopathy. An MRI without objective medical evidence of radiculopathy is not warranted.
>
> In essence, Plaintiff has failed in his burden to prove that he has an injury that has caused permanent impairment. He has not introduced any evidence of impairment under the American Medical Association Guides to Permanent Impairment, 5th Ed. Without evidence of a permanent impairment, he cannot prevail in his claim for Permanent Partial Disability Benefits.
>
> Plaintiff sustained a work-related injury. The ALJ was persuaded by Dr. Goldman that Plaintiff reached MMI on October 1, 2008. Plaintiff is entitled to TTD benefits from April 25, 2008 through October 1, 2008. His AWW was $450.03.

Concerning the need for the lumbar MRI, ALJ Justice determined as follows:

> Defendant filed a medical fee dispute contesting a proposed MRI by Dr. Lyon. The ALJ has already discussed the matter herein. Under the medical evidence filed herein, with Plaintiff having no objective medical evidence of radiculopathy, and the EMG being negative for disc injury, and with the hamstring diagnosis, the ALJ was persuaded by Drs. Best and Goldman that an MRI was not reasonable or necessary.

ALJ Justice also concluded there was no medical evidence establishing the need for future treatment of

Cunigan's "hamstring or sciatic nerve injury." Since Dr. Lyon was at a loss to explain Cunigan's continued complaints, ALJ Justice found he was not entitled to future medical benefits based on the opinions of Drs. Best and Goldman.

Consistent with his findings, ALJ Justice awarded temporary total disability ("TTD") benefits, dismissed Cunigan's claim for permanent partial disability ("PPD") benefits, and sustained Kuhlman's medical fee dispute to the extent the proposed MRI was found to be unreasonable and unnecessary for the cure and relief of the work injury.[5]

On September 21, 2010, Cunigan, *pro se*, filed a notice of appeal and attached the August 23, 2010, MRI report performed at Frankfort Regional Medical Center. In the notice of appeal, Cunigan stated as follows:

> Dr. Lyon, Plaintiff's Doctor had requested a MRI to be obtained which would aid in ruling out any injury the Plaintiff may have. Respondents and their Doctors have deemed a MRI unnecessary. As a result of chronic pain related to this injury, Plaintiff, through Dr. R. Lingreen, from pain management clinic obtained a MRI. The results of the MRI are enclosed.

[5] Kuhlman filed a petition for reconsideration which related solely to the award of TTD benefits. Accordingly, we will not go into its contents or the ALJ's ruling on the petition for reconsideration.

> Plaintiff requests that these findings be entered in as evidence.

On October 4, 2010, Kuhlman filed a motion to strike the notice of appeal and/or the attachment to Cunigan's notice of appeal. Kuhlman argued Cunigan should not have attached the MRI report. It maintained the grounds stated by Cunigan in the notice of appeal only pertained to the attached MRI. Therefore, the notice of appeal was improper.

On October 4, 2010, Hon. Thomas G. Polites, entered his appearance as counsel for Cunigan and filed a motion to dismiss the appeal asserting at the time Cunigan filed the notice of appeal he was not represented by counsel. Hon. Polites represented that since Cunigan was represented by counsel, Cunigan wished to have the appeal dismissed. On October 18, 2010, the Board entered an order granting Cunigan's motion and overruling Kuhlman's motion to strike as moot.

On October 28, 2010, Cunigan filed a motion to reopen alleging a change of disability and worsening of impairment since entry of the August 23, 2010, opinion, award, and order due to a condition caused by the injury. Cunigan noted the medical records of Dr. Lyon, his treating physician, had been introduced and Dr. Lyon had recommended

an MRI. Further, based on the opinions and testimony of Drs. Best and Goldman, ALJ Justice determined Cunigan suffered a hamstring strain or tear, and the MRI of the lumbar spine was not reasonable and necessary treatment of the work injury.

Cunigan asserted that after entry of ALJ Justice's decision, he was able to obtain a neurosurgical evaluation by Dr. Gregory Wheeler "which included the performance of a lumbar MRI." Cunigan attached the August 23, 2010, MRI report and Dr. Wheeler's October 8, 2010, report.

We note the MRI and Dr. Wheeler's report reveal Cunigan had a large disc herniation which was compressing the nerve root. In his report, Dr. Wheeler stated based on the tests and the history he received from Cunigan, he saw no reason to suggest this was anything other than an injury sustained from the work-related fall. He recommended "lumbar decompression discectomy at L5-S1 on the left with minimally invasive technique."

Cunigan maintained the MRI and Dr. Wheeler's notes indicate his problem the entire time had been a herniated lumbar disc which was misdiagnosed as a left hamstring injury due to the fact the insurance carrier's medical expert refused to authorize a lumbar MRI. Cunigan

asserted without the benefit of the MRI it was impossible for his treating physician, Dr. Lyon, to properly diagnose his condition, and Dr. Lyon was correct throughout the litigation in recommending Cunigan undergo an MRI. Cunigan conceded ALJ Justice had no choice but to resolve the claim as he did because he did not have the benefit of the medical testimony including the MRI. Cunigan argued as follows:

> The MRI report and Dr. Wheeler's opinions constitute newly discovered evidence which could not have been discovered with the exercise of due diligence as set forth in KRS 342.125(1)(b) which is a sufficient basis to grant reopening of this claim.

Cunigan maintained that pursuant to KRS 342.125(1)(b) and (d), his motion to reopen should be granted as he made the requisite *prima facie* showing. Cunigan also sought an award of PPD benefits.

On November 8, 2010, Kuhlman filed a response and objection to the motion to reopen. It asserted the decision of ALJ Justice is now *res judicata*, and Cunigan cannot prevail on a motion to reopen for a change of condition on a claim that was dismissed on its merits. Further, "the back issue was never properly preserved" by Cunigan in the previous proceeding. Kuhlman asserted the MRI and Dr. Wheeler's report were not newly discovered

evidence. It argued Cunigan did not attempt to procure any medical evidence on the issue until after the decision was rendered by ALJ Justice. Kuhlman argued there is no newly discovered evidence; rather, there is newly developed evidence and a *prima facie* case had not been established.

In a January 14, 2011, order, Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ Overfield") concluded Cunigan had made "a *prima facie* case for reopening" and sustained the motion to reopen to the extent the claim would be assigned to an ALJ for further adjudication.[6]

Thereafter, Kuhlman filed a Form 112 medical fee dispute contesting the services provided by Dr. Wheeler as not being work-related. Kuhlman also filed a motion to join the various medical providers relating to the surgery and the attendant care. That motion was sustained by ordered dated March 17, 2011.

Cunigan was again deposed on April 18, 2011, and testified at the November 14, 2012, hearing. Cunigan testified that after ALJ Justice's decision he requested Dr. Lyon refer him to a pain clinic because he was "allowed

[6] As ALJ Justice was no longer an ALJ, this claim was assigned to Hon. Jeanie Owen Miller, Administrative Law Judge, later entered an order of recusal. The claim was then assigned to ALJ Davis.

to kick this back into my wife's insurance." Consequently, he was sent to Dr. Richard Lingreen, a pain management specialist in August 2010. Dr. Lingreen ordered an MRI in August which revealed a herniated disc. During this time, Dr. Lingreen also administered an epidural injection. Dr. Lingreen advised Cunigan to see a neurosurgeon. Cunigan's wife who works for the hospital in Frankfort set up an appointment with Dr. Wheeler. Cunigan testified Dr. Wheeler diagnosed a ruptured disc, and because he had already undergone physical therapy and an injection, recommended surgery. Surgery was performed by Dr. Wheeler. Cunigan testified from the time of the injury up until the time surgery was performed by Dr. Wheeler, he experienced the same pain. Cunigan explained that from day one he has had pain from the "center of his butt down the back of his left leg to the knee."

Cunigan introduced the April 28, 2011, deposition of Dr. Wheeler.[7] Dr. Wheeler testified he first saw Cunigan on October 8, 2010. An August 23, 2010, MRI revealed a large disc rupture at L5-S1 which was contacting the left S1 nerve root. This was documented by EMG/NCV studies. Because Cunigan had intractable pain, Dr. Wheeler

[7] Because Dr. Wheeler's deposition closely mirrors the contents of his report we will not discuss the contents of the report.

recommended surgery which was performed on December 10, 2012. Regarding the cause of the herniation, Dr. Wheeler testified as follows:

> Q: Doctor, I'd like to ask you about the causation question. In page two or your note of 10/8/2010 I think you discuss it, and I'd like for you to assume that this gentlemen had from the work injury in 2008 only left leg pain, in his buttock, in his hip, down to his knee, and he didn't have any back pain at that time, just the leg symptoms. The doctor recommended an MRI, Dr. Lyon recommended a lumbar MRI, to rule out a herniated disk, but it was never done, and it was never accomplished until you had the opportunity to treat him. Doctor, assuming that that is accurate in terms of his symptoms, would you attribute the disk herniation and the surgery that you performed on him to that original work injury in 2008 more likely than not?
>
> A: Yes.
>
> Q: And, Doctor, could you explain how you could have a disk herniation in 2008 that caused only leg symptoms rather than back pain?
>
> A: It's quite possible to have purely leg pain, hip pain, posterior thigh pain, calf pain, from a disk rupture. It doesn't necessarily acutely or even chronically have to inflame, say, the joints in the back, they're called facet joints, that will commonly cause back pain.
>
> Q: And with the benefit of the MRI results now and looking back on this, do you believe that the work injury caused the disk herniation that you've

> been able to identify and fix with surgery.
>
> A: Yes.

Dr. Wheeler explained if Cunigan did not have back pain he may have had a full range of motion of the lumbar spine. Dr. Wheeler also noted even with the size of the herniation, he would not necessarily expect a positive EMG. Dr. Wheeler explained if there was no motor weakness the chances are the EMG will not be positive. Dr. Wheeler's personal experience is that EMG/NCV studies tend to underestimate the severity of disc irritation. Dr. Wheeler opined Cunigan had a positive examination the first time he saw Dr. Lyon when he had reproducible pain upon administration of the straight leg test. He also testified a disc rupture at L5-S1 that pinches the S1 nerve root will cause pain down the hip and leg into the ankle and maybe the bottom of the foot.

Cunigan also introduced the Form 107 dated June 20, 2012, prepared by Dr. James C. Owen. Dr. Owen opined Cunigan's injury was the cause of his complaints. Dr. Owen stated as follows:

> The patient gives a clear history of the same pain pattern from the time of the injury, and the EMG studies are noted to be 20% false negative. Therefore, I think [sic] missed the obvious radiculopathy.

On reopening, Kuhlman submitted the April 14, 2011, reevaluation IME report of Dr. Best. Dr. Best stated Cunigan was reevaluated on April 14, 2011, and concluded Cunigan could not be considered to have a work-related L5-S1 disc herniation. Dr. Best stated the July 17, 2008, EMG nerve conduction study found no evidence of radiculopathy; therefore, there was no doubt in his mind the disc herniation occurred sometime between July 17, 2008, and August 23, 2010. He believed the disc herniation cannot be causally related to the work injury of April 24, 2008.

In concluding the reopening was barred by the doctrine of *res judicata*, ALJ Davis entered the following findings of fact and conclusions of law:

> 11. The issues to be decided are benefits per KRS 342.730; unpaid or contested; work-relatedness/causation; credit for unemployment benefits; whether or not the Plaintiff has sustained a worsening of condition shown by an increase in impairment rating and/or occupational disability; a pending medical fee dispute regarding the work-relatedness of the low back injury; the subrogation rights of the private health insurer, Health Care Recovery; res judicata; failure to join all claims at the time of the original litigation; statute of limitations; and, for the perseveration of appellate rights only, the issue of whether or not the Plaintiff met the statutory threshold for re-opening.

As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky.App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. *Paramount Foods Inc., v. Burkhardt*, 695 S.W. 2d 418 (Ky., 1985).

In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.

I have, I hope, given the potential gravity of the Plaintiff's low back injury, carefully weighed the equities, facts and law herein. I agree entirely with the Plaintiff that a condition that is originally found to be a temporary condition can be re-opened to show a worsening of condition into a permanent condition.

I have also considered that at the time of the original litigation the Plaintiff was acting *pro se*, with all of its difficulties and disabilities. I have further, taken into account the fact that the Plaintiff may have a serious low back injury.

Nonetheless, it is clear to me that when Justice Palmore, *Messer. Drees*, 382 S.W.2d 209 (Ky. 1964) spoke of 'mistake' and 'change of condition' he was not speaking of a Plaintiff, on re-opening, alleging an entirely new injury and body part.

Furthermore, while the Plaintiff correctly argues that no physician, at the time of Judge Justice's original opinion, affirmatively stated the Plaintiff had a herniated disk it was clear that Dr. Lyons had requested a lumbosacral MRI. That MRI was denied and the issue of it was before Judge Justice. Therefore, the issue of whether or not the Plaintiff might have a work-related low back injury was before Judge Justice but he concluded that the Plaintiff only had a temporary hamstring injury.

Finally, on this issue, it is clear that the Plaintiff is not arguing that the herniated disk arose subsequent to the Opinion by Judge Justice, as a result of wear and tear or some other possible theory, but was present and work-related prior to the Opinion by Judge Justice. And, as discussed, Judge Justice was not persuaded.

Therefore, based on the following, including but not limited to the fact that the herniated disk was in existence at the time Judge Justice wrote his opinion, the issue of further lumbosacral treatment was before him and denied, and the only work-related finding was of a temporary hamstring injury the Plaintiff, as a matter of law, is precluded, based on the doctrine of *res judicata*, from now arguing that he has a work-related low back injury.

Accordingly, all of his claims in this matter, at this time, are dismissed because, as a matter of law and procedure, he does not have a work-related low back injury.

> I note, again, for emphasis, that this issue is markedly different from a psychological injury that arises subsequent to an original opinion due to increasing and unabated pain. It differs from wear and tear on an adjacent or effected body part to an original injury. It is a condition that was in existence, allegedly, from April 24, 2008, considered by Judge Justice, and rejected.
>
> I am compelled to address the Plaintiff's argument that at the time of Judge Justice's original opinion neither the physicians, the parties, nor Judge had the benefit of the MRI. Whether or not this is newly discovered evidence is not properly before the undersigned and will not be considered. Certainly the issue of the work-relatedness of the lumbar spine was before Judge Justice.
>
> I am dubious that the argument of joinder of claims is applicable since, at the time of Judge Justice's original opinion, the issue of a lumbosacral condition was clearly tried by consent and before Judge Justice.
>
> This re-opening is dismissed, in its entirety, on the doctrine of *res judicata*, according to the above analysis.

Cunigan filed a petition for reconsideration asserting ALJ Davis erroneously determined *res judicata* barred his claim. He also asserted ALJ Davis erred in finding mistake and change of condition did not apply on reopening where an "entirely new injury and body part is asserted." Cunigan argued either ALJ Justice's finding

regarding his condition was erroneous or his condition had worsened since the decision. Cunigan also argued ALJ Davis erred in stating Messer v. Drees, 282 S.W.2d 209 (Ky. 1964) did not apply. Cunigan asserted the finding he suffered from a herniated disc at the time of ALJ Justice's decision is erroneous as ALJ Justice determined he did not suffer from a herniated disc at the time of the initial decision. Alternatively, if ALJ Davis was correct and a herniation existed, then he "should have applied the rationale contained under mistake" addressed in Messer v. Drees, supra. Cunigan also argued the ALJ erred in concluding his condition had not worsened since entry of ALJ Justice's decision.

After Kuhlman filed a response, Cunigan filed an amended petition for reconsideration merely expanding on his original petition for reconsideration.

In the February 25, 2013, order denying the petition for reconsideration, ALJ Davis stated as follows:

> 1. The Administrative Law Judge did not find that the issue of the work-relatedness of a the low back injury was tried by consent before ALJ Justice, I found and stated that the work-relatedness of the lumbar MRI and thus the lumbar injury was specifically and by the terms of the then relevant Benefit Review Conference Memorandum clearly before him. Judge Justice made

> an unambiguous finding that the lumbar MRI was not work-related.
>
> 2. Judge Justice also made an unambiguous finding and Order that the only work-related injury was to the hamstring.
>
> 3. Based on the foregoing to find that on Re-Opening the undersigned is vested with the authority to mingle and blur the lines between "mistake" and "change of condition" so as to find that the Plaintiff has a work-related lumbar disk injury and herniation is not what is intended by either the statute or Justice Palmore.
>
> 4. The Plaintiff does not even argue that the hamstring injury caused his herniated disk. He simply wishes to use "mistake" and "change of condition" interchangeably to morph what is, as a matter of law, a hamstring pull into a herniated disk. This is not logical.
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> 5. A re-opening for mistake is based on newly discovered evidence that could not have been reasonably discovered at the time of the original litigation. A re-opening for change of condition is when a condition a Plaintiff has already been found to have changes, or that condition reasonably causes a new condition.
>
> 6. The Plaintiff is merely re-arguing the merits of the claim.

On appeal, Cunigan asserts KRS 342.125(1) sets forth limited exceptions to the doctrine of *res judicata*, and as those exceptions are applicable in the case *sub judice*, ALJ Davis erred in determining *res judicata* barred

his motion to reopen. Cunigan maintains ALJ Davis erred in stating ALJ Justice determined he only suffered a temporary hamstring injury. Further, ALJ Davis incorrectly concluded because ALJ Justice "denied coverage of a lumbar MRI" he ruled Cunigan did not suffer a work-related back injury. Cunigan argues ALJ Justice found he sustained a work injury on April 24, 2008, but did not limit it to a hamstring strain.

Cunigan maintains although the medical evaluations performed after ALJ Justice's opinion show the lumbar disc herniation was present prior to the decision, there was no evidence of its presence when ALJ Justice issued his opinion. Consequently, there was no evidence before ALJ Justice relating to the nature and severity of the low back injury. Cunigan contends while it is clear from ALJ Justice's opinion "the issue of a lumbosacral condition was tried by consent," there is no indication ALJ Justice determined he did not suffer a back injury when he fell at work. Thus, the reason ALJ Justice determined the MRI was not compensable was not due to the fact Cunigan did not suffer a low back injury, but because other tests indicated he was not suffering from radiculopathy or a disc injury. Cunigan maintains ALJ Justice "denied coverage of a lumbar MRI" because there was no medical evidence of

radiculopathy and he failed to rebut the opinions of Drs. Best and Goldman.

Cunigan contends had the MRI been performed prior to the opinion it would have shown a herniation. However, since the MRI revealing the herniation was not performed until after rendition of the opinion, the results of the MRI constitute newly discovered evidence of a previously unknown work-related condition which alone constitutes grounds for reopening. Pursuant to KRS 342.125(1)(b), Cunigan contends he exercised due diligence by repeatedly requesting an MRI which he was unable to obtain.

Cunigan also contends his disc herniation is not a new injury but additional disability stemming from the original injury. Thus, the disc herniation is a change of disability as shown by objective medical evidence of a worsening impairment due to a condition caused by the injury triggering the application of KRS 342.125(1)(d). Finally, Cunigan contends the claim should have been reopened on the grounds of mistake as defined in Messer v. Drees, supra.

Because Cunigan's argument regarding ALJ Justice deciding whether Cunigan sustained a low back injury is difficult to follow, we feel compelled to first address that issue. We conclude ALJ Davis correctly determined the

issue of whether Cunigan sustained a work-related low back injury was before ALJ Justice as he concluded the only injury Cunigan sustained was a temporary hamstring injury. A review of ALJ Justice's findings in his October 10, 2011, opinion, award, and order reveals Cunigan only introduced evidence regarding a hamstring strain, and the testimony of Drs. Best and Goldman persuaded him Cunigan had a "hamstring strain or tear." ALJ Justice was also persuaded by Dr. Best that the lumbar MRI was not warranted as there were no objective findings of radiculopathy. Therefore, we believe ALJ Justice had before him the issue of whether Cunigan sustained a low back injury and ultimately determined he did not.

That said, in arriving at our decision we do not find that determination to be significant. Because we believe *res judicata* did not bar Cunigan's motion to reopen, we reverse ALJ Davis' decision and remand for further proceedings.

It is well settled the doctrine of *res judicata* applies in the context of workers' compensation awards. Keefe v. O.K. Precision Tool & Die Co., 566 S.W.2d 804, 805 (Ky. App. 1978). On the other hand, KRS 342.125 provides specific and enumerated statutory exceptions to the general rule of the finality of judgments, also known as *res*

judicata. In order to qualify for reopening under the Act, there must be facts alleged sufficient to make a *prima facie* case for reopening pursuant to one of the conditions specified under KRS 342.125. Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681 (Ky. 1972). Where the Act expressly provides for the reopening of a prior decision on specified conditions, the rule of *res judicata* has no application when the prescribed conditions are present. Id. at 682. However, where the application by the parties fails to allege a condition specified under KRS 342.125 (i.e., a showing of change of disability, mistake, fraud, newly discovered evidence, challenges to medical fees, the institution of post award temporary total disability benefits or conforming an award with the requirements of KRS 342.730(1)(c)2), the ALJ and this Board are without statutory authority to provide relief and the doctrine of *res judicata* controls. Slone v. R & S Mining, Inc., 74 S.W.3d 259 (Ky. 2002).

In the case *sub judice*, we believe Cunigan made the requisite showing of two grounds set forth in KRS 342.125. First, Cunigan made a *prima facie* showing of newly discovered evidence. In Turner v. Bluegrass Tire Co., Inc., 331 S.W.3d 605, 609 (Ky. 2010), the Supreme Court defined newly discovered evidence as follows:

> A new trial request may not be granted under CR 60.02 if based on new evidence that could and should have been discovered and produced in the initial trial. [footnote omitted] Each party to a cause of action must, therefore, exercise due diligence in discovering and introducing evidence sufficient to prove its case *before* the matter is submitted for a decision.
>
> As used in KRS 342.125(1), "newly-discovered evidence" refers to evidence existing at the time of the initial proceeding that the moving party did not discover until recently and with the exercise of due diligence could not have discovered during the pendency of the initial proceeding. [footnote omitted] Moreover, the evidence must not be merely cumulative or impeaching but must be material and, if introduced at reopening, probably result in a different outcome. [footnote omitted]

Here, Cunigan established evidence existed at the time of the initial proceeding that he did not discover until recently and with the exercise of due diligence could not have discovered during the pendency of the initial proceeding. We acknowledge the results of the MRI were not in existence until after ALJ Justice decided the claim. Cunigan acknowledged in the April 18, 2011, deposition, that after the ALJ's decision, he could turn in the cost of the MRI on his wife's insurance and obtain the MRI. The MRI revealed he had a significant herniated disc. Although Kuhlman correctly notes the MRI report was not in existence

at the time of the proceedings, that fact is a distinction without a difference as Kuhlman fought to prevent the existence of the evidence sought, the MRI report.

In filing the action, Cunigan listed a leg injury which was the only body part which he knew was causing him significant pain. He did not have any back pain. Throughout the proceedings, Cunigan consistently emphasized he desired a lumbar MRI be performed. Dr. Lyon initially recommended a lumbar MRI and then stated in a report dated July 28, 2008, the MRI was not needed. However, on February 9, 2009, and November 18, 2009, Dr. Lyon emphasized an MRI was needed in order to obtain the right diagnosis. Cunigan testified Dr. Lyon would not let him return until he obtained the MRI. The record reveals Cunigan tried diligently to obtain an MRI and was blocked by Kuhlman at every turn. After Cunigan filed a Form 101, Kuhlman immediately filed a medical fee dispute contesting the necessity for the MRI. In fact, even though its own physicians agreed with Dr. Lyon's diagnosis of a hamstring strain, Kuhlman filed a medical fee dispute contesting Dr. Lyon's medical bills of $276.00. Cunigan tried diligently to obtain the MRI, but could not because Kuhlman prevented him from obtaining it.

Also of significance is the fact ALJ Justice initially ordered a university evaluation and, based upon Kuhlman's petition for reconsideration, reversed himself. Before an accurate diagnosis could have been rendered, it is clear an MRI should have been performed. We believe it is logical to conclude the MRI would not have been performed until ALJ Justice resolved the medical fee dispute concerning the reasonableness and necessity of the MRI. Thus, the fact the MRI was obtained after ALJ Justice's decision does not blur the fact it was sought by Cunigan, based on the recommendation of Dr. Lyon, and was resisted by Kuhlman through the use of numerous reports and letters of Drs. Best and Goldman.

Kuhlman's assertion the results of the MRI was not evidence in existence at the time of the initial proceedings rings hollow given its efforts to block Cunigan from obtaining the MRI. Moreover, the MRI report was not cumulative evidence but was material and probably would result in a difference outcome.

Cunigan made a *prima facie* showing adequate to support granting his motion as required by Turner v. Bluegrass Tire Co., Inc., supra. Cunigan "made a preliminary showing of the substantial possibility of proving one or more of the prescribed conditions sufficient

to justify putting the adversary to the expense of re-litigation." Id. at 609. Dr. Wheeler unequivocally stated the herniated disc necessitating the surgery was caused by the work injury of April 24, 2008. Dr. Wheeler's opinion is reinforced by Dr. Owen's opinion. Thus, ALJ Davis erred in applying the doctrine of *res judicata* and not determining Cunigan satisfied his burden under KRS 342.125(1)(b) by making a *prima facie* showing of newly discovered evidence which could not have been discovered with the exercise of diligence.

We also believe Cunigan made a *prima facie* showing of mistake pursuant to KRS 342.125(1)(c) in that all the physicians initially diagnosed a hamstring strain. Although in his later records Dr. Lyon diagnosed a pelvic sprain and restless leg syndrome, his earlier records reveal he had diagnosed a hamstring strain.[8] More importantly, the reports of Drs. Best and Goldman introduced during the proceedings reveal their agreement with Dr. Lyon's diagnosis of a hamstring strain. ALJ Justice relied upon these opinions in concluding Cunigan the work injury caused only a hamstring strain.

[8] See Dr. Lyon's July 28, 2008, record. In that notation, Dr. Lyon stated treatment options were discussed with Cunigan and the nerve studies were negative. Dr. Lyon stated an MRI was not warranted and recommended resuming physical therapy and diagnosed a hamstring strain.

We believe the rationale enunciated in Kendrick v. Bailey Vault Company, Inc., 944 S.W.2d 147 (Ky. App. 1997) is applicable. Kendrick sustained a work-related back injury and was "treated by and underwent surgery at the hands of, Dr. Richard Mortara." Id. at 148. Thereafter, Dr. Mortara assessed an 8% functional impairment, opined Kendrick was physically restricted for one year and stated Kendrick had reached MMI. Kendrick and the employer's carrier agreed to settle his claim for a lump sum payment of $13,000 plus two years of medical expenses. Kendrick testified he understood after two years following the date of approval of the settlement he would no longer be entitled to medical benefits. The settlement agreement included language that the claim against Bailey Vault Company, Inc. would be dismissed with prejudice and Kendrick waived the right to reopen the claim. With the passage of time, Kendrick realized his condition did not improve as predicted by Dr. Mortara. Instead, additional surgery was required.

Kendrick retained counsel and filed a motion to set aside the settlement agreement as unconscionable. Id. at 148. The motion was granted to the extent the claim would be reopened for the taking of proof. Bailey Vault Co. Inc. asserted the reopening was barred by *res judicata*.

The ALJ ruled the dismissal with prejudice and the waiver of reopening were not enforceable. The Board concluded the ALJ so ruled because he determined both parties were under a mutual mistake with respect to Kendrick's ability to return to work as predicted by Dr. Mortara. Id. at 149. The Court of Appeals affirmed the Board's holding as to mutual mistake.[9] The Court of Appeals ultimately determined it was undisputed both sides relied upon Dr. Mortara's opinion Kendrick had reached MMI, was 8% functionally impaired, and would have restrictions for only one year. In fact, Dr. Mortara was incorrect. Id. at 150. The Court of Appeals held as follows:

> Clearly, this scenario amounts either to constructive fraud or mutual mistake. In either case, Kendrick has presented a compelling case for setting aside the settlement agreement.

Id.

The same rationale applies in this case. All the physicians diagnosed a hamstring strain which ALJ Justice relied upon in determining Cunigan sustained only a hamstring strain. When Cunigan was able to obtain an MRI, because he could turn in the bill on his wife's insurance, it revealed the pain he had constantly experienced since

[9] The Court of Appeals affirmed in part and reversed in part.

the April 24, 2008, injury was due to a large herniated disc at the L5-S1 level. Mistake as defined in Kendrick v. Bailey Vault Co., Inc., supra, is present in the case *sub judice*.

We reject Cunigan's assertion the disc herniation is evidence of a change of disability as shown by objective evidence of a worsening of the impairment. During the preceding before ALJ Justice, Cunigan consistently maintained a lumbar MRI was necessary to reveal the extent of his work injury. Consistent with this premise, Cunigan argues on appeal the MRI report and Dr. Wheeler's report reveal the herniated disc was caused by the work injury and was present during the proceedings before the ALJ.

The MRI report and Dr. Wheeler's report establish KRS 342.125(1)(d) is not applicable. The MRI report is evidence of the true nature of Cunigan's condition caused by the work injury. It is not evidence of a worsened condition. Dr. Wheeler's report firmly establishes the lumbar MRI revealed the injury caused by the work incident of April 24, 2008, and not a worsened condition. Similarly, Cunigan's testimony throughout these entire proceedings was that his impairment/condition had remained constant rather than worsened.

Finally, although not necessarily on all squares with this case, we believe the principles enunciated in Messer v. Drees, supra, mandate vacating the ALJ's decision. Messer, while operating a backhoe, sustained a substantial injury. He filed a claim in December 1960 resulting in an award of total disability for forty weeks and a 10% partial permanent disability. The full Board award was entered on September 19, 1961, based on testimony taken in March, April, and May of that year. However, on September 18, 1961, while the matter was pending on review, Messer, through new counsel, sought reopening for the purpose of introducing further medical testimony. A supporting affidavit of counsel stated it had been discovered from a competent psychiatrist Messer was suffering from traumatic neurosis that had been unknown to both present and previous counsel. Counsel also avowed that further proof would establish a change of conditions and the existence of mistake in the referee's estimate of Messer's condition. Id. at 211. The Board overruled the motion commenting "there was also evidence indicating that [Messer] may be suffering from a traumatic neurosis. However, the evidence provided by [Messer] was highly insufficient to sustain this proposition, particularly as to causation." Id. Messer did not appeal.

A year later, on September 18, 1962, Messer again moved to reopen on the same grounds as before, attaching a report by another psychiatrist to the effect he was suffering from organic brain disease in the form of post traumatic encephalopathy manifested by blackout spells, severe memory loss, impairment of his thinking, and concentration. Id. The psychiatrist stated from a psychiatric standpoint Messer was probably permanently and totally disabled due to the accident in regards to adequate work or social adjustment. Id. The Board sustained the motion for the limited purpose of hearing evidence to determine the existence, *vel non*, of grounds for reopening. Id. Drees, the employer, introduced somewhat equivocal testimony from another psychiatrist. On the basis of the testimony of the psychiatrists, the Board issued an opinion and order dismissing the motion to reopen because there had been no change in Messer's condition or a mistake made in granting the original award. The Board relied on a comment in the previous opinion of September 19, 1961, to the effect there was evidence at that time indicating traumatic neurosis, buttressed by the new psychiatrist's more recent testimony in which he expressed the opinion Messer had been totally disabled from the date of the accident. Id. The Supreme Court stated as follows:

To make a long story short, we do not agree. We think the case should have been opened for further testimony in September of 1961, pursuant to the first motion, [footnote omitted] and that certainly it should be reopened now.

There is a rule in the game of chess that once the player with the move has touched a man he must move that man. He cannot change his mind and move another. Here the attorney who represented Messer until after the case had been submitted and passed on by a referee pitched his claim on the theory that the compensable injury was confined to aggravation or 'lighting up' of a pre-existing degenerative arthritic condition of the cervical spine. In the beginning it was not at all obvious that a psychiatric disturbance was involved. For example, the attending physician, a general practitioner, did not send him to a psychiatrist; he sent him, rather, to a neurosurgeon surgeon and then to an orthopedic surgeon, [footnote omitted] each of whom detected the presence of a psychological complication but refrained from an attempt to diagnose its cause or extent. Somewhere along the line, in April of 1961, Messer was seen by Dr. Thomas A. Weldon, the psychiatrist whose report dated September 14, 1961, was later used in support of the first motion to reopen. Whether counsel had a prompt report of this first examination by a psychiatrist and, if so, what it disclosed are not shown by the record. As we have suggested, however, Messer's present counsel did not know of it until immediately before they moved for permission to develop the matter further.

> We do not know the reason for the failure of original counsel to pursue the question of what relationship, if any, exists between Messer's mental disturbance and the accidental injury he sustained on August 4, 1960. As of now, however, it is abundantly clear from a mere reading of the record that the outward and visible manifestations of his disability have progressed to the degree that what may not have been readily apparent in the spring of 1961 is now clear. [footnote omitted] Somewhere during the course of this transition it was incumbent on Messer's counsel in the exercise of their professional responsibility to shift the course and theory of his claim. Their timing in this respect cannot fairly be judged according to the standards of medical skill; they are lawyers. And a workmen's compensation case is not a game in which a player may not reconsider his move once he has begun it. The first motion for reopening, in September of 1961, which stated in substance that there had been a misconception with respect to the nature of the disability, and thus in the way the case had been practiced, was in our opinion a timely and proper application under the particular circumstances at hand.

Id. at 212.

The Supreme Court held as follows:

> We do not suggest that after a case has been lost or appears about to be lost counsel should be allowed to halt the proceedings and bring up reinforcements. But bearing in mind that compensation laws are fundamentally for the benefit of the injured workman, a just claim must not fall victim to rules of order unless it

> is clearly necessary in order to prevent chaos. Time often tells more about medical cases than the greatest of experts are able to judge in advance. In *Clear Fork Coal Company v. Gaylor*, Ky., 286 S.W.2d 519, 522 (1956), this court recognized, for example, that even the permanence of a disability theretofore thought to be temporary 'is of itself in the nature of a change.' When subsequent events indicate that an award was substantially induced by a misconception as to the cause, nature or extent of disability at the time of the hearing, justice requires further inquiry. Whether it be called a 'mistake' or a 'change in conditions' is a matter of mere semantic taste. The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it. Cf. Blue Diamond Coal Co. v. Meade, Ky., 289 S.W.2d 503 (1956).
>
> *Wells v. Fox Ridge Mining Co.*, Ky., 243 S.W.2d 676 (1951), is distinguishable in that there was no change, actual or ostensible, in the claimant's condition, whereas in this case, though Messer's actual malady and consequent 100% permanent disability may actually have existed from the time of the accident, the observable symptoms necessary to an accurate and reliable diagnosis became more manifest over a period of time extending beyond the original hearing. [footnote omitted]

Id. at 212, 213.

The above language is applicable in the case *sub judice*. Here, after filing a Form 101 alleging an injury

to the only body part that hurt, Cunigan continuously sought an MRI of the lumbar spine. Dr. Wheeler's testimony sufficiently explains why Cunigan did not experience back pain and that he may well have had a full range of motion of the lumbar spine given the location of the herniated disc. In addition, Dr. Wheeler believed on the first examination by Dr. Lyon, Cunigan had a positive test for a ruptured disc because the straight leg test reproduced leg pain. Further, Dr. Wheeler's testimony establishes a ruptured disc at L5-S1 would cause the exact symptoms experienced by Cunigan from the time of the injury until he saw Dr. Wheeler post-award. In addition, the following observation of Dr. Goldman in his June 15, 2010, letter are insightful:

> I am still at a loss as to what Dr. Lyon is looking for and how an MRI will change this gentleman's treatment, nor is it medically necessary. However as he is now over 2 years out from this injury, if he is still having pain in that region, an MRI may be reasonable if for no other reason than to convince this gentleman, and possibly his treating physician, that there is nothing further that needs to be done.
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> Therefore, once again it is recommended while possibly reasonable the MRI is not medically necessary.

Accordingly, the January 10, 2013, opinion and order and the February 25, 2013, order ruling on the

petition for reconsideration and amended petition for reconsideration of ALJ Davis are **REVERSED**. This claim is **REMANDED** to ALJ Davis for a determination of whether Cunigan sustained a work-related low back injury on April 24, 2008, and, if appropriate, an award of income and medical benefits.

ALL CONCUR.

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