Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 7, 2018

CLAIM NO. 201296167

JAMES ALCORN PETITIONER

VS. **APPEAL FROM HON. BRENT DYE, ADMINISTRATIVE LAW JUDGE**

INDUSTRIAL MACHINE & TOOL CO., INC. and
HON. BRENT DYE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. James Alcorn ("Alcorn") appeals from the Opinion and Order rendered August 10, 2018 by Hon. Brent E. Dye, Administrative Law Judge ("ALJ"). The ALJ determined Alcorn failed to prove the work-related injury he sustained while working for Industrial Machine & Tool ("Industrial Machine") on January 24, 2012 has worsened since the decision rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ Weatherby") on August 24, 2015.

The ALJ determined Alcorn failed to prove the L4-5 lumbar fusion that he underwent after the August 2015 decision was caused by the January 24, 2012 injury. Alcorn also appeals from the September 13, 2018 order denying his petition for reconsideration.

On appeal, Alcorn argues the ALJ erred in finding the worsening of his lumbar condition was not caused by his work injury, and that a contrary result is compelled. Alcorn argues the ALJ's decision is arbitrary, capricious and an abuse of discretion. Because we determine the ALJ's decision is supported by substantial evidence, and a contrary result is not compelled, we affirm.

Alcorn filed a Form 101 on June 25, 2012, alleging he injured his low back and legs as he was lifting a heavy object in the course and scope of his employment as a welder/fabricator with Industrial Machine. His Form 104 reflects Alcorn's work history includes employment as a maintenance worker at a recreation area, a body shop laborer, a snow removal laborer, and as a welder/fabricator. The claim was assigned to ALJ Weatherby who issued an interlocutory decision on November 13, 2014 determining that based upon the "objective evidence along with the credible opinions based thereupon has satisfied the Defendant's burden and convinced the ALJ that the requested additional MRI and lumbar fusion surgery are not reasonable and necessary for the work injury." In his decision rendered August 24, 2015, ALJ Weatherby determined Alcorn sustained a work-related injury on January 24, 2012, but also determined he had a pre-existing active lumbar condition. He awarded permanent partial disability benefits based upon a 5% impairment rating

of which he attributed half to the work injury, and half to the pre-existing active condition.

Alcorn filed a motion to reopen his claim on April 25, 2017, alleging his work-related injury had worsened to the point that he is now permanently and totally disabled, after undergoing a spinal fusion surgery at L4-5 by Dr. Amr El-Naggar, paid for through his private health insurance. In support of the motion, Alcorn submitted the April 11, 2017 affidavit and March 21, 2017 office note of Dr. Chad Morgan, D.C., who opined his condition has deteriorated relative to his work injury since the August 24, 2015 decision. Hon. Douglas W. Gott, Chief Administrative Law Judge, issued an order on May 23, 2017, finding Alcorn had set forth a *prima facie* case for reopening pursuant to Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681 (Ky. 1992). The case was then assigned to the ALJ.

Alcorn testified by deposition on August 4, 2017, and at the hearing held October 25, 2017. Alcorn testified he underwent L4-5 fusion surgery by Dr. El-Naggar in June 2016, which was paid for through his health insurance. He testified he underwent the surgery because of the severity of his low back and leg pain. He stated the surgery did not provide much relief, and he still has problems with left leg and low back pain on a daily basis. He complained of burning and stabbing pain. Since the surgery, he has undergone lumbar injections, and takes anti-inflammatory medication.

Dr. Stephen Autry evaluated Alcorn after his surgery. Alcorn testified he took no diagnostic studies or medical records with him to that evaluation. He also testified that prior to his low back surgery he believed he could return to work,

but does not believe he can do so now. He also testified he does not believe he is able to return to the type of job performed on the date of the injury due to the lifting and bending requirements. He also testified he is a high school graduate, with specialized training in welding and automobile mechanics, but does not believe he can work in either field due to his low back pain. Alcorn admitted that at the time of his original claim he testified he did not believe he could return to his past work, and has not returned to work since the accident.

As noted above, Alcorn submitted Dr. Morgan's affidavit and office note in support of his motion to reopen. In his office note, Dr. Morgan attributed Alcorn's low back complaints to the January 24, 2012 work injury, with no mention of his pre-existing active condition as determined by ALJ Weatherby. Although the report did not detail how Dr. Morgan arrived at his opinion, he stated Alcorn's condition has worsened since the August 24, 2015 decision, and he is now totally disabled.

Alcorn submitted the Form 107-I medical report prepared by Dr. Autry who evaluated him at his attorney's request on June 21, 2017. Alcorn advised he sustained a sudden onset of low back pain while turning and handling materials at work on January 24, 2012. Alcorn also advised he had experienced some previous intermittent low back pain, but it was not comparable to the pain he experienced due to the work incident. Dr. Autry noted Alcorn had never returned to work after the January 24, 2012 work injury. He also noted Alcorn's 2016 surgery provided only moderate pain relief. Dr. Autry outlined the records he reviewed, which did not

include the reports from either Dr. David Muffly or Dr. Russell Travis. Likewise, Dr. Autry did not list ALJ Weatherby's 2015 decision.

Dr. Autry diagnosed Alcorn with a herniated lumbar disc, superimposed on degenerative arthritis of the lumbar spine, aggravated by the acute January 4, 2012 injury. He stated Alcorn's complaints are due to his work injury. He stated Alcorn had no previous history of a similar episode. Dr. Autry, contrary to ALJ Weatherby's decision, determined Alcorn had no active impairment prior to his work injury. He assessed a 23% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") 5th Edition, which he attributed to the January 24, 2012 work injury. Dr. Autry found Alcorn has reached maximum medical improvement ("MMI"), and stated he does not have the physical capacity to return to the type of work performed on the date of the injury. He also advised Alcorn to avoid lifting over twenty pounds, and to avoid repetitive bending, twisting, stooping, crouching, kneeling and climbing.

Alcorn also filed Dr. James Owen's June 20, 2013 report (rendered prior to the ALJ Weatherby's decision). He noted Alcorn reported a January 24, 2012 injury while moving heavy bolts. He diagnosed persistent low back pain with radiculopathy associated with a recent spinal cord stimulator operation. He found Alcorn had no pre-existing active conditions, but found he had pre-existing dormant conditions that were aroused into disabling reality by the work injury.

Alcorn additionally filed treatment records from Dr. El-Naggar. On May 12, 2016, Dr. El-Naggar noted Alcorn is status post removal of a spinal cord

stimulator, with complaints of low back pain radiating into both legs, worse on the left since his work-related injury. Alcorn was seen for a preoperative evaluation for a spinal fusion at L4-5. Alcorn also submitted Dr. El-Naggar's operative report reflecting he underwent a left L4-5 hemi laminectomy with partial facetectomy and discectomy followed by L4-5 posterior lumbar interbody fusion. He also filed the discharge summary from Lake Cumberland Regional Hospital dated June 3, 2016.

Dr. Muffly evaluated Alcorn at Industrial Machine's request on July 18, 2017. He had previously evaluated Alcorn on September 12, 2012. He noted Alcorn sustained a low back injury on January 24, 2012 from lifting a long bolt at work. He also noted Alcorn had a history of low back pain prior to that incident. He additionally noted Alcorn underwent lumbar surgery on June 1, 2016. Alcorn reported he experiences low back pain down the left leg to the knee on a daily basis. Dr. Muffly noted Alcorn did not limp or exhibit lumbar stiffness during his examination.

Dr. Muffly attributed Alcorn's continued complaints of low back pain after the L4-5 fusion to degenerative disk disease which he opined was pre-existing and active prior to January 24, 2012. He specifically stated as follows:

> The lumbar fusion was secondary to L4-5 degenerative disk disease. I consider the need for the lumbar fusion to be the pre-existing active portion of his impairment. The need for lumbar fusion was not related to the job accident dated 1-24-2012 which caused a temporary lumbar disc herniation. (Subsequent imaging studies show a resolution of the herniation). . . . The lumbar fusion was not related to the 1-24-2012 work injury.

Dr. Muffly stated that while Alcorn's impairment rating may have increased due to his degenerative condition and surgery to 17.5% pursuant to the

AMA Guides, this is due to a worsening of his pre-existing active condition. The 2.5% impairment attributable to the work injury remains unchanged. Likewise, any increase in restrictions is due to the pre-existing active condition, and not Alcorn's work injury.

Industrial Machine also filed Dr. Travis' September 20, 2017 report. Dr. Travis also opined that Alcorn's impairment has increased to 20% pursuant to the AMA Guides due to the fact he had surgery. Dr. Travis stated the surgery was not related to the January 24, 2012 injury, but was rather due to the pre-existing active degenerative changes. He noted the disk herniation, which occurred on January 24, 2012, has resolved. He stated the lumbar fusion was neither reasonable nor necessary for the cure and relief of Alcorn's work-related injury.

Industrial Machine filed a Form 112 and medical dispute on November 11, 2017. It attached the November 13, 2014 Interlocutory Opinion and Order from ALJ Weatherby who found the L4-5 fusion surgery proposed by Dr. El-Naggar was not reasonable and necessary for the January 24, 2012 work injury. ALJ Weatherby, relying upon the objective evidence and Dr. El-Naggar's own statement, found "that the objective evidence along with the credible opinions based thereupon has satisfied the Defendant's burden and convinced the ALJ that the requested additional MRI and lumbar fusion surgery are not reasonable and necessary for the cure and relief of the work injury."

A benefit review conference ("BRC") was held on October 10, 2017. The BRC order and memorandum reflects the issues preserved for determination included benefits per KRS 342.730/PTD (as well as constitutionality of KRS

342.730(4)), unpaid or contested medical expenses, work-relatedness/causation, credit for prior indemnity payments, exclusion for pre-existing disability/ impairment, temporary total disability, and whether the surgery performed by Dr. Magdy El-Kalliny is work-related as well as reasonable and necessary. The order also reflects additional issues including entitlement to reopening benefits, *res judicata* and law of the case, and whether surgery is the reason for the increase in impairment rating.

In his decision issued August 10, 2018, the ALJ, relying upon Drs. Muffly and Travis, determined Alcorn did not prove his increased impairment and impairment ratings are work-related. The ALJ specifically found as follows:

> After reviewing the medical evidence, as well as Alcorn's testimony, the ALJ finds Alcorn did not meet his burden. Alcorn did not prove his increased impairment and impairment rating are work-related. More specifically, Alcorn did not prove his L4-5 surgery and his January 24, 2012 injury are related. The ALJ finds the surgery was not work-related medical treatment. Industrial Machine is not liable for the surgery, or its resulting impairment or impairment rating.
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> Drs. Muffly and Travis' findings, opinions, and conclusions, are more credible than the ones Dr. Autry issued. Dr. Autry did not even directly address the L4-5 fusion's work-relatedness. He did not specifically explain or analyze how/why the June 1, 2016 fusion and the January 24, 2012 injury are related. Instead, Dr. Autry essentially re-argued the case's underlying injury merits, which ALJ Weatherby previously resolved.
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> Dr. Autry opined Alcorn's job duties caused his complaints and the diagnosis. Dr. Autry diagnosed a "[h]erniated lumbar disc superimposed on degenerative arthritis of the lumbar spine aggravated with the acute injury of January 24, 2012." Although this opinion may be accurate, it does not address how/why the June 1,

2016 fusion and the January 24, 2012 injury are related, especially when the diagnostic studies show the herniated disc subsequently self-absorbed and resolved.

Dr. Autry's diagnosis did not even state something to the effect, 'status-post work-related L4-5 surgery,' which the ALJ could directly infer connected the work injury and surgery. Instead, the ALJ is left with indirectly inferring it, based on the fact Dr. Autry opined the work injury caused a 23% permanent impairment rating, which takes the fusion into account. Again, however, this does not provide the ALJ any analysis or supporting rationale.

Under his report's causation section, Dr. Autry simply marked the "[y]es" area, when asked "[w]ithin reasonable medical probability, was plaintiff's injury the cause of his/her complaints?" He then stated, "[t]he plaintiff's history and job description correlate with the specific diagnoses. The plaintiff's job had significant lifting and twisting…[.]" This analysis does not address or focus on the L4-5 surgery, which caused Alcorn's increased impairment and impairment rating. Instead, it focuses on the underlying injury's mechanism.

In his report's "explanation of causal relationship" section, Dr. Autry only explains how/why cumulative trauma occurs. Again, Dr. Autry did not specifically address the L4-5 surgery. He did not provide any surgical rationale, analysis, or explanation. The ALJ is left with indirectly inferring Dr. Autry opined the June 1, 2016 surgery and Alcorn's January 24, 2012 injury are related, based on the fact Dr. Autry opined the work injury caused a 23% permanent impairment rating, which takes the fusion into account. The ALJ requires more.

Dr. Autry's impairment rating opinion, which would serve as the ALJs[sic] basis for indirectly inferring that Dr. Autry opined the surgery was work-related, is even flawed. Dr. Autry opined Alcorn has a 23% permanent impairment rating. He assigned this rating, because Alcorn underwent the L4-5 fusion. Significantly, Dr. Autry marked the "[n]o" area, when asked "[did the] [p]laintiff [have] an active impairment prior to this injury [?]" This establishes Dr. Autry formulated his

opinion, at least in part, because he thought Alcorn did not have any prior significant low back problems. This, however, is not true.

ALJ Weatherby's August 24, 2015 decision establishes that, immediately before his work-related injury occurred, Alcorn had a pre-existing, active, symptomatic, and impairment ratable, low back condition. ALJ Weatherby found Alcorn's pre-existing active low back condition warranted a 2.5% permanent impairment rating. This is half the rating ALJ Weatherby found Alcorn had at that time.

Even if the ALJ indirectly inferred Dr. Autry opined the June 1, 2016 surgery and Alcorn's January 24, 2012 injury were work-related, the fact Dr. Autry opined Alcorn did not have a pre-existing active impairment casts a dark shadow over his work-relatedness/causation opinion. Knowing the claimant's complete and relevant medical history, as well as whether there was a prior quasi-judicial finding that the claimant had a pre-existing active low back condition, is highly material when issuing a credible causation opinion.

The ALJ notes Dr. Autry did not reference ALJ Weatherby's prior decision. His report also does not list it. Dr. Autry's report does not indicate he reviewed Alcorn's prior medical records, or even ones before the June 1, 2016 surgery. Other than referencing a November 16, 2015 MRI report, every other medical record Dr. Autry reviewed represents treatment Alcorn received on or after June 1, 2016. Therefore, it appears Dr. Autry did not have a complete understanding and picture concerning Alcorn's prior medical history/ treatment, as well as ALJ Weatherby's factual-findings. There are too many questions with Dr. Autry's opinions. His report generates more questions than it answers. The ALJ does not find it credible.

Dr. Morgan's opinion falls into the same trap. He did not address the June 1, 2016 L4-5 surgery's cause. Dr. Morgan only documented Alcorn's symptoms, as well as noted he underwent the surgery. He also opined Alcorn's condition had deteriorated since the August 24, 2015 decision. Again, however, he did not provide any analysis concerning the surgery.

The ALJ finds Drs. Muffly and Travis credible. Unlike Dr. Autry, Drs. Muffly and Travis fully understood Alcorn's pertinent pre and post injury medical history. In fact, they both issued opinions during the initial proceedings. They are very familiar with Alcorn's medical history and condition. Dr. Muffly, who is an orthopedic surgeon, has even examined Alcorn on two separate occasions - occurring over seven years apart.

Drs. Muffly and Travis also reviewed the diagnostic studies. Unlike Dr. Autry, they directly addressed the surgery's etiology, and issued opinions concerning it. They also, unlike Dr. Autry, analyzed and supported their work-relatedness/causation opinions. They explained their opinions' rationale, and basis.

Dr. Muffly found the surgery was not work-related. Dr. Muffly, in pertinent part, when addressing whether the surgery was work-related, stated:

> The lumbar fusion was secondary to L4-5 degenerative disc disease. I consider the degenerative disease to be the pre-existing active portion of his impairment. The need for lumbar fusion was not related to the job accident dated 1-24-2012 which caused temporary lumbar disc herniation (subsequent imaging studies show resolution of the herniation)…The lumbar fusion was not related to the 1-24-2012 injury.

Dr. Travis reached the same conclusion, but provided a more detailed analysis. Dr. Travis, who is a neurosurgeon and has performed the surgery Alcorn underwent, in pertinent part, stated:

> There was no indication for lumbar fusion related to the 1/24/2012 incident. On 1/24/2012 Mr. Alcorn suffered a disc herniation at L4-5 on the left. This man had a lumbar MRI 2/28/2012…which showed a central extrusion at L4-5 paracentral to the left impacting the left L5 nerve root, pressing it against the

posterior spinal wall. Fortunately for Mr. Alcorn this large fragment went the way of 90% of extruded fragments and the body absorbed it. The disc herniation resolved without any further compression on the nerve root. There is clear literature that I can forward if requested that shows 85-90% of large extruded disk fragments will be considered a foreign body within the spinal canal by the body and will undergo granulation phagocytosis and absorb without further compression of the nerve root.

I reviewed the lumbar MRI of 12/6/2012. This clearly shows resolution of the previously large extruded disk at L4-5 left and no compromise of the neural foramen or neural elements. There was specifically no compromise of the neural foramen or neural elements. There was specifically no compromise of the left L5 nerve root at the L4-5 disk space.

In my addendum of 5/31/2014 I recorded that on 4/6/2013, just prior to the visit of 4/13/2013, Dr. El-Naggar noted he reviewed the MRI of the lumbar spine which demonstrated a small protrusion L4-5 left. He stated, "No significant foraminal stenosis or fragment component. The protrusion is decreased in size from the previous MRI scan. Therefore, I do not recommend we proceed with the scheduled L4-5 HLD."

The injury that Mr. Alcorn suffered, resulting in disc herniation L4-5 left, on 1/24/2012 resolved. The disc fragment resolved and no longer caused pressure on the left L5 nerve root. Therefore, there is no indication for any surgery related to the 1/24/2012 incident.

The only reason I can find that Dr. El-Naggar proceeded with fusion was

> because he had degenerative changes at L4-5. There is no disc herniation. There is no instability. No x-rays with flexion-extension ever demonstrated any instability or any indication for fusion. The MRI showed resolution of the disc fragment and no compression of the nerve roots at any level. There was no indication for any surgeries; and particularly not a fusion at L4-5.
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> Drs. Muffly and Travis opined Alcorn's June 1, 2016 L4-5 fusion caused his increased impairment and impairment rating. However, they also opined the surgery and Alcorn's 2012 work injury were not related. Therefore, if the increased impairment and impairment ratings' source is not work-related, then Alcorn's increased disability is also not work-related.
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> Alcorn had the proof burden, and non-persuasion risk. After carefully weighing the evidence, the ALJ finds Alcorn did not meet his proof burden. The ALJ found Industrial Machine's experts (Drs. Muffly and Travis) more credible than the ones (Drs. Autry and Morgan) Alcorn utilized. The ALJ explained his rationale. Based on the evidence's totality, the ALJ finds Alcorn did not meet his burden and dismisses his reopening.

Alcorn filed a petition for consideration, arguing the ALJ failed to provide essential findings of fact, and misinterpreted the evidence. He argued the evidence compelled a finding in his favor. While he admitted he had pre-existing issues with his back, they were not active or debilitating prior to the date of injury. He argued the primary issue in this reopening is not to re-determine the work-relatedness of his injury, but rather whether or not his condition had worsened.

The ALJ denied the petition in an Order dated September 10, 2018. He found Alcorn's petition for reconsideration was merely an attempt to re-argue the evidence. The ALJ expressed his belief that he properly reviewed, summarized, and

understood the evidence. He also asserted the reasoning behind his determination that Alcorn did not meet his burden of proof. The ALJ specifically stated as follows:

> The experts agreed that the Plaintiff's impairment and impairment rating had increased since the 8/24/15 decision. The experts further agreed that the June 1, 2016 L4-5 fusion caused the Plaintiff's increased impairment, and impairment rating. Therefore, because the surgery caused the Plaintiff's increased impairment and impairment rating, the Plaintiff had to prove the surgery and his work injury were related. The reason is if the increased impairment and impairment ratings' source (the surgery) is not work-related, then the Plaintiff's increased disability is also not work-related.
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> After reviewing the medical evidence, as well as the testimony, the ALJ found the Plaintiff did not meet his burden. The Plaintiff did not convince this ALJ that his increased impairment and impairment rating were work-related. More specifically, the Plaintiff did not prove his L4-5 surgery and his January 24, 2012 injury were related. Because the Plaintiff's increased impairment and impairment rating's source (the surgery) was not work-related, the ALJ found the Plaintiff's increased disability was also not work-related.

On appeal, Alcorn argues the ALJ erred in determining the worsening of his condition was not caused by this work injury. He argues a contrary result is compelled. He additionally argues the ALJ's decision is arbitrary, capricious and an abuse of discretion. Industrial Machine argues Alcorn's appeal should be dismissed for failure to join Dr. El-Kalliny and the Cumberland Neurosurgical Clinic as indispensable parties to the appeal.

We initially note that as the claimant in this reopening, Alcorn had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in his burden,

the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). (Emphasis added). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's

ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

As explained by the ALJ, it is undisputed that ALJ Weatherby, in his decision rendered August 24, 2015, found Alcorn had both a work-related injury, which occurred on January 24, 2012, as well as a pre-existing active condition of the lumbar spine. There was no appeal from that decision, therefore that determination is *res judicata*. The ALJ in the reopening clearly relied upon the opinions of Drs. Muffly and Travis who attributed the fusion surgery for the treatment of Alcorn's pre-existing active degenerative condition. Both physicians opined the compensable low back condition, the L4-5 disk herniation, had resolved. While Alcorn can point to evidence supporting his allegation that the surgery and increase in impairment were caused by the work incident, it does not compel a decision in his favor. The ALJ clearly reviewed all evidence of record, and adequately provided a basis and explanation for his decision. The ALJ acted within his discretion in finding the surgery, as well as the ensuing increase in impairment is not attributable to the work injury, and his decision will not be disturbed.

We decline to dismiss the appeal as requested by Industrial Machine. We determine Dr. El-Kalliny and the Cumberland Neurosurgical Clinic are not indispensable parties to this appeal. Reed & Damron v. Barnett, 2018 WL 3954276 (Ky. Ct. App., August 17, 2018) (designated Not to be Published), cited pursuant to CR 76.28(4).

Accordingly, the August 10, 2018 Opinion and Order, and the September 3, 2018 Order on petition for reconsideration rendered by Hon. Brent E. Dye, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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