BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H000809

STACY EVANS,
EMPLOYEE **CLAIMANT**

EL DORADO PACKAGING, INC.,
EMPLOYER **RESPONDENT**

CNA INSURANCE COMPANY,
INSURANCE CARRIER/TPA **RESPONDENT**

OPINION AND ORDER FILED JANUARY 12, 2022

Hearing before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on October 14, 2021, in El Dorado, Union County, Arkansas.

The claimant was represented by the Honorable Laura Beth York, Rainwater, Holt & Sexton, Little Rock, Pulaski County, Arkansas.

The respondents were represented by the Honorable Karen H. McKinney, Barber Law Firm, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the Prehearing Order filed July 23, 2021, the parties agreed to the following stipulations, which they affirmed on the record at the hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed with the claimant at all relevant times including January 27, 2020, the date the claimant alleges he sustained work-related injuries to his head, neck, and lower back.
3. The claimant's average weekly wage (AWW) is sufficient to entitle him to the 2020 maximum weekly compensation rates for temporary total disability (TTD), and permanent partial disability (PPD) benefits, if the claim is deemed compensable.
4. The respondents have controverted this claim in its entirety.
5. The parties specifically reserve any and all other issues for future determination

and/or litigation.

(Commission's Exhibit 1 at 1-2; Hearing Transcript at 6-8).

1. Whether the claimant has sustained compensable injury(ies) within the meaning of the Arkansas' Workers' Compensation Act (the Act) to his head, neck, and lower back on January 27, 2020.

2. If the claimant's alleged injury(ies) are deemed compensable, the extent to which he is entitled to medical and indemnity benefits.

3. Whether the claimant's attorney is entitled to a controverted fee on these facts.

4. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. 6-8).

The claimant contends that on Monday, January 27, 2020, he was hit by a forklift within the scope and course of his employment as a warehouse supervisor with El Dorado Packaging, Inc. (El Dorado Paper Bag). The claimant contends he sustained injuries to his head, neck, and lower back as a result of the subject alleged work incident. He claims further he has had seizures since the alleged incident. He contends he was treated at South Arkansas Medical Association Healthcare Clinic (SAMA), in El Dorado, and by Dr. Robert Watson, a primary care physician (PCP) associated with a facility called Family Medical Care of South Arkansas. In summary, the claimant contends he sustained compensable injuries to his head, neck, and lower back within the course and scope of his employment; that he is entitled to medical benefits at the respondents' expense, TTD benefits from the date of the alleged injuries to a date yet to be determined; and that his attorney is entitled to a controverted fee. The claimant specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 2; T. 6-8).

The respondents contend the claimant did not sustain a "compensable injury"(ies) within the Act's meaning arising out of the course and scope of his employment. Specifically, the respondents contend that if the claimant sustained any injury(ies) whatsover , any such injury(ies) was(were) idiopathic in nature and, therefore, not compensable within the Act's meaning. The respondents specifically reserve any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 2; T. 6-8).

The record herein consists of the hearing transcript and any exhibits contained therein and attached thereto, as well as the parties' blue-backed briefs.

STATEMENT OF THE CASE

The Witnesses' Testimony

The claimant, Mr. Stacy Evans (the claimant) was 49 years old at the time of the hearing, and 47 years old at the time of the alleged injury(ies) of January 27, 2020, is no longer employed at El Dorado Paper Bag. He obtained an associate degree online from Strayer University, which He worked with El Dorado Paper Bag from approximately some time in 1992, until the date of his alleged injury(ies), January 27, 2020, at which time he was working as a warehouse manager. The claimant's primary job duties involved oversight of shipping and receiving, along with other duties required to supervise the warehouse workers. (T. 14-25).

The claimant testified that on the day of the alleged incident, January 27, 2020, he was walking around the warehouse looking for a missing pallet of product. The forklift operator, Mr. Vincent Powell, was moving a pallet of Tidy Cat, and the claimant was waiting to ask Mr. Powell to help him look for the missing pallet, "because he's been there the longest, so if anything's

missing, he'll find it." While waiting for Mr. Powell to finish this job, he testified as Mr. Powell was backing-up, the back of the forklift hit him in the left arm, knocking him to the ground and causing his head to hit the concrete. The claimant said the forklift "beeps" when it is operating in reverse, but he does not recall hearing it beeping at the time of the alleged incident. He testified he sustained a scratch to his arm, a cut on his head, and also injured his neck and lower back as a result of the alleged incident. He also alleged he experienced seizures and incontinence after the accident, but he has not had any seizures since December 2020. The claimant testified he told someone to go get help, and to get Ms. Cashonna Moore and his son, both of whom also worked at the same location. He testified further he was taken to the hospital emergency room (ER) in an ambulance where he was examined and released without having received any treatment and in violation of "protocol" even though "they knew he had a concussion.", so he sought treatment on his own from SAMA and his PCP, Dr. Watson. (T. 26-50).

On cross-examination, the claimant admitted to various discrepancies between his deposition and hearing testimony related to exactly when the alleged incident occurred, and exactly how it occurred, but attributed them to his severe "anxiety." He became noticeably agitated and argumentative on cross-examination when confronted with the fact he was working under a "Performance Improvement Plan" and possibly in danger of being fired at the time of the alleged incident; as well as when he was asked more details about operation of the forklift, exactly how the incident occurred, and the specifics of his medical treatment. (T. 59-121).

The claimant's wife, Ms. Latisha Cato Evans, testified when she arrived at the hospital after the alleged incident she saw blood on the claimant's head, and said she witnessed the claimant

have seizures after the alleged incident. She also testified concerning which doctors had given the claimant's certain medications, and the fact his treating physician restricted the claimant's driving for a time when he reported having experienced seizures. (T. 127-131).

Mr. Robert Moore, who was employed as the janitor at El Dorado Paper Bag on January 27, 2020, was the respondents first witness. Mr. Moore testified he no longer worked for El Dorado Paper Bag, but was self-employed as a taxi driver. He said if he would not have left the company in March of 2021, he would have been employed there two (2) years as of the hearing date. He admitted he was present to testify pursuant to the respondents' subpoena as a reluctant witness. He testified both the claimant and Ms. Colleen Martin hired him, and that the claimant was his actual supervisor. Mr. Moore testified as an eyewitness to the incident. He said he saw the claimant present in the area where Mr. Powell was operating the forklift. (T.137-138).

Mr. Moore testified that from where he was standing about 10-15 feet away from the forklift and the claimant, he could see the claimant behind the forklift pacing back and forth. Mr. Moore testified he had a clear line of sight to the claimant and the forklift and there was nothing obstructing his vision. Mr. Moore saw Mr. Powell was pulled into an aisle with a pallet on the forks, and he was reading the bar codes on the pallets. He testified he heard the forklift beeping when Mr. Powell put it into reverse. (T. 139-141). Specifically, Mr. Moore testified:

A. So Mr. Powell threw it in reverse, but he was still up under the pallet. He never moved. And he was still reading the barcodes on the pallet and everything.
So he threw the forklift in reverse and everything, then that's when I saw Mr. Evans, he launched his self into the forklift and then he rolled on the other side and laid on the ground.

JUDGE PICKENS: What do you mean he launched himself into the forklift?

THE WITNESS: Like he ran into it.

JUDGE PICKENS: Like, intentionally?

THE WITNESS: Yeah. Ran into it, and then he kind of rolled off on the other side of it and laid down there on the floor.

JUDGE PICKENS: Okay, I mean, that sounds pretty odd to me. That's - -

THE WITNESS: I mean - -

JUDGE PICKENS: - - not something you see every day.

THE WITNESS: Right. It just – it – the way it happened – it happened so fast, the way it happened, it just - - it was real funny. It was just real funny.

(T. 141-142).

Mr. Moore also testified the forklift blades never moved from under the pallets, which means although the gear was in reverse because that is what initiates the "beeping" sound, the forklift was not moving backwards at the time the claimant's arm and side came into contact with it. He testified the forklift did not move backwards, and that Mr. Powell, "never moved the forklift at any time." In addition to the fact he testified pursuant to a subpoena, on both direct and cross-examination it was apparent from his overall demeanor Mr. Moore did not want to get involved. He testified he came forward with his testimony because the entire incident "kept bothering him and everything", he realized Mr. Powell could lose his job of some 40 years, and that is when he reported what he witnessed to Ms. Collen Martin. (T. 141-145).

On cross-examination, Mr. Moore candidly admitted he came forward because he,

"didn't want that man to get fired for something he didn't do. I know he did not hit the man with the forklift." Mr. Powell once again testified under oath he saw the claimant come into contact with the stationary forklift, that the claimant actually ran into the forklift, and that he never saw any blood. He also readily admitted his son was friends with Mr. Powell's son. (T. 145-150).

The forklift driver, Mr. Vincent Powell, was the respondents' second and final witness. (T. 152-160). Mr. Powell testified he has worked with El Dorado Paper Bag for 41 years. Mr. Powell testified he was also appearing as a reluctant witness pursuant to a subpoena. Mr. Powell has worked as the shipping clerk at El Dorado Paper Bag for the past 25 years. He trained the claimant, and has worked with him as a co-worker the entire time the claimant has worked with El Dorado Paper Bag. Mr. Powell testified he has never had any problems or issues with the claimant and they got along fine (T. 153-154; 162).

Mr. Powell testified he was working on January 27, 2020, using the forklift to store pallets of Tidy Cat bags. He said he made eye contact with the claimant when the claimant was in front of him, about two (2) aisles over. (T. 155). The next time Mr. Powell saw the claimant he was lying on the floor behind the forklift. (T. 155-156). Mr. Powell described the subject incident as follows:

> Q. Did you at any time see Mr. Evans behind you?
>
> A. No. I seen – both my mirrors on the forklift I had my reverse on, it was beeping, I seen a flash and that was it.
>
> Q. All right. You turned your reverse on, so you were getting ready to back up.

A. Yes, ma'am.

Q. Did you start backing up?

A. No. Nuh-uh.

Q. No?

A. No.

Q. What happened when you - - when you saw the flash, what did you do?

A. When I seen Stacy on the floor?
Q. Yes.

A. I just stayed in the pallett.

Q. Okay. So your forklift –

A. Yeah.

Q. Did your forklift move?

A. No. Nuh-uh. I was still in the pallett.

Q. Did you get off the forklift?

A. No. I stayed up there.

Q. Okay. At what point in time - - did you ever get off the forklift and go check on Mr. Evans?

A. Yeah.

Q. Okay.

A. Yeah, I checked on him.

Q. When? Tell me that - - tell me when that happened.

A. That was about when everybody was coming up there.

Q. So there were other people coming up.

A. Yeah, coming up.

Q. How soon after you see Mr. Evans on the floor do you get off the forklift? I mean, was it, like, within seconds, or did you stay there for several minutes?

A. No. it was about a second.

(T. 156-157).

Mr. Powell testified further he could not have hit the claimant with the forklift because he had not started to back-up the forklift when the alleged accident occurred. In all his years driving a forklift at El Dorado Paper Bag, Mr. Powell testified under oath he has never had an accident while operating a forklift. (T. 159).

On cross-examination Mr. Powell testified he was not aware that Mr. Robert Moore testified he was friends with one of Mr. Powell's sons; but he readily admitted this would not surprise him because his son Jermaine works at El Dorado Paper Bag. When the claimant's attorney asked how he knew the forklift had hit the claimant, the claimant testified, "I didn't know because I was reading the barcode. That's when we come off them barcodes. I was just reading the barcode, and I – I looked around and he was on the floor." Mr. Powell testified he did not feel any impact at all. When cross-examined about the written statement he provided two (2) days after the incident, Mr. Powell testified that although the written statement said the forklift was, "running in neutral, lights on, blue light on, beeping", the forklift was beeping because it was in reverse. He testified he had his foot on the brakes, so the forklift was not moving. He testified he placed the forklift in neutral after the accident as he was stepping down off it. (T. 160-167).

When questioned by the ALJ, Mr. Powell testified the beeping sound means the forklift has been put in reverse gear, but does not necessarily mean the forklift is moving backwards. It simply means the forklift is in reverse, it does not mean it is moving. (T. 169).

On redirect examination Mr. Powell testified that on the day of the incident, the claimant had "…done moved [his things] out" of his office. (T. 169) (Bracketed material added). On rebuttal, the claimant testified he had two (2) offices at the plant and from time to time he would move his things from one office to the other. (T. 173).

The claimant last called Ms. Cashonna Moore as a rebuttal witness. Ms. Moore was employed at El Dorado Paper Bag as the shipping coordinator on the day of the incident at issue. She testified she was sitting in her office, and Mr. Powell came in and said he had, "just hit boss-man." She testified she called an ambulance and accompanied the claimant to the ER.

On cross-examination Ms. Moore read the written statement she provided to El Dorado Paper Bag right after the incident occurred which stated: "Vincent Powell came into my office and stated that Stacy Evans was hurt. He then stated that he had been struck by the forklift. I went into the finished goods warehouse and found Stacy on the floor. I then called 9-1-1." Ms. Moore agreed the facts concerning the subject incident and what exactly happened and was actually said at the time she wrote the statement in January 2020 shortly after the incident happened would be more accurate than it was two (2)-years later at the hearing. Ms. Moore agreed she was friends with the claimant, and he was responsible for her promotion to the shipping coordinator position. (T. 180-183).

When the respondents' attorney asked confirmed with Ms. Moore that she did not want to see

anything happen to the claimant, or see him get fired, she confirmed she did not, and that she did not want to see anyone get fired. When asked if she lost her job shortly after the January 27, 2020, incident occurred, Ms. Moore adamantly testified she, “did not lose my job. I resigned.” However, when questioned about her resignation, Ms. Moore agreed she never submitted a letter of resignation. She confirmed that while she was off sick from work, she received a telephone call from the El Dorado Paper Bag human resources (HR) manager that they found her letter of resignation in her desk, and that she was no longer employed at the company. (T. 180-183).

The ALJ asked Ms. Moore if she had seen the claimant lying on the ground and bleeding from his head after the January 27, 2020, incident. Ms. Moore testified she did see some blood on the back right-side of the claimant’s head where she thought it had hit the ground. She testified under oath she did not see any blood on the right front side of the claimant’s head, which was where the claimant had testified under oath his head struck the warehouse concrete floor. (T. 186, 187; T. 39).

<u>The Medical Evidence</u>

The medical records from SAMA Healthcare reveal the claimant gave a history of having been injured at work when, “forklift spun, blades striking him in chest, knocking him backwards to ground.” At this time, the claimant reported an injury to his head, neck, upper back, low back, chest left clavicle, left upper chest, left breast, abdomen, and left upper quadrant. The ER examination revealed the claimant’s pupils were equal, round, and reactive to light with extra-ocular motion, indicating no serious head injury. Multiple diagnostic tests were performed including a CT scan of the claimant’s cervical spine; a CT scan of his head; and a CT scan of his

chest, abdomen and pelvis. All of these tests revealed no evidence of acute injury. The claimant's cervical x-rays were interpreted as normal, but did show some straightening of the cervical spine which the radiologist noted, "may be secondary to immobilization" since the claimant's neck was braced when he was transported by ambulance from the plant to the ER. The claimant was discharged from the ER with a diagnosis of "sprain of ligaments of cervical spine, subsequent encounter. Contusion of left front wall thorax, initial encounter. Contusion of unspecified back wall of thorax, initial encounter." After this thorough examination, the claimant was discharged to go home, and the medical records contain no assessment of a head injury or concussion. (Claimant's Exhibit 1 at 3-12).

The claimant presented himself to his family doctor/PCP, Dr. Watson, on January 27, 2020, the same day of the incident. With no explanation, Dr. Watson listed his initial "impression" of the claimant's condition: "1) Concussion 2) Loss of consciousness 3) Rib contusion 4) Cervical contusion 5) Headaches." Dr. Watson also immediately released the claimant to return home, and he did not prescribe any medication(s) nor any future recommended treatment at that time.(CX1 at 1-2).

The claimant next presented himself of his own initiative to Dr. Watson on January 29, 2020. Dr. Watson's clinic notes for this visit state the following history: "Patient states he is still having a lot of pain in his back and head. His left leg is tingling. He had to go to the ER yesterday for possible seizure. They did a CT scan of the head which was normal. He has weakness on the left side." Thereafter, without any diagnostic testing or independent assessment, and apparently based solely on the claimant's subjective complaints, Dr. Watson revised his impression to

"seizure disorder, change in mental status, paresthesia of left lower extremity, and lumbar pain" to the claimant's complaint's, but he removed the earlier, initial assessments of cervical contusion and headache. (CX1 at 14-15).

Dr. Watson ordered an MRI of the claimant's brain and lumbar spine, and referred him to a neurologist for an EEG. (CX1 at 14). The lumbar MRI revealed degenerative changes at L4/5 and L5/S1. (CX1 at 16). Other than noting "chronic sinus disease", the MRI of the brain did not reveal any acute intracranial abnormality. (CX1 at 17). After receiving these MRI results Dr. Watson again changed his impression of the claimant's condition to now only include concussion, syncope, lumbar pain, muscle spasms, and seizure disorder, again based apparently on the claimant's subjective complaints. (CX1 at 17). Despite the diagnosis of muscle spasms, there is no Dr. Watson does not mention he actually palpated any spasms during his examination of the claimant. In fact, Dr. Watson noted full range of active and passive motion during his musculoskeletal examination. (CX1 at 18).

The claimant returned to Dr. Watson on February 27, 2020, and advised his headaches were getting better. Dr. Watson prescribed Neurontin, but otherwise did not offer or recommend any additional treatment. (CX1 at 25). When the claimant returned to Dr. Watson once again on March 27, 2020, the claimant advised he had not had any more seizures, and reported his headaches had resolved. Dr. Watson released the claimant to light duty with no standing over four (4) hours per day. The clinic notes for this visit reveal Dr. Watson's physical examination did not reveal any objective medical findings of any injury. (CX1 at 26).

The claimant did not seek or obtain any additional medical treatment until some six (6)

months later, when he was seen by Dr. Dichelle George on September 14, 2020. At this time he presented with more subjective complaints: specifically, migraines, lower back pain, and finger numbness. Again, without objective evidence and apparently based solely on the claimant's subjective complaints, Dr. George assessed the claimant with seizures, chronic post-traumatic headaches, not intractable, pain in right knee, pain in left knee, and other chronic pain. Dr. George started the claimant on Gabapentin and referred him to a neurologist. She also prescribed meloxicam for the claimant's arthritis pain in his knee and back. (CX1 at 27-28)

Next, the claimant saw Dr. Jacquelyn Sue Frigon on November 18, 2020, with complaints of headaches and seizures. The claimant provided Dr. Frigon with a history of injury of being hit by a forklift at work in January 2020. He reported having a seizure the day following while in his doctor's office. He also complained that "nerve damage in back" prevents him from jogging. Dr. Frigon ordered an EEG and lumbar MRI. (CX1 at 29-33). The claimant returned to Dr. Frigon following these diagnostic tests on December 29, 2020. At this visit, the claimant provided a history of, "Recently, he lifted up his daughter and reinjured his back." The lumbar MRI revealed mild spondylosis in the lower lumbar spine and a small disc protrusion at L4/5 with no significant canal stenosis or foraminal narrowing. This EEG also was interpreted as normal. After going over the test results, Dr. Frigon released the claimant from her care with instructions to return only as needed. (CX1 at 34-39).

Thereafter, the claimant made his way to Dr. Scott Schlesinger of Legacy Spine & Neurological Specialists. He saw Dr. Schlesinger on April 19, 2021. The claimant provided Dr. Schlesinger with a history of low back pain that radiates in the posterior and anterior aspect of his

right leg to the knee. He complained of weakness in his leg but denied any numbness, tingling or burning. The claimant reported this pain initially occurred in January 2020 due to a work-related injury but had worsened over the past couple of months. (CX1 at 40). Dr. Schlesinger ordered yet another lumbar MRI which revealed a broad-based disc bulge at L4/5 with disc extrusion to the left and retrolisthesis with a broad-based disc bulge at L5/S1. (CX1 at 41).

On April 29, 2021, the claimant attended a telehealth visit with Dr. Schlesinger, and complained of neck pain that radiates down his right arm into his hand. Dr. Schlesinger assessed the claimant with lumbar degenerative disc disease (DDD)/degenerative joint disease (DJD) and prescribed injection therapy starting with a Lumbar Epidural Steroid Injection. (Cl. Ex. 1 pages 43-47) Dr. Schlesinger ordered a cervical MRI which revealed a broad-based disc bulge at C3/4. (CX1 at 50). When the claimant returned to Dr. Schlesinger on June 3, 2021, the claimant reported a history of having resigned his job, "because he could no longer safely perform these duties." (CX 1 at 53). The claimant further advised his first two (2) steroid injections significantly improved his leg and back pain. The claimant underwent a final lumbar epidural steroid injection (LESI) treatment. (CX1 at 53-59). On June 17, 2021, the claimant reported improved low back pain. Treatment with bilateral L3-S1 medial branch blocks were prescribed at that time. (CX1 at 60-66). The claimant still has not returned to work.

<u>DISCUSSION</u>

<u>The Burden of Proof</u>

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by

a preponderance of the evidence. ***Ark. Code Ann***. § 11-9-704(c)(2) (2021 Lexis Replacement). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel,* 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). ***Ark. Code Ann.*** Section 11-9-704(c)(3) (2021 Lexis Repl.) requires the ALJ, the Commission, and the courts "shall strictly construe" the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles,* 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party**.** ***Ark. Code Ann***. § 11-9-704(c)(4) (2020 Lexis Repl.); *Gencorp Polymer Products v. Landers,* 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep't of Corrections v. Glover,* 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Deana Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission's exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees**,*** 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc*., 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles, supra*.

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission's province to weigh the totality of the medical evidence and to determine what evidence is most credible given the totality of the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Compensability

For any specific incident injury to be compensable, the claimant must prove by a preponderance of the evidence that his injury: (1) arose out of and in course of her employment; (2) caused internal or external harm to the body that required medical services; (3) is established by medical evidence supported by objective findings; and (4) was caused by a specific incident identifiable by time and place of occurrence. ***Ark. Code Ann***. § 11-9-102(4); *Cossey v. Gary A. Thomas Racing Stable*, 2009 Ark. App. 666, at 5, 344 S.W.3d 684, at 687 (Ark. App. 2009). The claimant bears the burden of proving the compensable injury by a preponderance of the credible evidence. ***Ark. Code Ann.*** § 11-9-102(4)(E)(i); and *Cossey, supra*.

The claimant must prove a causal relationship exists between his employment and the alleged injury. *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 171, 72 S.W.3d 889, 892 (Ark. App. 2002) (citing *McMillan v. U.S. Motors*, 59 Ark. App. 85, 90, at 953 S.W.2d 907, at 909 (Ark. App. 1997). Objective medical evidence is not always essential to establish a causal relationship between the work-related accident and the injury where objective medical evidence establishes the existence and extent of the injury, and a preponderance of other nonmedical

evidence establishes a causal relationship between the objective injury and the work-related incident. *Flynn v. Southwest Catering Co.*, 2010 Ark. App. 766, 379 S.W.3d 670 (Ark. App. 2010).

"Objective findings" are those findings which cannot come under the voluntary control of the patient. ***Ark. Code Ann***. § 11-9-102(16)(A); *Long v. Wal-Mart Stores, Inc*., 98 Ark. App. 70, at 80 250 S.W.3d 263, at 272 (Ark. App. 2007). Objective findings "specifically exclude pain, straight-leg-raising tests, and range-of-motion tests." *Burks v. RIC, Inc*., 2010 Ark. App. 862, at 3 (Ark. App. 2010).

It is a well-settled and long-established principle of workers' compensation law that an employer takes the employee as he finds him; and an employment-related incident that aggravates a preexisting condition(s) is (are) compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (Ark. App. 2003). Stated another way, a preexisting disease or infirmity does not disqualify a claim if the work-related incident aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which the claimant seeks benefits. *Jim Walter Homes v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (Ark. App. 2003). The aggravation of a preexisting, otherwise non-compensable condition by a compensable injury is itself compensable. *Oliver v. Guardsmark*, 68 Ark. App. 24, 3 S.W.3d 336 (Ark. App. 1999). An aggravation is a *new injury* resulting from an independent incident. *Crudup v. Regal Ware, Inc*., 341 Ark. 804, 20 S.W.3d 900 (Ark. App. 2000) (Emphasis added). Of course, since it is a new injury resulting from an independent cause, any alleged aggravation of a preexisting condition must meet the Act's definition of a "compensable injury" in order for the claimant to prove compensability. *Farmland Ins. Co. v. Dubois*, 54 Ark. App. 141, 923 S.W.2d 883 (Ark. App. 1996).

Concerning the proof required to demonstrate the aggravation of a preexisting condition, our appellate courts have consistently held that since an aggravation is a *new injury*, a claimant must prove it by *new objective evidence of a new injury different than the preexisting condition*. *Vaughn v. Midland School Dist.*, 2012 Ark. App. 344 (Ark. App. 2012) (citing *Barber v. Pork Grp., Inc*., 2012 Ark. App. 138 (Ark. App. 2012); *Grothaus v. Vista Health, LLC*, 2011 Ark. App. 130, 382 S.W.3d 1 (Ark. App. 2011); *Mooney v. AT & T*, 2010 Ark. App. 600, 378 S.W.3d 162 (Ark. App. 2010). Where the only objective findings present are consistent with prior objective findings *or consistent with a long-term degenerative condition rather than an acute injury, this does not satisfy the objective findings requirement for the compensable aggravation of a preexisting condition injury. Vaughn,* 2012 Ark. App. 344, at 6 (holding that Arkansas courts have interpreted the Act to require "new objective medical findings to establish a new injury when the claimant seeks benefits for the aggravation of a preexisting condition"); *Barber, supra* (affirming the Commission's denial of an aggravation of a preexisting condition claim *where the MRI findings revealed a degenerative condition, with no evidence of, and which could not be explained by, an acute injury*).

Based on the aforementioned law as applied to the facts of this case, it is abundantly clear the claimant has failed to meet his burden of proof in demonstrating he has sustained any "compensable injury"(ies) to his head, neck, or lower back, in the curious subject work incident of Monday, January 27, 2020. Moreover, he has failed to meet his burden of proof in demonstrating any of these alleged injuries were debilitating so as to keep him from working since the aforementioned date of their alleged occurrence. My opinion in this regard is based on the

following analysis.

First, based on my close observation of the claimant's demeanor as he testified, as well as my comparison with the testimony of other relevant witnesses, and my review of the medical record as compared to his testimony, I found the claimant's testimony concerning relevant issues (including but not limited to his testimony concerning both when and how the work incident occurred versus that of other objective witnesses, and his alleged injuries as compared to the actual lack of objective medical evidence, I found the claimant's version of the incident rather nonsensical, contrived, inconsistent and, therefore, incredible. Cross-examination ultimately revealed the claimant may have had some reason to either stage or feign an alleged incident and alleged injury(ies).

Second, the claimant's testimony concerning a seemingly memorable event leading up to the day the subject alleged incident occurred – *i.e.*, Monday, January 27, 2020, to which the parties' stipulated – was contradictory. For example, the claimant testified he was at work every day the week immediately prior to the stipulated date. He agreed the alleged incident and alleged injury(ies) occurred on a Monday. However, when cross-examined concerning the testimony he had given under oath on direct examination that he caught a woman drinking at work *the day before the date of his alleged injury(ies)*, he admitted he did not work on Sunday, January 26, 2020, as follows:

> Q. So if the accident happened on a Monday, you caught her the day before, you caught her on a Sunday.
>
> A. Well, no. I'm sorry. I'm - - the medicine that I'm taking is for my anxiety, as you can understand that. I'm having - - I'm having a bad anxiety right now.

Q. So can we trust anything that you're saying?

A. Of course you can trust anything I'm saying.

Q. So you're telling me that although you're on medication that's affecting your anxiety, your testimony is the truth.

A. A hundred percent the truth.

Q. All right. Did you work on Sunday?

A. I went out and checked everything on Sundays.

Q. Did you run into the woman who had been raped, drinking at the plant on Sunday?

A. On Monday. Monday or – Monday or one – one day of the week.

Q. If the accident happened on Monday –

A. Uh-huh.

Q. - you said this happened the day before.

A. Well, it's been almost two years, so I can't be a hundred percent correctly on – on everything.

(T. 58-59). The claimant blamed his lack of specific recollection on his anxiety medication.

When asked if he worked the entire week before his accident, the claimant testified, "You got to work and make sure everything is good." (T. 59). When asked if he was subject to being fired for not working, the claimant surprisingly testified:

Q. And if you're not working, you're subject to being fired, aren't you?

A. No.

Q. If you don't –

A. No.

Q. If you don't show up and do your attendance and put in your time and do the work you're paid for –

A. No.

Q. - you're subject to being fired, aren't you?

A. No. Not – unless and I'm a – unless and I'm white. Unless I'm white. I – I'm I'm a black man in a position that when a – I'm subject to being anything I do is double than for a white person. Sorry, but that's the truth. I have to work a hundred times more than a white counterpart. But the white counterparts that they had wasn't doing the job."

(T. 59-60). Thereafter, the respondents' attorney showed the claimant his time card for the week prior to the alleged accident. He confirmed that his time card showed Paid Time Off (PTO) for January 20th, 22nd, and 23rd, but claimed he was denied that leave. (T. 60).

Most significantly – and a lack of recollection that is more difficult to credibly explain-away – was the fact cross-examination revealed the claimant was facing disciplinary action and had in fact been counseled concerning his work performance only some five (5) days before the stipulated alleged incident date of Monday, January 27, 2020. The respondents' attorney showed the claimant a document identified as a "Performance Improvement Plan" dated January 21, 2020. He became noticeably agitated, verbally combative, and testified he had refused to sign the document because he did not agree with what was written in it. The claimant read from this document as follows:

Q. If you'll read that loud to the judge.

A. "I think they are fair to tell you your apparent performance in all areas outlined above placing you in for future of company in

jeopardy."

Q. Okay. Keep going.

A. (As read), "You need to make immediate sustained improvement in your performance. Failure to improve will result in further disciplinary" – yeah. I remember that.

Q. "Further" –

A. I remember that meeting.

Q. (As read), "Further discipline up to and including termination"; isn't that what it says?

A. Yes.

(T. 62-63) (Parenthetical material added by court reporter).

Finally, the respondents' attorney asked the claimant to review a separate document identified as a "Performance Warning Notice" dated January 24, 2020, which he had in fact signed, and he verified his signature on the record at the hearing. The claimant confirmed this document stated: "On Wednesday the 22nd, we went over your performance improvement plan." The following exchange then took place:

Q. And then it says (as read), "One issue we discussed was your work schedule, and in particular that you need to be at the plant during the workday." Is that what it says?

A. "During the workday." I was – I'm at the day every day.

Q. All right. (As read), "After our meeting, you returned to the production floor and within one hour, you told Fred" –

A. Fred Jackson.

Q. - "one of your supervisors, that you needed to leave and would be back later."

A. Yes.

Q. Is that what it says?

A. Yes.

Q. And then it says (as read), "You then left without telling Greg or me." Is that what it says?

A. I told Colleen Martin that I had to leave because my daughter –

Q. This says (as read), "You left without telling Greg or me." Is that –

A. Am I supposed to - - I don't have to tell Greg. I'm a manager. I don't have to tell Greg. Who is Greg? I don't - - telling Dwayne Queen is the plant manager. I don't remember Greg.

Q. Greg Brashford?

A. Greg Brashford. Greg Brashford. I don't know if they brung him in after or what.

Q. Well, this is – his is saying –

A. Greg –

Q. - he's involved.

A. Oh, is he still out there? I don't know.

Q. Then it says (as read), "Despite what you told Fred, you did not return to work that day." Isn't that what this document says?

A. I did return back to work that day. If – this the thing about that ma'am, I'm on – I'm on salary. I don't clock in or out.

Q. But there's no evidence that you returned back to work. And then it – a

A. Yes, I returned to work that night.

Q. And then it say (as read), "You did not report to work on the next day," which was a Thursday.

A. Which I was - - thought I had my PTO day.

Q. But didn't you just tell me it was denied?

A. Denied, but I still went on and - - Dwayne told me that I could go ahead and take that day.

Q. Dwayne told you you could have PTO, but then Dwayne turns around and tells you you weren't at work and you're in trouble for it.

A. Yeah. No, I wasn't in trouble for nothing. Because I'm always out there. I'm always there.

Q. And then it say (as read), "I was able to reach you via text message and told you to be at work on Friday." Is that what –

A. Because that - - because he - - because he's got in warm water for what he's been doing. I'm sure.

Q. (As read), "This behavior is unacceptable." Isn't that what it says?

A. That's what it said on the paper. Thank you.

Q. So you were being disciplined for not showing up at work right before this incident occurred; is that correct?

A. I'm not for sure. What's the question again? Go back again?

Q. You got a written warning right before this incident happened at work for not showing up at work; isn't that correct"

A. Yes.

(T. at 66-68). The aforementioned testimony clearly reveals, which the claimant conveniently failed to disclose on direct examination, that his job was in jeopardy for a number of reasons he was reluctant to admit immediately preceding the date of the alleged

incident and alleged injury(ies) of Monday, January 27, 2020.

Third, and similarly, the claimant's wife was not a credible witness. At the beginning of the hearing the parties invoked the Rule. All of the witnesses were sworn at one time, then asked to leave the hearing room until they were called to testify. (T. 8-9). During the claimant's direct examination, the ALJ briefly recessed the hearing after the respondents' attorney alerted him and opposing counsel to the fact that one of the sequestered witnesses, the claimant's wife, was standing at standing at the loosely-fitted glass door to the hearing room as if she was trying to listen in on the proceedings. The ALJ was able to observe this fact himself, so he briefly recessed the hearing to caution the witnesses they needed to stay clear of the hearing room door and should not discuss their potential testimony among themselves. (T. 25). When she did testify, the claimant's wife simply corroborated his testimony, which also cannot overcome the lack of objective, as opposed to subjective, medical evidence.

Fourth, the testimony of both Mr. Moore and the forklift driver himself, Mr. Powell, was much more objective, consistent, and credible concerning what truly happened involving the forklift on whatever date the incident may have occurred. Mr. Moore and Mr. Powell, in both demeanor and in the substance of their testimony gave the distinct impression they were sincere, hard-working gentlemen with level heads and a great deal of experience in life whose words are few, but whose words are credible. In this case where the competing testimony was so diametrically opposed (see, *supra*), compared with the credibility of the claimant's and his wife's testimony, I found both Mr. Moore and Mr. Powell to be significantly more credible witnesses. This fact, especially when coupled with the claimant's contemporaneous pending disciplinary

issues, calls into question the claimant's story concerning the subject incident. Frankly, Ms. Moore's testimony did not add much to the weight of the evidence one way or the other.

Fifth, and perhaps most significantly, with respect to the claimant's alleged head, neck and lower back injuries, there simply exists insufficient evidence, medical or otherwise, to support his contentions. All relevant diagnostic tests of the claimant's head are normal, with no evidence of any anomaly that would account for the self-reported, alleged seizures which no medical professional apparently has witnessed or been able to document. The only evidence of seizures appears to be both the claimant's and his wife's self-serving testimony, which is inconsistent with the objective medical evidence. There exists no objective medical evidence indicating the claimant had or was subject to any seizures. No medical professional ever witnessed the claimant having a seizure, although he claims to have had them for some 11 months, from the date of the alleged injury, January 27, 2020, through some time December 2020.The reports of seizures came only from the claimant, and the unconvincing attempted corroborative testimony of his wife. The fact the claimant reported seizures to his doctor(s) is reason enough for them to restrict him from driving an automobile; but the fact his doctor(s) restricted him from driving does not provide objective medical evidence of seizures. In summary, no physician has opined within a reasonable degree or medical certainty the claimant has even had a seizure(s), much less that they are related to the bizarre subject January 27, 2020, incident, and no credible evidence by which to infer they have even occurred, much less that they are work-related within the Act's meaning. (CX1 at 3-12; 14-17).

Concerning the claimant's alleged neck and lower back injuries, all his diagnostic tests are

well within normal limits, especially for a person his age. In addition, no physician has opined he sustained any acute, debilitating injury to either his neck or his lower back as a result of what the preponderance of the medical, and the totality of the other credible evidence of record reveals to be – to say the very least – an odd, self-serving, and apparently contrived work incident that is wholly contradicted by the objective, credible testimony of the non-interested witnesses. Again, no physician has opined within a reasonable degree of medical certainty the claimant's neck, and lower back conditions – especially in light of his demonstrated lack of credibility – are related to the highly unusual January 27, 2020, work incident. The various "assessments" and "impressions" contained in the claimant's medical records are simply based on his subjective complaints, and not medical evidence sufficient to justify the claimant's contentions of alleged acute, head, neck, and lower back injury(ies) caused by any specific incident. Moreover, the "assessments" and "impressions" revealed in the medical record reflect the claimant's subjective complaints have changed – as is the nature of subjective complaints – by disappearing, reappearing, resolving, with new subjective complaints appearing as almost two (2) year has now passed from the stipulated January 2020 alleged incident date to the October 2021 hearing. Therefore, the relevant medical evidence is simply unremarkable, and is legally insufficient to prove he sustained "compensable injury"(ies) within the Act's meaning; and there exists insufficient other relevant medical evidence to infer any of the alleged injuries are work-related. (CX1 at 1-66).

While there exists insufficient evidence to attribute a definitive motive to this unusual incident and the alleged injuries, it must be noted as the record demonstrates, the claimant's testimony reveals him to be at the very least a discontented supervisor to whom his employer had just issued

a "Performance Warning Notice" dated January 24, 2020, just three (3) days before the subject incident; and the claimant had been working under "Performance Improvement Plan" since January 22, 2020, five (5) days before the January 27, 2020, work incident, and alleged injuries. Both of these documents, as well as the claimant's testimony related to them, as well as the totality of the claimant's testimonial and documentary evidence prove he has fallen short of his burden of proof in this case.

Both the claimant's and the respondents' attorneys were zealous advocates for their respective clients, tried their cases with poise and professionalism, and wrote excellent post-hearing briefs based on the evidence of record. I appreciate their efforts and advocacy which proved helping in rendering this opinion in such a unique, and may I say, somewhat unusual case.

Therefore, based on the applicable law as applied to the facts of this claim, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this claim.

2. The stipulations contained in the Prehearing Order filed January 27, 2020, which the parties affirmed on the record at the hearing, hereby are accepted as facts.

3. The claimant has failed to meet his burden of proof in demonstrating he sustained a "compensable injury"(ies) to his head, neck, and lower back in the subject alleged January 27, 2020, work incident.

4. Based on his demeanor as he testified on both direct and cross-examination, and the fact his hearing testimony contradicted his prior deposition testimony in relevant respects as set forth in the record as a whole; compared with that of the respondents' witnesses who I found to be mature, sincere, objective, and credible, I find the claimant's testimony to be inconsistent, self-serving,

somewhat contrived, and incredible. Moreover, beginning with the claimant's wife's blatantly noticeable attempt to listen to the claimant's testimony at the hearing door in violation of The Rule, in addition to her demeanor when testifying, I find the claimant's wife's testimony be self-serving, contrived, unsupported by a preponderance of the other relevant evidence of record and, therefore, to also lack credibility.

5. Perhaps most significantly, the medical record does not support the claimant's allegations of injuries – much less debilitating injuries – to his head, neck, and lower back. All relevant diagnostic tests were negative, and/or within normal limits; some changed with time and are simply not indicative of acute, debilitating injuries. Since the claimant has failed to meet his burden of proving compensability pursuant to the Act, the issue of the claimant's alleged entitlement to TTD benefits is rendered moot.

6. The claimant's attorney is not entitled to a controverted fee on these facts.

Wherefore, for all the aforementioned reasons, I am compelled by the Act to most respectfully deny and dismiss this claim.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp