

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. H004972**

**BARBARA HOWELL,  
EMPLOYEE**

**CLAIMANT**

**ARKADELPHIA HUMAN DEVELOPMENT CENTER,  
EMPLOYER**

**RESPONDENT**

**STATE OF ARKANSAS  
PUBLIC EMPLOYEE CLAIMS DIVISION,  
INS CARRIER/TPA**

**RESPONDENT**

**OPINION AND ORDER FILED APRIL 28, 2022**

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on Friday, January 28, 2022, in Arkadelphia, Clark County, Arkansas.

The claimant was represented by the Honorable Gary Davis, Gary Davis Law Firm, Little Rock, Pulaski County, Arkansas.

The respondents were represented by the Honorable Charles H. McLemore, State of Arkansas, Public Employee Claims Division (PECD), Little Rock, Pulaski County, Arkansas.

**INTRODUCTION**

In the Prehearing Order filed October 28, 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 at all relevant times including July 8, 2020, when the claimant alleges she sustained a "compensable injury(ies)" to her lower back, lower abdomen, and both her right and left hips and thighs.
3. The claimant's average weekly wage (AWW) was \$847.43, entitling her to weekly compensation rates of \$565.00 for temporary total disability (TTD), and \$424.00 for permanent partial disability (PPD) benefits, if her claim is deemed compensable.
4. The respondents controvert this claim in its entirety.
5. The parties specifically reserve any and all other issues for future determination

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and/or hearing. (Commission Exhibit 1 -2; Hearing Transcript at 5-7). The parties mutually agreed the issues litigated at the hearing were:

1. Whether the claimant sustained a “compensable injury”(ies) to her lower back, abdomen, and both her right and left hips and thighs within the meaning of the Arkansas Workers’ Compensation Act (the Act) on July 8, 2020.
2. If the claimant’s alleged injury(ies) is/are deemed “compensable” within the Act’s meaning, the extent to which she is entitled to medical and TTD benefits from the date of her alleged injury through a date yet to be determined.
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 other issues for future determination and/or litigation.

(Comms’n Ex. 1 at 4; T. 5-7).

The claimant contends she sustained compensable injuries to her lower back/lumbar spine, abdomen, and both her right and left hips and thighs while assisting a client on July 8, 2020. The claimant contends she is entitled to payment of any and all her reasonably necessary medical expenses related to the alleged subject injuries, as well as any and all out-of-pocket expenses associated with them. She contends she is entitled to TTD benefits from the date of the incident, July 8, 2020, through January 15, 2021, when she started work with another employer. The claimant’s attorney respectfully requests the Commission to order the respondents to deduct and pay directly to the claimant’s attorney via a separate check the claimant’s portion of any attorney’s fee awarded on controverted benefits. The claimant specifically reserves any and all other issues for future litigation and/or determination. (Comms’n Ex. 1 at 2-3; T. 4-6; 67-68, 70-71).

The respondents contend the claimant cannot meet her burden of proof pursuant to the

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Act in demonstrating she sustained any “compensable injury”(ies) whatsoever on July 8, 2020. She initially reported to her employer she allegedly had injured only her lower abdomen and both her right and left hips and thighs. The respondents provided her initial medical treatment; however, when the relevant medical records revealed there were no objective findings of any injury(ies), the respondents controverted this claim. The respondents paid only initial benefits to and/or on the claimant’s behalf, but they ceased these payments when her authorized treating physicians found no objective medical evidence of any injury(ies) whatsoever. The respondents contend that even before the date of the alleged injuries, July 8, 2020, the claimant already was scheduled to and she did in fact retire from, her employment as previously planned on July 31, 2020. The respondents specifically reserve any and all other issues for future litigation and/or determination. (Comms’n Ex. 1 at 3; T. at 4; 68-69).

The record consists of the hearing transcript and any and all exhibits contained therein and attached thereto.

### **STATEMENT OF THE CASE**

The claimant, Ms. Barbara Howell (the claimant), is 57 years old. She worked for the Arkadelphia Human Development Center (AHDC) for some 31 ½ years before she retired at the end of July 2020. Before the alleged July 8, 2020, work incident which is at issue herein, the claimant was scheduled to retire at the end of July 2020 (she applied for retirement on July 2, 2020), and she did in fact retire from AHDC effective July 31, 2020. (T. 32; Respondents’ Exhibit 2 at 1). After she retired, the claimant went to work for AllCare Pharmacy in Arkadelphia on or about January 15, 2021. (T. 8-9).

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In her career at AHDC the claimant first worked as an Aide for some nine (9) years, then was promoted to a Rehabilitation Instructor, a job she performed for some 22 years, and the job she was performing on the date of the alleged work incident. The Rehabilitation Instructor job required the claimant to prepare materials for the training program and to work with clients who were intellectually and/or physically disabled. When the claimant was promoted from the Aide position to the Rehabilitation Instructor position, the physical requirements of her job changed, as she was no longer required to lift, bathe, change, and perform other such duties for clients. She described the Rehabilitation Instructor job duties as being less physically demanding than those of an Aide. (T. 8-10).

On July 8, 2020, the date of her alleged injury(ies)incident, the claimant arrived at work and discovered the training class she was scheduled to teach had been cancelled. She explained that when this happens the Rehabilitation Instructor may be required to go to the clients' residence building and teach there, or to help with the clients, or substitute for the Aides. The claimant said she went to the clients' residence building and took her instruction materials with her. When she arrived at the residence, she found that another of the AHDC employees, who she described as a young lady was, "in a room hiding out on the cell phone." (T. 10-12).

The claimant testified she began making rounds, meaning she went by the clients' rooms to check on all of them. She was by herself since the only other AHDC employee was in another room on the cell phone. The claimant came to one room where an obese lady was lying on the couch, and she needed to get up and use the restroom, and to be changed. The claimant estimated the client weighed over 300 pounds. She said as she was helping the client off the couch into a

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standing position when the client's "legs was just buckling or something", and the client started to fall so the claimant "grabbed her" under the arms to help break her fall and ease her to the ground. The claimant testified she, "immediately...started feeling tight in my back and hurting somewhat", but she was, "hoping it would pass." She said she injured her lower back, abdomen, and both her right and left hips and thighs as a result of this alleged work incident. (T. 10-17). On cross-examination the claimant testified she, was "positive" the subject alleged work incident had occurred on July 8, 2020. (T. 35, Line 19; Lines 16-19). She testified further, "I know it was July 8<sup>th</sup>." (T. 35, Line 24).

Medical records in evidence reveal that even prior to July 8, 2020, the date of the alleged work incident, the claimant had a well-documented history of episodes of syncope (i.e., fainting spells), dizziness, as well as complaints of chest pain, heart palpitations, arthritis joint pain, anxiety, and muscle cramps, among other conditions. Medical records in evidence reveal the claimant has been receiving treatment for these conditions since May 5, 2017. (RX1 at 1-44; T. 17-18). On October 15, 2019, Dr. Sayyadul Siddiqui, a cardiologist associated with the Arkansas Heart Hospital, implanted a loop recorder in the claimant's chest for the purpose of monitoring the rhythm her heartbeat. This loop recorder was still in place as of July 8, 2020, and thereafter. (RX1 at 18-21; 25-29; 30-78).

The claimant testified that "the second or third day after" the alleged July 8, 2020, incident she was doing her hair and makeup and developed a pain in her chest and she thought she was having a heart attack, so she took six (6) baby aspirins and her son rushed her to the Baptist Hospital Medical Center emergency (ER) in Arkadelphia. (T. 17). Relevant medical

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records reveal the claimant was admitted to the hospital on July 10, 2020, overnight for observation. Her cardiologist, Dr. Siddiqui, performed a full cardiac workup which proved to be negative. The claimant was released the following day, July 11, 2020. (RX1 at 45-62).

Medical records further reveal the claimant had presented herself to her family physician, Dr. Noland Haygood, who is associated with the Arkadelphia Medical Clinic, both before and after the alleged July 8, 2020, work incident, on July 1, 7, 9, 10, 11, and 16, 2020. (RX1 at 25-78). Her primary complaints from July 1 through July 16, 2020, were allergy symptoms, dizziness, bilateral otalgia [bone pain], and chest pain. (RX1 at 25-78) (Bracketed material added).

On the July 9, 2020, visit to Dr. Hagood the claimant told him she had been experiencing, “dizziness with left-sided chest discomfort for the past 2 days” [which would have been since July 7, not July 8, 2020]. (RX1 at 39) (Bracketed material added). The medical record notes the claimant’s well-documented history of “dizziness and syncope”, and mentions the claimant told him she was, “lifting some clients at her work off the floor”, and that she was also having, “right ear pain.” (RX1 at 39). Dr. Hagood diagnosed the claimant as follows: “**Non-recurrent acute suppurative otitis [ear infection] media of right ear without spontaneous rupture of tympanic membrane...Chest pain, unspecified type...[and] Vertigo.**” (Emphasis in original) (Bracketed material added).

According to her testimony of direct examination, it would have been the next morning, July 10, 2020, when she was putting on her makeup and fixing her hair and experienced chest pain, thought she was having a heart attack, and her son took her to the ER, after which she was admitted to the hospital overnight for observation. (T. 17; RX1 at 45-62). The claimant testified

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on direct examination that her back was, “awful...terrible” at this time. (T. 18-19). The medical records of July 9-11, 2020, do not contain any statement, notation, or reference the claimant was complaining of lower back, lower abdomen, or left or right hip or thigh pain on July 9 or 10, 2020. (RX1 at 39-62). Dr. Hagood’s records of July 9, 2020, reveal his physical examination of the claimant’s gastrointestinal system was, “Negative for abdominal pain” and she had no, “abdominal tenderness.” (RX1 at 41-42). His physical examination of her musculoskeletal system was, “Negative for arthralgias and myalgias”, and she had “Normal range of motion.” (RX1 at 41-42). The Baptist Hospital records dated July 10, 2020, state the claimant had, “no abdominal pain”, and that the physical examination of her musculoskeletal system was, “Negative. Negative for back pain and neck pain.” (RX1 at 51-52).

The medical records reveal the claimant did not mention the complaints which are the subject of this claim until July 16, 2020. (RX1 at 63-70), at which time Dr. Hagood noted her physical exam was, “Positive for chest pain, abdominal pain (**chest wall, noncardiac**), and was, “Positive for back pain and myalgias. Negative for arthralgias.” (RX1 at 65) (Emphasis in original). At this visit, for the first time following the alleged July 8, 2020, work incident/injuries, Dr. Hagood prescribed her a muscle relaxant, Robaxin. (RX1 at 64).

On cross-examination the claimant did not recall bringing any Family Medical Leave Act (FMLA) request forms to Dr. Hagood’s office following the alleged July 8, 2020, work incident. (T.42-47). The claimant brought in two (2) separate sets of FMLA request forms for her provider to complete. Dr. Hagood’s Advance Practice Registered Nurse (ARPN), Charity M. Lowdermilk, dated and signed FMLA request forms on “07/13/20”, and “07/16/20”. (RX1 at 74,

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78; RX1 at 72-78). Neither of these FMLA request forms indicates the claimant was seeking FMLA leave for any of the conditions she alleges were a result of the alleged July 8, 2020, work incident. (RX1 at 72, 76; 72-78).

On July 22, 2020, the claimant sought medical treatment at CHI St. Vincent Hospital in Hot Springs. Under the heading entitled, “HISTORY OF PRESENT ILLNESS”, the clinic note states:

The problem began on 7/22/2020. 1<sup>st</sup> visit; 7/22/20: a very large client was about to fall so she got her under the arms and lowered her to the floor. [B]egan having discomfort in lower abdomen, b/l groin, b/l upper legs, upper arm, lower back pain and neck and upper back stiffness. Has been to her PCP several times, prescribed a muscle relaxer and has been taking Tylenol, admitted to hospital chest pain; r/o cardiac, continued pain. [c]an’t sleep, can[t] drive.

(Claimant’s Exhibit 1 at 1) (Bracketed material added). The “EXAMINATION” section of this report noted: with respect to the claimant’s chest, “...mild TTP of her upper midline”, revealed the following:

Upper arms: no bruising, swelling. Limited... .ROM. Cervical spine: No swelling, bruising, or wound present. No [P]alpable spasm noted TTP paracervical and upper thoracic Limited ROM... . Lower abdomen: reported TTP in suprapubic, groin, and upper thighs, b/l Lumbar Spine: No swelling, bruising, or wound present, TTP lower lumbar/SI jt region No Palpable spasm noted Limited ROM... .

(CX1 at 1) (Bracketed material added).

The claimant was diagnosed with, “Chest pain, unspecified. Lower abdominal pain, unspecified. Pain in right leg. Pain in left leg. Low back pain... . Strain of muscle, fascia and tendon at neck level...sprain of other specified parts of right shoulder girdle...Sprain of other specified parts of left shoulder girdle... .” (CX1 at 1). Although the examining physician, Dr. Mark



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Larey, specifically stated in his clinic note he was unable to palpate any muscle spasms in the claimant's neck and lower back, he prescribed her Celebrex, Flexeril, and Ultracet. (CX1 at 1; RX1 at 79-81). The claimant retired from AHDC as previously planned effective July 31, 2020.

On September 28, 2020, the claimant underwent an MRI of her lumbar spine at Baptist Health Medical Center. The MRI report indicates it was compared with an MRI from January 25, 2006. (CX1 at 7-8). The MRI revealed no significant findings, normal spinal alignment, no nerve root impingement at the various levels scanned, and only degenerative changes. (CX1 at 8; 7-8). The "IMPRESSION" section of the MRI report states:

- \* No spinal canal stenosis or nerve root impingement.
- \* Moderate bilateral facet arthrosis at L4-L5 and L5-S1; facet arthrosis is mild bilaterally at L3-L4.

(CX1 at 8). The claimant was prescribed Flexeril, a muscle relaxant, to take, "at bedtime as needed", and Meloxicam, an anti-inflammatory medication. (CX1 at 7; 3-6).

On September 21, 2021, the claimant visited APRN Lowdermilk complaining of lower back pain that radiated into both hips and into her bilateral groin. X-rays of the claimant's bilateral hips revealed "mild degenerative changes". (CX2 at 3-5). On October 15, 2021, the claimant underwent a second lumbar MRI which revealed her L1-2, L2-3, L3-4 discs were all, "Normal." (CX2 at 6). The "IMPRESSION" section of this MRI report states:

1. There are persistent degenerative changes across the L5-S1 level with patten canal and recesses. There is mild to moderate bilateral foraminal compromise accentuated by bulging and facet arthrosis as before.
2. There is bulging at L4-5 level with potent canal. There is stable mild left

foraminal narrowing as above however.

3. Alignment is unchanged without acute osseous abnormality.

(CX2 at 7; 6-7).

A medical report from Dr. Hagood's office dated November 19, 2021, reveals the claimant was reporting essentially the same complaints with respect to her lower back, and both her thighs. She also discussed her long history of hyperlipidemia [too many lipids, fatty acids, in the blood] and some other conditions the claimant is not contending are related to the alleged work incident of July 8, 2020. (CX2 at 8-9) (Bracketed material added). Dr. Hagood's report also indicates the claimant had been undergoing some pain management treatment, had received some injections, and she was "doing better." (CX2 at 8). She was still concerned about some tender spots on her thighs. (CX2 at 8).

On November 2, 2021, the claimant presented herself for treatment with APRN Hayley L. Rosnermanz of Dr. Hagood's office complaining primarily of lower back pain radiating into her bilateral thighs. APRN Rosnermanz directed the claimant to take her pain medication as prescribed and to notify her of any changes in her condition. (Claimant's Exhibit 3 at 4: 1-4). APRN Rosnermanz diagnosed the claimant's chronic lower back pain was related to lumbar spondylosis, and spondylosis in her cervical region. (CX3 at 4; 3-4).

On November 16, 2021, the claimant began treating with a pain management physician, Dr. Jacob Abraham, who is associated with the Advanced Interventional Pain Surgery Center in Malvern. She underwent steroid injections to her lumbar spine. (CX3 at 9-12). On December 1, 2021, the claimant saw Dr. Abraham, who also attributed her lower back pain to spondylosis in

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her lumbosacral region. Dr. Abraham performed radio frequency denervation of the claimant's right lumbar facet joint nerves at L2, L3, L4, L5, (L3-4, L4-5, L-5, S-1, facet joints) (CX3 at 13).

The claimant saw Dr. Abraham again on November 2, 2021, complaining of lower back pain. Dr. Abraham states in his clinic note for this visit:

Ms. Howell is a 57-year-old female that suffers from Chronic Low Back pain due to Lumbar Spondylosis. She has tried conservative treatments in the past and they were unsuccessful. Her back pain is axial but occasionally will radiate to bilateral thighs. She is being scheduled for MMBs for RF of her lumbar spine to date. She was also given an RX for a Zynex Unit and a back brace was fitted to her while in the office today.

(CX3 at 17).

On cross-examination the claimant testified she told her supervisor about the alleged work incident/injury(ies) on the same day she alleges it occurred, July 8, 2020. The AHDC incident report form, which the claimant signed on July 12, 2020, indicates the alleged incident occurred on, "07/09/20"; that she, "pulled wall muscle in chest, arms and lower stomach"; and that she reported it at, "5:44 pm" on, "07/11/20". (RX2 at 2-3). The Form PECD 2, which the claimant's supervisor completed on July 22, 2020, reflects the employer's recommendation was to deny the claim because the claimant did not report the alleged incident/injury(ies) until, "3 or 4 days later", or "until 7/11/2020", and because there was, "NO WITNESS" to the alleged July 8, 2020, incident. (T.33-54; RX2 at 16)). The claimant said her back was the primary problem arising out of the alleged July 8, 2020, incident, and her chest pain is no longer an issue. (T. 42).

The claimant emerged from retirement and started to work at AllCare Pharmacy in Arkadelphia on January 15, 2021. She performs data entry as well as other jobs and that this

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employer has made things very, “comfortable for me.” (T. 61). The claimant testified she is not claiming the heart palpitation/issues for which she initially sought medical treatment are related to the alleged incident. (T. 62-63).

## **DISCUSSION**

### **The Burden of Proof**

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 Supplement). The claimant has the burden of proving by a preponderance of the evidence She 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 Supp.) states that 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 her 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) (2021 Lexis Supp.); *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,

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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).

For any specific incident injury to be compensable, the claimant must prove by a preponderance of the evidence that her 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) (2021 Lexis Supp.); *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) (2021 Lexis Supp.); and *Cossey, supra*.

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The claimant must prove a causal relationship exists between her employment and the alleged injury(ies). *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 alleged injury(ies) 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).

Of course, it is a well and long-established principle of workers' compensation law that an employer takes the employee as he finds her; 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 for benefits *if* the work-related incident aggravated, accelerated, or combined with the preexisting 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

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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*) (Emphases added.).

**Compensability**

- 1. The claimant has failed to meet her burden of proof in demonstrating she sustained any “compensable injury”(ies) to her lower back, abdomen, and/or right hips and thighs on July 8, 2020.**

The claimant contends that, consistent with the Arkansas Supreme Court’s holding in *Fred’s, Inc. v. Jefferson*, 361 Ark. 258, 206 S.W.3d 238 (2005) and its progeny as interpreted by our court of appeals, even though the claimant’s physician did not palpate any muscle spasms after the alleged July 8, 2020, incident, and did not prescribe her any muscle relaxers until July 16, 2020 – almost a week after the alleged incident to which there was (were) no witness(es) – since he began prescribing and continues to prescribe her muscle relaxers since on or about July 16, 2021, this proves her alleged injury(ies) is (are) compensable and, therefore, she is entitled to TTD benefits from the date of the alleged injury(ies), July 8, 2020, through January 15, 2021, at which time she emerged from retirement to start work with AllCare Pharmacy. Respectfully, the claimant’s reliance on the *Fred’s, Inc. v. Jefferson* line of cases is misplaced on these facts. As usual, both attorneys did an excellent job representing their respective clients; however, I am compelled to find the claimant failed to meet her burden of proof, for the following reasons.

First, while I found the claimant to be an amiable person, her testimony was confusing, and oftentimes in directly conflict with the medical and other evidence of record. For example, the claimant adamantly testified under oath she was, “positive” the alleged incident occurred on July 8, 2020, and that, “I know it was July 8<sup>th</sup>.” (T. 35, Line 19, 16-19; Line 24). However, from the medical records in evidence it appears the claimant gave at least four (4) different alleged injury dates: July 8, 2020 (the stipulated date); July 7, 2020 (because when she first went to the doctor



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on 7/9/2020, she gave a history of, “dizziness with left-sided chest discomfort for the past 2 days”, and right ear pain (but, notably, no lower back, abdominal, and/or left or right hip and thigh pain); (RX1 at 39); July 9, 2020, which is the date stated on the AHDC incident report the claimant signed (RX2 at 2; 2-3); and July 22, 2020, when Dr. Larey’s clinic note states, “The problem began on 7/22/2020.” (CX1 at 1).

Second, adding to this confusion is the information contained in the two (2) separate sets of FMLA request forms the claimant presented to APRN Lowdermilk, one dated 7/13/2020, and the other 7/16/20. (RX1 at 74, 78; 72-78). The record contains two (2) sets of FMLA papers which APRN Lowdermilk completed, the first dated and signed on July 13, 2020, and the second dated and signed July 16, 2020, a little less than two (2) weeks before the date the claimant was already scheduled to retire on July 31, 2020. (RX1 at 71-74; 75-78). The first FMLA request form indicates, among other things, the serious health condition(s) for which the claimant was seeking FMLA: “commenced” in, “2017”; the “probable duration” of the condition, was “lifetime”; and listed the condition(s) for which she was seeking leave as, “chest pain, vertigo, palpitations.” (RX1 at 72). The second FMLA request form states the claimant’s condition, “commenced” on, “07/07/20”; the “probable duration” was, “2 weeks”; and the condition(s) for which the claimant was seeking FMLA were: “Atypical chest pain; [illegible], vertigo, palpitations, muscle strain.” (RX1 at 76) (Bracketed material added). There is no mention of “muscle strain” in the first FMLA application dated July 13, 2020.

Third, the medical record reveals the claimant never mentioned lower back pain, right and/or left hip and thigh pain when she first presented herself for medical treatment on July 9,

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2020 – one (1) day after the alleged July 8, 2020, work incident – to her family physician, Dr. Hagood. On July 9, 2020, she reported to Dr. Hagood her symptoms were, “dizziness with left-sided chest discomfort for the past 2 days” (which, again, would mean the alleged incident occurred on July 7, 2020, not July 8, 2020); “some lightheaded spinning feelings”; “quite a bit of anxiety”, and “right ear pain”. (RX1 at 39). Again, significantly, she did not mention any complaints related to her lower back, abdomen, and left and right hips and/or thighs, nor was she taking or was she prescribed any muscle relaxant(s) at the time of this visit. (RX1 at 39-44).

Fourth, while the July 9, 2020, medical record mentions the claimant, “admits to lifting some clients at her work off of the floor” (which differs somewhat from the claimant’s testimony of having helped break the fall of and helping up a single client on July 8, 2020; see T. 10-17), Dr. Hagood stated the claimant had, “a history of dizziness and syncope”, and further noted she had a loop recorder (which monitors the rhythm of her heartbeat) implanted in her chest. (RX1 at 39). Dr. Hagood even noted in his July 9, 2020, clinic note that his examination of the claimant’s gastrointestinal and musculoskeletal systems were, respectively: “Negative for abdominal pain, constipation, diarrhea, nausea and vomiting”; and “Negative for arthralgias and myalgia”. (RX1 at 41).

Fifth, the Baptist Hospital records for the date the claimant spent the night in the hospital, July 10, 2020, fail to reveal she was having any of the symptoms/complaints she attributes to the alleged July 8, 2020, work incident which are the subject of this claim. The claimant testified she had her son take her to the Baptist Hospital on July 10, 2020, because she thought she was having a heart attack. And, again, the claimant has a well-documented history of chest pain and

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palpitations, as well as hypertension, and anxiety. In addition, the claimant did not present the testimony of any witness(es) to corroborate her often confusing and conflicting testimony concerning either the date of or the facts relating to the alleged incident of July 8, 2020. (RX1 at 1-44; 18-21; 25-29; 30-78).

The medical records from July 9, 2020, through July 10, 2020, reveal the claimant's primary complaints at that time were chest pain and heart palpitations. She did not complain of any lower back, abdomen, left or right hip, and/or left or right thigh pain. (RX1 at 52). Moreover, the July 10, 2020, medical records show the claimant was taking a number of prescription medications, however, significantly, it appears she was not taking nor had any of her treating physicians prescribed any muscle relaxers as of that date. (RX1 at 64).

The claimant reported she was having some nausea on July 10, 2020, but – as they had been the day before, on July 9, 2020 – both the claimant's gastrointestinal exam was, "Negative for abdominal distention, abdominal pain...", and her musculoskeletal exam was, "Negative. Negative for back pain and neck pain." (RX1 at 52; 45-52). It was not until her ER follow-up visit with Dr. Hagood's office on July 16, 2020, that the claimant first complained of lower back, abdominal, and right and hip pain. (RX1 at 63). Again, the FMLA request forms APRN Lowdermilk completed and signed on both July 13 and July 16, 2020, do not cite the claimant's alleged work-related complaints as her reason for requesting FMLA leave. (RX1 at 72-78).

Sixth, on July 22, 2020, when the claimant saw Dr. Larey he specifically stated in his clinic note the claimant told him her lower back, and other complaints which are the subject of this claim, "began on 7/22/2020: and the "EXAMINATION" section of his clinic noted he found, "No

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Palpable spasm noted Limited ROM. (CX1 at 1; “Statement of the Case”, *supra*, at 7).

Seventh, on July 28, 2020, the claimant underwent an MRI of her lumbar spine/lower back at Baptist Medical Center in Little Rock. This MRI revealed no evidence of an acute injury; no significant findings; normal spinal alignment; no nerve root impingement; no spinal canal stenosis; and only moderate and mild facet arthrosis – degenerative changes related to the normal aging process – at L4-L5 and L5-S1, and L3-L4, respectively. (CX1 at 8; “Statement of the Case”, *supra*, at 8).

Over a year later, on September 21, 2021, the claimant underwent X-rays of both her right and left hips which also revealed, “only mild degenerative changes.” (CX2 at 3-5). Thereafter, on October 15, 2021, the claimant underwent a second MRI of her lumbar spine/lower back which revealed the L1-2, L2-3, L3-4 discs were all, “Normal.” (CX2 at 6). The remainder of the MRI report notes only degenerative changes of the claimant’s lumbar spine/lower back, all of which appear to be inconsistent with her pain complaints. (CX2 at 7; 6-7; “Statement of the Case,” *supra*, at 9).

Neither the July 2020 nor the October 2021 MRI findings reveal evidence of an acute injury, but simply show relatively mild to moderate degenerative changes in her lumbar spine. Moreover, the bilateral hip X-rays did not reveal any evidence of acute injury, and only mild degenerative changes. The results of these objective medical tests, especially when combined with the fact the claimant gave her various providers some three (3) different injury dates, and did not complain of symptoms of the alleged injury(ies) for over one (1) week, is insufficient to allow her to meet the Act’s required burden of proof. See, *Vaughan and Moody, supra*.

Eighth, and finally, although the claimant testified she reported the alleged July 8, 2020, work incident on the same day it happened, the preponderance of the evidence of record demonstrates otherwise. The claimant did not complete and sign the AHDC's required incident report until July 12, 2020, and the report indicates the alleged incident/injury(ies) occurred on, "07/09/20", and that the claimant did not contact her supervisor about the alleged incident/injury(ies) until July 11, 2020, at 5:44 p.m., alleging she sustained a "pulled wall muscle in chest, arms, and lower stomach". (RX2 at 3; 2; 2-3). The aforementioned evidence reveals the claimant did not report any alleged injury(ies) to her lower back, and right and left hips and thighs either on this incident report, nor did she mention these alleged injuries to her treating physician(s) until July 16, 2020; and Dr. Larey did not prescribe the muscle relaxer, Robaxin, to her until July 16, 2020, over one (1) week after the claimant alleges the incident/her injury(ies) occurred on July 8, 2020. Even then, Dr. Larey specifically stated he did not palpate any muscle spasms in her lower back. And, ultimately, the objective medical tests revealed there was, indeed, no objective medical evidence of a(n) injury(ies).

Therefore, in light of all the aforementioned medical and other evidence of record, as well as the claimant's confusing and oftentimes conflicting testimony, it would constitute sheer speculation and conjecture for me to find the claimant has met the Act's required burden of proof in demonstrating she sustained the alleged compensable injury(ies) which are the subject of this claim which, of course, the law does not allow me to do. See, *Deana Constr. Co., supra*.

Therefore, for all the aforementioned reasons, I hereby make the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations contained in the Prehearing Order filed October 28, 2021, which the parties affirmed on the record at the hearing, hereby are accepted as facts.
2. The claimant has failed to meet her burden of proof in demonstrating she sustained a “compensable injury”(ies) to her lower back, abdomen, and/or right and/or left hips and thighs as a result of the alleged July 8, 2020, incident.
3. The claimant has failed to meet her burden of proof in demonstrating she is entitled to TTD benefits from July 8, 2020, through January 15, 2021, at which time she emerged from her state retirement to begin working for AllCare Pharmacy.
4. The claimant’s attorney is not entitled to a fee on these facts.

WHEREFORE, for all the aforementioned reasons, the law as applied to the facts of this case compels me to find this claim should be, and hereby is, respectfully denied and dismissed.

**IT IS SO ORDERED.**

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Mike Pickens  
Administrative Law Judge

MP/mp