BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H204207

B. J. WALLACE,
EMPLOYEE **CLAIMANT**

GARLAND COUNTY
HABITAT FOR HUMANITY,
EMPLOYER **RESPONDENT**

BANKERS STANDARD INS. CO./
ESIS, INC.,
INS. CARRIER/TPA **RESPONDENT**

OPINION FILED FEBRUARY 1, 2024

Hearing before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on November 3, 2023, at Hot Springs, Garland 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 Eric Newkirk, Newkirk & Jones, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the prehearing order filed July 26, 2023, 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 March 8, 2022, when the claimant alleges he sustained a work-related injuries to his neck/cervical spine, both his right and left shoulders, and his lower back/lumbar spine.

3. The claimant's average weekly wage (AWW) is $378.79, which is sufficient to entitle him to weekly compensation rates of $252.00 for temporary total disability (TTD), and $190.00 for permanent partial disability (PPD) benefits subject *if* his

alleged injuries are deemed compensable.

4. The respondents have paid some medical benefits, but they controvert any and all additional medical and/or indemnity benefits other than those they have paid to date.

5. All parties specifically reserve any and all other issues for future determination and/or hearing.

(Commission Exhibit 1 at 1-2; Reporter's Transcript at 73-74; 5-6). Pursuant to the parties' mutual agreement, the issues litigated at the hearing were:

1. Whether the claimant sustained "compensable injuries" within the meaning of the Arkansas' Workers' Compensation Act (the Act) to his neck, both his right and left shoulders, and his lower back/lumbar spine on March 8, 2022.

2. If the claimant's alleged injuries are deemed compensable, the extent to which he is entitled to additional medical treatment.

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. 74).

The claimant contends that on March 8, 2022, he was loading a washing machine into a van with a co-worker, when the co-worker dropped his end of the load causing the claimant to sustain an injury to his neck, both his right and left shoulders, and his lower back. The respondents initially accepted the claim as compensable and paid some medical benefits. The claimant contends that on March 16, 2022, he received treatment from Dr. Mark Larey, who ordered twelve (12) sessions of physical therapy (PT), and placed the claimant on light duty work restrictions. On March 16, 2022, Dr. Larey halted the PT and ordered MRIs of the claimant's left and right shoulders. The claimant contends that June 14, 2022, MRIs revealed evidence of rotator cuff and

labral pathology, as well as chondromalacia along the glenohumeral joint of both the claimant's left and right shoulders. The claimant contends that, thereafter, on June 16, 2022, Dr. Larey opined he should continue PT, and he ordered an EMG/NCS study, noting the claimant would eventually need to be placed on permanent restrictions. The claimant contends at this point the respondents denied the claim and stopped paying for all medical treatment. Therefore, for all the reasons set forth above the claimant contends he sustained compensable injuries as set forth above within the course and scope of his employment, and that he is entitled to additional medical treatment, and TTD benefits, and that his attorney is entitled to a controverted attorney's fee. The claimant specifically reserves any and all other issues for future determination and/or litigation. (Comms'n Ex. 1 at 2-3; T. 75).

The respondents contend the claimant was involved in an admitted work incident/event on March 8, 2022, while he was assisting another employee load a washing machine into a van. The respondents contend they initially accepted the claim as compensable, and paid some medical benefits; however, relevant medical records and diagnostic studies conducted after the date of the alleged injury(ies) failed to reveal any acute or other "trauma-related" objective medical findings of any injury(ies) as the Act defines a "compensable injury"(ies). Instead, the only medical findings were degenerative in nature, and not causally connected or related to the work incident. Consequently, the respondents contend all the subject conditions were and are clearly preexisting and not work-related or "compensable" within the Act's meaning. Accordingly, the respondents contend the alleged injuries to the claimant's neck, both his right and his left shoulders, and lower back/lumbar spine are not compensable since there are no objective medical findings which are causally connected or related to the subject March 8, 2022, work incident. Alternatively, in the event the Commission deems this claim compensable, the respondents contend the claimant sustained nothing more than a temporary aggravation(s) of his clearly and demonstrably

preexisting conditions for which they have paid all appropriate medical benefits, and the claimant is entitled to no additional medical treatment or other benefits pursuant to the Act. Furthermore, the respondents contend that if the respondents have and continue to employ the claimant on a full-time basis, this claim is a "medical only" claim. Therefore, if the Commission deems the claimant is entitled to any additional medical benefits, the respondents contend he is not entitled to TTD benefits since he continued to work on a full-time basis without any lost time or wages. Finally, and alternatively, the respondents contend that if the Commission awards additional medical or indemnity benefits to the claimant, pursuant to ***Ark. Code Ann.*** Section 11-9-411 (Lexis Replacement 2023) they are entitled to a dollar-for-dollar credit/offset for any such benefits paid to the claimant by any and all third-party payor(s), including but not limited to, health insurance, short- and/or long-term disability (STD or LTD) benefits, as well as unemployment benefits. The respondents specifically reserve any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 3-4; T. 75-76; 67-68).

At the beginning of the hearing the parties presented an evidentiary dispute to the ALJ for resolution prior to the taking of testimony. The dispute related to certain medical records of CHI St. Vincent (St. Vincent) Hospital. The respondents had received the medical records late due to issues with a third-party vendor St. Vincent apparently uses to obtain and transmit medical records to anyone requesting them. Because the vendor was dilatory in obtaining and/or providing the medical records to the respondents, the respondents were unable to and admittedly did not provide the records to the claimant within seven (7) days before the hearing date as the prehearing order requires. (It appears the respondents' attorney provided the records to the claimant's attorney approximately 30 minutes before the start of the Friday, November 3, 2023, hearing. (T. 12)). Consequently, the ALJ resolved the dispute by sustaining the claimant's attorney's objection to

the introduction of the subject medical records, thereby denying the respondents' request to introduce the medical records into the hearing record. However, the respondents' attorney requested and the ALJ permitted the respondents to proffer the subject St. Vincent medical records as Respondents' Proffered Exhibit 1. (T. 7-16; RPX 1 at 1-55). Also, since the medical records related to questions respondents' counsel already had asked the claimant under oath in his sworn deposition, the respondents' attorney was allowed to utilize any such relevant information contained in RPX 1 in his cross-examination of the claimant. (T. 12; 15; 36-53; 57-60).

Consequently, the record herein on which the ALJ based his decision consists of the hearing transcript and any and all exhibits contained therein and attached thereto, *except* RPX 1 for the reasons set forth and explained in detail, *supra*.

STATEMENT OF THE CASE

The facts of this case are simple, straight-forward, and not subject to reasonable dispute. The claimant, Mr. B.J. Wallace (the claimant), is 69 years old and a resident of Hot Springs Village. In his professional career he worked for Weyerhaeuser, and also as a licensed property and casualty and life insurance agent. He worked with his wife at her Farmers insurance agency, and he also was appointed as an agent with Reliable Life in Little Rock. The claimant has kept his Arkansas insurance agent's license active, so he is still licensed to sell insurance in Arkansas. He started working with Habitat for Humanity (Habitat) around October of 2021, at which time he would have been 68 years old. He testified his job at Habitat entailed him working primarily as a repairman on small appliances, and he now continues working for them performing various other unnamed job duties which do not require him to lift anything heavy. (T. 18-19).

On March 8, 2022, the claimant and two (2) other men were loading a washing machine into a van through the van's sliding side door. One (1) of the men was in the van, and the claimant and another man were lifting the washing machine into the van when the other man lost his grip and dropped his end of the washing machine just inside the van, while the claimant maintained his grip on it. The claimant estimated the washing machine weighed approximately 100 pounds. He testified the other man did not drop his end of the washing machine to the ground, but was able to get it just inside the van before he lost his grip, which left the claimant holding one end of the washing machine while the other two (2) men were trying to lift and pull it all the way inside the van. The claimant testified he experienced pain in the area of both his left and right scapula, and the left side of his neck. He said he reported the incident to someone but he could not remember his name. (T. 19-24).

The medical records reveal the claimant did not seek to obtain medical treatment until some eight (8) days later, when on March 16, 2022, he went to see Dr. Mark Larey. At that time the claimant told Dr. Larey his chief complaint was bilateral shoulder pain which had developed, "mostly in the shoulder blade area, burning, stinging and interferes with sleep laying on R shoulder, tried salonpas [sic], no prior shoulder issues." (Claimant's Exhibit 1 at 1; T. 81) (Bracketed material added). The claimant told Dr. Larey his pain had started as a result of the washing machine incident on March 8, 2022, and had gotten worse since then. Dr. Larey's clinic note of 3/16/2022 reflects his physical examination of the claimant's left and right shoulders revealed no evidence of swelling, bruising or a wound of any kind, and although X-rays did show evidence of AC joint arthritis in both shoulders, and the claimant had limited ROM (range of motion). (CX1 at 1; T. 81).

Dr. Larey's physical examination of the claimant's cervical spine revealed no evidence of swelling, bruising or a wound, and the clinic note states, "No palpable spasm noted." Dr. Larey diagnosed the claimant with a, "Sprain of other specified parts of" both his left and right shoulder girdle. (CX1 at 1; T. 81). Dr. Larey released the claimant to return to light duty work, and the Habitat has accommodated and continues to accommodate the claimant with light duty work. (CX1 at 2; T. 82). The claimant has not missed any time from work, and Habitat has not required him to lift anything heavy, and has paid his regular salary from March 8, 2022, through the date of the hearing. (T. 19).

The claimant followed up with Dr. Larey on March 23, 2022, at which time he reported his shoulder condition had not improved. (CX1 at 6-7; T. 86-87). Consequently, on 6/14/2022, Dr. Larey ordered an MRIs of the claimant's right and left shoulders which showed, no evidence of a rotator cuff tear or labral pathology, and merely naturally-occurring, age-related degenerative changes. (CX1 at 8-11; T. 88-91). A CT scan of the claimant's head and cervical spine performed on 7/4/2022 showed no acute intracranial abnormality; and no traumatic fracture or malalignment of the cervical spine. (CX1 at 12-16; T. 92-96).

On cross-examination the claimant admitted that in June 19 or 20 of 2019 he was involved in a motor vehicle accident (MVA) which resulted in him having neck and shoulder pain and discomfort, The claimant went on to testify he did not have any neck or shoulder pain before the 2019 June MVA. Although he had denied any previous issues with his shoulder when he first saw Dr. Larey on 3/16/2022 (CX1 at 1, 1-5) – some eight (8) days after the washing machine lifting incident at Habitat – further cross-examination and testimony revealed the claimant complained of

neck, bilateral shoulder, and lower back pain after the June 2019 MVA. (T. 36-60). Finally, the record is unclear what outstanding medical bills, if any, the claimant has at this time. (T. 67).

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 has established it by a preponderance of the evidence. ***Ark. Code Ann***. § 11-9-704(c)(2) (2023 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) (2023 Lexis Repl.) 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 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) (2023 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).

The Act's Definition of a Specific-Incident Compensable Injury

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 his employment; (2) caused internal or external harm to his body that required medical services; (3) is supported by objective findings, medical evidence, establishing the alleged injury; 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, 687 (Ark. App. 2009). Of course, 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*.

"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 such subjective complaints or findings such pain, straight-leg-raising tests, and range-of-motion tests." *Burks v. RIC, Inc*., 2010 Ark. App. 862 (Ark. App. 2010). Objective medical evidence is not essential to establish a causal relationship between the work-related accident and the alleged injury where objective medical evidence exists to prove the existence and extent of the underlying injury, and a preponderance of other nonmedical evidence establishes a causal relationship between the objective injury and the work-related incident(s) in question. *Flynn v. Southwest Catering Co.*, 2010 Ark. App. 766, 379 S.W.3d 670 (Ark. App. 2010). Moreover, the claimant must prove a causal relationship exists between her 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, 953 S.W.2d 907, 909 (Ark. App. 1997)).

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) (Emphases added.). 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.). In *Mooney*, 2010 Ark. App. 600 at 4-6, 378 S.W.3d at 165-66 (Ark. App. 2010), the court affirmed the Commission's decision denying a back injury claim where the objective evidence of an injury - including muscle spasms, positive EMG test results, and spinal stenosis revealed on an MRI - were all present *both before and after the date of the alleged aggravation injury*. (Emphasis added).

Based on the aforementioned law as applied to the facts of this case, I am compelled to find the claimant has failed to meet his burden of proof in demonstrating he has objective evidence of an accidental injury related to the relatively minor 3/8/2022 work incident as the Act requires, for the following reasons. (And I refer to the 3/8/2022 work incident as "minor" and/or "relatively minor" based not only on the claimant's description of the work incident, but also on the facts he did not require medical attention until some eight (8) days after the incident, and he has continued to work at Habitat and has received his regular salary, since the incident.)

First, the fact the claimant denied to Dr. Larey he ever had any shoulder pain before the relatively minor work incident of March 8, 2022, then admitted on cross-examination he had been involved in an MVA on June 19 or 20, 2019, after which he complained of and was treated for

essentially the same pain complaints in his shoulders, neck, and lower back for which he now is seeking workers' compensation benefits, is troublesome. It is also troublesome, and somewhat revealing, the claimant apparently never even told Dr. Larey *anything* about the June 2019 MVA, and the pain complaints he had experienced as a result of the MVA. Why would the claimant keep this obviously relevant and significant medical history from Dr. Larey?

Second, the June 2019 MVA is at least as likely – if not *more likely* – to have caused the claimant continuing pain complaints in both his shoulders, his neck, and lower back than the relatively minor 3/8/2022 work incident. If anything, the totality of the evidence of record clearly preponderates in favor of the conclusion that while the minor 3/8/2022 work incident *may have exacerbated the claimant's preexisting pain* which apparently first manifested after the 2019 June MVA. It most certainly demonstrates there exists no objective evidence whatsoever – or at least grossly insufficient evidence with respect to the Act's required burden of proof – the claimant the claimant sustained an accidental injury as a result of the minor 3/8/2022 work incident. On these facts, it would constitute clear speculation and conjecture for a fact-finder to find the claimant's alleged injuries compensable in light of the June 2019 MVA, and the claimant's resulting symptoms and pain complaints which, again, are essentially identical to *his current subjective and self-serving complaints of pain, tingling, and numbness*, etc. Of course, it is well-settled Arkansas workers' compensation law that speculation and conjecture do not support a claim for benefits. *See, Deana, supra*.

Which brings us squarely to the third and most significant reason the claimant has failed to meet his burden of proof pursuant to the Act: the record is devoid of sufficient objective evidence

the claimant sustained an accidental work injury as a result of the minor 3/8/2022 work incident at Habitat for Humanity. The aforementioned X-rays, MRIs, and CT scan all reveal nothing more than evidence of degenerative changes which are the result of the natural process of aging, and which are entirely consistent with a man who is 69 years of age. As the *Vaughn, Grothaus*, and *Moody* decisions cited *supra* explain in detail, these type of degenerative, naturally-occurring objective findings are the result of the aging process, and precisely the type of findings the legislature intended to exclude as evidence of an accidental injury that occurred within the course and scope of employment when it passed Act 796 of 1993. The claimant's underlying degenerative conditions simply do not constitute objective (medical) evidence of an accidental work-related injury and, again, are entirely consistent with someone of his age. Such naturally-occurring, age-related conditions clearly are not the type of conditions the workers' compensation system was and is designed to cover, as the Act, and the aforementioned precedents – among others – make abundantly clear.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations contained in the prehearing order filed July 26, 2023, which the parties affirmed on the record at the hearing, hereby are accepted as facts.

2. The claimant has failed to meet his burden of proof pursuant to the Act in demonstrating he sustained a "compensable injury"(ies) within the Act's meaning to his neck/cervical spine, and/or to both his right and left shoulders, and/or to his neck/cervical spine, and/or to his lower back/lumbar spine as a result of the relatively minor March 8, 2022, incident at Habitat for Humanity.

3. Specifically, the claimant has failed to meet his burden of proof as the Act requires

in demonstrating he has any objective evidence of an accidental injury to any of the subject body parts set forth above. Indeed, the claimant had no objective medical evidence of an accidental injury when he first saw Dr. Larey on March 16, 2022, some eight (8) days after the incident; and none on the thorough and extensive diagnostic testing conducted thereafter revealed any objective medical evidence of an accidental injury, but merely showed objective findings that are entirely degenerative in nature, consistent with the claimant's age and the natural aging process. Therefore, pursuant to the *Vaughn, Grothaus, and Moody* precedents cited *supr*a, the claimant has failed to meet the burden of proof the Act requires.

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

For all these reasons, this claim is denied and dismissed subject to the parties' statutory appeal rights.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp