BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H304280

LARRY M. ZINTEL,
EMPLOYEE **CLAIMANT**

PULASKI COUNTY ROAD & BRIDGE,
EMPLOYER **RESPONDENT**

AAC RISK MG'T SERVICES,
CARRIER/TPA **RESPONDENT**

OPINION FILED MARCH 5, 2024

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on December 6, 2023, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by the Honorable Mark Alan Peoples, Peoples Law Firm, Little Rock, Pulaski County, Arkansas.

The respondents were represented by the Honorable Melissa Wood, Worley, Wood & Parrish, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the prehearing order filed October 31, 2024, the parties agreed to the following stipulations, which they affirmed on the record at the hearing.

1. The Commission has jurisdiction over this claim.
2. The employee-employer-carrier relationship existed at all relevant times including on January 18, 2022, when the claimant alleges he sustained a compensable injury to his lower back/lumbar spine
3. The claimant earned an average weekly wage of $744.40, which entitles him to weekly indemnity rates of $496.00 for temporary total disability (TTD), and $372.00 for permanent partial disability (PPD) *if* the claim is deemed compensable.
4. The respondents have controverted this claim in its entirety.
5. The parties reserve any and all other issues not litigated herein for future determination and/or litigation.

(Commission Exhibit 1 at 2; Reporter's Transcript at 6; 59). Pursuant to the parties' mutual agreement, the issues litigated at the hearing were:

1. Whether the claimant sustained a compensable injury to his lower back/lumbar spine on January 18, 2022.

2. If the claimant's alleged lower back/lumbar spine injury is deemed compensable, the extent to which he is entitled to medical benefits, and to TTD benefits beginning on January 19, 2022, and continuing through a date yet to be determined.

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

(Comms'n Ex. 1 at 2; T. 6; 59)

The claimant contends that on January 18, 2022, he sustained a compensable injury to his lower back/lumbar spine when he was involved in a motor vehicle accident (MVA) while in the course and scope of his employment. He contends he is entitled to medical treatment, and related expenses; to TTD from the date of the injury through a future date yet to be determined, as well as to a controverted attorney's fee. (*See*, Claimant's Prehearing Questionnaire Response filed October 9, 2023; and Claimant's Post-Hearing Response Brief).

First, the respondents contend the claimant was not engaged in the performance of "employment services" at the time of his alleged lower back/lumbar spine injury and, therefore, the injury cannot be deemed "compensable" within the Act's meaning. Alternatively, the respondents contend the claimant did not sustain a compensable injury on January 18, 2022, since there exist no objective findings of any traumatic injury in the relevant medical records. Third, the respondents contend that even if his alleged lower back/lumbar spine injury is deemed compensable, the claimant's treating physician opined he reached maximum medical improvement (MMI) on April 12, 2022, and, therefore, he is not entitled to any TTD benefits after

this date. (*See*, Respondents' Prehearing Questionnaire Response filed September 18, 2023; and the Respondents' Post-Hearing Brief).

The record herein consists of the hearing transcript and any and all exhibits contained therein and attached thereto, as well as the parties' prehearing questionnaire responses cited *supra*, and the parties' post-hearing briefs and any and all responses and/or replies thereto, all of which have been blue-backed and hereby made a part of the hearing record. The record specifically does *not* include the PCRB holiday work schedule Internet/website link cited on page 2 of the claimant's post-hearing brief; however, the ALJ does take administrative/judicial notice that the day before the subject accident, Monday, January 17, 2022, was both a state and federal holiday, namely Martin Luther King, Jr. Day.

STATEMENT OF THE CASE

The claimant, Mr. Larry Zintel (the claimant), is 45 years old. He worked for Pulaski County Road & Bridge (PCRB) as a senior operator for about nine (9) years and six (6) months, which he testified is a position similar to a crew chief. (T. 11-12). In addition to his supervisory duties, the claimant described his job as a senior operator as physically demanding since it involved, "shoveling asphalt, raking asphalt and rock, raking what we call Class 7 SB-2, jack-hammering-out a hole in the road to put asphalt into it, anything from climbing up on equipment to run it, to being on top of chip box giving hand signals for a driver to dump chips into it so we can resurface the road with chip." (T. 11-13; 22-23). His working hours were from 7 a.m. to 5:30 p.m., Monday through Thursday. The claimant testified that on occasion he would get called into work outside of his scheduled hours at any time of the day or night, for example when there was inclement weather, icy roads, storms, and similar incidents in order to sand and clear the roads. (T. 12-13; 23).

On the morning of January 18, 2022, the claimant testified he was on his way to work when he was involved in an MVA. He testified under oath he received a call from his supervisor, foreman Gary Ellis (whose name is actually Gary Ellison), at about 6:20 a.m. instructing him to drive by and pick up a co-worker named David Jones, who needed a ride to work. (T. 11-14; 24; 38). Specifically, the claimant testified:

> I was driving in to work, my phone rang. I was it was Forman Gary [Ellison], and I went to reach for it and couldn't reach it, so I had to pull over, get my phone. I answered it and Gary was instructing me I need to go pick up David Jones because his ride was not able to come in to work.

(T. 13) (Bracketed material added). The claimant testified it was not his understanding Foreman Ellison was asking him to perform a personal favor. (Id). The claimant testified, "I took it as he needed me to go pick up a fellow employee on my was in to work and bring him to work, which, in turn, I'd have to drive past the job, go pick him up and come back." (Tr. 14). The claimant did not believe he had a choice as to whether he could agree or refuse to pick up Mr. Jones. (Id).

The claimant further testified he talked to Mr. David Jones that morning to let him know he was on his way to pick him up. (T. 26). The claimant said he took Foreman Jones's instruction to retrieve Mr. Jones and bring him to work as a directive from his supervisor and, again, he did not believe he had a choice as to whether he could make his own decision as to whether to pick up Mr. Jones. (T.13-14).

The claimant explained that in order to pick up Mr. Jones he had to drive past the PCRB office. (T. 25). He was about two (2) miles away from Mr. Jones's house when he was involved in the MVA. (T. 14-15; 26). The claimant testified under oath he agreed the police report introduced at the hearing accurately reflects how the accident happened and that the Emergency

Medical Services ambulance (EMS, or the ambulance) arrived at the accident scene at 6:44 a.m., but testified the ambulance did not transport him anywhere. (T. 31). He further testified the police report further reflects he advised the officer he had sustained no injuries in the MVA, and he admitted that is what the told the officer because, "That's how I felt at the time." (Claimant's Exhibit 2 at 11; T. 31-32).

Scott Seymour, the PCBR asphalt superintendent, testified under oath at the hearing on the respondents' behalf. He testified he usually arrives at work at around 6:25 a.m. (T. 34). He explained that on the morning of January 18th, 2022, he got a call from Mr. Zintel at about 6:35 a.m. or 6:40 a.m., who told him he had been involved in a bad accident on Roosevelt Road. Mr. Seymour testified he did not instruct the claimant to pick up David Jones nor, to his knowledge, did anyone else in management instruct the claimant to do so. (T. 35). Gary Ellison (whom the claimant referred to in his testimony as "Gary Ellis") was terminated for calling another employee a racial slur, and he would consider him to be a "disgruntled" employee. (T. 38). Mr. Ellison did not testify at the hearing.

David Jones, who is a PCRB construction worker, testified he usually had a co-worker named Michael Needham take him to work. (T. 41-42). Mr. Jones testified he was the one who asked the claimant to give him a ride to work because Mr. Needham was off work. (T. 42-43). Mr. Jones went on to explain that the date before the accident (which was Monday, January 17, 2022) Mr. Needham, who usually gave him a ride to work, was off work, so he asked the claimant "that evening" (*i.e.*, Monday, January 17, 2022) if the claimant could give him a ride to work the next morning *(i.e.*, Tuesday, January 18, 2022). (T. 43-44). Mr. Jones said asking a coworker to pick

him up and take him to work is not something that would require a supervisor's permission. (T. 44).

Mr. Jones testified the claimant called him on the day of the MVA, after it had occurred; but said he did not talk to the claimant the morning of the MVA (Tuesday, January 18, 2022) before the accident occurred. Mr. Jones testified he had only talked to the claimant in person the evening before the date of the MVA (Monday, January 17, 2022) when he asked the claimant in person if he could give him a ride to work the next day – January 18, 2022 – which was the day the MVA occurred. (T. 43-44).

On cross-examination the claimant's attorney pressed Mr. Jones, attempting to clarify his testimony:

> Q. You called Mr. Zintel the night before and asked him to come pick you up the next day. Is that your testimony?
>
> A. I talked to Mr. Zintel that evening.
>
> Q. At work?
>
> A. Yes.
>
> Q. On Martin Luther King's birthday?
>
> A. Sir, I don't recollect what it was as far as a birthday. I don't recollect what it was.
>
> Q. The County Road and Bridge Department, is it open on Martin Luther King's birthday?
>
> A. I can't recall, sir.
>
> Q. Are you still employed with Pulaski County Road and Bridge?
>
> A. Yes, sir, I am.

Q. Did anybody tell you how to testify here today?

A. No, sir, they did not.

Q. All right.

(T. 46).

A little bit before Noon on the same day of the 1/18/2022 MVA, the claimant presented himself to the emergency room (ER) complaining of neck, shoulder, and hip pain. He was diagnosed with a cervical strain, prescribed narcotic pain medication, and released. (CX1 at 1-5). On April 7, 2022, the claimant underwent cervical and lumbar spine MRIs at Baptist Hospital, which will be discussed in more detail below. (CX1 at 7-9)

The claimant underwent a lumbar MRI on April 7, 2022, which the radiologist Dr. Raymond Peeples interpreted as follows: "No evidence of acute lumbar spine injury. Lower lumbar degenerative findings are present, superimposed on mild diffuse narrowing of the bony spinal canal secondary to short pedicles, as detailed above." (CX1 at 7-9; RX1 at 1). Consequently, in a note dated April 19, 2022, Dr. Robert Ritchie of Concentra opined the claimant suffered from "chronic" neck and back pain and that he reached MMI as of April 12, 2022. (RX1 at 5; 2-5).

Thereafter, the claimant underwent physical therapy (PT) and was treated with pain, muscle relaxant, and anti-inflammatory medications including Tramadol, Gabepentin, Robaxin, and Dicolfenac, although he did not take the Tramadol while working. (CX1 at 10). Because of his continued neck and lower back pain complaints, the claimant was evaluated by and treated with orthopedic specialists at Arkansas Spine and Pain and OrthoArkansas. (CX1 at 10-27).

The claimant eventually came under the care of Dr. I.U. Onyekwela (Dr. O) of

OrthoArkansas in August of 2023, for his continuing complaints of lower back pain and radiculopathy. Dr. O ordered an MRI. The claimant underwent this MRI on September 18, 2023, which was not inconsistent with the April 7, 2022, MRI, and was interpreted as follows: "Bilateral pars defect L5-S1 with grade 1 anterolisthesis. Neural foraminal stenosis worse on the right at L5-S1." (CX1 at 19; RX1 at 6). Believing the L5 pars defect to be the cause of the claimant's lower back pain, on September 26, 2023, Dr. O performed surgery on the claimant's lumbar spine to alleviate the claimant's lower back pain. (CX1 at 25-27).

There exists no evidence in the record the claimant suffered from chronic lower back pain before the subject MVA of January 18, 2022, or that the cause of his continued lower back pain in the days, weeks, and months after the 1/18/2022 MVA and the 9/23/2023 surgery was the result of some independent, intervening incident that happened at some point after the MVA. (T. 20-21; CX1 at 1-29; RX1 at 1-6).

The respondents requested that Dr. Ryan Fitzgerald, an Arkansas-licensed radiologist associated with Fitzgerald Medical Consulting, LLC, review the original films/media of the claimant's various diagnostic tests as set of in his written report dated November 28, 2023. (RX1 at 7-8). Dr. Fitzgerald concluded his report by stating:

> In summary, MRI exams obtained in April 2022 and August 2023 showed, on my personal review, no evidence of an acute traumatic injury. Instead, both exams revealed multiple potential degenerative pain generators independent of the subject event [*i.e.*, the Tuesday, January 18, 2022, MVA].

(RX1 at 8; 7-8) (Bracketed material added).

The claimant testified he has not returned to work since the January 18, 2022, MVA, and that he does not believe he is physically capable of returning to work at this time because he is,

"still recovering and recuperating." (T. 19). He also testified his, "doctor's still got me on light-duty, and we'll find out more on January 17." (T. 19). He further testified he does not believe he will ever be able to perform any type of physical work in the future. (T. 21).

The claimant testified that Ambetter and Medicaid paid his medical bills, and he did not pay anything out-of-pocket, but he no longer had insurance as of the hearing date. He also testified he took off work pursuant to the Family and Medical Leave Act (FMLA) for a period of time after the 1/18/2022 MVA, but that PCRB let him go after his FMLA time expired. (T. 29-31). On re-cross examination – as he had initially volunteered in his direct examination testimony – the claimant admitted that on the day of the 1/18/2022 MVA an ambulance had been called to the accident scene but he did not require it to take him anywhere for medical treatment; and that he told the police officer at the scene he was not injured. On re-cross he also admitted to having traveled to Eureka Springs in the Summer of 2023, and that he had attended a Jeff Dunham show since the subject MVA. The claimant has applied for Social Security disability (SSD) benefits, but his claim was denied. (T. 31-32).

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).

Both the claimant's and respondents' attorneys are to be commended for their thorough research as well as their zealous, good faith arguments on behalf of their respective clients. The excellent record they made, as well as their thoughtful, well-written, and well-reasoned briefs – both of which cited specific facts from the record – were most informative and helpful in assisting the ALJ render the opinion herein.

The Act's "Employment Services" Exception to Compensability

Of course, ***Ark. Code Ann.*** Section 11-9-102(4) (2023 Lexis Replacement), *infra*, sets forth the elements a claimant must prove by a preponderance of the credible evidence of record in order to demonstrate a specific-incident compensable injury. But in this case, before I may even reach the issue of compensability, I must address the threshold issue concerning whether the claimant was performing "employment services" at the time of the subject Tuesday, January 18, 2022, MVA.

Pursuant to ***Ark. Code Ann.*** § 11-9-102(4)(B)(iii) (2023 Lexis Replacement) exempts from the Act's definition of a "compensable injury" any injury that was inflicted upon the employee at a time when employment services were not being performed. An employee is generally not considered to be performing employment services while merely traveling to or from the workplace; thus, what we have referred to for as long as I can remember as the "going-and-coming rule" ordinarily precludes a finding of compensability for injuries sustained while an employee is going to or returning from work. *Moncus v. Billingsley Logging*, 366 Ark. 383, 235 S.W.3d 877 (2006).

The rationale for this rule is that all persons, including employees, are subject to the recognized hazards of travel to and from work in a vehicle (or otherwise). *Id.*

The Act's "employment services" exception has produced a great deal of appellate precedent. The Arkansas Supreme Court has held that the test to determine whether an employee was in fact performing "employment services" at the time of an alleged injury(ies) is the same as the test used to determine whether an employee was acting within the course and scope of employment, specifically: Whether the injury occurred within the time and space boundaries of the employment when the employee was carrying out the employer's purpose(s) or advancing the employer's interest(s), either directly or indirectly. *Collins v. Excel Specialty Products*, 347 Ark. 811, 69 S.W.3d 14 (2002); *Pifer v. Single Source Transportation,* 347 Ark. 815, 69 S.W.3d 1 (2002).

Concerning the threshold employment services issue, in their brief the respondents cite a number of cases – both Full Commission and Arkansas appellate court cases – in support of their contention the claimant was *not* engaged in "employment services" at the time of the subject Tuesday, January 18, 2022, MVA. In summary, all the cases the respondents cite in their post-hearing brief deal with fact situations wherein the Commission and/or courts have deemed the claimant *not* to have been performing "employment services" at the time of the incidents in question. (Respondents' Post-Hearing Brief at 3-5). The respondents' contention in this regard may be summarized by the following sentences in their brief: "At the time of Mr. Zintel's motor vehicle accident, he was doing absolutely nothing work-related. While it was generous of him to pick up a coworker, he was not in the course and scope of his employment at the time."

(Respondents' Post-Hearing Brief at 5). However, based on the facts of this case as applied to the applicable law, I am compelled to find the claimant has met his burden of proof in demonstrating he was engaged in employment services at the time the 1/18/2022 MVA occurred.

The preponderance of the credible evidence of record reveals a supervisor – forman Gary Ellison – called him while he was on his way to work and instructed him to deviate from his normal route to work in order to pick up a co-worker, Mr. David Jones, who was without transportation. (Mr. Jones apparently usually rode with another employee, but that employee was not going to be at work on Tuesday, 1/18/2022.) As the claimant credibly testified:

> I was driving in to work, my phone rang. I was it was Foreman Gary, and I went to reach for it and couldn't reach it, so I had to pull over, get my phone. I answered it and Gary was instructing me I need to go pick up David Jones because his ride was not able to come in to work.

(T. 13). The claimant did not understand that "Foreman Gary" was asking him to perform a personal favor. (Id). Quite to the contrary the claimant testified, "I took it as he needed me to go pick up a fellow employee on my way in to work and bring him to work, which, in turn, I'd have to drive past the job, go pick him up and come back." (T. 14). Indeed, the claimant did not believe he had a choice as to whether he was to pick up the co-worker. (Id). Of course, the claimant did not, however, ever make it to pick up Mr. Jones, as he was involved in the MVA before he arrived at Mr. Jones' house. (Id). The claimant only worked only one (1) day for respondent after the day of the accident, 1/18/2022. (T. 17).

Taken as a whole, the testimony of the respondents' two (2) witnesses seeking to rebut the claimant's testimony that a supervisor called him and asked him to pick up Mr. Jones simply is not persuasive. The first witness, Mr. Seymour, candidly conceded he had no knowledge of

whether directed to pick up Mr. Jones on the morning of the subject MVA:

> Q. You do not know one way or the other whether Gary Ellison called Larry Zintel on the morning of January the 18th 2022, do you?
>
> A. I do not know, sir.

(T. 40).

And the record reveals the testimony of the respondents' other witness, Mr. David Jones, is inconsistent and, therefore, lacks credibility. Mr. Jones initially testified:

> Okay. The day before the accident, like, my coworker that I normally ride with, he was off that particular day, so that evening I asked Mr. Zintel could he perhaps give me a ride to work? And he agreed that he would pick me up hat particular morning.

(T. 43). However, Mr. Jones's testimony is entitled to little or no weight since neither he nor Mr. Zintel were even *at work*, "the day before the accident."

The day before the accident was January 17, 2022. The Commission may take administrative/judicial notice that January 17, 2022, was both a state and federal holiday and, therefore, all city, county, state, and federal government offices were closed that day in observance of Martin Luther King, Jr.'s (MLK) birthday. There exists no evidence in the record to rebut this fact. More specifically, there exists no evidence in the record to demonstrate the PCRB employees were at work on the MLK birthday holiday.

Consequently, the preponderance of the credible evidence of record reveals Mr. Jones could not, and at the very least that it is more likely than not that Mr. Jones did *not* talk with the claimant at work on the evening of the MLK holiday – Monday, January 17, 2022 – the day before the subject MVA of Tuesday, January 18, 2022. Indeed, the preponderance of the credible evidence reveals the claimant, "was instructed to go and pick him [Mr. David Jones] up because his normal

ride was having to quarantine out for COVID from his son being positive for COVID." (T. 53) (Bracketed material added). I find the claimant's testimony to be more credible on these facts than that of the respondents' witnesses. The preponderance of the credible evidence leads one to the conclusion the claimant was in fact advancing his employer's interest when he followed a supervisor's instructions, and deviated from his normal route to work to pick up a coworker who otherwise would not have had ready transportation to work.

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

The respondents second contention is that the claimant has failed to meet his burden of proof in demonstrating he sustained a compensable lower back/lumbar spine injury in the subject MVA because the medical record fails to reveal any objective findings of an acute traumatic lower back/lumbar spine injury. (Respondents' Brief at 5-6).

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).

Without a doubt, the record reveals that objective evidence – objective medical evidence – exists in this case. Therefore, only real primary point of contention is whether the objective evidence in question – *i.e*., the various preexisting degenerative conditions and the L5-S1 pars defect the MRIs demonstrated – were or were not the result of the subject 1/18/2022 MVA, or whether the MVA aggravated or accelerated these preexisting degenerative conditions of the claimant's lumbar spine.

In the present case, the claimant underwent an MRI of his lumbar spine on April 7, 2022. The report from that test reflects, "No evidence of acute lumbar spine injury." (RX. at 1). An MRI of the cervical spine showed, "minimal degenerative changes." Another MRI of the lumbar spine was performed on August 18, 2023, which revealed, "Bilateral pars defects L5-S1 with grade 1 anterolisthesis. Neural foraminal stenosis worse on the right at L5-S1." (RX1 at 6). Dr. Ryan

Fitzgerald, a radiologist licensed to practice in Arkansas associated with Fitzgerald Medical Consulting, LLC, reviewed the claimant's lumbar MRI films and confirmed they fail to reveal any evidence of an acute traumatic injury but, "instead, both exams revealed multiple potential degenerative pain generators independent of the subject event." (RX1 at 7-8).

Even taking Dr. Fitzgerald's opinion at face value, the record is completely devoid of any evidence the claimant had ever suffered from lower back/lumbar spine-generated pain, undergone treatment for any such pain, or that any such pain had prevented him from performing his admittedly strenuous manual labor job at any time *before* the 1/18/2022 MVA. Based on the specific facts of this case I cannot and do not find Dr. Fitzgerald's opinion to be as persuasive as the totality of all the other credible, unrebutted evidence of record. To find otherwise would constitute sheer speculation and conjecture which, of course, can neither support or disprove a claim for compensation. *See, e.g., Deana, supra*.

Therefore, after examining the totality of all the medical and other relevant, credible evidence of record, I am compelled to find the 1/18/2022 work-related MVA more likely than not either caused and/or aggravated or accelerated the preexisting conditions identified by the post-1/18/2022 MVA MRIs – and particularly the L5-S1pars defect. Just as surely as the claimant did have preexisting degenerative conditions in his lumbar spine, he also was involved in a rather serious, practically head-on collision that created enough of a collision to deploy his truck's airbags, and to prompt someone to call an ambulance. And while the claimant did not ride in the ambulance to the ER, later that same day – 1/18/2022 – before Noon he himself was in enough

pain he presented himself to the ER. (T. 15; CX 1 at 1). Although his injuries initially appeared unremarkable, the claimant's treating physician emphasized to him, "that emergent conditions may arise and to return to the ER for new, worsening. Or any persistent conditions." (CX1 at 5).

After the 1/18/2022 MVA the claimant suffered chronic lower back/lumbar spine pain. (CX1 at 11-12). He was given a work restriction as of 6/2/22. (CX 1 at 15). And again, significantly, the record is devoid of any evidence revealing the claimant ever had a problem with his lower back before the subject work accident. And the claimant's unrebutted testimony was that he had no back pain and had never sought treatment for any back pain or discomfort, nor had lower back pain ever kept him from working. (C1 1 at 22). Dr. O ultimately diagnosed the claimant with a "bilateral LA5 pars defect", a condition well-known to the Commission that is a common cause of lower back/lumbar spine-generated pain and radiculopathy. (CX 1 at 22).

Consequently, the preponderance of the aforementioned evidence reveals the claimant's lower back pain/lumbar spine problems shown on the MRIs – including but not limited to the L5-S1 pars defect – were at the very least aggravated or accelerated by the subject 1/18/2022 MVA, creating pain and disability, requiring him to take narcotic pain, anti-inflammatory, and other medication (even Gabepentin, a well-known narcotic pain medication used in an attempt to help alleviate nerve pain), undergo PT, continuing medical treatment and, ultimately, requiring Dr. O to perform surgery in 2023 September. (CX 1 at 23; 25-27). And *see, e.g.*, *Lowes's Home Centers, Inc., v. Robertson*, 2019 Ark. App. 24, 567 S.W.3d 899 (Ark. App. 2019); *Fred's, Inc. v. Jefferson*, 361 Ark. 258, 206 S.W.3d 238 (2005), *et al*. (Of course, *if* the claimant would have had a demonstrated, documented, or admitted history of lower back/lumbar spine injury(ies), pain,

and/or treatment, etc., these facts may very well have demanded a contrary conclusion/decision in this claim.)

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 31, 2023, hereby are accepted as facts.

2. The claimant has met his burden of proof in demonstrating he was engaged in "employment services" at the time the subject January 18, 2022, MVA.

3. The claimant has met his burden of proof in demonstrating he sustained a compensable lower back injury/lumbar spine specific injury – the bilateral L5-S1 pars defect and/or the aggravation or acceleration of the preexisting degenerative condition(s) of his lumbar spine – as a result of the January 18, 2022, MVA. Based on the applicable law and the facts of this claim, these conditions constitute "objective findings" sufficient to support a claim for benefits herein.

4. The record is devoid of any evidence the claimant ever suffered from a history of lower back injury(ies), or chronic lower back/lumbar spine pain; that he ever required or underwent treatment for such pain; that such pain ever resulted in disability that required him to miss work as a result of any such pain and/or the preexisting degenerative condition(s) of his lower back/lumbar spine at any time *before* the subject Tuesday, January 18, 2022, MVA.

5. The respondents are responsible for payment of the claimant's related, reasonably necessary medical treatment, and other such expenses related to his compensable lower back/lumbar spine injury.

6. The claimant is entitled to TTD benefits from the date of his compensable lower back/lumbar spine injury – Tuesday, January 18, 2022 – through the date his treating orthopedic surgeon, Dr. O, opines he reached MMI. *Mad Butcher v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (Ark. App. 1982).

7. The claimant's attorney is entitled to a controverted fee on these facts.

AWARD

WHEREFORE, the respondents hereby are directed to pay benefits in accordance with the

"Findings of Fact and Conclusions of Law" set forth above. All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to ***Ark. Code Ann.*** Section 11-9-809, and *Couch v. First State Bank of Newport,* 49 Ark. App. 102, 898 S.W.2d 57 (Ark. App. 1995); *Burlington Indus., et al v. Pickett,* 64 Ark. App. 67, 983 S.W.2d 126 (Ark. App. 1998); and *Hartford Fire Ins. Co. v. Sauer,* 358 Ark. 89, 186 S.W.3d 229 (2004).

If they have not already done so, the respondents shall pay the court reporter's invoice within twenty (20) days of their receipt of this opinion.

IT IS SO ORDERED.

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Mike Pickens
Administrative Law Judge

MP/mp