BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H301211

WESLEY C. GIVENS,
EMPLOYEE **CLAIMANT**

J.E.L. ENTERPRISES, LLC,
d/b/a PLANT SERVICES OF
NORTH LITTLE ROCK,
EMPLOYER **RESPONDENT**

AUTO OWNERS INS. CO.,
INS. CARRIER/TPA **RESPONDENT**

OPINION FILED JANUARY 8, 2024

Hearing conducted on October 10, 2023, before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, in Little Rock, Pulaski 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 Randy P. Murphy, Anderson, Murphy, Hopkins, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the prehearing order filed August 2, 2023, the parties have agreed to the following stipulations, which they modified and 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 December 15, 2022, when the claimant alleges he sustained compensable injuries to his head, neck/cervical spine, lower back/lumbar spine, right shoulder, and right knee.

3. The claimant's average weekly wage (AWW) was $442.45, which corresponds to weekly indemnity rates of $295.00 for temporary total disability (TTD), and $221 per week for permanent partial disability (PPD) rates *if* the claim is deemed compensable.

4. The respondents have controverted this claim in its entirety.

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

(Commission Exhibit 1 at 1-2; Reporter's Transcript at 156-57). 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 head, neck/cervical spine, lower back/lumbar spine, right shoulder, and right knee, on December 15, 2022.

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

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

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

(Comms'n Ex. 1 at 2; RT. 157).

The claimant contends that on December 15, 2022, he was involved in a motor vehicle accident (MVA) within the course and scope of his employment. The claimant contends he was driving his employer's vehicle when the MVA occurred, and he sustained injuries to his head, neck/cervical spine, lower back/lumbar spine, right shoulder, and right knee as a result of the subject MVA. The claimant further contends the respondent-employer, J.E.L. Enterprises (JEL), first refused to file a claim, so the claimant filed a Form AR-C on February 23, 2023, and thereafter the respondents denied the claim in its entirety. The claimant contends he was forced to obtain his

own medical treatment which included an MRI of his lumbar spine which revealed disc herniations at L3-4, L4-5, L5-S1; an MRI to his right shoulder which revealed tears; an MRI of his brain which revealed a diffuse traumatic brain injury; and an MRI of his cervical spine which revealed a disc herniation at C5-6. The claimant contends he has undergone a rhizotomy for his cervical spine and his lumbar spine injuries; an arthroscopic surgery to his right shoulder; he has been diagnosed as having post-concussion syndrome; and his doctor has recommended he undergo an anterior cervical discectomy and fusion (ACDF) at C5-6, all as a direct result of the subject MVA. Therefore, the claimant contends he is entitled to payment of his medical and related expenses; to TTD benefits from December 16, 2022, through a date yet to be determined; and that his attorney is entitled to a controverted attorney's fee. The claimant reserves the right to plead further upon the completion of necessary and appropriate investigation and discovery; and specifically reserves any and all other issues for future determination and/or litigation. (Comms'n Ex. 1 at 2-3; RT. 157-58).

The respondents contend the claimant was not performing "employment services" at the time of the subject MVA. The respondents further contend the claimant cannot meet his burden of proof pursuant to the Act in demonstrating he sustained any compensable injuries within the course and scope of his employment with JEL. The respondents reserve the right to plead further upon the completion of necessary and appropriate investigation and discovery; and specifically reserve any and all other issues for future determination and/or litigation. (Comms'n Ex. At 3; RT. 158).

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

STATEMENT OF THE CASE

The claimant, Mr. Wesley C. Givens (the claimant) is 63 years old. He worked for the respondent-employer, Plant Services, from May 2016, to December 2022. He has worked in the plant servicing business for approximately 30 years, and has known Ms. Jane Ellen Lanning, the owner of Plant Services, since they worked together at Tipton-Hurst Florists in the 1990s. The claimant's job at Plant Services required him to service (examine, water, feed, etc.) plants in the Little Rock area, and he usually worked approximately three (3) days per week, with some days requiring only a few hours of work. Plant Services provided the claimant a list of the customers whose plants he was to service, but the claimant was in control of his daily route and schedule, and the claimant used his own vehicle, which he had purchased from Plant Services, for work. (RT. 12-20).

The claimant testified that on Thursday, December 15, 2022, the day of the subject MVA, he planned to service plants at the Park Plaza Mall, then travel to Corky's BBQ on Bowman Road in West Little Rock, and from there to Parker Lexus which is near Corky's. He said he had just completed servicing plants at the Park Plaza Mall when he was involved in a MVA at the corner of West Markham and North McKinley streets around 9:30 a.m. Concerning how the MVA occurred the claimant testified he had just left the mall and was traveling on N. McKinley towards W. Markham. He said he came to a complete stop at the stop sign located at the intersection of N. McKinley and W. Markham, and that as he was turning right onto W. Markham from N. McKinley another car that was traveling west on W. Markham struck his car about midway on the driver's side. The emergency room records from CHI St. Vincent Infirmary indicate the "impact speed was

< 30 mph." (RT at 20-25; Claimant's Exhibit 1 at 6; CX2 at 3-5). The claimant was wearing a seat belt with both shoulder and lap restraints, and the collision did not cause his car's airbag to deploy. (RT. 20-26; 88; 91). The claimant testified when the other car hit the driver's side of his car, his body was thrown to the right across the console and into his passenger seat. (RT 20-26; 88; 91).

Immediately after the MVA the claimant sent a group text to Ms. Lanning, the owner of Plant Services, and to his co-worker, Ms. Teresa Bailey, notifying them of the accident. The claimant said all of the paperwork documenting his work routes and time were inside his car at the time of the collision, and that Ms. Lanning and her partner, Ms. Wanda Yarber, came to the scene and retrieved items that were in the car. An ambulance was called and it took the claimant on the short ride from the accident scene to the St. Vincent ER (the ER). Thereafter, Ms. Lanning and Ms. Yarber went to St. Vincent to see about the claimant. (RT. 27).

The claimant admitted on both direct and cross-examination he never reported a workers' compensation claim to Ms. Lanning based on the 12/15/2022 MVA. (RT. 58). He further admitted he did not ask Ms. Lanning or her workers' compensation carrier to provide him any medical treatment, and that he obtained the subject medical treatment on his own. (RT. 58). Ms. Lanning testified the claimant told her he was finished with work after he serviced the plants at Park Plaza Mall, and he was headed home. The claimant testified he does not remember telling Ms. Lanning this, but admitted he may have done so. (RT. 133-34; RT. 61-63). Ms. Lanning testified that although the claimant was supposed to turn-in his route/time log sheets every day, he was not very good at doing so, and it was not unusual for him to accumulate log sheets for a number of days before turning them in. (RT. 131-32). Ms. Lanning testified she did not recall seeing any log sheets

in the claimant's car when she and Ms. Yarber retrieved the claimant's personal items from the car following the 12/15/2022 MVA. (RT. 127-34). The claimant was responsible for completing and turning in the log sheets; but the only log sheets introduced into evidence at the hearing stop at December 6, 2022, and reveal the claimant often was finished with the route in question by 10 a.m. (Respondents' Exhibit 1 at RT. 332-430; RT. 64-70). Ms. Lanning testified she does not dispute the claimant serviced the plants at Park Plaza Mall immediately before the accident; but it is her testimony the claimant told her he was finished with work and was headed home at the time of the MVA. (RT. 132-33).

In addition to describing the claimant's pain as "minimal" and noting the absence of any bleeding, the ER records of 12/15/2022 reveal his chief complaints were some neck, back, and muscle pain and tenderness, as well as left shoulder pain. (CX1 at 6-7). The claimant disputed the accuracy of the ER records and testified he told the ER personnel he had injured his right and not his left shoulder. (RT. 32). The ER records of 12/15/2022 also note that examination of the claimant's other body systems were all normal (except for the complaints of pain and tenderness mentioned above); that the claimant was, "Alert, no acute distress"; his head was, "Normocephalic"; his, "Pupils are equal, round, and reactive to light, extraocular movements are intact, normal conjunctiva"; and noted his musculoskeletal examination showed, "Normal ROM, normal strength." (CX1 at 7).

A CT test of the claimant's cervical spine performed on the same day as the accident – 12/15/2022 – and the CT report states the CT showed, "Normal alignment of the cervical spine", and, "no fracture or subluxation." (CX1 at 9). The CT report further states, "There is some

degenerative spurring at C4-5, C5-6 and C6-7. Degenerative facet hypertrophy is present to a mild degree at cervical levels." (CX1 at 9). The ultimate "Impression" of the CT scan report states: "There is some degenerative change of the cervical spine but no fracture or subluxation." (CX1 at 9).

Also, on the same day of the MVA – 12/15/2022 – the claimant underwent a CT scan of his lumbar spine, the report of which states: "Normal alignment of the lumbar spine is present. There is some anterior degenerative spurring at T11-12 through L3-4. Degenerative facet hypertrophy is present at L3-4 through L5-S1. There is no fracture or subluxation." (CX1 at 10). The "Impression" section concludes the lumbar CT report, stating: "Advanced degenerative change of the lumbar spine as discussed above but no fracture or subluxation." (CX1 at 10).

On cross-examination the claimant, who has participated in rodeos through the years, denied ever having injured his right shoulder while rodeoing, and he denied he had been taking any medication for his right shoulder before the 12/15/2022 MVA. He admitted he did wear a back brace on his lower back even before the subject MVA, but he said he did so, "to help just so I didn't have an injury." (RT. 82-83). The claimant also said he sometimes wore a knee brace when he needed to do so. (RT. 83).

Finally, on the same day as the MVA – 12/15/2022 – the claimant underwent an AP and lateral X-ray of his left, not his right, shoulder. The X-ray report states the findings of this diagnostic test as follows: "No dislocation is identified. No arthritis is noted. No suspicious periosteal reaction or unexpected opaque foreign body is seen." (CX1 at 11). Although the claimant testified, he told the ER physician it was his right, and not his left, shoulder which was

injured, there exists no mention in any of the ER records the claimant objected to the X-ray of his left shoulder, or that he requested the physician examine and take an X-ray or perform any other diagnostic tests, on his right shoulder. (RT. 32; CX1 at 6-11). An X-ray report from the Cabot Emergency Hospital of the claimant's right shoulder performed on 1/28/2023 – over one (1) month after the subject 12/15/2022 MVA found:

IMPRESSION:

1. No fracture or dislocation of the right shoulder.
2. Osteoarthritis of the acromioclavicular and glenohumeral joints noted.

(CX1 at 42).

The MVA occurred at approximately 9:30 a.m. on Thursday, 12/15/2022 and, after the claimant was examined and underwent the aforementioned diagnostic tests, he was discharged from the hospital with no further treatment recommended at 12:02 p.m. the same day as the MVA – 12/15/2022. (CX1 at 8; RT. 27).

The claimant testified that after his immediate release from the hospital over the course of the next few days is pain worsened. (RT 33-35). He said he began peeing blood and could not eat. (RT. 35). The following Monday, 12/19/2022 (after the MVA which occurred on Thursday, 12/15/2022), the claimant said he was walking down the hallway at home when his legs suddenly gave out. He said he was able to drag himself to his front door and open it, as he knew that Jane Lanning was coming to pick him up soon. When Ms. Lanning arrived, she called an ambulance. (RT. 36). This time, the ambulance took the claimant to Baptist Hospital, where he was examined and given a catheter and, once again, immediately discharged to return home without any further

treatment recommended. (RT. 35-38; CX1 at 20-30).

On March 31, 2023, the claimant underwent arthroscopic surgery on his right, not his left, shoulder surgery and, according to his testimony, his right shoulder recovered well following the surgery. The claimant testified that he also underwent a lumbar laminectomy on August 17, 2023, by Dr. Boddu and is still receiving follow-up treatment. Claimant testified that Dr. Boddu has also recommended a cervical fusion to be performed after he recovers from the lumbar surgery. According to the claimant, while he remains symptomatic, he is reluctant to have another surgery and will seek a second opinion. (RT.

On 1/23/2023 – again over one (1) month after the subject MVA – of his own accord the claimant presented himself to Kay Lynn Brunt, PA-C on his own when he was not contacted by a workers' compensation adjuster. Brunt noted that the claimant presented with post-concussion symptoms, low back, neck, and right shoulder complaints. (CX1 at 31-40; RT. 199-209). An MRI of the claimant's brain at that time revealed:

1. Multiple T2 and FLAIR hyperintense foci in bilateral frontal, parietal, parietooccipital white matter and pons, suggestive of UBOs (unidentified bright object) / non-specific lacunes. Periventricular white matter hyperintensity. These can be seen in patients with chronic small vessel ischemic disease or can be seen in patient with headaches. Please correlate clinically.

2. Mild cerebral and cerebellar atrophy.

3. Partially empty Sella.

4. Mild tortuosity of the cavernous portions of both the internal carotid arteries.

5. Incidental note is made of minimal mucosal thickening in bilateral mastoid air cells.

6. Mild mucosal thickening in ethmoid air cells and maxillary sinuses.

(CX1, 45-52; RT; 213-220).

The claimant testified on cross-examination he had looked for an attorney to represent him in a third-party lawsuit against the driver of the other car involved in the 12/15/2022 MVA which is the subject of this claim for workers' compensation benefits, and testified the Rainwater, Holt & Sexton law firm (the Rainwater Firm) was representing him in the matter and that they already had filed a third-party lawsuit against the other driver on his behalf. The claimant testified that after he retained the Rainwater Firm, his lawyer set-up an appointment with a doctor, who had then referred him to other doctors. (RT. 77-78).

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).

Employment Services

Before the issue of compensability is addressed, the threshold issue to be decided in this claim is whether the claimant was engaged in "employment services" at the time of the subject MVA. ***Ark. Code Ann.*** Section 11-9-102(4)(B)(iii) (2021 Lexis Repl.) specifically excludes from the definition of "compensable injury" an "injury which was inflicted upon the employee at a time when employment services were not being performed...." An employee is performing "employment services" when he or she "is doing something that is *generally required by her employer*." *White v. Georgia-Pacific Corp*., 339 Ark. 474,478, 6 S.W.3d 98, 100 (1999) (Emphasis added). The test our appellate courts have landed on in determining whether an employee was performing employment-related services at the time of an injury is, "*whether the injury occurred within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly.*" *Pifer v. Single Source Trans*., 347 Ark. 851, 69 S.W.3d 1 (2002) (Bracketed material and emphasis added); and *Curtis v. Lemna*, 2013 Ark. App. 646, 430 S.W.3d 180 (Ark. App. 2013).

In summary, Arkansas's appellate courts have interpreted the term "employment services" as *performing a duty(ies) the employer generally requires, and that benefit the employer in a tangible way*. *See, Pfifer and Curtis, supra*. In other words, our appellate courts use the same test to determine whether an employee is engaged in "employment services" at the time of an alleged work incident as they do when determining whether an employee was acting "within the course and scope" of their employment. *Id.* The test is *whether the claimant's alleged injury occurred within the time and space boundaries of the employment, when the employee was carrying out the*

employer's purpose or advancing the employer's interest directly or indirectly. Id.

Likewise, Arkansas workers' compensation law has long held that an employee traveling to and from work is generally said *not* to be acting within the course of employment. *Olsen Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). This "going and coming" rule ordinarily precludes a claimant from receiving workers' compensation benefits when he is traveling to or coming from his place of employment. *Id.* Of course, the rationale behind this rule is that an employee is *not within the course of employment* while traveling to or from his job. *Id.* The threshold test of whether or not an injury(ies) may be deemed work-related is whether the injury(ies) occurred, "within the time and space boundaries of employment, when the employee was carrying out the employer's purpose or advancing the employer's interest either directly or indirectly." *White v. Georgia-Pacific Corp.,* 339 Ark. 474, 6 S.W.3d at 100 (1999).

Based on the applicable law as applied to the relevant facts herein, I find the claimant has failed to meet his burden of proof in demonstrating he was engaged in "employment services" at the time of the subject 12/15/2022 MVA.

First, the claimant's own testimony in this regard is revealing. Indeed, the claimant's own testimony lends support to a finding he was not in fact engaged in employment services at the time of the incident. The claimant testified at the hearing he had completed servicing his clients at Park Plaza Mall and was traveling in his vehicle when the accident occurred. Significantly, the claimant admitted he "might have" told Jane Lanning at the hospital that he was done working for the day and was going home at the time the MVA occurred. Concerning this issue, the claimant testified as follows:

Q. Let me state it this way: did you tell Jane and Wanda that you were done for the day and you were going home?

A. Not that I remember.

Q. Okay. Could you have said that to them at that time?

A. I might've but I cannot remember it.

(RT. 59, Line 24; RT. 60, ln. 5).

Second, the evidence at the hearing established the claimant was required to keep daily logs documenting his service calls. The daily logs, which were introduced into the hearing record, showed that the last daily log provided by the claimant is dated December 6, 2022. The claimant testified he kept the daily logs, along with other items, in his vehicle before eventually turning them into the office. The credible evidence reveals Ms. Lanning and Ms. Yarber cleaned-out the claimant's car after the MVA, and that Ms. Lanning delivered put the items that were in the claimant's car in plastic containers, or totes, and delivered them to the claimant's address. Concerning the issue of the lack of evidence from the log books demonstrating where the claimant may have been going after he left the mall at the tome of the 12/15/2022 MVA, once again the claimant's own testimony is revealing:

Q. Okay. I understand. But on this particular date you would have had, in addition to the other items that you described, you said groceries and water and snacks, a clipboard –

A. Right.

Q. -- with your daily logs.

A. Right.

Q. Okay. And you don't' know what happened to those daily logs?

A. No.

Q. All right. Now, while you were at the emergency room or at the hospital, Jane and Wanda cleaned out all your personal items from the car, right?

A. Mm-hm.

Q Yes?

A. Yes.

Q. And they were placed in two plastic storage containers. Is that your understanding?

A. Yes.

Q. Did you see those plastic storage containers?

A. Yes.

Q. And when Jane and Wanda drove you home – this was when you were still living with Dr. Richard Jordan, right?

A. Right.

Q. Okay. The carried those items, including the plastic containers, down to the basement and left them there.

A. Yes.

Q. Have you gone back in to look at those plastic containers –

A. Yes, --

Q. -- to see –

A. -- I have, and the paperwork was not there.

Q. Okay.

A. And stuff got water on it and you couldn't read it because it got ruined from the water that was in the totes.

Q. Were the daily logs in there?

A. It was just white pieces of paper that I couldn't read.

Q. Okay. All right. Could those have been the daily logs destroyed?

A. It could have been the daily logs.

(RT. 61, Line 12 – RT 63, ln. 5).

Third, Ms. Lanning, the owner of Plant Services, testified credibly at the hearing regarding the claimant's employment history, as well as the events and conversations that occurred immediately after the 12/15/2022 MVA. Ms. Lanning confirmed that the last daily log the claimant turned-in turned in was for the work day of December 6, 2022. (RT. 132.). Concerning her conversation with the claimant at the ER immediately following the MVA as to where he was going at the time of the accident on 12/15/2022, Ms. Lanning testified as follows:

Q. And did Mr. Givens make any statement about where he had been or where he was going or what his activities were?

A. He said – he said that he was leaving Park Plaza to go home and out of nowhere, boom, this lady just hit him.

Q. Okay. He told you he had been to Park Plaza?

A. Mm-hm.

Q. Is that right?

A. Yes.

Q. You don't have any reason to dispute that, do you?

A. No.

Q. Okay.

A. They [Park Plaza] have a sign-in log. I've – I've seen it.

Q. All right. But he [the claimant] told you he was leaving there and going home?

A. Yes.

Q. Okay. Did he ever say anything else about the accident other than boom and there was an impact?

A. Other than, you know, that his shoulder was sore.

Q. Okay.

A. He complains after the accident where his shoulder was sore?

Q. Yes, his left shoulder.

(RT. 132, ln. 12 – RT 133, ln. 20) (Bracketed material added).

The threshold issue in this case is whether the claimant has met his burden of proof in demonstrating he was engaged in performing employment services at the time of the subject 12/15/2022 MVA. This burden is the claimant's, and the claimant alone. Prior to the passage of Act 796 the tie went to the runner: *i.e.*, the law required the fact finder to give the claimant "the benefit of the doubt" when evidence was unclear and/or ambiguous, etc. That is not the case under Act 796.

In this case, at best the claimant's testimony concerning the employment services issue is unclear and contradictory. *See, supra*. At worst, the preponderance of the evidence reveals the claimant admitted he told, or he "might have" told, Ms. Lanning he had finished

his work for the day the claimant admitted to Jane Lanning following the accident that he had completed work and was going home at the time of the accident. On these facts it would constitute sheer speculation and conjecture to find the had met his burden of proof as required by Act 796 in demonstrating he was engaged in employment services at the time of the 12/15/2022 MVA; and speculation and conjecture cannot and do not support a claim for benefits pursuant to the Act. *See, Deana, supra*.

Compensability

Moreover, even if the claimant had met his burden of proof on the threshold issue herein, the preponderance of the evidence reveals he has failed to meet his burden of proof in demonstrating any and/or all of the alleged injury(ies) to his neck/cervical spine, lower back/lumbar spine, and/or his left shoulder were related to the 12/15/2022 MVA. In order to find and and/or all of the claimant's alleged injuries compensable based on these facts a factfinder must ignore the applicable law and contort the clear medical evidence of record.

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).

First, while I found the claimant to be an amiable person, based on the entirety of his demeanor on the witness stand; the rather evasive way he answered seminal questions; and his tendency in his testimony to exaggerate symptoms in such a way that was obviously inconsistent with the clear preponderance of the relevant objective medical evidence of record, I did not find the claimant's testimony to be credible or reliable.

Indeed, the claimant's allegation he developed symptoms of an alleged brain injury over one (1) month after the 12/15/2022 MVA, especially as compared to the brain MRI which shows no such condition and is within the range of normality for a person of his age, provides just one (1) example of how the claimant's tendency towards shaping his testimony in such a way so as to make it obviously self-serving, inconsistent with the objective medical evidence and, quite simply,

incredible. The claimant did not allege any head trauma; and having initially not thought he had lost consciousness after the MVA at some point apparently began to think he had done so. The claimant's head never struck anything; he never complained of any head trauma; and although his car apparently was "totaled" for insurance purposes (which simply means the cost to repair the damage to the car exceeds the "Blue Book"/fair market value (fmv) of the car), the claimant had no evidence of head trauma when he was examined at the St. Vincent ER.

Even the claimant's testimony as to what happened to him/his body when the car struck the driver's side of his vehicle defies the laws of physics. The claimant testified when the car struck the driver's side of his car, he was thrown across the console and into the passenger seat of his own car. Again, if this were true it would contradict the physical laws of the universe, specifically Newton's laws of motion. Pursuant to the conclusively proved and well-settled scientific laws of motion, when a car strikes another car from the left side – i.e., the driver's side of the car (at least as cars are manufactured in the United States, with the steering wheel being on the left side of our vehicles) – anyb*ody* inside of a car which was struck on the left side would move to the *left, and not to the right*. This is *not only common sense*, it is something we all learned in 9th grade physics class when we learned about Newton's Laws of Motion; here, specifically, Newton's First Law of Motion, relating to inertia. (If one requires a source for this common sense, fundamental law of nature, *See, e.g.*, *The Encylopedia Britannica*, https://www.britannica.com, "Newton's Law's of Motion," as well as Sir Isaac Newton's *Philosophiae Naturalis Principia Mathematica*, first published by Edmond Halley, of Halley's Comet fame, at his own cost in 1687; and as *The Mathematical Principles of Natural Philosophy*, 1729, 3rd Edition).

Second, and most significantly, the medical record is grossly insufficient of objective evidence which demonstrates any of the claimant's obviously osteoarthritic, age-related conditions were caused and/or aggravated by the subject MVA. The claimant wore a right knee and lower back brace from time to time even before the MVA; and none of the diagnostic tests the claimant underwent on the day of the accident, Thursday, 12/15/2022 – the CT scans of his cervical and lumbar spine, as well as an X-ray of, not his right but his left, shoulder showed no abnormalities whatsoever other than those related to preexisting, age-related osteoarthritis and other age-related conditions which clearly are not compensable pursuant to the Act. *See, Vaughan, Barber,* and *Mooney, supra*. None of the aforementioned and cited/quoted objective, thorough, appropriate, and relevant diagnostic tests revealed any evidence of a new or acute injury resulting from the MVA in question. The medical record is devoid of any such objective medical evidence of a new injury/aggravation which would have necessitated the two (2) surgeries the claimant has had to date (one on his right shoulder and a second – a lumbar laminectomy – on his lumbar spine), nor the apparently recommended cervical surgery for which the claimant said he intends to obtain a second opinion.

Finally, it is noteworthy that on the same day of the accident – Thursday, December 15, 2022 – after a couple of hours undergoing diagnostic tests at the hospital the claimant was discharged with no recommendation for any treatment regimen. While the claimant was cognizant and aware enough following the accident to send his long-time friend and employer a group text advising her he had been involved in an MVA, he testified under oath he "might have" told her he had finished his work for the day and was on his way home at the time the MVA occurred, and he

never inquired of her about filing or asked that she file a workers' compensation claim or otherwise assist him in obtaining medical treatment (although the evidence does seem to reflect Ms. Lanning told her insurance agent about the MVA). Instead, he looked into finding an attorney to file a third-party lawsuit against the other driver. In their post-hearing brief, the respondents argue the claimant's medical treatment in late January 2023 was "directed" by his attorney in the third-party lawsuit, was "delayed" and, therefore, not reasonably necessary treatment related to the MVA (presuming the MVA and the alleged injuries were "compensable" within the Act's definition). (Respondents' Brief at 8; and 7).

Based on the aforementioned law as applied to the facts of this case, I am compelled to find that even if the claimant had met his burden of proof with respect to the "employment services" issue, he has failed to meet his burden of proof in demonstrating he injured his neck/cervical spine, lower back/lumbar spine, or his right shoulder and/or right knee in the subject 12/15/2022 MVA. If the claimant has a legal remedy arising out of the 12/15/2022 MVA, it is in the third-party lawsuit he has filed, and not under Act 796 of 1993.

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 August 2, 2023, which the parties modified and affirmed on the record at the hearing, hereby are accepted as facts.

2. The claimant has failed to meet his burden of proof in demonstrating he was engaged in the performance of employment services at the time of the subject December 15, 2022, MVA.

3. The claimant has failed to meet his burden of proof in demonstrating he sustained a

compensable injury(ies) to his lower back/lumbar spine, neck/cervical spine, and/or his right shoulder and/or his right knee in the 12/15/2022 MVA.

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

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

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp