

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F613086

CONEY DUNCAN, EMPLOYEE	CLAIMANT
UNIMIN CORPORATION, EMPLOYER	RESPONDENT
ACE AMERICAN INSURANCE CO., C/O ESIS, CARRIER/TPA	RESPONDENT

OPINION FILED AUGUST 4, 2008

Hearing before Administrative Law Judge O. Milton Fine II on May 6, 2008, in Batesville, Independence County, Arkansas.

Claimant represented by Mr. Kenneth A. Olsen, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. James C. Baker, Jr., Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 6, 2008, the above-captioned claim was heard in Batesville, Arkansas. A prehearing conference took place on October 29, 2007. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. Claimant and Respondents reached one additional stipulation, resulting in the following three, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The employee/employer/carrier relationship existed in late February and early March of 2006 and at all relevant times.
3. Claimant's average weekly wage was \$574.00.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. Without objection from Claimant, Respondents added an issue concerning their entitlement to an offset, resulting in the following being litigated:

1. Whether Claimant sustained a compensable head injury in late February/early March of 2006.
2. Whether Claimant's seizure condition is a non-compensable pre-existing condition or a compensable consequence of a compensable injury.
3. Whether Claimant is entitled to medical and related benefits.
4. Whether Claimant is entitled to temporary total disability benefits from March 31, 2006 to a date yet to be determined.
5. Whether, in the event this claim is found to be compensable, Respondents are entitled to an offset due to accident and sickness disability benefits Claimant drew.

Contentions

Respondents added two additional contentions. The respective contentions of the parties are thus as follows:

Claimant:

1. Claimant contends that he sustained a compensable head injury in late February/early March of 2006.
2. Claimant contends that he is entitled to payment of medical expenses and temporary total disability benefits from March 31, 2006 to a date yet to be determined.

Respondents:

1. Respondents contend that Claimant's seizure disorder is a pre-existing condition that did not arise out of and in the course of his employment.
2. Respondents further contend that Claimant's healing period ended by August 27, 2007, based on a report on that date by Dr. J.R. Baker.
3. Respondents further contend that in the event that Claimant is awarded benefits, they are entitled to an offset for accident and sickness disability benefits that Claimant has drawn.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, depositions, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.

3. Claimant has not proven by a preponderance of the evidence that he sustained a compensable head injury because his epilepsy or seizure disorder is a pre-existing condition, and is not an objective finding supporting medical evidence that a work-related injury occurred or a compensable consequence of such an injury.
4. Because of the above finding, the balance of the issues presented are moot and will not be addressed.

CASE IN CHIEF

Summary of Evidence

_____The witnesses at the hearing were Claimant; his wife, Santhony; and Garry Wheatley, a maintenance worker for Respondent Unimin.

In addition to the prehearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Claimant's Exhibit 1, a compilation of Claimant's medical records, consisting of one index page and 31 numbered pages; Claimant's Exhibit 2, a December 11, 2007 letter from Dr. Jeffrey W. Britton at Mayo Clinic, consisting of one page; Claimant's Exhibit 3, the deposition, plus exhibits, of Dennis Sartin taken September 11, 2007, consisting of 28 pages; Claimant's Exhibit 4, the deposition of Jim Stegeman taken September 11, 2007, consisting of 20 numbered pages; Claimant's Exhibit 5, the deposition of Garry Wheatley taken September 11, 2007, consisting of 30 numbered pages; Respondents' Exhibit 1, the deposition of Dr. Reginald Rutherford taken October 18, 2007, consisting of 20 numbered pages; Respondents' Exhibit 2, a compilation of Claimant's medical records, consisting of a 13-page index and abstract and 190 numbered pages; Respondents' Exhibit 3, a neuropsychology report dated September 12,

2007 by Dr. Gary Souheaver, consisting of four numbered pages; Respondents' Exhibit 4, a Century Flooring Company Accident Investigation Report concerning Claimant dated July 31, 1998, consisting of one page; Respondents' Exhibit 5, a WCC Form N concerning Claimant dated July 31, 1998, consisting of one page; Respondents' Exhibit 6, a Unimin Accident & Sickness Benefit application by Claimant dated April 10, 2006, consisting of two pages; Respondents' Exhibit 7, a Unimin Accident & Sickness Benefit application by Claimant dated October 19, 2006, consisting of two pages; Respondents' Exhibit 8, an Accident Investigation Report dated November 29, 2006 concerning Claimant, consisting of two pages; Respondents' Exhibit 9, a Form AR-N dated December 7, 2006 concerning Claimant, consisting of one page; Respondents' Exhibit 10, a Request for Information dated December 7, 2006 concerning Claimant, consisting of one page; Respondents' Exhibit 11, Claimant's 2006 Attendance Record at Unimin, consisting of two pages; Respondents' Exhibit 12, Claimant's 2006 Attendance Record at Unimin containing handwritten notations, consisting of one page; Respondents' Exhibit 13, Daily Maintenance Reports for Claimant at Respondent Unimin, consisting of 31 numbered pages; Respondents' Exhibit 14, Daily Maintenance Reports for Garry Wheatley at Respondent Unimin for February 22-23, 2006, consisting of one page; and Respondents' Exhibit 15, Daily Maintenance Reports for Wheatley Respondent Unimin for February 24-25, 2006, consisting of one page.

Testimony-Hearing

Coney Duncan. Claimant testified that he is 31 years old and has a high school degree. Prior to working for Respondent Unimin, he worked for Century Hardwood. Claimant was unable to provide his dates of employment there. He stated that while he

worked at Century, he suffered from headaches that he ascribed to the hot environment—but were not caused by any specific incident. However, the headaches caused him to miss some work and led him to seek treatment at the emergency room. His diagnosis was that the headaches were caused from exposure to heat. Claimant testified that he left Century because of hostility from other employees and from management.

He began work at Respondent Unimin in 1999. It is a sand mining operation located in Guyon. After holding various positions there, he became a maintenance worker. He held this position for three or four years before leaving Unimin on March 30, 2006. Claimant was supervised in this position by Jamie Cannon. Cannon provided direction in the morning, and Claimant carried out the instructions throughout the day. In November 2005, he underwent surgery on his right shoulder. After returning to work, he worked until February 14, 2006 on light duty, testing sand samples for fineness. Thereafter, he returned to work in the maintenance area.

As a maintenance worker, Claimant serviced various types of equipment, including the mobile crusher. The mobile crusher is a piece of equipment used to crush rock for road-building material. Claimant stated that the crusher was a recent addition to the Guyon plant, but was not new. Maintenance personnel were told that they would handle the refurbishing of this piece of equipment, including re-wiring it. He testified that he had climbed the crusher to inspect it while he was still in light duty. Jim Stegeman installed handrails on it.

Claimant's testimony was that after he returned to full duty and while climbing the ladder of the crusher, Claimant struck his head on a metal bar welded across the top of the ladder to prevent falling. The blow did not crack the hard hat he was wearing, and did not

render it useless. When he struck his head, he saw a bright flash of light and became very nauseous, and had a headache the rest of the day. Claimant sat down for awhile. However, he returned to work and was able to complete his shift. He worked the next day as well. He did not go to the doctor. Claimant testified that while he did not report the incident, Stegeman and others witnessed it. When he went home, he told his wife that he had hit his head.

Despite being able to recall the incident involving the blow to his head, Claimant did not know exactly when it occurred. He stated that he knew he climbed the mobile crusher to prepare for its re-wiring. But he did not know how long after this occurred that the re-wiring job began. He also did not know whether the blow to the head occurred before or after he performed a pulley relocation job at the plant.

Claimant testified that this blow to the head has led him to suffer complex partial seizures. This condition has rendered him unable to drive or be left alone. He stated that he is no longer able to do anything by himself.

His testimony was that his symptoms did not appear until after he struck his head while climbing the mobile crusher. Even then, Claimant did not notice anything unusual about his condition. He stated that his father-in-law, Tony Moser, told him that some others had asked Moser if he knew that Claimant was experiencing blackouts. Claimant could not recall when this conversation between Moser, who also works at Unimin, and he took place; but he stated that it occurred while Claimant was working as a haul truck driver. He stated that he switched from maintenance worker to haul truck driver because the driver position entailed more hours and less strenuous work, and the work was not outside. However, when he was no longer able to drive, he could not work. Claimant reported his

inability to drive to Unimin and went on medical leave. He drew accident and sickness disability benefits for one year. He has drawn no other type of benefits, however.

Claimant admitted that he did not seek medical attention until Moser told him about the blackouts. He first saw Dr. Baker, his family physician. Baker referred him to Dr. Tamer Abou-Abou-elsaad, a Batesville neurologist. He, in turn, referred Claimant to Dr. John Towbin, a neurologist in Little Rock. Claimant underwent an EEG in Little Rock. On his own, Claimant went to the Mayo Clinic in Rochester, Minnesota. He has been treated at Baptist Hospital in Little Rock as well. Claimant is currently taking a number of prescription medications, including Lyrica to control his seizures.

According to Claimant, he is not aware when he is experiencing a seizure. Others have to observe them and tell him about it. His wife reported that he had a seizure the Saturday before the hearing. The last one occurred three months before that. In 2007, he went through a period where he was experiencing two to three seizures per day. He has not been released to return to work, and does not have medical clearance to have his driving privileges reinstated. Claimant still possesses a driver's license, however, and has renewed it since being injured. He has not driven since leaving Unimin. While he is not looking for work, and stated that he doctors do not want him working, he believes he is able to do so.

Claimant testified that he did not file a workers' compensation claim for this incident until November 2006, approximately eight months after he left Unimin. He explained that the delay was due to his desire to make sure that his seizure condition was due to striking his head at work. His testimony was that his seizures are caused by head trauma, and that he has not had any other falls and injuries that caused him to black out. Also, no one ever

reported that he had seizures prior to striking his head at Unimin. This includes the period he was experiencing headaches while employed at Century Hardwood. While he testified that he has not had epilepsy or other neurological disorders, he admitted that his maternal uncle died from a seizure disorder.

When questioned by Respondents, Claimant stated that when he was 16, he suffered a heat stroke and was taken to White River Medical Center. The Century Flooring event took place on July 31, 1998. While he was working there, he developed a severe headache and he became weak and wobbly. Claimant did not recall being treated at the emergency room and by a neurologist for this.

With respect to the mobile crusher, Claimant testified that it had a vertical ladder that went up to a platform. The platform had hand rails around it, and a welded safety bar instead of a chain. The bar was three or four feet above the platform. He struck the bar while pulling himself up on the platform. The blow did not crack his hard hat, but popped the rivets out of the bracing on the strap inside the helmet. They could be popped back into place, making the hard hat ready for use. Claimant did not have a discernable bump on his head, and no break in the skin. Other than “seeing stars” and having a headache and nausea the day it occurred, everything appeared normal to Claimant until Moser approached him. Even then, Claimant did not associate blackouts with what occurred on the mobile crusher—that did not occur until later.

As reflected on Respondents’ Exhibit 6, when he applied for accident and sickness benefits on April 6, 2006, he listed the accident as “unknown.” He gave the date of the accident as March 24, 2006 only because that was the date that Moser approached him. When Claimant filled out a similar application on October 19, 2006, he did not give an

accident date, and stated that he did not intend to pursue workers' compensation benefits—even as of this date, he did not associate the seizure condition with the blow to his head on the mobile crusher.

As reflected in Respondents' Exhibit 8, Claimant did not notify Unimin that he intended to pursue workers' compensation benefits until November 29, 2006. He described the incident on the mobile crusher, and gave the date as February 2006. He did the same thing on the Form AR-N dated December 7, 2006.

With respect to Respondents' Exhibit 13, Claimant identified them as maintenance and driver reports he had filled out. However, he denied filling out the driver report for March 29, 2006, but stated that may have been because he was in training during that period. With respect to the maintenance reports, Claimant testified that he filled them out before he left work on that day. Each one is supposed to list all the maintenance tasks performed on the day of the report. This included preparatory work.

Claimant stated that worked on BC03A, a large conveyor belt that moves sand. The work involved moving a counter weight pulley to a different location. Claimant returned from light until full duty on February 13, 2006, and the reports do not reflect that he began work on this project until February 22, 2006. That day, plan and preparation work was performed. The work on the pulley continued the next day. The reports reflect that Claimant worked on this one-time project on February 22-March 2, 2006. They also reflect that he did not begin working on the mobile crusher until March 8, 2006. This continued until March 17, 2006.

Under further questioning from his counsel, Claimant stated that he told Dr. Towbin that he believed that he struck his head on February 2 or 3 of 2006. At that time, he was

still on light duty. While at the time he was running sand samples, he was able to go and look at future jobs. Such things would not necessarily be reflected on his daily report. Claimant testified that while the re-wiring of the mobile crusher did not begin until March 8, 2006, he had been on the mobile crusher several times before then. Claimant stated that he could not recall an instance when Garry Wheatley attempted to get his attention but could not do so.

Under further cross-examination, Claimant admitted that he was speculating when he stated that February 2 or 3 of 2006 was when he struck his head. He did not recall when he went on the mobile crusher. If he actually worked on the crusher, it should be reflected in his maintenance reports. He did recall that when he struck his head, the re-wiring of the crusher had not yet begun; the maintenance crew was on it to do planning and preparation. Such work should be in the reports, but he stated that it is not always done. However, Claimant stated that he would not disagree with Stegeman if he testified that they were going to perform re-wiring when the incident occurred. He also admitted that if he had spent a large portion of the day working on the mobile crusher the day he struck his head, that work would be reflected in his maintenance report. Claimant recalled that when he hit his head, Stegeman was already on top of the mobile crusher. He did not remember if Dennis Sartin was there.

Under questioning from me, Claimant testified that the blow caused the entire ring to become detached from the hard hat. The blow caused no cut, bruise or mark on his head. At the top of the platform on the crusher is a catwalk. The crusher has two levels; Claimant was climbing from the first to the second level when he struck his head. Claimant

stated that he does not remember why he was climbing to the top of the mobile crusher. He added that "I've forgot [sic] a lot."

Santhony Duncan. Called by Claimant, Mrs. Duncan (hereinafter "Duncan") testified that she has been married to Claimant for 12 years. She has known him since the second grade, and has been around him regularly since then. Duncan stated that she first saw Claimant have a seizure on Friday, March 24, 2006, while they were in Branson, Missouri. She described the incident as follows:

He was walking up the stairs and he just—I don't know. He like kind of stopped and started swallowing. And then he went up to our room and he laid [sic] down and went to sleep, and it was all I could do to get him to go to eat supper. And he come [sic] back and crashed. And he was—it just drains him of his energy. At that time, I did not know what was going on.

The next week, on March 29 or 30, Duncan's father, Moser, called her to ask if she had noticed anything unusual about Claimant. Moser related to her that Jason Manning and Garry Wheatley had approached him. This led Duncan to contact Claimant's mother, and they took Claimant to White River Medical Center.

Duncan recalled Claimant telling her about striking his head at work. He stated, "I knocked my brains out at work today." This occurred shortly after he came off light duty at work, prior to his becoming a driver. She estimated that it occurred the first part of February 2006. When Claimant's counsel pointed out that his light duty ended in mid-February, Claimant changed her testimony to state that she only knew that it occurred in February, and that she could not supply a specific date.

She stated that after he reported hitting his head, he began to come in and sleep in the afternoons. Duncan confirmed that Claimant last had a seizure the Saturday prior to the hearing. During these episodes, his head is down and he swallows and blinks a lot,

and is unresponsive. The seizures can last from 30 seconds to an hour. After they subside, Claimant takes a nap. He is unable to recall what occurred after the onset of the seizure.

Duncan testified that the Lyrica helps prevent seizures. When he is taking the medication, the seizures are two to three months apart. If he does not take the medication, however, he can have multiple seizures in a day.

She stated that the time Claimant is by himself is limited. Moser stays with him and keeps their children during the day, while Duncan is at work. Claimant does not drive.

When questioned by Respondents, Duncan testified that when Claimant told her about hitting his head at work, he said it jokingly. He related that he did it while climbing a ladder, but did not describe what job he was performing at the time. She did not give the incident a second thought until the seizure issue arose, and on March 30, 2006 she started trying to recall when it had taken place. Since the incident occurred after he went back to regular duty but before he switched jobs, it had to have occurred between February 13 and March 29 of 2006. Duncan did recall that it was a Thursday when Claimant told her about hitting his head.

Duncan's testimony was that she accompanied Claimant when he first went to the doctor. She recalled telling the physician at the emergency room that Claimant had struck his head. Later in her testimony, however, she stated that it was not until Claimant saw Dr. Towbin that he related the incident involving striking his head on the bar at work, and that she could not recall if she or Duncan told emergency room personnel that he had hit his head. Her testimony was also inconsistent concerning whether treating personnel asked about a head injury. She first testified that the question of head trauma did not arise

until after the emergency room visit, but before Claimant went to Dr. Abou-elsaad. Later, she stated that she did not know all of what Claimant had been asked at the emergency room, but that the questioning about a head injury did not come up until the visit to Dr. Towbin. She could not explain why she immediately thought about the incident at work when told by her father that he was blacking out, but that the question of head trauma did not arise during his medical visits until he saw Drs. Abou-elsaad or Towbin. Duncan also did not know why Dr. Abou-elsaad's notes reflect that Claimant denied having a head injury, but she stated that Abou-elsaad did not believe Claimant.

When questioned by me, Duncan stated that she did not connect the seizures to Claimant hitting his head at work until someone at one of the clinics asked if he had suffered a head injury. She stated that the question of head injury did not come up during the emergency room visit. Duncan testified that her description of Claimant's behavior at Branson is typical of him when is having a seizure.

Garry Wheatley. Called by Respondents, Wheatley testified that he has worked for the Unimin plant in Guyon for nine and a half years. He has worked in the maintenance area for three of those years, including February and March of 2006. Claimant was on the maintenance crew there, and Wheatley worked with him often. He stated that he considers Claimant to be a friend. As part of their job, they worked together on the BC03A pulley relocation job. Part of this process was to stiffen up the A-frame to support the weight of the relocation. While this was going on, Wheatley observed something happen to Claimant. He described it as follows:

Well, he was standing up on top of the concrete pillar. We was adding material to this beam. And we were sitting there talking, and then he just froze. And I-I hollered at him and he didn't respond to me. And, you know,

I got concerned at the moment. So the first thing I do is I—I mean, I reached up and grabbed him by the leg because I didn't know what was going on. I didn't know if he was going to fall or what. And he probably stayed that way for—oh, probably a good thirty seconds or so. And finally he responded to me, and he climbed down. And we—I think we headed back towards the maintenance shop or something.

When asked whether what he observed was similar to the Branson episode described by Duncan, Wheatley stated that he did not observe Claimant swallowing repeatedly, but that he did witness that at another point in time. After the A-frame episode, Wheatley asked Claimant asked what he should do the next time Claimant has such a spell, but Claimant merely “looked at [him] like [he] was crazy.”

Wheatley testified that he observed Claimant have another episode later. One morning at 7:00, the maintenance crew was in the break room. Claimant froze and swallowed repeatedly. Wheatley was concerned because he knew that Claimant was to begin driving trucks, so he approached Jason Manning and they decided to talk to Moser, Claimant's father-in-law.

Shown Respondents' Exhibits 14 and 15, Wheatley identified them as daily maintenance reports he had filled out. From them, he stated that the pulley relocation project was completed on February 25, 2006. He testified that the A-frame episode had to have occurred prior to that date.

When questioned by Claimant, Wheatley stated that the date that the pulley relocation job was completed, Claimant was not present. Wheatley, Sartin and Manning finished the job. He stated that he did not participate in the re-wiring of the mobile crusher. While Wheatley testified that he had climbed on top of the crusher, that would not be reflected in his daily reports. Similarly, he did not believe it would have been unusual for

a trip by Claimant to the top of the machine not to be reflected in his reports. He stated that the members of the maintenance crew are given free rein around the Unimin site as long as the work assignments given them by their supervisor are completed.

Wheatley testified that he remembers hearing about Claimant hitting his head at work. He believed that Sartin told him about it, but did not remember when the conversation took place. But he was certain that he did not observe Claimant to have a blackout episode prior to hearing about him hitting his head.

When questioned by Respondents, Wheatley stated that while he would not necessarily note in his maintenance report if he merely went to inspect a piece of equipment, he would do so if he were actually working on it and a substantial amount of time were involved. He added that he might not note the job if it was "just a little quick job."

As for the time line of his witnessing Claimant's blackout during the pulley job vis-a-vis hearing about him striking his head, Wheatley testified that his memory had faded about the incident, and he was not certain that he had heard of Claimant striking his head prior to his witnessing the unresponsive episode while working on the A-frame.

Under questioning from Claimant, Wheatley testified that it would not be unusual to go and inspect a job weeks prior to beginning it, and not noting this task in his maintenance report. He also did not think that it would have be unusual for someone to have inspected the mobile crusher prior to undertaking the re-wiring of it.

Testimony-Deposition

Dennis Sartin. Sartin was deposed on September 11, 2007, and the transcript thereof was admitted as Claimant's Exhibit 3. His testimony under questioning from Respondents was that he has worked for Respondent Unimin in the maintenance

department since May 2004. Claimant worked with him in the department, which is comprised of four employees. While at one point there was a fifth employee, the four during the time period at issue were Claimant, Sartin, Jason Manning and Garry Wheatley. They were supervised by Mark Schroeder. The maintenance workers pair up at the start of each day. From May 2004 until Claimant left Unimin, Sartin was around Claimant each day. They paired up an average of three days each week.

Sartin testified that he and Claimant performed the rewiring job on the portable crusher. He estimated that the two worked on the project for two months, off and on. Sartin stated that a metal bar was located at the top of the second ladder on the crusher, “[a]nd if you wasn’t [sic] real [sic] careful, you would hit your head on it.” The two workers went up the ladder a lot because they ran a lot of wires up to the top of the crusher. The remote switch to run the jaw of the crusher was placed near the bar.

He stated that he witnessed Claimant strike his head on the bar more than once “pretty hard.” On at least one of these occasions, Claimant cursed loudly when this happened, but continued working after taking a short break. During this period, Claimant was working on the top of the crusher, and Sartin stood below him and fed wires to him. Claimant only complained about his neck hurting in the hours after he struck his head. Both Claimant and Sartin told Stegeman that the bar needed to be cut away, and it eventually was. Sartin testified that he once struck his head on the bar and “jammed [his] neck pretty good.” He identified the exhibits to his deposition as being daily reports he had filled out that explained what duties he performed that day; but he could not state on which day he witnessed Claimant hit his head.

Sartin testified that he could not recall ever witnessing Claimant being unresponsive or appearing to be in a trance or blacking out. He did vaguely recall that Steve Bell, the superintendent at Unimin, asked him about this in April 2006. But he could not remember what he told Bell. He stated that he has had memory problems that are stress-related. When asked about Bell relating statements that Sartin had made to him about Claimant at times since April 2004 having spells where he was unresponsive or appeared to be unaware of his surroundings, Sartin stated that Bell was “probably” being truthful.

Sartin remembered at least one instance where Claimant did not respond to him. But he added that his being unresponsive could have been due to the noise at the site or the distance between the two.

When questioned by Claimant, Sartin testified that he had no recollection about what he told Bell about how Claimant acted, and that he had no idea if Bell had interpreted him correctly.

Jim Stegeman. Stegeman was deposed on September 11, 2007, and the transcript thereof was admitted as Claimant’s Exhibit 4. He testified under questioning from Respondents that he is, inter alia, a mobile maintenance equipment supervisor at Unimin. In that capacity, he sometimes works with the maintenance crews. The crusher had a steel bar at the top of the second ladder that was made of two-inch pipe.

He testified that he was present when Claimant struck his head on the bar of the mobile crusher, but that he did not witness it because he was ahead of him. Someone was behind Claimant at the time, but Stegeman was unsure if it was Sartin. Claimant was wearing a hard hat at the time. Stegeman heard the collision, however. Claimant stated, “I hit my blankidy blank [words Stegeman apparently substituted for curse words] head.”

After Stegeman showed Claimant where the remote control for the feeder should be located, the three of them descended the ladder. He told Stegeman that he was “a little dizzy,” and stated that he was going to sit down for a minute, and he did so for four to six minutes. Claimant then stated that he was fine and went back to work. Stegeman stated that Claimant also remarked “that was a heck of a jolt.” However, he did not state that the bar needed to be removed. According to Stegeman, Claimant continued working on the crusher for the rest of the day. He stated that other employees, Mike Maloney and Jamie Cannon, had also struck their heads on the bar; but to his knowledge, they were uninjured. Stegeman’s testimony was that at the time the incident in question occurred, Claimant was already working on the rewiring of the mobile crusher; he was working on the wiring at the ground level at the time.

Stegeman did not observe Claimant to have any symptoms. He stated that had Claimant appeared to have any problems while on the platform, he would have had someone assist him in climbing down. He also has never seen Claimant have seizures, or blackout or unresponsive spells.

When questioned by Claimant, Stegeman stated that he could not tell from hearing how hard Claimant hit the bar. After the blow, Claimant acted “addled.” Other than stating that he was dizzy, Claimant did not mention any other symptoms. In the weeks after the incident, Stegeman did not witness Claimant acting any differently. He testified that he was not aware of any other incident where Claimant struck the bar. In the opinion of Stegeman, Claimant is an honest and hardworking individual.

Garry Wheatley. Wheatley was deposed on September 11, 2007, and the transcript thereof was admitted as Claimant’s Exhibit 5. Under questioning from Respondents, he

gave testimony along the lines of his hearing testimony. He stated that during the pulley relocation job, he witnessed an incident involving Claimant that he described as follows:

Well, we was sitting there working one day. I think that's the first time I ever noticed him doing anything like that. And we was standing there and all of a sudden he froze. And I hollered at him and he didn't answer me. We was up on this big A frame. He was up off the ground. I hollered at him again. He didn't answer me. I didn't know whether to grab him by the legs.

I tried to get his attention to get him to talk to me and he wouldn't ever talk to me. So I kind of reached up and grabbed him by the legs because I didn't know what was going on. And even when I grabbed him he didn't—didn't acknowledge that I even grabbed him or was talking to him or anything. And—well, when he got down, you know, I didn't think nothing about it at the time.

We got in the truck. I think we was [sic] going to either break or lunch or something and I asked him—I said, "When you do that, do I need to grab you or what?" And he looked at me like I was crazy. He didn't know what I was talking about.

According to Wheatley, at the time this occurred, they were not wearing hearing protection; they had been talking and had been able to hear each other. Wheatley stated that he never worked on the mobile crusher project.

Wheatley testified that he saw Claimant later in a similar episode, when they were putting on their gear one morning in the maintenance break room. Claimant froze for one or two minutes, staring, and was swallowing a lot as if he were about to vomit. This incident occurred after the completion of the crusher project, before Claimant switched jobs and became a driver.

Wheatley never witnessed any other episodes involving Claimant having this type of behavior. In fact, he testified that while he heard Sartin stated that he had seen Claimant acted like this previously, Wheatley did not believe it. He stated that he had worked with Claimant (while the transcript reflects that Wheatley referred to "Tony" and not

“Coney” when making this statement, the context shows that he was undoubtedly referring to Claimant) for years, beginning in the mill at Unimin, and he had never seen Claimant have an episode like those described above. He did, however, allow that Sartin may have witnessed something he had never seen, since there were times that Sartin worked with him and Wheatley was not around at the time.

During questioning by Claimant, the following exchange took place:

Q. Okay. So, in terms of making a time line as to when things occurred that you observed—

A. Uh-huh.

Q. —do you happen to know if the times that you saw him freeze up were after the date that he had hit his head?

A. Yes. It was after. After the—after the crusher job.

He added later that he was certain that this was the case. He also stated that he never witnessed Claimant to present any problems with his mental state, awareness or alertness that concerned him prior to the time that he heard about him striking his head. In his opinion, Claimant is an honest person and a hard worker. He also opined that Sartin is honest.

Under further questioning from Respondents, Claimant stated that the “crusher job was done and finished when we started all of [the pulley] relocation job.” However, he allowed that the maintenance records would show when the jobs took place.

Dr. Reginald Rutherford. Rutherford, a neurologist, was deposed on October 18, 2007, and the transcript thereof was admitted as Respondents’ Exhibit 1. Under questioning from Respondents, he testified that he conducted an independent medical evaluation of Claimant on March 6, 2007. In so doing, he had Claimant’s records from Drs.

Towbin and Britton. He learned from Claimant that he had had several instances of diminished awareness that began a month after he suffered a closed-head injury, and that he had been seen by two neurologists in Arkansas and one at Mayo Clinic. Rutherford stated that Claimant's family history was notable because (1) he had two sisters with a seizure disorder, but both were related to head trauma; (2) he had no genetic predisposition to epilepsy; and (3) he reported no seizure episodes prior to his head injury. Claimant related to him that when he struck his head, he was knocked onto his buttocks.

Based upon the description of the impact given by Claimant, Rutherford opined that his seizure abnormality most likely emanates from the medial temporal lobe of Claimant's brain. EEG testing showed the right temporal lobe to be the source of his seizures. Dr. Rutherford stated that the hit would have caused some displacement of the brain, with a slight shift of brain tissue and resulting scarring in the medial portion of the temporal lobe. He stated that such damage may or may not show up on an MRI or CT scan.

Dr. Rutherford agreed with Dr. Towbin that para-infectious autoimmune encephalitis and paraneoplastic limbic encephalitis were eliminated as possible causes of the seizures. He also agreed that Claimant's condition would be more likely after a penetrating head injury or a severe concussion with several days of amnesia and loss of consciousness, which did not occur here. Nonetheless, he opined that based on his medical documentation, the only cause for his temporal lobe epilepsy would be the striking of the bar at work.

Temporal lobe epilepsy, according to Rutherford, is always acquired—not inherited. While trauma can cause the condition, so can such things as a high fever or a stroke. Dr. Rutherford testified that he was unaware that Claimant had suffered heatstrokes with loss of consciousness in 1992 and 1997. Based on that, he stated that while he would “like to

see a closer temporal relationship between the heatstroke and the development of seizures . . . that's not out of the realm of possibilities." Moreover, Rutherford stated to a reasonable degree of medical certainty that if it could be established that Claimant had a seizure at the workplace two to four weeks before his head hit the bar, "the head injury is irrelevant."

Under questioning from Claimant, Dr. Rutherford testified that if Respondents could not establish the above, then his earlier opinion would stand.

Records-Medical

The medical records of Claimant that were introduced at the hearing and are part of Claimant's Exhibits 1 and 2 and Respondents' Exhibits 2 and 3 reflect the following:

Pre-injury. On July 20, 1998, Claimant was seen by Dr. Charles Smith for headaches that he had been having for one month, along with nausea and some light sensitivity. He stated that the headaches are generalized and begin in his forehead area, but go to the back of his neck. He related that they are much worse in heat. Claimant reported that he is dizzy when he gets up. He denied that he had had a head injury. An MRI conducted on July 24, 1998 was normal. In providing his medical history, he related that he had a heat stroke in 1992. Claimant went to Dr. John Collins, a neurologist, who thought the headaches were heat-related. Because of the condition, Claimant applied for short-term disability benefits, and represented that he had a diagnosis of heat stress-induced tension headaches. Collins released Claimant to return to work on July 30, 1998 without restrictions, but advised him to avoid prolonged exposure to temperatures of 95 to 100 degrees.

In obtaining treatment for a right shoulder injury on September 19, 2005, Claimant in providing his medical history reported having problems with memory loss.

Post-injury. Claimant on April 1, 2006 went to White River Medical Center and reported having strange episodes three times in the same week. The first was a tonic/clonic event in Branson on March 24, 2006 where he became unresponsive for five to seven minutes, without a postictal event. He reported that the onset of these symptoms was two weeks ago. In relating his history, he stated that he had heat stroke at age 15 and also has a history of migraine headaches. A CT scan of his head was normal.

On April 5, 2006, Claimant was referred to Dr. Tamer Abou-Abou-elsaad of the Batesville Neurology Clinic. He told the doctor that in March 2006 he was witnessed by his co-workers to have three episodes of loss of awareness without a total loss of consciousness. In one instance, Claimant was standing and had to have help sitting down. A fourth episode was witnessed by his wife in Branson. While he was lying down, she witnessed him to have generalized body shivering without actual stiffening or convulsion. Claimant denied a family history of epilepsy and denied having a "head trauma with loss of consciousness." He reported having, inter alia, headaches and dizziness, blackouts, memory loss, fainting spells, and loss of appetite. Claimant was assessed as having a "possible" new onset seizure and transient loss of awareness and staring spells. Because he did not have postictal confusion and the lack of classic jerking activity in the Branson episode, the doctor could not make a final diagnosis of possible new onset seizure. An MRI and an EEG were scheduled to rule out underlying epilepsy.

The note from Dr. Abou-Abou-elsaad for April 20, 2006 reflects that the EEG and MRI were unremarkable. Two weeks prior, he had a brief episode of loss of awareness

and staring without confusion or loss of consciousness. Claimant attributed it to hypoglycemia. The doctor stated that Claimant's symptoms were vague, and due to lack of postictal confusion and the normal EEG appeared less likely to be an epileptic episode. He returned on April 28, 2006 and his mother reported three more episodes. She mentioned that there was a strong family history of epilepsy on her side, with two sisters and a brother having the condition. The doctor recommended a sleep-deprived EEG.

In his May 9, 2006 visit, Dr. Abou-elsaad reported that the EEG technician witnessed Claimant to have a brief episode of loss of awareness without true loss of consciousness. The EEG, however, did not conclusively show epilepsy. The doctor opined that the episode was probably a paroxysmal event, and stated that he wanted to refer Claimant to the epilepsy monitoring unit at the University of Arkansas for Medical Sciences.

Dr. John Towbin of The Epilepsy Center saw Claimant on June 8, 2006. Claimant's wife in relating in symptoms did not mention the swallowing that she mentioned at the hearing. Claimant reported a history of heat stroke, and reported that he struck his head on a metal bar at work on February 2 or 3 of 2006. He reported that he "felt a little woozy for a minute" and sat down, but the symptoms quickly resolved and he returned to work, feeling fine. After noting the MRI and the two EEGs were essentially normal, Dr. Towbin stated that 48-hour EEG monitoring was required, along with an MRI to rule out interval change. The June 21, 2006 MRI was essentially normal. Also, an August 2, 2006 cervical MRI showed only minimal degenerative changes.

On September 21, 2006, Claimant reported to Dr. Towbin that he had fairly frequent headaches in his teens, but not in recent years. He also reported a remote history of heat

exhaustion. The first 24-hour summary of video EEG monitoring of Claimant on this date at Baptist Hospital was abnormal and showed asymmetry involving slowing of the right hemisphere, indicative of a mild degree of cerebral dysfunction in the hemisphere but not specific as to etiology. These same findings occurred on the second day, along with spikes in the right temporal area that indicated cortical hyperirritability in that area, which was strongly correlated with a propensity for seizures of localized onset. This was the same finding for the third and fourth consecutive days of monitoring.

Claimant went without a referral to Mayo Clinic and saw Dr. J.W. Britton on November 21, 2006. He was assessed as having partial epilepsy with complex partial seizures of probable temporal origin. Britton stated that the diagnosis of temporal lobe onset seizure disorder given by Towbin is correct. He saw Claimant again on November 27, 2006, noted that his Mayo EEG showed right temporal spikes, and that his MRI and spinal tap were normal. He was given diagnoses of partial seizure disorder, right temporal region, and status post mild concussion. Dr. Britton opined that Claimant's seizure disorder is "most likely work-related." In so doing, Britton noted that the members of his mother's family who have epilepsy are not direct relatives; nonetheless, he stated that this family history could not be excluded as a cause. The spinal fluid exam and the MRI ruled out a parainfectious immune CNS encephalitis as the cause; and paraneoplastic limbic encephalitis was eliminated as well. Britton appears to have reached his conclusion because (1) he relied on the statement that Claimant did not have seizures prior to striking his head; and (2) no other cause was found.

On December 14, 2006, Dr. Towbin wrote a letter that reads in pertinent part:

Mr. Coney Duncan has been seen as a patient in this clinic for evaluation of complex partial seizure disorder. He had the new onset of seizures in March, 2006, as witnessed by his wife. The seizures have continued since then, and were the reason for his referral to this clinic. After review of his medical history, and his complete evaluation and testing, the only risk factor found for seizure disorder was a head injury which occurred while he was at work. The seizures began a short time after that head injury. In the absence of other etiologies of seizure onset, with the type of seizures demonstrated and recorded on video EEG monitoring, and with the temporal proximity to his head injury, his diagnosis is, in my best medical judgment, posttraumatic seizure disorder, secondary to the head injury described above. That is to say, I do believe that the head injury was causal in the development of his seizure disorder.

He will need ongoing care for seizures, including regular follow-up visits in the clinic, occasional laboratory studies, and ongoing treatment with antiseizure medications. It is fairly likely that he will need to repeat some studies, such as EEG, and some time in the future.

Dr. Reginald Rutherford performed an independent medical evaluation of Claimant on March 6, 2007. The report of Dr. Rutherford reads in pertinent part:

Mr. Duncan is sent for an IME. This is to address etiology for temporal lobe epilepsy and work restrictions.

...

Mr. Duncan hit his head in the work place in February, 2006. He was wearing a hard hat. He struck a beam. He was knocked on his buttocks, saw stars and was nauseated. It took several minutes to recover. The following month in March, 2006 he began to have episodes of loss of awareness ultimately diagnosed as temporal lobe epilepsy via EEG video monitoring. Abnormality is localized to the right temporal lobe. Mr. Duncan has seen two neurologists in state and one neurologist at the Mayo Clinic. He has undergone exhaustive diagnostic work up. This serves to exclude tumor, vascular malformation, infection and perineoplasty syndrome as the basis for temporal lobe epilepsy. By history there is no evidence for birth trauma or febrile convulsion. There is a family history of two of Mr. Duncan's mother's sisters suffering from epilepsy but this is related to head trauma and thus there is no genetic predisposition to epilepsy but it should be noted that temporal lobe epilepsy represents an acquired rather than inherited epilepsy and thus family history would not be relevant with respect to potential etiology based upon the abnormalities identified via EEG video

monitoring. On directed questioning Mr. Duncan reports no episodes suggestive of seizure activity prior to the head injury.

It is clear from the medical documentation and Mr. Duncan's history that the only potential cause for temporal lobe epilepsy in his case is the head injury he sustained in the work place. He has undergone extensive diagnostic work up which excludes all other possible explanations.

Claimant returned to Mayo Clinic on August 14, 2007 to evaluate him as a candidate for epilepsy surgery. The notes for the visit reflect that his PET scan showed subtle hypometabolism of the right mesial temporal region, and that neuropsychology testing showed findings more consistent with left temporal dysfunction. Dr. Britton explained that Claimant was not a good surgical candidate because he had no MRI-documented abnormality. He was discharged on August 22, 2007 with the diagnosis of refractory partial epilepsy.

Claimant underwent neuropsychological testing at Behavior Management Systems, Inc., on September 12, 2007. The testing showed normal IQ, memory and neuropsychological test results for Claimant's age, gender and education, except for low-average short-term verbal memory and mildly abnormal nonverbal auditory processing. Dr. Gary Souheaver, the clinical neuropsychology consultant, stated that the test results "were not consistent with significant brain dysfunctions [sic] that could be attributed to residuals of a closed head injury of February/March 2006." Souheaver added that he "would prefer that [his] neurology colleagues discuss the probabilities of the seizures being related to the minor head trauma vs. remote heat stroke vs. idiopathic causes."

On December 11, 2007, Dr. Britton wrote a letter that reads in pertinent part:

Coney Duncan is a patient who has been under my care at Mayo Clinic in the Department of Neurology for a seizure disorder. This is associated with a concussion he experienced at work. He has complex partial seizures. They have proven to be refractory to medication therapy. He underwent a surgical evaluation but was, unfortunately, found to not be a surgical candidate. This is because he has bilateral independent temporal lobe seizure onsets. His seizure disorder is, unfortunately, permanent, and he will always require medication to maintain seizure control.

Records-Non-medical

Respondents' Exhibit 4. Claimant on July 31, 1988 signed in accident investigation report for Century Flooring Company, stating that he was working when he became weak and began to suffer a severe headache.

Respondents' Exhibit 5. This exhibit is the Form AR-N for the incident described immediately above.

Respondents' Exhibit 6. This exhibit is Claimant's April 10, 2006 application for accident and sickness benefits while at Unimin for his seizure condition. He described the accident or sickness as "Unknown - blackout spells" and the date they began as "Unknown 3/24/06."

Respondents' Exhibit 7. This exhibit is another accident and sickness benefits application dated October 19, 2006. In this instance, Claimant described his condition as "partial complex seizures." His physician, Dr. J.R. Baker, wrote that Claimant first experienced symptoms in February 2006.

Respondents' Exhibit 8. This exhibit is the accident investigation report signed by Claimant on November 29, 2006 concerning the incident involving him striking his head.

He stated that Jim Stegeman witnessed the incident, and that it occurred one morning in February 2006.

Respondents' Exhibit 9. This exhibit is the Form AR-N for this incident. It reflects that Stegeman witnessed Claimant hitting his head.

Respondents' Exhibit 10. This exhibit is an application signed by Claimant for benefits for the alleged injury at issue, signed by him on December 7, 2006. Stegeman is again listed as a witness to the incident.

Respondents' Exhibit 11. This exhibit is Claimant's 2006 attendance record at Respondent Unimin.

Respondents' Exhibit 12. This exhibit is a photocopy of Respondents' Exhibit 11, but contains handwritten notations concerning duties Claimant performed from January to March of 2006.

Respondents' Exhibit 13. This exhibit is comprised of Claimant's daily maintenance reports at Unimin from January 11, 2006 to March 22, 2006, along with his driver logs from March 29-31, 2006. The maintenance reports reflect that the counterweight relocation project on BC-3A was performed by Claimant on February 22-24, 2006, that he worked on the guard on BC-3A from February 27-28, 2006, and he worked on the rewiring of the mobile crusher from March 8-10, 13, and 15-17 of 2006.

Respondents' Exhibit 14. This exhibit is comprised of Wheatley's daily maintenance reports at Unimin from February 22-23, 2006. They reflect that on those dates, he worked to prepare for the counter weight relocation.

Respondents' Exhibit 15. This exhibit is comprised of Wheatley's daily maintenance reports at Unimin from February 24-25, 2006. They reflect that on the 24th, he worked on the counter weight relocation, and on the 25th the counter weight assembly was completed.

ADJUDICATION

A. Compensability

Claimant has contended that he suffered a compensable head injury in late February/early March of 2006. Respondents have countered that Claimant's seizure disorder is a preexisting condition that did not arise out of and in the course of his employment at Respondent Unimin.

Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2002), which the I find applies to the analysis of Claimant's alleged injury, defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). "Objective findings" are those findings that cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16). The element "arising out of . . . [the] employment" relates to the causal connection between the claimant's injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant's employment "when a causal connection between work conditions and the injury is apparent to the rational mind." *Id.* A causal relationship may be established between an employment-related incident and

a subsequent physical injury based on the evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962).

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). This standard means the evidence having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003)(citing *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947)).

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

With respect to the presence of objective findings supporting Claimant's alleged head injury, Claimant testified that as a result of striking his head on the bar, he suffered no bump, bruise, or cut—no mark of any kind. Moreover, the multiple MRIs he has undergone have been normal. EEGs have shown the presence of a seizure disorder. But the question remains whether this is an objective finding of an injury, a compensable consequence, or merely a preexisting condition.

It is noteworthy that Claimant is not contending that the seizure disorder is a preexisting condition, but that the striking of his head at work aggravated, accelerated, or combined with the infirmity to produce the disability for which compensation is sought. See *Nashville Livestock Comm. v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990). As has been commonly stated, an employer takes the employee as he finds him. See *Conway Convalescent Center v. Murphree*, 266 Ark. 985, 588 S.W.2d 462 (Ark. App. 1979). Indeed, there is no evidence that such is the case. In fact, Dr. Rutherford opined that if Claimant was suffering from seizures prior to striking his head at work, the work-related incident is “irrelevant.”

Dr. Rutherford, along with Drs. Towbin and Britton, have opined that Claimant’s seizure condition is work-related. In examining their opinions, each based this finding on one crucial assumption, gleaned from information that Claimant or his family has provided: that Claimant never suffered a seizure prior to striking his head. As Rutherford opined within a reasonable degree of medical certainty, if the time line shows that Claimant had a seizure before he ever hit his head on the bar, the mobile crusher incident means nothing.

I credit this testimony and opinion. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). In *Cooper v. Textron*, 2005 AWCC 31, Claim No. F213354 (Full Commission Opinion filed February 14, 2005),

the Commission addressed the standard when examining medical opinions concerning causation:

Medical evidence is not ordinarily required to prove causation, *i.e.*, a connection between an injury and the claimant's employment, *Wal-Mart v. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999), but if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. This medical opinion must do more than state that the causal relationship between the work and the injury is a possibility. Doctors' medical opinions need not be absolute. The Supreme Court has never required that a doctor be absolute in an opinion or that the magic words "within a reasonable degree of medical certainty" even be used by the doctor; rather, the Supreme Court has simply held that the medical opinion be more than speculation; if the doctor renders an opinion about causation with language that goes beyond possibilities and establishes that work was the reasonable cause of the injury, this evidence should pass muster. *See, Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). However, where the only evidence of a causal connection is a speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. *Crudup v. Regal Ware, Inc.*, 341, Ark. 804, 20 S.W.3d 900 (2000); *KII Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

Dr. Rutherford stated that a person suffering from a temporal lobe seizure

will stop doing whatever they're doing, and they'll gaze off into space. They may have some involuntary movements, lip smack and chewing movements, some movements of their hands. It tends to be relatively brief lived. When they come out of it, they probably won't remember what happened, and within a couple of minutes, they'll recover and go on with what they were doing.

There are vague references in the record to Dennis Sartin, Claimant's frequent partner on maintenance projects, informing others that Claimant had had unresponsive episodes prior to hitting his head. However, in his deposition, Sartin stated that he could not recall this, and claimed to have a faulty memory due to stress. Moreover, he testified that any instance where Claimant did not respond to him could have been due to noise at the site or the distance between the two of them.

Garry Wheatley testified that he had heard that Sartin had referred to earlier episodes, but he stated that he did not believe it because he had never witnessed one in the many years he and Claimant had worked together. However, Wheatley gave detailed testimony at the hearing and in his deposition of seeing Claimant “freeze” and becoming unresponsive on two occasions. The latter episode took place shortly before Claimant left his maintenance job to become a driver at Unimin, so it is not relevant here. But the other one potentially is. Wheatley stated that while he was working with Claimant to stiffen an A-frame in preparation for relocating a pulley counterweight, he saw one of these episodes. Based upon his description of the event, and compared to Dr. Rutherford’s description above and the medical evidence in this case, I find that Wheatley did in fact witness Claimant suffering a temporal lobe seizure.

The question then becomes whether this event preceded or followed the head-striking incident. Wheatley at first testified that he was certain that he had heard about Claimant hitting his head prior to witnessing this episode during the pulley relocation. But under further questioning, he admitted that he was not certain. The following exchange took place at the hearing when he was questioned by Respondents’ counsel:

- Q. Okay. And in terms of which came first, you hearing about him hitting his head on the safety bar or the event you saw on the A-frame, you really don’t remember which came first, do you?
- A. No, I don’t really remember it, but it seems like he had hit his head before. I mean, I—I’ve said that and I’ll say it again.
- Q. That’s a question that you were asked in a deposition—
- A. Right.
- Q. —a couple years after the fact, wasn’t it?

A. Right.

Q. And to the best you can remember, it [sic] your answer is the one you gave in your deposition?

A. Yes.

Q. But—but you're not representing to the Court that you have a well-defined memory about which came first, are you?

A. True.

In evaluating this testimony, I note that Wheatley in his deposition stated that the mobile crusher project was completed prior to the beginning of the pulley relocation job. But the maintenance reports that are in Respondents' 13-15 conclusively refute this. I find that Wheatley is sincere but that his testimony is not worthy of credit in evaluating the time line here.

Wheatley's maintenance reports show that the pulley relocation was done on February 24-25, 2006, and that the preparatory work for this was done on February 22-23, 2006. Wheatley confirmed this. Claimant's maintenance reports show that he worked on this job on the 22nd, 23rd and 24th, and his duties in the reports are similar to those in Wheatley's. Hence, for the head-striking incident to be relevant, it had to have occurred prior to February 22, 2006.

In his testimony at the hearing, Claimant stated that at the time he struck his head, he was engaged in preparing for the rewiring of the mobile crusher. However, he stated that he was not sure how far in advance of the actual rewiring that this preparatory work occurred. In fact, he was not sure if the blow occurred before or after he worked on the pulley relocation.

While Claimant testified that he came off light duty on February 14, 2006, he admitted that the records reflect that he did so on February 13, 2006. His spouse testified that she remembered his coming home and telling her about hitting his head. She stated that this conversation took place after he went back on regular duty.

Claimant testified that the first time he climbed the mobile crusher, he was on light duty following shoulder surgery. While he stated that at the time he hit his head, he was still on light duty, his testimony was that he climbed the crusher that day to prepare for its rewiring. I note that this is at odds with his contention that the head-striking incident occurred in late February or early March of 2006.

Sartin was Claimant's partner on the re-wiring project. He testified that Claimant actually hit his head on the bar on more than one occasion, but in at least one instance cursed loudly when he did so. He did not recall on which date this occurred, however. His testimony does not lend support to Claimant's theory that the incident occurred when he came over to inspect the job while he was still on light duty. Sartin's testimony reflects that the project was underway at the time Claimant hit his head; he stated that Claimant was more likely than him to hit his head because Sartin as the less experienced worker stayed on the ground and fed wires to Claimant at the top of the crusher.

Claimant testified that Jim Stegeman saw him strike his head. When he was deposed, Stegeman stated that he did not actually see the incident occur, because at the time it happened, he was ahead of Claimant in climbing the crusher. However, he heard the collision and witnessed Claimant cursing about hitting his head. His testimony was that after the incident occurred, he showed Claimant where he wanted the remote switch for the feeder installed before the two climbed down. Stegeman testified that at the time

Claimant hit his head, the re-wiring of the crusher was underway; he was working on the wiring at the ground level at the time.

Claimant at the hearing admitted that he was speculating when he gave February 2 or 3 of 2006 as the time when he struck his head. While he was unsure of the date, he stated that he was only on the crusher for planning and preparation for the job. However, he testified that he would not disagree with Stegeman if he stated that they were going to perform re-wiring when the incident occurred. He also stated that even preparatory work should be in his maintenance reports, but added that it is not always there. I note that at the close of his testimony, Claimant admitted that he does not recall why he was climbing the crusher the day he struck his head and that he remarked, "I've forgot [sic] a lot."

In view of the foregoing, I credit the testimony of Sartin and Stegeman in particular over that of Claimant in finding that at the time he hit his head, the re-wiring project had begun. Examination of Claimant's maintenance reports in Respondents' Exhibit 13 shows that the first entry of any type concerning the crusher is for March 8, 2006, when Claimant simply noted that he worked eight hours on the following job: "wire mobile crusher." While the evidence shows that Sartin saw Claimant hit his head, the first entry in his maintenance records (attached to his deposition, Claimant's Exhibit 4) concerning the crusher job is March 13, 2008. After consideration of all of the evidence, I find that Claimant has not proven by a preponderance of the evidence that he did not have had a temporal lobe seizure until after he struck his head on the bar while climbing the mobile crusher. In fact, the evidence shows otherwise. I also note that Dr. Rutherford testified that Claimant's heatstroke history could play a role in the development of his seizure disorder.

Taking this into account in light of the opinions of Drs. Towbin, Britton and Rutherford, and especially Rutherford, I find that the seizure condition is a pre-existing condition and not a compensable consequence of a work-related incident. Causal connection is generally a matter of inference, and possibilities may play a proper and important role in establishing that relationship. *Osmose Wood Preserving v. Jones*, 40 Ark. App. 190, 843 S.W.2d 875 (1992). The determination of whether a causal connection exists is a matter for the Commission to determine. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). The basic test is whether a causal connection between the two episodes exists. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). Claimant has not established a causal connection between the head-striking incident and his seizure condition. There are no objective findings to support that he injured his head as a result of striking his head on the bar. Hence, he has not proven that he sustained a compensable injury.

B. Balance of Issues

Because I have found the alleged injury not to be compensable, the balance of the issues presented in this case are moot and will not be addressed.

CONCLUSION

Claimant bears the burden of proving by a preponderance of the evidence that his alleged head injury is compensable. He has been unable to do this. Therefore, this claim is hereby denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge