

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F705689**

**DONALD L. LAMB, EMPLOYEE**

**CLAIMANT**

**CONAGRA FROZEN FOODS CO., SELF-INSURED  
EMPLOYER**

**RESPONDENT NO. 1**

**SEDGWICK CLAIMS MANAGEMENT  
SERVICES, INC., TPA**

**RESPONDENT NO. 1**

**SECOND INJURY FUND**

**RESPONDENT NO. 2**

**DEATH AND PERMANENT TOTAL  
DISABILITY TRUST FUND**

**RESPONDENT NO. 3**

**OPINION FILED SEPTEMBER 9, 2008**

Hearing before Administrative Law Judge O. Milton Fine II on June 11, 2008, in Russellville, Pope County, Arkansas.

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

Respondents represented by Mr. Bill Walmsley, Attorney at Law, Batesville, Arkansas.

**STATEMENT OF THE CASE**

On June 11, 2008, the above-captioned claim was heard in Batesville, Arkansas. Claimant was represented by Mr. Kenneth Olsen of Little Rock, Arkansas. Respondents No. 1 were represented by Mr. Bill Walmsley of Batesville, Arkansas. The Second Injury Fund, Respondent No. 2, represented by Mr. David Simmons of Little Rock, Arkansas, was excused from participation. The Death and Permanent Total Disability Trust Fund, Respondent No. 3, represented by Ms. Christy King of Little Rock, Arkansas, was likewise excused from participation.

A prehearing conference took place on April 14, 2008. 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 No. 1 reached additional stipulations concerning Claimant's compensation rate and the controversion of the claim, resulting in the following four, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/self-insured employer relationship existed on January 10, 2007.
3. Claimant's average weekly wage was \$517.61, rounded up to \$518.00, giving him a temporary total disability rate of \$345.00 and a permanent partial disability rate of \$259.00.
4. Respondents No. 1 have controverted this claim.

### Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. Without objection from Respondents No. 1, Claimant only sought temporary total disability benefits from January 11, 2007 through August 2, 2007, and reserved the issue concerning entitlement to temporary total disability benefits beyond that and the issues of permanency and Second Injury Fund liability. In addition, the third issue was amended to reflect that Claimant is also seeking reimbursement for medical expenses he has already incurred. The following were litigated:

1. Whether Claimant sustained a compensable injury to his spine on January 10, 2007.
2. Whether Claimant provided Respondents No. 1 with notice of his injury prior to June 14, 2007.
3. Whether Claimant is entitled to reasonable and necessary medical treatment.
4. Whether Claimant is entitled to temporary total disability benefits from January 11, 2007 through August 2, 2007.
5. Whether Respondents No. 1 are entitled to a credit for short-term disability and group health benefits paid to Claimant.
6. Whether Claimant is entitled to a controverted attorney's fee.

Contentions

Claimant:

1. Claimant contends he sustained a compensable lumbar spine injury on January 10, 2007, and that he is entitled to payment of medical expenses and indemnity benefits from January 11, 2007 to a date to be determined, controversion and attorney's fees.

Respondents No. 1:

1. Respondents No. 1 contend that Claimant did not sustain a compensable injury on January 10, 2007.
2. Respondents No. 1 contend that Claimant did not give Respondent notice of an injury until June 14, 2007.

3. Respondents No. 1 contend that they have paid certain group medical insurance benefits and short-term disability benefits to the Claimant since January 10, 2007, and if the claim is found compensable, is entitled to credit for those benefits.
4. There is no medical evidence, supported by objective findings, that the Claimant sustained a compensable injury to the L1-2 and L2-3 levels of his spine.

Respondent No. 3:

1. Pursuant to Ark. Code Ann. § 11-9-525(b)(1), Second Injury Fund liability must be determined prior to consideration of the Death & Permanent Total Disability Trust Fund liability. If the Second Injury Fund is found to not have liability and Claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with Ark. Code Ann. § 11-9-502. Therefore, the Trust Fund has not controverted the Claimant's entitlement to benefits.

**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. The hearsay objections by Respondents No. 1 to portions of Claimant's testimony are overruled. The admission of the testimony will help to "best ascertain the rights of the parties" under Ark. Code Ann. § 11-9-705(a)(1) (Repl. 2002).
4. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his spine.
5. In light of the above finding, the balance of the issues presented are moot and will not be addressed.

### **PRELIMINARY RULINGS**

#### Admission of Testimony of Claimant Regarding Statements Made by Others:

During Claimant's testimony, he related conversations made to him by others. His supervisor, David Reed, allegedly asked him if he could walk after Claimant told him about his alleged injury. Also, a worker at the plant allegedly told Claimant that he did not have to clock out before leaving after he went to the infirmary. Respondents No. 1 objected to both items of testimony on grounds of hearsay. I took the objections under advisement and permitted Claimant to proffer the testimony.

Arkansas Code Annotated § 11-9-705(a)(1) (Repl. 2002) provides:

In making an investigation or inquiry or conducting a hearing, the Workers' Compensation Commission shall not be bound by technical or statutory rules of evidence or by technical or statutory rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct the hearing, in a manner that will best ascertain the rights of the parties.

The Commission has a “great deal of latitude in evidentiary matters.” *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001). I find that admission of these pieces of testimony will help to “best ascertain the rights of the parties.” Thus, Claimant’s proffered testimony should be and is hereby admitted into evidence, and the objections of Respondents No. 1 are overruled. I will give the statements due weight, taking the source thereof into consideration.

### **CASE IN CHIEF**

#### **Summary of Evidence**

\_\_\_\_\_The witnesses at the hearing were the Claimant and Bertha Kellybrew.

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 33 numbered pages thereafter; Claimant’s Exhibit 2, a supplemental medical exhibit, consisting of one index page and eight numbered pages thereafter; Respondents No. 1 Exhibit 1, a compilation of Claimant’s medical records, consisting of one index page and eight numbered pages thereafter; Respondents No. 1 Exhibit 2, a copy of an e-mail, consisting of one page; Respondents No. 1 Exhibit 3, a wage report for Claimant from Respondent ConAgra, consisting of two unnumbered pages; Respondents No. 1 Exhibit 4, an itemization of short-term disability payments made to Claimant, consisting of 19 unnumbered pages; Respondents No. 1 Exhibit 5, documents pertaining to Claimant’s orientation at ConAgra, consisting of five unnumbered pages; Respondents No. 1 Exhibit 6, warning notices issued to Claimant, consisting of ten unnumbered pages; Respondents No. 1 Exhibit 7, incident reports concerning Claimant, consisting of two unnumbered pages; Respondents No. 1

Exhibit 8, Claimant's leave of absence record at ConAgra, consisting of one page; Respondents No. 1 Exhibit 9, the transcript of the deposition of Claimant taken August 22, 2007, consisting of 64 numbered pages; and Respondents No. 1 Exhibit 10, medical records concerning Claimant from Dr. Gary Russell, consisting of two unnumbered pages.

### Testimony-Hearing

Donald Lamb. Claimant testified that he has an eighth grade education. He was incarcerated for a total of ten years, and was released in 1982. His testimony was that he has never returned to the lifestyle that resulted in his imprisonment, and that he has become a Christian. However, he admitted that he was jailed for one night after getting into a fight with two individuals on a parking lot. Claimant stated that he has not been in trouble with the law since he went to work for Respondent ConAgra in 1993. He testified that he is still employed there, but has not worked since January 10, 2007, the date he was allegedly injured.

Claimant worked in the spice room, mixing ingredients for frozen dinners produced by the plant. The spice containers ranged from small bags to 50-pound boxes to 300-pound barrels. He indicated that the circumference of the barrels is such that when he picks them up, his fingertips are about a foot from touching. At another point, he stated that they are not as large as trash barrels. He stated that he used a forklift to pick up the barrels and place them on a rack. However, he added that once they are up on the platform and are ready to be used, a forklift cannot be used to lift them; they have to be "manhandled." Claimant was the only person performing this job on the second shift, from 1:00 p.m. to 9:00 p.m. His counterpart was the sole worker of this type on the first shift.

In describing the January 10, 2007 incident, which he said occurred around 5:00 to 5:15 p.m., Claimant testified:

I guess I picked up something. I just started feeling pain, and I tried to—I ripped a muscle in my back before, and I thought that was what it was, so I kept trying to do the blend. And then I went downstairs to dump the blend into the box. And when I crawled over of [sic] the pipe, I realized then that I was hurting, but I dumped the blend anyway. And I wobbled out to the forklift to pull the blend out, and then I couldn't hardly get—get back off of it once I got up on it. I made the blend, and I got out in the hallway and finally slipped off it. There's some bars on the floor and it keeps you from running into the floor, so I slipped off onto it. And there was a couple of guys there, one of them was a supervisor, and I told him I was hurt, and he asked me if I could walk . . . David Reed is a supervisor. I told him I was hurt, and he asked—he asked me if I could walk, and I said, "No, I don't think I can." And another guy was there, so David and David Reed both tried to help me walk down the hall, but they had to get a wheelchair because, you know, I'm heavy.

Claimant estimated that it was two minutes after the lifting incident that he began to experience pain—when he crawled over the bar and got on the forklift. He assumed that Reed retrieved the wheelchair from the infirmary. Claimant was wheeled to see the nurse and he told her what had happened. He was placed on a table on top of hot pads. The nurse did not provide medication, and no one directed Claimant to seek medical attention anywhere outside the plant. Neither Reed nor anyone else instructed Claimant to return to his position. He did not ask to fill out forms to report the alleged injury because "I thought that I had done the same thing that I'd done before, and I thought it was going to go away." He also testified that he did not recall being instructed during orientation what he was to do in case he was injured at work. However, he did recall signing forms concerning the policy. In any case, no one offered the forms to him. Claimant asked to go home. He was told that he did not have to clock out. Someone went and pulled up his truck, and Claimant used crutches to reach it.

Claimant testified that he went home, took a hot shower, and took muscle relaxers. He stated that he was unable to sleep that night. The next day, he did not go to work, although he was scheduled to do so. He called the plant and spoke to Billie, who was at the guard shack. Claimant had followed this practice in previous instances when he was not coming to work.

He stated that he first sought treatment for his back the date after the alleged incident, on January 11, 2007. Claimant went to the Dardanelle Clinic and was sent for therapy. During this period, according to Claimant, he was in constant pain in his low back. After treating there for a time and being on medical leave from work, Claimant was referred to Dr. Peek by a physician at the Dardanelle Clinic. He first saw Peek on March 19, 2007. The doctor treated him with injections, which Claimant stated only lasted the length of time it took for him to reach his vehicle. During this period, he was given off-work slips by the clinic and by Peek, which he brought to Respondent ConAgra. In July 2007, Dr. Peek performed surgery on Claimant.

With respect to his current condition, Claimant testified that he has slept in a chair since the date of the alleged incident because he cannot lie flat. At first, he stated that none of his medications provide relief. Then he added that only Demerol helps. He has been taking it since the surgery. He walks three blocks a day, but uses a walker to do so and takes breaks during the course of the walk. Claimant also uses an electric wheelchair that a friend provided him. He still sees Dr. Peek, and had an appointment scheduled with him for June 29, 2008. Claimant stated that he does not feel that he has recovered enough from his injury to be able to return to work. At present, Claimant "just pretty much hang[s] around the house." He uses a riding lawn mower to mow a portion of his yard.

Claimant is drawing Social Security disability benefits. He also drew eight or nine weeks of short-term disability benefits.

He testified that in 2003, he suffered a ripped muscle in his side. The tear went into his low back. Claimant did not file for workers' compensation for this. He underwent injections for the condition. His testimony was that he had no physical limitations when he went back to work, and that he worked continuously until the alleged January 10, 2007 event.

When questioned by Respondents No. 1, Claimant stated that he is six feet tall. At the time of the alleged incident, he weighed 337 pounds. He now weighs approximately 400 pounds.

When shown Respondents No. 1 Exhibit 5, Claimant identified the initials "DL" as the ones he made on the orientation checklist. One was the instruction that he should complete a Form AR-N if he is hurt. Claimant denied filling one out for the January 10, 2007 incident. However, when shown one bearing the date of June 14, 2007, he identified it as the one he filled out. The orientation form also provided that he was instructed to use a medical provider or doctor provided by Respondent ConAgra. But Claimant admitted that he did not do this on January 11, 2007 when he went to the Dardanelle Clinic. This was a provider that he, not the company, selected. While the orientation form provided that all doctor's appointments for work-related injuries are to be scheduled through and authorized by the company, Claimant admitted that he did not pursue this. He merely requested leave from ConAgra. The notes he gave the company on January 11 and 12 do not mention why he should be excused. None of the forms stated that he had a work-related injury. However, he stated that although he applied for family leave (as reflected in Claimant's

Exhibit 8) from January 11, 2007 through July 9, 2007, he did not know that such leave was not ordinarily to be used for work-related injuries.

In contrast to his testimony on direct, Claimant admitted that he testified at the deposition that he had drawn 13 weeks of disability benefits. He repudiated his deposition testimony that he understood that short-term disability benefits could not ordinarily be drawn for employment-related injuries. Claimant first explained that he gave this answer because he had been “rattled,” and then stated that it was because he “probably” did not understand the question. While he testified that none of his medical bills have been paid, he admitted that he turned them in to his health insurance. At the time of his deposition, he thought they would be paid. Claimant stated that he did not know that his group medical insurance was not for work-related conditions. He testified that he indicated to a representative at ConAgra named Bertha that his condition was work-related and was told to go to health and safety and report it and complete the forms. His testimony was that no one would help him there. He admitted that he saw Bertha again after his short-term disability had run out and he was going to have to pick up the COBRA payments to keep his group health insurance in effect, and that it was possible that he told her that he was going to file for workers’ compensation because he could not afford the COBRA payments.

He testified that while Dr. Peek treated the L1-2 and L2-3 levels, Claimant did not think those were not affected by the 2003 incident. He was not aware that his January 22, 2003 MRI indicated disc protrusions at those levels along with stenosis at L2-3. Claimant did not recall taking leave from November 22-28, 2005 for lumbosacral strain.

As for the alleged January 10, 2007 incident, Claimant stated that he injured his back while catching a barrel that was sliding off a platform. He stated that his deposition

testimony that he was picking up a barrel at the time was not inconsistent because he was “pulling” the barrel at the time he felt something in his back. While his testimony on direct was that he felt pain within two minutes, he admitted that he testified at the deposition that he continued to shovel the entire contents out of the barrel, with each shovelful weighing ten-plus pounds, and that while he was “tensed,” he did not think he was having problems doing this. Emptying the barrel took ten minutes. He also stated that he drove the forklift after he was injured, and that he drove himself home that night. The route is seven miles long.

As for his direct testimony that he was unable to sleep the night of the alleged incident, Claimant admitted that he stated in the deposition that he slept all night. He stated that he actually did not sleep much.

Up until his surgery, his pain was only in his low back. Thereafter, he began having leg pain, which he attributed to retaining water. He stated that it would be fair to say that the surgery did not help. Since the surgery, he has had to use a walker.

With respect to his criminal record, Claimant testified that he began serving time when he was 17. He was convicted of more than five felonies—burglary and theft of property—and was sentenced to 12 years’ imprisonment.

Under further questioning from his counsel, Claimant stated that upon further reflection, he was not sure how long he has used the walker. He identified Bertha Kellybrew in the courtroom and stated, “I told her I needed to file a workman’s [sic] comp. That was—this time it was going to be seriouser [sic] than what I thought it was going to be. I thought I had just ripped a muscle.” He stated that this conversation probably occurred months after his alleged injury, but was prior to the June 2007 date that he filled out the

workers' compensation forms. He then changed his testimony to state that this occurred within a month of the time that he was injured. He also stated that this was the date that he attempted to fill out the forms, but was not able to do so.

Claimant testified that on January 10, 2007, no one from the infirmary gave him any workers' compensation forms to fill out or directed him to a physician. This was despite the fact that he allegedly told her that he was hurt on the job. No one from ConAgra called him thereafter to direct him to a doctor. This was the case even after he filled out the forms in June 2007. Claimant stated that he did not make a conscious decision to go to a provider other than the company doctor. He was aware that the company doctor was Dr. Allison. As to why he did not file a claim following his 2003 injury, he stated that he feared the loss of his job if he did so. According to him, Trey Tobin, a company official, visited him in the hospital and threatened to terminate him if he filed a claim.

Under further cross-examination, Claimant apparently became confused when confronted with his deposition testimony. It appears, from a review of the transcript, that he was consistent in testifying that he was threatened with termination in 2003 if he filed a workers' compensation claim, but that he was not so threatened in 2007. However, he was able to give Tobin's name at the hearing but could not supply it at the deposition.

When questioned by me, Claimant explained that his work area consisted of a mixer that went up to the ceiling. Ingredients are poured in at the top. The mixer is framed in order to support a platform around it. Part of the frame is a waist-high bar that Claimant had to climb across to reach the container at the bottom that holds the now-mixed spices. The upstairs portion of the mixer was where Claimant stated that he was injured while catching the barrel. At the time, he felt a "tingling." When he crossed over the bar, he felt

intense pain, but continued working—opening the mixer, dumping the contents, and replacing its top. After he drove the forklift, he found that he could barely get off of it.

Claimant reiterated that his group health insurance has not paid for any of his treatment. He could not state whether his belief that group health would pay led him to delay filing a workers' compensation claim. But his realization that his health insurance was not going to cover it, based on a letter he received from the carrier, led him to see Kellybrew about filing a claim. But under further questioning from Respondents No. 1, Claimant could not say when he received notification of non-coverage from his insurance company.

Bertha Kellybrew. Called by Respondents No. 1, Kellybrew testified that she has worked at ConAgra since September 1985. She is presently in the safety department, but has worked in human resources. In that capacity, she is familiar with workers' compensation claims, group insurance, short-term disability, leaves of absence, and the Family Medical Leave Act. She is also familiar with the new employee orientation process as it existed in 1993. Part of that training was the instruction of workers to immediately report any injury to the supervisor. If the injury was incurred on the job, the company selected the physician for the employee to see. Kellybrew stated that she saw the orientation documents that comprise Respondents No. 1 Exhibit 5. From Respondents No. 1 Exhibit 8, she noticed that Claimant had a fairly large number of requests for leaves of absence. But such leave, which is non-paid, is not to be used for an on-the-job injury. Kellybrew testified that short-term disability likewise is not to be used for job-related injuries.

She stated that she had two conversations with Claimant on or before June 12, 2007. During the first conversation, he told her that his injury was work-related, and she told him that he would have to go down to the medical department to complete the proper paperwork. He replied that the department would not send him to the doctor. Thereafter, Claimant continued to file requests for leaves of absence. In the second conversation, he told her that his group insurance was getting ready to expire and that his doctor was refusing to treat him without insurance, and that this was the reason he wished to file a workers' compensation claim. Respondent ConAgra, per policy, would not pay toward Claimant's health insurance because he had been off work for 12 weeks. Claimant also told her that he could not afford to pay for COBRA benefits.

When questioned by Claimant, Kellybrew stated that the first conversation with Claimant occurred around February 2007, and the second in late May or early June of 2007. When he mentioned in February that he thought his injury was work related, she did not follow-up to see if Claimant went down to the medical department and filled out the paperwork as she instructed. The department is the same as the infirmary. Kellybrew stated that if Claimant on the night he went to the infirmary indicated that his injury was work-related, that would have been enough for the nurse to have started the paperwork and to have sent him to a doctor. She testified that she would not have gotten any of Claimant's records in the course of considering his leave; she would only have gotten the off-work slips.

When questioned further by Respondents No. 1, Kellybrew examined the notes that Claimant provided her (Respondents No. 1 Exhibit 10) and she pointed out that none of them indicated that he sustained a work-related injury. She heard Claimant testify that the

night he was allegedly injured, he did not request a doctor. In light of this, it was not surprising to her that no paperwork was completed on the alleged incident. Kellybrew testified that in her 23 years with ConAgra, she has never heard a supervisor or other person in authority threaten to terminate an employee if he or she filed a workers' compensation claim. Such an action would be in violation of company policy. Kellybrew added that she had seen Claimant prior to the two incidents discussed in the e-mail. In those earlier incidents, he never indicated that he had hurt himself on the job. Moreover, he did not mention being hurt on the job in his later visits with her.

Under recross-examination, she stated that she saw him two to three times before the February 2007 meeting. She admitted that she continued to process his medical leave applications even after Claimant told her that he thought his injury was work-related.

Under questioning from me, Kellybrew stated that she spent the vast majority of her tenure at ConAgra in human services. She testified that while it is not a policy for plant personnel to visit injured workers in the hospital, it was normal for someone in management to visit such workers. As for her contacts with Claimant, she stated that ConAgra has no policy requiring someone in human services to report when someone is claiming to have a work-related injury. In fact, no policy required that she inform Claimant to go to the medical department to make a report. While she admitted that if someone had told her while she was in human resources that that person had suffered a work-related injury, she would have considered it an obligation to inform ConAgra's third party administrator about it. But first, however, the employee would have to fill out paperwork in the medical department. Once Claimant filled out a Form AR-N, the medical department staff would have put the information in the system and notified the third party administrator.

The medical department, and not the human resources department, handles workers' compensation forms at the plant.

### Testimony-Deposition

Donald Lamb. Claimant was deposed on August 22, 2007, and the transcript thereof was admitted as Respondents No. 1 Exhibit 9. Under questioning from Respondents No. 1, he testified that he injured his low back prior to the incident at issue on January 20, 2003. He suffered a lumbar strain when lifting a 250-pound barrel of spices. He suffered pain in the right side of his low back. His thigh was injured as well. Claimant was off for six weeks. When asked whether he filed a workers' compensation claim for this, he responded, "I was threatened." His health insurance paid for his treatment.

With respect to the incident at issue, he stated that it occurred at 10:00. He took a 250-pound barrel of freeze-dried onions down from the rack and as he was setting it down or catching it, he felt something in the center of his back toward the belt line. Claimant continued working, shoveling out the entire contents of the barrel into the blender. He stated that he did not think he had difficulty doing the shoveling that day, but felt "tensed" in his back and felt some pain. Claimant then got on a forklift and picked up the container of blended spices and took it to the rack where it was to be stored. But Claimant stated he could not get off the forklift, and he told David Reed, his supervisor at the time. He stated at this point in his testimony that it occurred around 5:10 to 5:30 p.m., because David George, his supervisor until 5:00, had gone home for the day. Claimant's testimony was that he told Reed, "I think I've hurt my back. I can't get off the fork." After using pipes

to slide off the forklift, Claimant was helped by Reed and other individual. When they could not help him walk, a wheelchair was retrieved.

He was taken to the infirmary. Claimant stated that he told the infirmary nurse, whose name he could not recall, that he hurt his back picking up a barrel. She wrote the information down. The nurse told him to go home. He signed something, and used crutches borrowed from the infirmary to leave. A maintenance worker brought his truck to the door, and Claimant got in and drove the seven miles home. He took medication that Dr. Addison had prescribed him following the 2003 incident. He then stated that he got in his recliner and went to sleep, about 25 minutes after coming home, and slept all night. When he awoke at 5:00 the next morning, he could not move. He described his symptoms as the same he had in 2003, only in a different location—beginning about 12 inches above his waist and going down to his waist.

Claimant thereafter drew 13 weeks of short-term disability benefits, and turned in his medical expenses to his health insurance. He did not know whether he checked on the disability benefits application form whether the injury was work-related. He went to the plant in mid June of 2007 and filled out some workers' compensation forms. Claimant stated that before that time, the only people he told at ConAgra that the injury was work-related were Reed and the infirmary nurse. He added that he went to human resources about a month after the incident and told Bertha Kellybrew that he wanted to file for workers' compensation, and she sent him to the nurse's station. When he went to the nurse's station, but ultimately did not fill out the workers' compensation paperwork. He first stated that someone told him he could be terminated for filing, but clarified that it did not happen that day. Craig Tolben told him that in 2003. Claimant stated that he left without

filling out the paperwork, and at first he stated that he did not remember why. He then stated that he left because the nurse left and he was “aggravated” because no one would help him.

### 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 No. 1 Exhibits 1 and 10 reflect the following:

Pre-incident. On January 22, 2003, Claimant presented to St. Mary’s Regional Medical Center with low back and right hip pain, which he stated began when he lifted a n 80-pound bag of feed and felt a “pop” in his back. Dr. Russell Allison assessed him as having low back pain. Claimant was placed in pelvic traction and recommended for an MRI. The MRI, conducted on January 22, 2003, showed a disc protrusion at L1-2 and L2-3. When Claimant returned to Dr. Allison on January 31, 2003, he reported feeling better, but still having pain in his back but not into his legs. He was continued off work for four weeks. Claimant underwent physical therapy and was returned to full duty on February 28, 2003 and was discharged from therapy on March 3, 2003.

Post-incident. On January 11, 2007, Claimant presented to Dr. Gary Russell and stated that he sprained his back at work because he was walking and carrying a 50-pound bag and tripped on an uneven floor. X-rays of his spine taken that day were negative. He was diagnosed as having a lumbosacral strain and was excused from work for January 11-12, 2007. On January 15, 2007, Russell took him off work until January 21, 2007. When he returned to Dr. Russell on January 22, 2007, Claimant complained of being unable to lie flat and of having swollen ankles. He was referred for physical therapy and was taken

off work pursuant to the Family Medical Leave Act through February 5, 2007. Claimant reported to Russell on February 16, 2007 that he was still in pain. Dr. Russell referred him for an MRI. When Claimant sought treatment on February 20, 2007, he was noted to have muscle spasms. His February 21, 2007 MRI had the following findings:

L1-2: Degeneration of the disc with concentric disc displacement producing moderate central canal encroachment with evidence of moderate biforaminal narrowing.

L2-3: Shallow right paracentral subligamentous disc protrusion with low-grade bilateral foraminal narrowing.

L3-4, L4-5 and L5-S1: Normal intradiscal T2 signal without focal disc protrusions. Concentric disc displacement accompanied by hypertrophy of the facets results in moderate biforaminal encroachment at all three levels, slightly greater at L5-S1.

He was given the diagnosis of degenerative disc disease.

When Claimant presented to Arkansas Specialty Spine Center on March 19, 2007, he gave the following as his “[e]xplanation of injury”: “reaching for 50 lb bag to pick up and twisted. I felt a sharp pain and couldn’t walk.” In relating his medical history, he mentioned going to the emergency room and staying overnight for back pain. Dr. Richard Peek examined Claimant on that date and reviewed the MRI. He diagnosed him as having an L1-2 herniated nucleus pulposus and diffuse degenerative disc disease, and noted that there was impingement of the thecal sac at L1-2. He recommended a series of up to three epidural steroid injections, home lumbar exercises, and that Claimant return to work in two months. The injections were performed on March 19 and April 3 and 17 of 2007.

When Claimant returned to Peek on May 7, 2007, he complained of constant, stabbing and burning neck, back and left leg pain. His follow-up MRI showed mild facet hypertrophy at three levels, multilevel problems in the lumbar spine, and a herniated disc

at L1-2. Dr. Peek wrote that he would proceed with a lumbar myelogram and CT scan and consider surgery. The myelogram, performed on May 10, 2007, showed severe spinal canal stenosis at the L1-2 and L2-3 levels and mild-to-moderate stenosis at L5-S1. The CT scan, performed the same day, showed

Multilevel broad-based and bilateral disc bulge with associated ligamentum flavum and facet joint hypertrophy causing moderate to severe spinal canal stenosis at L1-L2, mild to moderate spinal canal stenosis at L2-L3, mild to moderate bilateral neural foraminal narrowing at L4-L5, and L5-S1 levels.

Claimant underwent a bilateral decompressive laminectomy of L2-3 on July 2, 2007. His pre and post-operative diagnoses were herniated nucleus pulposis spinal stenosis at L1-2 and L2-3. Dr. Peek wrote on July 24, 2007 that Claimant would need to be off work for six weeks, with the possibility that this would have to be extended. On August 2, 2007, he returned to Peek and complained of an aching, burning back and bilateral leg pain. He was given the diagnoses of L1-2 herniated nucleus pulposis; diffuse degenerative disc disease; enthesopathy, lumbar multicus; and peripheral edema. Dr. Peek opined that Claimant is "disabled from employment" and "in no shape to return to work."

#### Records-Non-medical

Respondents No. 1 Exhibit 2. On June 14, 2007, Lawana Bradley sent an e-mail with the subject line of "Donald Lamb" that reads in pertinent part: "Donald came in this morning and filled out an injury report."

Respondents No. 1 Exhibit 3. This is the wage report for Claimant.

Respondents No. 1 Exhibit 4. This is an itemization of short-term disability payments that were made to Claimant from January 18, 2007 to April 9, 2007.

Respondents No. 1 Exhibit 5. This is a set of documents pertaining to Claimant's orientation at Respondent ConAgra in 1993 and a certification of training in reporting work-related injuries/illnesses dated June 14, 2007. On November 10, 1993, Claimant signed a document confirming that he had been advised to immediately report all injuries to his supervisor. A Form AR-N was provided to him on November 4, 1993.

Respondents No. 1 Exhibit 6. This is a collection of warning notices that were given to Claimant at ConAgra.

Respondents No. 1 Exhibit 7. This exhibit is a printout of two incident reports concerning Claimant with incident dates of January 20, 2003 and March 23, 2005.

Respondents No. 1 Exhibit 8. This is a leave of absence record for Claimant from March 26, 1997 through July 9, 2007.

Respondents No. 1 Exhibit 9. This is the August 22, 2007 deposition of Claimant summarized above.

### **ADJUDICATION**

#### A. Compensability

Claimant has contended that he suffered a compensable back injury on January 10, 2007. Respondents No. 1 have countered that Claimant's back condition is not compensable.

Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2002), which 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.*

Based upon my observation of Claimant while he testified at the hearing, and on my review of that testimony when arrayed against his deposition testimony and the balance of the evidence in this case, I cannot, and do not, find him to be credible on many crucial points. Nor do I find that he has proven that his back condition arose out of and in the course of his employment at Respondent ConAgra.

His hearing testimony was that on January 10, 2007, he injured himself by “pick[ing] up something.” He elaborated on cross-examination that at the moment at issue, he was trying to catch a barrel that was sliding off a platform. However, his deposition testimony was that he was picking up a barrel at the time. Claimant attempted to explain the discrepancy by stating that at the moment in question, he was actually pulling the barrel. However, the versions above are completely at odds with what he told Dr. Russell. When he presented for treatment on January 11, 2007, Claimant told Russell that he hurt his back when he tripped over an uneven floor while carrying a 50-pound bag. He told Dr. Peek that he actually was reaching for a 50-pound bag and twisted when the injury came about. These respective versions are simply not reconcilable.

His hearing testimony was that pain did not appear for about two minutes after the incident, when he crawled over a bar. However, he stated that he continued to shovel the entire contents out of the barrel, which he estimated took ten minutes. His cross-examination and deposition testimony was at the time he was performing this action, he was only “tensed” and had no problems with the shoveling. At the deposition, the incident involving the bar was not mentioned.

According to his testimony at the hearing, when Claimant arrived at the infirmary, he did not ask to fill out an injury report because he believed that he had merely “done the same thing that [he’d] done before,” and that the pain would go away. However, he later testified that he did not file the forms because he was afraid that he would be terminated for filing a workers’ compensation claim. While Claimant testified that he did not remember being told during orientation what he was supposed to do when injured, he admitted that he initialed the forms showing that he had been so instructed.

Claimant’s hearing testimony was that after he left the infirmary, he went home, took a hot shower and some muscle relaxers; but he was unable to sleep that night. However, on cross-examination he admitted that his deposition testimony was that he slept all night. While he tried to explain the discrepancy by stating that he actually did not sleep much that night, my review of his deposition testimony reflects that he was clear then in stating that he went to sleep 25 minutes after lying in the recliner, and that he slept all night long.

The problems with the case do not end there. Instead of going to a physician authorized by Respondents No. 1, Claimant went to a provider of his own choosing, Dr. Russell. It was Russell who referred him to Dr. Peek. Nothing in the medical records before me show that Claimant told the doctors that he was injured at work. The off-work slips they supplied did not indicate it. Dr. Russell’s apparent ignorance of the situation is perhaps best exemplified by the fact that his off-work slip of January 22, 2007 indicates that it is for “FMLA,” or the Family Medical Leave Act—and not workers’ compensation.

Claimant’s lack of belief that he sustained a work-related injury on January 10, 2007 is also shown by the fact that he took family leave from ConAgra while under his doctors’ care, used his group health insurance to pay for that care, and applied for short-term

benefits. At the hearing, he repudiated his deposition testimony that he knew that short-term disability was not ordinarily for work-related injuries. The evidence at the hearing shows that Claimant did not seek to file a workers' compensation claim until it appeared that he was in danger of losing his group health coverage, and that his doctor would not continue to treat him without it. He could not afford to retain his coverage through COBRA. Claimant did not file a Form AR-N until June 14, 2007—over five months after the alleged incident—despite being instructed on the use of this form at his new employee orientation. He attempted to explain this by stating that when Bertha Kellybrew directed him to go to the medical department in February 2007 when he was saying that his condition was work-related, no one in the infirmary would help him. Regardless, the record reflects that after February, Claimant continued to request leaves of absence and collect short-term disability benefits.

Claimant's testimony that he did not make a conscious decision to not go to the company doctor is difficult to believe. He testified that he knew that Dr. Russell Allison was the physician for ConAgra. Indeed, his records show that he sought treatment for his back from Allison in 2003. This continuing lack of consistency in his testimony is all the more problematic in light of Claimant's admission that he has been convicted of more than five felonies.

Another troubling aspect of the claim is that Claimant was treated for low back strain in 2003, roughly two years before the incident at issue here. A January 22, 2003 MRI showed disc protrusions at L1-2 and L2-3 (the level at which the laminectomy was performed). Those are the levels that were each found to contain a herniated nucleus pulposus in 2007. The other levels tested had only degenerative findings. The medical

evidence contains nothing attributing his 2007 L1-2 and L2-3 findings to an acute as opposed to a degenerative condition; and I note that as of January 11, 2007, Claimant weighed in 349 pounds according to his medical record. Apart from the numerous discrepancies and features recounted above that show that Claimant did not believe he sustained a compensable injury, his medical evidence is such that I cannot find that the condition of his lumbar spine is causally related to his employment on January 10, 2007 without resorting to speculation and conjecture, which I am not permitted to do. Speculation and conjecture cannot serve as a substitute for proof. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979). In sum, Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury.

B. Balance of Issues

Because I have found the alleged injury not to be compensable, the other 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 spinal injury is compensable. He has been unable to do this. Therefore, this claim is hereby denied and dismissed.

**IT IS SO ORDERED.**

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Hon. O. Milton Fine II  
Administrative Law Judge