

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303972

PAUL W. BULLARD,  
EMPLOYEE

CLAIMANT

SEARCY MACHINING & FABRICATION,  
EMPLOYER

RESPONDENT

CINCINNATI INDEMNITY COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 13, 2005

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by the HONORABLE NEAL L. HART,  
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM C.  
FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the  
Administrative Law Judge filed January 5, 2005. In said  
order, the Administrative Law Judge made the following  
findings of fact and conclusions of law:

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on December 23, 2002, and at all other relevant times.
3. Claimant suffered a compensable injury on December 23, 2002.

4. Respondents paid medical expenses through August 25, 2003.

5. Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to additional reasonably necessary medical treatment in connection with his compensable injury. Claimant's compensable injury continues to cause him pain which affects his ability to work; the testimony of both doctors establishes that Claimant's compensable injury is at least a factor in his need for medical treatment. Further, Dr. Chan's testimony establishes that the procedures he recommends are reasonably necessary to treat Claimant.

6. As conceded at the hearing, Claimant is not entitled to an award of an attorney's fee, because applicable law does not permit such awards on medical benefits or services.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the January 5, 2005 decision of the Administrative Law Judge, including all findings of

fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

---

OLAN W. REEVES, Chairman

---

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

---

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was injured on December 23, 2002, while getting sheet metal out of a rack. He initially treated with Dr. Killough for low back pain radiating down into his right leg. Dr. Killough ordered an MRI which showed that the claimant had degenerative changes with no disc protrusion. Dr. Killough ultimately referred the claimant to Dr. Patrick Chan, who performed lumbar steroid injections on the claimant on April 29, 2003, and June 10, 2003. The claimant last sought treatment from Dr. Chan on August 25, 2003, and was ordered to continue physical therapy and follow up in one month. The claimant failed to follow through with Dr. Chan's ordered physical therapy.

On September 22, 2003, the claimant had a fall. The claimant underwent an MRI of his brain and it was opined that the claimant had a transient ischemic attack. The claimant did not complain of any back pain

at that time. The claimant continued to work during this entire period of time and bought the respondent employer's business during this time period as well.

The claimant did not seek any additional medical treatment from Dr. Chan until April 7, 2004. Dr. Chan ordered another MRI which was performed on April 14, 2004, which showed an annulus bulging and disc protrusion at L5-S1. Dr. Chan recommended an L5-S1 decompression and fusion.

On September 16, 2004, Dr. John L. Wilson performed an independent medical evaluation of the claimant. Dr. Wilson opined that the claimant's bulging disc was superimposed on the degenerative disc disease and that his current problem was due to his on the job injury. However, he also opined that the claimant needed to continue with conservative treatment of physical therapy and to see Dr. Bill Deeton for consideration of a selective nerve block.

Dr. Chan acknowledged that the initial MRI report did not show an annular tear. He acknowledge that his reading would essentially be a natural or degenerative process of the spine. Dr. Chan stated that he reviewed the initial MRI independently and testified that he saw an annular tear but admitted that he could

not say when it occurred. When he examined the claimant on April 16, 2003, he stated that he did not find anything that could be considered abnormal. Dr. Chan had no explanation as to why the claimant did not start the physical therapy that he ordered. Dr. Chan had agreed to allow the claimant to return to work when he last saw him on August 25, 2003. When Dr. Chan examined the claimant again in April of 2004, he ordered another MRI. Dr. Chan admitted that something else could have occurred in the seven month interim between visits. Dr. Chan stated that the claimant's current condition was related to the progression of the claimant's degenerative process, yet he admitted that during the initial five months of treatment that the claimant did not show any progression of neurological findings. Dr. Chan related that his opinion was based upon the history given to him by the claimant along with the two MRI reports. The Commission has the authority to accept or reject a medical opinion and the authority to determine its probative value. Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 74 S.W.3d 878 (2002). The Commission may accept only those portions of testimony that it determines are worthy of belief. Tucker v. Roberts-McNutt, 342 Ark. 511, 29 S.W.3D 706 (2000).

Furthermore, it is well established that it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. Smith Blair, Inc., v. Jones, 77 Ark. App. 273, 280, 72 S.W.3d 560 (2002). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. Id. Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Echrich, Inc. v. Brock, 63 Ark. App. 188, 975 S.W.2d 857 (1998). Moreover, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). Finally, the Commission is not bound by a doctor's opinion which is based largely

on facts related to him by the claimant where there is not sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

In my opinion, the claimant's testimony is suspect, at best. The claimant testified, that if Dr. Chan had in his records that his pain decreased with physical activity that it would be correct even though he initially denied it. The claimant also acknowledged that his reasons for not having treatment from August of 2003, until April of 2004, that were given during his deposition, were actually incorrect. Interestingly, the claimant felt well enough in the Fall of 2003 to go on a guided bird hunt. The claimant further admitted that during the gap in treatment, he did not contact Dr. Killough and ask for treatment. Nor did he contact Dr. Chan and ask for treatment. He did not seek medication but instead continued to work full time. It is also important to note that the claimant had a long history of low back pain, which the claimant readily acknowledged.

Moreover, the claimant's own report of injury, by way of the medical histories, is inconsistent. According to Dr. Killough's note of January 14, 2003,

the date of injury given was January 10, 2003. Dr. Chan's history and physical dated March 17, 2003, indicated a date of injury of December 11, 2002. The patient information form, filled out by the claimant, listed a date of injury of December 14, 2002. When the claimant reported for the IME he gave Dr. Wilson yet another date, December 23, 2002. Obviously, the claimant's history, which was relied upon by Dr. Chan, is unreliable to say the very least.

Other than pure speculation, there is no credible evidence linking the claimant's current condition to his work injury. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Dr. Chan clearly testified that there was a lot of uncertainty in this case. The respondents contended that the claimant's current condition was not causally related to the claimant's work related injury. Assuming, only for the sake of argument, that the Commission finds that the claimant's current condition is related to his work related injury, a finding which I

do not make, I would agree with the respondents that the nerve block and conservative treatment recommended by Dr. Wilson was appropriate rather than the fusion sought by Dr. Chan.

Accordingly, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

---

KAREN H. MCKINNEY, Commissioner