

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307186

DAVID FANT,
EMPLOYEE

CLAIMANT

ALAMO PCS HOLDINGS, INC.,
EMPLOYER

RESPONDENT

ST. PAUL MERCURY INS. CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 2, 2005

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

Claimant represented by HONORABLE EDDIE H. WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE JAMES ARNOLD II,
Attorney at Law, Fort Smith, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

The respondents appeal from a decision of the
Administrative Law Judge filed July 15, 2004. The
Administrative Law Judge entered the following findings of
fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On November 5, 2001, the relationship of employee-employer-carrier existed between the parties.
3. The claimant is entitled to the maximum compensation rate for 2001.

4. The claimant has proven by a preponderance of the evidence that he sustained a work related injury to his neck and back on November 5, 2001, while working for the respondent.
5. The respondents should pay for all reasonable and necessary medical care for this claimant's compensable injury.
6. The claimant has proven by a preponderance of the evidence that he is entitled to a 7 percent impairment rating for his compensable injury.
7. The respondents have controverted this claim in its entirety.
8. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

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 of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, 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 must respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that he sustained a left sided

herniated disc as a result of his November 5, 2001, work related incident. Based upon my de novo review of the record, I cannot find that the evidence preponderates in favor of the claimant on this issue.

It is undisputed that the claimant was involved in a work related incident on November 5, 2001, when he was lifting an eighty pound power amplifier out in front on him when he lost his balance and fell backwards. The claimant reported this incident to his supervisor and stated that he bruised his right shoulder and tore a muscle in his arm. However, the claimant did not seek medical treatment until December 12, 2001, when he saw Dr. John Lachowsky. The claimant initiallu reported complaints of "pain in his neck, shoulder, and running down his right arm with episodes of numbness, tingling, and stinging of his right hand, primarily thumb and index fingers and sometimes, to a lessor degree, the hypothenar area of his right hand." An MRI performed in December of 2001, revealed a left posterolateral disc protrusion which slightly compromised the left C6/7 foramen."

Claimant was referred to Dr. Tonya Phillips, a neurologist with Cooper Clinic whom he saw on January 2, 2002. Dr. Phillips' described the claimant's symptoms as an

aching sensation, not a radicular type pain. Dr. Phillips assessed the claimant with possible musculoskeletal pain, but she could not rule out compressive neuropathy due to the claimant's diabetes. Dr. Phillips ordered an EMG, which was cancelled by the claimant. After conservative treatment, claimant's right sided complaints subsided. In a report by Dr. Lachowsky dated March 29, 2002, the claimant provided a history of being nearly asymptomatic for over a month before waking up with severe pain in his left upper extremity. The claimant eventually came under the care of Dr. David Davis. Dr. Davis first examined the claimant on April 30, 2002. Dr. Davis initially opined that the claimant's complaints were due to musculoskeletal pains. When the claimant's complaints did not improve, Dr. Davis ordered a new MRI. An MRI performed on May 30, 2002, revealed a disc herniation to the left at C6/7. Dr. Davis described this as a moderately large disc herniation. Dr. Davis referred the claimant to Dr. Vincent Runnels to determine how to treat the claimant with diabetes and to determine whether the claimant was a surgical candidate.

Drs. Davis and Runnels were deposed by the parties. Dr. Davis testified that he could not make a declaration as to when the claimant's disc herniation

occurred. Moreover, Dr. Davis testified that he could not state within a reasonable degree of medical certainty whether the disc protrusion was or was not caused by the claimant's work related incident.

Dr. Runnels testified:

...But I think what happened, when he turned over he herniated more disc material out at 6-7 on the left. Whether or not it was set up by the lifting that we talked about, that's speculation. But it's sort of - - that's the way it happens a lot, and sorry that it's not all black and white. That would make it easy...

On re-direct examination, Dr. Runnels testified that in his opinion the chain of event which lead to the claimant's left-sided herniated disc began with the work related lifting incident. However, Dr. Runnels further testified that his opinion was based upon the fact that the claimant did not have any prior injuries.

The Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. Green Bay Packing v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 692 (1999). Medical opinions based upon "could", "may", "possibly", and "can" lack the definiteness required to satisfy Ark. Code Ann. § 11-9-102(16)(B) (Supp. 1999) which requires that medical

opinions be stated within a reasonable degree of medical certainty. Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000). In Frances v. Gaylord, supra. the Arkansas Supreme Court expressly overruled a prior Court of Appeals decision to the extent that the Court of Appeals had held that such indefinite terms were sufficient to meet the requirements of Ark. Code Ann. § 11-9-102(16)(B). In Frances v. Gaylord, the Arkansas Supreme Court held that a doctor's opinion that an accident "could" produce a lumbar disc injury was insufficient to satisfy the standard of within a reasonable degree of medical certainty. Moreover, in Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000), the Arkansas Supreme Court held that a medical opinion based upon theoretical possibility of a causal connection did not meet the standard of proof. In Freeman v. Con-Agra Frozen Foods, ___ Ark. ___, ___ S.W.3d ___ (2001), the Arkansas Supreme Court held that in order for a medical opinion regarding causation to "pass muster" such opinion must be more than speculation, and go beyond possibilities. While, Dr. Runnels stated his causation opinion with force and conviction, he acknowledged that it was all based upon speculation. 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 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Accordingly, I cannot place any weight upon Dr. Runnels causation opinion. Without Dr. Runnels' opinion, I find that the claimant has failed to establish by a preponderance of the evidence that he sustained a left-sided disc herniation at C6/7 as a result of his work related incident. Therefore, I must respectfully dissent.

Commissioner Karen H. McKinney