BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500540

LOUIS MULANAX, EMPLOYEE	CLAIMANT
PERSONNEL CONSULTANTS, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 2, 2007

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE ROBERT MONTGOMERY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

NUNC PRO TUNC ORDER

The Full Commission, on its own motion, finds that an error exists in the opinion and order filed on October 26, 2007. The Full Commission finds that the opinion and order from October 26, 2007 failed to include a concurring opinion from Commissioner Hood.

The Full Commission is authorized to correct clerical errors and this is a proper case for exercise of that authority. Ark. Code Ann. § 11-9-713(d)(Repl. 1996) The

following is the substituted opinion with the concurrence added.

The claimant appeals an administrative law judge's opinion filed December 14, 2006. The administrative law judge found that the claimant did not prove he suffered a compensable injury. After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the claimant proved he sustained a compensable injury, and that the claimant proved he was entitled to reasonably necessary medical treatment and temporary total disability compensation.

I. HISTORY

Louis Ray Mulanax, Jr., age 39, testified that he began working for Personnel Consultants in about November 2004. Through this employment, Mr. Mulanax at first worked with plastic at Johnson & Johnson before being sent to ABC Block. "I was there for three hours, and I hurt my arm," the claimant testified. The parties stipulated that the employment relationship existed on December 20, 2004. The claimant testified, "I was chipping slag off of block with a big hammer. And, after a while, my arm got tired. I missed

the chisel and the weight of the hammer forced extended the arm to where I felt just a big burning, pop sensation in my arm. And that's when I reported it to the guy that works there....I reported it to my supervisor there at ABC Block, and he told me to go over to Personnel Consultants and report it to them, so I walked across the street. I set down in front of Cindy, told her that I'd hurt my arm, pulled my arm sleeve up, and she just stared at me, like, what are you going to do? I said I was going to the hospital; I went straight to the hospital."

The claimant testified that he went to a hospital in Harrison, and that he was immediately referred to University of Arkansas for Medical Sciences. The record contains handwritten notes dated December 20, 2004 authenticated by Dr. Charles A. James: "Injury @ work (8# hammer) "forced flexion" @ wrist pulled on forearm RUE (dominant). Abrupt swelling black/blue."

The record indicates that the claimant was treated at UAMS Medical Center on December 21, 2004. The claimant was diagnosed with "Rupture," "brachioradialis, extensorcarpi muscle tears." It was noted on an E.D. Physician Record that the "Activity during injury" was "hammering" and that

the onset of pain was "immediate." The "Mechanism of Injury" was "direct blow." It was also noted on the Physician Record, "muscular bulge proximal Rt radial forearm."

Dr. Andrew Heinzelmann dictated the following on December 30, 2004:

> Patient is a 37-year-old right-hand dominant white male who works as a mason. He presented to the UAMS ER on 12/22/04 with history of injury to his right forearm. He reports hammering with a heavy mallet with his right hand and chiseling mortar from bricks when he missed the spike with the mallet. There was no resistance and he felt a sharp pain and deformity in his right forearm....
>
> Patient has had a similar injury in the past that required an open repair of his forearm musculature. This was done in 1991. He reports that this is the same pain that he experienced at that time....
>
> He has a prominent area in the right forearm that is exquisitely tender to palpation. There is no cellulitis or erythema. He has a previous dorsal incision over his extensor mechanism at the proximal forearm level. It measures 4 cm in length....

Dr. Heinzelmann assessed, "Avulsion injury of the right forearm extensor musculature, most likely ECRB and ECRL, and possibly BR. His EDC is intact....Patient will be scheduled for an open exploration and reconstruction with graft jacket for tomorrow morning....We will place him in a splint and

send him to preop." Dr. Randy R. Bindra electronically signed Dr. Heinzelmann's dictation.

Dr. Bindra performed a "Repair of R extensor tendon" on December 31, 2004.

Dr. James noted on December 31, 2004, "Surgical resection. No improvement postop. Progressive STS Now softball size Most discoloration gone. Hard to pick things up. No strength. Constant pain/numbness." Dr. James' notes appeared to indicate that the claimant had undergone "muscle injury repair" in 1993, "muscle reconstruction" in December 2004, and "5th digit laceration/repair" in 1996.

The claimant did not return to work following surgery. "I was in a cast for three months, and then the medication that they had me on, I wasn't able to work," he testified. The claimant testified that he told Personnel Consultants on or about January 8, 2005 that he had physical restrictions following the accident.

The claimant presented to North Arkansas Regional Medical Center on January 10, 2005 for continued complaints of right forearm pain.

The claimant saw Dr. Peter R. Heinzelmann on January 17, 2005:

> Mr. Mulanax is a 36-year-old mason seen in the clinic on 01/17/05. He sustained an acute injury to the extensor muscles of his right forearm when he was using a sledge hammer in his work. He noticed some acute pain, localized tenderness, and swelling in the proximal extensor area of his forearm. Dr. Bindra operated on him and found what was reported as a hemangioma and surrounding hematoma in the proximal muscle belly in the extensor carpi radialis brevis. The mass was excised, however, I do not have a path report with records which we have and a hematoma was evacuated. The posterior interosseous nerve was also decompressed with release of the supinator muscle. Today, the patient states he had moderate degree of pain and reports having taken Mepergan until just recently....
>
> IMPRESSION: Postop evacuation of a hematoma and possibly an hemangioma from the proximal extensor carpi radialis muscle of the right forearm with release of the supinator muscle over the posterior interosseous nerve right forearm with complaints of some numbness in the right thumb but evidence of active extension of the thumb, fingers, and wrist.

Dr. Heinzelmann provided the claimant with a new long arm posterior splint and scheduled a followup visit in two weeks.

Dr. Heinzelmann noted on January 18, 2005, "Dr. Bindra would like to see him back for a follow-up visit at the Medical Center in Little Rock. We will arrange that appointment for him."

On an emergency room note dated February 20, 2005, the claimant appears to have been diagnosed with "Contusion

RUE.” The claimant reported that he had slipped and fallen, bending back his right wrist.

Dr. David L. Wassell at UAMS examined the claimant on March 11, 2005:

> The patient is a 37-year-old gentleman who was operated on by Dr. Bindra back in November for a right ECRB hemangioma and hematoma in the brachioradialis secondary to a rupture of the common extensor origin with acute posterior interosseus nerve palsy. The patient was referred postoperatively to Fayetteville, Arkansas, Dr. Heinzelman, but because of the patient’s continued problems, he was referred back to us.
>
> The patient continues to have significant difficulty with his arm. He still has very large soft tissue swelling of the right forearm with pain over the incision site over the lateral epicondyle. He continues to have a radial nerve palsy with inability to extend his wrist very well. He has been wearing a wrist brace that has helped out quite a bit.
>
> Patient is here today to see about continued treatment. Patient continues to have a tumor in the right forearm that will need to be removed at some point. The pathology from his original report showed just a benign venous malformation, which I am sure that he continues to have a large one in there.
>
> It is felt that the patient would benefit from an MRA of his right forearm. We will also look at seeing if this is something that could be treated with embolization. The patient was informed that his surgery would be fairly extensive and that he would probably always have difficulty with extension of is (sic) wrist postoperatively. We will see him back in clinic following his MRA and plan out our surgical options at that time.

Dr. Bindra electronically signed Dr. Wassell's report.

An MRI of the claimant's right elbow was taken on March 20, 2005, with the following impression: "1. Probable intramuscular hemingoma with sparing of the brachioradialis and supinator muscles. However, partial encasement of the median nerve is noted."

Dr. Bindra noted on April 1, 2005:

> Mr. Mulanax returned today for a followup after his MRA. This has been reported to show a hemangioma which is intramuscular, sparing the brachioradialis and supinator muscles, with partial encasement of the posterior interosseous and median nerves. I discussed this with Mr. Mulanax. I told him that I would have to check with the radiologist, as the differential diagnosis here is a venous malformation rather than a hemangioma and complete excision could not be guaranteed and recurrence is most likely. I told him we could control this with pressure garment with which we will fit him today, and there is a possibility that it could be treated with sclerosant injection. I will have to discuss this with the radiologist and see if he will be a candidate for that. We will discuss these x-rays and possible sclerotherapy with Dr. James at Children's Hospital and this gentleman will return to see me back in one month.

The record indicates that medical imaging taken April 5, 2005 showed "Intramuscular venous malformation."

The claimant followed up with Dr. Bindra on April 22, 2005:

> This patient has swelling in the right forearm, which has been diagnosed with venous malformation on the MRA. Today we had a long discussion with the patient about the nature of his disease and the MRA findings discussed with the radiologist. Since this patient has an extensive involvement of the forearm with the venous network in most of the forearm muscles, intramuscular as well extramuscular. He also has some of the tumor engulfing and wrapping the posterior interosseous nerve. We discussed his management with Dr. James, the radiologist, and he will be contacted by the radiology team for a possible sclerotherapy for his condition. Since this is an extensive tumor involving all the major structures of the forearm, we told him that surgery is not possible to completely eradicate the disease. Hence, the best option for him at this point would be sclerotherapy to block some of the feeding vessels. As far as his pain is concerned, the patient will be referred to pain clinic because of his chronic long-term pain problems....We told him that we will see him periodically every six months about the progress of the condition.

Dr. Charles A. James, Associate Professor Radiology and Pediatrics at UAMS, wrote on May 17, 2005 regarding "Insurance approval for Venous Sclerotherapy, Pt.":

> Venous Malformations are rare lesions, which enlarge throughout life and if untreated they cause increasing pain, mass effect, disfigurement, and dysfunction for the patient. They are often initially incorrectly diagnosed and often undergo incomplete surgical treatment before a correct diagnosis is made. We have established an expertise in the diagnosis and treatment of Vascular Malformations at our institution and receive worldwide referrals in this field. It is our experience over the last seven years that sclerotherapy is a good primary treatment option

> for venous malformations by controlling extent and symptoms of these difficult lesions.
>
> Mr. Mulanax is a 37 year old white male who sustained trauma in December of 2004. He subsequently underwent surgery for evacuation of a hematoma, neurolysis and removal of the intramuscular lesion. It was at surgery the diagnosis was made for a venous malformation. Mr. Mulanax reports that the lesion has increased in size since the surgery. He continues to have persistent pain, numbness, and weakness. He was given a compression sleeve to wear for the swelling for which he states he has worn for most of the day. However, he feels this aggravates his symptoms. His clinical exam reveals a softball size mass on his right forearm. The mass is noted to be prodominately (sic) intramuscular on the ventral and radial aspect with a small component in the antecubital fossa. The mass is very tender to touch to him. There is numbness over the distal forearm, right hand but worse over the thumb. He also has limited range of motion involving the elbow, decreased extension of the wrist and incomplete extension of the wrist, and decreased suprination/pronation (sic)....
>
> We plan to perform scleropathy of the posterior thigh intramuscular component venous malformation on Thursday, May 26, 2005 at the University Hospital of Arkansas....I hope this letter will clarify for you our treatment plan of this patient.

The impression from a Patient Diagnostic Report on May 26, 2005 was as follows:

> 1. SUCCESSFUL SCLEROTHERAPY OF THIS PATIENT IS RIGHT FOREARM VENOUS MALFORMATION WITH ABSOLUTE ETHANOL INJECTIONS FROM THREE SEPARATE SITES AS WELL AS A FOLLOW UP RIGHT UPPER EXTREMITY VENOGRAM WHICH SHOWED PATENCY OF THE BRACHIAL VEIN AT THE TERMINATION OF THE PROCEDURE.

Dr. Lonnie Wright performed sclerotherapy on August 29, 2005, with the impression, "1. Successful percutaneous sclerotherapy of this patient's right forearm venous malformation."

The claimant testified that sclerotherapy "wasn't fun." The claimant testified, "They put me out on the operating table. They take a needle, inject this with rubbing alcohol, to destroy the tissues, and then they drain it and fill it up with dye to keep it - the pockets in there from stagnating with blood."

The claimant continued follow-up visits for treatment at UAMS.

Dr. James stated the following on September 28, 2005:

> Venous Malformations are uncommon developmental errors of vein formation present throughout a patient's life. We evaluate and treat a large number of venous malformations at our medical center and have developed international expertise in this field.
>
> Traumatic injuries can aggravate an existing venous malformation by causing it to enlarge, bleed and/or partially clot. Therefore a traumatic event can result in new or worsening patient symptoms. The new or increased patient symptoms frequently include significant pain and difficulty with function of the body part involved.
>
> It is documented in the medical literature that an injury can cause an underlying venous malformation

> to become symptomatic. I have evaluated and treated many patients in which a traumatic injury made a previously asymptomatic venous malformation become symptomatic.
>
> I believe this patient's injury was the most important reason that the forearm venous malformation required subsequent medical therapy (venous sclerotherapy).

Dr. Jeffrey Johnson gave the following impression on October 14, 2005: "Venous malformation of the right forearm, status post sclerotherapy and surgical intervention without improvement....Dr. Bindra would like to discuss the case further with the interventional radiologist and will contact Mr. Mulanax by phone to set up follow-up appointment if needed in the future. Please note that Dr. Bindra saw and examined Mr. Mulanax and formulated the treatment plan."

The final outpatient note of record was entered by Dr. Firnhaber-Burgos on October 31, 2005:

> Mr. Mulanax is a 37-year-old, white male who is referred from Dr. Bindra, for evaluation of chronic right arm pain. The patient has a history of venous malformation of his right forearm. According to the patient, he was at work when he injured his right arm in December 2004. On December 31, 2004, he underwent a right forearm exploration and partial excision of the mass. He has also undergone sclerotherapy twice. His MRI suggested that the venous malformation encompassed the entire right forearm including the median nerve. According to the patient, he has no relief after two sessions of sclerotherapy.

The patient complaints of severe throbbing pain in the right forearm where the venous malformation swelling is most prominent. The patient's pain is sometimes burning and radiates down the palm at times. The patient had his forearm in a sling and, according to him, any activity of movement makes the pain worse....The patient wishes for surgical excision of the mass, but it appears that surgeons are not going to proceed with further excision....

The patient appears to have swelling on the right forearm which is very tender to touch....There is some wasting on the left hypothenar muscles....He is able to perform motor maneuvers like extension of the thumb and fingers, abduction, adduction and opposition though the movements were restricted due to pain....

According to the MRI report, the signals are suggestive for an intramuscular hemangioma. The mass is seen to pass between brachioradialis and supinator muscles. Radial nerve lies in the posterior most aspect of the lesion. The median nerve is medial to the lesion and is partially encased by the tumor. The ulnar nerve is spared. No joint effusion was identified.

IMPRESSION:
The patient seems to have an unresectable AV malformation in the right forearm with chronic pain. The patient may have an element of neuropathic pain because of involvement of the nerves in the AV malformation....

At this moment, we do not feel that the patient has any signs or symptoms suggestive of CRPS though the patient may have some element of neuropathic pain due to direct involvement of the nerves by the malformation. We feel that the patient may benefit from Neurontin and trazodone to help him with his neuropathic pain. We do not feel that his pain is sympathetically mediated and

> doing sympathetic ganglion block would not be helpful at this stage....

Dr. Firnhaber-Burgos prescribed the recommended medication and referred the claimant back to his primary physician for continuation of care.

A pre-hearing order was filed on August 1, 2006. The parties agreed to litigate the following issues: "1. Whether Claimant sustained a compensable right arm injury on December 20, 2004. 2. Whether Claimant is entitled to medical benefits. 3. Whether Claimant is entitled to temporary total disability benefits. 4. Whether Claimant is entitled to an attorney's fee."

A hearing was held on September 7, 2006. At that time, the claimant contended that he was entitled to temporary total disability benefits from December 21, 2004 through October 31, 2005.

The claimant testified on direct examination:

> Q. Are you still under care at UAMS?
>
> A. Not at this moment. He's wanting me to get a hold of the sclerotherapy team again, this week, to schedule another sclerotherapy.
>
> Q. Since your injury in December of '04, has your arm ever been back to normal?
>
> A. No, ma'am, not at all.

The administrative law judge found, in pertinent part:

> 5. Claimant did not sustain his burden of proving by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment on December 20, 2004. Claimant's testimony concerning an injury and notice is rebutted by Heather Brewer's testimony; the medical evidence is inconsistent. In particular, the orthopaedic history form signed by Claimant on December 30, 2004 indicates that he suffered an "accident," not a "work accident."

The administrative law judge therefore denied and dismissed the claim; claimant appeals to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4)(A)(i) defines "compensable injury":

> 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). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A)(i).

The claimant’s burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4)(E)(i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

The administrative law judge found in the present matter that the claimant did not prove he sustained a compensable injury on December 20, 2004. The Full Commission reverses this finding. The claimant testified that he was using a large hammer with a chisel at work on December 20, 2004. The claimant testified that he began tiring and missed the chisel, and that he felt a burning and pop in his arm. The claimant testified that he reported an accident to his supervisor and to an individual at Personnel Consultants. We recognize Heather Brewer’s testimony for the respondents that the claimant did not report an accident to Ms. Brewer’s staff. However, the Full Commission attaches more weight to the claimant’s testimony that there was involved in a workplace specific incident on December 20, 2004.

The medical evidence corroborates the claimant’s testimony. A note from Dr. James on December 20, 2004

indicated that the claimant had sustained an injury at work while using an eight-pound hammer. The record contains objective medical findings establishing a compensable injury, including a diagnosis of "extensorcarpi muscle tears" on December 21, 2004 along with a "muscular bulge" in the claimant's right forearm. Other objective findings include a "prominent area" in the claimant's forearm noted by Dr. Heinzelmann on December 30, 2004, a note by Dr. James on December 31, 2004 that there had been discoloration in the claimant's arm in the area of injury, and soft tissue swelling in the claimant's forearm noted by Dr. Wassell on March 11, 2005. Additionally, in May 2005, Dr. James noted a "softball size mass" on the claimant's right forearm.

The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained an accidental injury on December 20, 2004 which caused physical harm to the claimant's body. The accidental injury arose out of and in the course of the claimant's employment, required medical services, and resulted in disability. The accidental injury was caused by a specific incident identifiable by time and place of occurrence. The claimant established a compensable injury by medical evidence

supported by objective findings not with the claimant’s voluntary control. The decision of the administrative law judge is reversed.

B. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to requested medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng’g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

In the present matter, the claimant proved by a preponderance of the evidence that all of the medical treatment of record was reasonably necessary in connection with the claimant’s compensable injury. The record demonstrates that treatment from Dr. James, Dr. Andrew Heinzelmann, Dr. Bindra, Dr. Peter Heinzelmann, Dr. Wassell, Dr. Wright, Dr. Johnson, and Dr. Firnhaber-Burgos was all causally connected to the December 20, 2004 specific

incident. The record does not show that any of this treatment was causally related to a pre-existing condition.

C. Temporary Disability

An employee who has suffered a scheduled injury is to receive temporary total disability benefits during his healing period or until he returns to work. Ark. Code Ann. §11-9-521(a); *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Whether an employee's healing period has ended is a question of fact for the Commission. *Armstrong, supra*.

In the present matter, the record demonstrates that the healing period for the claimant's compensable scheduled injury began on December 20, 2004. The claimant's testimony indicated that he did not return to work after the compensable injury. The claimant underwent surgery on December 31, 2004. The claimant testified that his arm has not been "back to normal" following the compensable injury. The record also indicates that the claimant has consistently sought reasonably necessary medical treatment following the compensable injury and has remained within a healing period for his compensable injury. As we have noted *ante* the last treatment of record was provided by Dr. Firnhaber-Burgos on

October 31, 2005. The claimant contends that he is entitled to temporary total disability from December 21, 2004 through October 31, 2005. The Full Commission finds that the claimant proved he was entitled to temporary total disability compensation for that period.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained a compensable injury on December 20, 2004. The claimant proved that the medical treatment of record was reasonably necessary, and the claimant proved that he was entitled to temporary total disability from December 21, 2004 through October 31, 2005. The decision of the administrative law judge is reversed. The claimant’s attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant’s attorney is entitled to an additional fee of five hundred dollars ($500), pursuant to Ark. Code Ann. §11-9-715(b)(2)(Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Hood concurs.

CONCURRING OPINION

I concur with the principle decision and find that the claimant sustained a compensable injury, provided notice of that injury, and that the claimant is entitled to the entire requested period of related temporary total disability and medical benefits. I now write separately to expand on the reasons I found the claimant's injury to be compensable.

In the instant case, the sole reason for denying the claim was because of an erroneous conclusion that the claimant was not credible. The findings of the Administrative Law Judge on the issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987). It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony the claimant or other witnesses, but may accept and translate into findings of fact only those

portions of the testimony it deems worth of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). Indeed, the Commission may not arbitrarily disregard any witness's testimony. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

It is apparent that the claimant sustained an injury that occurred during the course and scope of employment. The claimant credibly testified that he worked for approximately two hours before he sustained his injury, and that the injury occurred when he was hammering, attempted to hit a chisel, and missed. The same morning the claimant went to Dr. James and was noted to be suffering from an injury at work which was due to a forced flexion. This indicates that the statement given by the claimant contemporaneously with the claimant's injury is consistent with the claimant's testimony that he was injured when he hammered and missed.

Notably, in the same report, the claimant's arm was noted to be swelling and to be black and blue. Clearly, had the claimant reported to work in such a condition, it is unlikely he would have been able to

work for some two to three hours given his condition. Furthermore, his condition would have been noticeable. Yet, there is no testimony to indicate that he had a swollen and bruised arm when reporting to work. Also noticeably absent is evidence that the claimant somehow injured himself between the time he reported to work and presented for treatment. Given the claimant's report that he injured himself in a flexion type injury at work and the fact that he had severe bruising, I find that the note from the date of the injury is compelling evidence that the claimant sustained a flexion type injury while at work.

Additionally, from that point on, virtually every medical record indicates that the claimant injured himself while at work. In particular, I note that on December 30, 2004, Dr. Bindra noted the claimant had suffered an injury to a forearm as a result of using a mallet and missing a spike. Notably, other reports from the same day indicate the claimant's injury occurred at work. Finally, it is important to note that throughout the course of his treatment, the claimant's physicians

consistently opined that the claimant suffered from an injury consistent with a hammering type accident.

The claimant's testimony is also supported by the opinion of Dr. James. It is particularly important to note that Dr. James was the person that the claimant initially received treatment from after the accident. As previously indicated, on that date, the claimant was explicitly noted to have suffered from a flexion injury while using a hammer. Based, in part, on that information, Dr. James, on September 28, 2005, opined that the incident the claimant described was consistent with the nature of his injury. Furthermore, Dr. James also indicated that the claimant's work injury caused his need for treatment. As Dr. James was the claimant's initial physician, and saw his condition immediately after the accident, I find that his opinion should be given great weight. I find that to be particularly true since there is no other opinion regarding causation in the record. Furthermore, I note that it is well accepted that where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is

stated within a reasonable degree of medical certainty. Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2002), citing Howell v. Scroll Tech., 343 Ark. 297, 35 S.W.3d 800 (2001). However, the Commission is not free to arbitrarily disregard any expert medical opinion. Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). In my opinion, to ignore the opinion of Dr. James would be to arbitrarily disregard his opinion. Accordingly, I find that the overwhelming weight of the evidence shows the claimant's injury occurred as he described in his testimony.

The respondents argue that the claimant did not give a consistent account of his condition during his treatment. However, the medical records are incredibly consistent. Instead, it is apparent that, while there are a few minor inconsistencies, they are not enough to conclude the claimant's injury did not occur during the course and scope of employment. In fact, to deny this claim on the evidence in the record, would be to essentially deny the claimant benefits simply because any inconsistency exists. To make such a finding holds the claimant to an impossibly high burden

of proof, especially since some of the discrepancies occurred in reports that the claimant did not complete.

When reading the record, it is apparent that the claimant constantly described that his injury was obtained while using a hammer. The form indicating the claimant sustained an injury as a result of a "direct blow" was not completed by the claimant. Instead it was completed by a nurse. I find it is more probable than not that the nurse simply misunderstood the cause of the claimant's injury. Since the claimant consistently reported that his injury occurred due to a "hammering accident", which does not clearly articulate how the injury occurred, but would be consistent with either an injury caused by a direct blow or was caused by a flexion type injury while holding a hammer, it is easy to understand how such an error could occur. Furthermore, virtually every single other medical document in the record indicates that the claimant was injured, not as a result of a direct blow, but rather because the claimant missed an object he was attempting to hammer. As previously indicated, the initial report after the injury indicated the claimant had a flexion

type injury. Since that report was given contemporaneously with the accident, it should be accorded the most weight. Additionally, I note that the only report that was completed by the claimant was on December 30, 2004. In that report, the claimant indicated that he was seeing the doctor for, “Right forearm muscle pulled.” Certainly, this injury is more consistent with a flexion type injury than with an injury occurring due to a direct blow.

The respondents further argue that because on December 30, 2004, the claimant checked a box, indicating that his injury occurred as a result of an “Accident” rather than a “Work Accident”, he did not sustain an injury at work. This is not logical and appears to be a mere oversight on the part of the claimant. On December 30, 2004, the date this error occurred, the claimant was noted to suffer from an injury that occurred at 8:00 a.m. on December 21, 2004. The claimant also reported that he was injured at work in an accident involving a hammer. When this notation is considered in conjunction with the unrefuted testimony that the claimant would have been at work at

that time, it is evident that the claimant’s checking the box entitled “Accident” was merely an oversight. The claimant testified that he began work at around 7:00 a.m. on the day he was injured. There is no dispute that he worked approximately two hours for the respondent employer that day. As such, it is evident that the claimant was reporting he was injured at work.

Finally, I agree with the principle opinion that the claimant’s testimony that he reported his injury was more credible than the testimony given by the respondent’s witnesses. The claimant credibly testified that he reported the injury to his supervisor at the temporary assignment and that when he returned to the respondent employer’s worksite, he reported the injury to Cindy. The claimant further indicated that Cindy always gave him his schedules and his paychecks. As such, he believed that was the person he needed to report the injury to. In my opinion, either of these actions is sufficient to constitute notice. There was no convincing evidence to rebut the claimant’s testimony and I simply do not find the testimony of Brewer to be credible.

In my opinion Brewer’s testimony was not convincing and seemed inconsistent with the facts of this case. Brewer essentially provided testimony that the claimant was supposed to report his injury to his immediate supervisor at the place he had been assigned, and then to report the injury again to herself. She indicated that the claimant had been given a handbook and made aware of such a policy. Yet, curiously, the respondent did not put a copy of that policy into the record. I believe that this is simply too convenient. Furthermore, since the claimant reported the injury to the supervisor at the temporary work assignment and to the receptionist, who the claimant believed was responsible for personnel matters, I find that his actions constituted valid notice.

Additionally, I find that it is highly suspicious that Clint, the supervisor to which the claimant reported his injury, was not deposed and did not testify at the hearing. In fact, the only evidence regarding whether Clint received notice of the injury was inadmissible hearsay. Likewise, I find it highly suspicious that Cindy did not testify as this was the

person that the claimant has indicated he reported the injury to. Certainly, while Cindy no longer works for the respondent employer, there was ample testimony given to indicate that there was controversy over the claim while she remained employed. Yet, the respondents did not even depose her. Finally, I note that the respondent employer did not include in the record the supposed documentation that the claimant quit his job. I find that this failure is highly suspicious given the issues and evidence in this case. In short, I do not believe the respondent employer would have failed to introduce such critical documentation and testimony into the record if it really existed.

Accordingly, I concur with the principal opinion.

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury to his right forearm on December 20,

2004. Based upon my de novo review of the entire record, I find that the claimant has failed to meet his burden of proof. Accordingly, I find that the decision of the Administrative Law Judge should be affirmed.

The claimant contends that he sustained an injury to his right forearm on December 20, 2004, when he swung a hammer, missed the chisel and forcibly extended his wrist. According to the claimant, he reported this injury to the supervisor at the job site and was informed by him to report the injury to Personnel Consultants, which he claims to have done. The concurring opinion makes much of the fact that the respondents did not call this supervisor or the former Personnel Consultants' employee to prove a negative, i.e. that the claimant did not report an injury. However, it is axiomatic that the claimant bears the burden of proof. The burden of proof rests upon the claimant to prove the compensability of his claim. Ringier America v. Comles, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is compensable, that the claimant's injury is job-related or that a claimant is entitled to benefits. Crouch

<u>Funeral Home v. Crouch</u>, 262 Ark. App. 417, 557 S.W.2d 392 (1977); <u>O.K. Processing, Inc. v. Servold</u>, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1996). In determining whether a claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; <u>Wade v. Mr. C Cavenaugh's</u>, 298 Ark. 363, 768 S.W.2d 521 (1989); and <u>Fowler v. McHenry</u>, 22 Ark. App. 196, 737 S.W.2d 663 (1987). Heather Brewer, the Branch Manager for respondent employer testified that there is no record of the claimant reporting an on the job injury. In fact the only notation regarding the claimant’s work on December 20, 2004, indicated that the claimant walked off the job. Given that the claimant carries the burden of proof, I find that he has failed to establish by a preponderance of the evidence that he sustained a compensable injury. It is just as likely as not that the claimant injured himself prior coming to work on December 20, 2004, attempted to work and

discovered that he simply could not; thus he walked off the job. Had this injury occurred prior to 1987, when the benefit of the doubt was always weighed in the claimant’s favor, then I could understand the finding and reasoning of the majority decision. However, since 1987, the law has clearly stated: "In determining whether a party has met the burden of proof on an issue, Administrative Law Judges and the Commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party." Ark. Code Ann. § 11-9-704(c)(4)(Repl. 1996). After weighing the evidence impartially, and without giving the benefit of the doubt to either party, I find that the claimant has failed to meet his burden of proof. The claimant did not present any corroborating evidence that he sustained a compensable injury. He alleges to have reported this injury to at least two people, yet he did not call any witnesses to substantiate his story. Maybe his injury was caused by swinging a hammer; however, the claimant has failed to present any credible evidence that a he sustained a hammer injury which arose out and in the course of his employment. Based upon the evidence

presently before the Commission a finding of compensability can only be reached if one resorts or speculation and conjecture. 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, for those reasons stated herein, I must respectfully dissent.

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KAREN H. McKINNEY, Commissioner