

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F607158

JOHN L. VAUGHAN, EMPLOYEE	CLAIMANT
ALMATIS, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JULY 30, 2007

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

Claimant represented by HONORABLE C. BURT NEWELL, Attorney at Law, Hot Springs, Arkansas.

Respondent represented by HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal the January 10, 2007, opinion of an Administrative Law Judge, which finds that the claimant sustained a compensable neck injury. The decision further awarded the claimant related medical and temporary total disability benefits and allowed the respondents a credit pursuant to Ark. Code Ann. §11-9-411. After a de novo review of the record, we find that the decision of the Administrative Law Judge is affirmed.

The claimant worked for the respondent employer as a maintenance mechanic. The claimant began his employment

for the respondent employer in 1981. The claimant testified that on April 10, 2006, he sustained an injury when he slipped and fell in "slurry". The claimant described that the previous weekend there had been a chemical spill, that he slipped in the "slurry" and landed on his back. The claimant said he did not immediately experience pain but that he reported his injury to the guard, to Tipp Hockersmith, Operator, and to his supervisor, Garland Garrett. The claimant said that around 10:00 the same day he was seen by Dr. Cathcart, the respondents' physician.

On April 10, 2006, Dr. Cathcart noted the claimant suffered from a burning pain that started in his lower back and went down to his ankle and foot. The claimant was noted to have suffered from a previous surgery to his lumbar back some 12 years ago. The claimant was diagnosed with a lumbar strain that was superimposed over preexisting back disease. The claimant was given Toradol, Naprosyn, Lorcet Plus, and Flexeril. He was given lifting and bending restrictions and instructed to return in two weeks. On April 26, 2006, the claimant returned for a yearly physical with the employer. The claimant was noted to have been involved in an injury to his back a week or two before. The report indicates that Dr. Cathart was treating him for the injury and that while

the claimant still had pain and "some back problems", he was getting better.

The claimant testified that he continued to work but that after approximately a week, he began experiencing a loss of strength in his arms and burning in his upper back, neck and shoulder area. The claimant used an over-the-counter sports cream called Tiger Balm. The claimant said he also told Garrett that he was losing strength in his arm and that he was having trouble tightening and loosening bolts. The claimant said that while he experienced these symptoms, he believed they would resolve and therefore was not particularly concerned.

The claimant continued to work until May 8, 2006, at which time he had the recurring symptoms of neck and upper back pain and loss of strength in his arm. The claimant continued working, but his symptoms did not get better and, in fact, worsened. The claimant told Garrett he was going to go home. The next day he went to his personal physician, Dr. Hollis.

On May 9, 2006, Dr. Hollis noted the claimant had fallen about one month before. The claimant reported he was having radicular pain in his arm and weakness in his arm. The claimant was referred for an MRI which revealed the

claimant suffered from a disc herniation at C3-4. The claimant was referred to Dr. Arthur.

When seeing Dr. Arthur, the claimant again indicated he had fallen three or four weeks before. The claimant related that he was suffering from a decrease of strength in his deltoid muscle. The claimant testified that when he sought treatment from Dr. Arthur his wife completed the paperwork for him. He said that his wife, while completing the paperwork, was informed that Dr. Arthur would not treat workers' compensation claims. Accordingly, the claimant used his private health insurance to cover the visit. Additionally, the claimant's wife completed paperwork indicating the claimant's injury was not due to a work injury.

Dr. Arthur scheduled the claimant for a fusion which was performed on May 11, 2006. The claimant was taken off work until August 17, 2006. At that point he was released to return to work with a 40 pound restriction. However, the claimant stayed off work around another month at the instruction of the respondents' physician, Dr. Cathcart.

On May 18, 2006, the claimant submitted a Form AR-N. The claimant testified that his wife completed the

document for him and then he signed it. On the report, the claimant's wife indicated he had injured his back when he slipped and fell on a slick floor. The claimant reported the incident occurred on April 10, 2006. Under cross-examination, the claimant testified that he reported the injury was to his back because he considered his neck to be part of his back.

On October 25, 2006, Dr. Arthur, in response to a letter from the claimant's counsel, answered several questions. The first question was, "Did Mr. Vaughan relate the symptoms of neck and arm pain to have originated with a fall at work on April 10, 2006?" Dr. Arthur answered, "Yes. Mr. Vaughan filed a workers' compensation report with his employer on April 10, 2006. This was documented in my progress note dated May 10, 2006." Dr. Arthur indicated that the claimant suffered from a herniation at C3-4. He indicated that the claimant's injury was consistent with a sudden onset injury rather than due to a chronic or long-standing neck problem.

The claimant's supervisor, Garland Garrett also testified at the hearing. Garrett testified that after falling the claimant reported he had hurt his back. Garrett said the claimant did not specifically report a neck

injury, but instead said he had injured his back. The claimant subsequently reported that he had a loss of strength in his arm and hand and that he was unable to perform some of his work. Garrett testified that the morning of May 8 the claimant indicated that, "he didn't know what was going up here but that up in here (indicating) he didn't know if he had a crick or what he had but that he was hurting so bad that he was going to his doctor." Garrett testified that he had known the claimant for 30 years. He indicated that he and the claimant worked together for some 12 years for another company and then he later worked alongside the claimant. He also said the claimant had worked as his subordinate for three years. He also testified regarding the claimant's character. He indicated as follows,

Q How would you describe Mr. Vaughan's character?

A Upstanding.

Q Have you ever known Mr. Vaughan to be untruthful?

A No, sir.

Q Have you ever known Mr. Vaughan to be someone who is a malingerer?

A No, sir.

Q Have you ever known Mr. Vaughan to be someone who claims to be hurt when he's not?

A No, sir.

Q Have you ever known Mr. Vaughan to take medications? Is he a pill popper?

A Not to my knowledge.

Q Has Mr. Vaughan ever done anything at work to cause you concern about his fitness to work?

A No.

Q How would you describe his work ethic?

A Very well.

Q Can you give me an example?

A He's an excellent employee. He does his job and goes above and beyond doing his job.

After a de novo review of the record, we find that the claimant has met his burden of proof in showing he sustained a compensable neck injury. In our opinion, the claimant credibly testified that he did not immediately suffer from a loss of strength in his arm, but that shortly after the incident he developed that symptom due to his fall. We further found the claimant's testimony that he reported the loss of sensation to be credible, particularly

since Garrett corroborated the claimant's testimony. When this testimony is considered in conjunction with the medical records indicating the claimant's injury was due to a fall, and with Dr. Arthur's opinion that the claimant's injury was due to a sudden, specific injury and that the injury was sustained during the work-related fall, we find the claimant has met his burden of proof in showing a compensable injury. Accordingly, we affirm the decision of the Administrative Law Judge.

The claimant has the burden of proof in showing a compensable injury. The burden of proof the claimant must meet is the preponderance of the evidence. Voss v. Ward's Pulpwood Yard, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met the burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); Wade v. Mr. C.Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

A claimant is not required to establish the causal connection between a work-related incident and an injury by either expert medical opinion or objective medical evidence. See, Wal-Mart Stores, Inc. v. Van Wagner, 337 Ark. 443, 990 S.W.2d 522 (1999). In fact, the Arkansas Courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on 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); Harris Cattle Company v. Parker, 256 Ark. 166, 506 S.W.2d 118 (1974). However, if the disability does not manifest itself until months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and disability, the issue becomes a question of fact for the Commission's determination. Kivett v. Redmond Co., 234 Ark. 855, 355 S.W.2d 172 (1962); Wentz v. Servicemaster, 75 Ark. App. 296, 57 S.W.3d 753 (2001).

In this instance, we find that the testimony and medical records in evidence support a finding that the

claimant sustained a compensable injury. Specifically, we find that the claimant's testimony regarding his injury and his onset of symptoms is very credible. There is no dispute the claimant actually fell at work and the respondents have accepted liability for his back treatment. While the claimant did not initially report he suffered from neck pain, it is certainly not uncommon for someone to fall and then to have symptoms arise at a later date. Additionally, the claimant testified that after the fall he suffered from upper back pain and a loss of sensation and strength in his arm. The claimant testified that he relayed those symptoms to Garrett and that he had not engaged in any activity that would cause him to sustain a new injury. Not surprisingly, Garrett testified the claimant had a character that was essentially beyond reproach. He also indicated the claimant had relayed a loss of strength in his arm shortly after his fall, indicating the truthfulness of the claimant's testimony.

Furthermore, the claimant's testimony that he injured his neck in the fall is corroborated by the medical records. The claimant said that he did not suffer neck symptoms until around one week after falling. He attempted to work through his pain, and when he could not, he reported

to his primary care physician. Notably, at that time, the claimant reported to both Dr. Hollis and to Dr. Arthur that he had fallen three to four weeks before. He also related his symptoms to the fall. This is entirely consistent with him having fallen at work.

In fact, Dr. Arthur issued a letter corroborating the claimant's testimony that his symptoms were due to the fall. On October 25, 2006, Dr. Arthur drafted a letter indicating the claimant had filed a worker's compensation claim on April 10, 2006, and that such was noted in a progress report from his initial visit with the claimant. Dr. Arthur went on to indicate the objective findings of the claimant's injury were consistent with the claimant having fallen and opined the claimant's injury was due to the fall.

Furthermore, the medical evidence shows the claimant's injury was due to a sudden event rather than due to a chronic problem. There is no dispute that the claimant had never received previous treatment for his neck. Likewise, Garrett testified that he had never been told or personally observed the claimant having loss of strength in his arm or suffering from neck problems prior to the fall. Furthermore, Dr. Arthur also indicated the claimant's herniation was due to a specific incident rather than a

gradual process, which further corroborates the claimant's testimony and the other evidence establishing causation.

In fact, it is evident that the respondents only real two arguments to deny compensability are that the claimant did not initially report neck pain and that he filed it on his private insurance. However, in order to give credence to these arguments, one would essentially have to find that the claimant was not credible and speculate the claimant's herniation came from some other injury. In order to conclude such would be sheer speculation and in direct contradiction to the medical evidence and the testimony of both the claimant and Garrett.

The respondents assert that the claimant is not credible. However, we do not agree and instead find the claimant to be 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).

In the present instance, there is simply no legitimate reason to doubt the claimant's testimony. We found the claimant's testimony to be credible and largely consistent with that of Garrett and the medical records in evidence. The respondents' own witness, Garrett indicated the claimant was a hard worker and was a truthful individual, giving credence to the claimant's testimony. Additionally, it is apparent the claimant was both trustworthy and a hard worker, as evidenced by the fact that the claimant immediately reported his injury and continued to work despite being injured and having ongoing pain in his back and a loss of strength in his right arm. However, even if one does not find the claimant to be credible, there is simply no reason to dispute Garrett's testimony regarding the claimant's onset of symptoms. Furthermore, there is no

persuasive reason to doubt the veracity of Dr. Arthur's opinion.

Though the respondents argue that because the claimant did not immediately suffer from neck pain he did not hurt his neck in the fall, we find the evidence shows otherwise. While the claimant did not initially complain of neck pain, that does not mean that his neck injury is not related to the fall. The claimant was very forthright in explaining that he did not initially suffer from neck pain. Instead, the claimant indicated he began suffering a burning sensation in his upper back and a loss of strength in his arm after about a week. As previously indicated, this was corroborated by Garrett, and the claimant's relation of his symptoms with the fall is consistently noted throughout the medical records.

We also note the claimant was treated on the day of his injury, and as has been noted in other cases before the Commission, symptoms from a fall do not always present immediately thereafter. Furthermore, in our opinion, it is simply error to assert that a lapse of symptoms for a period of one week would preclude a finding of compensability.

We also note the respondents' argument that the claimant's veracity is lessened because he did not report

neck pain to a doctor until May 2006. We find this argument to be unconvincing. The claimant testified that even after he started having neck problems, he still considered that to be a part of his back because he had a burning sensation in his upper back and because he considered the area that was hurting to be part of his back. We find that this is reasonable, particularly given the fact that the claimant was suffering problems with his upper back, which is in close proximity to his neck. Furthermore, we note that even the Commission and the appellate courts of Arkansas have had difficulty in determining whether the back and neck are synonymous. See, Hapney v. Rheem Manufacturing Company, 342 Ark. 11; 26 S.W. 3d 777 (2000) (wherein the Supreme Court, on petition for rehearing from its prior decision, found that the back and neck are not synonymous under Ark. Code Ann. §11-9-102(4) (A) (ii) (b)); See also, Hapney v. Rheem Manufacturing Company, 341 Ark. 48; 26 S.W. 3d 771 (2000) (wherein the Supreme Court found that the neck and back are synonymous pursuant to Ark. Code Ann. §11-9-102(4) (A) (ii) (b)).

Furthermore, we note Garrett testified the claimant relayed he had sustained a back injury and reported a loss of sensation. This is entirely consistent with the

claimant's ongoing reports of back pain due to falling while at his yearly physical. We also find that it is notable that the during the claimant's yearly physical he was not noted to have loss of strength in his arm despite having reported such to Garrett.

Likewise, it is apparent that even after having surgery, the claimant believed his back and neck were synonymous. When filing the Form AR-N, the claimant indicated he had injured his back. As that form was completed after the claimant had reported to Dr. Hollis and Dr. Arthur that his symptoms were due to falling, and had in fact had neck surgery, it is apparent that the claimant truly considers the neck and back to be the same area of the body.

Finally, we find it is important to note the claimant's testimony with regard to his past injury. The claimant was extremely forthright in admitting that he had previously had low back surgery. The claimant did not attempt to draw out his medical treatment even though he, after receiving treatment from Dr. Cathcart, continued having problems related to his old surgery. Certainly since the respondents had accepted that he had at least a temporary aggravation of his low-back, the claimant could

have easily sought additional treatment for his back at the respondents' expense. Instead, he did not. In our opinion, the claimant's admitting that his low back condition was pre-existing and not the respondents' responsibility is yet another example of his truthfulness.

With respect to the argument that the claimant filed claims on his private insurance and denied having a work injury when he went to Dr. Hollis and Dr. Arthur, we note that the claimant still reported his symptoms were due to falling. As the only known fall occurred while the claimant was at work, it is evident that his injury was sustained during the course and scope of employment and was due to his fall at work. Furthermore, we note the claimant's testimony that his wife was told that Dr. Arthur would not visit someone for workers' compensation cases. While certainly the respondents would attempt to say the claimant was committing fraud, that is simply not the case. The claimant's testimony instead indicates that his wife was told that Dr. Arthur would not treat workers' compensation cases, and that the claimant then filed it on his private insurance. Notably, the Court of Appeals has considered a case quite similar to this recently and rejected the argument the claimant was committing fraud or that his

credibility could be discounted. See, Wilson v. Masonry, CA 05-966 (Ark. App. 3-22-2006). Furthermore, Dr. Arthur drafted a letter indicating that at the time of initial treatment, the claimant related his injury to a worker's compensation injury. Thus, it is evident the claimant disclosed his injury was work-related. As such, we find that the respondents' arguments are simply not convincing.

Finally, we address the respondents' contention that Dr. Arthur's opinion should be rejected because it is based on an incorrect history. We find that this argument is not supported by the record. First and foremost, we reject this argument because Dr. Arthur's letter indicates that the claimant's herniation was caused by a sudden injury rather than a long-standing neck problem. Specifically, Dr. Arthur, responded to the question, "Did your findings during surgery correlate with Mr. Vaughan's reported onset of injury, i.e., a sudden onset injury as opposed to a longstanding neck and arm problem?". Dr. Arthur answered, "Yes. The findings did reflect a sudden onset of injury as opposed to a chronic long-standing neck problem." Clearly, when reviewing this language, it is evident that Dr. Arthur's opinion was not based solely on the claimant's history. Rather, it was based on the objective findings of

the claimant's physical condition.

Furthermore, it is evident that the respondents do not contend that Dr. Arthur's opinion that the claimant's injury was caused by a sudden injury should be rejected. Accordingly, the only valid reason to reject his opinion would be because the claimant had somehow sustained his neck injury due to some other, sudden injury. Yet, there is no evidence of such an injury. Since, Garrett also testified that the claimant had already been reporting he had back pain and that he had a loss of strength in his right arm, and the claimant's only known injury was due to his fall, we find that the claimant has met his burden of proof. Those are both findings consistent with a cervical herniation.

The respondents contend that the claimant's statement to Garrett that he had a possible "crick" in his neck to be evidence that he sustained some other injury. Yet, curiously, the respondents do not provide any evidence of any injury that would have cause the claimant to have a possible "crick" in his neck. In fact, the claimant's only known injury was due to falling at work. As such, to assert the claimant had sustained some other injury due to some other, unknown incident is simply speculation. As has been noted by the Courts, 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).

We further find that the claimant has shown he is entitled to additional medical benefits. Arkansas Worker's Compensation law provides that an employer shall promptly provide 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 bears the burden of proving that she is entitled to additional medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). Whether treatment is reasonably necessary in relation to the claimant's compensable injury is a question of fact for the Commission. See, e.g., Hill v. Baptist Medical Centers, 74 Ark. App. 250, 48 S.W.3d 544 (2001).

In this instance, there appears to be no dispute that if the claimant overcomes the issue of compensability, then he would be entitled to receive related medical benefits. Furthermore, the treatment received by the claimant at the direction of Dr. Hollis and Dr. Arthur is

directly related to the claimant's fall and his neck injury and is both reasonable and necessary.

The claimant also requests temporary total disability benefits for the time period of May 13, 2006 to September 17, 2006. It is apparent from the record that the claimant did not work during that time period and that he remained in his healing period. Therefore, the claimant is entitled to the requested benefits.

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

A claimant who has been released to light duty work but has not returned to work may be entitled temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp.

v. Leisure, 12 Ark. App. 274 (1984).

The claimant underwent surgery on May 11, 2006, for his compensable neck injury. The claimant continued to receive care for that condition throughout the time period for which he is requesting benefits. Likewise, he was not issued an impairment rating or fully released during that time period, indicating that he remained in his healing period.

Additionally, the claimant was taken off work until August 17, 2006. At that time Dr. Arthur released the claimant to return to work with a restriction of no lifting, pushing or pulling over 40 pounds. However, the claimant said that after being allowed to return to light duty, he contacted the plant and was told not to return for another month. The medical records indicate that the claimant went to Dr. Cathcart and that he was taken off work for another month, at which time he returned to work. Based on this evidence, we find that the claimant has shown he is entitled to temporary total disability benefits from the time period of May 13, 2006 to September 17, 2006.

Finally, we address the issue of a credit. The evidence shows the claimant received benefits pursuant to a group health plan and short term disability benefits.

Therefore, the respondents are be entitled to a credit pursuant to Ark. Code Ann. §11-9-411.

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. §11-8-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (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

PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur, in part, and dissent, in part, from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his neck and back on April 10, 2006. Specifically, I concur in the majority's finding that the respondents are entitled to a credit. However, I must dissent from the finding that the claimant sustained a compensable injury. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant's supervisor, Garland Garrett, testified that the claimant made no mention of any neck pain or any difficulties when he first reported the injury. Mr. Garrett stated that the first time that he had heard of an injury to the claimant's neck was when the claimant reported to him on May 8, 2006, that he was going to his family doctor because of a possible crick in his neck.

On May 8, 2006, the claimant reported to his family physician, Dr. Thomas Hollis, who referred the claimant to Dr. James Arthur. Dr. Arthur scheduled the claimant for neck surgery for May 11, 2006.

The claimant underwent a company physical on April 26, 2006. At the time, the claimant made no mention of any neck problems or neck related symptoms in his upper extremities.

When the claimant filled out the patient information sheet in Dr. Arthur's office on May 8, 2006, he was specifically asked if the visit was related to a specific job injury. The claimant circled the answer NO. The claimant answered that his neck and shoulder were where he was hurting when he was asked to describe where it was that he was having problems. The claimant also listed the date his condition began as May 8, 2006. In addition, the claimant completed an application for benefits with Blue Cross Blue Shield where he indicated that his neck problems were not attributable to any kind of an accident. The questionnaire contained a space for the claimant to designate whether or not he had been hurt at work and a place for him to provide the details of any accident. The claimant failed to make any mention of any specific injury at his place of employment or anywhere else.

The Form N the claimant completed on May 18, 2006, only indicated that his back was the body part that was injured. Although Dr. Arthur has opined that the claimant's

fall in April was the precipitating factor, Dr. Arthur assumed that claimant suffered an immediate onset of neck pain with spasms immediately after the fall. Dr. Arthur's notes state that "...fell 3 or 4 weeks ago and has had severe neck and right arm pain since then as well [sic] muscle spasms. He has had no relief with any medication." Dr. Arthur was obviously under the mistaken impression that the claimant had been experiencing neck related symptoms soon after the fall. This could not be any further from the truth as the claimant testified that it was a week or more after the fall when he started experiencing problems with his neck. Dr. Arthur's opinion is based upon his misunderstanding of the facts of the circumstances and is pure 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 Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

After considering the fact that the claimant failed to report an injury to his neck on the day he fell, the fact that the medical history that the claimant gave Dr. Cathcart contemporaneously with the fall on April 10,

2006, indicated that the claimant had back pain and that he had burning pain all the way into his foot involving his ankle, the fact that the claimant had a physical for his employment on April 26, 2006, and failed to mention an injury or problems with his neck, plus the fact that forms filled out by the claimant in Dr. Arthur's office on his first visit stated that it was not work related, and the insurance information stating that it was not work related, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his neck on April 10, 2006. Therefore, for the reasons stated herein, I must dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner