

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F612608

ANNA STIELER, EMPLOYEE	CLAIMANT
ARCHITECTURAL BUILDING PRODUCTS, ET AL, EMPLOYER	RESPONDENT NO. 1
FIRSTCOMP INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 27, 2008

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

Claimant represented by the HONORABLE ADRIENNE KINCAID MURPHY, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE, 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 November 20, 2007.

In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 30, 2007, and contained in a pre-hearing order filed

that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$750.00 which would entitle her to the maximum compensation rate is also hereby accepted as fact.
3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right shoulder while employed by the respondent.
4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right shoulder injury. This includes surgery performed by Dr. Dougherty.
5. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable cervical injury.
6. Claimant is entitled to temporary total disability benefits beginning July 12, 2007 and continuing through a date yet to be determined.
7. Respondent is entitled to a credit for any benefits paid by a group carrier pursuant to A.C.A. §11-9-411.
8. Respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits.

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 November 20, 2007, 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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury to her right shoulder on August 16, 2006. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof. Accordingly, I must dissent from the majority opinion.

The claimant is a 56-year-old woman who moved to the United States from South Africa in 2001. The claimant moved to Northwest Arkansas in August 2005 and began working for the respondent employer as an office manager in March 2006. The claimant suffered an injury while working for the respondent on August 16, 2006. On that date, the claimant attended a meeting and as she

got up from a table and turned to walk out a door, she tripped over a wire and fell to the floor. The claimant did not seek medical treatment that day, but instead took some medication. The claimant worked on August 17, 2006 and went to the emergency room that night after work.

After the emergency room visit the claimant came under the care of Dr. Vandergriff who diagnosed the claimant as suffering from a lumbosacral and cervical spine strain and thoracic muscle spasm. Dr. Vandergriff treated the claimant conservatively with medication and physical therapy. Dr. Vandergriff eventually ordered an MRI scan of the claimant's cervical spine and referred the claimant for a neurosurgical evaluation. The claimant was referred by respondent to Dr. Sprinkle, a D.O. who specializes in non-operative care of the spine. Dr. Sprinkle treated the claimant conservatively which included medication, cervical epidural injections, physical therapy, and a TENS unit. Dr. Sprinkle eventually released the claimant from his care in early 2007.

The claimant was granted a change of physician by the Commission to Dr. Cyril Raben. In a report dated February 26, 2007, Dr. Raben assessed the claimant's condition as a cervical spine degeneration, herniation,

and stenosis. He also believed that the claimant suffered from rotator cuff syndrome and recommended an injection of the claimant's right shoulder. The injection provided temporary relief and Dr. Raben referred the claimant to Dr. Dougherty for further shoulder evaluation. Dr. Dougherty assessed the claimant's condition as shoulder impingement syndrome and rotator cuff tear. Dr. Dougherty performed surgery on the claimant's right shoulder on July 12, 2007.

The respondent accepted an injury to the claimant's cervical spine as compensable and paid some compensation benefits through the date of last treatment by Dr. Sprinkle. The respondent denied compensability of the claimant's right shoulder injury. As a result, the claimant filed this claim contending that she suffered a compensable injury to her right shoulder as a result of the fall on August 16, 2006. In addition, the claimant also contends that she was entitled to additional medical treatment for her compensable cervical spine injury.

It is of note that all of the medical records and accounts of the claimant's injury indicate that when she fell on August 16, 2006, she landed on her left side. This claim is for an injury to her right shoulder, which is completely inconsistent. Further, the initial

medical reports do not actually discuss the shoulder. In fact, the medical reports fail to discuss any problems the claimant may have had with her right shoulder until after her return from her trip to Africa following her accident. In addition, the MRI ordered by Dr. Sprinkle did not show a rotator cuff tear.

It was not until after the claimant's return from her trip to Africa and her change of physician that any doctor opined that the claimant had sustained a right rotator cuff tear. Causally connecting this to her fall at work simply based on her statement alone that she had not done anything else to her shoulder is certainly not enough proof.

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 January 22, 1996 (Claim No. E417617). Moreover, 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).

As previously stated, the claimant lived in Africa for many years prior to moving to the United States. The claimant previously undergone a three-level fusion from C4-7 and clearly has degenerative problems at C3-4 and C7-T1. Dr. Sprinkle, in fact, indicated the he thought the boney disc problems at C3-4 were due to the prior disc surgery and not due to the claimant's fall on August 16, 2006.

With regard to the claimant's claim for continued medical treatment for her cervical spine injury, Dr. Sprinkle released the claimant from his care in February of 2007 with no permanent impairment. Dr. Raben's opinion that the claimant was in need of additional medical treatment was just that, an opinion. Arkansas law states that the authority of the Commission is to resolved conflicting evidence also extends to medical testimony. Swift-Echirch, Inc. v. Brock, Supra. 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. Dr. Sprinkle was the claimant's treating physician for her compensable cervical injury. Admittedly, he treated her conservatively, but opined that surgery would not benefit the claimant, and, in fact, she testified that she continues to have pain even after the surgery

performed by Dr. Dougherty. Certainly Dr. Sprinkle's opinion should be given greater weight.

With regard to the claimant's claim for temporary total disability benefits, it is obvious from the claimant's testimony during cross-examination that she is running a business cleaning job sites. In fact, the claimant is the point of contact person and the person who signs the contracts entered into for the work. The claimant was very evasive when questioned about her wages in regard to this business and the records provided post-hearing; the record having been held open for these records to be provided; specifically revealed her as receiving no wages, although, again, she was the contact person. Instead, the records revealed that it was her husband and her children who are gainfully employed and earning the wages. The entire line of questioning in regard to this cleaning business demonstrates the claimant's lack of credibility.

The claimant testified that her physical therapy sessions are about one and one-half hours long and that, after each session, she has to take painkillers to get through the rest of the day. By the claimant's own admission, she got into a fight with her sister after she was terminated by the respondent employer and that her sister hit her on her head and

shoulder. It was shortly after that incident that the claimant went to Dr. Raben. When cross-examined about that during her deposition, it was evident that her testimony at the hearing differed from that at her deposition. It was also evident that her testimony at the hearing concerning her reported pain symptoms differed markedly from the medical reports introduced as exhibits at the hearing. Despite Dr. Raben's May 14, 2007, medical report indication she could work full duty, the claimant said she was given a 10-pound lifting restriction. Despite Dr. Dougherty's July 23, 2007, report reflecting that she had "...no significant pain in the shoulder exam...", she said that she did not agree with that report.

It is clear from the medical reports of Dr. Vandergriff that the claimant did not have any bruising when she saw the claimant six days after the work incident. She then went to South Africa for two and a half weeks. When she returned, she reported to Dr. Vandergriff that her daughter had noticed bruising. No doctor of record ever reported seeing any bruising.

The medical exhibits in this case are also revealing. The August 17, 2006, x-rays of the claimant's cervical, thoracic, and lumbar spine levels were all negative. The CT scan of her head on the same date was

also negative. Dr. Vandergriff saw the claimant on August 21, 2006. In the history, she clearly states that the claimant fell on her left side. She complained of pain in the thoracic and cervical spine. Significantly, while x-rays were taken of her lumbar, thoracic and cervical spine areas, and a CT scan of her head, no diagnostic test were conducted on either of the claimant's shoulders. No bruising was noted. All of the claimant's neurological, reflex, and strength tests were normal. Dr. Vandergriff's September 13, 2006, report reflects that the claimant complained of pain in her shoulders that goes down her back. There is nothing in this report to even suggest any arm pain. The only reference to her arm was merely a statement by the claimant herself that her daughter in Africa "...noticed bruising on her back and arm...". Dr. Vandergriff saw no evidence of bruising at the time of her examination. It was noted on her exam at that time that the claimant was able to "twist at her hips and shoulders without difficulty..." and that she had full range of motion in all of her upper and lower extremities.

The claimant was seen for a physical therapy workup on October 2, 2006, and for the first time, she reported right arm pain. She reported to the therapist on October 5, 2006, that her right arm "feels heavy".

There was no actual report of arm pain. An MRI of the right shoulder on October 19, 2006, revealed no rotator cuff tear. The post-test diagnosis was a "grade I strain".

The claimant saw Dr. Raben for the first time on February 26, 2007. A review of his report showed that he was given the history from the claimant that she tripped and fell and sustained immediate right arm pain. That is not an accurate history. Relying on that erroneous history, Dr. Raben, in his June 5, 2007, report concluded that "...the previous evaluating physicians simply missed this other injury...". He, of course, did not have access to the medical reports from those physicians who all "simply missed" the alleged shoulder injury. Based upon his skewed perspective, Dr. Raben referred the claimant to Dr. Dougherty for surgery. The Commission has a duty to translate the evidence on all the issues before it into findings of fact. Weldon v. Pierce Bros. Const. Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Moreover, the Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any

conflicting medical evidence is a question of fact for the Commission to resolve. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993); McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). However, it is well established that the determination of the credibility and weight to be given a witness's testimony is within the sole province of the Workers' Compensation Commission. Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. McClain, supra.

The Commission is never limited to medical evidence in arriving at its decision. Moreover, it is well within the Commission's province to weigh all the medical evidence and determine what is most credible. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 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. In addition, the Commission has the authority to accept or reject a medical opinion and determine its medical soundness and probative force. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). The Commission's resolution of the medical evidence has the force and effect of a jury verdict. McClain, supra.

The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Further, 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, January 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no 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). Moreover, the Commission need not base a decision on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of the Workers' Compensation Law. Weldon v.

Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

Therefore, when I consider the fact the claimant fell on her left side, the fact she did not complain of any shoulder pain until after she returned from a trip to Africa and the claimant's general lack of credibility, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her right shoulder on August 16, 2006. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner