

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508548

GEORGE M. CATES, EMPLOYEE	CLAIMANT
STRUCTURAL STEEL, INC., EMPLOYER	RESPONDENT
BITUMINOUS CASUALTY CORP., INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 7, 2009

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

Claimant represented by the HONORABLE J. RANDOLPH SHOCK, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE SCOTT ZUERKER, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed July 29, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 8, 2005, the relationship of employee-employer-carrier existed between the parties.

3. On August 8, 2005, the claimant sustained a compensable injury to his head and cervical spine.
4. There is no dispute, at the present time, over temporary disability benefits.
5. There is no dispute, at the present time, over medical services rendered to the claimant through November 9, 2007.

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 July 29, 2008, 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.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion affirming and adopting the opinion of the Administrative Law Judge finding that the claimant is

entitled to the additional diagnostic testing recommended by Dr. Capocelli. Although the Administrative Law Judge stated that a finding that surgery is reasonable and necessary is premature at this time, I believe the majority should go a step further. A finding that diagnostic testing is reasonable and necessary should in no way imply or infer that any treatment recommendations based upon the results of these diagnostic tests are, likewise, reasonable and necessary medical treatment in connection with the claimant's compensable injury. However, I cannot find that the actual diagnostic testing is reasonable and necessary medical treatment. As noted by the respondents in their brief, there is no evidence that Dr. Capocelli has reviewed the claimant's extensive medical records and prior diagnostic tests. Any determination for additional treatment or testing must consider the claimant's entire medical history, not just his treatment since coming under the care of Dr. Capocelli. The respondents have provided the claimant with extensive medical care, including but not limited to an MRI, epidural steroid injections, and treatment by over seven physicians. Moreover, at least three board certified specialists have opined that the claimant does not require surgical treatment to correct a congenital

condition. In addition, the claimant underwent a Functional Capacity Evaluation and gave an unreliable effort. The claimant was found to have reached the end of his healing period for his compensable injury and he was assigned a 5% permanent impairment rating which was accepted and paid by respondents. Accordingly, after considering the totality of the claimant's medical treatment, I cannot find that an additional diagnostic test to determine whether the claimant requires surgery is reasonable and necessary medical treatment in connection with the claimant's compensable injury.

Furthermore, I write separately to address a clear misinterpretation of the facts as made by the majority by affirming and adopting the opinion of Administrative Law Judge. This misinterpretation of the facts with regard to the Functional Capacity Evaluation performed by Functional Testing Centers, Inc. may have persuaded the Administrative Law Judge to reach his finding of compensability. As such I find that it is improper for the majority to rely upon the findings of facts and conclusions of law of the Administrative Law Judge. Specifically, the Administrative Law Judge commented about the respondents hiring The Functional Testing Center in Mountain Home, Arkansas and improperly assumed that respondents hired this company. After

making this assumption, it is evident from reading the Administrative Law Judge's opinion that he placed little weight upon the various tests "purportedly" conducted by The Functional Testing Center. However, the very first paragraph of this report clearly and unequivocally states that the claimant was referred by Dr. Bradley Short, D.O., not the respondents nor a nurse case manager. Moreover, this very same paragraph clearly states that the claimant was not examined in Mountain Home, Arkansas, but rather in the DWD Testing offices in Van Buren, Arkansas, which is just outside of Fort Smith. Given this misinterpretation of the facts by the Administrative Law Judge, I do not find that the Full Commission should rely upon any of the conclusions drawn by the law judge.

Accordingly for those reasons set forth herein, I must respectfully dissent.

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KAREN H. MCKINNEY, Commissioner