

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F012836

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| BARBARA HARPOLE,<br>EMPLOYEE                         | CLAIMANT         |
| DELAPLAINE SCHOOL DISTRICT,<br>SELF-INSURED EMPLOYER | RESPONDENT NO. 1 |
| RISK MANAGEMENT RESOURCES,<br>TPA                    | RESPONDENT NO. 1 |
| SECOND INJURY FUND                                   | RESPONDENT NO. 2 |
| DEATH & PERMANENT TOTAL DISABILITY<br>TRUST FUND     | RESPONDENT NO. 3 |

OPINION FILED MAY 12, 2009

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

Claimant represented by the HONORABLE FREDERICK S.  
SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents No. 1 represented by the HONORABLE BETTY J.  
HARDY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L.  
PAKE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY W.  
RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondents No. 1 appeal an opinion and order of  
the Administrative Law Judge filed August 20, 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 September 14, 2000, the employment relationship existed between the claimant and respondent #1, when the claimant sustained a low back injury within the course and scope of her employment. The claimant earned wages sufficient to entitle her to workers' compensation benefits at the rate of \$78.00, for temporary total/permanent disability.
3. Further medical treatment under the care of Dr. Rebecca Barrett-Tuck is reasonably necessary in connection with the claimant's September 14, 2000, compensable injury, with any further surgical procedure being preceded by a psychiatric evaluation. (sic)
4. Respondent #1 has controverted the claimant's entitlement to the further medical treatment recommended by Dr. Barrett-Tuck.

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 August 20, 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.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion affirming and adopting the decision of the Administrative Law Judge. Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party, I find that the decision of the Administrative Law Judge must be reversed.

First I note that claimant's exhibit no.1 contains an index listing an August 17, 2007, report from Dr. Rebecca Barrett-Tuck at page 36. Claimant's exhibit no. 1 in the official record only goes through page 35, the final page of Dr. William Blankenship's IME report. Thus, our record is not complete. Second, and even more important to our determination is the fact that Dr. Rebecca Barrett-Tuck authored a letter dated April 22, 2008, which claimant's counsel found significant enough to ask Dr. Blankenship to review in his deposition but was not submitted into the record for our review. Dr. Blankenship read this letter from Dr. Barrett-Tuck as indicating that Dr. Barrett-Tuck no longer considered fusion surgery to be in order. Specifically, when questioned about this letter, Dr. Blankenship stated...

...I don't know if it's objective evidence of it. I think it's just objective when you read the whole body of it, which you handed me, you know, right before we started this deposition, was that he said her MRI looked good, her myelogram, post-myelogram looked otherwise good. She does mention that the joints were exceptionally loose, and she was concerned about trouble in the future, but I think that - - and then I think the real crux of the matter as I read into this, is I think that - - Dr. Tuck, please forgive me for saying this - - I don't think by reading this that you were convinced that fusion would be in order at this point in time based on that. Not to try to argue, I don't think there's objective findings even Dr. Tuck felt they were subjective findings, that this lady needed back fusion.

Clearly, Dr. Blankenship opined that fusion was not appropriate for this claimant given the fact that she does not have objective medical findings necessitating a fusion and the fact that two previous surgeries have failed to provide the claimant with any benefit. Dr. Blankenship further opined that the claimant should undergo psychological testing to better explain her failure to improve following surgery, but he did not consider fusion to be reasonable and necessary medical treatment for the claimant. We do not have the benefit of Dr. Barrett-Tuck's April 22, 2008, letter,

but from Dr. Blankenship's reading of this letter, it appears that Dr. Barrett-Tuck may have been questioning the necessity of a fusion at this time. Without this letter before the commission, we are left to speculate as to whether or not Dr. Tuck is still of the opinion that the claimant would benefit from further surgery. 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). Furthermore, the fact that this letter exists, yet claimant failed to introduce it either during Dr. Blankenship's deposition or at the hearing, raises the presumption that the evidence would be unfavorable to the claimant. Williams v. Sanyo Manufacturing Inc., Full Commission opinion filed November 27, 2007 (F508006); West v. Tyson, Full Commission opinion filed May 8, 1997 (E408320); Combs v. Conway Human Development Center, Full Commission opinion filed May 3, 1995 (E315849); Ark. Highway Commission v. Phillips, 252 Ark. 206, 478 S.W.2d 27 (1972). Therefore, it is reasonable to assume that the missing medical record reveals that Dr. Barrett-Tuck is no longer of the

opinion that the claimant is in need of a fusion. Accordingly, based upon the record currently before this commission, I cannot find that the claimant has proven by a preponderance of the evidence that any additional surgery, including the fusion surgery previously recommended by Dr. Barrett-Tuck is reasonable and necessary medical treatment in connection with the claimant's compensable injury. Therefore, I find that the decision of the Administrative Law Judge must be reversed.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner