

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F908887

ROBERT BRUSHWOOD, EMPLOYEE	CLAIMANT
C & N ELECTRIC POWER CONTRACTING, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL GROUP, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 12, 2010

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

Claimant represented by the HONORABLE GUNNER DELAY, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE JAMES ARNOLD, II, 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 21, 2010. 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 January 13, 2010, and contained in a pre-hearing order filed January 13, 2010, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that he suffered compensable injuries to his right shoulder in the form of a SLAP tear and a labrum tear on August 5, 2009.
3. The claimant has proven by a preponderance of the evidence that the infection in his right shoulder was aggravated by both his compensable right shoulder injuries and the medical treatment given for the claimant's compensable injuries.
4. The claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment for his compensable right shoulder tears and the aggravation to the infection in his right shoulder.
5. The claimant has proven by a preponderance of the evidence that he is entitlement (sic) to temporary total disability benefits from August 6, 2009, until December 7, 2009.
6. The claimant's attorney is entitled to the statutory attorney's fees based on the benefits awarded herein.

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 21, 2010, 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's findings that the claimant proved by a preponderance of the evidence that he was entitled to medical treatment and temporary total disability benefits for his alleged injury on August 5, 2009. Based upon my de novo review of the record, I find that the claimant failed to meet his burden of proof.

The claimant was employed by the respondent employer doing line work. The claimant was working in a bucket truck on August 5, 2009, rolling back slack rope onto a spool with several other individuals. The claimant testified that he felt something pop or give in his shoulder. The next day, the claimant went to the emergency room at Mercy Hospital Turner Memorial with

complaints of right shoulder pain. The claimant's shoulder was x-rayed, he received pain medication, and he was diagnosed with tendinitis. The X-rays did not show any objective findings of injury but showed mild arthritic changes and minimal calcific tendinitis. There was no visible bruising of the shoulder.

The claimant returned to Mercy Hospital Turner Memorial on August 10, 2009, again with right shoulder pain. Multiple tests were ordered including a white blood cell count, which indicated that the claimant was suffering from an active infection. The claimant was also shown to have an elevated glucose indicative of diabetes. The claimant was given a cortisone injection in his right AC joint. The claimant testified that the injection was given through a knot in his right shoulder and that pus oozed from the injection site.

On August 16, 2009, the claimant had a CT scan of his right shoulder, which demonstrated degenerative changes to the AC joint with cystic changes involving both articular surfaces. It was determined at that time that the claimant likely had a soft tissue abscess. The claimant underwent an MRI on August 17, 2009, which demonstrated degenerative changes of the AC joint with a 3 cm heterogeneously hyperintense mass, posterior and superior to the AC joint. There was also edema within

the anterior deltoid muscles and edema within the subcutaneous soft tissues.

On August 17, 2009, the claimant underwent an excision of the necrotic tissue in his right shoulder. This procedure was performed by Dr. Robert May. Dr. May, at that time, identified a SLAP lesion and anterior labral tear in the claimant's right shoulder. Dr. May did not repair either of those at the time. The claimant underwent two other operative procedures on August 20, 2009 and August 27, 2009. The claimant underwent debridement in the first procedure and the second procedure involved examination of the wound and closure of the wound.

The claimant saw Dr. May on September 21, 2009. Dr. May reported at that visit that the claimant had diabetes, hypertension and status post-septic AC joint and osteomyelitis, distal clavicle in right shoulder. The claimant was again admitted into the hospital. He had drainage that was staph sensitive to Gentamicin. While in the hospital, the claimant underwent debridement of the AC joint, distal clavicle, retention of the anterior portion of the AC ligaments, debridement of granulation tissue and packing with Iodoform gauze. The claimant underwent another debridement on September 24, 2009. The claimant

underwent several follow-up visits with Dr. May in October of 2009 and the reports seem to indicate that the claimant was doing better. In a letter dated October 19, 2009, Dr. May stated that the claimant's shoulder injury was the cause of his visits to the emergency room, thereby causing him to get a cortisone injection in which caused the infection to spread. Specifically, Dr. May stated:

We feel that the shoulder injury most likely initiated his trips to the emergency room and probably subsequent to the cortisone infection is when his infection began to spread. I would say the date of his accident was the original injury and complications of his pain somehow resulted in injection with cortisone and infection. His diabetes also played a part in him developing the infection, but he probably would never have gotten the injection if he had not injured his shoulder.

In a letter dated April 7, 2010, Dr. Theodore Hronas reviewed all the claimant's medical records. Dr. Hronas stated the following medical opinion:

In my medical opinion, based on review of the medical records and imaging studies, this patient presented with a soft tissue and bone infection of the right shoulder unrelated to any trauma or any other inciting event. This type of infection is most commonly secondary to hematogenous spread, meaning transmitted through the bloodstream, and is not related to trauma. The

source of the infection is through the bloodstream, not from damage to the skin or from an injection of any kind. The medical record does show presence of positive blood culture from a bacterial infection, which supports this route of transmission. The pathology also showed evidence of acute and chronic infection; therefore, it took some time for this to develop. This presentation is much more common in diabetic patients. The reported activity or injury the day prior to the first ER visit is completely unrelated and not the cause of the infection. A letter from Dr. Robert May (10-19-09) states, "I would say the date of his accident was the original injury and complications of his pain somehow resulted in injection with cortisone and infection. His diabetes also played a part in him developing the infection, but he probably would never have gotten the injection if he had not injured his shoulder." I would strongly disagree with this statement, based on the fact there is no history of a AC joint injection on the first ER visit (8-6-09). The steroid injection (Cortisone) was performed on the second ER visit (8-10-09), when the patient already demonstrated advanced infection with an elevated white count. Therefore, it is not reasonable to infer the steroid injection was the source of infection. Patients with diabetes often become infected from the bloodstream, with no inciting event. Gradual onset of pain, becoming more severe is a common presentation.

The claimant must prove by a preponderance of the evidence that she sustained a "compensable consequence" pursuant to all of the statutory elements

of compensability. Jones v. B.A.E. Sys., Full Commission Opinion filed May 6, 2004 (F001696); Atchison v. John P. Marinoni Const. Co., Full Commission Opinion filed September 19, 2001 (E616344). The burden of proof rests upon the claimant to prove the compensability of her 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 Funeral Home v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979).

In my opinion, a review of the evidence demonstrates that the claimant cannot prove by a preponderance of the evidence that his shoulder problems were the result of a compensable injury. The evidence demonstrates that Dr. Hronas, a board-certified radiologist reviewed the claimant's medical records along with his radiographic films. Based upon his review of the medical records and imaging studies, he opined that the claimant presented with a bone infection of the right shoulder unrelated to any trauma or inciting event. Dr. Hronas stated that this type of infection is commonly transmitted through the blood stream rather

than being trauma related. He further stated that the infection source is more common in diabetic patients.

Although Dr. May's letter of October 19, 2009, reflected that he thought the accident led to the complications and that the cortisone injection caused the infection, I cannot agree with Dr. May's opinion. I give Dr. Hronas's opinion more weight. 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.

It is clear that the claimant had an infection when he went to the hospital to begin with. The

Cortisone injection did not make the infection worse. When the claimant went to the hospital on August 10, 2009, his white blood cell count was 17,500. This clearly shows the claimant had an active infection at that time. This was before the claimant received a cortisone injection. The claimant is a diabetic and Dr. Hronas indicated that this kind of infection is very common in diabetics. In my opinion, it is speculation and conjecture to conclude that the claimant's injury caused the infection. Although the claimant's alleged injury may have sent him to the hospital, the claimant's infection was a result of something that was clearly there before any alleged injury occurred. 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). Accordingly, for all the reasons set forth herein, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner