

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F910351

RUSSELL K. SHERRELL,
EMPLOYEE

CLAIMANT

IZARD COUNTY CONSOLIDATED
SCHOOL DISTRICT,
EMPLOYER

RESPONDENT

ARKANSAS SCHOOL BOARDS ASSOCIATION,
SELF-INSURED TRUST

RESPONDENT

OPINION FILED FEBRUARY 16, 2011

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

Claimant appears Pro Se.

Respondents represented by the HONORABLE BETTY J. HARDY,
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 September 22, 2010. 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 the within claim.
2. The employee-employer-insurance carrier relationship existed at all relevant times, including October 14, 2009.
3. The claimant's average weekly wage at the time of his injury was \$615.38. This entitled him to a weekly temporary total disability rate of

\$410.00, and a permanent partial disability rate of \$308.00.

4. The claimant filed a claim for a work-related injury (pulled muscle in the left shoulder blade) occurring on that date for which some benefits were paid.
5. The claimant proved by a preponderance of the evidence that he sustained a left lung injury as a result of his work-incident of October 14, 2009.
6. The claimant proved by a preponderance of the evidence that the medical treatment of record was reasonable and necessary treatment for his compensable lung injury.
7. The claimant proved his entitlement to temporary total disability from October 28, 2009, until January 2, 2010.
8. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

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 September 22, 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 opinion finding that the claimant is entitled to additional benefits. In my opinion, the claimant has failed to meet his burden of proof.

The evidence demonstrates that the claimant sustained an admittedly compensable pulled muscle to his left shoulder on October 14, 2009. The claimant was diagnosed with a shoulder strain and returned to work and continued working until October 23, 2009. The claimant did not seek any other medical treatment related to the shoulder strain.

On October 23, 2009, the claimant reported to Fulton County Hospital where an X-ray of his chest was performed and he was noted to have pneumonia and a peripneumonic effusion. The claimant was admitted to White River Medical Center on October 25, 2009, with left lower lobe pneumonia. The claimant was noted to have a cough and was spitting up yellow sputum.

On October 31, 2009, the claimant had a bronchoscopy with washings. The report stated that the claimant had "Opacification of left lung due to

pneumonia." The claimant was discharged on November 1, 2009, and sent to the Arkansas Heart Hospital in Little Rock. The claimant's release from the White River Medical Center indicated the claimant presented to the hospital with "cough, fever, and congestion," and "evidence of pneumonia was seen."

The claimant was seen at the Arkansas Heart Hospital and admitted there. On November 2, 2009, a CT scan of the claimant's chest indicated that the claimant's lower left lobe was consistent with pneumonia. The claimant was ultimately diagnosed with a pleural effusion. The claimant had a central venous line installed and a thoracotomy. A pain pump was also put in to deliver pain medication to the claimant's incision.

The claimant's treating physician, Dr. Nolan, opined that the claimant's shoulder injury could lead to a pleural effusion if there had been chest wall trauma. However, Dr. Nolan was under the impression that the claimant had fallen on October 14, 2009, and contained a contusion to the chest wall. Dr. Nolan did not review the medical records from Fulton County Hospital or the White River Medical Center where the claimant was treated prior to arriving at Arkansas Heart Hospital. The evidence demonstrates that the claimant did not

sustain a contusion to the chest wall. He was merely reaching to change a fan blade belt when he felt a muscle pull. When Dr. Nolan was apprized of the claimant's incident, he merely opined that the shoulder blade could traumatize the chest wall.

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.

In order to establish a compensable injury by medical evidence, the injury must be supported by

objective findings. Ark. Code Ann. §11-9-102(4) (D). Furthermore, the requirement that a compensable injury be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997). "Objective findings" are those that cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). Moreover, objective medical evidence, while necessary to establish the existence and extent of an injury, is not necessary to establish a causal relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. App. 443, 990 S.W.2d 522 (1999). There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

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).

Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(B). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2002), citing Howell v. Scroll Technologies, 343 Ark. 297, 35 S.W.3d 800 (2001).

Medical opinions based upon "could", "may", "possibly", and "can" lack the definiteness required to satisfy Ark. Code Ann. §11-9-102(16)(B), which requires that medical opinions be stated within a reasonable degree of medical certainty. Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000). In Frances, the Arkansas Supreme Court expressly overruled a prior Court of Appeals decision to the extent that the Court of Appeals had held that such indefinite terms were sufficient to meet the requirements of Ark. Code Ann. §11-9-102(16)(B). The Arkansas Supreme Court held that a doctor's opinion that an accident "could" produce a lumbar disc injury was insufficient to satisfy the standard of within a reasonable degree of medical certainty. Moreover, in Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000), the Arkansas Supreme Court held that a medical opinion based upon the theoretical possibility of a causal connection did not meet the standard of proof. In Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001), the Arkansas Supreme Court held that in order for a medical opinion regarding causation to "pass muster" such opinion must be more than speculation, and go beyond possibilities.

After reviewing the evidence of record, I give no weight to the opinion of Dr. Nolan stating that the claimant's shoulder blade muscle pull could have caused trauma to the chest wall and caused the pleural effusion. This opinion, was not made within a reasonable degree of medical certainty. The evidence shows that the claimant sustained a shoulder strain when he was reaching for a fan blade. To conclude the shoulder strain caused the pleural effusion requires conjecture and speculation. 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).

Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional benefits. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER