

**ARKANSAS COURT OF APPEALS**

DIVISION I  
No. CA08-1140

BUILT WELL CONSTRUCTION CO.  
APPELLANT

V.

JORGE VERA

APPELLEE

**Opinion Delivered** April 8, 2009

APPEAL FROM THE WORKERS'  
COMPENSATION COMMISSION  
[NO. F605957]

REVERSED AND REMANDED

**JOHN MAUZY PITTMAN, Judge**

Appellee sustained a compensable back injury while employed by appellant. Back surgery was performed by Dr. James Blankenship. This surgery involved placing screws into several of appellee's vertebrae. Appellee later sought additional medical treatment in the form of surgery proposed by Dr. Cyril Rabin to redo and revise the back surgery in order to forestall catastrophic injury to appellee's back as a result of possible failure of the hardware installed by Dr. Blankenship. After a hearing, the administrative law judge stated that the evidence was in equipoise and, without request by any party, ordered that a third physician be appointed to conduct an independent examination and render an opinion on the need for the requested surgery. The Commission affirmed and adopted that opinion. Appellant argues that the appointment of the third physician was error under *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (1991). We agree, and we reverse.

*Gencorp* held that a claimant should not be permitted a second opportunity to offer proof to meet his burden on the issue of the period of temporary total disability and that the Commission had exceeded its authority in permitting such. The rationale for the holding was that, when an issue is fully developed, it is the duty of the Commission to make findings of fact, and that the Commission must find that the claimant has failed to meet his burden of proof if he does not do so. We said:

It is the duty of the Workers' Compensation Commission to translate the evidence on all issues before it into findings of fact. *Sanyo Manufacturing Corporation v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). The Commission's statutory obligation is to make specific findings of fact and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence. *White v. Air Systems, Inc.*, 33 Ark. App. 56, 800 S.W.2d 726 (1990); Ark. Code Ann. § 11-9-705 (a)(3) (1987). The quoted paragraph is not a finding of fact, but is a declination to find a fact.

Ark. Code Ann. § 11-9-705(c)(1) provides that all evidence shall be presented to the Commission at the initial hearing on the controverted claim. The burden of proving a case beyond speculation and conjecture is on the claimant. *Bragg [v. Evans St. Clair, Inc.]*, 15 Ark. App. 53, 688 S.W.2d 959 (1985)]; 3 Arthur Larson, *THE LAW OF WORKMEN'S COMPENSATION*, § 80.33 (a) (1952).

By reserving the issue of whether the appellee was entitled to temporary total disability benefits for the period from February to June 1989, the Commission simply declined to say that the appellee failed to meet her burden of proof on this issue. This constitutes error on the part of the Commission as our workers' compensation statute states that the evidence shall be weighed impartially, and without giving the benefit of the doubt to any party. Ark. Code Ann. § 11-9-704(c)(4). The Commission has allowed the appellee a "second bite at the apple" by giving her another opportunity to present evidence substantial enough to carry her burden. Though we do not interfere with the actions of the Commission unless we find it has acted without or in excess of its authority, *Allen Canning Company v. McReynolds*, 5 Ark. App. 78, 632 S.W.2d 450 (1982), disregarding its duty to find the facts in order to give the appellee the benefit of the doubt is not within the Commission's authority.

*Gencorp*, 36 Ark. App. at 194-95, 820 S.W.2d at 477-78. The facts of the present case are essentially indistinguishable from those presented in *Gencorp*, and we therefore reverse and remand for further consistent proceedings.

Reversed and remanded.

GLADWIN and HENRY, JJ., agree.