

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F312432**

**ALVIN MALONE, EMPLOYEE**

**CLAIMANT**

**CONAGRA POULTRY CO.,  
SELF-INSURED EMPLOYER**

**RESPONDENT**

**GALLAGHER BASSETT SERVICES, TPA**

**RESPONDENT**

**OPINION FILED AUGUST 30, 2004**

Hearing before Administrative Law Judge J. Mark White on August 27, 2004, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. R. Theodor Stricker, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by Mr. Norwood Phillips, Attorney at Law, El Dorado, Arkansas.

**STATEMENT OF THE CASE**

On August 27, 2004, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on August 2, 2004, and a Prehearing Order was entered that same day. A copy of the August 2, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection.

Prior to the hearing the parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/self-insured employer relationship existed at all relevant times, including May 21, 2003;

that on May 21, 2003, the claimant sustained a compensable injury to his hands; and that respondent accepted the May 21, 2003, injury as compensable and paid medical benefits.

The parties agreed that the issues to be presented were whether the claimant is entitled to permanent partial disability benefits; whether this claim has been brought without reasonable grounds; and controversion and attorney's fees.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Following a colloquy between the Commission, counsel for the respondents, and counsel for the claimants, the following findings of fact and conclusions of law were issued from the bench in accordance with Ark. Code Ann. § 11-9-704:

1. The claimant has continued these proceedings in respect to his claim without reasonable grounds. Therefore, costs must be assessed in accordance with Ark. Code Ann. § 11-9-714.
2. The claimant is hereby directed and ordered to pay the costs of the hearing held August 26, 2004, specifically the cost of the court reporter.
3. The claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent partial disability benefits.

## DISCUSSION

On August 2, 2004, the parties agreed in a telephone prehearing conference to schedule a full hearing in this claim for August 26, 2004. The parties agreed that the issues to be considered in the hearing were whether the claimant is entitled to permanent partial disability benefits; whether his claim had been brought without reasonable grounds; and controversion and attorney's fees.

Three weeks before the hearing, the respondents' attorney sent the claimant's attorney a document signed by Dr. Greg Smart stating that the claimant sustained no permanent impairment as a result of his compensable injury. The claimant had requested all medical records from the respondents via discovery months before; the respondents' attorney represented at the hearing that the document had been misplaced as a result of confusion during a corporate merger.

At the hearing, the claimant's attorney stated that there were no issues to be decided, in light of the document signed by Dr. Smart. The claimant's attorney acknowledged that he had no evidence to present in support of his claim for permanent partial disability benefits.

It is well settled that it is the burden of the claimant to prove by a preponderance of the evidence his entitlement to benefits under the Workers' Compensation Act. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543

(1999). The claimant's attorney admitted at the hearing that he had no evidence to support his client's claim, and that he had known for three weeks of Dr. Smart's opinion that the claimant sustained no permanent impairment. Yet, he chose to proceed with the full hearing anyway, rather than cancelling the hearing, or at least postponing it to seek another medical evaluation for his client. Given these facts, I must find that the claimant continued the proceedings in respect to his claim without reasonable grounds.

Arkansas law provides:

If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect to the claim or order have been instituted or continued without reasonable grounds, the cost of the proceedings shall be assessed against the party who has instituted or continued the proceedings.

ARK. CODE ANN. § 11-9-714.

The sanctions required by this statute are not discretionary; costs "shall" be assessed if proceedings are continued without reasonable grounds. Because I find that the claimant continued the proceedings in respect to his claim without reasonable grounds, I must find that the claimant should be assessed costs per Ark. Code Ann. § 11-9-714. The claimant is hereby directed and ordered to pay the costs of the hearing held August 26, 2004, specifically the cost of the court reporter.

In making this finding, I note that the respondents' attorney indicated his

willingness to waive sanctions if the Commission would enter an order finding that the claimant has received all benefits to which he is entitled. But the only issue identified for the hearing was permanent partial disability benefits; entering a broad order barring the claimant from *any* future benefits would be unjust and unfair to the claimant, particularly since it was the choice of his attorney to proceed with the hearing. Moreover, the choice of the claimant's attorney to continue with a moot hearing was an inconvenience not only to the respondents, but also to the Commission, to the court reporter, and to other parties who might have otherwise been able to schedule a hearing during that time. The assent of the respondents alone does not alleviate the inconvenience caused to these other interested parties.

I also note the claimant's contention that the respondents should be sanctioned for failing to timely provide the document when it was requested via discovery. Rule 37 of the Arkansas Rules of Civil Procedure does allow the imposition of sanctions for failure to comply with discovery, even in the absence of an order to compel discovery. *Coulson Oil Co., Inc. v. Tully*, 127 S.W.3d 486 (Ark. App. 2003). The form signed by Dr. Smart constituted evidence favoring the respondents themselves, not the claimant. Because it is the claimant's burden to prove his case, the claimant was not prejudiced by the respondents' failure to produce this document. Moreover, at any point in the three weeks between his

receipt of the document and the hearing, the claimant's attorney could have moved for a continuance of the full hearing, to give him time to generate evidence opposing Dr. Smart's opinion. This he did not do. Because the claimant was not prejudiced by late receipt of the document, and because the claimant failed to act once he received the document, I decline to sanction the respondents for their failure to timely produce the document.

Despite the imposition of costs and the claimant's lack of evidence, the parties asked that I rule on the issue of the claimant's entitlement to permanent partial disability benefits. Because the claimant introduced no relevant evidence supporting his claim for permanent partial disability benefits, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent partial disability benefits.

**AWARD**

The claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent partial disability benefits. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

In accordance with Ark. Code Ann. § 11-9-714, the claimant is hereby directed and ordered to pay the costs of the hearing held August 26, 2004, specifically the cost of the court reporter.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge