

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F411639**

<b>MICHAEL L. FOWLER, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>MCCLINTON ANCHOR/ASHLAND, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>BANKERS INSURANCE COMPANY, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED SEPTEMBER 22, 2005**

A hearing in this case was conducted on July 7, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Harrison, Boone County, Arkansas.

Claimant was represented by Frederick Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents were represented by E. Diane Graham, Attorney at Law, Fort Smith, Arkansas.

**STATEMENT OF THE CASE**

A prehearing telephone conference was held in this claim on March 22, 2005; a Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to three stipulations. Two of these stipulations are found in the Prehearing Order and were confirmed by the parties at the hearing; the third stipulation was agreed upon at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on June 17, 2004 and at all other relevant times.
2. Respondents controvert this claim in its entirety.
3. If Claimant's wife were to testify, her testimony would corroborate that given by

Claimant.

At the July 7, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable left knee injury on June 17, 2004.
2. Whether Claimant is entitled to reasonable and necessary medical benefits; if so, whether Respondents are entitled to any credit available under Ark. Code Ann. § 11-9-411.
3. What is Claimant's average weekly wage?
4. Whether Claimant is entitled to temporary total disability benefits.
5. Whether Claimant is entitled to an attorney's fee.

Claimant contends that he slipped while exiting a truck at work on June 17, 2004. He argues that he sustained a compensable specific incident to his left knee. He seeks medical and temporary total disability benefits, as well as an attorney's fee. Respondents controvert this claim in its entirety.

### **THE RECORD**

On July 6, 2005, Claimant faxed to the Commission a Motion to Recuse and related documents. A cover letter from Claimant's attorney dated July 6, 2005 states: "While preparing my file for hearing, I noted that you may not have received a copy of the Motion to Recuse and Brief in support since there has not been a response from your office. I apologize if you did not receive these documents. I am faxing you a copy of these documents so that you may respond accordingly." Of course, this was one day prior to the hearing on this matter. A review of the Commission's file does not indicate that the Motion to Recuse and related documents were received prior to July 6, 2005.

Claimant's Motion to Recuse is addressed in this Opinion. Therefore, the following will be blue-backed and considered a part of the record:

1. Rick Spencer's letter to the ALJ dated July 6, 2005;
2. Rick Spencer's letter to the ALJ dated May 25, 2005;
3. Rick Spencer's letter to the Attorney General dated May 25, 2005;
4. Claimant's Motion to Recuse; and
5. Claimant's Brief in Support of Motion to Recuse.

At the hearing, Claimant offered Claimant's Exhibit #1 into evidence; it consists of two affidavits and an article. Respondents objected to this exhibit's admission on the basis that it was not provided to Respondents' attorney until the day of the hearing. Respondents note that the Prehearing Order provides: "No documents will be allowed into evidence unless exchanged by the parties at least twenty-five (25) days prior to the scheduled hearing." Claimant did not offer an explanation for not exchanging Claimant's Exhibit #1 prior to the hearing. I find that Respondents' objection should be sustained, and that Claimant's Exhibit #1 should not be admitted into the record as evidence.

At the conclusion of the hearing, the parties were invited to submit briefs as mentioned in the Prehearing Order. Respondents filed a trial brief that was received on August 8, 2005. Because this trial brief was reviewed in preparation of this Opinion, it will also be blue-backed and considered a part of the record.

### **MOTION TO RECUSE**

Claimant's Motion to Recuse alleges a number of specific constitutional violations affecting the adjudication process. In essence, Claimant states that the Commission and its Administrative Law Judges ("ALJs") are subject to external political pressure, biased,

or both. Claimant therefore seeks the disqualification and recusal of the ALJs.

Without conceding the appearance of bias, Claimant's Motion to Recuse should be denied on the basis of the rule of necessity. This rule provides that an administrative officer is not disqualified because of bias or prejudice where he or she alone has the power and authority to act, and if disqualified, action could not otherwise be taken. See Acme Brick Co. v. Missouri Pacific R.R. Co., 307 Ark. 363, 369, 821 S.W.2d 7, \_\_\_ (1991). The Arkansas Supreme Court adopted this rule to provide an exception to disqualification where the authority of the administrative officer is exclusive, and no legal provision for calling in a substitute is provided. Id. at 370, 821 S.W.2d at \_\_\_. Here, Claimant cites no provision for appointing a special administrative law judge that would be free from the concerns that prompted his motion in the first instance. There is no statutory procedure in place to address Claimant's request. If all ALJs must recuse and a special administrative law judge cannot be appointed, this claim could not be heard. Therefore, pursuant to the rule of necessity, the Motion to Recuse must be denied.

It should be noted that the Full Commission recently rejected similar or identical arguments in support of motions for the Commission to recuse. See Bland v. Baxter Reg'l Med. Ctr., Full Workers' Compensation Commission Order filed August 16, 2005 (F204378); Long v. Wal-Mart Stores, Inc., Full Workers' Compensation Commission Order filed June 24, 2005 (F309931).

## **DISCUSSION**

### **A. Compensability**

Claimant worked in the Respondent employer's service department, "[c]hanging oil

and servicing equipment and driving a fuel truck.” He described an injury that allegedly occurred on June 17, 2004.

It was in the afternoon, and I was getting out of the fuel truck. It was a Ford truck, and the steps is on the tank. And I was stepping down off of the tank, and my knee just popped. And I -- it's like popping your elbow or something is what I thought, you know, and I started walking off there and it felt funny. So it was at quitting time, it was right at five o'clock, and I went on to the shop and proceeded to do my paper work, and my knee just -- I felt like my knee was swelling, because I could feel it in my blue jeans. And I went ahead and closed the shop down, done my paper work and went home. And, by the time I got home, my knee was -- it was really swelled bad.

Either that evening or the next morning, Claimant presented to a Med-Quick clinic, where a brace was applied to his left knee.

Claimant testified that he notified his employer of his injury on the morning of June 18, 2004. He claims to have told his supervisor, Des, about the injury in Des' office, a double-wide trailer a quarter of a mile from Claimant's work place. Claimant testified that a secretary, Roberta Shauver, was present during this conversation. Claimant alleges that Des directed him to see the company doctor. Claimant then began a course of medical treatment that included an arthroscopy of his left knee, with partial lateral meniscectomy, on July 15, 2004.

On direct examination, Claimant denied that there was a boss around on June 17, 2004, for Claimant to notify of his injury. Claimant also addressed the possibility that he injured his knee falling on a porch at home. Claimant denied telling Des that he injured himself in that fashion; Claimant had no idea how that story arose.

On cross-examination, Claimant admitted that he was not the only person on the Respondent employer's premises at the time of his accident, but he did not tell anyone about the injury.

Q. Now, you knew that, if you had an accident at work, you were supposed to report it to your supervisor. Isn't that correct?

A. Yes, ma'am.

Q. Okay. And, at that point in time, Des was your supervisor.

A. Yes, ma'am.

Q. And you did not report it to Des when this accident occurred. Is that correct?

A. At that time, I didn't.

Q. Okay. Des was on the premises, was he not?

A. Not on the work premises.

Q. His office is a quarter of a mile down the road.

A. Yes, ma'am.

Q. On the same property. Is that correct?

A. I think it is. I'm not sure about that.

Q. Okay. So you didn't go down there and report it to him that day.

A. No, ma'am.

Claimant admitted signing a document notifying him to make use of a company doctor or the nearest emergency room. He admitted that, instead, he saw a doctor at Med-Quick twice following his June 17, 2004 incident.

Claimant was questioned further about the alleged fall on his porch:

Q. Is it your testimony, Mr. Fowler, that you never said anything to Des about falling off a porch or stepping off a porch or hurting your knee on a porch at home?

A. Yes, ma'am.

Q. Okay. And is it your testimony, under oath, that you never talked to

Randy Summers, at all, about any kind of injury or health condition after June 17th 2004?

A. Yes, ma'am.

On redirect examination, Claimant agreed that he was not disputing the possibility that a supervisor may have been a quarter of a mile down the road. He also confirmed that he initially did not think his injury would be permanent or anything that would require a doctor's treatment. He clarified that he felt the swelling at his home later on.

Roberta Shauver testified that she worked in the office with the branch manager, Desmond Heyliger. There is a door between their offices. She recalled that on June 18, 2004, Claimant brought in a doctor's excuse from Med-Quick; it did not refer to a work-related injury, and it did not take Claimant off work. She testified that Claimant did not talk to Des in her presence. However, she recalled that Claimant returned on June 21, 2004 and spoke to Des: "The conversation that I understood him to say was that he had stepped off of a truck and had went -- at that particular time, I thought he said that he heard something pop, and it was -- and he thought it was his ankle." She did not recall Claimant mentioning his knee, but she conceded that the phone distracted her.

Randy Summers testified on behalf of Respondents. He worked with Claimant, and testified concerning a conversation they had on the morning of June 18, 2004 on the company's premises. He read a note that was introduced into evidence as Respondents' Exhibit #4.

At 8:00 AM 06.18.04 Mike Fowler came to me and ask me to tell Des that he needed to go home and go to his doctor. He said he hurt his knee the day before when he stepped off his porch at home. Then he left. When Des came by a short while later I told him what Mike had said.

At the hearing, Summers confirmed that this note reflects what happened on the morning

of June 18, 2004. Summers also testified that he spoke to Des “[a] little short while later, when Mike was leaving. Maybe 8:15.”

Desmond Heyliger testified on behalf of Respondents. He is a branch manager for the Respondent employer; on June 17, 2004, he was Claimant’s supervisor. Claimant did not come to him at any time that day to discuss an injury. Heyliger did see Claimant on the morning of June 18, 2004.

Q. Okay. Tell us about that.

A. Well, it was around eight o’clock in the morning. Been making the rounds at different locations around the site, because I have to supervise several people on the site. Pulled up to the shop around eight a.m., give or take a few minutes. Saw Mike Fowler walking from the shop office, in the main shop area, directly across -- right next to me, within fifty feet of me. Walked straight out, and I noticed him going to his vehicle. Within a --

Q. Let me stop you.

A. Okay.

Q. Did Mr. Fowler say anything to you?

A. No, no. Just kept walking.

Q. Go ahead.

A. Within a few minutes later, I asked Randy Summers where he was going. Where’s Mike going? And that’s when Randy told me that he told him that he had hurt himself at home, and that he was going to his doctor to get it looked at.

Heyliger did not either see or speak to Claimant until the following Monday, June 21, 2004, at approximately 11:30 a.m. Heyliger described that conversation:

I can tell you that Michael Fowler came in, spoke to me about his injury, and I was just casually talking to him about it, how his leg was doing and stuff, and he said it wasn’t doing too good and that he still had some problems, and he was wondering if we were going to pay for it or what -- he brought up something to the effect that the company was going to have to pay for it.

And I said, well, what do you mean? He says, well, it happened at work. And I said, that's the first time I've heard about that. You've never mentioned that, up until this point. And then he told me that, oh, yeah, I fell off the service truck, on the step, when I was getting off. And I said, well, that's a big surprise, and we're going to have to go through different procedures now, because it's a -- because of Workmen's Comp claim, and we have to go through our doctor. And that's about all that was said at that point, and we tried to set up a doctor's appointment from that point on.

Heyliger's note recording this conversation was admitted into evidence as Respondents' Exhibit #6.

Claimant was called to testify again. He denied making any statements to Randy Summers about falling off a porch and hurting his leg, but when asked if he saw Randy Summers on June 18, 2004, Claimant replied: "I don't remember whether I seen him or not." He insisted that he spoke to Des about his injury on June 18, not June 21, 2004.

As to the medical records, it should be noted that there are no records from Med-Quick in evidence. The earliest medical record following Claimant's June 17, 2004 incident is a July 1, 2004 note by Dr. Charles Klepper. Dr. Klepper records that Claimant "was injured at work about two weeks ago. When he fell and felt his knee pop, he was seen at MediQuick..." Claimant was ultimately referred to Dr. Tom Coker; in his first clinic note dated July 9, 2004, he records that Claimant "injured his left knee at work."

Claimant must prove that he sustained a compensable injury as defined by Ark. Code Ann. § 11-9-102(4)(A)(i). Among other requirements, Claimant must prove that his injury is one "arising out of and in the course of employment..." Id. "Arising out of the employment" refers to the origin or cause of the accident while the phrase "in the course of the employment" refers to the time, place, and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 229, 691 S.W.2d 879, \_\_\_

(1985); see Preacher v. Cave City Nursing Home Inc., Full Workers' Compensation Commission Opinion filed January 15, 2004 (E512363). Claimant must sustain his burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_ (1947).

I find that Claimant did not sustain his burden of proving that he sustained an injury arising out of and in the course of his employment on June 17, 2004. The evidence of greater convincing force establishes that Claimant made no effort to report an injury on June 17, 2004, nor did Claimant report a work-related injury on the following day. Rather, the credible testimony of Randy Summers and Roberta Shauver establishes that on June 18, 2004 Claimant reported an injury at home, sought medical treatment for this injury from someone other than the company doctor, and then presented a doctor's note to Shauver that made no reference to a work-related injury. The testimony of Shauver and Desmond Heyliger establishes that Claimant did not mention a work-related injury until Monday, June 21, 2004. It should also be noted that the medical records from Med-Quick, which could perhaps corroborate Claimant's testimony, do not appear in evidence. In short, the preponderance of the evidence - the credible evidence of greater convincing force - weighs against Claimant's history. Claimant simply did not sustain his burden of proof so as to establish that his injury arose out of and in the course of his employment.

## **B. Remaining Issues**

It is not necessary to discuss Claimant's average weekly wage or his requests for

medical benefits, temporary total disability benefits, or an attorney's fee. Because Claimant failed to establish by a preponderance of the evidence one of the requirements for establishing the compensability of the alleged injury, he failed to establish the compensability of his claim, and compensation must be denied. Reed v. Conagra Frozen Foods, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744); see Ark. Code Ann. §§ 11-9-102(4)(F)(i) and 11-9-715(a)(2)(B)(ii).

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

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on June 17, 2004 and at all other relevant times.
3. Respondents controvert this claim in its entirety.
4. If Claimant's wife were to testify, her testimony would corroborate that given by Claimant.
- \_\_\_\_\_5. Claimant did not sustain his burden of proving by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment on June 17, 2004. Claimant did not report an injury on that date; he did not seek medical treatment from the company doctor. Further, credible evidence establishes that Claimant initially gave a history of injuring himself at home, and that he did not report a work-related injury until four days after the alleged incident.
6. Because Claimant failed to prove a compensable injury, it is not necessary to ascertain his average weekly wage, or to discuss his requests for medical benefits, temporary total disability benefits, or an attorney's fee.

**ORDER**

Claimant failed to sustain his burden of proving that he suffered a compensable injury. Therefore, the above claim is respectfully denied and dismissed.

**IT IS SO ORDERED.**

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D. FRANKLIN AREY, III,  
Administrative Law Judge

DFA/ml