

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F200210, F207888, & F207889

MARLENE DEWEESE,
EMPLOYEE

CLAIMANT

BAXTER REGIONAL MEDICAL CENTER,
SELF-INSURED EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
TPA

RESPONDENT

OPINION FILED JANUARY 30, 2006

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondents were represented by HONORABLE WALTER A. MURRAY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on November 2, 2005 in Mountain Home, Arkansas. A prehearing order was entered in this case on August 26, 2005. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties in the prehearing order or during the hearing and are hereby accepted:

1. The employer-employee relationship existed at all times pertinent to this claim.
2. The claimant's average weekly wage was \$291.93. Her compensation rate for temporary total disability is \$195.00 per week.
3. The respondents controvert this claim in its entirety.
4. The respondent employer is properly captioned "Baxter County Regional Medical Center" not "Baxter County Regional Hospital".

ISSUES

The claimant identified during the course of the hearing that the issues to be litigated and resolved at the present time are as follows:

1. Administrative Law Judge Recusal.
2. Constitutionality of the Arkansas Workers' Compensation Law.
3. Compensability of back problems caused by specific incidents on August 15, 2000 and/or October 8, 2001 and/or by gradual onset.
4. Controverted attorney's fees.

The respondents object to any claim for a gradual onset back injury made at the start of the hearing on the grounds

that the claimant has only alleged specific injury dates and at no point prior to the hearing ever alleged a compensable gradual onset back injury.

The record consists of the two volume transcript of the November 2, 2005 hearing, and the exhibits contained therein. In addition, I have "blue-backed" to designate as part of the record the respondent's post hearing brief received at the Commission on December 14, 2005 and the Full Commission's Opinion filed in Leslie E. Bland v. Baxter Regional Medical Center, Full Workers' Compensation Commission Opinion filed August 16, 2005 (F204378).

DISCUSSION

1. Motion to Recuse and Constitutional Issues

The claimant challenges the constitutionality of this administrative law judge and all administrative law judges and the Commissioners conducting hearings and deciding claims for compensation. The claimant generally asserts that claims being decided by the Arkansas Workers' Compensation Commission, being a part of the Executive Branch of Government, violates the Due Process Clause of the United States and the Arkansas Constitution, violates Ark. Const. Art. 4, §§ 1 and 2; Ark. Const. Art. 5, § 32; Ark. Const. Art. 2, §§ 2 and 3; Ark. Const. Art. 2, § 18; and

Ark. Const. Art. 2, § 29. The claimant's motion to recuse alleges that all of the administrative law judges appear tainted with potential bias, prejudice, and impropriety, and a financial interest in the outcome of the claimant's constitutional challenge. The claimant did not request a hearing on the motion to recuse.

The Arkansas Workers' Compensation Commission adopted recusal guidelines for its administrative law judges by memorandum dated April 7, 2003. Under these guidelines, a judge shall hear cases assigned to the judge except when disqualification is required. A judge shall disqualify himself in cases where the judge's impartiality might reasonably be questioned, including but not limited to instances where (1) the judge has a personal bias or prejudice concerning a party or lawyer, including personal knowledge of disputed facts; (2) the judge knows that he has anything more than a de minimis interest that could be substantially affected by the proceeding; or (3) the judge or a family member is a party to the proceeding, is a lawyer in the proceeding, has more than a de minimis interest in the proceeding, or is likely to be a material witness in the proceeding.

Members of administrative agencies that perform quasi-judicial functions are also required to follow the disqualification rules provided in the Arkansas Code of Judicial Conduct. Acme Brick Co. v. Missouri Pacific R.R., 307 Ark. 363, 821 S.W.2d 7 (1991). The Arkansas Code of Judicial Conduct contains essentially the same disqualification rules adopted by the Commission in 2003. See generally, Ark. Code of Judicial Conduct Canon 3.

In the present case, I, like the other administrative law judges and the Commissioners at the Commission, may have personal knowledge regarding the truth or falseness of at least some of the allegations contained in the affidavits proffered by the claimant with her motion to recuse. In addition, as mentioned above, the claimant's motion alleges that all of the administrative law judges appear tainted with potential bias, prejudice, and impropriety, and notes that the Commission's administrative law judges all have a potential pecuniary interest in the outcome of the claimant's constitutional claims.

The claimant's general allegations notwithstanding, I note that the claimant does not allege that I would be called to testify as a witness on her constitutional challenge in this case. I have no personal knowledge about

the claimant, the respondent or the attorneys, outside of any information made known to me in my capacity as an administrative law judge, and I have no basis to conclude that I might be biased or prejudiced against any party or attorney in this pending claim.

To the extent that the claimant has alleged potential bias, prejudice, impropriety, and a pecuniary interest with respect to all administrative law judges employed at the discretion of the Commission in the Executive Branch of State Government, I respectfully point out that the claimant's recusal argument in this case appears to present the special circumstances requiring application of the rule of necessity discussed by the Arkansas Supreme Court in Acme Brick Co. v. Missouri Pac. R.R., 307 Ark. 363, 821 S.W.2d 7 (1991), where the Court explained:

Under the doctrine or rule of necessity, it has been held that administrative officers or bodies are not disqualified because of bias, prejudice, or prejudgment of the issues where they alone have the power and authority to act and where, if they are disqualified, action cannot otherwise be taken, particularly where a failure of justice would result if they are not permitted to act....

Id. quoting 73 C.J.S. Public Administrative Law and Procedure 61(b) (1983). In Acme Brick Co., the Supreme Court concluded that an appearance of bias in fact existed where

an attorney representing one of the parties in litigation before the Arkansas Highway Commission was simultaneously representing the Commission and its members in two pending lawsuits. The Supreme Court nevertheless determined that the rule of necessity overrode the rule of disqualification under circumstances where the law failed to provide a procedure for the appointment of special Highway Commissioners to hear the case.

Similar to Acme Brick Co., supra, the claimant in the present case has failed to indicate how the current administrative law judges at the Commission might legally be replaced by a temporary administrative law judge appointee assigned the task of determining the claimant's constitutional challenge, nor am I aware of any such procedure. The law clearly does provide for appointment of special Commissioners. See Ark. Code Ann § 11-9-201. However, I note that special Commissioners are appointed by the Governor under current law, and I note that it is the appointment or hiring of quasi-judicial officials through the Executive Branch of Government which forms the basis of the claimant's constitutional challenge. Therefore, even if the claimant's allegation of potential bias, prejudice, impropriety and/or pecuniary interest involving all of the

administrative law judges had merit, as she asserts, it appears to me that the rule of necessity would override the claimant's request for disqualification of the Commission's administrative law judges as a group.

Finally, I note that the claimant's attorney raised, and the Full Commission rejected, essentially identical constitutional arguments in Leslie E. Bland v. Baxter Regional Medical Center, Full Workers' Compensation Commission, Opinion filed August 16, 2005 (F204378).

Since the claimant's motion has not alleged any personal bias, prejudice, or impropriety on my part, but instead only alleges potential bias, prejudice, impropriety, and financial interest on the part of all administrative law judges at the Workers' Compensation Commission, and since the claimant has failed to cite any legal mechanism for assigning a replacement administrative law judge to conduct a hearing on her constitutional arguments, I find that her motion for recusal must be denied under the rule of necessity. Furthermore, since the Full Commission has previously considered and rejected the claimant's same constitutional argument in a prior published decision, I find that the claimant's request that I recuse in order to

avoid rendering a decision on her constitutional challenge is also moot.

Based on the factual and legal conclusions of the Full Commission in Leslie E. Bland v. Baxter Regional Medical Center, Full Workers' Compensation Commission, Opinion filed August 16, 2005 (F204378), I find that the claimant's constitutional challenge is without merit.

2. Nature of the Back Injury Claims Filed

The respondents assert that the claimant's Form AR-C filled out on July 18, 2002 filed a claim specifically for back injuries allegedly sustained by specific incidents which occurred on August 15, 2000 and on October 8, 2001, and that the claimant did not file the claim at that time for a gradual onset type of back injury. The accident information section of the claimant's Form AR-C signed on July 18, 2002 provides:

Briefly describe the part of body injured and cause of injury:
On August 15, 2002, she was mopping a patient's room and lifted up a stool and felt a twist in her back. On August 11, 2001, she hit her head on the corner of the chemical machine and on October 8, 2001 she was mopping and twisted her back.

Within the section of the form entitled "Place of Accident" the AR-C states "Mountain Home, AR" Under the

section of the form requesting "Date of Accident" the form states "on or about 8/15/00 & 1/11/00 10/08/01".

As a practical matter, I note that the Form AR-C adopted by the Commission, as revised on January 1, 2001, refers to a place of accident, and a date of accident, and therefore arguably causes some ambiguity in cases where an injury may not be caused by an accident, i.e. a specific incident identifiable by time and place of occurrence. I note that the information that the claimant provided on the Form AR-C on July 18, 2002 does not specifically indicate that she is limiting her legal remedies to injuries only caused by a specific incident. I likewise conclude from the prehearing order filed in this case that the claimant's prehearing contentions likewise did not intentionally limit her back injury claim to an injury caused by specific incident. I find that claimant's Form AR-C signed on July 18, 2002 provided the respondents adequate notice of alleged back injury or injuries which could have been sustained either by specific incidents that occurred on August 15, 2000 and/or on October 8, 2001, or by gradual onset of an injury which manifested itself on August 15, 2000 or on October 8, 2001.

3. Compensability of Alleged Work Related Back Injury

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In Wal-Mart Stores v. Leach, 74 Ark. App. 231, 48 S.W.3d 540 (2001), the Arkansas Court of Appeals summarized the requirements for establishing a compensable gradual onset low back injury as follows:

When a claimant requests benefits for an injury characterized by gradual onset, Arkansas Code Annotated section 11-9-102(4)(A)(ii) (Supp. 1999) controls, defining "compensable injury" as follows:

(4)(A)(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of

employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

. . . .

(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

A claimant seeking benefits for a gradual-onset injury must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was a major cause of the disability or need for treatment. *Freeman, supra*. Furthermore, objective medical evidence is necessary to establish the existence and extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999).

In *Pina v. Wal-Mart Stores, Inc.*, ___ Ark. App. ___, ___ S.W.3d ___ (CA04-1045 May 11, 2005), the Arkansas Court of Appeals noted that it has long been held that the statute of limitations does not commence to run until the true extent of the injury manifests itself and causes an incapacity to earn sufficient to give rise to a claim for disability benefits. An injury manifests itself when a person becomes aware of their symptoms, not when the person becomes aware

of the diagnosis of the alleged work relativeness of these symptoms. Id.

In the present case, the claimant, who I found to be a very credible witness, testified that she began work at Baxter Regional Medical Center in December of 1996. The claimant testified that her back problems started in January of 1999. (T. 15). In 1999 she experienced at least two lifting incidents. The first caused her to miss three days of work. After the second incident, she missed three weeks of work. (T. 31). The claimant testified that she had as many of 15 perceived injuries while working at Baxter. (T. 32).

The claimant testified that the medical notation of soreness in her lumbo sacral spine identified on May 3, 1999 has never gone away. In addition to her 1999 back problems, the claimant described an incident in 2000 where her back pain became severe, and another incident in 2001 where her back pain became severe. In this regard, the claimant testified that on August 15, 2000 while mopping up spilled coffee, she lifted a stool, and she felt her back. It was hurting and felt like she had a knot. (T. 11-12). On October 8, 2001, her back also began hurting more while performing her mopping duties. Ms. DeWeese testified that

she was fired on approximately November 14, 2001 and at that time was told that she was not performing her work in the proper time, that housekeeping was too strenuous for her, and that if she kept doing housekeeping she would hurt herself.

At the start of the hearing, the claimant's attorney explained that this case hinges, to a large extent, on whether or not there are objective findings of injury. The claimant's attorney noted the finding of disc bulging in the lumbar spine indicated by MRI performed on December 6, 2002, and Dr. Schmidt's deposition testimony that Dr. Schmidt did not consider these disc bulges to be minor, unlike Dr. Landrum. In addition to the results of the MRI performed on December 6, 2002, I note that the record also contains what appear to me to be objective notations of muscle spasm in the gluteus medius as observed by Dr. Charles Osgood on September 4, 2002.

In the present case, I find that the claimant has failed to establish the existence of any back injury allegedly sustained or manifested on or about either August 15, 2000 or October 18, 2001 with medical evidence supported by objective findings for the following reasons. First, I note that the chiropractor's observation of muscle spasm in

September of 2002 occurred some eleven months after Ms. DeWeese allegedly sustained her last injury at work in October of 2001, and I note that the MRI performed in December of 2002 occurred more than one year after Ms. DeWeese last allegedly sustained a back injury at work in October of 2001, and more than two years after Ms. DeWeese allegedly sustained a back injury at work in October of 2000. In light of the length of time that transpired between the dates of the alleged injuries and the dates of the treatment which led to observations of muscle spasm and MRI diagnosis, I find that the claimant has failed to establish a causal connection between either the muscle spasm notation or any MRI findings in 2002 with any incident or injury which allegedly occurred at work in 2000 or 2001.

Furthermore, I find that any MRI abnormality indicated in the December 2, 2002 study is not indicative of any new injury sustained in 2000 or in 2001. In this regard, I find credible the deposition testimony of Dr. William Landrum who compared MRI studies of the claimant's lumbar spine performed on December 6, 2002 and on April 2, 1999, and I am persuaded by Dr. Landrum's conclusions that a preponderance of the evidence establishes that the disc bulging observed in the 2002 study progressed very minimally as compared to

the bulging indicated on the earlier April 2, 1999 MRI study. I note that the claimant missed work for back problems in 1999 and experienced persistent back problems at work in 1999, in 2000, and in 2001. I find credible Dr. Landrum's testimony that degenerative disc disease is very common in people who do not have any trauma. (R. Ex. 2 P. 11).

In addition, in light of the claimant's testimony that her back problems began in 1999 and never resolved, I find that the claimant has failed to establish by a preponderance of the evidence that her current back condition was caused by the specific incidents of lifting a stool on August 15, 2000, by the specific action of mopping on October 8, 2001, or occurred in a gradual onset nature where the injury manifested itself either in August of 2000 or in October of 2001. To the contrary, the preponderance of the evidence establishes that the claimant became aware of her ongoing back symptoms during the first half of 1999, that she missed sufficient time during 1999 to be entitled to disability compensation in 1999 if her back problems were compensable, and that any gradual onset back injury which she sustained therefore manifested itself in 1999, not in August of 2000 or in October of 2001.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer-employee relationship existed at all times pertinent to this claim.
2. The claimant's average weekly wage was \$291.93. Her compensation rate for temporary total disability is \$195.00 per week.
3. The respondents controvert this claim in its entirety.
4. The respondent employer is properly captioned "Baxter County Regional Medical Center" not "Baxter County Regional Hospital".
5. The claimant has failed to establish by a preponderance of the evidence that she sustained a compensable back injury.

ORDER

For the reasons explained herein, this claim for benefits must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge