

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500284

BRENDA F. HIXSON, EMPLOYEE	CLAIMANT
ARK. DEPARTMENT OF HEALTH, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 15, 2006

Hearing held November 23, 2005, before the HONORABLE DALE DOUTHIT, Administrative Law Judge, at Mountain Home, Baxter County, Arkansas.

Claimant represented by HON. FREDERICK S. "RICK" SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by HON. RICHARD S. SMITH, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on November 23, 2005 in Mountain Home, Arkansas. A prehearing order was entered in this case on August 23, 2005. The prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the full hearing. A copy of the prehearing order was marked Commission Exhibit "1" to the hearing record.

The following stipulations were submitted by the parties during the full hearing and are hereby accepted:

- 1) The employer-employee-carrier relationship existed at all relevant times, including August 24, 2004.
- 2) The respondents controverted this claim in its entirety; however, respondents agree to pay for the claimant's 1/12/05 visit with Dr. McBride and the subsequent MRI.

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The parties agreed the following issues would be presented for determination at the full hearing:

- 1) Whether the claimant sustained a compensable left shoulder injury and/or a compensable neck injury on August 24, 2004.
- 2) If compensability is overcome, whether the claimant is entitled to associated medical treatment, TTD benefits from December 3, 2004 through February 3, 2005, and attorney's fees.
- 3) Determination of claimant's average weekly wage and applicable compensation rates.
- 4) Administrative Law Judge recusal.
- 5) Constitutionality of the Arkansas Workers' Compensation Law.

At the hearing, the claimant contended, in summary, that she sustained compensable injuries to her shoulder and neck on or about August 24, 2004, which arose out of the course and scope of her employment with the respondents. That as a result of these compensable injuries, she is entitled to associated medical benefits, TTD benefits from December 3, 2004 through February 3, 2005, and attorney's fees. The claimant reserved all issues related to permanent impairment.

Respondents contended, in summary, that the evidence does not establish that the claimant sustained a compensable injury at work. Specifically, the evidence does not establish objective findings of an injury or a causal connection between the claimant's symptoms and any event at work. Further, respondents contended there is no contractual guarantee with home health aides of any particular hourly rate per week.

DISCUSSION

A. History

The claimant, age 51, testified that on August 24, 2004, in her capacity as a home health aid, she sustained compensable injuries to her neck and shoulder. The claimant specifically stated that on that date she was at a client's house, and while attempting to lift boxes of Depends, she felt something pull in her left upper extremity and neck. (T. pg. 20, lns. 12-20)

The claimant testified she continued to work, but reported the incident the next day, August 25, 2004, to her employer. The medical records introduced at the full hearing indicate the claimant did not seek medical attention for the alleged work related incident until December 3, 2004. (CX-1, pg. 1) According to the claimant's testimony, it appears the claimant only missed one day of work after the alleged incident up until she went to the doctor on December 3, 2004.

On June 10, 2004, the claimant underwent an MRI of the left upper extremity. The MRI reported the following impressions:

"A tiny amount of signal in the rotator cuff might represent tendonitis. I do not see any obvious full-thickness rotator cuff tear nor other significant abnormality." (CX-1, pg. 5)

B. Adjudication

Arkansas Code Annotated §11-9-103(4)(A) defines "compensable injury" as:

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aides, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place

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of occurrence.

A compensable injury must be established by medical evidence supported by objective findings A.C.A. §11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. A.C.A. §11-9-102(16)(A)(i) The claimant's burden of proof shall be a preponderance of the evidence. A.C.A. §11-9-102(4)(E)(i)

In the case at hand, I find the claimant did not establish a compensable injury by medical evidence supported by objective findings. The claimant testified she felt "something in my arm pull" as a result of a specific incident on August 24, 2004. Although the medical reports indicate the claimant was diagnosed with "rotator cuff sprain" and "minimal tendonitis", there are no reports of swelling, bruising, or any other objective findings. The MRI of claimant's left upper extremity conducted on January 10, 2005 revealed "A tiny amount of signal in the rotator cuff might represent tendonitis. I do not see an obvious full thickness rotator cuff tear, nor any other significant abnormality. (CX-1, pg. 5) (Emphasis added.) I do not find that the possible tendonitis is sufficient objective medical finding to establish a compensable injury on August 24, 2004.

The Full Commission was faced with a similar situation in the case of **Hassler v.**

Thomas and Betts Corporation, 2005 AWCC 215, Claim No. F403780, Opinion filed

October 19, 2005. In the Hassler case the Full Commission held as follows:

"The Full Commission does not find that the "mild tendonitis" and "small amount of fluid signal" shown on MRI are objective findings establishing a compensable injury to the claimant's right shoulder occurring on March 23, 2004."

The claimant has introduced twelve pages of medical documentation, none of which

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evidences objective findings of injury to the claimant's left shoulder or neck. As such, I find the claimant has failed to prove compensable injuries to either her left shoulder or neck supported by objective medical findings.

Further, the claimant waited nearly 100 days after the alleged incident to seek medical attention. During that time, the claimant continued to work. Not until December 3, 2005 did the claimant go to the doctor for the alleged injury. The large block of time between the alleged incident and medical treatment, coupled with the doctor's reports, leads this examiner to find the claimant has not meet her burden of proof in establishing her alleged injury arose out of and in the course of her employment. Even if one were to find the tendonitis to be an objective finding, the claimant did not prove by a preponderance of the evidence that the tendonitis arose out of and in the course of her employment with the respondent employer.

C) 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 only requested to submit the attached exhibit in support of these matters rather than to address them on the record at the full hearing.

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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.

After applying the Commission Rules, the Code of Judicial Conduct and Arkansas Case Law, I find the claimant's motion for all Administrative Law Judges to recuse is without merit and must be denied. The Full Commission has previously considered and rejected the claimant's constitutional arguments in a prior published decision, I find 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), copy of which is blue backed as Commission

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Exhibit "C". I find that the claimant's constitutional challenges are without merit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had the opportunity to hear the testimony of the witness and to observe her demeanor, and without giving the benefit of the doubt to either party, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704:

- 1) The Parties stipulations are hereby accepted as fact.
- 2) Claimant did not submit credible evidence of bias, pressure or any other legitimate reason evidencing sufficient grounds for the recusal of this ALJ, and therefore the claimant's motion to recuse is denied.
- 3) Claimant's constitutional challenges to the Commission's adjudication process should be, and hereby are rejected. Claimant has failed to show how the Commission's adjudication process violates the separation of process principle or does not comport with procedural due process.
- 4) The claimant has failed to prove by a preponderance of the evidence that she sustained compensable injuries to her left shoulder or neck arising out of and in the course of her employment with the respondents, supported by objective medical findings.
- 5) Due to the lack of compensable injury, issues two and three outlined herein are rendered moot.

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ORDER

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

IT IS SO ORDERED.

DALE DOUTHIT
Administrative Law Judge