BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F304373 & F304374

FERN K. RICHMOND, EMPLOYEE	**CLAIMANT**
BAXTER HEALTHCARE, INC., EMPLOYER	**RESPONDENT**
LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER	**RESPONDENT**

OPINION FILED MARCH 1, 2006

A hearing in this case was conducted on September 21, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Mountain Home, Baxter County, Arkansas.

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

Respondents were represented by Tom Harper, Jr., Attorney at Law, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on January 25, 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; these stipulations were confirmed at the hearing and are hereby accepted.

1. The employee-employer-carrier relationship existed at all relevant times.

2. Claimant's average weekly wage in November, 2001 was $439.20; therefore, Claimant's temporary total disability rate is $293.00, and her permanent partial disability rate is $220.00.

3. Respondents controvert both claims.

At the September 21, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. Because the hearing did not involve the question of indemnity benefits, the parties agreed that issue number 5, concerning Claimant's entitlement to an attorney's fee, should be stricken. The parties agreed that the issues to be litigated and resolved are therefore limited to the following:

1. Whether Claimant suffered a compensable gradual low back injury in November, 2001.

2. Whether Claimant suffered a compensable injury to her right ankle on June 4, 2002.

3. Whether Claimant reported the alleged injuries to the respondent employer.

4. Whether Claimant is entitled to reasonably necessary medical benefits.

MOTION TO RECUSE

Prior to the hearing, Claimant filed a Motion to Recuse and a Brief in Support Thereof. At the September 21, 2005 hearing, the parties were notified that the following items will be blue-backed and made a part of the Commission's record, with regard to this Motion:

1. Claimant's May 7, 2005 letter to the Attorney General;

2. Claimant's Motion to Recuse;

3. Claimant's Brief in support of that Motion;

4. Respondents' Response received on May 23, 2005;

5. Respondents' Brief in support of that Response; and

6. An article authored by Claimant's attorney.

In this opinion, I must first address the admissibility of two affidavits attached to Claimant's

brief and then address the Motion to Recuse itself.

A. Admissibility of Affidavits

_____Claimant moved to introduce two affidavits: the affidavit of former Administrative Law Judge C. Michael White marked as Exhibit "A" and the affidavit of former Administrative Law Judge William "Bill" Daniels marked as Exhibit "B." Respondents' attorney objected to the admission of these affidavits "because it deprives me of the right to cross examine the witness." Claimant's attorney argued that Respondents have no interest in the Motion to Recuse; Respondents' attorney disagreed.

I find that Respondents do have an interest in Claimant's Motion to Recuse. All parties to this proceeding have an interest in the resolution of this claim. Recusal by the Commission's administrative law judges, as sought by Claimant, would affect the parties' interest by delaying the claim's resolution, at the very least. Thus, Respondents certainly do have an interest in cross-examining the authors of these affidavits that support the Motion to Recuse.

Because the authors of the affidavits were not available for cross-examination by Respondents, I find that the affidavits should not be admitted into evidence. Although the Commission is not bound by technical rules of evidence, it must adhere to basic rules of fair play such as recognizing the right of cross-examination. See St. Paul Ins. Co. v. Touzin, 267 Ark. 539, 542, 592 S.W.2d 447, ___ (1980). A party appearing before the Commission has the right to cross-examine a witness. See Davis v. Arkansas Best Freight Sys., 239 Ark. 632, 634-35, 393 S.W.2d 337, ___ (1965). Since Claimant did not present the authors of the affidavits for cross-examination, Respondents were denied this right, so the affidavits will not be admitted into evidence. See id. at 635-36, 393 S.W.2d at ___.

B. Motion to Recuse

Claimant's Motion to Recuse raises a number of arguments that essentially challenge the constitutionality of the Arkansas Workers' Compensation Commission. She notes that "Judge Arey would not consciously intend to discriminate against the claimant in this case." However, Claimant argues that all administrative law judges are under pressure to rule against claimants. Claimant therefore seeks my recusal, the recusal of all other administrative law judges, and the appointment of a special administrative law judge (without specifying how that might be accomplished).

It should be noted that the Full Commission has rejected these arguments in other claims. See Long v. Wal-Mart Stores, Inc., Full Workers' Compensation Commission Opinion filed January 25, 2006 (F309931) (citing cases addressing Claimant's issues in other proceedings).

Further, the rule of necessity mandates that I remain on this claim. The rule of necessity 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., 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, there is no statutory procedure in place to address Claimant's request for the appointment of a special administrative law judge. Therefore, if one administrative law judge must recuse for the reasons given, all administrative law judges must recuse; and, even if one could be appointed, a special administrative law judge would

be subject to the same infirmities which form the basis for Claimant's challenges and recusal motion. If all administrative law judges must recuse and a special administrative law judge cannot be appointed, this claim could not be heard. Therefore, pursuant to the rule of necessity, and in light of the Commission's rejection of Claimant's arguments in other cases, I will remain on this claim. Claimant's Motion to Recuse is denied.

POST-HEARING BRIEF

At the conclusion of the September 21, 2005 hearing, the parties were invited to submit post-hearing briefs as mentioned in the Prehearing Order. The Commission received Respondents' Post-Hearing Brief on October 20, 2005; apparently, Claimant did not submit such a brief. Respondents' Post-Hearing Brief will be blue-backed and made a part of the record.

DISCUSSION

A. Compensability of Low Back Injury

The medical records document Claimant's preexisting complaints of back pain that were not related to work. On May 23, 2000, Dr. Michael Hagaman recorded that Claimant came in "complaining of back, hips, and legs bothering her. Mostly in the sacroiliac joint, mostly early in the morning, gets better somewhat throughout the day when she gets up and moves around." A nurse practitioner recorded the following on June 5, 2000:

> A few days later [after May 11, 2000] she was taking care of an elderly family member who has since deceased and was lifting her, pushing her wheel-chair, and she hurt her back. Back pain became excruciating over Memorial Day. It was radiating down her leg. She was then seen by Dr. Hagaman and treated. However, she relates the pain is no better.

Claimant signed a disability form on June 6, 2000. She listed the cause of disability as

"[b]ack, leg, hip pain (not related to work)." She noted that this condition was first treated by a physician on May 23, 2000. On June 12, 2000, Claimant reported to the nurse practitioner that "her symptoms have improved greatly on the Vioxx and Ultram." Then, on July 18, 2000, Claimant complained of "back pain still being a problem in her low back down into her left leg. Vioxx didn't help and she feels like hips and legs are painful. There is no numbness down either leg though."

On October 23, 2001, the nurse practitioner recorded Claimant's history of "3 mo intermittent Hx of lower back, hip, and buttock discomfort." Apparently, Claimant related this problem to her work. On November 12, 2001, Claimant again presented with back pain. The note records:

> 58 YO presents to the clinic today w/ more back pain. This lady was seen initially by me on 10-23-01 for what appeared to be a lumbar sacral strain, probably associated w/ repetitious work functions. She reports that she has discomfort into both buttocks and sometimes down both legs.
> ....
>
> It should be noted that she had a normal lumbosacral XR on 7-19-00, she recalls no trauma to her back, just an insidious amount of low back discomfort off and on while working.

An MRI of Claimant's lumbar spine taken November 13, 2001 reports the following impressions: "1. Severe degenerative disk disease and diskitus present at L4-L5 due to long-standing degenerative disk disease. 2. Disk disease is also demonstrated at L3-L4 and L5-S1. 3. Herniated nucleus pulposus is demonstrated at all three levels (L3-L4, L4-L5, and L5-S1.)"

Respondents introduced a group benefits form dated December 5, 2001; this form purports to record a conversation between Claimant and a representative of the group benefits agency. Under the heading "Details of Medical Condition," the form notes

Claimant "[h]ad MRI, has two degenerative disks, one is bulging, will see specialist, symptoms incl constant pain, goes into hips and legs, feels like 'charlie horses', symptoms began 6 mos ago." Under the heading "If chronic condition, what has changed?," the form states "1 yr ago was treated for same thing, has recurred."

Dr. Hagaman referred Claimant to Dr. John Ferguson for further back treatment. She presented to Dr. Ferguson on January 2, 2002; he recorded the following history.

> Fern Richmond is a 58-year-old white female referred by Dr. Michael Hagaman for evaluation of chronic back and leg pain of one year's duration and progressive severity. She denies any specific injury. She reports that the hip and leg is more severe than the back pain.... Left leg pain is more severe than right and the great toe is more involved than the little toe.

Dr. Ferguson recorded an impression of spinal stenosis at L3-L4 and L4-L5 with diffuse lumbar spondylosis. An operative note dated February 21, 2002 indicates that Claimant underwent "[b]ilateral nerve root decompression, medial facetectomy, and foraminotomy L3-4, L4-5."

Claimant testified extensively concerning the nature and pace of her job duties. When asked to describe what motion there was to her back, she replied: "I mean, you move your back back and forth sitting, you can feel a motion in your back."

> Q. Okay. Fern, when did you learn that your back condition was related to your work?
>
> A. Well, it would hurt a lot. And I took pain pills, usually, with me, you know, to take, instead of going to the nurse's station. Because we only got a ten-minute break and twenty minutes for lunch, and it was hard to find somebody to take your place. And, anyway, I, you know, just -- I'd go home and sometimes I'd think, I just can't get out of the car. And sometimes, you know, getting ready for work and stuff, you know, it was painful.

On cross-examination, Claimant elaborated a bit on her history of back pain and how much of that history was reported to Dr. Ferguson.

> Q. Is it fair for me to say that you've been treated for back pain fairly regularly since June 5 of 2000, when whatever happened with the wheelchair happened?
>
> A. Well, I was treated before that. I mean, you know, I've had back pain off and on, you know, ever since I -- well, probably after three or four years of work.
>
> Q. A long time. Is there any reason you didn't mention that June 5, 2000 incident to Dr. Ferguson?
>
> A. You mean about my pain?
>
> Q. Yes, ma'am.
>
> A. Ongoing? Yes, I did.
>
> Q. Did you tell him you had excruciating back pain because of the wheelchair incident?
>
> A. Well, no, I don't suppose. Because I didn't know that was even in the report from Dr. Hagaman.

On August 22, 2003, Dr. Ferguson wrote a letter to Respondents' attorney that included the following:

> I have reviewed Mrs. Richmond's chart and do not find anything that specifically relates her back problems to her job. It is certainly true that our life activities are responsible for progressive injuries; however, without a definitive accident reported, it would be very difficult to directly relate Mrs. Richmond's spine condition to her work.

However, Claimant's attorney prepared a note that Dr. Ferguson signed on December 9, 2004. He opined that "the 'major cause' of her back problems [more than 50%] arises out of her employment there for those 11 years." He further opined that "even with the pre-existing degenerative problems in her back, the job based upon the history and my clinical findings was the triggering mechanism that required the surgery performed by me in 2002 and 2004."

Having authored these inconsistent statements, Dr. Ferguson addressed them both in a letter to Respondents' attorney dated February 19, 2005.

> [I]t would appear that I have created what is probably an irresolvable situation. Obviously at the time I signed the note for Mrs. Richmond's attorney on 12/09/04 I had forgotten my previous letter to you of 08/22/03.
>
> In fact, as I review the situation and try to evaluate my thinking at each point, I must say that both situations are probably true, i.e. it is probably true that her problems came from her work at Baxter Healthcare, however, there is nothing in the medical record that identifies a specific accident. It therefore is difficult to relate her spine condition to her work, although it "probably" is related to it.
>
> Having created the above quagmire, I suppose the best thing to do would be to remove myself from the debate and turn this situation over to other physicians of your choosing who might evaluate the situation.

Claimant contends that she sustained a compensable gradual low back injury as defined by Ark. Code Ann. § 11-9-102(4)(A)(ii)(b). Claimant's condition is compensable only if the alleged compensable injury is the major cause of her disability or need for treatment. Ark. Code Ann. § 11-9-102(4)(E)(ii). "Major cause" means more than fifty percent (50%) of the cause. Ark. Code Ann. § 11-9-102(14)(A). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B).

Claimant carries the burden of proving the compensability of her claim, including the existence of major cause, by a preponderance of the evidence. Ark. Code Ann. §§ 11-9-102(4)(E)(ii) and (14)(B). "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 has not sustained her burden of proving by a preponderance of the evidence that her alleged compensable injury is the major cause of her disability or need for treatment. The medical records document that Claimant had a preexisting low back problem. A specific incident, not related to her work, harmed her low back in May of 2000 to the extent that she sought medical treatment. Claimant's November 13, 2001 MRI notes "long-standing" degenerative disc disease. Given these records, the preponderance of the evidence will not sustain a finding that Claimant's alleged work injury is the major cause for her current condition.

Further, Dr. Ferguson's statements concerning compensability are not stated within a reasonable degree of medical certainty. While Dr. Ferguson's December 9, 2004 endorsement of Claimant's attorney's statement supports Claimant's position, it is inconsistent with Dr. Ferguson's August 22, 2003 letter. Dr. Ferguson's February 19, 2005 letter further muddies the water. Taken together, these three statements indicate that Dr. Ferguson is uncertain as to the major cause of Claimant's further need for treatment.

B. Compensability of Right Ankle Injury

Claimant returned to work after her February 21, 2002 back surgery. She described an injury to her right ankle that occurred on June 4, 2002.

> I had been to the rest room, and the girl -- a girl had took my place, because they don't -- you know, you have to have somebody take your place. And I came back and I started to step up to my work station, and it happened so fast I really don't -- I don't know. You know, we would get parts on the floor some of the time, and you just can't keep them all picked up, because you can't do it yourself. And the supply girl's busy and the cleaning girl goes through two or three different rooms picking up and cleaning. And so I don't know if I stepped on a part. I don't know what happened. It just went over and popped, and I couldn't touch my toe or my heel to the floor. And I would have fell if I wouldn't have caught the chair.

Claimant described her chair as a stool; another witness, Linda Smith, described a round bar that ran around the legs of the stool. Claimant testified that she "didn't ever have to step on that thing. I was tall enough, you know, usually, that I could get on it." On direct examination Claimant admitted that her ankles would turn "occasionally."

Smith, who worked with Claimant, testified that she glanced at Claimant as she returned from the restroom: "She was trying to get up in her chair, and I could tell she had hurt her ankle really bad, by the look of pain on her face...." Smith noticed that Claimant was walking normally as she returned from the restroom, and that she first appeared to change the way she walked "[w]hen she tried to get up in the stool and she couldn't." She recalled that Claimant said "I was trying to get up in my chair, and I think I broke my ankle."

Another co-worker, Annette Tilley, testified that she spoke to Claimant after her ankle injury as Claimant was being taken by wheelchair to see a doctor.

> Q. All right. And did she tell you how she had hurt her ankle, or did she say anything about the ankle as she went by you?
>
> A. She said she was getting up in her chair. That, you know, her ankle gave way. That she didn't know, for sure, what had happened that it happened so fast.

Tilley recalled that Claimant appeared to be in a lot of pain.

Amy Thalmueller, a registered nurse employed by the Respondent employer, identified the document found on page 23 of Respondent's Exhibit #2. She took a wheelchair to pick up Claimant after her ankle injury had been reported. She did not believe Claimant was in such pain that she had no cognizance of what she was saying.

> Q. What did she tell you?
>
> A. She told me that she -- she said she had weak ankles and she said her left ankle had given out on her multiple times and just like the right one had

> that day.
> ....
>
> Q. Did you ask her whether there were any obstructions in the path? Or whether she slipped?
>
> A. Yes, I did.
>
> Q. What did she say?
>
> A. She said, no there was not.
>
> Q. Okay. Did she ever at any time tell you that her -- somehow her work activity had caused this injury?
>
> A. No, she did not.
>
> Q. Just that her ankle had given way?
>
> A. She said she had weak ankles.

Thalmueller's testimony is essentially identical to the statement she signed, dated June 4, 2002, found at page 23 of Respondents' Exhibit #2.

Claimant subsequently sought treatment for her right ankle injury. Dr. Hagaman or his nurse recorded in a note dated June 4, 2002, the date of the injury, that Claimant "suffered a right ankle sprain at work.... She was returning to the line and got tripped up and sprained her right ankle." He noted "moderate swelling" in Claimant's right ankle and provided some treatment. A study of that same date recorded an impression of "[n]ormal x-ray of right ankle."

Claimant presented to Dr. Ronald Pak for a disability assessment on July 25, 2002. He recorded the following history:

> When asked what the most difficult problem is, she indicates that her ankles "turn over." She apparently twists her ankles repeatedly and has done this over the last two years. It is bad enough that she will fall. She estimates that she has fallen 20 times in the last couple of years. She did sprain her ankle

> June 4th of this year when walking and her ankle just gave out.... She is unsure why she falls but she did have problems with increasing back pain for many years that became worse last November.

Dr. Pak recorded an impression of "[c]hronic difficulty with mobility related to lower extremity weakness."

Dr. Paul Shurnas also examined Claimant; on October 23, 2002, he recorded the following history.

> She had a severe sprain on June 4th while at work and felt a pop. She was basically treated nonoperatively and she did okay but has continued to have pain behind the fibula with popping. Her foot gives way too, without any provocation. She has problems on uneven ground as well.

Claimant completed a medical history form on October 23, 2002. She noted: "My ankles turn sometimes when I'm walking without warning. It makes me fall sometimes." She described her June 4, 2002 injury: "I was coming back from break & stepped up to my station to work & my ankle just pop[p]ed & turned over...." She noted that "for 6 or 7 years I could be walking & my ankle would turn over and I'd fall."

Claimant contends that she sustained a compensable specific incident injury to her right ankle on June 4, 2002. Respondents contend that Claimant's injury is idiopathic and thus not compensable.

> An idiopathic injury is one whose cause is personal in nature, or peculiar to the individual. Injuries sustained due to an unexplained cause are different from injuries where the cause is idiopathic. Where a claimant suffers an unexplained injury at work, it is generally compensable. Because an idiopathic injury is not related to employment, it is generally not compensable unless conditions related to the employment contribute to the risk of injury or aggravate the injury.

Swaim v. Wal-Mart Associates, ___ Ark. App. ___, ___ S.W.3d ___ (May 25, 2005) (citations omitted).

I find that Claimant has not sustained her burden of proving by a preponderance of the evidence that she suffered a compensable specific incident injury to her right ankle on June 4, 2002. Specifically, the preponderance of the evidence indicates that Claimant's injury is idiopathic, and thus not compensable. Claimant's injury is not unexplained: Dr. Pak's July 25, 2002 note documents Claimant's history of "repeatedly" twisting or turning her ankles for two years, while her October 23, 2002 medical history states this problem had been ongoing for six or seven years. Claimant admitted at the hearing that her ankles would turn "occasionally." Tilley testified that Claimant told her that Claimant's ankle "gave way" and that she didn't know "for sure, what had happened." Claimant told Thalmueller that Claimant "had weak ankles." Claimant's condition is not related to her employment, but is personal in nature.

Further, Claimant's employment conditions did not contribute to her risk of injury or aggravate the injury. Claimant testified that she did not need to step up on the bar that ran around the legs of the stool. Claimant speculated that there may have been parts on the floor, but Thalmueller testified that immediately after the accident, Claimant told her there were not any obstructions in her path. Thus, this is not a compensable idiopathic injury.

C. Remaining Issues

It is not necessary to discuss whether Claimant reported the alleged injuries to her employer or whether Claimant is entitled to reasonably necessary medical benefits. Claimant is not entitled to medical benefits as provided by law unless she is determined to have a compensable injury. See Ark. Code Ann. § 11-9-102(4)(F)(i). Likewise, if Claimant did not sustain a compensable injury, the issue of reporting such an injury need not be addressed.

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 at all relevant times.

3. Claimant's average weekly wage in November, 2001 was $439.20; therefore, Claimant's temporary total disability rate is $293.00, and her permanent partial disability rate is $220.00.

4. Respondents controvert both claims.

5. Because Claimant did not present the authors of the affidavits marked Exhibit "A" and Exhibit "B," attached to her Brief in support of her Motion to Recuse, those affidavits will not be admitted into evidence, upon Respondents' objection to the denial of their right of cross-examination.

6. I find that Claimant's Motion to Recuse should be, and hereby is, denied. In other cases, the Commission has rejected the arguments made by Claimant in this case concerning the constitutionality of the Commission. Further, the rule of necessity mandates that I remain on this claim.

7. Claimant did not sustain her burden of proving by a preponderance of the evidence that she suffered a compensable gradual low back injury in November, 2001. The medical records document Claimant's preexisting low back problem, including a specific incident not related to her work that harmed her low back in May of 2000. Further, Claimant suffered from "long-standing" degenerative disc disease. Claimant thus failed to prove that her alleged compensable injury is the major cause of her disability or need for treatment; the statements of Dr. Ferguson are inconclusive on this point.

8. Claimant did not sustain her burden of proving by a preponderance of the

evidence that she suffered a compensable injury to her right ankle on June 4, 2002. Claimant's injury was idiopathic in nature: she has a history of twisting or turning her ankles and the testimony indicates that her ankle simply "gave way" on the date in question. There is no proof that conditions related to Claimant's employment contributed to the risk of injury or aggravated the injury.

9. Because Claimant failed to prove any compensable injury, it is not necessary to discuss the remaining issues in this case.

ORDER

Claimant failed to sustain her burden of proving that she suffered a compensable injury, either to her low back or to her right ankle. Therefore, the above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

_____
D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml