

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403235

MARVIN RIPPE,
EMPLOYEE

CLAIMANT

DELBERT HOOTEN LOGGING,
EMPLOYER

RESPONDENT

AMERICAN INTERSTATE INS. CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 9, 2006

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

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

The respondents were represented by HONORABLE MICHAEL RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on March 1, 2006 in Mountain Home, Arkansas. A prehearing order was entered in this case on December 9, 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 either in the prehearing order or during the course of the hearing and are hereby accepted:

1. The jurisdiction of the Commission.

2. The employee-employer relationship.
3. An injury to the claimant's head and elbow on 3-15-04. (The respondents do not stipulate to a brain injury)
4. Claimant's appropriate compensation rate for temporary total disability is \$199 per week.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

Claimant:

1. Administrative Law Judge Recusal.
2. Constitutionality of the Arkansas Workers' Compensation Law.
3. Reasonable and necessary medical care. The claimant has suffered a traumatic brain injury and is having serious residual problems. Mr. Rippe is suffering from severe headaches.
4. Compensability of all injuries head, vision, back, neck, left arm and elbow.
5. Past due TTD - dates yet to be determined.
[Reserved]
6. Controverted attorney fees.

7. Average weekly wage \$300.00. [Resolved by stipulation].

Respondents:

1. The end of the healing period. [Reserved]
2. Attorneys fees.
3. Additional treatment.

The record consists of the March 1, 2006 hearing transcript and the exhibits contained therein.

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 he 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 and recusal arguments in the following decisions: Long v. Wal-Mart, Full Workers' Compensation Commission, Opinion filed January 25, 2006 (F309931); Edwards v. Galloway Sand & Gravel, Full Workers' Compensation Commission, Opinion filed October 11, 2005 (F109737); Plummer v. Wal-Mart, Full Workers' Compensation Commission, Opinion filed October 10, 2005 (F209057); 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 his constitutional arguments, I find that his 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 and recusal arguments in prior published decisions, I find that the claimant's request that I recuse in order to avoid rendering a decision on her constitutional challenge is moot. Based on the factual and legal conclusions of the Full Commission in the cases cited in the previous paragraph, I find that the claimant's constitutional challenge is without merit.

2. Compensability of Alleged Traumatic Brain Injury, Vision Difficulties, Back, Neck, and Left Arm Injuries.

The claimant sustained an admittedly compensable scalp laceration and an admittedly compensable elbow injury on March 15, 2004, when a tree fell off a logging truck and struck the claimant as he was working for Delbert Hooten Logging.

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 the present case, the medical record indicates that the claimant was initially seen on an Emergency Room basis at Baptist Health Medical Center in Heber Springs on March 15, 2004. Mr. Rippe later underwent inpatient hospitalization at the White County Medical Center in Searcy from March 20, 2004 until he was discharged on March 23, 2004. Mr. Rippe was followed after his discharge by Dr. David L. Staggs who also referred Mr. Rippe to an eye doctor and to Dr. Kyle Blickenstaff for treatment of Mr. Rippe's elbow. The claimant also presented to Vann Smith, a neuropsychologist, for evaluation on August 6, 2004 for perceived cognitive difficulties.

After reviewing the entire medical record, I have found no reference in the medical record to any alleged neck or back injury related to trauma sustained on March 15, 2004. I therefore find that the claimant has failed to establish by a preponderance of the evidence that he sustained any

degree of neck or back injury on March 15, 2004, which arose out of and in the scope of his employment or that was established by medical evidence supported by objective findings.

Likewise, I find no objective findings in the April 21, 2004 office note of the unnamed eye doctor which purport to relate to any trauma that Mr. Rippe sustained to any part of his body on March 15, 2004. Specifically, the eye doctor has noted that he did not see any "floaters", and also wrote that Mr. Rippe sustained "no ocular injuries". In light of these findings, I find that Mr. Rippe has failed to establish by a preponderance of the credible evidence that he sustained any injury to his vision by any type of eye injury causally related to the trauma he sustained on March 15, 2004, and Mr. Rippe has also failed to establish the existence of any eye injury by medical evidence supported by objective findings.

To the extent that Mr. Ripper perhaps instead attributes his vision problems to a traumatic brain injury, and to the extent that Mr. Rippe has alleged that he sustained a compensable traumatic brain injury, I note that the only physician's interpretation of the CT Scan to the head which Mr. Rippe underwent indicates that the CT Scan

was normal. I recognize that Vann Smith has diagnosed organic brain dysfunction based on his neuropsychological testing performed on August 6, 2004. However, I understand that neuropsychological testing, without more, is not adequate to establish organic brain injury by "objective findings" within the meaning of Ark. Code. Ann. § 11-9-102(4)(D). See Watson v. Tayco, Inc. (McDonald's), 79 Ark. App. 250, 86 S.W.3d 18(2002).

Consequently, I am also constrained to find that the claimant has failed to establish his alleged organic brain injury by medical evidence supported by objective findings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee-employer relationship existed on March 15, 2004.
3. The claimant sustained admittedly compensable injuries to his head and elbow on 3-15-04.
4. The claimant's appropriate compensation rate for temporary total disability is \$199 per week.
5. The claimant has failed to establish by a preponderance of the evidence that he sustained a compensable brain injury, a compensable neck injury, a

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compensable back injury, or a compensable eye injury on
March 15, 2004.

ORDER

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

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge