

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E900428

SUSANNE SHAY, EMPLOYEE	CLAIMANT
FLEMING COMPANY, INC., EMPLOYER	RESPONDENT
ACE/USA INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 25, 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 BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on August 2, 2006 in Mountain Home, Arkansas. A prehearing order was entered in this case on January 25, 2006. 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 at the hearing and are hereby accepted:

1. That the Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. That the employee/employer relationship existed on or about November 20, 1997 and at all relevant times.

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

1. Compensability of neck injury, in addition to admittedly compensable left arm injury.
2. Unpaid medical bills related to the neck, and Dr. Michael Moore's March 18, 2002 bill.
3. TTD and permanent impairment related to the neck injury are reserved.
4. Controverted attorney's fees.
5. ALJ Recusal.
6. Constitutionality of the Arkansas Workers' Compensation Law.

The record consists of the three volume August 2, 2006 hearing transcript and the exhibits contained therein. In addition, Commission Exhibit 4, the record from a prior hearing on June 19, 2002 in this claim, has been retained in the Commission file under separate cover. I have also blue-

backed to designate as part of the record a copy of Commission Rule 099.30.

DISCUSSION

1. ALJ Recusal and Constitutionality of the Arkansas Workers' Compensation Law.

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 to recuse 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 the claimant's constitutional arguments, I find that the claimant's 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 the 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.

In addition, I note that the documents purportedly constituting evidence in support of claimant's constitutional arguments are contained on a CD. This CD cannot be admitted into the record as documentary evidence under Commission Rule 099.18. Therefore, in the present case, there is no evidence in the record supporting the claimant's constitutional arguments. Therefore, the claimant's constitutional arguments contained in his brief should not be addressed. See generally, Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 279, 72 S.W.3d 560, ___

(2002) (Declining to consider an argument unsupported by evidence).

2. Dr. Moore's March 18, 2002 Unpaid Medical Bill

At the start of the hearing held on August 2, 2006, Mr. Spencer explained that Ms. Shay has paid herself Dr. Moore's medical bill of \$461.10 and that she seeks reimbursement for that medical expense. Mr. Spencer indicated that this medical bill has been provided to respondents, and in support, Mr. Spencer provided in Claimant's Exhibit No. 5 a letter dated May 28, 2002 to Ms. Demory seeking payment/reimbursement for a number of expenses. Attached to that letter is a description of services for patient Susanne Shay, including what appear to be some type of codes, and amounts of payment made by the patient. On page 13 of the hearing transcript, Ms. Demory indicated that the respondents need some kind of bill or document from the doctor saying the amount that was paid so that the claimant can be reimbursed. On page 41 of the hearing transcript, Ms. Demory also asserted that the document attached to Mr. Spencer's May 28, 2002 letter does not comply with the requirements of Commission Rule 30.

Commission Rule 099.30 Section I. I. 4. provides "Billing for provider services shall be submitted on the

forms approved by the Commission: UB-92 and HFCA-1500." The claimant has the threshold burden of establishing when, if ever, any medical expenses at issue were submitted to the respondents for payment in accordance with Rule 099.30. Virgil C. Furr v. Bechtel Power Corporation, Full Workers' Compensation Commission, Opinion filed January 28, 2003 (E405149). The requirements of Rule 099.30 are non-discretionary. Burlington Industries v. Pickett, 336 Ark. 515, 988 S.W.2d 3 (1999).

In the present case, the statement from Arkansas Specialty Care Centers, P.A., dated June 11, 2003 does not purport to be a form UB-92 or a form HFCA-1500. On this record, I find that the claimant has failed to meet the threshold burden of establishing that the medical expense at issue was submitted to the respondent for payment in accordance with Rule 099.30.

3. Compensability Of The Claimant's Alleged Work Related Neck Injury.

In the present case, the claimant sustained a compensable left elbow injury on November 20, 1997, when she struck her elbow on a cooler door while protecting herself from a stack of falling bananas. Dr. Thomas Knox performed a left elbow extensor release on January 12, 1999 to treat

diagnosed refractory left elbow lateral epicondylitis. His February 11, 1999 follow up report indicates that the claimant's pre-surgical sharp pain was completely gone and that she had a little soreness in the elbow. However, on April 29, 1999, the claimant reported that her elbow had gone back to the way it was before since she had returned to work.

The claimant was evaluated by Dr. Michael Moore on March 18, 2002. He concluded that the majority of her symptoms at that time may be related to a radial tunnel syndrome. Dr. Reginald Rutherford performed electrodiagnostic testing to rule out co-morbid carpal tunnel syndrome referable to the clinical diagnosis of radial tunnel syndrome. Dr. Rutherford's September 9, 2002 test results were normal. However, Dr. Rutherford also performed a neurological evaluation on September 16, 2002, to assess the claimant's reported altered sensation in her left hand. Based on the altered sensation in the left hand, and a minor reflex abnormality involving the left leg and arm, Dr. Rutherford indicated that the claimant's clinical picture suggested demyelination of the claimant's central nervous system. Dr. Rutherford concluded on September 25, 2005 that cervical disk abnormalities at C3-4 and C4-5 with

spinal cord impingement at C4-5 accounted for the claimant's left hand sensory complaints and reflex changes.

Dr. Moore performed a left radial tunnel release on October 10, 2002. In a January 7, 2003 report, Dr. Moore indicated that the claimant's left forearm symptoms had resolved.

Meanwhile, Dr. Rutherford prescribed traction for the claimant's cervical condition and reported on January 7, 2003, that the claimant had no sensory deficit remaining in her left hand due to traction. Unfortunately, the claimant's symptoms worsened again by April 1, 2003, and the claimant ultimately underwent an anterior cervical decompression and fusion at the C4-5 level performed by Dr. Scott Schlesinger on May 6, 2003.

The claimant contends that she sustained a compensable neck injury, in addition to her compensable elbow injury during the incident when the bananas fell on her on November 20, 1997. To prove the occurrence of a compensable neck 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, I find that the claimant has failed to establish by a preponderance of the evidence that a neck injury allegedly sustained on November 20, 1997 is established by medical evidence supported by objective findings. In this regard, I note that Dr. Harter and Dr. Rutherford both interpreted a September 25, 2002 MRI as indicating disk herniation at C4-5 with cord compression. (R. Exh. 1 pgs 89 and 90). Certainly, there is no dispute that disk herniation can represent an objective finding to support the existence of a compensable injury. However, I also note that Dr. Schlesinger, who actually performed surgery and therefore observed and removed the material causing spinal compression, has described his findings as "longstanding *degenerative* spondylosis and spinal stenosis." (R. Exh. 1 p. 151, Emphasis mine). Because I accord Dr. Schlesinger's surgical findings great weight, and since Dr.

Schlesinger has described his findings as *degenerative*, the claimant has failed to establish that the surgical abnormalities treated by Dr. Schlesinger are objective findings that support the existence of a neck injury allegedly sustained on November 20, 1997.

In addition to failing to support the existence of an alleged November 20, 1997 neck injury with objective medical findings, I also find that the claimant has failed to establish by a preponderance of the credible evidence any causal connection between the incident that occurred on November 20, 1997, and the claimant's subsequent neck-related symptoms. In reaching that conclusion, I note that no physician stated an opinion in the record before me indicating that the claimant's spinal cord compression problems were caused by the incident on November 20, 1997. In fact, Dr. Schlesinger, the claimant's treating neurosurgeon, testified in his deposition that he could *not* state within a reasonable degree of medical certainty what caused the claimant's need for his services and surgery in 2003. (R. Exh. 3 p. 24).

Furthermore, I note again that Dr. Rutherford was the first physician to develop concern for a possible spinal component to the claimant's problems, and Dr. Rutherford's

concern originated in an evaluation related to the claimant's report of altered sensation in her left hand. (R. Exh. 1 p. 85). The claimant's hearing testimony, Dr. Rutherford's September 16, 2002 Consultation Report, and the information sheet completed for Dr. Schlesinger all indicate to me that the claimant's altered sensation in her left hand began in 1999 after Dr. Knox's surgery on January 20, 1999. (T. 85; R. Exh. 1 pgs. 85 and 129).

Finally, to the extent that the claimant's attorney has suggested, at least in Dr. Schlesinger's deposition, the possibility that the claimant was experiencing symptoms from her neck either instead of or concurrent with symptoms from tennis elbow and radial tunnel syndrome, I find persuasive the reports of Dr. Knox and Dr. Moore that their respective surgeries in 1999 and in 2002 improved the symptoms for which the treatment was provided. (R. Exh. 1 pgs. 54 and 124).

Consequently, in light of Dr. Schlesinger's inability to render a causation opinion within a reasonable degree of medical certainty based on information available to him, in light of the evidence establishing that the altered sensation in the claimant left hand did not begin after the November 20, 1997 incident until at least January 20, 1999,

and in light of the good results reported from the 1999 and 2002 surgeries for the conditions treated, I find that the claimant has failed to establish by a preponderance of the evidence any causal connection between the incident at work on November 20, 1997, and the neck condition which caused her to undergo surgery in 2003.

For the foregoing reasons, I find that the claimant has failed to establish that she sustained a compensable neck injury on November 20, 1997.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer relationship existed on or about November 20, 1997 and at all relevant times.
3. The claimant has failed to establish that the Administrative Law Judge should recuse from rendering a decision in this case.
4. The claimant has failed to present any admissible evidence in connection with her constitutional challenge.
5. The claimant has failed to establish that the Arkansas Workers' Compensation Commission Law is unconstitutional.

6. The claimant has failed to establish that Dr. Michael Moore's March 18, 2002 bill has been properly presented to the respondents for payment on a form approved by the Commission.

7. The claimant has failed to prove by a preponderance of the credible evidence that she sustained a compensable neck injury on November 20, 1997.

ORDER

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

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge