

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F005865

JAMES TABOR, EMPLOYEE	CLAIMANT
ANDY YEAGER MOTORS, INC., UNINSURED EMPLOYER	RESPONDENT NO. 1
ANDY YEAGER MOTORS, INC., INSURED EMPLOYER	RESPONDENT NO. 2
AIG CLAIM SERVICES, INSURANCE CARRIER	RESPONDENT NO. 2

**OPINION FILED JUNE 30, 2006**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Harrison, Boone County, Arkansas.

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

Respondent no. 1 was represented by HONORABLE JAMES GOLDIE, Attorney at Law, Harrison, Arkansas.

Respondents no. 2 were represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on April 18, 2006 in Harrison, Arkansas. A prehearing order was entered in this case on December 19, 2005. This prehearing order 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. James Tabor was employed by Andy Yeager Motors from April 1, 1997 through mid-May of 2000.
2. Andy Yeager Motors was uninsured for workers' compensation until April 28, 1999, when AIG Claim Services went on the risk.
3. The claimant's deposition contained in Claimant's Exhibit No. 3 was taken on January 31, 2001.

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

Claimant:

1. Compensability.
2. Reasonable and necessary medical treatment.
3. Past due TTD and PPD benefits. (Reserved)
4. Controverted attorney fees.
5. Administrative law judge's recusal.
6. Constitutionality of the Arkansas Workers' Compensation law.

Respondent No. 1:

1. Whether or not claimant was an employee of Andy Yeager Motors relating to any claim made prior to January 2000. (Resolved by stipulation)

2. Whether or not the claimant's medical records support any claim he has made.
3. Whether or not claimant was actually injured by any work or conditions caused by his employment with respondent.
4. Whether or not claimant's request for additional medical treatment is reasonable and necessary.
5. Whether or not the statute of limitations has run on the alleged 1998 injury.
6. Whether or not the original filing by claimant was dismissed by the Commission or should be dismissed because not dealt with in the time set by Commission rules and regulations.

Respondent No. 2:

1. The compensability of the claimant's alleged injury.
2. Statute of limitations.
3. Whether respondent/carrier is liable for coverage associated with an alleged 1998 injury. (Resolved by stipulation)
4. Whether claimant's request for additional medical treatment is reasonable and necessary.

5. Whether the medical records support entitlement to indemnity benefits, both temporary and permanent.  
(Reserved)
6. Notice.

The record consists of the two volume April 18, 2006 hearing transcript and the exhibits contained therein. In addition, I have "blue-backed" to designate as part of the record the Post-Hearing Brief filed on behalf of Respondent no. 2 on May 17, 2006.

#### **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 offered in support of the claimant's 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 the 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 the claimant 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 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.

## **2. Evidentiary Objections**

On page 17 of the hearing transcript, Attorney Worley objected to Mr. Tabor testifying to what other people told him regarding the benefit, or lack of benefit, of possible carpal tunnel relief surgery. I find that this testimony is admissible only for the purpose of establishing the claimant's state of mind as to why he did not undergo carpal tunnel surgery in 1998, and is not admitted as evidence as to whether or not carpal tunnel surgery would or would not have provided the claimant a medical benefit had he undergone the treatment in 1998.

On page 19 of the hearing transcript, Attorney Worley objected to the claimant testifying regarding what he was told about the condition of his nerve after surgery. I find this proffered testimony to be impermissible hearsay and

will not consider the testimony at issue when rendering a decision in this case.

On page 63 of the hearing transcript, Attorney Goldie objected to the claimant's wife testifying regarding conversations that other individuals allegedly had which were apparently relayed to her by the claimant. I find this testimony to be impermissible double hearsay and will not consider further the testimony at issue on page 63 and 64 of the hearing transcript.

On page 76 of the hearing transcript, Attorney Worley objected as "asked and answered" Mr. Spencer's repeat question to the claimant's wife regarding the nature of her husband's symptoms before and after January of 2000. I have considered the claimant's answer in deciding this case and Ms. Worley's objection is therefore overruled.

On page 78 of the hearing transcript, Attorney Worley objected to the claimant's wife's testimony that the claimant was told he had a "possible carpal tunnel syndrome" for the first time between January and March of 2000. This testimony is accepted for the purpose of establishing the claimant's state of mind (i.e. his understanding of his injury), and when he first was made aware of the diagnosis of that injury by a physician. To that extent, Attorney

Worley's objection is overruled. However, the testimony is not accepted into evidence on the question as to whether the claimant did or did not in fact have carpal tunnel syndrome at or prior to that time.

**3. Compensability of the Claimant's Gradual Onset Upper Extremity Conditions.**

Arkansas Code Annotated § 11-9-102 (4) (A) (Suppl. 2003) defines "compensable injury" in relevant part as follows:

(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:

(a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition[.]

The test for determining whether an injury is caused by rapid repetitive motion is two-pronged: (1) the task must be repetitive and (2) the repetitive motion must be rapid.

Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W.2d 644 (1998). Multiple tasks involving different movements can be considered together to satisfy the "repetitive element" of rapid repetitive motion. Id. It is unnecessary to prove rapid repetitive motion when there is a diagnosis of carpal tunnel syndrome. Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 969 S.W.2d 190 (1998).

A compensable injury must also be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D); Ark. Code Ann. § 11-9-102(16). For a gradual onset injury caused by rapid repetitive motion, including carpal tunnel syndrome, the resulting condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4)(E)(ii); Medlin v. Wal-Mart Stores, Inc., 64 Ark. App. 17, 977 S.W.2d 239 (1998).

In the present case, Mr. Tabor's job duties at Andy Yeager Motors could include washing vehicles, detail work, mechanical repairs, or whatever was needed. Mr. Tabor testified that he used his hands and wrists and arms in his work, and that he sometimes did his work rapidly and repetitively. Mr. Tabor testified that he pulled wrenches, changed starters and alternators, used pry bars, in addition to mowing on a riding lawnmower and some weed-eating.

During and after the time that Mr. Tabor was employed by Andy Yeager Motors, he was diagnosed with several upper extremity abnormalities. Medical reports in the record indicate that in 1995, Mr. Tabor had a history of tendinitis in the right wrist, and was also diagnosed with arthritis of the wrist. In early 2000, Mr. Tabor came under the care of

Dr. Thomas Knox, an orthopedic specialist, who diagnosed Mr. Tabor with bilateral carpal tunnel syndrome. Dr. Knox performed a left open carpal tunnel release on May 19, 2000 and a right open carpal tunnel release on June 2, 2000.

Shortly after the right carpal tunnel surgery, and also shortly after Mr. Tabor's separation from Andy Yeager Motors, Dr. Knox found symptoms of cubital tunnel syndrome in the elbow. Dr. Knox performed a cubital tunnel release of Mr. Tabor's right elbow on September 12, 2000, and Dr. Knox performed a cubital tunnel release of Mr. Tabor's left elbow on May 15, 2001. Based on the nature and progression of Mr. Tabor's symptoms, Dr. Bruce Robbins, a neurologist, who compared studies from 2000 and 2001, concluded it likely that Mr. Tabor has another disease process, such as polyneuropathy.

However, the claimant has failed to present any credible evidence, through expert medical testimony or otherwise, indicating that any of his various upper extremity abnormalities are causally related to the work that he performed at Andy Yeager Motors. In addition, I note that Mr. Tabor's cubital tunnel syndrome, and his diagnosis of polyneuropathy, were not even apparent until after Mr. Tabor have left work at Andy Yeager Motors and

have undergone bilateral carpal tunnel release surgeries. Under these circumstances, I find that it would require speculation and conjecture on my part in order to find any causal connection between Mr. Tabor's abnormalities at issue and his work at Andy Yeager Motors.

In addition, I again note that the claimant is not required to establish that his job duties were rapid and repetitive in order to establish a compensable carpal tunnel syndrome injury. However, the claimant must establish that his work at Andy Yeager Motors was rapid and repetitive in order to establish the compensability of any of his other diagnosed upper extremity abnormalities, including the cubital tunnel syndrome and possible polyneuropathy. In the present case, the claimant has failed to establish that his various job duties involve repetitive actions, and the claimant has also failed to establish how rapidly that he performed his job duties at Andy Yeager Motors. Accord Holland Group, Inc. v. Hughes, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (CA 05-1376 decided June 14, 2006).

#### **4. Notice and Statute of Limitations Defenses**

Because I find that the claimant failed to establish that he sustained a compensable upper extremity injury, I find that the respondents' defenses regarding notice and the

statute of limitations are moot. Accord Kimberly Taylor v. Baldwin Piano & Organs Co., Full Workers' Compensation Commission, Opinion filed February 9, 2005 (W.C.C. No. F212244).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. James Tabor was employed by Andy Yeager Motors from April 1, 1997 through mid-May of 2000.
2. Andy Yeager Motors was uninsured for workers' compensation until April 28, 1999, when AIG Claim Services went on the risk.
3. The claimant's deposition contained in Claimant's Exhibit No. 3 was taken on January 31, 2001.
4. The claimant has failed to establish by a preponderance of the evidence that any of his upper extremity abnormalities at issue in this claim arose out of his employment with Andy Yeager Motors.
5. The claimant has failed to establish that his job duties at Andy Yeager Motors involved rapid repetitive motion of the upper extremities.
6. The claimant has therefore failed to establish that he sustained any compensable upper extremity injury while employed at Andy Yeager Motors.
7. Because the claimant has failed to establish that

he sustained a compensable injury, the respondents' defense regarding notice and the statute of limitations are moot.

**ORDER**

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

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge