

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505538

MISTY WEIGEL,
EMPLOYEE

CLAIMANT

THE STEAKHOUSE,
EMPLOYER

RESPONDENT

FARMERS INSURANCE EXCHANGE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 3, 2006

Hearings 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 CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

Hearings were held in the above-styled claim on February 1, 2006 and on March 1, 2006 in Mountain Home, Arkansas. A prehearing order was entered in this case on December 19, 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 and are hereby accepted:

1. The employee/employer relationship existed on February 6, 2005.
2. The respondents have controverted this claim in its entirety.

The claimant identified during the prehearing conference and in her post-conference filings the issues to be litigated and resolved at the present time as follows:

1. Administrative law judge recusal.
2. Constitutionality of the Arkansas Workers' Compensation Law.
3. Compensability of injury to claimant's left knee.
4. Reasonable and necessary medical treatment.
5. Average weekly wage \$90.00. (Reserved)
6. Past due TTD benefits. (Reserved)
7. Controverted attorney fees.

The respondents raised the following issues at the prehearing conference:

1. Compensability of the claimant's left knee injury.
2. Notice.

During the course of the February 1, 2006 hearing, the respondents asserted that the issue of an alleged idiopathic injury was also timely raised. The claimant's attorney left

it to the discretion of the administrative law judge to determine whether that in fact occurred.

The record consists of the February 1, 2006 and the March 1, 2006 hearing transcripts 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 she 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 her constitutional arguments, I find that her 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. Evidentiary Objections.

Each party has raised multiple evidentiary objections. On page 6-7 of the hearing transcript, the Administrative Law Judge acknowledged the respondents' objection to Claimant's Proffered Exhibit No. 3, which includes affidavits of former ALJs Michael White and Bill Daniels, and an article prepared by Attorney Rick Spencer. My research indicates that the Full Commission has previously allowed these affidavits into the record on the same constitutional issues presented in the present case. See Long v. Wal-Mart Stores, Inc., Full Workers' Compensation Commission, Opinion filed May 4, 2005 (F309931). Accordingly, the respondents' objection in the present case is overruled and Claimant's Proffered Exhibit No. 3 is accepted into the record.

On page 8 of the hearing transcript, the respondents' attorney objected to the claimant's attorney's request to submit his client's discovery deposition into evidence prior to performing a direct examination of the claimant. The respondents' objection is sustained for two reasons, and I therefore will not consider Claimant's Proffered Exhibit No. 4 when deciding this case. First, there appears to be no dispute that the claimant's attorney did not advise the respondents' attorney at least seven days prior to the hearing that he intended to submit this documentary evidence into the record, as required by my December 19, 2005 prehearing order. Second, to the extent that the claimant's attorney suggests that the claimant has unfettered discretion to submit her own deposition into evidence based on the rules of evidence and/or rules of procedure, I note that the Commission is not bound by the rules of evidence or the rules of procedure in general. Even if the Commission were bound by such rules, I respectfully point out that consistent with Arkansas Rule of Civil Procedure 32(a)(2) the deposition of a party may be used by the adverse party for any purpose at the trial. Missouri R. R. v. Mackey, 297 Ark. 137, 760 S.W.2d 59 (1988). On the other hand, a deponent-party's own deposition can be admitted into the

record by the deponent-party only where one of the conditions in Arkansas Rule of Civil Procedure 32(a)(3) are met. Crisp v. Brown, 4 Ark. App. 208, 628 S.W.2d 596 (1982). Since the purpose of a live hearing is to provide the Commission the benefit of credibility determinations from hearing live testimony and viewing the demeanor of the witnesses while testifying about disputed facts and events, since the applicable rules in a court of law would not otherwise provide a party unfettered discretion to admit her own deposition when she is available to testify, as the claimant's attorney seems to argue, and since the claimant's attorney has not otherwise presented good cause or exceptional circumstances to justify placing his client's deposition into the record, I find that permitting an attorney unfettered discretion to submit his client's deposition into the record in lieu of live testimony is inconsistent with the Commission's mandate to conduct the hearing in a manner as will best ascertain the rights of the parties. See Ark. Code Ann. § 11-9-705(a).

On page 50 of the hearing transcript, the claimant's attorney objected to the respondents' attorney questioning a witness on recross examination beyond the scope of redirect examination. On page 52 of the hearing transcript, the

respondents' attorney objected to the claimant's attorney recalling a witness to the stand who had been released.

My review of the hearing transcript indicates that the witness who Mr. Spencer recalled had in fact been re-sequestered, in order to permit Mr. Spencer to recall the witness if necessary. To the extent that Mr. Spencer and Ms. Worley each appear to bind Commission's proceedings to technical rules of procedure in these objections, the Commission has recently noted again its broad discretion with reference to admission of evidence, and that the Commission should be more liberal with the admission of evidence rather than more stringent as compared to the technical or statutory rules of evidence. See Coleman v. Pro Transportation, Full Workers' Compensation Commission, Opinion filed March 14, 2006 (F210837). I therefore overrule Mr. Spencer's objection to Ms. Worley's asking questions on recross examination which arguably go beyond the scope of redirect examination, and I overrule Ms. Worley's objection to Mr. Spencer recalling a witness who was re-sequestered between her initial testimony at the hearing and her supplemental testimony at the hearing.

On page 21 and page 24 of the March 1, 2006 hearing transcript, Ms. Worley objected to the relevance of Mr.

Spencer questioning Charles Winham, the owner of The Steakhouse, about alleged prior instances where Mr. Winham may have denied receiving notice about an alleged work related injury, as he has done in his testimony in the present case. My research indicates that there is not a rule of evidence in Arkansas which specifically addresses the issue of admitting proof on the existence or non-existence of prior accidents or injuries to show negligence, notice, or causation. The Arkansas courts have adopted the general rule with respect to the admissibility of evidence of similar occurrences that such evidence is admissible only if "the events arose out of the same or substantially similar circumstances." See Fraser v. Harp's Food Stores, Inc., 290 Ark. 186, 718 S.W.2d 92 (1986).

In the present case, Mr. Spencer's questions appeared to have been designed to uncover possible instances of Mr. Winham asserting an alleged lack of notice to Mr. Winham under substantially similar circumstances to the circumstances presented in this case (i.e., employees of Mr. Winham allegedly notifying Mr. Winham of work-related injuries and Mr. Winham asserting that he never received notice from the injured employees during the time frame alleged by the employees). I therefore find that Mr.

Spencer's questions to Mr. Winham and Mr. Winham's answers to which Ms. Worley objected are admitted into the record.

By letter dated February 22, 2006, Mr. Spencer attempted to supplement the record with a report of an MRI which Ms. Weigel underwent on February 17, 2006. By letter dated February 22, 2006, Ms. Worley objected to the introduction of the MRI as untimely.

Had the MRI been performed prior to the seven day deadline in the prehearing order filed in this case, Ms. Worley's objection would certainly be well taken. However, the MRI in the present case, similar to Ms. Worley's additional evidence in Coleman V. Pro Transportation, Full Workers' Compensation Commission, Opinion filed March 14, 2006 (F210837), was not performed until after the seven day deadline expired. More importantly, Ms. Weigel's testimony at the March 1, 2006 hearing credibly indicates that she did not undergo the MRI until February 17, 2006 because she had no financial resources to pay for an MRI herself. The respondents have refused to provide the MRI at issue in this claim which Dr. McBride recommended on March 11, 2005, and which the claimant had no financial means to obtain herself until she was approved for SSI and Medicaid after the first hearing held on February 1, 2006. In comparing the facts in

the present case to the facts presented in Hargis (War Eagle) Transport v. Chesser, ___ Ark. App. ___, ___S.W.3d ___ (Ark. App. 9-8-04), I find that the claimant was diligent in obtaining the medical MRI once she had the means to do so, and I find that the claimant was diligent in presenting this additional medical report to the Commission in a timely manner after the procedure was performed. The MRI is relevant, is not cumulative, and could change the outcome of this case.¹ Therefore, the respondents' objection is overruled, and the Claimant's Proffered Exhibit No. 1 to the March 1, 2006 hearing transcript is accepted into the record.

3. Compensability and Notice.

The claimant asserts that she sustained a knee injury at work on February 6, 2005, which she reported that day to the restaurant owner, Jay Winham, who refused to follow up on the injury. Specifically, Ms. Weigel testified that at

¹However, until a surgeon reviews the MRI, I am without any means to know whether the MRI reveals any surgical condition. In addition, I have relied on a physician's observation of guarding, and not on any abnormality in the MRI report, to conclude below that the claimant established a compensable knee injury with medical evidence supported by objective findings. Therefore, my factual and legal conclusions regarding the substantive issues in this case would not change regardless of whether the MRI report is admitted or excluded from the record.

approximately 1:30 p.m. on February 6, 2005, she was working as a waitress at The Steakhouse restaurant. Ms. Weigel testified that she set a plate down; she was turning to pick up a spray bottle, and she felt a crack and an instant throbbing sensation. Ms. Weigel testified that she told Jay Winham that day that she had hurt her leg, and that "He didn't want to acknowledge anything I had to say. He turned around and walked away. He would not even talk to me". Ms. Weigel testified that she also told Brian, the assistant manager under Mr. Winham, who was standing at the cash register. Ms. Weigel testified that she worked until February 16, 2005, and that she tried to talk to Mr. Winham three or four times during the interim. Ms. Weigel testified that "He would say, well, how are you doing today, you look like you are in pain. And I would say, well, yeah, I'm hurting, but I can't afford to go to the doctor, I have no insurance I have nothing. He said to me that was not his problem." Ms. Weigel testified that on February 16, 2005, Mr. Winham advised her that she was going to have to go to the doctor, and not to return until she had done so. Ms. Weigel testified that she also told Mr. Winham on February 6, 2005, that she was hurt and needed to go to the doctor. Ms. Weigel testified that she rolled up her blue jeans pant

leg, and showed Mr. Winham her knee on the day of the injury.

Valerie Ross, a friend and former co-worker with the claimant at The Steakhouse, testified that she observed Ms. Weigel become injured at work. Ms. Ross and Mr. Spencer (verbally describing Ms. Ross' re-enactment) described the mechanism of injury essentially as Ms. Weigel turning her body (including her knee) to the side while her foot remained inadvertently planted when it should have pivoted. [See February 1, 2006 transcript p. 12-13]. Ms. Ross testified that the incident occurred in the kitchen, that she could not have heard a cracking sound because of the other noises in the kitchen, but that she did hear Ms. Weigel moan. Ms. Ross testified that she observed Ms. Weigel report the injury on the date that it happened to Jay Winham. Ms. Ross testified that Ms. Ross took the claimant to the emergency room on February 16, 2005. Notably, the February 16, 2005 emergency room report contains a history that corroborates that Ms. Weigel twisted her knee at work approximately a week earlier.

Jay Winham testified that Misty Weigel worked at The Steakhouse for approximately a month. Mr. Winham testified that he did not know why she quit working, and that she did

not at any point in time when she worked for him indicate to Mr. Winham that she had injured herself at work. Mr. Winham testified that he did notice Ms. Weigel limping one day, but that he never asked her what was wrong with her knee. Mr. Winham testified that he "would assume" that the first he knew of an alleged work-related injury is on approximately June 1, 2005, when Mr. Spencer forwarded a Form-C. Mr. Winham testified that it is not unusual for employees to just walk away and not come back from his business, and that he had approximately 400 employees last year. Mr. Winham testified that it is not unusual for his employees to work only two or three weeks.

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).

Ark. Code Ann. § 11-9-701(a)(1) provides:

Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

Furthermore, Ark. Code Ann. § 11-9-701(b)(1) provides that:

Failure to give the notice shall not bar any claim: (A) If the employer had knowledge of the injury or death; (B) If the employee had no knowledge that the condition or disease arose out of and in the course of the employment; or (C) If the commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

In the present case, after hearing the live testimony and observing the demeanor of the witnesses, I find credible the testimony of Ms. Weigel and Ms. Ross that Ms. Weigel sustained an injury at work on February 6, 2005, which she reported that day to Mr. Winham, and which Ms. Ross observed. Because I find that the claimant provided notice to the restaurant owner on the date of injury, and that he would not provide her the documentation to complete for a

work-related injury, I find that the claimant's failure to give notice to the employer on a form prescribed by the Commission sooner than June 1, 2005 does not in any way bar her claim for benefits in the present case.

To the extent that the respondents' attorney argued at the start of the hearing that the Commission should find that the claimant's injury at issue, if it occurred, was idiopathic, I find that any issue regarding an alleged idiopathic injury was not properly raised prior to entry of a prehearing order, or by requested amendment to the issues specifically identified in the prehearing order filed in this case. Therefore, I find that this issue was not timely raised when identified at the start of the hearing. See Williams v. Cingular Wireless, Full Workers' Compensation Commission, Opinion filed June 7, 2005 (F206182). Even if the issue of an alleged idiopathic injury had been timely raised in this case, I note that the mechanism of injury credibly described in this case appears to me to be essentially identical to the mechanism of injury which the Full Commission found compensable, and not idiopathic in Mize v. University of Arkansas for Medical Sciences, Full Workers' Compensation Commission, Opinion filed May 17, 2001

(E804727). Accord Crawford v. Single Source Transp. Ins., ___ Ark. App. ___, ___S.W.3d ___ (6-30-04).

I also find that the claimant has established the existence of her compensable knee injury by medical evidence supported by objective findings. Specifically, I note that Dr. McBride found it impossible to perform McMurry's testing on the knee on March 11, 2005 secondary to guarding. Stedman's Medical Dictionary 26th Edition (1995) defines guarding as "spasms of muscles to minimize motion or agitation of sites affected by injury or disease". I note that the Full Commission has concluded on at least four occasions that guarding is an objective finding within the meaning of Act 796 of 1993, and my research indicates that the Commission's conclusion was not appealed in any of the four cases that I have reviewed. Hayes v. Employment Security Division, Full Workers' Compensation Commission, Opinion filed November 28, 2001 (E807300); Spencer v. Superior Industries, Full Workers' Compensation Commission, Opinion filed December 21, 1999 (E812836/E900900); Edmondson v. Mid Ark Auto Auction, Full Workers' Compensation Commission, Opinion filed November 24, 1999 (E800680); Murry v. Riceland Foods, Full Workers' Compensation Commission, Opinion filed January 20, 1999 (E516632).

Because I find that the claimant has established all of the requirements necessary to establish a compensable left knee injury caused by a specific incident identifiable by time and place of occurrence, I find that the claimant is entitled to benefits for a compensable injury.

4. Medical Treatment.

At the hearing conducted on February 1, 2006, the claimant's attorney clarified that the only benefit which the claimant was seeking at that time was an MRI to determine whether there is something surgical that needs to be fixed in her knee. I find that an MRI of the knee (which the claimant has now obtained) is reasonably necessary in light of Dr. McBride's prior clinical observations and recommendations. At a minimum, I also find that a return visit to Dr. McBride in order to interpret the results of the MRI, and to perform additional clinical testing in order to ascertain the claimant's present condition, is also reasonably necessary treatment for the claimant's compensable left knee injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee/employer relationship existed on February 6, 2005.

2. The respondents have controverted this claim in its entirety.

3. The claimant has established by a preponderance of the evidence that she sustained a compensable left knee injury on February 6, 2005.

4. The preponderance of the evidence establishes that the MRI which the claimant has now undergone, and at a minimum a return visit to Dr. McBride to interpret that MRI and perform additional clinical testing, is also reasonably necessary medical treatment for the claimant's compensable left knee injury.

5. The claimant has failed to prove any constitutional violation.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on any indemnity benefits to which the claimant may become entitled as a result of the findings herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge