

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F509851

**VICKI LYNN WILSON,
EMPLOYEE**

CLAIMANT

**LITTLE ROCK HEALTH
& REHABILITATION,
SELF-INSURED EMPLOYER**

RESPONDENT

**CANNON COCHRAN
MANAGEMENT SERVICES,
BENEFITS ADMINISTRATOR**

RESPONDENT

OPINION FILED JANUARY 22, 2007,

Pursuant to a hearing conducted October 24, 2006, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. James W. Stanley, Jr., Attorney at Law, Little Rock, Arkansas, appearing for the claimant and

Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to consider (1) the threshold issue of compensability of injuries alleged by the claimant and (2) the secondary issue of entitlement to related benefits.

The claimant contended that on August 28, 2005, she sustained compensable injuries when she fell at work and that she should be awarded related benefits, including unpaid medical expenses and temporary total disability benefits from the date of injury until September 20, 2005. An attorney's fee for controversion was also requested. Other possible issues, specifically including a change of physician, were reserved.

The respondents contended that the claimant did not sustain a compensable injury; that a compensable injury cannot be established by medical evidence, supported by objective findings; and, alternatively, that the claimant was released by her treating physician to return to work as of

September 12, 2005, so that she is not entitled to temporary total disability benefits after that date because she was no longer in a healing period.

The record, which included documentary evidence and the testimony of the claimant, was closed at the conclusion of the hearing, consistent with the Prehearing Order and Ark. Code Ann. §11-9-705(c). Nevertheless, following the hearing, a Motion was filed on behalf of the claimant requesting that the Commission consider the report of an electromyogram performed October 11, 2006, thirteen days before the October 24 hearing. The Motion, which was received by the Clerk of the Commission December 7, 2006, stated, inter alia, that counsel for the respondent “raised the issue at the hearing” of a lack of objective findings, citing page 5 of the hearing transcript; the report was evidence of objective responses; and that the report had not been received by claimant’s counsel until November 15, 2006. Copies of an EMG/NCS report dated October 11, 2006, were also filed with the Motion. The Motion, which was opposed by respondents, is hereby denied. The Motion and the response by respondents will be included in the record and the copy of the EMG/NCS report will be included as Claimant’s Preferred Exhibit 2.

It is puzzling, if not troubling, to note that the Motion contains statements of fact that are either contradicted or not supported by evidence of record. For example, the Motion, as noted above, states that counsel for the respondent raised the issue “at the hearing” of a lack of objective findings. The Motion, in its prayer for relief, asks the Commission to consider “this new proof that was not available at the time of the hearing but was brought to the ALJ’s attention and respondents were aware of.”

The issue of objective findings was not raised by counsel for the respondents at the hearing.

The Prehearing Order dated August 16, 2006, shows (1) that the hearing was scheduled for October 24, 2006, by agreement of counsel, and (2) that the hearing was to address the primary issue of compensability, including the respondent's contention that a compensable injury cannot be established by medical evidence, supported by objective findings. The issue of objective findings had been previously specifically raised in item 3 of the respondent prehearing information which had been received by the Commission August 14, 2006, and which was discussed during the telephone prehearing conference. Thus, claimant's motion is incorrect when it states that counsel for the respondent raised the issue of objective findings "at the hearing."

The statement that this new proof was not available at the time of the hearing, but was brought to the ALJ's attention and respondents were aware of it, is without a clear basis in the record. The ALJ, in fact, asked about records from UAMS specifically and was not advised that such a report was forthcoming. Tr. at 26. There is no indication in the record that the respondents were aware of this new proof. Indeed, it is difficult to understand the statement that the new proof was not available at the time of the hearing, but the ALJ and the respondents were nevertheless aware of it. Indeed, this new proof may have been "not available" because of the lack of diligence on the part of the claimant's counsel.

It has been Commission policy that new evidence will be permitted, pursuant to Mason v. Lauck, 232 Ark. 891 (1960) and Haygood v. Belcher, 5 Ark. App. 127 (1982), only where it is relevant, not cumulative, and would change the result of the case, and provided that the claimant was diligent in presenting the evidence to the Commission. Moreover, the Prehearing Order, on page 2, stated, "The record will not remain open at the conclusion of the hearing for the parties to obtain

additional evidence.” This is consistent with Commission policy as well as Ark. Code Ann. §11-9-705(c) which generally requires that all evidence be submitted at the initial hearing on a claim.

Also, as to diligence, claimant’s counsel had agreed to the date and time of the hearing after participating in the prehearing conference where the issue of lack of objective findings have been discussed. During the prehearing conference, and thereafter, claimant’s counsel gave no indication that the hearing should be continued in order to have a more complete evidentiary record, even though records from UAMS had not been obtained. At the hearing, an inquiry was made about UAMS records, which by then would have included the document now proffered by claimant’s Motion, and claimant’s counsel gave no indication that such records were forthcoming, but merely responded that he had made a couple of requests to get the records some time ago but they never furnished them. Tr. at 26. Even though claimant’s counsel had been put on notice by respondents and during the prehearing conference that a lack of objective findings was an issue, there was no timely request that such records be subpoenaed from UAMS and, at the hearing, there was no request for a continuance or postponement in order to attempt to provide a more complete medical record. Thus, it cannot be said that there was diligence in presenting this evidence to the Commission.

Furthermore, although the proffered report is not cumulative, its minimal findings are, at best, only arguably relevant to the claimant’s fall at work, rather than to other sources, such as her diabetic condition, which the report references. Indeed, the report notes that the claimant is diabetic and has had pain in the left elbow/arm/forearm since she “hit her elbow a year ago,” but fails to make specific mention of an injury resulting from a fall at work. Finally, the proffered exhibit would not change the result in this case. Thus, the claimant’s Motion should be denied, pursuant to the Prehearing Order, Commission Policy, and current case law.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including August 28, 2005, when the claimant's average weekly wage was \$512.00.

3. The preponderance of the evidence shows that the claimant suffered a compensable injury on or about August 28, 2005, and is entitled to reasonably necessary medical and related expenses, including treatment at Concentra Health Centers September 12, September 15, and September 20, 2005. Claimant's treatment at UAMS October 11, 2005, was not presented at the hearing as a portion of her medical claim and is considered an issue reserved by the claimant.

4. The record fails to show that the claimant is entitled to temporary total disability benefits as a result of this injury because it fails to show that she was totally incapacitated to earn wages during her healing period.

5. The record fails to show that the claimant's counsel is entitled to an attorney's fee from claimant or respondents.

DISCUSSION

The claimant, 51 years of age at the time of the hearing, was employed as a licensed practical nurse by the employer when she fell at work on August 28, 2005. She testified, without contradiction, that the incident occurred when, as she was preparing to assist a patient from a

wheelchair back into bed, she slipped and fell, striking her left leg and landing on her buttocks, while banging her left arm into the floor, which she described as concrete. She stated that she felt pain at the time of the incident, but got up immediately and filed an incident report.

The claimant stated that she was not examined at the time, which was a Sunday, but when she returned on Monday she again spoke with the employer about the incident, and was not offered medical care. The claimant testified that by September 12 she decided she needed to see a doctor and she advised the employer that she needed to see a doctor, and the employer sent her to Concentra Medical Center. Later, she discussed changing physicians with her employer and switched to Dr. Scott Carle. Tr. at 12. Dr. Carle saw the claimant on September 15, 2005, according to the medical record. The claimant testified that she suffered a contusion on her left elbow but at the time of the hearing her leg was not bothering her. She has requested benefits as stated above.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

Here, the record is insufficient to establish that the claimant's fall at work resulted in more than minor injuries, a contusion to her left arm and a contusion to the lower left leg. The respondents admit that the claimant suffered an abrasion to the arm, which is consistent with the finding of Dr. William Warren on September 12, 2005, that there was ecchymosis of the left elbow at that time. Dr. Warren also noted that the claimant had a lower leg contusion although his report showed no further objective finding of the injury. Later, on September 15, 2005, Dr. Carle's report indicated that there was slight swelling mid shin on the claimant's left lower leg. He also noted swelling at the left elbow. However, the record does not reveal that the healing period for these minor conditions continued or that the claimant was incapacitated to earn wages because of the injuries. Indeed, her physicians generally indicated that she was capable of working.

Her testimony on cross-examination was that she only worked on the weekends at the time of the injury and that following the injury, she worked Saturday and Sunday, September 3 and September 4, her normal shift. When she saw Dr. William Warren on September 12, he released her that day to return to regular duty. The claimant testified that, after seeing Dr. Warren, she did not attempt to go back to work, except for Sunday of the following weekend, because she was in pain and hurting, even though she had been released to return to work.

When the claimant saw Dr. Carle September 15, he also released her to regular duty. Nevertheless, the claimant testified that once again she did not return to work, but later saw a doctor at the UAMS emergency room in October because of pain. At that time, her chief complaint was pain in her elbow. She stated that she was a medication nurse and had to push a big cart down the hall and needed both hands to do that, and that her left arm affected her ability to perform her job

duties. She also stated that she also had to pick up and move patients, which caused pain in her left arm.

Although the record fails to show that the respondents owe the claimant temporary total disability benefits, the Act requires the employer to provide such medical care as may be reasonably necessary in connection with a compensable injury. Ark. Code Ann. §11-9-508(a). Thus, the claimant is entitled to look to the respondents for the expenses of medical care reasonably necessary for her compensable arm and leg injuries, but not for medical care related to pre-existing conditions such as diabetes.

The statutory provision for attorney's fees, in its current form, allows for an attorney's fee in a controverted case to be awarded only on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. §11-9-715(a). That section also provides that medical providers may voluntarily contract with the attorney for the claimant to recover disputed bills, and the attorney may charge a reasonable fee to the medical provider as a cost of collection. There has been no proof here of such a contract concerning medical bills. Thus, on this record, claimant's counsel is not entitled to a fee on this matter at this time.

AWARD

The claimant's post hearing Motion should be, and it is hereby, respectfully denied and dismissed, although the proffered medical record will be included in the record as a proffered exhibit and the Motion and response will likewise be included.

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge