

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F100453

JAMES CHESSER,
EMPLOYEE

CLAIMANT

WAR EAGLE (HARGIS) TRANSPORT,
EMPLOYER

RESPONDENT

GUARANTY FUND OF THE STATE OF ARKANSAS,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 29, 2003

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE LAWRENCE FITTING, Attorney
at Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE WILLIAM C. FRYE,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

The respondents appeal from a decision of the
Administrative Law Judge filed September 20, 2002. The
Administrative Law Judge entered the following findings of
fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission
has jurisdiction of this claim.
2. On all relevant dates, including October 24,
2002, the relationship of employee-employer-
carrier existed between the parties.

3. The appropriate weekly compensation rates are \$394.00 for total disability and \$296.00 for permanent partial disability.
4. The claimant has proffered additional medical evidence subsequent to the initial hearing of May 15, 2001, and the prior opinion of July 25, 2001, which is relevant, is not cumulative, would change the result reached in the prior opinion, and the claimant has acted in a diligent manner in obtaining and seeking to introduce this additional evidence. Thus, under the Rule announced in Mason v. Lauck (cited supra), this additional evidence should be and hereby is admitted into the record.
5. The claimant has proven by the greater weight of the credible evidence that on or about October 24, 2000, he sustained a compensable injury to his right elbow-arm. Specifically, he has established by medical evidence, supported by objective findings, the actual existence of a physical injury to his right elbow/arm. He has further proven by the greater weight of the credible evidence that this physical injury arose out and occurred in the course of his employment with this respondent, was caused by a specific incident, is identifiable by time of place and occurrence, caused internal physical harm to his body, and required medical services and resulted in disability.
6. The initial medical services provided the claimant by and at the direction of Dr. Michael Norwood and by and at the direction of physicians at the River Valley Orthopaedic Center constitutes reasonably necessary medical services for the claimant's compensable right elbow/arm injury. The medical services subsequently provided to the claimant by and at the direction of Dr. Marc DeSchaine, Dr. Gloria Box, and Dr. Karen Johnston-Jones, also represents reasonably

necessary medical services for the claimant's compensable right elbow/arm injury. Pursuant to Ark. Code Ann. § 11-9-508, the expense of the foregoing services, subject to the medical fee schedule established by this Commission, is the liability of the respondents herein.

7. The claimant has proven by the greater weight of the credible evidence that he was rendered temporarily totally disabled as a result of the effects of his compensable right elbow-arm injury for December 15, 2000 through April 24, 2002. Specifically, he has proven that during this time he continued within his healing period from the effects of this compensable right elbow/arm injury and was not employed.
8. The respondents have controverted this claim in its entirety.
9. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all benefits herein awarded.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

In reaching our decision, we have the following observations regarding the argument of respondents and the

dissent on appeal that the Administrative Law Judge abused his discretion in accepting into evidence the additional medical records under consideration on remand to the Administrative Law Judge.

At the initial hearing in this matter, held on May 15, 2001, the central issue was whether the claimant's alleged right elbow injury was established by medical evidence supported by objective findings. In an opinion filed July 25, 2001, the Administrative Law Judge found that the claimant failed to meet this requirement. Specifically, the Administrative Law Judge found that:

[The] diagnosed injury in the form of epicondylitis of the claimant's right elbow is based slowly (sic) upon the claimant's subjective complaints. . . . [These] simply do not meet the requirement of "objective findings" as that term is defined by Ark. Code Ann. §11-9-102(16) (A) (i).

The claimant's failure to meet the essential requirement of Ark. Code Ann §11-9-102 (4) (d) precludes any injury he may have sustained to his right elbow from being considered a "compensable injury" within the meaning of the Act. I have no alternative but to so find and deny and dismiss the claim in its entirety.

The claimant appealed on August 16, 2001 and filed his appeal brief on October 25, 2001. The appeal was suspended following a stay order entered as a result of the liquidation of the respondent carrier, but the stay was

lifted and the respondents filed their brief on December 20, 2001. On January 11, 2002, the claimant filed a motion to remand for the consideration of new evidence. He filed a supplemental motion to remand for additional new evidence on March 4, 2002.

In an Order entered March 27, 2002, the Full Commission remanded this case to the Administrative Law Judge for findings on whether the proffered evidence would change the result of the case and whether the claimant exercised diligence in obtaining and seeking to introduce the proffered additional evidence. The Administrative Law Judge found that the evidence would change the result of the case and that the claimant was diligent in seeking to introduce that evidence. Upon accepting the evidence, the Administrative Law Judge found that the claimant had met his burden of proof that he sustained a compensable injury and was entitled to medical and temporary total disability benefits.

The respondents have appealed from the Administrative Law Judge's decision; in particular, the Administrative Law Judge's finding that the claimant was diligent in obtaining and presenting the new medical evidence. The dissent argues that the respondents' position is well-founded, that the

claimant was not diligent in obtaining or seeking to admit the new medical evidence, that the evidence should not have been accepted by the Administrative Law Judge, and that the claimant should therefore not have been awarded benefits.

The claimant's injury occurred on October 24, 2000. The medical records entered into evidence at the initial hearing spanned the dates November 8, 2000 through April 20, 2001. By the time of his last visit with treating physician, Dr. Cheyne, on April 20, 2001, the claimant had moved from Arkansas to Texas, and Dr. Cheyne noted in his progress note from that last visit: "I have suggested to him very strongly that he see an orthopedist in Houston and have some regular physical therapy treatment." However, the claimant did not consult with Dr. Deschaine in Texas until December 17, 2001, some eight months later.

The new records include: the report of an MRI performed on December 20, 2001, which was the subject of the claimant first motion to remand filed on January 15, 2002; and operative reports from surgery performed on February 12, 2002, which were the subject of the claimant second motion to remand filed on March 7, 2002.

Ark. Code Ann. § 11-9-705(c)(1)(A) (Repl. 2002) provides that all evidence shall be presented by each party

at the hearing, and that additional evidence shall be allowed only at the discretion of the Commission. In the exercise of this discretion, we must consider whether the proffered additional evidence is relevant; whether it is cumulative; whether it would change the result of the case; and whether the party proffering additional evidence exercised diligence in obtaining and seeking to introduce the evidence. Mason v. Lauck, 232 Ark. 891, 340 S.W.2d 575 (1960); Haygood v. Belcher, 5 Ark. App. 127, 633 S.W.2d 391 (1982).

The dissent argues that the claimant's proffered evidence does not meet the final requirement set forth above, i.e., that the claimant was not diligent in presenting this evidence to the Commission and that the claimant was not diligent in seeking the medical treatment in Texas on which the proffered reports are based.

As the Administrative Law Judge noted, the arguments of the respondents and the dissent contain the following flaws. First, to the extent that the respondents and the dissent seem to suggest that the claimant should have presented MRI and surgery results at the first hearing, the record establishes that none of the claimant's authorized treating physicians in the Fort Smith area had provided or

recommended an MRI, much less accurately diagnosed the actual nature of the elbow injury and performed surgery. Therefore, the MRI and surgery records could not have been presented into evidence at the time of the first hearing.

To the extent the dissent suggests that the claimant was dilatory in seeking testing and surgery in Texas, the Administrative Law Judge, who heard the live testimony and observed the claimant's demeanor, found credible the claimant's testimony that he was unable to obtain medical services in Texas earlier because of his own lack of finances and because the respondents refused to accept their liability for the services sought.

To the extent that the dissent suggests that the claimant was dilatory in presenting the additional evidence to this Commission after undergoing the MRI and later the surgery, we note, as did the Administrative Law Judge, that the claimant had obtained and presented to the Commission a report on the MRI study only 25 days after the study was performed, and the claimant obtained and presented to the Commission a surgery report only 21 days after the surgery was performed. We point out that during these approximately three week periods, the reports had to be dictated and made available to the claimant and his attorney, the reports from

Texas had to be sent to the claimant's Arkansas attorney, his Arkansas attorney had to prepare an accompanying motion to submit additional evidence, and the Arkansas attorney had to file that motion and the Texas medical reports with the Arkansas Workers' Compensation Commission. Clearly, the claimant's attorney should be complimented, not criticized, for the relatively short order in which he and his client brought the additional medical reports at issue to the attention of this Commission. For all of the foregoing reasons, we find no merit in the dissent's criticism of the claimant and his attorney regarding their work in obtaining the additional medical treatment in Texas and their timing in presenting reports of that treatment to this Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 1996).

For prevailing on this appeal before the Full Commission, the claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner Yates dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion. Based upon my de novo review of the evidence, I find that the claimant was not diligent in obtaining or seeking to admit the new medical evidence, that this evidence should not have been accepted by the Administrative Law Judge, and that the claimant should not have been awarded benefits.

The claimant testified that he could not afford any treatment after his move to Texas and therefore no medical providers would accept him for care; however, he was unable to name a single provider from whom he had attempted to obtain care and was refused, nor could he provide any documentary records to that effect.

The new records proffered by the claimant include the report of an MRI performed on December 20, 2001, which was the subject of the claimant first motion to remand filed almost a month after the procedure, on January 15, 2002; and operative reports from surgery performed on February 12, 2002, which were the subject of the claimant second motion to remand, again filed almost a month after the procedure, on March 7, 2002.

Ark. Code Ann. § 11-9-705(c)(1)(A) (Repl. 2002) provides that all evidence shall be presented by each party at the hearing, and that additional evidence shall be allowed only at the discretion of the Commission. In the exercise of this discretion, we must consider whether the proffered additional evidence is relevant; whether it is cumulative; whether it would change the result of the case; and whether the party proffering additional evidence exercised diligence in obtaining and seeking to introduce the evidence. Mason v. Lauck, 232 Ark. 891, 340 S.W.2d 575 (1960); Haygood v. Belcher, 5 Ark. App. 127, 633 S.W.2d 391 (1982).

I find that the claimant's proffered evidence does not meet the final requirement set forth above. The claimant was not diligent in presenting this evidence to the

Commission, and was not diligent in obtaining the medical treatment, as he waited almost eight months after Dr. Cheyne recommended he seek additional treatment in Texas before he actually did so. If the claimant thought that he had not been thoroughly examined by Dr. Cheyne, he should have requested a continuance of the initial hearing to obtain further testing. If he wanted to obtain and attempt to present more medical information in his case following his hearing, he had ample opportunity to do so within a more reasonable time. Instead the claimant waited until after the appeal process was well underway before he sought "a second bite at the apple" by attempting to bolster the record with additional medical diagnostic test results.

Because I find that the claimant was not diligent in obtaining or seeking to admit the new medical evidence, that this evidence should not have been accepted by the Administrative Law Judge, and that the claimant should not have been awarded benefits, I respectfully dissent from the majority opinion.

JOE E. YATES, Commissioner