

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210837

JOHN COLEMAN,
EMPLOYEE

CLAIMANT

PRO TRANSPORTATION,
EMPLOYER

RESPONDENT

COMMERCE & INDUSTRY INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 15, 2005

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

Claimant represented by the HONORABLE KEVIN ODUM, Attorney
at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD
WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Remanded.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed December 27, 2004. The administrative law
judge found that the claimant proved he was entitled to
temporary total disability compensation, anatomical
impairment, wage-loss disability, and medical expenses. The
Full Commission remands this matter to the administrative
law judge for additional proceedings.

I. HISTORY

The parties stipulated that the claimant sustained compensable injuries on September 19, 2002. A pre-hearing conference was held on August 5, 2004, and a pre-hearing order was filed on August 5, 2004. The claimant contended that the respondents should be estopped from contending that the claimant did not sustain a permanent anatomical impairment. The claimant contended that he was entitled to an impairment rating, wage-loss disability, and attorney's fees. The respondents contended that all appropriate benefits had been paid and were continuing to be paid. The administrative law judge ordered that the parties would litigate the issues of temporary total disability compensation, reasonably necessary medical treatment, permanent physical impairment, wage-loss disability, and fees for legal services.

Hearing before the Commission was held on Wednesday, September 29, 2004. The following colloquy took place:

MS. WORLEY: Your Honor, in addition to the surveillance report, which I have attached to I guess it's my hearing exhibit packet 2, Respondents have the video surveillance, I believe it was, the report is dated September 24, 2004

and I think surveillance was actually performed on the 20th, 21st, and 23rd of September 2004, which I would request to be introduced....

JUDGE BLOOD: Mr. Odum, any objections to the exhibit?

MR. ODUM: To the part of the investigative report, yes, Your Honor. First, I don't believe we have anybody here to testify that can authenticate both the report or the video that was taken and it's not going to meet the evidence standard....On Monday of this week we were provided a copy of the report. On Tuesday, we were provided the videos and that was yesterday, well in violation of the Judge's Prehearing Order filed August 5th, 2004....

JUDGE BLOOD: There is a prehearing conference conducted in this case. There's a cutoff date in there....I'm not going to allow any of this stuff in. Since there is a de novo proceeding before the Full Commission, assuming that there is an appeal from my ruling or in this case here, you get a chance to argue it anew to the Commission. But at this point I'm not going to allow any of those documents to come in. I'm speaking strictly to this Order, Prehearing Order, and saying for the respondent adjuster or third party administrator that they had best notify their counsel what's going on in the case. I know for a fact that they were aware of the date of the Prehearing Order....So, that's going to be my ruling in this matter right here. You have a de novo review before the Full Commission so if there is an appeal for this matter and so that the offer of the video surveillance and the offer of the correspondence, you may provide that to them but at this juncture, it is cut off.

MS. WORLEY: Your Honor, I would formally request a continuance of the hearing so that I have time to put that surveillance in the record.

JUDGE BLOOD: And because - again, I'll note, I'm going to deny that request -

MS. WORLEY: I'm doing that for the record, Your Honor....And I also would formally request a proffer of the video surveillance and the video surveillance report and I would indicate to the Commission, although you've indicated there may be a problem with the adjuster, that surveillance was actually ordered much earlier, according to correspondence that I have recently seen.

JUDGE BLOOD: Very well. I understand. I will note your request. I'm going to deny those requests. I'll note your exception to the rulings in that regard.

MS. WORLEY: Deny the request for the proffer?

JUDGE BLOOD: Yes, ma'am.

MS. WORLEY: You're not going to allow me to proffer that in?

JUDGE BLOOD: That's correct.

After a hearing before the Commission, the administrative law judge found that the claimant proved he was entitled to temporary total disability compensation, anatomical impairment, and medical expenses. The respondents appeal to the Full Commission. The respondents request a *de novo* hearing before the Commission; the respondents also request "that they be allowed oral arguments before the Full Commission in the event a hearing *de novo* is not allowed."

II. ADJUDICATION

Ark. Code Ann. §11-9-705 provides:

(c) INTRODUCTION OF EVIDENCE. (1)(A) All oral evidence or documentary evidence shall be presented to the designated representative of the commission at the initial hearing on a controverted claim, which evidence shall be stenographically reported.

(B) Each party shall present all evidence at the initial hearing.

(C)(i) Further hearings for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or commission.

(ii) A request for a hearing for the introduction of additional evidence must show the substance of the evidence desired to be presented.

(2)(A) Any party proposing to introduce medical reports or testimony of physicians at the hearing of a controverted claim shall, as a condition precedent to the right to do so, furnish to the opposing party and to the commission copies of the written reports of the physicians of their findings and opinions at least seven (7) days prior to the date of the hearing....

(3) A party failing to observe the requirements of this subsection may not be allowed to introduce medical reports or testimony of physicians at a hearing, except in the discretion of the hearing officer or the commission.

(4) The time periods may be waived by the consent of the parties.

The Commission is charged with the duty to make and enter findings of fact and conclusions of law. Ark. Code Ann. §11-9-207(a)(5). As the fact finder, the Full Commission is obligated to make specific findings of fact on

de novo review based on the record as a whole, and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence. Wilson v. Cargill, Inc., 45 Ark. App. 174, 873 S.W.2d 171 (1994).

In the present matter, the Full Commission denies the respondents' request for oral argument. However, we note the February 21, 2005 correspondence from the respondents' attorney, to wit: "evidence I attempted to proffer was not allowed into the record." The hearing transcript demonstrates that the administrative law judge would not allow counsel to "proffer" video surveillance and an accompanying report. An exclusion of evidence cannot be reviewed in the absence of a proffer showing what the evidence would have been. Jackson v. Farm and Commercial Properties, 284 Ark. 130, 680 S.W.2d 105 (1984).

The Full Commission remands this case to the administrative law judge. We direct the administrative law judge to conduct those proceedings necessary to allow the respondents to proffer the video surveillance and accompanying report, and to determine whether introduction

of this evidence into the record would comply with the relevant provisions of Ark. Code Ann. §11-9-705.

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

KAREN H. MCKINNEY, Commissioner