

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F406110

CHARLES DAVIDSON,
EMPLOYEE

CLAIMANT

A. E. STALEY MANUFACTURING CO.,
EMPLOYER

RESPONDENT

ACE AMERICAN INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

ORDER FILED JUNE 2, 2005

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

Claimant represented by the HONORABLE DEAN GARRETT, Attorney
at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE E. DIANE GRAHAM,
Attorney at Law, Fort Smith, Arkansas.

ORDER

_____This matter is currently before the Full Workers'
Compensation Commission on the claimant's request to remand
in order to introduce additional evidence. After
considering the claimant's motion, the respondents' response
thereto, and all other matters properly before the
Commission, we find that the claimant's motion should be
denied.

In an opinion filed March 28, 2005, an administrative
law judge found that the claimant failed to prove that he

sustained a compensable injury to his right elbow in the course of his employment with respondent. Specifically, the administrative law judge found that the claimant failed to prove that there was evidence supported by objective medical findings. The claimant has filed this motion to remand so that he can submit additional medical documents that should have been considered in the administrative law judge's review of his case. The claimant maintains that these documents constitute proof of a medical condition supported by objective findings.

We note that the hearing in this case was held on January 13, 2005, and claimant's surgery was scheduled for January 26, 2005. Claimant did not ask the administrative law judge at the hearing to keep the record open or make any other effort to secure this document for the record. The administrative law judge issued her opinion March 28, 2005, and on March 31, 2005, the treating physician issued her post-operative report. It is this report claimant wants the administrative law judge to consider. This report clearly is in response to the very findings made by the administrative law judge in her Order.

Ark. Code Ann. § 11-9-705(c)(1) (Repl. 2002) provides that all evidence must be submitted at the initial hearing on the claim. In order to submit new evidence, the claimant must show that the new evidence is relevant; that it is not cumulative; that it would change the result of the case; and that the claimant was diligent in presenting the evidence to the Commission. 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 Commission has broad discretion with reference to admission of evidence, and the Supreme Court will not reverse that decision absent a showing of abuse of that discretion. Clark v. Peabody Testing Service, 265 Ark. 489, 579 S.W.2d 360 (1979); W.W.C. Bingo v. Zwierzynski, 53 Ark. App. 288, 921 S.W.2d 954 (1996); Linthicum v. Mar-Bax Shirt Co. 23 Ark. App. 26, 741 S.W.2d 275 (1987); Southwest Pipe and Supply v. Hoover, 13 Ark. App. 144, 680 S.W.2d 723 (1984).

In this medical report, the doctor actually states that there was no objective medical findings before the surgery. When faced with no objective medical findings, the

administrative law judge found the injury was not compensable.

We find claimant was not diligent in securing this document. The surgery was January 26, 2005, and this report was issued three days after the administrative law judge ruled.

Therefore, after considering the claimant's motion, the respondents' response thereto, and all other matters properly before the Commission, we deny the claimant's motion to submit additional evidence on appeal.

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____The Majority's decision denies the claimant's request to remand in order to introduce and consider additional evidence. The Majority supports this decision by

reasoning that the claimant did not show due diligence in attempting to have the additional evidence entered into the record prior to the issuance of the decision. The Majority further finds the claimant did not indicate that the additional evidence would change the outcome of the Administrative Law Judge's decision. I find that the evidence in question did not exist at the time of the previous hearing, and therefore, the claimant could not have reasonably been expected to introduce it into the record at the time of the previous hearing. Additionally, I note that the proposed evidence directly refutes the Administrative Law Judge's finding that the claimant's injury was not shown by objective findings. As that was the reason the Administrative Law Judge denied benefits, I find the proposed evidence would change the outcome of the case. For these reasons, I respectfully dissent.

In the present case, the claimant is seeking benefits for an allegedly compensable injury to the upper right extremity. The claimant's hearing was conducted on January 13, 2005. At that time, the claimant had been diagnosed with right cubital syndrome and right lateral epicondylitis. At that time, the claimant was scheduled to have surgery on January 26, 2005 but made no effort to try

and hold the record open for medical reports from his impending surgery. On March 28, 2005, the Administrative Law Judge issued a decision denying the claimant benefits. This opinion was based on the finding the claimant had not established his injury with objective medical findings.

On March 31, 2005 the claimant's doctor, after treating the claimant, issued a letter indicating the claimant had objective findings during a surgery. The letter indicated the findings supported a diagnosis of epicondylitis. On April 21, 2005 the Commission received the motion to remand in order to consider additional evidence in the form of the doctor's note from March 31, 2005.

Ark. Code Ann. §11-9-705(c)(1) (Repl. 2002) provides that all evidence must be submitted at the initial hearing on the claim. In order to submit new evidence, the claimant must show that the new evidence is relevant; that it is not cumulative; that it would change the result of the case; and that the claimant was diligent in presenting the evidence to the Commission. 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 claimant in this case did not submit the proposed additional evidence until approximately two months after the surgery was performed. However, the lapse of time between the motion being filed and the issuance of the doctor's note was a period of less than one month. At the time of the hearing the claimant did not know what the outcome of the surgery would be or whether asking for the record to remain open would be in his best interest. Furthermore, since the surgery had not yet occurred, the claimant did not have access to medical records that were composed after the hearing. As such, any failure to hold the record open at the time of the hearing was justifiable.

Additionally, any delay in getting the medical report to the Commission was for a short period of time, especially considering that the attorney would have had to contact the doctor and ask for the report prior to submitting the motion. Furthermore, the note was submitted for consideration within one month of being composed and within one month of the issuance of the decision itself, indicating that the claimant did show diligence in attempting to have the medical record introduced into the record. Each of these factors indicate the claimant did

show diligence in attempting to have the document introduced in a timely manner.

With regards to the evidence itself, I find that the proposed evidence, is relevant, is not cumulative, and would in fact change the result of the case. The issue to be decided at the previous hearing was whether the claimant suffered from a compensable injury to the upper right extremity. The Administrative Law Judge denied the claimant solely because there were no objective findings. The proposed evidence says,

Mr. Davidson is healing from his right tennis elbow release. Objective findings that support this diagnosis and treatment include only the findings at surgery. These included edema and swelling around the extensor carpi radialis brevis muscle origin at the lateral epicondyle."

This medical record shows that the claimant did, in fact, have objective findings indicating that he suffered from a compensable injury to the upper right extremity and that the only objective findings for that injury were not discovered until after the hearing was conducted. Since the Administrative Law Judge denied the claimant due to a lack of objective findings and did not consider that evidence, I find that the evidence proposed by the motion would be

relevant, would not be cumulative, and would, in fact, change the outcome of the case.

For the aforementioned reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner