

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F411324

MICHAEL E. BROWN, EMPLOYEE	CLAIMANT
WINFIELD CABINETS SHOP, EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JUNE 28, 2006

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

Claimant represented by HONORABLE TERRENCE C. JENSEN, Attorney at Law, Benton, Arkansas.

Respondent represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed November 18, 2005.

The Administrative Law Judge entered the following 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 24, 2004; the claimant's average weekly wage was \$400.00; he has received an impairment rating of 7% to the body as a whole which has been paid by the respondents.

3. The preponderance of the evidence fails to show that the claimant sustained a compensable injury arising out of and in the course of his employment on or about August 24, 2004.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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.

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.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority affirms and adopts the November 18, 2005, decision of the Administrative Law Judge, finding that the claimant did not sustain a compensable injury and is not entitled to associated benefits. I must respectfully dissent from their decision.

After a de novo review of the record, I find that the decision of the Administrative Law Judge should be reversed and the claimant should be entitled to additional medical treatment as requested. More specifically, I find that the Administrative Law Judge improperly allowed the respondents to withdraw their stipulation regarding compensability; despite the objections of the claimant. Additionally, I find that the medical records show that the claimant did sustain a compensable injury and that the requested treatment is directly related to his work-related injury. Accordingly, he should be entitled to additional medical benefits as requested.

The Majority finds that the Administrative Law Judge was correct in allowing the respondent to withdraw their stipulation as to compensability. Their sole argument for supporting this contention is that the claimant waived any objection by allowing the presentation of testimony prior to objecting. In my opinion, the evidence does not support this contention. Instead, I find that the Administrative Law Judge failed to properly delineate

whether the issue of compensability was being considered prior to testimony being given. Accordingly, the claimant's delay in objecting was reasonable. Additionally, I find that even if the claimant failed to object until after testimony was entered, it did not constitute a waiver of an objection. Accordingly, I would have reversed the decision of the Administrative Law Judge.

In the case of Marty Powers v. City of Fayetteville Municipal League, ___ Ark. App. ___, ___ S.W.3d ___, (Opinion filed October 12, 2005), the Court of Appeals indicated,

A stipulation is "an agreement between the attorneys respecting the conduct of the legal proceedings. That agreement is the equivalent of undisputed proof and leaves nothing for the fact finder to decide as to the stipulated matter. We held in *Arkansas Louisiana Gas Co. v. Grooms*, that when the parties stipulate to certain facts, neither the ALJ nor the Commission may ignore that stipulation and to decide the matter on an issue which, because of the stipulation had not been fully developed by the parties or upon which they had not introduced proof. The only exception is when the ALJ or Commission gives notice of their intent to do so and

afford an opportunity to offer proof on that issue. (Internal citations omitted).

Likewise in the case of Sharron Mayo v. Area Agency on Aging, 1998 AWCC 72, Claim No. E610215 (Full Commission Opinion filed February 18, 1998) the Commission indicated,

As a general rule parties are bound by their stipulations. However, the Commission should not rigidly enforce a stipulation where, due to special circumstances, enforcement would be unjust or produce a result contrary to established notions of justice and fair play. Adjudicative bodies such as this Commission have discretion to relieve parties from their stipulations where, due to special circumstances, enforcement would conflict with these basic notions. (Internal citations omitted).

In this instance the claimant's attorney and the respondent's attorney agreed to the stipulation that the claimant had sustained a compensable injury. Only at the time of the hearing did the respondent attempt to change this contention. At that time they argued that compensability and showing that causation existed for

reasonably necessary medical treatment were distinguishable. Even after the Administrative Law Judge attempted to clarify the issue and indicated his belief that their argument was tantamount to deciding compensability, the respondent's attorney continued to maintain that compensability was not at issue. Despite this persistence, later in the hearing, they changed their position to say that compensability was an issue.

In my opinion, the evidence also shows that the issues were not clearly defined prior to the beginning of testimony. The Administrative Law Judge failed to rule on whether or not he would allow the respondent to present testimony that the claimant never injured himself when working. While the Administrative Law Judge initially indicated that he believed that the employer would either have to present testimony regarding compensability or would have to concede the issue in relation to reasonably necessary medical treatment, he still allowed the employer to maintain that compensability was stipulated to and was not at issue. As the employer continued to maintain

compensability was not an issue and the judge did not clarify this issue, I find it would be unreasonable to expect the claimant to enter an objection before testimony was entered.

This point is illustrated by the dialogue immediately preceding testimony. At that point the Administrative Law Judge indicated that he did not agree with the respondent's assertion that there was a distinguishing factor between arguing compensability and arguing treatment was not reasonable because the accident never occurred. However, immediately thereafter, the respondent's attorney said, "Your honor, the Respondents have accepted compensability and they did pay benefits associated with the claim". In my opinion, this language shows that the respondent was attempting to confuse the issues by saying the injury never occurred but that compensability was still a stipulation.

In my opinion the language surrounding the claimant's actual objection also shows that the issues at the beginning of the hearing were not defined in a manner

where all parties were aware of what was at issue. The Administrative Law Judge indicated,

Let me say this, for my clarification, and maybe for everybody's clarification: today is that we stipulate to average wage and benefits paid and the fact that it was initially accepted as a compensable injury, but I would frankly, think, that, at this point, the Respondents are taking the position that they are controverting this injury, although they initially accepted it, what is consistent with this man's testimony, and that just seems to me to be what it is today. ...

Considering that the Administrative Law Judge felt it necessary to clarify the issues for the parties and for himself, I find that it is not reasonable to conclude that the claimant was to have known that compensability was an issue prior to that point.

I also note that when the Administrative Law Judge asked the respondent's attorney if she was contesting compensability, she responded, "Your Honor, in light of Mr. Winfield's testimony, I think that is, in fact, accurate." This language is indicative that the employer's attorney apparently did not decide exactly how to frame the issue

until after Mr. Winfield's testimony. In my opinion, to change one's contentions prior to the hearing and then once again in the middle of the hearing is impermissible. It does not allow the other parties to have proper notice and renders them virtually unable to prepare their case. Accordingly, I find that it is unreasonable and that it does not comport with the notions of fair play.

I find the cases of Powers and Mayo to be instructive. In Powers, the Court indicated that the only exception for allowing parties out of stipulations would be when the Administrative Law Judge or Commission affords the party to offer proof on the issue at hand. In this instance, the claimant could offer proof but was given no notice beforehand. As such, he was in effect given no opportunity to adequately argue the new contentions of the respondent. Instead, he was forced to continue with the issues as framed prior to the hearing. Since that admittedly did not include the issue of compensability, there is no way that he could have offered such proof without a continuance or without some additional opportunity to rebut the testimony of the

respondent's witnesses. Also, I note that since the claimant had no advance notice of the respondent's intent to offer evidence as to compensability, he was unable to adequately prepare for the hearing. Accordingly, I find that allowing the respondent to change the stipulation at the beginning of and in the middle of the hearing did not comport with due process and the elements of fair play.

Likewise, the case of Mayo, is instructive. In that case, the parties agreed to litigate the issues of additional medical and TTD benefits. At the time of the hearing, the respondent withdrew their stipulation regarding compensability. The Administrative Law Judge offered the claimant a continuance but it was declined. The Commission concluded that they would not rigidly enforce the stipulations because the claimant turned down the offer of a continuance. However, the Commission also indicated,

Had the claimant not declined the administrative law judge's offer to continue the case, we likely would reverse the administrative law judge's approval of respondents' change position regarding compensability. In light of the administrative law judge's offer of

continuance, we will not, in this matter, rigidly enforce the pre-hearing stipulation regarding compensability.

In my opinion, this language indicates that but for the administrative law judge's offer of a means to limit prejudice caused by the stipulation in the case, the case would have been reversed. Since no such recourse was offered to or afforded to the claimant, I find that the stipulation should be enforced.

The Majority finds that the claimant's objection was untimely and therefore constituted a waiver on the issue of presenting testimony on compensability. I find that this conclusion is incorrect. First, I note that the Court of Appeals, in Powers, indicated that the only basis for not following an objection would be where the party is given notice and afforded an opportunity to present proof on the issue. I note that the Court of Appeals makes no mention that the failure to object in a timely manner would constitute a waiver of the issue. Accordingly, I find that the delay in objecting did not constitute a waiver of the issue.

Second, I find that the claimant's attorney did object in a timely manner. As previously asserted, at the time of the start of the hearing the respondent insisted that compensability was not an issue, even after the Administrative Law Judge indicated that he believed that the argument of compensability and the argument of causal relation and reasonably necessary medical treatment were synonymous. Since the respondent continued to insist that compensability was accepted and not an issue after those statements, I find it logical that the claimant would conclude that the respondent was accepting compensability and resorting to the arguments of whether the reasonably necessary medical treatment was not related due to a pre-existing illness or independent intervening cause.

The Majority opines that the claimant's request for an attorney's fee in the event compensability was issue to be an acknowledgment that the issues had changed. However, I do not find that to be the case. Instead, I find that the claimant's attorney, who was justifiably confused, was simply attempting to reserve his right to request an

attorney's fee in the event the respondent tried to raise a new argument during the course of the hearing.

The respondent cites a host of cases regarding the waiver issue. However, I find none of those cases to be persuasive. None of those cases involved a situation where an entire issue was stipulated to and then changed at the time of the hearing. Also, in this instance, as noted above, the respondent continued to change their position throughout the course of the hearing.

The respondent relies on the case of Bledsoe v. Red Arrow Freight Lines, 1997 AWCC 263, (Full Commission Opinion filed June 11, 1997) to show the claimant waived any objection regarding the issue of compensability. In Bledsoe, the claimant objected to the admission of documents regarding drug testing. This objection was initially made in advance of the hearing. The objection was also made at the time of the hearing. The objection was that the documents were impermissible hearsay and lacked proper authentication. Despite having advance notice of the objection, the respondent did not produce any evidence to authenticate the

documents or to explain how the test results were arrived at or whether they were authentic. They also did not ask for a continuance even after they were offered one. The Administrative Law Judge ultimately agreed with the claimant and excluded the documents. The Court of Appeals, in affirming the exclusion of the documents, indicated that the respondent had waived their objection to introduction of the documents and noted the respondent's failure to properly rebut the testimony or take advantage of the offered continuance. They further indicated that the claimant's fundamental rights should not be penalized because of that failure.

In my opinion, the facts of the present case are distinguishable from Bledsoe. First, I note that in the present case, the claimant was given no notice of the respondent's intent to change their contentions. Accordingly, the claimant in the present case could not prepare evidence to rebut that of the respondent. Additionally, I note that the claimant's attorney was

offered no continuance or other mechanism to overcome the prejudice caused by that change.

The respondent also relies on the cases of Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2D 275 (1987), Hanson v. Amfuel, 54 Ark. App. 370, 925 S.W. 2d. 370, (1996). I find each of these cases to be unpersuasive as in both instances the claimant failed to make any objection at the time of the hearing. In contrast, in the present case the claimant objected during the hearing at the time when it became apparent that the respondent was changing their argument regarding compensability.

Last, the respondent relies on the case of Daniels v. Cravens, 297 Ark. 388, 761 S.W.2d 942, (1988). In that case, the claimant and another citizen were involved in an automobile accident. The claimant filed a tort suit for negligence. His employer's insurance carrier asserted their right to intervene. The alleged tortfeasor objected to allowing full participation. The claimant did not object and then relied on testimony provided by witness experts used by the insurance carrier. The insurance carrier was allowed to

intervene and at trial the claimant and the person named in the suit were found to be equally at fault in causing the accident. The trial judge ordered that the claimant and the insurance carrier take nothing and dismissed the case with prejudice. The claimant appealed and argued that the insurance carrier should not have been allowed to participate in the trial. The Arkansas Supreme Court, in finding the claimant had waived his objection, noted that the claimant worked, "in tandem with Liberty Mutual." They further noted that he never objected to their participation until after the case had gone to trial and been decided.

The claimant in the present case in no way argued that his injury never occurred. Nor did he in any way "invite" the respondent to change their stipulations. Furthermore, the claimant in the instant case raised his objection at the time of the hearing rather than after it was closed and he had received an adverse decision. Accordingly, I do not find the case of Cravens to be relevant.

Ultimately, I find that the respondent attempted to change their argument multiple times in order to gain advantage. It is unimaginable that they would be unaware they were unaware of their contentions prior to the hearing. Likewise, I find no reasonable explanation for their change in position in the middle of the hearing. Prior to the time of the hearing, they had paid for benefits and accepted the claim as compensable. Since they had done so, the claimant was in no position to argue or to present any case as to compensability or regarding when or how the injury occurred. As such, to allow the respondents to withdraw their stipulation amounts to reversible error.

For the aforementioned reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner