

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309931

TONY LONG,
EMPLOYEE

CLAIMANT

WAL-MART STORES, INC.,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED JANUARY 25, 2006

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

Claimant represented by the HONORABLE FREDERICK S. SPENCER,
Attorney at Law, Mountain Home, Arkansas.

Respondent represented by the HONORABLE CURTIS L. NEBBEN,
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed February 1, 2005. The administrative law
judge found, among other things, that the claimant failed to
prove he sustained a compensable injury. After reviewing
the entire record *de novo*, the Full Commission affirms the
opinion of the administrative law judge.

I. HISTORY

The testimony of Tony Ray Long, age 44, indicated that he began suffering from back problems after an injury with another employer in 1997.

An MRI of the claimant's lumbar spine was taken in July 1999; the resulting impression was, "Degenerative disk disease at L3-L4 and L4-L5, with disk herniations at L3-L4 and L4-L5 as described above."

Dr. Jeff K. Ketcham examined the claimant in June 2001 and assessed, "intractable low back pain and right leg pain."

The impression from an MRI of the lumbar spine in July 2002 was, "Central disc protrusion at L3-4 with indentation upon the ventral aspect of the thecal sac and slight disc protrusion at L4-5 indenting the epidural fat and with some associated articular facet hypertrophy noted."

The impression from a lumbar discogram in September 2002 was, "Contrast extravasation at L5-S1 disk."

Dr. Frank Bivins examined the claimant in May 2003 and assessed, "1) Hypertension 2) GERD 3) Degenerative disc disease 4) HNP 5) Hypertriglyceridemia."

The parties stipulated that the employment relationship existed on or about September 2, 2003. The claimant testified:

Q. But let's talk about on September 2nd of 2003, what happened?

A. I went to, I was fixin' to go to the break room and a lady named Norma called me from the appliance part of the store. She needed a 27 inch Apex TV....And I went back to get the TV and I drug it back out of the shelf....

Q. And did you feel something happen as you were lifting that 27 inch TV, putting it -

A. Well, right at the time, I didn't, didn't feel anything, you know, right then. But I began to hurt before the night was up. That was at the end of the night, the last break. I didn't really feel a whole lot of pain until the next, you know, the next day.

Dr. Bivins noted on September 4, 2003, "Mr. Long comes in today. He states for the last 2 to 3 days he has been having severe pain in his right leg mainly just below his knee on the lateral posterior calf." Dr. Bivins did not note any sort of work-related accident or injury.

The record contains a Worker's Compensation Request For Medical Care dated September 8, 2003. A member of management filled out a Date of injury of September 2, 2003, and wrote that the accident happened while the claimant was lifting a television onto a shelf. On the September 8

Request form, Dr. Mark A. Woods took the claimant off work for seven days and referred the claimant to a neurologist. Dr. Woods assessed "Low back strain and chronic back pain."

The respondent terminated the claimant's employment on or about September 23, 2003.

Dr. Bivins wrote on October 3, 2003, "He is unable to work at this time due to a herniated nucleus pulposus."

An MRI of the claimant's lumbar spine was taken on October 3, 2003, with the following impression:

"Degenerative disc disease at L3-4 and L4-5 with herniated disc material at both levels causing compression on the thecal sac at both levels as described above. These findings appear to be consistent with finding of an MRI from four years ago and probably show little change since that time; however, again the MRI was missing for this patient, so no direct comparison could be made."

A pre-hearing order was filed on June 29, 2004. The claimant contended, among other things, that he sustained an injury to his back on or about September 2, 2003, "during the course of and arising out of his employment with Wal-Mart Stores, Inc." The respondents contended that the claimant did not sustain a compensable injury.

Claimant's Proffered Exhibit 5 contains correspondence from Dr. Bivins dated November 2, 2004, stating, "Clearly Mr. Long's injury at Wal-Mart did definitely (sic) aggravate (sic) the back pain that he had been having."

A hearing was held on November 3, 2004. At that time, the administrative law judge denied the claimant's motion for a continuance or a dismissal without prejudice.

The parties deposed Dr. Bivins, a family practitioner, on January 12, 2005. The respondents' attorney questioned Dr. Bivins:

Q. Just a few minutes ago, you read from Claimant's Proffered Exhibit 5 that Mr. Long's injury at Wal-Mart did definitively aggravate the back pain that he had been having; is that correct?

A. Yes, sir....

Q. Is that based on any objective findings?

A. No.

Q. Purely subjective findings?

A. Yes, sir.

The administrative law judge found, in pertinent part:

1. Mr. Spencer's November 3, 2004 motion for a continuance or voluntary dismissal is denied....
4. Mr. Long has failed to establish by a preponderance of the credible evidence that he sustained a new injury at work on September 2, 2003 caused by lifting a television as he asserts.

5. Mr. Long has also failed to prove by a preponderance of the evidence or any proffer of evidence the existence of any new injury with medical evidence supported by objective findings as the term "objective findings" is defined in Ark. Code Ann. §11-9-102(16)(A)(i).

6. Mr. Long has therefore failed to prove ... that he sustained a compensable injury on September 2, 2003.

The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Constitutionality

The claimant contends, "the entire Workers' Compensation Law, as set-forth at Ark. Code Ann. §11-9-101, et. seq., is unconstitutional."

It is well-settled that an act by the legislature is entitled to a presumption of constitutionality. *Golden v. Westark Community College*, 58 Ark. App. 209, 948 S.W.2d 108 (1997). The party challenging a statute has the burden of proving it unconstitutional. *Lambert v. Baldor Elec.*, 44 Ark. App. 117, 868 S.W.2d 513 (1993).

The claimant has not demonstrated to the Full Commission that Act 796 of 1993 is unconstitutional.

The Commission may appoint as many persons as may be necessary to be administrative law judges, and administrative law judges are employees of the Commission.

Ark. Code Ann. §11-9-205(b). When deciding any issue, administrative law judges shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. Ark. Code Ann. §11-9-704(c)(2); §11-9-705(a)(3).

The claimant asserts that the workers' compensation system employing administrative law judges violates due process, equal protection, and separation of powers. However, the Full Commission has already refuted all of these purported constitutional violations raised by the claimant's attorney in Plummer v. Wal-Mart Stores, Inc., Workers' Compensation Commission F209057 (Oct. 10, 2005), Edwards v. Galloway Sand & Gravel, Workers' Compensation Commission F109737 (Oct. 11, 2005), and Bland v. Baxter Regional Medical Center, Workers' Compensation Commission F204378 (Aug. 16, 2005).

The claimant also asserts that administrative law judges are "under pressure" to rule against claimants, based on an alleged "business friendly" political environment. An adjudicator is presumed to be unbiased, and to overcome that presumption, a litigant must show a conflict of interest or

some other specific reason for disqualification. *Quinn v. Webb Wheel Prods.*, 59 Ark. App. 272, 957 S.W.2d 187 (1997), citing *Withrow v. Larkin*, 421 U.S. 35 (1975). In general, the test is whether the adjudicator's situation is one that might lead him not to hold the balance [between the parties] clear and true. *Quinn, supra*, citing *Tumey v. Ohio*, 273 U.S. 510 (1927).

The claimant in the present matter has not demonstrated that administrative law judges generally are pressured to rule for or against claimants based on political interests. Moreover, the claimant has not presented a scintilla of evidence to demonstrate that the administrative law judge in the present matter was under pressure or was biased in any degree against the claimant.

The Full Commission finds that the claimant did not prove Act 796 of 1993 is unconstitutional. Nor did the claimant prove that the Workers' Compensation Commission's employment of administrative law judges is violative of constitutional due process, equal protection, or separation of powers. Finally, the claimant did not prove that the administrative law judge in the present case was in any way

under political pressure to rule against the claimant or biased in any other way.

B. Compensability

The claimant's attorney does not discuss on appeal whether or not his client sustained a compensable injury pursuant to the provisions of Act 796 of 1993 as codified at Ark. Code Ann. §11-9-102(4) (A) *et seq.* Nor does counsel discuss on appeal whether or not the administrative law judge properly denied his motion for continuance or return to general files. The claimant has therefore abandoned these arguments on appeal. Seay v. Wildlife Farms, Inc., 342 Ark. 503, 29 S.W.3d 711 (2000).

Nevertheless, the Full Commission determines in this matter that the claimant is entitled to an adjudication of the substantive merits of his claim. Ark. Code Ann. §11-9-102(4) (A) (i) defines "compensable injury":

An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i).

In the present matter, the Full Commission affirms the administrative law judge's finding that the claimant did not prove he sustained a compensable injury on September 2, 2003. The claimant did not establish a compensable injury by medical evidence supported by objective findings. An MRI in July 1999 showed degenerative disk disease in the claimant's lumbar spine with herniations at L3-L4 and L4-L5. An MRI in July 2002 showed protrusions at L3-4 and L4-5. A discogram in September 2002 showed an abnormality at L5-S1.

The claimant contended that he sustained an accidental injury on September 2, 2003. Dr. Bivins examined the claimant on September 4, 2003 and did not note any sort of work-related accident or injury. Nor did Dr. Bivins note any objective findings, such as bruising, swelling, or spasm. An MRI in October 2003 confirmed the claimant's pre-existing degenerative disc disease in his lumbar spine, with herniated material at L3-4 and L4-5. It was reported at

that time, "These findings appear to be consistent with finding of an MRI from four years ago and probably show little change since that time; however, again the MRI was missing for this patient, so no direct comparison could be made."

The claimant in the present matter did not establish a compensable injury occurring on September 2, 2003 by medical evidence supported by objective findings. The record does not demonstrate that the claimant sustained any disc abnormality or any other objective findings as a result of the alleged September 2, 2003 specific incident. Nor did the claimant prove that he sustained a compensable aggravation of a pre-existing condition. The decision of the administrative law judge is affirmed.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant failed to prove he sustained a compensable injury. The Full Commission finds that the claimant did not prove that Act 796 of 1993 was unconstitutional. Nor did the claimant prove that the Arkansas workers' compensation system was violative of constitutional due process or equal protection. The

claimant did not prove that the workers' compensation system was violative of separation of powers. Finally, the claimant did not present any evidence demonstrating that the administrative law judge was pressured or biased in the claimant's claim. This claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.