

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F107697

JAMES DALE ELLENBERG, EMPLOYEE	CLAIMANT
BURNETT GIBBS MOTORS, EMPLOYER	RESPONDENT NO. 1
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

ORDER FILED MAY 24, 2007

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

Claimant represented by HONORABLE KENNETH E. BUCKNER,
Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 1 represented by HONORABLE BETTY J. HARDY,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

ORDER

Presently before the Commission is claimant's Motion for Expansion of the Record/Alternatively Remand to the Administrative Law Judge for Further Evidence. After consideration of claimant's motion, respondents' responses thereto, and all other matters properly before the Commission, we find that the motion must be, and hereby is, denied.

A hearing was held before an Administrative Law Judge on August 11, 2006, to determine the end of the claimant's healing period and whether the claimant is entitled to permanent total disability or wage loss benefits. In an opinion filed November 17, 2006, the Administrative Law Judge found among other things that the claimant failed to prove entitlement to permanent total disability or wage loss benefits. The claimant filed a Notice of Appeal to the Full Commission. Claimant now moves the Commission to expand the record to include the April 4, 2007, report of Dr. Thomas Ward or remand the claim to the Administrative Law Judge to take further evidence.

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).

Claimant contends that Dr. Ward's report "reflects a significant change in physical condition since the hearing..." The issue before the Administrative Law Judge at the hearing, as well as the issue before the Commission on appeal, is whether the claimant sustained any wage loss as a result of his compensable injury. In our opinion whether the claimant has experienced a "significant change in physical condition" since the hearing was neither an issue at the hearing nor on appeal. Accordingly, we find that this new evidence is not relevant to the issues on appeal. This is not to say, however, that the claimant cannot seek a new hearing on the issue of a change in physical condition.

Therefore, after considering the claimant's motion, the respondents' response thereto, and all other matters properly before the Commission, we deny the

claimant's request to expand the record or remand this claim back to an Administrative Law Judge for further evidence.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's opinion denying the claimant's motions. After reviewing the record, I find that the best course of action would be to remand the case to the Administrative Law Judge. While the claimant did not originally contend he had a change in physical condition, certainly such a contention is relevant in determining the claimant's entitlement to wage loss. In my opinion, to now require him to request an additional hearing would result in delay, confusion, and additional expense for both parties. Furthermore, as it appears that the change in condition became apparent after the time of

the initial hearing, the claimant had no way to attempt to introduce the proposed evidence at the time of the initial hearing. Finally, I note that in the past this Commission has remanded similar cases to the Administrative Law Judge. Therefore, I find that the same course of action should have been followed in this instance.

The claimant is contending that he sustained a change in physical condition pursuant to Ark. Code Ann. §11-9-522 (d), which provides,

In accordance with this section, the commission may reconsider the question of functional disability and change a previously awarded disability rating based on facts occurring since the original disability determination if any party makes application for reconsideration within one (1) year after the occurrence of the facts.

In support of this contention, the claimant has submitted a doctor's note evidencing that change in physical condition. In the past, the Commission, when presented with a change in physical condition, has remanded the case back to the Administrative Law Judge. In the case of Bruhn v. Ashland, Inc., the claimant had already had a hearing in which he was awarded wage loss. His case was on appeal with

the Commission when an alleged change in physical condition occurred. The claimant moved for a remand. The employer did not object; however, the Second Injury Fund did. The Commission granted the motion to remand, indicating,

Claimant has allegedly undergone additional medical procedures and a change in physical condition. Since these allegations could very well affect the extent of the claimant's permanent disability, we find that a remand is appropriate.

Bruhn v. Ashland, Inc., Full Commission Opinion Filed April 7, 1999 (E700259).

I find this case is virtually identical to Bruhn. The claimant is contending that a change in his condition occurred and his case is on appeal. There is evidence to support that claim. Furthermore, as previously mentioned, I find that the Majority's denial of this motion simply causes unnecessary confusion, expense, and delay for all the parties involved. Accordingly, I would have granted the claimant's motion and must now respectfully dissent.

PHILIP A. HOOD, Commissioner