

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E209042

BETTY FRICKS, WIDOW OF CLAIMANT
CHARLES P. FRICKS, EMPLOYEE

OSCEOLA FOODS, INC., EMPLOYER RESPONDENT NO. 1

LIBERTY MUTUAL INSURANCE CO., CARRIER RESPONDENT NO. 1

DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND RESPONDENT NO. 2

OPINION FILED DECEMBER 21, 2007

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

Claimant represented by HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

ORDER

Presently before the Commission is Respondent No. 2's Motion Objecting to Attachment to Claimant's Brief, and Claimant's Motion to Introduce Additional Evidence. After consideration of said motions, we find that Respondent No 2's Motion should be and hereby is granted and Claimant's Motion is hereby denied.

Claimant filed a brief on appeal with a letter from her son-in-law, a paramedic, attached thereto. Respondent No. 2 filed a Motion objecting to the attached

letter. Respondent No. 1 joined in this objection. Claimant subsequently filed a Motion to Introduce this letter as additional evidence. Both motions are presently before the Full Commission for consideration.

In his letter, Christopher Ulry, the claimant's son-in-law, explained that he was the first person the claimant called when she found her husband unresponsive in the bed and as such he arrived at the claimant's home before EMS arrival. Mr. Ulry recounted his findings upon arrival at the home and elaborated at length regarding his knowledge as an emergency medical provider and how it related to the claimant's situation.

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 our decision will not be reversed 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 Belcher, supra, the Court of Appeals set forth the prerequisites for admission of newly-discovered evidence: (1) the newly-discovered evidence must be relevant; (2) it must not be cumulative; (3) it must change the result of the case; and (4) the party seeking to introduce the evidence must be diligent.

Claimant asserts in her Motion to Introduce Additional Evidence that she did not know that she could introduce other witnesses at the hearing. However, the claimant was represented by counsel when the hearing was held before the Administrative Law Judge. Mr. Ulry's letter presents both lay and expert testimony regarding Mr. Fricks and his death. There is nothing in Mr. Ulry's letter that was not available to the claimant at the time of the

hearing. This is not newly discovered evidence, merely evidence which was not presented at the hearing.

As Mr. Ulry responded to the claimant's call regarding her finding Mr. Fricks unresponsive, Mr. Ulry's testimony may be relevant to this claim. After recounting his findings, the lack of autopsy, his knowledge of Mr. Fricks's health, and his experience as a paramedic, Mr. Ulry primarily concluded that his father-in-law died as a result of his compensable injury and the pain it caused. This testimony is cumulative of Dr. Christine Kasser's testimony in which she opined that claimant's injury and its consequences were the best known contributors to Mr. Fricks's death. Dr. Kasser was deposed and was subject to cross-examination. Mr. Ulry was not. Likewise, as this letter is cumulative of other evidence in the record, it is not known that this evidence would change the results of the claim. Finally, and most importantly, despite the fact that the claimant now asserts that she did not know that she could present other witnesses at the hearing, the claimant was not diligent in presenting this testimony.

In the present matter, both the claimant and the respondents introduced evidence at the hearing. The claimant

should have called Mr. Ulry as a witness at the hearing. The claimant did not do so. We find that the claimant has not proved the elements necessary to allow the introduction of additional evidence in this claim.

Accordingly, Respondents' motion objecting to the attachments to the Claimant's brief is hereby granted. Claimant's motion to introduce additional evidence is hereby denied.

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 Motion to Introduce Additional Evidence. After consideration of both Motions, I find that the claimant's Motion should have been granted, and the respondent's motion to deny the claimant's motion should have been denied.

_____First, the evidence is relevant. The respondents even admit that it is relevant. In fact, Mr. Ulry's letter is directly relevant in explaining the facts and certain medical of this case.

Second, the evidence is not cumulative. The respondents argue that the evidence is cumulative of Dr. Kasser's testimony that the Mr. Frick's injury and its consequences were the best known contributors to his death. However, Dr. Baskins opined that it was more likely than not that the claimant died from conditions or causes that are unknown or were undiagnosed prior to his death. As it is the Commission's duty to weigh the testimony presented, Mr. Ulry's letter corroborates the testimony of Dr. Kasser. As such, the evidence is not cumulative, but corroborative.

Third, the evidence change the result of the case. The Administrative Law Judge's opined that the claimant failed to prove by a preponderance of the evidence that Mr. Fricks died as a result of the compensable injury. The claimant appealed this decision. It is clear that the ALJ relied on Dr. Baskin's medical opinion, not Dr. Kasser's medical opinion. Dr. Kasser's testimony was that Mr. Frick's injury and its consequences were the best known contributors

to his death. As such, Mr. Ulry's corroborative letter weigh's heavily on the medical facts and opinions of this case and would change the results.

Fourth, the party seeking to introduce the evidence was diligent. The claimant specifically states in her Motion that she was unaware that she could have witnesses testify at trial. I find the claimant credible, as it is unlikely that Mr. Ulry would not have testified had the claimant been informed that he could testify at that time. The claimant presented this evidence when she fired her attorney and began seeking assistance from the Commission on her own. Accordingly, I find that the claimant was diligent.____

_____Therefore, for the aforementioned reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner