

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F709219

BILLY MARK BEAN, EMPLOYEE CLAIMANT

HANESBRANDS, INC., EMPLOYER RESPONDENT

AIG CLAIM SERVICES, INC, INSURANCE CARRIER RESPONDENT

**OPINION FILED DECEMBER 10, 2008**

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

Claimant represented by the HONORABLE SUSAN WALKER ALLEN,  
Attorney at Law, Russellville, Arkansas

Respondents represented by the HONORABLE MELISSA WOOD,  
Attorney at Law, Little Rock, Arkansas.

ORDER

This matter is presently before the Full  
Commission on claimant's Motion to Present New Evidence.  
After consideration of claimant's motion, respondents'  
response thereto, and all other matters properly before the  
Commission, we find that claimant's motion must be, and  
hereby is, denied.

Arkansas Code Annotated § 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 newly discovered  
evidence is (1) relevant; (2) is not cumulative; (3) will  
change the result; and that (4) the party seeking to

introduce the evidence was diligent. 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); Litnthicum 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).

The hearing on this claim was held on May 15, 2008. In an opinion filed August 12, 2008, the Administrative Law Judge found that the claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury on July 15, 2007, and that the claimant's current difficulties are a recurrence of his prior cervical problems not an aggravation. Claimant now seeks to introduce a letter from Dr. Scott Schlesinger, the claimant's treating neurosurgeon, clarifying that he performed surgery in 2007 at the C6-7 level, not the C5-6 level as stated in at least two of his post-surgical letters. We find that this "new evidence" is not relevant to the appeal and will not change the results of this claim. The Administrative Law Judge specifically found that the

claimant's present condition is a recurrence of his pre-existing cervical problems and not a new injury or aggravation. Whether Dr. Schlesinger incorrectly stated that he operated at the C5-6 level as opposed to the C6-7 level is not relevant to the ultimate outcome of this claim. As noted by the Administrative Law Judge, the medical records prior to the claimant's alleged compensable injury document the existence of "disc disease in the cervical region [which] appears to be greatest at C6-7 where there is severe narrowing of the neuroforamen." In addition, the Administrative Law Judge noted that when the claimant sought medical treatment ten days after the alleged injury, he provided a history of an onset of neck pain "in the last month of so." Thus, while the Administrative Law Judge noted the discrepancy between the C5-6 and C6-7 levels in Dr. Schlesinger's correspondence, this discrepancy did not play a role in the ultimate determination of compensability. Moreover, despite this discrepancy, the Administrative Law Judge noted Dr. Schlesinger's actual medical records from his evaluations and assessments of the claimant all reference the need for and his treatment of the C6-7 level. Accordingly, we find that the "new evidence" claimant seeks to introduce is not relevant and would not change the results of this claim.

Moreover, as claimant was in possession of the letters containing the alleged typographical errors and, in fact, introduced these letters into evidence, it cannot be found that the claimant was diligent in attempting to rectify any ambiguity created by the content of these letters. Claimant knew or should have known that the letters he introduced into evidence contained the incorrect surgical level, yet he did not attempt to seek a clarification or correction from Dr. Schlesinger until after the hearing was held and an unfavorable opinion was received.

We find that the "new evidence" claimant seeks to introduce is not relevant and would not change the results of the claim. We further find that the claimant was not diligent in obtaining and presenting this evidence.

Therefore, after consideration of the claimant's motion, 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.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion regarding this motion. The majority finds that the claimant did not meet the requirements for submitting new evidence under Ark. Code Ann. §11-9-705(c)(1) (Repl. 2002). I disagree and would grant the claimant's Motion to Present New Evidence.

The claimant specifically seeks to introduce a letter from the Dr. Scott Schlesinger dated October 28, 2008, indicating that there were typographical errors in the medical records which the Administrative Law Judge relied on in making his decision.

The Administrative Law Judge's May 15, 2008, Opinion states:

However, it is unclear where surgery was actually performed on the claimant. The claimant states in testimony to the Commission that his work related injury was to C6-C7. However, on August 26, 2007, Dr. Schlesinger indicated that the claimant had a fusion at the C5-C6 level for the left C6 radiculopathy and spinal stenosis without difficulty on August 21, 2007.

Furthermore, the Administrative Law Judge specifically states in his findings: "That the difficulties of the claimant are a reoccurrence of his prior cervical problems and not an aggravation."

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).

First, the evidence the claimant seeks to introduce is relevant. Here, the letter the claimant seeks to introduce relates directly to the timeline of the surgeries and whether the claimant had a recurrence of his prior cervical problems or an aggravation.

Second, the evidence is not cumulative. The letter the claimant seeks to introduce is not contained in the record. Indeed, the evidence the claimant seeks to admit clarifies the time line in which the claimant's surgeries occurred. Furthermore, the letter the claimant seeks to introduce was not in existence at the time of the hearing.

Third, the evidence changes the result of the case. The Administrative Law Judge specifically stated in his findings: "That the difficulties of the claimant are a reoccurrence of his prior cervical problems and not an

aggravation." Therefore, it is clear that the evidence the claimant seeks to introduce, which bears heavily on the issue of whether the injury to the claimant was a reoccurrence or an aggravation of the injury, would change the result of this case.

Fourth, the party seeking to introduce new evidence was diligent in seeking to introduce the new evidence. A hearing was held on this matter on May 15, 2008 and the Administrative Law Judge issued his opinion on August 12, 2008. The claimant filed a Motion to Present New Evidence on November 7, 2008. As stated above, the relevance of the evidence the claimant seeks to introduce could not be determined until August 12, 2008. As the claimant's Motion to Present New Evidence is dated November 7, 2008, it is evident that the claimant was diligent.

After consideration of both the claimant's Motion and the respondent's objection thereto, I find that the claimant's Motion to Present New Evidence should be granted.

Therefore, I must respectfully dissent from the majority.

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PHILIP A. HOOD, Commissioner