

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308154

JOE A. AUSTIN, EMPLOYEE	CLAIMANT
EATON CORPORATION, EMPLOYER	RESPONDENT NO. 1
OLD REPUBLIC INS. CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
PERMANENT AND TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

ORDER FILED MAY 18, 2009

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

Claimant represented by Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondent No. 1 represented by William C. Frye/Cynthia Estes Rogers, Attorneys at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Robert Roddy, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by Christy King, Attorney at Law, Little Rock, Arkansas.

ORDER

Presently before the Commission is respondent no. 1 and respondent no. 2's Motion to Strike Portions of Claimant's Brief and for Extension to File Briefs Pending Ruling on Motion. After consideration of said motion, claimant's and respondent no. 3 responses thereto, and all other matters properly before the Commission, we find that the Motion must be, and hereby is, granted.

In an opinion filed January 14, 2008, the Administrative Law Judge found that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable bilateral carpal tunnel syndrome injury, that he is entitled to additional medical treatment for a cognitive injury, that the claimant is entitled to additional temporary total disability benefits, that he is entitled to any permanent physical impairment for his compensable external head injury, or that he was rendered permanently and totally disabled as a result of his compensable head injury. Claimant filed a timely notice of appeal from this opinion. In claimant's brief filed April 13, 2009, claimant attached four exhibits to which he referred in his brief. These four exhibits were not introduced at the hearing before the Administrative Law Judge. Three of said exhibits were in existence and were available at the time of the hearing. These exhibits consist of a Blue Cross/Blue Shield Clinical Guidelines, and three medical articles which address chronic pain. One of the medical articles was not published until several months after the hearing on this claim.

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).

Claimant contends that the evidence "would clearly be admissible in even a civil trial - much less in an administrative hearing that is not played [sic] with the strict application of evidence." The issue is not whether the evidence would have been admissible at the hearing, but

whether said evidence is admissible on appeal, once the hearing has been closed and a decision has been rendered on the claim. First, with the exception of the one article that was not published until after the hearing, we cannot find that the exhibits attached to claimant's brief is "new evidence" as it was all readily available to the claimant prior to the hearing. The claimant simply did not prevail before the administrative Law Judge on the evidence he presented at the hearing and he now seek to supplement the record with additional evidence on appeal. In essence he is seeking a second bite at the apple. Claimant was not diligent in obtaining and presenting this evidence. Moreover, by slipping this expert evidence in on appeal, the claimant is depriving respondents of the Daubert challenge under A.C.A. § 11-9-705(d). Therefore, we find that exhibits attached to claimant's brief shall not be admitted into evidence and any references in claimant's brief to these exhibits shall be stricken.

Therefore, after consideration of the respondents no. 1 and no. 2's motion, claimant's and respondent no. 3's responses thereto, and all other matters properly before the Commission, we find that respondents' Motion to Strike

Portions of Claimant's Brief is granted. We further find that all respondents are granted additional time to respond to claimant's brief on appeal. The Clerk of the Commission is hereby order to establish a new briefing schedule.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.