

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E212110 & F701148

LARRY LUNDAY, EMPLOYEE	CLAIMANT
ENTERGY ARKANSAS, INC., EMPLOYER	RESPONDENT NO. 1
SELF-INSURED, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

ORDER FILED JUNE 17, 2011

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

Claimant represented by the HONORABLE STEVEN R. McNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE JIM L. JULIAN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID B. SIMMONS, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas.

ORDER

Presently before the Commission is Claimant's Motion to Vacate and Set Aside the Full Commission Opinion dated May 23, 2011. 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.

Although we reached differing findings of fact and conclusions of law in our opinion filed May 23, 2011, on which we still stand firm, we agree that claimant's motion must be denied. For his motion, claimant contends that he was denied due process by the appointment of Gail Matthews as a special chairperson. Arkansas Code Annotated § 11-9-201(a)(3) sets forth the requirements for the Chairman of the Commission. Such person must be an attorney "who shall have been engaged in the practice of law in the State of Arkansas for not less than five (5) years...." If for some reason any member of the Commission must recuse from a case, A.C.A. § 11-9-201(c)(1) states in pertinent part:

...the Governor shall appoint a qualified person to hear and participate in the decision on the particular matter....

This appointment was duly executed on April 19, 2011. Arkansas Code Annotated § 11-9-2-1(c)(1) does not require notification to the parties prior to the recusal or appointment of a special by the Governor.

In contending that he was denied due process, claimant argues that Special Chairman Matthews meets the requirements for the "representative of employers" whose

qualifications are set forth in A.C.A. § 11-9-201(a)(1), and thus denied him of the right to a neutral third party. A similar issue has previously been addressed by the Arkansas Court of Appeals in Jones v. Scheduled Skyways, Inc., 1 Ark. App. 44, 612 S.W.2d 333 (1981). The Court of Appeals held, "... and the law is well settled that public officers are presumed to act lawfully, sincerely and in good faith in the execution of their duties."

More recently, the Court of Appeals stated in Long v. Wal-Mart, 98 Ark. App. 70, 250 S.W.3d 263 (2007),

Due process requires impartiality on the part of persons performing judicial or quasi-judicial functions." See Schweiker v. McClure, 456 U.S. 188 (1982). Hearing officers are presumed to be unbiased; however, the presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. *Id.* The burden of establishing such a disqualifying interest rests with the party making the assertion, and speculation and conjecture cannot substitute for credible evidence. See *id.*; see also Cloverleaf Express v. Fouts, 91 Ark. App. 4, 207 S.W.3d 576 (2005).

Each member of the Commission, including all special Commissioners, are charged with the duty of deciding

cases "impartially and without giving the benefit of the doubt to either party." A.C.A. § 11-9-704(c)(4).

"Consequently, no Commissioner is free to act in a capricious fashion with disregard to the facts and the law, regardless of his or her statutory designation." Quinn v. Webb Wheel Products, Full Commission decision filed November 15, 1996 (E209211). With regard to claimant's allegations that Special Chairman Matthews is biased, claimant attached Commission opinions in which as a practicing attorney Special Chairman Matthews represented respondents. This, in and of itself does not prove bias. As noted by the Court of Appeals in Quinn v. Webb Wheel Products, 59 Ark. App. 272, 957 S.W.2d 187 (1997), "We begin with the premise that an adjudicator is presumed to be unbiased, and to overcome that presumption, a litigant must make a showing of a conflict of interest or some other specific reason for disqualification." Id. See Withrow v. Larkin, 421 U.S. 35, 37 (1975); Gibson v. Berryhill, 411 U.S. 564 (1973); Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972). Claimant's only argument is that Special Chairman Matthews represents employers and carriers before the Commission, which would thus qualify him for the position of employer representative. However, we take judicial notice that Mr.

Matthews has also represented claimants before the Commission. Attached to this order is a list of claims wherein Special Chairman Matthews is listed as the claimant's attorney in workers' compensation claims. All that is required to be appointed as Chairman or Special Chairman is for the candidate to have practiced law in the State of Arkansas for five years. Special Chairman Matthews clearly possesses and surpasses this minimum requirement.

Claimant has failed to present evidence of a conflict of interest or any other specific reason for Special Chairman Matthews to be disqualified, therefore, we find that claimant's motion is hereby denied.

IT IS SO ORDERED.

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KAREN H. MCKINNEY, Commissioner

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PHILIP A. HOOD, Commissioner

Special Chairman Gail Matthews not participating.