

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F809640

JESSICA SWINK,
EMPLOYEE

CLAIMANT

RESTAURANT MANAGEMENT GROUP,
EMPLOYER

RESPONDENT

UNION STANDARD INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 18, 2011

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

Claimant represented by the HONORABLE MICHAEL HAMBY,
Attorney at Law, Greenwood, Arkansas.

Respondent represented by the HONORABLE GUY ALTON WADE,
Attorney at Law, Little Rock, Arkansas.

OPINION AND ORDER

The claimant in the above-styled matter has filed a
Motion To Supplement The Record. The Full Commission denies
the motion.

The parties stipulated that the employment relationship
existed on August 10, 2008. A pre-hearing order was filed
on January 19, 2011. The claimant contended that she
sustained a compensable injury to her right knee on August
10, 2008. The claimant contended that she was entitled to

reasonably necessary medical treatment, temporary total disability, and permanent partial disability. A hearing was held on March 29, 2011, and an administrative law judge filed an opinion on June 16, 2011. The administrative law judge found that the claimant failed to prove she sustained a compensable injury. The claimant filed a Notice Of Appeal to the Full Commission.

John D. Young informed the Commission on July 27, 2011 that the claimant had terminated his services, and requested that he be removed as the claimant's attorney of record. The Full Commission granted Mr. Young's request in an Order dated August 29, 2011. Michael Hamby subsequently informed the Commission that he had been retained as counsel for the claimant.

In her Motion To Supplement The Record, the claimant states that her previous attorney "failed to obtain and file of record as a Claimant's Exhibit, the medical reports from her original doctor visit in regards to her right knee injury." The respondents object to the claimant's motion.

Ark. Code Ann. §11-9-705(Repl. 2002) provides, in pertinent part:

(c) INTRODUCTION OF EVIDENCE. (1)(A) All oral evidence or documentary evidence shall be

presented to the designated representative of the commission at the initial hearing on a controverted claim, which evidence shall be stenographically reported.

(B) Each party shall present all evidence at the initial hearing.

(C) (i) Further hearings for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or commission.

The Commission's discretion should be exercised and the motion to present new evidence should be granted where the movant was diligent and the new evidence is relevant, is not cumulative, and would change the result. *Hargis Transport v. Chesser*, 87 Ark. App. 301, 190 S.W.3d 309 (2004), citing *Mason v. Lauck*, 232 Ark. 891, 340 S.W.2d 575 (1960).

In the present matter, the claimant states that she was unaware her former attorney had failed to submit a return to work slip dated August 4, 2008 and a medical report dated August 4, 2008. Nevertheless, the Full Commission finds that the claimant was not diligent in submitting this proposed new evidence. We note that the claimant contended she sustained a compensable injury in August 2008. A pre-hearing order was filed on January 19, 2011, and a hearing was held before an administrative law judge on March 29, 2011. The administrative law judge filed an opinion on June

16, 2011. The claimant did not attempt to submit the additional evidence until October 21, 2011.

The Full Commission therefore denies the Motion To Supplement The Record.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a review of the filings of the parties, I would remand this claim back to the Administrative Law Judge for an additional hearing.

Ark. Code Ann. §11-9-705 (c) (1) (C) (i) states:

Further hearings for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or commission.

Subdivision (c) (1) (C) (i) specifically contemplates that while all evidence is to be offered at the initial hearing, See Ark. Code Ann. §11-9-705 (c) (1) (B), the Commission and the Administrative Law Judge have the discretionary power to permit the introduction of additional evidence. See Grimes v. North Am. Foundry, 316 Ark. 395, 872 S.W. 2d 59. The Commission's discretion should be exercised and the motion to present new evidence should be granted where the movant was diligent and the new evidence is relevant, is not cumulative, and would change the result. Hargis Transport v. Chesser, 87 Ark. App. 301, 190 S.W. 3d 309 (2004), citing Mason v. Lauck, 232 Ark. 891, 340 S.W. 2d 575 (1960). I find that the claimant has met all of the above elements.

The majority finds that the claimant was not diligent. I disagree. The time clock should be started from when the claimant retained new counsel, not the date of the Administrative Law Judge's Opinion. Although the Commission was notified on July 29, 2011 that the claimant had terminated her former attorney's services, the former attorney was not actually relieved of his duties by the Commission until August 29, 2011. The Commission was

notified of the claimant's new counsel on September 21, 2011. Claimant's new counsel immediately requested a 30-day extension of time in which to file the claimant's brief, stating that he needed time to review the file. The request was granted by the Commission, and the claimant's brief was designated to be due on October 24, 2011. A fax copy of the claimant's Motion to Supplement the Record was received by the Commission on October 21, 2011. I find that upon discovery of the former attorney's omission, the claimant's new attorney acted diligently. The claimant should not be penalized for the actions of her former attorney.

Furthermore, I would note that Ark. Code Ann. §11-9-705(a)(1) states:

In making an investigation or inquiry or conducting a hearing, the Workers' Compensation Commission shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct the hearing, in a manner as will best ascertain the rights of the parties.

As such, I find that this claim should be remanded to the Administrative Law Judge for a hearing on the issue

of whether or not the records the claimant wishes to submit are necessary to best ascertain the rights of the parties.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner