

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA08-544

DONNA CHAMNESS

APPELLANT

V.

WENDY'S RESTAURANT, ITT
HARTFORD INSURANCE Co. and
DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND

APPELLEES

Opinion Delivered MARCH 4, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. E606801]

AFFIRMED

KAREN R. BAKER, Judge

Claimant, Donna Chamness, appeals from a decision by the Workers' Compensation Commission, affirming the ALJ and finding that she failed to meet her burden of proof by a preponderance of the evidence that her May 8, 1996 compensable low back injury resulted in permanent physical impairment. Claimant has one argument on appeal: that the Commission erred in not remanding her claim to the ALJ with instructions to the ALJ to allow and consider Dr. Howser's deposition. We affirm the Commission's decision.

Prior to the hearing, the parties stipulated that claimant sustained a compensable injury to her low back on May 8, 1996, that arose out of and in the course of her employment with Wendy's Restaurant and that claimant reached the end of her healing period on April 5, 2000.

Claimant provided testimony that since her injury, she experienced trouble walking and was unable to complete normal tasks. She explained that while every day was a new experience for her,

she often had difficulty getting up in the mornings and difficulty while driving. Her husband and daughter had to help care for her and complete tasks for her on days when she suffered from extreme back pain and pain that radiated down her legs. She also suffered from muscle spasms in her back.

Claimant was seen by Dr. Rutherford, who performed numerous tests. Dr. Rutherford's September 13, 2005 letter states:

She has undergone extensive investigation including MRI studies of the lumbar spine and cervical spine, a lumbar myelogram with post-myelographic CT with no structural pathology identified. She underwent facet joint blocks followed by facet joint rhizotomy for assumed facet joint syndrome lumbar spine. There is no indication that the diagnostic blocks were placebo controlled which renders interpretation problematic. . . . She has not undergone any diagnostic injections of the cervical spine and thus there is no objective basis for the suggested diagnosis in the medical records of cervical facet joint syndrome. . . . Her complaints comprise low back pain, neck pain, dropping objects both hands, bilateral wrist pain both upper extremities and headache. . . . She is currently under the care of a psychiatrist. Ms. Chamness did undergo an FCE in 1996 which was said to be valid. She was released to restricted duties of which she proved intolerant and thus re-entry into the work place proved unsuccessful.

. . . .

There is no objective neurological abnormality identified in Ms. Chamness' case. There is prominent pain behavior and clear cut functional overlay. It is recommended that Ms. Chamness undergo an FCE under the direction of Rick Byrd and conventional EMG/Nerve Conduction Study both upper extremities to address whether or not there is any objective evidence for carpal tunnel syndrome. With respect to the alleged diagnosis of lumbar and cervical facet joint syndrome there is not evidence to support either of these diagnoses neither of which are considered valid or credible.

At Dr. Rutherford's request, claimant underwent a functional capacity evaluation performed by Rick Byrd. The functional capacity evaluation report reflected that the claimant put forth inconsistent effort throughout testing. The report reflected that the results of the evaluation suggest that the claimant gave an unreliable effort. Overall, Dr. Rutherford found no objective medical explanation for the claimant's subjective complaints. Specifically, he found no objective evidence

of lumbar facet joint syndrome and likewise no objective evidence of cervical facet joint syndrome. He also opined that there was no objective evidence to support carpal tunnel syndrome as the nerve conduction study yielded normal results. Based on the testing, Dr. Rutherford did not recommend any impairment rating for claimant's back, neck, or carpal tunnel injuries.

Claimant testified that a friend referred her to Dr. Howser, a Memphis neurosurgeon. She explained that Dr. Howser performed a number of diagnostic studies, including range of motion, an MRI, and an EMG nerve conduction study. Claimant acknowledged that the MRI and the EMG/NCV were normal. Claimant introduced a July 2, 2004 letter from Dr. Howser, which stated in relevant part:

It continues to be my opinion that this patient has sustained a cervical facet syndrome, lumbar facet syndrome and left carpal tunnel problem secondary to the fall at Wendy's restaurant which happened on the morning of May 8, 1996. She has been properly worked up including MRIs, myelogram and post myelogram CTs which failed to show any evidence of a ruptured disc. She has had blocks which were very successful in the lumbar area but they did not last. She has had facet rhizotomies in the lumbar area which did not work. She has had a typical cervical facet syndrome and lumbar facet syndrome.

Her diagnosis continues to be lumbar facet syndrome, cervical facet syndrome with cervicogenic headache and bilateral carpal tunnel syndrome.

She will have a 3% anatomic disability rating rated to the body as a whole as a result of her lumbar facet syndrome. She will have a 3% anatomic disability rating rated to the body as a whole as a result of her cervical facet syndrome. She will have a 2% anatomic disability rating rated to the body as a whole as a result of her right carpal tunnel problem. She will have a 2% anatomic disability rating rated to the body as a whole as a result of her left carpal tunnel problem. All of these problems are related to the injury as discussed above. This is a total of 10% anatomic disability, however, her major disability is industrial. She is totally disabled to perform any type of work and in my opinion this will be a permanent restriction. As mentioned above, she has already been approved for social security because of these problems.

At the conclusion of the hearing, claimant requested that the ALJ allow counsel to take Dr. Howser's deposition pursuant to Commission Rule 99.16. Claimant's counsel stated that the

deposition could be scheduled and copies obtained before the record in the case was complete. Respondents objected on the basis that Dr. Howser was not listed as a witness in the pre-trial order. Respondents also argued that they had made previous attempts to depose Dr. Howser, and in those previous attempts, there was a question as to whether Dr. Howser would accept the Commission's payment schedule. After considering claimant's request, the ALJ did not allow claimant to take Dr. Howser's deposition.

On the evidence presented, the ALJ found that the claimant failed to meet her burden of proof by a preponderance of the evidence that the May 8, 1996 compensable low back injury resulted in permanent physical impairment. The Commission summarily affirmed and adopted the ALJ's decision. The Commission also declined claimant's request to remand the case to the ALJ for claimant to take Dr. Howser's deposition. The Commission reasoned that Dr. Howser's report was in the record and that claimant could have obtained the deposition prior to the hearing and submitted it at the hearing.

On appeal, claimant contends that the Commission should have granted her request to remand the case to the ALJ with instructions to the ALJ to allow and consider Dr. Howser's deposition in the decision. Arkansas Code Annotated section 11-9-705 (c)(1)(A) (Supp. 2007) states that "[a]ll oral evidence or documentary evidence shall be presented to the designated representative of the commission at the initial hearing on a controverted claim. . . ." Subsection (B) states that "[e]ach party shall present all evidence at the initial hearing." Additional hearings requested for the purpose of introducing additional evidence "*will be granted only at the discretion of the hearing officer or commission.*" Ark. Code Ann. § 11-9-705 (C)(i) (emphasis added); *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001) (stating that the Commission has broad discretion with

reference to the admission of evidence, and that decision will not be reversed absent an abuse of that discretion).

In order for the Commission to allow the submission of additional evidence, the movant must demonstrate that the new evidence is relevant; that the new evidence is not cumulative; that the new evidence would change the result of the case; and that the movant was diligent in presenting evidence to the Commission. *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007) (citing *Hargis Transp. v. Chesser*, 87 Ark. App. 301, 190 S.W.3d 309 (2004)). In declining to remand the case for the taking of Dr. Howser's deposition, the Commission found that claimant lacked diligence in that "[i]t ha[d] been over three years since Dr. Howser wrote his report. . . . [t]he deposition could certainly have been obtained earlier and submitted at the hearing."

We find that claimant did not exercise due diligence in obtaining Dr. Howser's deposition. A remand based upon newly discovered evidence is only proper when the new evidence could not have been brought before the Commission through the diligent efforts of appellant. *Long, supra* (citing *Neal v. Hanford Produce Co.*, 256 Ark. 1074, 511 S.W.2d 636 (1974)). The evidence showed that Dr. Howser evaluated claimant more than three years before the hearing. Claimant was, therefore, aware of Dr. Howser's findings and the impact of those findings on her case long before the hearing. Moreover, in preparing for the hearing, claimant did not list Dr. Howser as a witness in any of the pretrial pleadings. Rather, she listed only herself and her husband as witnesses. Finally, as the Commission pointed out, Dr. Howser's report was contained in the record on claimant's case and the contents of the report were considered by the ALJ in his determination. We hold that the Commission did not abuse its discretion when it declined to remand the case to the ALJ with instructions to allow the deposition of Dr. Howser.

Affirmed.

PITTMAN and GRUBER, JJ., agree.