

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F309931

Tony R. Long, EMPLOYEE

CLAIMANT

**Wal-Mart Stores, Inc.,
EMPLOYER**

RESPONDENT

CLAIMANT'S SUBSTITUTED BRIEF

**I. JURISDICTION OF THE ARKANSAS WORKERS' COMPENSATION
COMMISSION TO CONSIDER CONSTITUTION CHALLENGES**

The Arkansas Court of Appeals has found that questions related to the constitutionality of the Arkansas Workers' Compensation Law must first be raised at the Commission level. Hamilton v. Jeffrey Stone Co., 6 Ark. App. 333, 641 S.W.2d 723 (1982); see also, Frank Quinn v. Webb Wheel, 52 Ark. App. 208, 915 S.W. 2d 740 (1996); Priest v. United Parcel Service, 58 Ark. App. 282; 950 S.W.2d 476 (1997). In Hamilton, supra. the Court concluded the following:

“Even though the Commission may not have the authority to declare statutes unconstitutional, we believe such issues should first be raised at the Administrative Law Judge or Commission level. Constitutional questions often require an exhaustive analysis which is best accomplished by an adversary proceeding. Obviously this can be done only at the hearing level. Requiring these constitutional issues to be considered by the Commission, we can be assured that such issues will be thoroughly developed before we are asked to rule on a statute's validity.”

Accordingly, under the decisions of the Arkansas Court of Appeals, raising these constitutional questions before the Commission is procedurally mandatory.

II. INTRODUCTION

It is our sincere belief that the entire Worker's Compensation Act as enacted and/or as applied to the injured worker in Arkansas is unconstitutional as there are no safeguards to protect the administrative law judges from the threats of those politically powerful citizens favored by the chief politician in this State – the Arkansas Governor. Alternatively, the claimant argues that the Worker's Compensation Act even though constitutional *per se* is certainly unconstitutional in its actual application to the claimant since there are no safeguards to prohibit unlawful pressures being placed on the Commission and the Administrative Law Judges by the politically powerful. Again, even though the claimant maintains the entire process is unconstitutional, in the alternative, the claimant states that the worker's compensation commission's process is unconstitutional as applied to him.

In the case of Lake View School Dist. No. 25 vs. Huckabee, 351 Ark. 31, 91 S.W.3d 472, the Supreme Court stated that the judiciary has the ultimate power and the duty to apply, interpret, define, and construe all words, phrases, sentences, and sections of the state constitution as necessitated by the controversies before it and it is solely the function of the judiciary to so do. Therefore, the Court stated that this duty must be exercised even when such action services as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.

Without any changes in the law requiring the position of administrative law judge to be an elected office or making appointments for a worker's compensation administrative law judge positions a term of years appointment or even a lifetime appointment, it will be proven that these administrative law judges and the Commissioners over them have been and in all likelihood will continue to be subjected to extreme pressures toward their job security in order to find in favor of the Governor's favored political patrons – i.e. the employers in the State of Arkansas who the Governor has publicly promised will find him doing everything he can to make the State of Arkansas “business friendly”. As will be seen by the affidavits of two fired administrative law judges, this goal on its face - although quite benign - hides an agenda that allows large businesses like Wal-Mart the privilege of demanding and receiving the firing of an administrative law judge because she was too “claimant friendly” when she ruled in favor of an employee who had a claim against Wal-Mart. This problem was published by the undersigned attorney in 2002 in an article published in the Arkansas Trial Lawyers’ “The Docket” entitled “What will we do about the “terrorists” in our backyards?: a worker’s compensation claimant attorney’s perspective and challenge to come to the aid of the innocent victims of corporate greed and legislative and judicial abuse of power!” That article is attached hereto, marked Exhibit “A” and made a part hereof as though set out word for word herein. Certainly that article sets out sufficient facts legitimately criticizing Governor Huckabee that would give the Governor motivation to demand that the

Commission “get Spencer”. The two affidavits of Administrative Law Judge C. Michael White and William “Bill” Daniels, both fired by the Governor for not allowing the Governor’s administration to consciously influence their decisions and which confirm that there was an active and vocal Commission-wide effort to “get Spencer”, are attached hereto, marked Exhibit “B” and “C” respectively and made a part hereof as though set out word for word. These affidavits and the article can also be found in their entirety on the internet at http://www.rickspencer.com/WCC_Abuses.htm.

In a nationally broadcast radio, Arkansas Governor Mike Huckabee once compared the State of Arkansas to a “banana republic.” See, "Huckabee: State like a 'banana republic'." Arkansas DemocratGazette 7 Nov. 2000. The evidence which the Claimant intends to submit at the hearing scheduled in this matter will show that Governor Huckabee has attempted to establish a “business friendly” environment in the State of Arkansas through the use of coercive tactics that are similar to the tactics used by the dictators of the “banana republics” to which he compared this State. Specifically, in response to influences and pressure from private interests and to further his quest to create a “business friendly” environment in this State that favors private enterprise, Governor Huckabee’s administration has focused extreme pressure on the administrative law judges of the Workers’ Compensation Commission and the Commissioners themselves to decide claims presented to them in favor of employers and insurance carriers or

else these judges would be fired. This pressure focuses directly and substantially upon the mental decision-making processes of the administrative law judges and Commissioners. The effect of this pressure compromises and impairs the appearance of impartiality which is so essential to any concept of justice and fair play. In fact, the Commission's administrative law judges have seen at least three other administrative law judges fired with no reason for their termination other than the fact that they "serve at the pleasure of the governor." Moreover, the commission's administrative law judges have been exposed to news reports and other evidence which suggests and establishes that the employment of these administrative law judges was terminated because they were viewed by the Governor's office as deciding claims in favor of claimant's too often.

Because the Arkansas Worker's Compensation Law provides no safeguards to protect the Commission's decision-makers from these improper external pressures, the entire adjudication process established by the Law violates the separation of powers doctrine and the constitutional guarantees of due process and equal protection that are set forth in the Constitutions of the United States and the State of Arkansas. Therefore, the entire Arkansas Workers' Compensation Law should be declared unconstitutional. Specifically, the claimant contends that the provisions of the Arkansas Workers' Compensation Law giving the Executive Branch of the State's government absolute power to appoint the three (3) members of the Arkansas Workers' Compensation Commission and giving the Governor sole authority over the Commission and its employed judges makes the judicial

functions of government a part of and subject to the Executive Branch of the State of Arkansas violates the separation of powers provisions of the Arkansas Constitution Article 4, Section 1 which states the following:

“The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.”

Hence, the claimant contends that the power and authority to conduct hearings and to decide claims for compensation under the Arkansas Workers’ Compensation law violates this provision of the Constitution of the State of Arkansas as well as Article 4, Section 2 which states the following:

“No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.”

The claimant further contends that the provisions of the Arkansas Workers’ Compensation Law violates Article 5, Section 32 of the Arkansas Constitution by placing the judicial functions of the adjudication of claims for injured workers for injury and death under the Executive Branch of the State of Arkansas. This constitutional provision only provides that the Legislature has the power to provide the means, methods, and forum for adjudicating claims but never expressly allows nor provides for any exceptions to the other provisions of the Arkansas Constitution set out above requiring separation of powers.

The claimant also contends that the provisions of the Arkansas Workers' Compensation Law which authorize the Arkansas Workers' Compensation Commission to appoint administrative law judges and grants the administrative law judges appointed by the Commission the power and authority to conduct hearings and to decide claims for compensation under the Arkansas Workers' Compensation law violates the Due Process Clauses of the Constitutions of the United States of America and the State of Arkansas for the reasons discussed herein.

The claimant further contends that the provisions of the Arkansas Workers' Compensation Law which places the judicial functions of the adjudication of claims for injured workers for injury and death under the Executive Branch of the State of Arkansas is a violation of Arkansas Constitution Article 2, Section 3 which states the following:

“The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition.”

The claimant also contends that the provisions of the Arkansas Workers' Compensation Law which place the judicial functions of the adjudication of claims for injured workers for injury and death under the Executive Branch of the State of Arkansas is a violation of Arkansas Constitution Article 2, Section 2 which states the following:

“All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying

and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.”

Furthermore, the claimant contends that the provisions of the Arkansas Workers’ Compensation Law which place the judicial functions of the adjudication of claims for injured workers for injury and death under the Executive Branch of the State of Arkansas is a violation of Arkansas Constitution Article 2, Section 18 which states the following:

“The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”

Finally, the claimant contends that the provisions of the Arkansas Workers’ Compensation Law placing the judicial functions of the adjudication of claims for injured workers for injury and death under the Executive Branch of the State of Arkansas is a violation of the Article 2, Section 29 of the Arkansas Constitution, which states the following:

“This enumeration of rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights herein retained, or any transgression of any of the higher powers herein delegated, we declare that everything in this article is excepted out of the general powers of the government; and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void.”

Consequently, the Claimant contends that the entire Workers’ Compensation Law, as set-forth at Ark. Code Ann. § 11-9-101, et. seq., is unconstitutional.

III. THE EVIDENCE SUBMITTED BY THE CLAIMANT ESTABLISHES THAT THE EXECUTIVE BRANCH OF THE STATE OF ARKANSAS AND PRIVATE INTERESTS HAVE EXERTED PRESSURE ON WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGES AND COMMISSIONERS WHICH HAS INFRINGED UPON THEIR DECISIONAL INDEPENDENCE AND RESULTED IN ACTUAL BIAS AND THE APPEARANCE OF BIAS IN THE DECISIONS OF THE ADMINISTRATIVE LAW JUDGES AND COMMISSIONERS.

For many years, injured workers have perceived a bias and inherent unfairness in the adjudicative process established by the Arkansas Workers' Compensation Law. See, e.g., Quinn v. Webb Wheel Products, 334 Ark. 573, 976 S.W.2d 386 (1998); Vickie Scarbrough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991). However, allegations of bias and prejudice in the Commission's adjudicative process have been rejected by the Courts because no actual proof of bias or prejudice has been presented.

However, in the present matter, proof to support this constitutional challenge will be presented. In this regard, former Administrative Law Judge Eileen Harrison was fired on August 19, 1998. See, "Judge's daughter files suit; 4 justices recuse, Out-of-state appointment for case likely." Arkansas Democrat Gazette 03 Nov. 1998. The Commission's administrative law judges are "Grade 99" states employees who are said "to serve at the pleasure of the governor," and Ms. Harrison was advised that no reason had to be given for the termination of her employment. However, an aide for Governor Huckabee ultimately acknowledged that Ms. Harrison's employment was terminated by because she was viewed "as being too claimant friendly," which clearly was not consistent

with the Governor's quest for "a business friendly Arkansas." Ms. Harrison filed a wrongful termination lawsuit in federal court against two of the Commission's members, Eldon F. Coffman and Michael K. Wilson. Id. Ms. Harrison's lawsuit was ultimately settled for \$125,000.00. See, "Legislators question judge's firingState paid \$125,000 to settle case brought by Workers Comp hearing officer." Arkansas Democrat Gazette 31 Jan. 2001. However, deposition testimony and other evidence discovered during her lawsuit reveal that Ms. Harrison's employment was terminated because of pressure asserted by private interests on the Commission on the Governor's office. Specifically, this evidence disclosed that Ms. Harrison's employment was terminated when Wal-Mart's attorney, Steve Carter, "pressured commission Chariman Eldon F. Coffman of Fort Smith to fire Harrison, one of ten administrative law judges, who hear worker's claims." Id.

As cited herein, this evidence of the influence of Wal-Mart and the Governor's office was publicized in newspapers circulated statewide which were accessible to all administrative law judges who continued to be employed by the Commission and continued to hear and decide claims for compensation. For the administrative law judges remaining with the Commission, these publicized stories validated the long suspected influence of private interests on the Commission and the Governor's office. Moreover, these stories as well as other information that was disclosed during the discovery process of Ms. Harrison's law suit and which was available to the remaining judges sent a clear message to those judges: "If

you want to keep your jobs, you'll forget the little working man or woman with no political power or voice and bend to the wishes of large companies like Wal-Mart when deciding cases.”

The effect of this publicity on the administrative law judges who continued to hear and decide claims presented by the Commission is established by the affidavits of former administrative law judges William Daniels and C. Michael White, which have been presented as evidence in the present matter. The employment of both of these former judges was also terminated in the same manner that Ms. Harrison's employment. Both were told as Ms. Harrison that their services were no longer needed and the Commission refused to give either judge any reason for their termination. Instead, both were told that they “served at the pleasure of the Governor” and that no reason had to be given for their terminations. Both Daniel and White state that they are aware of no reason to justify their termination other than the number of claims that they were deciding in favor of claimants when the facts and law justified it rather than deciding the case in favor of the Governor's expressed policy to decide cases in a “business friendly” manner.

The affidavits of both White and Daniels establish that improper pressures were being placed upon the administrative law judges and the Commissioners of the Arkansas Workers' Compensation Commission that clearly influenced their decision-making process. Specifically, the Chairman of the Commission indicated to Judge White that the Commission had to be sensitive to the “political winds”.

Prior to becoming an administrative law judge, White had worked for the Full Arkansas Workers' Compensation Commission, assisting former Commission Chairman James Daniel, and White made the following statements regarding his observations of pressures bought upon the Commissioners and administrative law judges and the effects of these pressures during the course of his employment with the Commission:

“That during the time I worked for the Full Commission I overheard conversations on a number of occasions that indicated that the Commission’s decisions were influenced by political influences and not by the law or facts of the particular case before the Commission; That as an employee of the Full Workers’ Compensation Commission, that I was directed to interpret the amendments to the Workers’ Compensation law that were enacted by Act 796 of 1993 in a manner that was favorable to respondents because of the direction the “political winds” were blowing at that time; that as an administrative law judge I continued to see the affect of these “political winds” on the decisions of the Commission, both in their administrative decisions and in the disposition of appeals; I have been involved in conversation with other administrative law judges where the effect of decision cases in favor of claimants on a judge’s job security was discussed; The prevailing opinion among the judges during the time I was with the Commission was that deciding cases in favor of claimants created a high risk of termination; The judges were award that Eileen Harrison’s employment as an administrative law judge was terminated because she was perceived as being too claimant friendly by the Executive Branch of the State of Arkansas; It was always my belief that I decided cases fairly and justly, by applying the law to the facts presented to me and that I did not allow concern about my job security affect my decisions; however, at all times, I was very cognizant that I had no control over the subconscious effect of these influences on my decisions; Other administrative law judges expressed similar concerns to me; That these concerns were exacerbated when Bill Daniel’s employment as an administrative law judge was terminated, especially by the fact that he was advised that the Commission did not have to give a reason for his termination.”

White also stated the following with regard to the environment that existed at the Workers' Compensation Commission prior to his termination:

“That Arkansas Workers' Compensation Administrative Law Judges decide cases in a tense environment with the knowledge that they are ‘at will’ employees, subject to the whims of Governor Huckabee and his agents in the Commission, and with the knowledge that history has shown that they are expected to decide cases in accord with a politically influenced administrative policy, and not in accord with the law; That they are cognizant that history has shown that the failure to decide cases in accord with the politically influenced administrative policy can result in the loss of their job;

In addition to statements similar to these, Mr. Daniels also stated the following:

“. . . I recall other ALJ's mentioning to me on occasions in a joking manner that to hold in favor of an injured worker against Wal-Mart was the “kiss of death” for the future of any ALJ. This was caused in large part by the fact that Administrative Law Judge Eileen Harrison was fired when it was demanded by Wal-Mart's agents.”

Daniel also states that Shelby “Terry” Turner, the labor representative on the Commission and the husband of Governor Huckabee's Chief of Staff made him aware that the Commission was monitoring the number of claims that he decided in favor of claimants when Turner told Daniels that he had caused a review to be made of all of Daniel's decisions and was surprised to find that he had ruled in favor of Claimants about 35% of the time. Shortly after that conversation, Daniels' employment was terminated. With regard to his termination, Daniel's made the following statements in his affidavit:

“Thereafter, my employment as an Administrative Law Judge was terminated by the Commission only approximately five (5) months later on May 1, 2003; that I was simply told that “it was in everyone's best interests” that I go and they did not even have to give me a reason for that decision to fire me because I was classified

as a Grade 99 state employee and any ALJ could be fired without any cause whatsoever; that I believe that the only reason I was fired was because of the ratio of favorable decisions for Claimants as compared to Respondents even though according to Commissioner Terry Turner I only held 35% of the time in favor of Claimants in all my hearings. That even having to know or keep up with the ratio of favorable decisions for or against Claimants went against my own grain and standards since I never wanted to know the amount of times I voted for or against either side since I believe that cases should be decided on the law and the particular facts of that case and not because of the fear of being fired or to avoid unreasonable pressures being placed on you if you voted too many times for the claimants in cases versus the employers and their insurance companies; However, it was clearly apparent to me from the pressure I was receiving that my superiors were not happy with the number of times I found in favor of injured workers; That I had experienced other situations prior to my termination either caused by or directly with my superiors that caused me to believe that I was in jeopardy of losing my job because of the number of claims or the manner that I was deciding in favor of Claimants. And since I was given no reason whatsoever for my termination when it happened or subsequently even though I continued to try to find out reasons, and only being told that I was an “at will” employee and could be fired for no reason whatsoever, I believe that the primary reason I was fired by the Commission was because I would not be influence in carrying out my statutory duties and judicial responsibilities as an administrative law judge with the Worker’s Compensation Commission in a manner that would advance the Governor’s spoken and clear quest to make the State of Arkansas “business friendly; . .”

Moreover, Daniels stated that statements were made to him by Brenda Turner, Governor Huckabee’s Chief of Staff which he interpreted to be a directive from the Governor’s office to decide claims presented to him “in a manner that would result in decisions favorable to respondents and the business and insurance industry without regard to the facts and the law. In this regard, Daniels states the following:

“That on April 3, 2000, prior to being hired as an ALJ for the Workers’ Compensation Commission, I received an email communication from Brenda Turner, the Chief of Staff to Governor Mick Huckabee, stating: ‘I’d like you to read up on Act 796 as it related to Workers Comp. I’d like to visit with you to get your opinion of the act.’ After contacting Ms. Turner by telephone on April 3, 2000, she arranged for me to meet with Eldon Coffman, then Chairman of the Workers’ Compensation Commission, on April 4, 2000; Chairman Coffman arranged for me to be interviewed by the other two Commissioners, Pat Humphrey and Mike Wilson, on April 5, 2000, in reporting back to Ms. Turner, whom I considered responsible for obtaining my appointment to the ALJ position, I thanked her for her assistance and she later stated that I should ‘remember that we have a very pro-business Governor.’ I believed then that I was being directed by the Governor’s Chief of Staff to interpret Act 796 of 1993 and any cases which came before me in a manner that would result in decisions favorable to respondents and the business and insurance industry without regard to the facts and the law. Later, when Ms. Brenda Turner’s Husband, Shelby ‘Terry’ Turner was appointed as a Commissioner in December 2000, I had an opportunity to repeat his wife’s comments about ‘remember that we have a very pro-business Governor’ to him and Mr. Turner later reported to me that he had relayed it to her; Yet in the numerous subsequent discussions with Mr. Turner, there was never any denial or rejection of his wife’s statement or its implications.”

In addition, both Daniels and White state that the Commission’s Chief Administrative Law Judge pressured them to “handle” claims involving the undersigned attorney in manner that was unlike the manner in which other attorneys appearing before the Commission. Moreover, both Daniels and White stated that the manner in which they were directed to “handle” the undersigned attorney was contrary to their best legal judgment and each stated in their affidavits that they felt that “handling” those claims in the manner directed would have resulted in a deprivation of the due process rights of the claimants represented by the undersigned attorney. The affidavits of each also suggested

that the directives regarding the handling of these claims by the undersigned attorney was intended to cause the undersigned attorney to stop handling workers' compensation claims completely. A memorandum is attached to Daniels' affidavit which showed that he felt that he was in jeopardy of losing his job because he was not handling claims of the undersigned attorney in accord with the directives of the Chief Administrative Law Judge, Judge Greenbaum. In addition, White's affidavit indicates that statements reflecting the Chief Judge's displeasure with his handling of the undersigned attorney was publicly made during a meeting of all administrative law judges including Judge Churchwell and Judge Arey (the two judges that replaced Judge White and Judge Daniels) and that the judges assigned to the territory where the undersigned attorney practices were of the belief that they were expected to "handle" the undersigned in accord with the Chief Judge's directives.

IV. AN ADMINISTRATIVE QUASI-JUDICIAL PROCEDURE WHICH DOES NOT PROVIDE SAFEGUARDS TO PROTECT THE DECISIONAL INDEPENDENCE OF HEARING OFFICERS VIOLATES THE SEPARATION OF POWERS DOCTRINE ESTABLISHED BY THE CONSTITUTION OF THE STATE OF ARKANSAS

The democracy established by the framers of the Constitutions of the United States and the State of Arkansas incorporates a policy of three separate branches of government, to-wit: the legislative, the executive, and the judicial. In this regard, the Arkansas Constitution incorporates the separation of powers doctrine by providing the following:

“The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another.”

By keeping each of the individual branches of government separate from the others, the Framers of both constitutions clearly intended to protect the rights established in the constitutions by creating a system of checks and balances to guard against the tyranny and unfairness that can occur when all power is concentrated in the hands of only one person or even a few privileged persons. Regarding the purpose of the separation of powers under the federal constitution, James Madison explained that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective may justly be pronounced the very

definition of tyranny.” The Federalist No. 47, at 324 (James Madison) (Wesleyan Univ. Press ed., 1961). Thus, the separation of powers doctrine is a means of preventing any one person or one group of people from being able to exercise power arbitrarily or unfairly.

Administrative agencies, which inherently combine legislative, executive, and judicial functions, are in direct conflict with the separation of powers doctrine. However, Courts have long accepted this combination of the functions traditionally reserved for the separate branches of the government. And the Courts have found that this co-mingling of functions does not, in itself, violate the separation of powers doctrine or due process. Withrow v. Larkin, 421 U.S. 35 (1975) However, if the goals underlying the separation of powers doctrine cannot be achieved by keeping the branches of government separate, the goals must be achieved by some other means. Thus, although governmental powers may be combined, there must be a limiting factor that will serve to check and balance the combination whenever they are combined. If administrative procedures do not include some means of protecting against the unfairness and tyranny guarded by the separation of powers doctrine, then violations of the doctrine may occur and the due process rights of participants in the administrative procedure may be violated. Legislation such as the Federal Administrative Procedure Act and the Arkansas Administrative Procedure Act were enacted to provide a semblance of the protections provided by the separation of powers doctrine. 5 U.S.C. §551-559 (1988); Ark. Code Ann. § 25-15-201 (Michie 1992). However, the Arkansas

Administrative Procedure Act specifically excludes the Arkansas Workers' Compensation Commission from its provisions. In this regard, the statute states that the Commission, along with other specifically excluded agencies, were excepted from the law because the General Assembly determined "that the existing laws governing those agencies provide adequate administrative procedures for those agencies."

Courts considering whether a combination of functions in administrative agencies violates the separation of powers doctrine have applied the "appearance of fairness standard" at times and have applied the "actual unfairness" standard at other times. In the absence of clear evidence to the contrary, Courts presume that public officers have discharged their official duties properly. See, United States v. Chemical Foundation, 272 U.S. 1, 71 L. Ed. 131, 47 S. Ct. 1 (1926). Without this presumption, agency officials might find themselves in court constantly burdened with challenges from parties unhappy with the agency's decisions. See, Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650 (D.D.C. 1978).

However, public officials are not immune from scrutiny. When there are adequate grounds to suspect bad faith or improper behavior that are not apparent from the administrative record Courts must consider other evidence in determining whether constitutional violations have occurred. See, Community Federal Sav. & Loan v. Federal Home Loan Bank, 96 F.R.D. 619, 621 (D.D.C. 1983) (citing United States v. Morgan, 313 U.S. 409, 422, 85 L. Ed. 1429, 61 S. Ct. 999 (1941)).

The “actual bias” standard arises from the decision of the United States Supreme Court in Withrow v. Larkin, 421 U.S. 35 (1975). In Withrow, the United States Supreme Court held that one who alleges that the combination of functions in an administrative agency violates the Constitution must overcome the presumption of honesty and integrity in those serving as adjudicators and must show that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. Numerous decisions have followed Withrow or have applied similar reasoning. See, e.g., Kessler Food Mkt. V. NLRB, 868 F.2d 881 (6th Cir. 1989); Cobb v. Yeutter, 889 F.2d 724 (6th Cir. 1989); Hercules v. EPA, 598 F.2d 91 (D.C. Cir. 1978); Doe v. Hampton, 566 F.2d 265 (D.C. Cir. 1977); FTC v. Cinderella Career & Finishing Sch., 404 F.2d 1308 (D.C. Cir. 1968); Pangburn v. Civil Aeronautics Bd., 311 F.2d 349 (1st Cir. 1962); United States ex rel. Catalano v. Shaughnessy, 197 F.2d 65 (2^d Cir. 1952). Despite Withrow and its progeny, other courts have applied the less stringent “appearance of fairness” standard. These courts only require a showing that the challenged proceedings or procedure appeared to be unfair. See, e.g., Utica Packing Co. v. Block, 781 F.2d 71 (6th Cir. 1986); Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260 (D.C. Cir. 1962). In Utica Packing Co., the Court explains the “appearance of fairness” standard by stating that “[t]he requirement of a fair trial before a fair tribunal . . . requires the appearance of fairness and the absence of a probability of outside influences on the adjudicator; it does not require proof of actual partiality.”

Arkansas Courts have applied both the “appearance of fairness” standard and the “actual unfairness standard.” See, General Telephone Co. v. Arkansas Public Service Commission, 295 Ark. 595, 751 S.W.2d 1 (1988) (no clear evidence of actual bias); AEEC v. Arkansas Public Service Commission, 31 Ark. App. 155, 790 S.W.2d 183 (1990) (no actual unfairness); Madden v. Unites States Ass’ns, 40 Ark. App. 143, 844 S.W.2d 374 (1992) (appearance of unfairness denied parties the right of a fair trial).

In Quinn v. Webb Whel Prods., 59 Ark. App. 272, 957 S.W.2d 1897 (1997), the Court rejected the contention that the composition of the Arkansas Workers’ Compensation Commission violated due process, and, in doing so, appeared to consider both the “actual bias standard” and the “appearance of unfairness” standard. In this regard, the court concluded that no evidence had been presented to demonstrate an actual bias in the Commission’s decisions. But the Court went on to hold that there is nothing inherent in the composition of the Commission or the selection of the Commissioners that was unconstitutional.

However, as the affidavits of Daniels and White clearly demonstrate, the existing laws do not, in actual fact, provide any protections for the administrative law judges deciding claims presented to the Commission. These judges “serve at the pleasure” of the Executive Branch of state government and history has shown that these judges perform under the constant threat of immediate termination if the Executive Branch is not pleased with the decisions of these judges. Moreover, these affidavits establish that the Executive Branch scrutinizes the decisions of

these judges not based on whether the decisions are based on a fair and just application of the law to the facts, but instead on whether the decisions favor the private interests which the Governor's office expressly seeks to satisfy for obviously political motivations.

In this regard, the affidavits of the former workers' compensation administrative law judges discussed and quoted above clearly establish that that Executive Branch of our state government and private interests have exerted improper and undue influence on all administrative law judges and Commissioners of the Workers' Compensation Commission. This pressure has infringed upon and chilled the independent decision making process of the administrative law judges and the Commissioners. These quasi-judicial decision makers are and have been exposed to proof and have obtained knowledge of evidence discovered in the Eileen Harrison federal law suit that establishes that their employment and livelihood is in jeopardy if they decide claims presented to them in a manner that is not acceptable to private employer and insurance interests and to the Governor's office. As indicated in all the proof, Governor Huckabee's administration has demonstrated a willingness to accommodate these private employers demand without regard to the law and the particular facts of the individual cases. This situation exists because the Commission's decision-makers have no protection under the law of the State of Arkansas to protect them these coercive political influences.

The United States Supreme Court was presented with an analogous situation in Humphrey's Executor v. United States, 295 U.S. 602 (1935). In Humphrey's Executor, the Court upheld Congress's limitation of the President's power to remove a Federal Trade Commissioner. The Court had previously held in Meyers v. United States, 272 U.S. 52 (1926) that Congress could not restrict the President's authority to remove the PostMaster because this would unconstitutionally interfere with the executive branch. However, the Court in Humphrey's Executor distinguished Meyers by finding that the PostMaster in Meyers was a purely executive official. But the Commissioner in Humphrey's Executor also performed legislative and judicial functions. Significant for the matter currently under consideration, the Court in Humphrey's Executor found that allowing the President the unlimited power to remove the Commissioner would be to give the President a "coercive influence" over the other branches of government. In this regard, the Court specifically stated the following:

"For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." Id. At 629; see also , Bowsher v. Synar, 478 U.S. 714 (1986).

Although the performance of judicial functions by an administrative agency which is under the control of the executive branch does not, in and of itself, violate either the separation of powers doctrine or due process guarantees, such constitutional violations can occur where there are no safeguards for protection against unfairness typically provided by the separation of powers doctrine.

Therefore, even though the performance of adjudicative functions by an administrative agency does not in itself violate the Separation of Powers doctrine or Due Process, it clearly does violate those constitutional requirements when there are no safeguards giving decisional independence to the administration law judges.

The evidence submitted by the claimant in support of these constitutional arguments establishes that extreme and highly improper pressures and undue influences are inflicted on the adjudicative process of the Arkansas Workers' Compensation Commission by outside sources including but not limited to the Executive Branch of the State of Arkansas. These improper pressures and undue influences render not only the adjudicative decisions and actions taken by the Commission under this adjudicative system invalid on constitutional grounds, but also render the entire process unconstitutional.

At a very minimum, the procedural due process provisions of the Constitutions of the United States and the State of Arkansas mandate a fair and just proceeding before an independent and impartial trier of fact. In re Murchison, 349 U.S. 133 (1955). Fairness requires not only an absence of actual bias by the trier of fact but also requires safeguards to avoid even the probability of unfairness. Id. As applied to quasi-judicial functions of administrative agencies, due process mandates a process that is structured so as to assure that the hearing examiner can exercise his independent judgment on the evidence before him, free from pressures by the parties, other officials within the agency, and other officials

with the executive branch of the government. See, e.g., Butz v. Economou, 438 U.S. 478 (1978); see, also, Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951). The United States Supreme Court has found that the role of an administrative hearing officer or administrative law judge is “functionally comparable’ to that of a judge.” In this regard, the Court stated the following:

There can be little doubt that the role of the modern hearing examiner or administrative law judge within this framework is “fundamentally comparable” to that of a judge. His powers are often, if not generally, comparable to those of a trial judge. He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions.

Furthermore, in Butz, supra, the Court recognized that assurances that the hearing examiner or administrative law judge “exercises his independent judgment on the evidence before him free from pressures by the parties or other officials with the agency . . .” is viewed as “the heart of formal administrative adjudication. . . .” In addition, the Court also recognized that the decisional independence of administrative hearing officers may be infringed if the officers are responsible and subordinate to executive officials within the agency. Butz, supra.

V. EXTERNAL PRESSURE EXERTED BY POLITICAL AND PRIVATE INTERESTS UPON THE QUASI-JUDICIAL ADMINISTRATIVE DECISION MAKERS VIOLATES THE DUE PROCESS RIGHTS OF PARTIES APPEARING BEFORE THE AGENCY AND INVALIDATES AND RENDERS VOID ADJUDICATIVE PROCEDURE OF THE AGENCY

Where an agency performs its judicial function, external pressure can violate the parties' right to procedural due process, thereby invalidating the

agency's decision. Sokaogon Chippewa Comm. Ass'n v. Babbitt, 929 F. Supp. 1165, 1173-80 (D. Wis. 1996); ATX, Inc. v. United States Dept. of Transp., 309 U.S. App. D.C. 367, 41 F.3d 1522, 1527 (D.C. Cir. 1994); Pillsbury Co. v. Federal Trade Comm'n, 354 F.2d 952, 963-64 (5th Cir. 1966); Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1543-48 (9th Cir. 1993); Jarrott v. Scrivener, 225 F. Supp. 827 (D.D.C. 1964). Courts have recognized that external interference in the administrative process is of heightened concern in a quasi-judicial proceeding. ATX, Inc., supra. In considering whether external interference in administrative quasi-judicial proceedings violates constitutional protections, Courts have found that "the appearance of bias or pressure may be no less objectionable than the reality." See, e.g., District of Columbia Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir.), *cert. denied*, 405 U.S. 1030, 92 S. Ct. 1290, 31 L. Ed. 2d 489 (1972); see also Koniag, Inc. v. Andrus, 188 U.S. App. D.C. 338, 580 F.2d 601, 610 (D.C. Cir.), *cert. denied*, 439 U.S. 1052, 99 S. Ct. 733, 58 L. Ed. 2d 712 (1978). Courts have further found that judicial evaluation of the external pressure must focus on the nexus between the pressure and the actual decision maker. ATX, Inc., supra In this regard, Courts have found that "the proper focus is not on the content of . . . communications in the abstract, but rather upon the relation between the communications and the adjudicator's decisionmaking (sic) process." See, ATX, Inc., supra; see also, Peter KiewitSons' Co. v. United States Army Corps of Eng'rs, 714 F.2d 163 (D.C. Cir. 1983). In

National Labor Relations Board v. Phelps, 136 F.2d 562 (5th cir. 1943), the Court made the following comments:

“For a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed.”

VI. BY FAILING TO PROVIDE ADEQUATE SAFEGUARDS TO PROTECT LITIGANTS BEFORE FOR THE ARKANSAS WORKERS' COMPENSATION COMMISSION FROM THE INFLUENCE OF OUTSIDE POLITICAL AND PRIVATE PRESSURES, THE ARKANSAS WORKERS' COMPENSATION LAW VIOLATES THE EQUAL PROTECTIONS PROVISIONS SET-FORTH IN THE CONSTITUTIONS OF UNITED STATES AND THE STATE OF ARKANSAS

The Fourteenth Amendment to the U.S. Constitution prohibits discrimination by state government institutions. The clause grants all people "equal protection of the laws," which means that the states must apply the law equally and cannot give preference to one person or class of persons over another.

Article 2, Section 18 of the Arkansas Constitution states the following:

“The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”

In addition, Article 2, Section 3 of the Arkansas Constitution states the following:

“The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition.”

As discussed above, the failure of the Arkansas Workers' Compensation law to provide adequate safeguards to protect the adjudicative decision makers from the pressures of political and private influences has resulted in a system where the law is not applied equally in the same manner to injured workers and the dependents of deceased workers appearing before the Commission as it is to the employers and insurance carriers appearing before the Commission. Accordingly, these injured workers and the dependents of deceased workers' are not afforded the same rights and privileges to adjudicate claims before the Commission as are afforded to employers and insurance carriers appearing before the Commission. Accordingly, by failing to provide adequate safeguards to protect litigants from the influence of outside political and private pressures, the Arkansas Workers' Compensation law violates the equal protection provisions set forth in the Constitutions of the United States and the State of Arkansas.

VII. CONCLUSION

Unfortunately, the following quotes which are included The American Bar Association's Central and East European Law Initiative's assessment of the fairness of judiciaries in emerging democracies in former Communist countries could very easily be used to describe the current situation existing within the workers' compensation system in Arkansas:

“Montenegro -- Social pressures, political influences, and private interests at times influence judicial decision making. Court presidents have great sway over the decisions of lower judges within their courts.

Bulgaria -- . . . [J]udges frequently face improper pressure from their superiors, other branches of government, and private parties. Judges have good reason to fear pressure from the procuracy.

Kazakhstan -- Courts are reported to be subject to undue influence both from state powers as well as private economic interests.

Kyrgyzstan -- It is widely believed that the courts are corrupt and that the executive branch and senior level judges wield undue influence over judicial decision making.

Macedonia -- Improper influence on judicial decision-making by court presidents, private interests, and other government branches is an ongoing problem in the judiciary.

Romania – Judges in Romania may be subject to pressure from other branches of government and private interests. Presidents of courts are frequently cited as the means by which such pressures are applied to junior judges.

Uzbekistan -- The courts are widely believed to be corrupt, controlled by the executive power (largely through the procuracy), and non-independent.”

In Arkansas, the clear and direct evidence establishes that our Governor’s office has caused the employment of at least one administrative law judge to be terminated solely because the Governor’s office and private interests did not agree with the decision of the administrative law judge. The evidence further establishes that every administrative law judge remaining employed by the Commission was aware that their employment could potentially be terminated if they did not decide claims presented to them in the way desired by the Governor’s office and by these private interests. Further, the evidence establishes that this at least creates the appearance of bias in the decisions of the Commission if not actual bias. Both fired administrative law judges in their affidavits frankly admitted that the

pressures could have had an effect on their decisions at least subconsciously. Clearly, these pressures creates a potential for bias that not only resembles the situations that exists in the former Communist countries described above, but simply is not constitutionally acceptable under any applicable standards nor is it acceptable under the democratic principles embraced by the Framers of the Constitutions of the United States and the State of Arkansas.

This intrusion into the judicial functions of the Workers' Compensation Commission by the Governor's office and by his corporate "pals" including but not limited to Wal-Mart violates the due process rights of the litigants appearing before the Commission and renders the entire adjudicative system established by the Workers' Compensation Law unconstitutional. Consequently, because the Arkansas Worker's Compensation Law provides no safeguards to protect the Commission's decision-makers from these improper external pressures, the entire adjudication process established by the Law violates the separation of powers doctrine and due process and the entire Arkansas Workers' Compensation Law should be declared unconstitutional.

Accordingly, the Claimant contends that the entire Workers' Compensation Law, as set-forth at Ark. Code Ann. §11-9-101, et. seq., should be declared unconstitutional. In this regard, the claimant contends, for the reasons stated above and based on the evidence presented in this matter that the entire Arkansas Worker's Compensation Act violates the substantive and procedural due process guaranteed to those workers in this State who happen to have the misfortune of

being injured or killed while working for an Arkansas employer. The claimant further contends that the law should be declared unconstitutional because the Act allows the Executive Branch of this State, which by its very nature is subjected to and influenced by the politically powerful in this State, to adjudicate and judge the merits of those claims by weaker and less powerful injured citizens of this State thereby violating equal protection provisions of the State and U.S. Constitution. Finally, the claimant contends that the Arkansas Worker's Compensation Law should be declared unconstitutional because it violates the separation of powers requirements and provisions of the Arkansas and United States Constitutions. Specifically, the law expressly or implicitly authorizes the appointment of the Commissioners by the executive branch of government who then with the blessings of the Governor appoint specific administrative law judges within an adjudicative system thereby inviting political pressures to be exerted on the judicial branch of government by the Executive Branch even though these same appointees have the power and authority to hear and decide claims for compensation for death or disability.

Arkansas Statute §5-53-115 states that “(a) person commits the offense of jury tampering if he attempts directly or indirectly to communicate with a juror, other than as a part of the official proceedings in which the juror is participating, with the purpose of influencing the juror's vote, decision, or other action as a juror” and said statute deems such action a Class D felony. Surely the Commission would want to join the undersigned claimant's request to seek the

constitutional guarantees to all our citizens so that the possibility of this kind of conduct – especially by a public official who serves in a position of public trust – is eliminated and the sanctity of the Commission’s decisions remains inviolate. In that way, every litigant and party before the Commission – whether employee or employer - is always assured that only the facts and the law as applied to those same facts determines the outcome of the case by the decision-maker. As one French philosopher once wrote:

“Justice in the hands of the powerful is merely a governing system like any other. Why call it justice? Let us rather call it injustice, but of a sly effective order, based entirely on cruel knowledge of the resistance of the weak, their capacity for pain, humiliation and misery. Injustice sustained at the exact degree of necessary tension to turn the cogs of the huge machine-for-the-making-of-rich-men, without bursting the boiler.” George Bernanos (1888–1948), French novelist, philosopher and political writer. M. Olivier, in *“The Diary of a Country Priest,”* ch. 7 (1936).

Surely injustice and the disregard of our guaranteed rights under the Constitution should not now be embraced in the State of Arkansas simply because we are so intent in making our natural State “business friendly” to the exclusion of the rights of the injured Arkansas citizen. Those same citizens are promised by this Commission absolute total fairness in its deliberations and equal justice for all before it without considering who may be Governor of this State or otherwise politically powerful. As a British judge once said “Justice should not only be done, but should manifestly and undoubtedly be seen to be done.”¹ This case represents

¹ Lord Hewart (1870–1943), British judge. Ruling on the quashing of a conviction on technical grounds, 9 Nov. 1923, in *Rex v. Sussex Justices*. Quoted in: *King’s Bench Reports, 1924*, vol. 1.

one worker who not only sees what was done to him as an injustice, but who is the actually the victim of political favoritism of the largest retailer in the world.

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing was deposited in the United States Mail with proper postage affixed thereto and sent to all attorneys of record at their proper business addresses on this the 28th day of July, 2005.

Frederick S. "Rick" Spencer

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