

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. H300170**

TERESA KIMES, Employee	CLAIMANT
INDEPENDENCE AT HOME, Employer	RESPONDENT
GUARD INS. CO., Carrier	RESPONDENT

**OPINION FILED JANUARY 3, 2024**

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL L. ELLIG, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by KAREN H. MCKINNEY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On October 5, 2023, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on August 7, 2023, and a Pre-hearing Order was filed on August 8, 2023. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The relationship of employee-employer-carrier existed between the parties on December 4, 2022.
3. The respondents have controverted the claim in its entirety.

4. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$144.00 for both temporary total disability benefits and permanent partial disability benefits.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether Claimant sustained a compensable injury to her low back on or about December 4, 2022.
2. Whether Claimant is entitled to medical treatment for her compensable low back injury.
3. Whether Claimant is entitled to temporary total disability benefits from December 15, 2022, to a date yet to be determined.
4. Whether Claimant's attorney is entitled to an attorney fee.

The claimant's contentions are as follows:

“The claimant contends that she sustained compensable injury to her lower back while attempting to move a patient on December 3 [sic], 2022. She contends that her injury has required reasonably necessary medical services and has rendered her temporarily totally disabled from December 5, 2022, until a date yet to be determined. She seeks the statutory attorney's fee for her attorney on all appropriate benefits that might be subsequently awarded.”

The respondents' contentions are as follows:

“Respondents contend that the claimant cannot prove by a preponderance of the evidence that she sustained a compensable injury for which she is entitled to medical and indemnity benefits. Specifically, Respondents contend that the claimant suffers from pre-existing degenerative disc disease for which she has received treatment as far back as 2010 and that the claimant did not report a work related injury occurring on December 3 [sic], 2022, or at any time during her employment.”

The claimant in this matter is a 61-year-old female who alleges to have sustained a compensable low back injury on or about December 4, 2022. The claimant was employed by the respondent as a home health provider. On direct examination, the claimant provided testimony about her job duties generally and for the specific client she was servicing on December 4, 2022, when she alleges she was injured as follows:

A I was working at Frances's place as a home health provider.

Q And what does that involve?

A It involves cleaning, doing light housekeeping, and helping them with their personal care and cooking a meal.

Q What all is involved in this personal care?

A Okay. She was bed – she could not walk or nothing, so I had to change her diaper, her bedding. Give her a sponge bath, dress her. I put lotion on her. Comb her hair.

Q Did your job involve moving clients?

A No. I never did use the Hoyer lift.

Q Did it involve that? Were you required to do that at times?

A No, but I did have to help like turn her in the bed so that I could make sure that – when you are changing her diaper and stuff, you had to turn her.

Q Okay. You didn't have to get her in and out of bed or anything?

A No, sir.

Q All right. And none of your other clients – you were talking about one client, but your job in particular didn't involve getting clients in and out of beds, assisting them to go to the bathroom and things like that?

A No, not at all – no. I had very good clients.

The claimant testified that on December 4, 2022, she was in the process of changing the client's undergarments, here a diaper, when she alleges to have been injured. The claimant testified that the client, named Frances, was not being cooperative with her during the changing process. Following is a portion of the claimant's very lengthy description of the undergarment changing:

She grabs ahold of the rail and I was trying to start the roll I call it of all her stuff that needs to go under her and she lets go of the rail and she says, "I can't do this. It hurts."

I said, "Okay, Frances." I said, "Frances, you are going to have to help me."

So she done it again, so I put my arm up to hold her where she cannot roll back over and I can proceed to roll her diaper and all the items that she needed under her bed, her linens, and she kept hollering, "I can't do it. It hurts. It hurts." So that did take some time.

Then I went over on the other side and she has a Hoyer bar I guess you would say. I am not familiar with the words. I've never done this work before in my life. And you have to straddle it and I told her, "Let's get this done. You are going to have to help me on this. It is harder."

Well, she went to roll back over and she started telling me, "I can't do this," blah, blah. So when I was bent over and I was rolling up the unsanitary linens and trying to roll out the other one and I was tugging on it and she lets go and just says she can't do it no more. When I leaned over, I had a pain in my back. I stopped right then. And I told her, "Frances, I have hurt my back. You are going to have to help me. I cannot do this."

She says, "Well, I can't, either."

Eventually, I did get it done, but I did not do everything like it should have been. As soon as I got her where she was able to lay down on the linens and all that – and on one of the diapers, I did not tape down. I said that she needed to do that and I said, "I've got to sit down." I sat down for a minute.

The claimant then left the client's home to go to a previously scheduled personal event. En route, the claimant testified that she called "Samantha" at the respondent's office to report her back injury, but no one answered. The claimant testified upon returning from her personal event

she called someone at the respondent's office named Tiffany. The following is a portion of the claimant's direct examination testimony:

So I went to church. Coming back from church, I called Independence and I got Tiffany. She told me that she will tell the girls, which the girls was Christy and Carolyn. And she said, "Just take it easy and just relax and they will get ahold of you," you know. I said, "Okay."

The claimant testified that she returned to the client's home and took it easy.

The claimant's testimony about what occurred over the next few days regarding her work and calling in to report her injury is confused. However, at some point in the next few days, she claims she called Carolyn, a supervisor for the claimant, and told her "I can't work because of the pain in my back." Carolyn Langley was called as a witness by the respondent in this matter. Ms. Langley is a scheduling supervisor for the respondent. Ms. Langley was questioned on direct examination about her knowledge of the claimant's allegation of a low back injury as follows:

Q Now, we are here because Ms. Kimes is claiming that she injured her back on December the 4<sup>th</sup>, 2022, while working for Ms. Frances. Are you aware that is her allegations?

A I'm aware that that is the allegation.

Q Okay. What do you know, if anything, about what Ms. Kimes claims about what happened on December 4<sup>th</sup>? Did she tell you anything?

A No, ma'am.

Q What do you know?

A Nothing other than just the call-ins for needing to go to the doctor for her back hurting and us requesting a doctor's release to come back to work, as we would with any caregiver.

Q So you are aware that she reported she needed to go to the doctor for back pain?

A Yes.

Q Was there any discussion about why she had back pain or how it occurred?

A No, ma'am.

Q Did she ever volunteer to you that she got hurt at work?

A No, ma'am.

Q When did you become aware that she was claiming she got hurt at work?

A It had to have been early this year.

Q So January of 2023?

A That sounds correct.

Q And that is when we know she filed a claim with the Workers' Compensation Commission. I believe it was filed January 8<sup>th</sup> or 9<sup>th</sup>, somewhere around there, of 2023. Does that sound like –

A Sounds accurate, yes.

Ms. Langley testified that she was one of the individuals that makes work schedules for the respondent's employees. She also testified about how schedules are changed and that records are kept of the process. Following is a portion of that testimony from Ms. Langley and the testimony regarding the claimant's changes of schedule during the time period of her alleged low back injury:

Q And are you one of the people that make the schedule?

A Yes.

Q And if she has to change her schedule for any reason, how does she go about doing that?

A She would actually call my personal phone often.

Q And are you aware of her doing that after December 4<sup>th</sup> of 2022?

A The call-ins mainly is all she called for.

MS. MCKINNEY: All right. May I approach?

THE COURT: You may.

Q [BY MS. MCKINNEY]: I have some business records. Did you all make note of the call-ins.

A Yes.

Q All right. And I have highlighted December the 3<sup>rd</sup>, so this would have been a Saturday, is that correct, if December 4<sup>th</sup> is a Sunday?

A Yes.

Q CG, would that be caregiver?

A Caregiver, yes.

Q And that is Teresa Kimes; correct?

A Uh-huh.

Q Is that a “yes”?

A Yes.

Q So was she scheduled to work on December the 3<sup>rd</sup>?

A I have access to that. I can pull that up.

Q Okay. I have what I purport to be her December schedule. Is that what you have access to?

A Yes, ma'am.

Q All right. It shows she is not working on December 3<sup>rd</sup>; doesn't it?

A It shows because she was sick and throwing up.

Q So she was sick –

A So she was pulled from work that day.

Q So she may have been scheduled, but she calls in and calls out; correct?

A Correct.

Q She was throwing up on the night before this alleged injury on December the 4<sup>th</sup>?

A Correct.

Q All right. And then we have her working on December the 4<sup>th</sup>. Are you aware of any complaints of anything occurring with Ms. Kimes working on December the 4<sup>th</sup>?

A The only one that I am aware of is when I received a phone call on the 5<sup>th</sup> from the client herself asking us to remove Teresa and never send her back due to a temperamental situation.

Q Okay. So December the 5<sup>th</sup> is the Monday after this?

A Correct.

Q All right. Did you have that conversation with Ms. Frances?

A I do believe that I did take the phone call myself because I am the one who put the caregiver block in for Frances.

Q So she was blocked from treating Frances after December the 4<sup>th</sup>; is that correct?

A Correct.

Q All right. And then looking at these reports, are you aware of any other call-ins after December the 4<sup>th</sup> where she called to be off work?

A Yes.

Q And when was that?



A There was one on the 15<sup>th</sup>.

Q Okay. Did you take that one?

A I believe so.

Q Okay. And what do you recall from that?

A I believe she was calling in to go to the doctor because her back hurt.

Q And was there any discussion during that conversation about how or why she hurt her back?

A No, ma'am.

Q Did she at any time report to you that she hurt her back taking care of Ms. Frances on December 4<sup>th</sup>?

A No, ma'am.

On cross examination the claimant's attorney asked Ms. Langley about the client, Frances, blocking the claimant as follows:

Q Why was she blocked from treating Ms. Frances?

A Why?

Q Yes.

A The allegations were that she was cussing and screaming at the client and threw the client's phone.

Q Okay. So Ms. Frances didn't want her out there?

A Correct. She didn't want her back.

Q Was that the only day – was the 5<sup>th</sup> (sic) the only day she actually treated her?

A No.

Q How many days prior to that had she been treating her?

A I cannot recall without looking back on the schedule.

Q Could you look back on it and give me an idea?

A Sure.

(Whereupon, the witness is looking on her phone.)

MS. MCKINNEY: Your Honor, I am approaching and handing business records to Ms. Langley.

THE COURT: So noted.

THE WITNESS: It looks like one, two, three –

MS. MCKINNEY: If I may ask – I mean the question is how many days. It may be faster to indicate when did she start working with Ms. Frances.

THE WITNESS: She had Ms. Frances as a permanent morning client beginning of June of '22.

THE COURT: Mr. Ellig, is that satisfactory?

MR. ELLIG: That is satisfactory.

Q [BY MR. ELLIG]: And apparently there was a falling out on the 5<sup>th</sup>, but everything went well from June until the 5<sup>th</sup> of December?

A On the 4<sup>th</sup> there was a falling out. The client called on the 5<sup>th</sup>.

Q The client called on the day we are saying she was hurt.

A No, the next day.

The claimant was asked on cross examination about her testimony regarding reporting her alleged low back injury and any request for medical treatment as follows:

Q All right. Then I am jumping to December the 4<sup>th</sup>. You claimed this incident at work; right?

A Yes, ma'am.

Q You claim you called it in and you told everybody at work that you hurt yourself at work. Is that your testimony?

A Yes, ma'am.

Q But you don't go to the doctor and you don't ask to be sent to the doctor; do you?

A No, ma'am.

Q All right. You claim that on December the 15<sup>th</sup> you are in pain, so you call in and you get up and you go to the Urgent Care Clinic; correct?

A Yes, ma'am.

On December 15, 2022, the claimant was seen at Baptist Urgent Care by NP Shelby Valerie. The medical record from that visit gives a chief complaint of back pain. The history of present illness section states:

Patient Reports:

Back pain [Onset: 1 Week(s); Duration: 1 Week(s); Free text: Pt is home health nurse has hurt back working with patients, worsening back pain for a week.]

The claimant underwent x-rays of her lumbar spine and received injections in her right buttocks. The claimant was referred to neurosurgery for the following stated reason, "Severe multi-level degenerative change of the spine, Grade 1 anterolisthesis of L-5 on S-1."

On December 20, 2022, the claimant was seen at Baptist Health Family Clinic by APRN Nycole Oliver. Following is a portion of that medical record:

Reason for Visit:

Back Pain

Teresa L. Kimes is a 60 y.o. female who has a past medical history of Diabetes mellitus (HCC), Hyperlipidemia, Hypertension, Obesity, RLS (restless legs syndrome), Shingles, and SOB (shortness of breath). Patient presents with:

### Back Pain

Complains of lower back pain. She went to urgent care not long ago and was told she had spinal enthesopathy and needed to see a neurosurgeon. She would like a referral. She states this is going on for years. She has recently been on a Medrol Dosepak and cyclobenzaprine. She states that she has tried injections and physical therapy. She does see an orthopedic doctor about this but states none of it is helping. She declines chiropractic referral. Please note, this was prepared using DragonSpeak dictation software. Any typographical errors or other abnormal wording may be related to this dictation system.

At that time, the claimant was given an ambulatory referral to neurosurgery.

On December 21, 2022, the claimant was seen at the Baptist Hospital Emergency Department. Following is a portion of that medical report:

#### History

#### Chief Complaint

Patient presents with

\* Back Pain

Teresa L. Kimes is a 60 y.o. female to the emergency department with complaints of increasing lower back pain. She states that she has been having gradual increase in pain over the past 7 months or so however the past week she has had much more trouble with it. She is she does heavy lifting at work as she works in home health and was seen last week at urgent care and had imaging done and is subsequently seen her PCP who has sent a referral for neurosurgery evaluation. She has been on Medrol Dosepak along with Flexeril however this does not seem to be helping her pain. The pain goes mostly into her right hip and leg but sometimes on the left side as well. No bowel or bladder incontinence. No falls. She has been trying to use a cane to help as well.

The claimant was diagnosed with “chronic right-sided low back pain with right-sided sciatica.”

The claimant was also prescribed hydrocodone during her emergency department visit.

On January 6, 2023, the claimant underwent an MRI of the lumbar spine at Baptist Health. The diagnostic report from that visit was authored by Dr. James Ireland. Following is portion of that report:

Findings:

Alignment: Normal.

Vertebral bodies: Normal height.

Marrow: No signal abnormality.

Intervertebral discs: Moderate disc space narrowing at L3-4.

Spinal cord: The imaged cord is normal in size and signal and the conus medullaris terminates at a normal level.

Cauda equine: Unremarkable.

Soft tissues: The included soft tissues of the abdomen and pelvis are unremarkable.

L1-2: Normal.

L2-3: Normal.

L3-4: Posterior disc protrusion with moderate canal narrowing to 0.6 cm. Ligament flavum and epidural fat hypertrophy contribute to canal narrowing. There is severe left and moderate to severe right foraminal narrowing.

L4-5: Posterior disc protrusion with mild canal narrowing to 0.8 cm. Ligament flavum and epidural fat hypertrophy contribute to canal narrowing. There is mild right and moderate left foraminal narrowing.

L5-S1: Normal.

Impression:

Degenerative changes of the lumbar spine which are described in detail by level above.

On February 21, 2023, the claimant was seen by Dr. Gautam Gandhi, a neurosurgeon.

Following is a portion of that medical report:

Chief Complaint

Patient presents with

\* Back Pain

### Back Pain

This is a chronic problem. The current episode started more than 1 year ago (>10 years). The problem occurs constantly. The problem has been gradually worsening since onset. The pain is present in the lumbar spine. The quality of the pain is described as aching, burning, cramping, shooting and stabbing. The pain radiates to the right thigh, right foot, right knee, left thigh, left knee and left foot. The pain is at a severity of 9/10. The pain is severe. The symptoms are aggravated by bending, position, standing and twisting (ADLs, ambulation). Associated symptoms include leg pain, numbness, tingling and weakness. She has tried bed rest, heat, home exercises, NSAIDs and muscle relaxant for the symptoms. The treatment provided no relief.

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### Assessment/Plan

Teresa L. Kimes is a 60 y.o. female initially evaluated 2/21/2023 for chronic neurogenic claudication and progressively worsening mechanical low back pain and symptoms in the last 6 months with imaging showing multisegmental lumbar spondylosis with significant spondylosis worse at L3-4 with collapse of the interspace and severe central canal stenosis at L3-4 and L4-5. Her imaging is slightly worse compared to an MRI performed in May 2018. Clinically she feels significantly worse in the last 6 months. She has not undergone conservative therapy. I personally reviewed the clinic reports as well as imaging studies. Discussed surgical and nonsurgical treatment options. The patient had an opportunity to ask questions and their questions were answered and they endorsed understanding and agreement with the plan of care. Discussed conservative treatment including weight loss, physical therapy, and aquatic therapy. I personally reviewed the clinic reports as well as imaging studies. Discussed surgical and nonsurgical treatment options. The patient had an opportunity to ask questions and their questions were answered and they endorsed understanding and agreement with the plan of care.

- Discussed continued conservative treatment and weight loss.
- Discussed L3-5 posterior fixation with L3 laminectomy and L4-5 TLIF.
- AP and lateral lumbar x-rays.
- Return to clinic in 6 months.

On May 4, 2023, the claimant was seen by Dr. Michael Wolfe at Baptist Health Orthopedics. Following is a portion of that medical record:

HPI:

Patient is a 61-year-old white female came in today chief complaint of low back pain she has had treatment and known degenerative changes lumbar spine in the past but she was lifting a patient is a home health aide on December 4, 2022 felt a pull in her low back she had progressive severe pain she was seen by neurosurgeon in Conway who recommended a fusion I am going on this from history I do not have these records available again history is from the patient she is considering having surgery later this year no numbness or weakness.

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Assessment:

Radiographs show degenerative changes at L3-4, L4-5, and L5-S1 with grade 1 spondylolisthesis at L5-S1 findings are somewhat similar to what was noted 3 years ago but she definitely has progressive disc deterioration and joint space narrowing she is having mechanical pain related to her disc changes and I do think that surgical intervention could be of help to her because she is having such severe problems she is to follow-up with the physician in Conway she will continue on Mobic at present I will see her back in clinic on a as needed basis. No follow-ups on file.

The claimant has asked the Commission to determine if she sustained a compensable low back injury on or about December 4, 2022. It is the claimant's burden to prove that she sustained a compensable low back injury. In order to do so, she must prove the existence of objective medical findings of the low back injury she alleges. The claimant's January 6, 2023, MRI of her lumbar spine certainly shows multiple areas of derangement in the claimant's lumbar spine. However, the claimant also underwent an MRI of the lumbar spine on June 12, 2015, which had very similar findings to her January 6, 2023, MRI. Following is a portion of the claimant's 2015 lumbar spine MRI:

At L3-4, there is a posterior disc herniation more prominent to the left of midline with spinal and bilateral foraminal stenosis worse on the left than the right.

At L4-5, there is a disc bulge and degenerative facet change with spinal and bilateral foraminal stenosis.

At L5-S1, there is degenerative facet change with bilateral foraminal stenosis.

At L1-2, there is a mild disc bulge without spinal or foraminal stenosis.

There is degenerative facet change at all levels.

Impression:

1. At L3-4, there is a posterior disc herniation with spinal and bilateral foraminal stenosis, worse on the left than the right.
2. At L4-5, there is a disc bulge and degenerative facet change with spinal and bilateral foraminal stenosis.
3. At L5-S1, there is degenerative facet change with bilateral foraminal stenosis.
4. At L1-2, there is a slight disc bulge without spinal stenosis.
5. Degenerative facet change at all levels.

Dr. Gandhi, whom the claimant saw on February 21, 2023, does not reference the claimant's June 12, 2015, lumbar spine MRI in his medical report, but does reference a May of 2018 MRI. That May of 2018 MRI does not appear in the records submitted into evidence. In referring to her January 6, 2023, MRI, Dr. Gandhi states, "Her imaging is slightly worse compared to an MRI performed in May 2018."

Dr. Wolfe, who saw the claimant on May 4, 2023, also treated the claimant for her low back pain on three dates prior to her alleged injury; those being April 20, 2022, June 22, 2022, and August 22, 2022. In the May 4, 2023, medical record he states, "Radiographs show degenerative changes at L3-4, L4-5, and L5-S1 with grade 1 spondylolisthesis at L5-S1. Findings are somewhat similar to what was noted three years ago but she definitely has progressive disc deterioration and joint space narrowing. She is having mechanical pain related to her disc changes..."

Medical records introduced into evidence by the respondent show that the claimant has been treating for low back pain since June 29, 2010. In review of the claimant's pre-December 4,



2022, medical records and post-December 4, 2022, medical records, I do not find the claimant able to prove the existence of objective medical findings of low back injury relating to her alleged acute incident of December 4, 2022. Here, the evidence shows a continuation of her long, chronic lower back issues and not an acute incident as she alleges. The claimant is unable to demonstrate objective medical evidence of the December 4, 2022, injury she alleges.

Even if the claimant were able to prove the existence of objective medical evidence of low back injury as she alleges, she would be unable to prove the required causal connection between her 2023 MRI and the December 4, 2022, incident she alleges.

In direct testimony at the hearing in this matter, the claimant stated, “When I leaned over, I had a pain in my back.” In an AR-C form filed with the Commission, the claimant filled out the section which states, “Briefly describe the cause of the injury” as follows:

Worked as a Home Health Provider. In June of 2022, I was switched to another client. The client was unable to get out of bed. Had to bathe and change diaper and change linens. Moving her was hurting my back. A lot of lifting and moving client. I told the schedulers in the office about that. Lifting heavy person.

In the claimant’s direct examination testimony at the hearing, the claimant was clear that she never lifted clients.

Q Did your job involve moving clients?

A No. I never did use the Hoyer lift.

Q Did it involve that? Were you required to do that at times?

A No, but I did have to help like turn her in the bed so that I could make sure that – when you are changing her diaper and stuff, you had to turn her.

Q Okay. You didn’t have to get her in and out of bed or anything.

A No, sir.

Q All right. And none of your clients – you were talking about one client, but your job in particular didn't involve getting clients in and out of beds, assisting them to go to the bathroom and things like that?

A No, not at that – no. I had very good clients.

However, she told medical providers at the Baptist Health Emergency Department on December 21, 2022, “she is she does heavy lifting at work as she works in home health...” On May 4, 2023, the claimant told Dr. Wolfe, “she was lifting a patient, is a home health aide on December 4, 2022, felt a pull in her low back. She had progressive severe pain...” The claimant’s credibility is very low. I simply do not believe that the incident she alleges occurred. The claimant says she reported the incident to Ms. Carolyn Langley; Ms. Langley denies that occurred. The claimant in this matter is unable to prove by a preponderance of the evidence that she sustained a compensable low back injury on or about December 4, 2022.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on August 7, 2023, and contained in a Pre-hearing Order filed August 8, 2023, are hereby accepted as fact.

2. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her low back on or about December 4, 2022.

3. The claimant has failed to prove by a preponderance of the evidence that she is entitled to medical treatment.

4. The claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from December 15, 2022, to a date yet to be determined.

5. The claimant has failed to prove by a preponderance of the evidence that her attorney is entitled to an attorney fee in this matter.

**ORDER**

Pursuant to the above findings and conclusions, I have no alternative but to deny this claim in its entirety.

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

**IT IS SO ORDERED.**

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**HONORABLE ERIC PAUL WELLS  
ADMINISTRATIVE LAW JUDGE**