

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708523

DAVID L. LEWIS, EMPLOYEE	CLAIMANT
NORWOOD LOGGING, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, c/o AIG CLAIMS SERVICE, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 25, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on April 8, 2008, at Hot Springs, Garland County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney-at-Law, Little Rock, Arkansas.

Respondent represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted April 8, 2008, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws.

A prehearing conference was conducted in this claim on January 15, 2008, and a Prehearing Order was filed on said date. No stipulations were agreed to at either the prehearing conference or the hearing. At the hearing, the parties agreed that the issues, as well as their respective contentions were properly set out in the Prehearing Order, subject to some amended contentions, specifically, from the claimant concerning the period of temporary total disability claimed, as well as additional defenses asserted by respondents following the conference. A copy of

the Prehearing Order was introduced, without objection, as “Commission’s Exhibit 1.”

By agreement of the parties, the following issues were presented for determination:

- 1) Whether the employment relationship existed at the time of the alleged injury.
- 2) Wages, if employment was established.
- 3) Compensability.
- 4) Entitlement to associated benefits, if the claim was found compensable.

At the prehearing conference, the claimant contended, in summary, that he was an employee of Norwood Logging on June 21, 2007; that he sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on said date; that he was entitled to temporary total disability benefits beginning June 22, 2007, and continuing through the present, while maintaining that his healing period had not ended; that respondents should be held responsible for all outstanding hospital, medical, and related expenses, together with continued reasonably necessary medical treatment; and that a controverted attorney’s fee should attach to any benefits awarded. At the hearing, the claimant amended his contentions to claim temporary total disability from June 21, 2007, through September 19, 2007.

The respondents contended that the claimant was not an employee of Norwood Logging at the time of the alleged injury, further maintaining that the

claimant was not performing any employment-related services that either directly or indirectly benefitted the employer at the time of his incident. Respondents further contended that the medical documentation did not support a causal connection between the claimant's need for treatment and any work-related injury nor did the medical records support entitlement to additional medical or indemnity benefits in this claim. Subsequent to the Prehearing Order, respondents raised an affirmative defense alleging that the claimant's injury was caused by intoxication and/or illegal drug use.

In addition to the claimant, Judge Bill Scrimshire, Judy Brown, and his wife, Jennifer Renee Lewis, were called as witnesses in his behalf. David Norwood, Phillip Dale Norwood, and Christine Norwood were called as witnesses for the respondents. The record is composed solely of the transcript of the April 8, 2008, hearing containing numerous exhibits.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. A preponderance of the credible evidence reflects that the employment relationship existed between the claimant and respondents on and before June 21, 2007.
3. A preponderance of the credible evidence reflects that, at the time of his injury, the claimant was earning \$100.00 per day for an average weekly wage of \$500.00, entitling him to compensation rates of \$333.00 per week for temporary total disability and \$250.00 per week for permanent partial disability.
4. The claimant has proven, by a preponderance of the credible evidence, that he sustained a compensable injury arising out of and during the course of his employment with Norwood Logging, Inc., on June 21, 2007, which was the result of a specific incident identifiable in time and place of occurrence on that date and which is established by medical evidence supported by objective findings.
5. Respondents are responsible for all outstanding hospital, medical, and related expenses as the result of the claimant's June 21, 2007, injury and respondents remain responsible for continued, reasonably necessary medical treatment.
6. The claimant is entitled to temporary total disability benefits for the period beginning June 22, 2007, and continuing through September 19, 2007. The claimant cannot prove entitlement to temporary total disability after

September 19, 2007.

7. Respondents have failed to establish that the claimant's accident and injury was substantially occasioned by the use of illegal drugs pursuant to Ark. Code Ann. §11-9-102(4)(B)(iv).
8. Respondents have controverted this claim in its entirety.
9. Claimant's attorney is entitled to the maximum statutory attorney's fee on this entire claim pursuant to, and limited by the provisions of Ark. Code Ann. §11-9-715.

DISCUSSION

This claim is simply replete with inconsistencies and contradictions. Further, the record reflects that the claimant is not a credible witness. On cross-examination, respondents' attorney showed that the claimant had made several inconsistent and untrue representations. Further, the claimant is a convicted felon which further diminishes his credibility. However, I found the respondents' principle witness, David Lee Norwood, to also be less than truthful. David Norwood was the respondents' designated representative at the hearing. Mr. Norwood maintained that he was an independent contractor while acknowledging that he only worked for one company, the employer herein, which was owned by his brother, Phillip Dale Norwood. It must be noted that the claimant and all of the witnesses, save Judge Scrimshire, are related by either blood or marriage. A claimant's testimony is never considered uncontroverted. In fact, the testimony of

any interested party is always considered to be controverted. *Lambert v. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

Bill Scrimshire was called as a witness by the claimant. Mr. Scrimshire is the County Judge of Hot Spring County. His testimony provides questionable probative value. Judge Scrimshire did observe a logging operation which was being conducted near his home. He stated that he stopped by out of curiosity to determine what was going on. During the time of his visit, the workers were taking an ice cream break and he was offered some ice cream by a young boy which was purportedly the claimant's son. Judge Scrimshire did not recall the date the logging operation was being conducted. Further, he did not identify the claimant. The record reflects that the claimant's accident and injury occurred in Stuttgart, Arkansas County, rather than in Malvern, Hot Spring, County where Judge Scrimshire observed the logging operation. Apparently, the sole purpose of Judge Scrimshire's testimony was to show that the claimant was present at multiple logging operations for the employer herein. The record reflects the claimant's family served the ice cream at the Malvern job-site while the workers were taking a break.

The claimant, David Lynn Lewis, testified in his own behalf. The claimant resides in Malvern, Arkansas. The claimant stated that he was working for Norwood Logging under the supervision of David Norwood, specifically, topping trees behind

a skidder operated by David Norwood at the time Judge Scrimshire stopped to visit the job-site in Malvern, Arkansas. The claimant maintained that a fan belt had broken loose on the skidder and started smoking and that the crew was taking a break at the time. The claimant stated that his wife had brought ice cream to the job-site and that he offered Judge Scrimshire some ice cream.

The claimant acknowledged that he had been convicted of a felony, negligent homicide, and that he spent time in prison. The claimant cannot read or write, having quit school in the 8th grade. The claimant asserted that he was drinking coffee at a Fina gas station where his sister-in-law worked when David Norwood, Kevin Norwood, and Coben Norwood came by and stated that they needed a “saw hand.” The claimant reportedly told them that he had something to do that morning, but could start work the following day. He stated that thereafter, he met with crew at the Fina gas station in Malvern, Arkansas, daily and worked everyday until his injury on June 21, 2007. The claimant maintained he worked approximately three (3) weeks before his injury. The claimant first assisted the crew at the job-site in Malvern. Upon completion of that job, the claimant stated that they started a new logging operation in Stuttgart, Arkansas. The claimant stated that he was paid cash money, \$100.00 per day. He stated that Norwood Logging provided all the equipment and that he operated a chain saw which was furnished by the employer. The claimant pointed out that after the work moved to Stuttgart, a large machine cut the trees down and that he cut the tops out of the trees. The claimant testified that

he met David Norwood each day and that it was approximately a two (2) hour drive from Malvern to Stuttgart. The claimant's description of the logging operation, the accident, and its reporting is set out below:

Q . . . That type of equipment was the operation using out there?

A A log loader that would pick the logs up and stack in a pile then it'd put 'em on the truck, and a skidder, which is a big tractor that drags 'em out of the woods.

Q Okay. And who all was working down there for Norwood Logging at that time?

A It was me, Kevin Norwood, Coben Norwood, and David.

Q All right. And what were your various jobs?

A Coben was trimming the knots and stacking the logs over, and Kevin was skidding, and I was running a chainsaw.

Q Okay. Did you get hurt out there?

A Not – not down there, I got hurt in Stuttgart.

Q Okay. Well that's what I'm talking about.

A Yeah.

Q How did you get hurt?

A Well, what happened is he throwed all the timber down and he'd done moved out of that spot. Well he left one tree 'bout like that there, (INDICATING WITH HANDS) and I told David, I said "I'm gonna cut that –

Q Oh – hold on. See, you're indicating with your hands and the Court Reporter can't take that down. You gotta put it into words.

A About nine (9) to ten (10) inch stump, and he left it standing there. And I told David, I said, "Well, he left that one tree, I'm gonna go ahead and cut it so he won't have to come back in that area." Well when I cut the tree down, it done fell on the ground. I's fixin' to walk up there and top it and a limb fell out of another tree and hit me in the head.

Q All right. Did it knock you out?

A Yes, sir.

Q What happened? Did you come to later or what happened?

A When I woke up, I kinda rolled around and I seen Billy and them's log loader down there.

Q Say that again. I couldn't understand you.

A I said I rolled around and Billy was sitting down there on his log loader. And I hollered, tried to get him to answer me, you know, telling him I's hurt.

Q Who's Billy?

A One of Phillip's son-in-laws that was running another crew out there. Two (2) crews was on that job.

Q Okay.

A And I was just right there by his loader. And I was hollerin' for him to help me but he couldn't hear me. So I rolled around and got up off the ground and walked out to the labor truck and I told David I need to go to the hospital.

Q Walked out to the labor truck?

A Out to the truck that I drove up there, yeah.

Q And you encountered who, David Norwood?

A Yes, sir.

Q And you told him that you were injured?

A I told him, I said, "I'm hurt and I need to go to the hospital," . . . (Tr.21-22)

Following the injury, David Norwood took the claimant to the Stuttgart hospital. The claimant stated that the information provided to the hospital was conveyed by David Norwood. The claimant was initially treated at the emergency

room at the Stuttgart Regional Medical Center. He was then transferred to UAMS where he was hospitalized for several days and placed in a body cast. The claimant remained in a body cast approximately six (6) weeks. The claimant stated that he was unable to perform any type of gainful employment from the date of the injury through September 19, 2007.

On cross-examination, the claimant acknowledged that he was not completely truthful in his discovery deposition taken January 25, 2008. In his deposition, the claimant testified that he had not earned any income up to the date of the deposition. However, documentary evidence established that the claimant had been hauling and selling metal for money beginning in late October, 2007. The claimant also admitted that he did not have a valid driver's license, but continued driving despite the fact that his license had been revoked since he was twenty-one (21) years old. The claimant has had approximately ten (10) DWI convictions. He admitted that he regularly smoked marijuana. In fact, the claimant stated that he smoked daily, while further maintaining that he had to quit two (2) or three (3) days before his accident because he was out of money. Incredibly, the claimant purchased a six-pack of beer and received another DWI the night before his accident. Respondents raised an intoxication and/or drug defense following the January 15, 2008, prehearing conference based solely upon the claimant admissions in his evidentiary deposition taken subsequent to the prehearing conference.

On further cross-examination, the claimant denied that he was cutting firewood for his own use at the time of the accident. He further denied that he was in the woods in Stuttgart pulling up scrap iron to sell when the accident occurred, specifically maintaining that he was topping trees for Norwood Logging when the injury occurred.

On re-direct examination, the claimant stated that it would cost more money to drive his pickup from Malvern to Stuttgart and return to cut firewood. He further maintained that there was plenty of firewood in Malvern and that it would be unnecessary to drive to Stuttgart for that purpose. Concerning respondents' inference that the claimant was injured hauling scrap iron out of the woods for money, there is no competent evidence to support this allegation. I feel compelled to point out that respondents introduced numerous records from Tri-County Recycling reflecting that the claimant sold scrap metal beginning October 26, 2007, through February 7, 2008. If respondents had any evidence whatsoever that the claimant was hauling metal from Stuttgart to Malvern on and before June 21, 2007, those records would have been readily available to support respondents' allegations. (Resp. Ex. B, pp.2-37)

Judy Brown was called as a corroborating witness by the claimant. Although Ms. Brown could not identify any specific dates, she stated that the claimant was in the convenience store in which she worked, drinking coffee when David Norwood came in and offered the claimant a job earning \$100.00 per day, first at Rockport,

Hot Spring County, for a short time after which they would go to Stuttgart for additional work. She stated that David Norwood and David Lewis shook hands and that the claimant agreed to meet him the following morning at the Fina station to begin work.

David Lee Norwood was called as a witness for the respondents. Mr. Norwood stated that he worked in the log woods for a living. I did not find Mr. Norwood to be a credible witness. Based upon my observations of his demeanor, Mr. Norwood appeared to be extremely cautious and evasive in his testimony. Although Mr. Norwood described himself as a contractor working exclusively for his brother, Phillip Norwood, the owner of the employer/business, he maintained that he did not have any employees. However, on cross-examination, it became clear to me that David Norwood was an employee rather than an independent contractor as were all the workers in the log woods at Stuttgart as reflected below:

Q Are you an employee of Norwood Logging?

A I was hired by Norwood Logging subcontractor.

Q Okay. But yet you've set through this proceeding here today as the representative of Norwood Logging, haven't you?

A No.

Q Then what are you doing here?

A My name was drug up in it. Am I wrong there?

Q Well you sat through this proceed [sic] at counsel's table with Ms. Worley, correct?

A Uh-huh. Uh-huh.

Q Is that right?

A My name was drug up in it, that he worked for me.

Q Could you just answer my question, please?

A I did answer it.

Q Okay. You sat here today at this proceeding with Ms. Worley as the representative of Norwood Logging, is that correct?

A Because he got hurt out there with me.

Q Is that a yes?

A I'm not – I don't know what you're wanting me to say here. I'm telling you that's –

Q Well I want you to answer my question.

A It's not making no sense to me.

Q Did you – okay, well I'm trying to make a record here.

A Okay.

Q And I'll break it down to you.

A Well, break it down good for me.

Q Okay. Today is the 8th day of April, right?

A Right.

Q And we're sitting here in the Garland County courthouse in a workers' compensation hearing, correct?

A Right.

Q And during this hearing you've sat here in the hearing –

A Right.

Q At counsel's table, right?

A Right.

Q And the reason you sat here was because you were here as the representative of Norwood Logging.

A I work for Norwood Logging, yes.

Q Okay. But you're saying that you're not an employee of Norwood Logging.

A He pays me, so I guess if that makes me an employ –

Q How does he pay you? How does Phillip Norwood pay you?

A Contract.

Q Okay.

A He pays me by the ton.

Q All right. And whose equipment to [sic] you use?

A His.

Q And you use his loader?

A I use the loader.

Q His labor truck?

A Yes.

Q His chainsaws?

A Yes.

Q Okay.

A Just a – you're talking about now or when all this happened?

Q When all this happened. Back on June 21 of 2007.

A Okay. It was his. (Tr.61-64)

David Norwood testified that, at the time of the claimant's injury, he was not performing any work either for David Norwood or Norwood Logging. He later modified his earlier testimony that the claimant was in Stuttgart hauling junk, while acknowledging that he was making that assumption without any evidence to support that assumption. However, David Norwood also acknowledged that he provided the personal information at the Stuttgart Regional Medical Center which reflected that the claimant had been struck in the top of the head by a limb, sustaining multiple injuries including rib fractures, head, neck, and upper body injuries, at which time the claimant was transferred to UAMS. Again, David Norwood, and not the claimant, provided the information concerning the employment relationship. (Cl. Ex. A, pp.1-8)

Both the owner of Norwood Logging, Phillip Dale Norwood, and his wife, Christine Norwood, testified that the claimant was not an employee of Norwood Logging. Suffice it to say that I found their testimony to be self-serving. Further, it has been my experience that it is not unusual for employers in the logging business to pay employees cash because insurance premiums are based upon payroll. It should also be noted that the testimony of David Norwood set out above indicates a change in the control of equipment between June 21, 2007, and the hearing concerning whether workers were treated as employees rather than independent contractors.

Admittedly, the record is replete with inconsistencies and contradictions. Nevertheless, a preponderance of the credible evidence as a whole supports the claim. The history provided by David Norwood at the Stuttgart hospital supports the claim. Respondents' multiple alternative assumptions are simply not credible. The record reflects that the claimant was struck in the head with the limb of a tree. I do not find it persuasive that the claimant drove from Malvern to Stuttgart to cut firewood when firewood is readily available in every county in this State. I further do not find it credible that the claimant was in Stuttgart hauling junk when there is no evidence reflecting the sale of any junk prior to the June 21, 2007, injury. The nature and extent of claimant's injury, which was significant, is consistent with the claimant's description of a logging injury.

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson v. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer v. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss v. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met the burden of proof be weighed impartially, without giving the benefit of the

doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade v. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that a preponderance of the credible evidence supports the claim that the claimant's injury arose out of and during the course of his employment with Norwood Logging.

Alternatively, respondents have raised a drug and/or alcohol defense to this claim. I find respondents' alternative defense to be without merit. First, while there is evidence that the claimant has used both alcohol and marijuana, there is no credible evidence that he was impaired at the time of the injury. Clearly, David Norwood could have requested a drug test at the time that he personally took the claimant to the Stuttgart hospital. No drug test was performed. Further, as previously noted, the claimant and the employer herein, together with all the witnesses, are related by either blood or marriage. The employer either knew, or should have known, about the claimant's propensity to use alcohol and/or recreational drugs. Nevertheless, the claimant was permitted to operate a chainsaw for the employer herein. The drug defense simply has no application in this claim.

In view of the foregoing, I hereby make the following:

AWARD

Respondents, Commerce & Industry Insurance Company and AIG Claims

Service, Inc., is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$333.00 per week beginning June 22, 2007, and continuing through September 17, 2007.

All benefits having accrued, respondents are to pay same in lump sum and without discount.

Respondents are further directed and ordered to pay all outstanding hospital, medical, and related expenses, and respondents remain responsible for continued reasonably necessary medical treatment.

Additionally, claimant's attorney, Mr. M. Keith Wren, is hereby awarded the maximum statutory attorney's fee on this entire Award, to be paid pursuant to, and limited by Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge