

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302267

GILL GRIMES,
EMPLOYEE

CLAIMANT

APPLE TREE SERVICE, INC.,
EMPLOYER

RESPONDENT

COMMERCE & INDUSTRY INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 27, 2005

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

Claimant represented by the HONORABLE R. THEODOR STRICKER,
Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD
WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed May 26, 2004. The administrative law judge found, in pertinent part, "The respondents have proven by a preponderance of the evidence the presence of illegal drugs in the claimant's body at the time of his injury, thereby creating a rebuttable presumption that his injury was substantially occasioned by the use of illegal drugs. The claimant has failed to prove by a preponderance of the evidence that his injury was not substantially occasioned by

the use of illegal drugs. The claimant has failed to rebut by a preponderance of the evidence the statutory presumption that his injury was substantially occasioned by the use of illegal drugs." After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the claimant proved by a preponderance of the evidence that illegal drugs did not substantially occasion the accident occurring on February 19, 2003. We therefore find that the claimant proved he sustained a compensable injury.

I. History

The claimant, age 44, began working for the respondent on April 12, 2000. In June of 2002, the claimant's employment status was reduced from foreman to tree trimmer, and he was placed on probation because he tested positive for marijuana pursuant to a random drug test. On February 19, 2003, while working for the respondent, the claimant, and his brother, George Grimes, who was the foreman of the two-man crew, were attempting to cut down a huge dead pine tree (which was approximately 140 feet tall) when it unexpectedly fell over on a smaller pine tree and caused it to snap at the roots and fall, striking the claimant. As a

result, the claimant sustained a large laceration to his head, a right scapular fracture, and multiple right rib fractures. The claimant was transported to a nearby hospital (Medical Center of South Arkansas), in El Dorado, as the accident had occurred in Three Creeks. The claimant was admitted to the hospital for observation and pain control.

In addition, hospital personnel performed a drug screen on the claimant. This drug screen was positive for the presence of opiates, which can be explained by the claimant having received a number of injections of Morphine (an opiate-type drug) from hospital personnel prior to the collection of the specimen. Therefore, a subsequent sample was forwarded to Laboratory Corporation of America (LabCorp), for an independent evaluation. The specimen for this test was taken the next day on February 20, 2003, which rendered results positive for opiates and cannabinoids (marijuana metabolites). Under LabCorp's policy, when initial test results are presumptively positive for a drug, a second aliquot of the specimen is retrieved for confirmation by a second chemically independent method, which was done. This test confirmed positive results for

marijuana metabolite and morphine, as this specimen was received by LabCorp on February 22, 2003. The claimant subsequently obtained a drug screen on his own which was performed by Advanced Toxicology Network, a company located in Memphis, Tennessee. The specimen for this drug screen was collected on March 7, 2003. Although it was negative for marijuana metabolites, morphine, and other drugs tested for, the report indicated that the specimen was diluted.

Subsequently, the respondent controverted the claim as a compensable injury because the post-accident drug test performed on the day of the injury was positive for marijuana. The claimant has therefore filed this claim asserting a compensable injury and his rights to associated benefits and compensation.

The claimant's deposition was taken September 19, 2003. At that time, the claimant admitted that he remembered very little about the accident, but recalled it having happened around 2:00 p.m. The claimant denied having smoked marijuana or used any other drugs or over-the-counter medications prior to the accident. However, the claimant testified that prior to the accident, he had last smoked marijuana in June of 2001.

On February 24, 2003, the claimant was feeling significantly well and his pain was well tolerated. As a result, the claimant was discharged home with follow-up instructions to see Dr. Jeffrey Hall. According to the claimant, upon being released from the hospital, he saw Dr. Hall who advised him not to work for awhile, as he had sustained injuries to his head and a broken collarbone. Hence, the claimant testified he was unable to work as of the date of his deposition. The claimant further testified that since the accident his whole body itches, and he sees people and hears voices. According to the claimant, one doctor has said this resulted from his allergies and another doctor has said that this was caused by his "nerves". However, the claimant denied any prior problems with his head or shoulder, nor had he experienced any other physical problems for which he was receiving treatment.

Dr. Henry Simmons's (who is a medical doctor and a toxicologist) deposition was taken on January 26, 2004. Dr. Simmons testified that the claimant having initially tested positive for opiates can be explained by him having received a number of injections of Morphine (an opiate-type drug) prior to the collection of the specimen. He testified that

the claimant could have used marijuana within an hour of the collection (which he noted was improbable because the claimant was in the hospital), or two days to a number of weeks prior to the time of the collection. However, Dr. Simmons admitted that he could not tell from a test conducted on the 19th or the 20th (February), when his last use had occurred. In addition, Dr. Simmons specifically testified that "The chances of having a THC-related accident are clearly highest when the blood concentrations are at their peak, even more specifically when the amount of THC is at its -- specific receptor site is at its peak. And, of course, that happens shortly after ingestion...."

With respect to the diluted specimen, Dr. Simmons testified:

Q. What would cause there to be a diluted specimen?

A. Well, there are many reasons why a specimen might be diluted. One can simply add a dilution after the urine has been voided. One can intentionally consume large quantities of fluid and produce a dilute specimen. One can have a concentrated defect in the kidney that leads to a dilute specimen or one can drink nervously prior to a test or just because he is interested in drinking a lot of coffee or something and produce a dilute specimen completely innocent. The dilution reduces the concentration of the analyte of interest, whether it's THC or metabolites, amphetamine, opiates.

In addition, Dr. Simmons essentially testified that the dilution rendered the claimant's test results suspect, but there was no way to know why or how the sample became diluted.

A hearing was held in this matter on April 15, 2004. John Burson, a former Entergy employee, also gave testimony during the hearing. Mr. Burson, retired from Entergy on December 31, 2003, as he formerly worked as vegetation operations manager for the El Dorado area. In this position, he was required to inspect circuits, oversee dead tree removal, storm response, and to coordinate vegetation in general. Moreover, his job duties entailed coordinating and overseeing the Apple Tree Services' work. As to the incident of February 19, 2003, Mr. Burson testified that he (along with Bob Weaver, state supervisor of vegetation management and Bill Camplaign, operations manager for the respondent) inspected the site the day after the accident. Mr. Burson testified, "It appeared to us that they cut a large dead pine tree. Before that tree hit the ground, it impacted another tree, a smaller green pine and that green pine is what hit Gill [the claimant]. Upon being questioned as to whether a three-man crew would have prevented this,

Mr. Burson stated that he did not think so, as he further testified that he thought that "this was just something that happened." As to the cause of the accident, Mr. Burson testified that if one had been impaired, they might not have run as fast or as far as you would have had you not been impaired. However, he admitted to not having any formal investigative training or actual knowledge of what the claimant was doing at the time of the accident.

George Grimes, the claimant's brother and supervisor at the time of the accident, also gave testimony during the hearing. However, at the time of the hearing, he worked for Milbank, a plant that makes electrical boxes that are installed on houses. According to Mr. Grimes, he worked for the respondent for approximately four years, as he most recently held the position of crew foreman, which included the claimant and himself. Mr. Grimes testified that the majority of the time he had previously worked with a three-man crew, which entailed a ground man, the foreman and a trimmer, but they had reduced him to a two-man crew. He further testified that this change had been implemented around the first of 2003.

Mr. Grimes testified that he did not see the claimant smoking marijuana on the day of the accident, nor did he appear to be impaired at the beginning of the day when he picked him up at 7:00 a.m. or when the accident happened. Moreover, Mr. Grimes testified that he did not see the claimant use any drugs on the day of the accident, nor did the claimant appear to be impaired in any way.

Mr. Grimes testified on direct:

Q. Could you describe, in your own words, what you observed of this incident?

A. Well, like I say, he climbed the tree and put the rope in there. We ran it out to another tree to make a come-along. Y'all probably don't know what I'm talking about. All right, after we put the come-along in there, before we tightened up, he notched the tree. Since I was bigger than he was, I was on, I was to wench the other tree. I tightened up on the rope so it would give leverage and come towards me. All right, he come back, after I got it as tight as I could get it, he come back to help me put more leverage on it. We tied it off to the tree behind us. All right, he went back up there and put the back cut on the tree. I was on the rope putting pressure on there. The tree started, from the top of it twisted and hung up on the other tree, so he had cut almost through because he was falling. So he come back, he killed the saw and come back there with me. It was slack in the rope. We untied the rope and we made another notch up further for the come-along so he can give more leverage. We pulled it. We started pulling. He was on that side of the rope and I was on this side. We just pulled it like that- This is all the time, before we started, we always found an escape route.

Q. An escape route?

A. Yes. I already knew where I was going and he knew where he was going. He was on this side and before he came there--

Q. Did you discuss where you were going?

A. Yeah. Because see the rope was between us and he couldn't go my way and I couldn't go his way. So when the tree started falling, all right, here it come, and we broke and ran. I went that way and he went that way. And as the tree hit the ground, I turned around and I was calling him because it was just habit because every time we take a tree down and it hits the ground, we call each other, "Is everything all right? Did no debris hit you?" that's the way it was. And this time I called out, "Gill" and I turned around and looked and he was on the ground. I ran over to him and there was a tree laying across the back part and he was laying face forward and his head was like that and I couldn't see nothing but the white part of his eyes. And I shook him, "Gill, Gill," and he answered me when he finally came to, "What happened?" So I had to run from the woods to the truck to get my cell phone and call Jack and then called the ambulance. I went back out there and got the first aid, applied the pressure to stop the bleeding, you know, until the ambulance got there.

Mr. Grimes also testified that the accident was unavoidable. Moreover, he testified that he made it about the same distance away from the falling tree as did the claimant, which was approximately 10 or 15 feet. According to Mr. Grimes, "it was a freak accident," as the tree that struck the claimant broke in a way that he had never seen in

his 14 years of logging. Specifically, he essentially testified that although the tree was small in diameter, it broke at the root instead of just folding over, as pine trees usually just break over. Mr. Grimes also testified that there was no way the claimant could have predicted that this would have happened or planned and avoided this accident. According to Mr. Grimes, had the claimant been impaired, the way it looked out there, he couldn't have gotten away from the tree no matter what. He also testified that a third person would not have avoided or prevented this accident.

William (Bill) Camplaign, the respondent's operations manager, gave testimony during the hearing. He admitted to going to view the scene with Mr. Burson. According to Mr. Camplaign, the claimant did not have a good escape route to begin with because there were cross logs from the dead pine trees in his path, which he could have easily tripped on when trying to escape from the site. He also testified that there were some cross logs in the area where the claimant had supposedly hit the ground. According to Mr. Camplaign, he learned this because the claimant's hard hat and safety glasses were still in this area. Mr. Camplaign also agreed

that the dead tree had fallen and side-swiped a third tree, causing it to fall and strike the claimant. Moreover, he testified that other than clearing the path, the logs, there was nothing else in his opinion the claimant could have done to avoid the accident. However, he admitted that any error in judgment would also be the error and judgment of George Grimes since he was the crew foreman.

At the hearing, the claimant was called upon by the respondent's attorney to give testimony as a hostile witness. On direct, the claimant admitted to using marijuana in the past, and he also admitted that the reason for his termination with respondent was because of marijuana. However, the claimant admitted that he did not indicate that he had used marijuana in the past during his deposition which was taken on September 19, 2003. Hence, the claimant further testified that he subsequently signed an affidavit that he submitted to the Workers' Compensation Commission indicating that this was probably wrong, that he may have well used marijuana the Christmas (December of 2002) before the accident. He also admitted to applying for unemployment benefits and telling them at that time on October 30, 2003, he did not have any disabilities that

would limit his ability to work. However, he further testified that he was denied unemployment benefits due to his inability to perform suitable work.

Prior to the hearing, a Prehearing Conference was held in this claim on November 10, 2003, and as a result a Prehearing Order was entered on that date. The following stipulations were submitted by the parties and accepted:

- 1). That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2). That the employee/employer/carrier/relationship existed at all times, including February 19, 2003.
- 3). That on February 19, 2003, the claimant sustained a an injury to his right shoulder, right arm, brain, ribs and spine.
- 4). That the claimant earned an average weekly wage of \$459.00, entitling him to a compensation rate of \$306.00 per week for temporary disability benefits and \$230.00 per week for permanent partial disability benefits.

By agreement of the parties, the issues to be ligated and resolved at the hearing were limited to the following:

1. The compensability of the claimant's February 19, 2003, injury.
2. The claimant's entitlement to associated medical and indemnity benefits.
3. Controversion and attorney's fees.

The claimant contended that the injury subject of this claim is a compensable injury; that he is entitled to temporary total disability benefits from February 19, 2003, to a date yet to be determined; that he is entitled to additional medical benefits; and that he is entitled to attorney's fees.

In contrast, the respondent contended that a post-accident drug test performed on the day of the injury was positive for marijuana, and that the claimant therefore did not suffer a compensable injury; that the medical evidence does not support entitlement to temporary total disability benefits; and in the alternative, that if the claimant is entitled to temporary total disability benefits, his entitlement would cease on October 30, 2003, when the claimant applied for unemployment compensation benefits.

After a hearing before the Commission, the administrative law judge found, in pertinent part, "The respondents have proven by a preponderance of the evidence the presence of illegal drugs in the claimant's body at the time of his injury, thereby creating a rebuttable presumption that his injury was substantially occasioned by the use of illegal drugs. The claimant has failed to prove

by a preponderance of the evidence that his injury was not substantially occasioned by the use of illegal drugs. The claimant has failed to rebut by a preponderance of the evidence the statutory presumption that his injury was substantially occasioned by the use of illegal drugs."

The claimant appeals to the Full Commission.

II. Adjudication

Ark. Code Ann. §11-9-102(4) provides:

(B) "Compensable injury" does not include:

(iv) (a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders....

(d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's did not substantially occasion the injury or accident.

In the present matter, the claimant had worked for the respondent/employer approximately four years. The claimant admits to having been demoted from foreman to trimmer due to him having tested positive for marijuana pursuant to a

random drug test. While the claimant maintains that he has abstained from regular use of marijuana since June of 2001, he admits to having smoked marijuana in December 2002 at a Christmas party. However, the claimant testified that he had not smoked marijuana or used any other drugs or over-the-counter medications prior to his injury. The claimant's brother and supervisor, George Grimes, credibly testified that he did not observe the claimant smoking marijuana on the day of the accident, nor did the claimant appear to be impaired at the beginning of the day when he picked him up at 7:00 a.m. Moreover, Mr. Grimes testified that he did not observe the claimant using any drugs on the day of the accident, nor did the claimant appear to be impaired in any way to him. As such, there were no witnesses who observed the claimant smoking marijuana on the date of the accidental injury of February 19, 2003. Nor were there any witnesses who observed any "impairment" on the claimant's part as a result of marijuana intoxication.

In addition to the claimant, who the Commission determines was a credible witness, Mr. Grimes also credibly testified that the accident was unavoidable. Moreover, we note that Mr. Grimes characterized the accident as being a

"freak accident," essentially because the tree that struck the claimant broke and fell in a way he had never seen in his 14 years of logging. Mr. Grimes essentially testified that the dead tree fell in an unexpected manner on a smaller pine tree, causing it to snap at the roots and fall, thereby striking the claimant. This version of events was supported by the testimony of John Burson, an Entergy employee, and Bill Camplaign, the operations manager. Both of these witnesses testified that they inspected the scene of the accident the day after the claimant's accident. They both testified that the claimant's personal items were found near the green tree which had broken at the roots. Both men testified that it was the green tree that struck the claimant and not the dead tree which they had been cutting down. Moreover, we note that since the claimant did not expect the smaller pine tree to snap at the roots and fall over on him, there was no reason for him to clear an escape path for this tree, as had been prudently done for the dead pine tree being taken down. The Full Commission recognizes that the claimant was the only employee who was struck by the falling tree on February 19, 2003, while Mr. Grimes was able to escape unharmed. Nevertheless, any assertion or

finding that the claimant being struck by the tree was the result of impairment from marijuana would be based on speculation and conjecture, which can never be submitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979).

The Full Commission recognizes that the record contains the results of four drug tests performed on the claimant, two of which revealed test results positive for "cannaibinoids," the metabolic by-product of THC, which is the primary psychoactive ingredient of marijuana. Specifically, the first test performed at the hospital on the day of the accident revealed the presence of opiates, which can most likely be explained by the claimant having received a number of injections of Morphine (an opiate-type) from hospital personnel prior to the collection of the specimen. As a result of this positive screen, a sample was taken from the claimant on February 20, 2003, the day after the accident, and sent to LabCorp for an independent screen. This drug screen revealed results positive for cannabinoids. Therefore, another specimen was obtained by LabCorp on February 22, 2003 for confirmation by utilizing a second chemically independent method. This confirmation test also

revealed results positive for marijuana metabolites. Dr. Simmons, a toxicologist, testified that the first drug screen done by the hospital may have utilized a different cutoff standard for triggering a positive response, which provides a plausible explanation as to why the first screen performed by the hospital was not positive for "cannabinoids." With respect to the fourth drug test, the claimant submitted this specimen on his own to Advanced Toxicology Network, more than two weeks after the accident, March 7, 2003. Although this test was negative for cannabinoids, the report indicated that the specimen was diluted. According to Dr. Simmons, the dilution rendered the test results suspect; however, he further testified that there was no way for determining how or why the sample was diluted. In light of the testimony of Dr. Simmons concerning the fourth drug test (it being suspect), and the fact that this specimen was not taken until March 7, 2003, some two weeks after the accident, we find no validity to the test results rendered by the fourth screen. However, given the two drug screens performed by LabCorp, which were positive for cannabinoids and THC, the Full Commission finds that these two positive drug screens created a rebuttable

presumption that the claimant's accident was substantially occasioned by the use of illegal drugs. Weaver v. Whitaker Furniture Co., 55 Ark. App. 400, 935 S.W.2d 584 (1996). The burden shifts to the claimant to prove by a preponderance of the evidence that illegal drugs did not substantially occasion the accident. Whether the rebuttable presumption is overcome is a question of fact for the Commission to determine. Woodall v. Hunnicut Construction, 340 Ark. 377, 12 S.W.3d 630 (2000). Based on the record before us, the Full Commission finds that the claimant proved by a preponderance of the evidence that illegal drugs did not substantially occasion the accident on February 19, 2003.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that, "The claimant has failed to prove by a preponderance of the evidence that his injury was not substantially occasioned by the use of illegal drugs." The Full Commission finds that the claimant proved by a preponderance of the evidence that illegal drugs did not substantially occasion the accidental injury on February 19, 2003. The claimant proved that all the medical treatment of record was reasonably necessary in connection with the

compensable injury, pursuant to Ark. Code §11-9-508(a). The claimant also proved that he remained in his healing period beginning on the date of the compensable injury and he had not returned to work, so that the claimant proved he was entitled to temporary total disability compensation from February 20, 2003, until a date yet to be determined. See, Wheeler Const. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The claimant's attorney is entitled to a fee for legal services pursuant to Ark. Code § 11-9-715 (Rep. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(Rep. 2002).

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant has overcome the

rebuttable presumption that his injury was caused by the use of illegal drugs and has proven by a preponderance of the evidence that he sustained a compensable injury. Based upon my de novo review of the entire record, I cannot find that the claimant has overcome this presumption. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury as a result of his work related accident.

It is undisputed that the claimant was involved in an accident at work on February 19, 2003, when he was hit by a tree during the course and scope of his employment. The majority has found that the two positive drug screens performed after the claimant's injury which were positive for cannabinoids and THC created a rebuttable presumption that the claimant's accident was substantially occasioned by the use of illegal drugs. I agree with this finding. However, I must dissent from the finding that the claimant proved by a preponderance of the evidence that the illegal drug did not substantially occasion the claimant's injury on February 19, 2003. Contrary to the majority's finding, I

do not find the claimant' brother to be a credible witness. George Grimes, the claimant's brother testified that the claimant climbed the dead tree to tie it off with a rope prior to notching the tree. However, the claimant testified in his deposition that he did not climb the tree because one never climbs a dead tree. Mr. Grimes further testified that he and the claimant discussed an escape route prior to pulling the tree over and had cleared a pathway with "...no vines or nothing in there." Contrary to this testimony, both John Burson, the Vegetation O.C. for Entergy, and Bill Camplaign, the operations manager for respondent employer, testified that the area where the claimant was found was not a cleared pathway. Mr. Camplaign specifically testified:

Well, from looking at the site and what they explained to me he did, he went out to help him pull the rope. From looking at it, they didn't clear the way after they got out there, after Gill went to help him pull the rope. The escape route to Gill's - - In Gill's direction hadn't been clear because there were logs still laying there. The proper way to clear it would be to cut those broken logs out of the way so you'd have a path to run.

According to Mr. Camplaign, the proper procedure would have been to move or cut the logs to make a clear escape route. While Mr. Camplaign testified on recross-examination that debris is scattered around when a tree falls, there is no evidence that the logs laying in the claimant's path were mere debris, nor can I reach this conclusion from Mr. Camplaign's testimony. Consequently, I cannot find that the claimant utilized proper judgement in helping his brother pull on the rope prior to clearing an escape route. The evidence reveals that the claimant was a trimmer or notcher at the time of his accident but that he had been a foreman in the past. As an experienced trimmer and foreman, the claimant was aware of the proper procedure of clearing a path prior to felling a tree. While Mr. Grimes may have cleared his own pathway, I cannot find that the same is true for the claimant. When the claimant and Mr. Grimes were preparing the tree to fall, there is no evidence that the claimant intended to assist Mr. Grimes with pulling the rope. The evidence reveals that the claimant cut the notch and Mr. Grimes was pulling on the rope. The only reason the claimant assisted Mr. Grimes with

pulling the rope was because the dead tree had hung up on another tree. This unforeseen event caused the claimant to move from his initial spot as the notcher and move to assist his brother pull the rope. Since the claimant did not intend to pull on the rope, there was no need to clear an escape route prior to working on the tree. Thus, if George Grimes is to be believed, the claimant had to notice that he needed help, come over to lend a hand, but first stop to clear an escape route of all vines and stuff. I am simply not persuaded to find this to be so.

Based upon the record before us, it is unknown whether the claimant tripped, fell, and was struck by the green tree, or whether the green tree knocked the claimant to the ground. The claimant does not know, and the claimant's brother was running in the opposite direction so he did not observe the claimant get hit by the tree. Nevertheless, the claimant testified in his deposition that he must have tripped over something, thus implying that he fell before he was hit by the tree. While I acknowledge that the green tree that fell on the claimant was not the dead tree the claimant was

removing, and that the testimony reveals that the manner in which the green tree fell was a "freak accident," I cannot find that a preponderance of the evidence weighs in favor of finding that this tree struck the claimant and knocked him to the ground. Pursuant to A.C.A. § 11-9-102(4)(iv) we must start with the presumption that the presence of marijuana in the claimant's system substantially occasioned the claimant's accident. The claimant has presented an alternative theory, but that is all it is - a theory. The evidence reveals that the claimant did not have a clear path. This, in and of itself, is evidence of the claimant's failure to properly clear a means of escape from the falling tree. Without a clear means of escape, the claimant's ability to react and run away from the falling tree was obviously hampered. Did the claimant fall, or was the claimant struck by the green tree first? In my opinion it is irrelevant. The mere fact that the claimant did not have a proper pathway to escape, more than likely caused either of these scenarios.

Finally, I do not find the claimant's brother to be a credible witness. George Grimes testified that

the claimant did not appear intoxicated and that he has not known of the claimant ever using marijuana. However, the claimant has admitted that he "may have taken a drag" on a marijuana joint around Christmas of 2002. In addition, the claimant tested positive on a random drug test in June of 2002 which resulted in his demotion. George Grimes's testimony is inconsistent with the claimant's description of the events prior to the claimant's accident, in that Mr. Grimes testified that the claimant climbed the tree to tie it off with a rope, but the claimant testified in his deposition that he would not climb into a dead tree. The claimant's attorney tried to downplay any discrepancies by arguing that the claimant is suffering from a traumatic brain injury and has relied upon what others have told him in remembering the events of his accident. First, there is no evidence before this Commission indicating that the claimant has been diagnosed with a traumatic brain injury. At best, a physiatrist, Dr. Bruce Safman, "wondered" whether the claimant sustained a traumatic brain injury, and the claimant's attorney sent the claimant to TimberRidge Ranch to obtain a treatment

plan. Neither of these amounts to a diagnosis. Second, if the claimant relied upon the only witness at the scene to provide him with a "memory" of what happened, the claimant's memory of not climbing into the tree is inconsistent with his brother's testimony. Accordingly, the only conclusion to be drawn is that someone is not telling the truth. Finally, as noted above, despite Mr. Grimes's testimony that both he and the claimant cleared an escape route, the overwhelming credible evidence reveals that the claimant did not have a clear pathway of escape. It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). In my opinion, George Grimes, as the claimant's brother, is an interested witness trying to protect his brother and assist his brother in the

recovery of benefits, therefore, I accord his testimony little weight with regard to whether the claimant was intoxicated or not.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. McKINNEY, Commissioner