

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602056

ANTHONY FLINT,  
EMPLOYEE

CLAIMANT

TEMP SERVICES OF ARKANSAS, LLC,  
EMPLOYER

RESPONDENT

LIBERTY MUTUAL INSURANCE CORP.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 19, 2007

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

Claimant appeared *pro se*.

Respondents represented by the HONORABLE MICHAEL RYBURN,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the  
Administrative Law Judge filed August 3, 2006. In said  
order, the Administrative Law Judge made the following  
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation  
Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties  
are reasonable and are hereby accepted as  
fact.

3. The respondents have proven by a preponderance of the evidence that illegal drugs were present in the claimant's body at the time of his work injury.
4. The claimant has proven by a preponderance of the evidence that his injury was not substantially occasioned by the use of illegal drugs.
5. The claimant has proven by a preponderance of the evidence that he sustained an injury to his leg arising out of and in the course of his employment; that his injury was caused by a specific incident identifiable by time and place of occurrence; that his injury caused internal physical harm to the body requiring medical services; and that the existence and extent of his injury is established by medical evidence supported by objective findings.
6. The claimant has therefore proven by a preponderance of the evidence that he sustained a compensable injury to his leg.
7. The claimant has proven by a preponderance of the evidence that the medical treatment he has undergone for his compensable leg injury has been reasonably necessary.
8. The claimant has proven by a preponderance of the evidence that he was within his healing period and had not returned to work from February 21, 2006, through June 12, 2006.
9. The claimant has therefore proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from February 21, 2006, through June 12, 2006.
10. The respondents have controverted this claim in its entirety.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 3, 2006 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. §11-9-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's

attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

---

OLAN W. REEVES, Chairman

---

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

---

DISSENTING OPINION

I must respectfully dissent from the majority opinion that the claimant overcame the presumption that his injury was substantially occasioned by the use of illegal drugs, and finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on February 21, 2006. Based upon my de novo review of the record, I find that the claimant has failed to rebut the presumption that his injury was substantially occasioned by the use of illegal drugs. Accordingly, I would reverse the decision of the Administrative Law Judge.

On February 21, 2006, the claimant was working for the respondent employer as a construction laborer. He was installing insulation in the walls of a dormitory and he was stuffing the insulation between the wall studs. The claimant testified that there were several dozen large pieces of sheet rock stacked up on their ends on the floor that were leaning up against the hallway walls. The claimant had to reach behind these pieces of sheet rock to get to the area where he was placing the insulation. The claimant testified that several pieces of the sheet rock started to fall towards him and he stepped back in between the wall studs to escape. However, his left foot was caught by a six-inch pipe laying on the floor and the sheet rock struck his left leg, fracturing his tibia and fibula. The claimant was taken to the hospital where he had surgery to repair the fractures. The claimant underwent a drug test at the hospital which revealed the presence of cocaine and opiates in the claimant's system.

Act 796 of 1993 made substantial changes in the law regarding this issue. As amended by Act 796, an injury which was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders is not compensable, just as under

prior law. However, under the amended law, every employee is deemed by his performance of services to have impliedly consented to testing for any of these substances in his body, and the presence of any of these substances creates a rebuttal presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's order. Ark. Code Ann. § 11-9-102(4) (B) (iv) (Repl. 2002). In addition, the amended law provides that:

...[a]n 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 orders did not substantially occasion the injury or accident.

A statutory presumption is a rule of law under which the finding of a basic fact compels the finding of a presumed fact, unless sufficient evidence to the contrary is presented to rebut the presumption. See, Black's Law Dictionary, (5th Ed.). If evidence which is contrary to the presumed fact is presented, the determination of the existence or nonexistence of the presumed fact is a question for the trier of fact. Ross v. Vaught, 246 Ark. 1002, 440 S.W.2d 540 (1969); Curtis Circulation Co. v. Henderson, 232

Ark. 1029, 342 S.W.2d 89 (1961); Ford & Son Sanitary Co. v. Ransom, 213 Ark. 390, 210 S.W.2d 508 (1948); and Ball v. Hail, 196 Ark. 491, 118 S.W.2d 668 (1938). Just as the determination of the weight to be given to the evidence is a matter within the province of the trier of fact, the determination of the weight to be given to the presumption is a matter within the province of the trier of fact. Dunn v. Dunn, 255 Ark. 764, 503 S.W.2d 168 (1973). In this regard, the presumption should be given the weight necessary to "best serve the interest of justice." Id.

With regard to the effect of the testimony of an interested party on a presumption, the Arkansas Supreme Court made the following statements in Dunn, supra, (Barnhart, Use of Presumptions In Arkansas, 4 Ark. L. Rev. 128, 141 (1950):

Except as the court may be restrained by constitutional requirements of due process of law..., there would seem to be no reason in law or logic why there should not be accorded to any or all presumptions the weight which the court feels would best serve the interest of justice. If dissipation by a bare denial from an interested witness seems to accord too trifling in affect to a presumption, the court would seem justified to require more before the presumption is rebutted.

Therefore, the question of whether the testimony of an interested party is sufficient to rebut the presumption remains a question for the trier of fact. However, in determining if the testimony of an interested party is entitled to sufficient weight to overcome the presumption in itself, it must be remembered that the testimony of interested parties is not to be treated as undisputed in determining the weight it is to be accorded. Ball, supra; Felts v. Parte, 208 Ark. 212, 185 S.W.2d 705 (1945). A claimant's testimony is never considered uncontroverted. 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). 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 the present claim, the evidence shows that cocaine and opiates were present in the claimant's system at the time of the injury. As a result of the claimant testing positive for the presence of cocaine and opiates in his system, the claimant must then overcome the presumption that the accident was substantially occasioned by the claimant's drug use. In my opinion, the claimant has failed to rebut that presumption. The evidence demonstrates that the claimant admitted that he had used cocaine in the past, but he denied using it the day of or in the weeks and months prior to his injury. The claimant contrived a story that he was only in the presence of others who were using cocaine at a party on the weekend prior to his injury and exposed to second-hand smoke. The claimant testified that the second-hand smoke was the cause of his positive drug test. This account of how cocaine came into the claimant's system is neither plausible nor is it conceivable. In my opinion, the claimant completely lacks credibility. It is well settled that questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816

S.W.2d 876 (1991); Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forest Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964). Arkansas Code Annotated section 11-9-704(b)(6)(A) vests with the Commission the duty to "review the evidence" and if deemed advisable to "hear the parties, their representatives, and witnesses." The statute further requires the Commission to determine, "on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by preponderance of the evidence." A.C.A. § 11-9-704(c)(2). Thus, in determining that the Commission's authority and duty to conduct a de novo review of the entire record, including issues of credibility as being constitutional, the Court of Appeals stated in Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000):

When the Commission reviews a cold record, demeanor is merely one factor to be considered in credibility determinations. Numerous other factors must be included in the Commission's analysis of a case and reaching its decision, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. The flexibility permitted the Commission adequately

protects the claimant's right of due process of law.

Accordingly, when there are contradictions in the evidence, it is constitutionally within the Commission's exclusive province to reconcile the conflicting evidence and to determine the true facts. White v. Gregg Agriculture Ent., supra. In addition, 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)

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 275 (1994). Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. There is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000).

However, the findings of the Administrative Law Judge on issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d (1987). By allowing the Commission to review evidence or, if deemed advisable, hear the parties, their representatives and witnesses, Ark. Code Ann. §11-9-704(b) (6) (A) (Repl. 2002), adequately protects a claimant's due-process rights. Id. When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Numerous other factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. "The flexibility permitted the Commission adequately protects the claimant's right of due process of law." Id.

The claimant's account of how the accident happened simply does not make sense. According to the claimant, the sheet rock was on his left when it began to fall. He saw the motion of the sheet rock and he stepped back through the sheet rock with his right leg but he did

not get his left leg all the way through because of the pipe. The claimant was stepping backwards through the studs on the opposite side of the hall. It only make sense that the sheet rock would have fallen on the anterior aspect of the claimant's left leg and not on the medial part of the left leg. If he was stepping backwards at the time of the accident, the sheet rock would have hit him on the outside of the left leg, not on the inner side of the left leg. Moreover, the claimant said he was working at one end of the sheet rock which meant that there had to be empty space behind him in the hallway, yet he chose to step through the studs on the opposite of the hall where there was a pipe sticking out in the floor. In my opinion, this demonstrates that the claimant was not using his right senses or there is a flaw in his account of what occurred. There simply is no adequate explanation to explain why the claimant proceeded the way he did. All we have is the claimant's version of the accident.

In my opinion, the claimant failed to successfully rebut the presumption that the drugs caused his accident. All we have is his uncorroborated testimony about the mechanics of the accident and that demonstrates that the claimant used bad judgment. Logically, we can conclude that

the claimant used bad judgment because his judgment was impaired by the use of drugs. Had he not been under the influence of drugs, this accident could have been prevented by using clear judgment and getting out of the way of the slow moving sheet rock. Simply put, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

---

KAREN H. MCKINNEY, Commissioner