NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510838

JAMES MILLIGAN,
EMPLOYEE CLAIMANT

CONAGRA FOODS, INC.,
EMPLOYER RESPONDENT

SEDGWICK CLAIMS MANAGEMENT,
INSURANCE CARRIER RESPONDENT

OPINION FILED DECEMBER 26, 2007

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

Claimant represented by the HONORABLE EVELYN E. BROOKS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CURTIS L. NEBBEN, 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 May 8, 2007. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 30, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable back injury. This includes surgery and medical treatment provided by Dr. Raben through February 1,

> 2007. Medical treatment claimant received from Dr. Raben subsequent to February 1, 2007 is not causally related to claimant's compensable injury.

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 May 8, 2007 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 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 awarding the claimant additional medical treatment. In my opinion, the claimant has failed to meet his burden of proof.

The claimant worked for the respondent employer in direct sales and delivery. On June 20, 2005, the claimant slipped getting out of the truck, fell and hit the steps. The claimant reported the incident to his supervisor and was sent to Dr. Howes for medical treatment. The respondent accepted the claimant’s injuries and paid benefits. The claimant left the employ

of the respondent employer in August of 2005 and went to work for Great Plains Coca Cola as a merchandiser where his job duties included stocking shelves and placing orders.

The claimant underwent an MRI on August 17, 2005, which reflected a mild disc protrusion at L5-S1 with no compression of the nerve roots. Dr. Haws wrote on September 7, 2005:

> The MRI of the lumbar spine shows mild disc protrusion at the L5-S1 disc space level, with the protrusion being in the left paracentral region without compromising the neuroforaminal elements. With no compromise of neural elements and the patient not complaining of any radicular type pain in the area of the left lower extremity, I do not feel this is of medical significance or explains his complaint of pain in the right hig region.

Dr. Haws went on to recount:

> I think it is also of note that his physical therapy evaluation at Healthsouth was basically cut short by the physical therapist, given the fact that the patient was observed in the lobby performing full lumbar flexion with straight lower extremities and showing no appearance of distress or pain. However, when the patient was taken back and put through testing with the therapist he was only able to show a ROM to approximately 50% with lumbar flexion and complained of

> increased pain during the evaluation. The physical therapist also noted that his complaints of numbness did not follow nerve root patterns.

Dr. Haws recommended a neurological evaluation but the clinic refused to schedule it because of an unpaid bill by the claimant from a previous workup. Dr. Haws suggested that the claimant had symptom magnification and secondary gain. He released the claimant from his care.

The claimant continued to work for Great Plains Coca Cola during this time. He was involved in a motor vehicle accident in November of 2005, but he contended he was not hurt. The x-rays taken at the hospital were merely precautionary. The claimant sought a change of physician to Dr. Cyril Raben and saw him on April 17, 2006. The claimant told Dr. Raben his back pain started approximately one year prior but he failed to mention a motor vehicle accident in November of 2005. It is curious that the claimant has been involved in several accidents where he received financial settlements.

Dr. Raben treated the claimant conservatively but the claimant ultimately underwent surgery on October 12, 2006. At the time of the surgery, the claimant’s

personal history was taken and that history reflected that the claimant had low back pain that radiated into both legs for almost two years and he denied any accident or injury. During his deposition, Dr. Raben attempted to explain the discrepancy away by speculating that his nurse practitioner took the claimant's history and she must have gotten the information from other reports. Dr. Raben was not aware that the claimant had been in a motor vehicle accident in November of 2005.

Ark. Code Ann. §11-9-508(a)(Supp. 2005) provides that an employer shall provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). However, employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of the employee's injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of the compensable injury. Wal-Mart, supra; GEO Specialty Chemical v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000); Dalton v. Allen Eng'g Co., 66 Ark.

App. 201, 989 S.W.2d 543 (1999). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001); White Consolidated Indus. v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996).

In my opinion, a review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that the surgery to his lumbar spine performed by Dr. Raben in October of 2006, was causally related to his compensable injury in June of 2005. The evidence demonstrates that the claimant had a minor compensable injury and was released to return to work on September 27, 2005, without restrictions and no permanent impairment. The claimant continued to perform a physically demanding job and was involved in a motor vehicle accident subsequent to that release. The claimant did not seek medical treatment for over six months after being released by Dr. Haws.

Further, the claimant's credibility is suspect at best. Dr. Haws indicated that the claimant was not truthful about his pre-existing carpal tunnel. Dr. Haws

did not find out about it until he was trying to schedule a neurological examination for the claimant and found he had an unpaid bill. Dr. Haws noted that the claimant continued to request narcotic pain medication even though he had no objective evidence to support his level of pain and discomfort. Dr. Haws refused to prescribe any further. Moreover, the claimant was observed by the physical therapist performing exercises without pain in the lobby but had symptom magnification when the therapist examined him. Furthermore, the history taken prior to the claimant's October 12, 2005, surgery, stated that the claimant denied being involved in any accident or having any injury. The claimant not only failed to disclose his motor vehicle accident, his accident with the respondent employer but an incident during his service in the Marine Corps where he had shrapnel removed and a knee surgery 3 years prior. In my opinion, the claimant is not a credible witness. 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. <u>White v. Gregg Agriculture Ent.</u>, 72 Ark. App. 309, 37 S.W.3d 649 (2001); <u>Johnson v. Riceland Foods</u>, 47 Ark. App. 71, 884 S.W.2d 626 (1994); <u>Scarbough</u>

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 Forests, Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964).

The constitutionality of the Commission's authority and duty to conduct a de novo review of the record, including issues of credibility, has been established by the court. See, Stiger v. State Line Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000). 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. Stiger, supra; see also, White, supra.

Ark. Code Ann. §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." By allowing the Commission this latitude, Ark. Code Ann. §11-9-704(b)(6)(A)(Repl. 2002), adequately protects a claimant's due-process rights. Stiger, supra. 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). However, neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. Moreover, 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 Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995).

When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Stiger, supra. 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. More specifically, in Stiger, supra, the Court of Appeals stated:

> 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, 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 to due process.

Uncorroborated testimony of an interested party is always considered to be controverted. However, the rule also applies to a non-party witness whose testimony might be biased. Burnett v. Philadelphia Life Insurance Co., 81 Ark. App. 300, 101 S.W.3d 843 (2003). It is not arbitrary to choose not to credit such testimony. Id. Furthermore, a witness's close familial relationship to a party has been held to demonstrate a sufficient possibility of bias so as to treat the witness's testimony as disputed. See, Sykes v. Carmack, 211 Ark. 828, 202 S.W.2d 761 (1947). Moreover, the testimony of an interested party is taken as disputed as a matter of law whether offered on his own behalf or on the behalf of another interested party. Knoles v. Salazar, 298 Ark. 281, 766 S.W.2d 613 (1989).

Finally, 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, supra. 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 275 (1987).

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's award of additional medical treatment.

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KAREN H. McKINNEY, Commissioner