

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708523

DAVID LEWIS, EMPLOYEE	CLAIMANT
NORWOOD LOGGING, INC., EMPLOYER	RESPONDENT NO. 1
COMMERCE & INDUSTRY INS. COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED OCTOBER 6, 2008

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

Claimant represented by the HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents No. 1 appeal an opinion and order of the Administrative Law Judge filed June 25, 2008. 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 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.

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 June 25, 2008 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 finding that the claimant was an employee of Norwood Logging and finding that he sustained a compensable injury arising out of his employment. Based upon my de novo review and without giving the benefit of the doubt to either party, I find that the claimant has failed to meet his burden of prove.

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); Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994); 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 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).

In the opinion affirmed and adopted by the majority, the Administrative Law Judge specifically

found that the claimant was not a credible witness; that he made untrue representations and several inconsistent statements. The Law Judge further found that David Lee Norwood, the respondents designated representative, was less than truthful. Thus, we are face with determining whether the claimant has met his burden of proof through unsupported, unsubstantiated and untrue testimony.

The burden of proof rests upon the claimant to prove the compensability of his claim. Carman v. Hayworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001); Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is indeed compensable, that the claimant's injury is job-related or that the claimant is entitled to benefits. Crouch Funeral Home, et al v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K. Processing, Inc., et al v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. §11-9-704(c) (2). In determining whether a claimant has sustained his or her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. §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).

The claimant contends that he was an employee of respondent employer on July 21, 2007, when he sustained an injury while in the logging woods. Respondents presented the testimony of at least two witnesses whose credibility was not questioned by the Administrative Law Judge. Phillip Norwood, owner of respondent employer, and his wife Christine Norwood both testified that the claimant was not an employee of respondent employer in July of 2007 and that David Norwood was not authorized to hire any employees for respondent employer. Christine Norwood further testified that David Norwood would not have any need to hire any employees. Finally, Christine Norwood testified that she did not take the claimant nor his wife any cash while the claimant was in the hospital.

The claimant's entire case is based upon his own self-serving testimony that he was an employee of respondent employer and that he was paid under the table in cash. Thus, the claimant's claim rests solely upon his testimony, which has not been found to be credible. Since claimant conveniently devised a payment method that did not require documented proof, respondents'

inability to supply any payroll records on the claimant would, therefore, be understandable. However, the opposite is also true; the claimant has failed to submit credible evidence or proof, through payroll records that he was, in fact, employed by respondent employer. Nor has the claimant presented any type of documentary evidence that would support his allegations that he was paid anything at all by respondents. No bank records, receipts, or tax forms were introduced by the claimant to support his allegations of payment.

The claimant's testimony lacks credibility and should not be given any weight whatsoever. Claimant presented no credible corroborating evidence to support his allegations of employment. At best, the claimant called Judy Brown, his sister-in-law, to testify that David Norwood hired the claimant. However, when her testimony is considered as a whole, it is clear that she offered a different story regarding the claimant's employment arrangement than the claimant. Moreover, the testimony of Bill Scrimshire only serves to corroborate that the claimant and his entire family were at a job site of Norwood Logging. This does nothing to substantiate the claimant's employment status.

The claimant bears the burden of proving by a preponderance of the evidence that he was an employee of respondent employer at the time of his injury. When I weigh the credible evidence of record, I cannot find that the claimant has established by a preponderance of the evidence that he was respondents' employee. Claimant just is not a credible witness. When his testimony is considered together with all the other evidence of record, it simply does not preponderate in favor of claimant. Therefore, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner