

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F608889

RICHARD RODGERS, EMPLOYEE	CLAIMANT
NILES ROSS CONSTRUCTION, INC., D/B/A ROSS ELEVATOR, EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 11, 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 represented by the HONORABLE FRANK B. NEWELL, 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 17, 2007. 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 the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employee-employer-insurance carrier relationship

existed at all pertinent times; an injury to the claimant's right ankle on August 3, 2006; the maximum compensation rates apply; if the claim is compensable; and the claim has been controverted in its entirety.

3. The preponderance of the evidence shows that on August 3, 2006, the claimant suffered a compensable injury to his ankle, arising out of and in the course of his employment, at a time when employment services were being performed, so that he is entitled to benefits.
4. The preponderance of the evidence shows that as the result of his compensable injury the claimant received reasonable necessary medical care, including surgery, for which the respondents are responsible.
5. The preponderance of the evidence shows that the healing period for this scheduled injury ended October 31, 2006, and that the claimant did not return to work during that time so that he is entitled to temporary total disability benefits from August 4, 2006, until October 31, 2006. Although the respondent employer might have cooperated with the claimant regarding limited duty employment, the preponderance of the evidence fails to show that an offer of light duty employment within the claimant's physical limitations was made at any particular time.
6. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

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 17, 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 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.

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on August 3, 2006. Based upon my de novo review of the record, I find that the claimant was not performing employment services at the time that he sustained his injury.

The claimant was employed by the respondent employer and his job duties required that he install elevators. On August 3, 2006, the claimant was installing an elevator in a house being built on Greers Ferry Lake. The claimant testified that he had gone to

his car to retrieve his lunch as well as some cable ties when he fell down and injured his ankle upon returning to the house. The house was being built on the down side of a hill and he had to walk up the hill to the street in order to get to his vehicle. The driveway was not finished at the time. After the claimant hurt his ankle sometime between 12 and 1 o'clock, he called his employer, Niles Ross. He told Mr. Ross that he was at lunch and that something bad had happened to his leg. Mr. Ross instructed the claimant to call Karen Ross at the office. The claimant called Ms. Karen Ross and told her that he was coming back from lunch when he fell down the hill and hurt his ankle. Ms. Ross testified that the claimant did not mention anything about getting cable ties, but he did tell her that he had spoken with Mr. Ross.

The claimant was working with Mr. Ray Dixon at the time of the incident. Mr. Dixon testified that he and the claimant walked out of the house together to get their lunches from the claimant's vehicle that was parked on the street. Mr. Dixon got his lunch and walked back to the house. He stated that he felt like the claimant had been gone too long so he went to check on him and found him being helped up by some other contractors that were there working on the home.

Act 796 defines a compensable injury as a "an accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death." Ark. Code Ann. §11-9-102(4) (A) (i). A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when employment services were not being performed... ." Ark. Code Ann. §11-9-102(4) (B) (iii).

Employment services are performed when the employee does something that is generally required by his or her employer. Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transport, 347 Ark. 851, 69 S.W.3d 1 (2002); White v. Georgia-Pacific Corp., 339 Ark 474, 6 S.W.3d 98 (1999). We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." Smith v. City of Ft. Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004); Collins, supra; Pifer, supra; White, supra; Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524

(1997). The test is whether the injury occurred "within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly." Collins, supra; Pifer, supra; White, supra; Olsten, supra. The critical issue is whether the interests of the employer were being carried out by the employee at the time of the injury. Collins, supra. In Collins and Pifer, the Arkansas Supreme Court specifically overruled "all prior decisions by the Arkansas Court of Appeals" to the extent that they were inconsistent with the holdings in those two cases. Wal-Mart Stores, Inc. v. King, 93 Ark. App. 101, ___ S.W.3d ___ (2005).

An employee is generally said not to be acting within the course and scope of employment when he is traveling to and from the workplace, the rationale being that an employee is not within the course and scope of his employment while traveling to and from his job. Pettey, supra. Whether a worker was performing employment services within the course of employment depends on the particular facts and circumstances of each case. The controlling test is whether the employee is engaged in the primary activity that he was hired to perform, or in incidental activities that are inherently

necessary for the performance of the primary activity. Matlock v. Arkansas Blue Cross and Blue Shield, 74 Ark. App. 322, 49 S.W.3d 126 (2001).

This case basically boils down to whether or not you believe the testimony of the claimant or the testimony of the Mr. Ross and Ms. Ross. Mr. Ross stated that the claimant told them he was coming back from lunch when he sustained an injury. 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.

In my opinion, the evidence demonstrates that the claimant's version of what happened is less believable than what he told Mr. Ross or Ms. Ross. It was not until sometime later after the claimant had been questioned and found out that his workers' compensation benefits were not going to be awarded that he stated that he was going to pick up cable ties from his car and not just his lunch. The evidence demonstrates that the claimant was not compensated for his lunch time. It is clear from the evidence that the claimant was going to get his lunch out of his vehicle at the time he hurt his ankle. The claimant was very clearly not performing employment services.

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

KAREN H. MCKINNEY, Commissioner