

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512377

ARCADIO AMBRIZ, EMPLOYEE	CLAIMANT
LEE WILSON & COMPANY, EMPLOYER	RESPONDENT NO. 1
AG-COMP SIF CLAIMS, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED OCTOBER 27, 2009

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

Claimant appeared *pro se*.

Respondent No. 1 represented by the HONORABLE BETTY J. HARDY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 waived its appearance.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed March 9, 2009. 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. On November 15, 2005, the claimant was an employee of Lee Wilson & Company. On

that date, the claimant sustained an injury arising out of and during the course of his employment caused by a work-related incident identifiable in time and place of occurrence which resulted in the partial amputation of three (3) fingers to the claimant's right hand, as well as to a portion of the palm of the claimant's right hand.

3. Respondents have controverted this claim in its entirety based upon a positive post-accident drug screen for Norpropoxyphene which respondents maintained caused the claimant's accident, relying on the presumption created by A.C.A. §11-9-102(4)(B)(iv)(b).
4. A preponderance of the credible evidence of record overcomes the presumption that the claimant's accident was substantially occasioned by the use of prescription drugs.
5. The claimant has proven, by a preponderance of the credible evidence, that his injury arose out of and during the course of his employment with Lee Wilson & Company, entitling him to appropriate workers' compensation benefits. The claimant has rebutted the presumption that the accident was caused by prescription drugs used in contravention of a physician's orders.
6. The exact extent of the claimant's injury, as well as claimant's entitlement to appropriate benefits requires further development of the medical evidence and is, by necessity, specifically reserved.

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 March 9, 2009, 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.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority's finding that the claimant successfully rebutted the presumption that his accident was substantially occasioned by the use of prescription drugs used in contravention of a physician's orders. Based upon my de novo review of the record, I find that the claimant has failed to rebut the statutory presumption that his accident was substantially occasioned by the use of prescription drugs used in contravention of a physician's orders.

The claimant was employed by the respondent employer as a seasonal worker. On November 15, 2005, the claimant sustained an accident which resulted in the

partial amputation of three of his fingers on his right hand, as well as a portion of his palm on his right hand. The claimant was taken to the hospital in Osceola and then transported to a Memphis Hospital. During the course of his transport to the hospital in Memphis from Osceola, the claimant received hydromorphine, Phenergan and Ancef. The claimant also received another dose of hydromorphine. The claimant's drug screen was collected at 7:45 a.m., after the pain medications were administered. The drug screen resulted in a positive for medication for which the claimant did not have a prescription and was not administered in the emergency room prior to the sample being taken for the drug screen.

Act 796 of 1993 made substantial changes in the law regarding an injury substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders. As amended by Act 796, an injury which is 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)(a) (Supp. 2005).

Prior to the passage of Act 796 of 1993, it was the employer's burden to prove that an employee's accident was caused by intoxication or drug use. Express Human Resources III v. Terry, 61 Ark. App. 258, 968 S.W.2d 630 (1998). However, Act 796 of 1993 shifted this burden of proof by requiring the employee to prove by a preponderance of the evidence that alcohol or drug use did not substantially occasion the injury, if alcohol or drugs were found in his body after an accident. Id. The Commission is required to determine whether the claimant has met his/her burden of proof in rebutting the presumption. Weaver v. Whitaker Furniture Co., 55 Ark. App. 400, 935 S.W.2d 584 (1996). Moreover, whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. Id.

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 effect 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; Phelps v. Partee, 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). Further, 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). 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).

In the present claim, the evidence shows that norpropoxyphene was present in the claimant at the time of the injury. Therefore, we begin with the assumption that the claimant's injury was substantially occasioned by the drug. The question in this case then becomes whether the claimant's denial of having used prescription medication on that date of the accident is sufficient to constitute a preponderance of the credible evidence and rebut the presumption that the accident was substantially occasioned by the use of the drug. The Commission has previously held such testimony is insufficient to rebut the presumption. Sanders v. CFSI Temporary Services, Full Commission Opinion October 13, 1995 (Claim No. E408568).

The claimant testified at the hearing that he had taken one of his sister's pain pills a week and a half prior to his accident. The emergency room form denotes that the claimant was not taking any over-the-counter prescription medication. However, the claimant admitted that he had taken Benadryl and was also taking some over-the-counter pain medication. The drug screen

the claimant underwent the day of the accident showed positive for Norpropoxyphene, which is a metabolized form of a prescription medication. However, none of the medication the claimant received in the emergency room would produce a positive result for that drug.

The respondents introduced the report of Dr. Henry Simmons, a toxicologist. Dr. Simmons' opinion stated that he reviewed the medical records for the purpose of determining if the claimant received medication in an emergency department that would explain the positive drug screen. He stated: "In brief, they would not."

The claimant admitted that he took the pill his sister gave him for back pain, and he did not know what kind of pill it was. He also admitted that he did not have a prescription for the pill, nor did he know where his sister got it. He tried to dismiss the taking of the pill and any effects he might have from it by saying he took it a week and a half prior to the accident. The claimant is not credible. His testimony is not sufficient to rebut the presumption.

The evidence demonstrates that the accident occurred on a machine the claimant had been running since he started working for the respondent employer about ten weeks prior. He admitted that he was given a

booklet that was in both Spanish and English about safety, yet he placed his hand in a machine while it was running.

In my opinion, a review of the evidence demonstrates that the claimant cannot rebut the presumption that the accident was substantially occasioned by the use of prescription medication. The evidence demonstrates that the claimant did take prescription medication that his sister had given him, that he did not have a prescription for it. He initially denied taking any medication and then at the hearing said that he did take a pill his sister gave him. Further, he also denied taking anything and he admitted later that he was taking over-the-counter pain medication and Benadryl. In my opinion, this does not rise to the level to successfully rebut the presumption that the claimant's accident was substantially occasioned by the use of prescription drugs in contravention of a physician's orders. Accordingly, I must dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, Commissioner