

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F712105

LICA "LISA" BURTON, EMPLOYEE	CLAIMANT
MAZZIO'S PIZZA, EMPLOYER	RESPONDENT NO. 1
NEW HAMPSHIRE INSURANCE COMPANY, C/O AIG CLAIM SERVICES, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED APRIL 27, 2008

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

Claimant represented by the HONORABLE JOHN RICHARD BYRD,  
Attorney at Law, Hamburg, Arkansas, and by the HONORABLE  
GARY M. DRAPER, Attorney at Law, Crossett, Arkansas.

Respondent No. 1 represented by the HONORABLE JARROD  
PARRISH, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID  
SIMMONS, 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 December 31, 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 of this claim.
2. The employer/employee/carrier relationship existed on November 6, 2007.
3. The claimant earned an average weekly wage of \$216.36 and if the claim is found to be compensable, the applicable compensation rate for temporary total disability benefits is \$144.00 and for permanent partial disability benefits is \$144.00.
4. The claimant has proven by a preponderance of the evidence that she sustained a compensable injury on November 6, 2007, when she was bitten by a spider while performing employment services at Mazzio's Pizza.
5. The claimant has proven by a preponderance of the evidence that the medical treatment provided by Dr. Burt, Ashley County Medical Center, the St. Francis Medical Center, and the St. Vincent System were reasonable and necessary medical treatment related to (sic) work-related injury of November 6, 2007.
6. The claimant has proven by a preponderance of the evidence that she is entitled to medical benefits and temporary total disability benefits from November 6, 2007, until March 15, 2008.
7. Respondents No. 1 have controverted claimant's entitlement to medical benefits and temporary total disability benefits.
8. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the

respondents and one-half to be withheld from the claimant's award of benefits.

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 December 31, 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.

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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 opinion finding. In my opinion, the claimant has failed to establish that she had been bitten by a spider while discharging her employment duties with the respondent employer. The claimant admitted that she did not feel any bite or sting or any type of pain at the time she swatted the spider to the floor and killed it. It was not until the next afternoon that she began having pain. Further, Dr. Burt testified that he never

saw a break in the claimant's skin and that he thought the claimant had cellulitis. In fact, the claimant testified that she never saw a bite or any puncture or fang mark on her jaw. We also have the report of Dr. Simmons who opined that the claimant's blood work, lab tests and clinical presentation all pointed toward a lack of envenomation of any kind or secondary infection related to a bite. In fact, Dr. Alec Lindley, the infectious consultant specifically stated that he did not see any signs on the claimant that would be suggestive of a Brown Recluse spider bite.

Further, the claimant testified at the hearing that she was not sure if she was bitten. However, in her deposition she stated that she was not bitten. It is of note that she changed her testimony regarding whether she was bitten or not after finding out that Ms. Smith had testified that the claimant indeed said she was bitten. In my opinion, this calls the claimant's testimony into question and her credibility is suspect at best. 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 fo 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.

Simply put, I cannot find that the claimant's MRSA was linked to a spider bite that she received while she was performing employment services with the respondent employer. When I consider the testimony of the claimant, Mr. Moore, Ms. Smith, Dr. Burt, and the opinion of Dr. Simmons, I find that it is speculation

and conjecture to conclude that the claimant was bitten by a spider while working for the respondent employer that resulted in the claimant having MRSA. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner