

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F810763

JEFFREY PERKINS,  
EMPLOYEE

CLAIMANT

I C BUS, LLC,  
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED NOVEMBER 4, 2009

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

Claimant represented by the HONORABLE ADRIENNE K.  
MURPHY, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE JOHN D. DAVIS,  
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 July 2, 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 of the within claim.
2. The employee-employer relationship existed at all relevant times, including October 20, 2008.
3. The claimant's average weekly wage at the time of his injury was \$583.83. This entitles him

to a weekly temporary total disability rate of \$389.00, and a permanent partial disability rate of \$292.00.

4. This claim has been controverted in its entirety.
5. The claimant sustained a compensable injury to his back while working for the respondent-employer, on October 20, 2008.
6. The claimant proved by a preponderance of the evidence that all the medical treatment of record was reasonably necessary in connection with his compensable back injury.
7. The claimant proved by a preponderance of the evidence that he is entitled to temporary total disability compensation from October 21, 2008, until a date yet to be determined.
8. The respondent is entitled to an offset for all benefits paid under the short-term disability policy, pursuant Ark. Code Ann. § 11-9-411.
9. The claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715.
10. All issues not litigated herein are reserved under the Act.

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 July 2, 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 respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on October 20, 2008. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

In my opinion, a review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury while working for the respondent employer. The claimant admitted that he had been hunting the weekend before his injury and he had been up in a deer stand. His claim that he hurt his back in an incident at work was at the beginning of the workday on Monday.

The evidence demonstrates that the claimant has credibility issues. The claimant has a history of

deceit with the Arkansas Game and Fish Commission. The claimant admitted that he has tagged deer that he did not kill. As a matter of fact, he received a citation from the game warden which put six points on his hunting license for illegally hunting after he sustained his alleged injury. The claimant said it was his deer he shot and he was tracking it. In actuality, it was a deer his mother shot. The claimant was willing to take the citation because it was "his mother" and have points on his hunting license to protect her. However, the claimant repeatedly testified that a workers' compensation injury was "different". The claimant testified as follows:

Q Why should I believe you sustained a compensable injury on October 20, 2008, given your history of not correctly reporting deer and things of that nature?

A Because I believe deer hunting is different than this. Deer is just an animal. This is somebody's well being, somebody's life. I'm not going to lie or cheat anybody out of anything. To me this is human beings and that's an animal. It's just, in Perry County tagging deer and turkey and stuff like that in other people's name is just a way of life. Everybody does it. And I know that's not just because Bob does it that I need to do it, no, ma'am, but it's just the way I was

brought up. That's the way we've always done it.

Q .... So whenever it is convenient for you then, like it was that day you claimed, you're willing to tell a lie?

A Yes, sir.

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. 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).

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).

It appears that the claimant will lie whenever it is convenient for him. The claimant openly admitted that he was willing to tell a lie whenever it was convenient, and what could be more convenient than to lie to obtain workers' compensation benefits? Therefore, for all the reasons set forth herein, I

respectfully dissent from the majority's award of  
benefits.

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KAREN H. MCKINNEY, COMMISSIONER