

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F711607

GREG E. PROCK, EMPLOYEE	CLAIMANT
BULL SHOALS LANDING, INC., EMPLOYER	RESPONDENT
AMERICAN HOME ASSURANCE/ AIG CLAIM SERVICE, CARRIER/TPA	RESPONDENT

OPINION FILED OCTOBER 14, 2009

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

Claimant represented by HONORABLE FREDERICK S. "RICK" SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent represented by HONORABLE JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant successfully rebutted the presumption that his November 1, 2007 injury was substantially occasioned by the use of illegal drugs. Based upon our de novo review of the record, we find that the claimant has failed to rebut the statutory presumption that his injuries were substantially occasioned by the use of illegal drugs. Accordingly, we reverse the decision of the Administrative Law Judge.

On November 1, 2007, the claimant was using an acetylene torch to cut into a sealed metal barrel with the help of Matt Edminston when an explosion occurred. The claimant sustained burns over approximately 48 percent of his body. He had burns to his face, arms, hands, torso and legs. The claimant was transported to the hospital where he tested positive for benzodiazepine, marijuana and opiates. The respondents controverted the claim based upon the claimant's positive drug screen. The Administrative Law Judge found that the claimant rebutted the statutory presumption. The respondents appealed and the issue currently before us is whether or not the claimant successfully rebutted the statutory presumption that his injury was substantially occasioned by the use of illegal drugs.

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. 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. Moreover, 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). Act 796 of 1993 now requires the claimant 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 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 THC was present in the claimant at the time of the injury. Therefore, we begin with the presumption 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 marijuana 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 marijuana. 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 only evidence in this case to rebut the presumption is the claimant and Mr. Edminston's denial of smoking marijuana. The claimant in the case presently before us denied using marijuana on the date of the accident. The claimant's testimony is not sufficient enough to rebut the statutory presumption. The evidence demonstrates that the claimant's testimony is filled with inconsistencies and unexplained evidence which clearly indicates that the claimant failed to rebut the presumption.

The claimant testified that he arrived at work sometime between 7:00 and 8:00 a.m. He clocked in and stopped at the marina to have a cup of coffee. The claimant testified that he met Steve Eastwold, the owner, as he walked out of the marina. The claimant had not begun any work-related activities when he saw Mr. Eastwold. The claimant testified that this was when Mr. Eastwold directed the claimant to take the tops off two barrels so he could burn Styrofoam. It was while cutting these barrels that the explosion happened.

The respondents offered the testimony of Mr. Eastwold who has a completely different recollection of the

events leading up to the incident. He testified as follows:

Q Can you tell me what happened that morning, what you remember occurring?

A When I came down to the shop, parked outside the shop, I was walking into the big bay door, and Greg and Matt come down the hill in his black Wagoneer and I come out to the door and I hollered at them, and they went around the corner and stopped at the trash containers. And I hollered and they backed up. I said, "Hey, Greg, " I said, "What are you guys doing today?" He said, "Well," he says, "I've got to finish welding on the houseboat and then we'll pull another one out." And I said, "Well," I said, "When you get a chance, can you, not today, not tomorrow, just sometime before the end of next week, go up to the top of the hill and get a couple of barrels and take the top out of them?" I said, "Bring them down here to the shop, take the plugs out, make sure they're clean and do that for me, would you?" I said, "It doesn't have to be today."

Q Okay. And you stated they -- Greg Prock and Matt Edminston in Greg's vehicle?

A Yeah, the black Cherokee.

Q Where were they coming from?

A Top of the hill or somewhere up above the hill, somewhere up above the bathroom. I don't know. They made the turn and come on down past the front of the shop.

Q Okay. What's up at the top of the hill? What's up that way?

A The main road, main highway, main town.

Q Is it the highway that comes into Mountain Home?

A No. There's 178 Highway and then there's an offshoot that goes where you turn to go down to the boat dock.

Q Okay. When you got them to stop and spoke with them, did you notice anything odd about Greg or Matt?

A No. I didn't get close enough, though. I was --

Q Did Greg Prock avoid eye contact or look away from you?

A Neither one would really look at me square.

Q Okay.

A Straight on.

Q And where in position to say you or the driver's side of the vehicle, where were you when you're speaking to them?

A Right -- like this. This --

Q Straight on view of the side window?

A Yes.

Mr. Eastwold made perfectly clear during his

testimony that there was no reason for the claimant to be in his own vehicle on the stretch of road that he and Mr. Edminston had been driving on. The claimant offered no explanation, but only denied being in the vehicle with Mr. Edminston. The claimant testified that he and Mr. Edminston were down at the marina when he encountered Mr. Eastwold. We place greater weight upon the testimony of Mr. Eastwold. 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).

The evidence demonstrates that the claimant is an admitted frequent marijuana smoker. The claimant testified as follows:

Q All right. Your explanation for the positive drug test was that -- at least for the marijuana portion of it was that you'd smoked it a couple of weeks before, correct?

A That's correct.

Q All right. And you maintain that it was at someone's house with a group of friends, correct?

A That's correct.

Q And you don't have any of those people here to testify to confirm when you were smoking marijuana, do you?

A No.

Q All right. Told me that you smoke pot frequently, correct?

A Yeah, somewhat.

Q Okay. You told me you smoked it through the work week, it wasn't just a weekend thing, right?

A After work.

Q Right?

A After work at home, yes.

Q Three or four days a week sometimes, right?

A Sometimes.

Q You smoked at home?

A Yes.

Q You smoked it in front of you wife?

A Yes.

Q You smoked out of a glass pipe?

A Yes.

Q You smoked a traditional paper joint?

A Sometimes.

Furthermore, the claimant testified that he had quit smoking pot prior to this incident.

Q Okay. And your explanation for why you had quit smoking after being a frequent chronic smoker was that you had a job offer, correct?

A That's correct.

Q But you couldn't tell me the company name when I first asked you and you couldn't tell me the guy you talked to, right?

A I couldn't remember it at first, but I think I did end up telling you.

Q By the end of it, you came up with a name that you weren't quite sure whether that was it, Metalogic.

A Metalogic, yes.

Q Okay.

A I believe his name is Steve, but I don't know his last name.

Q All right. You don't have Steve here, do you?

A No, I don't.

Q You don't have any letters or correspondence or applications or any employment paperwork or anything showing that he made a job offer to you in November of '07, do you?

A No. But I'm sure --

Q Or October of '07.

A -- I'm sure if it was investigated, it -- he may still have an application from me.

Q Okay. But you didn't bring that here today, did you?

A No.

It is of note that the claimant could not unequivocally identify the company he was supposedly trying to go to work for, nor could he positively identify the individual who had supposedly offered him a job. The claimant had never given Mr. Eastwold two weeks notice, and he never went to work for this employer after the incident. In fact, the claimant tried to come back to work for the respondent employer and then later went to work for a local welding shop. Simply put, the claimant's explanation that he had quit smoking pot due to a job offer is completely

unsupported by the evidence. This is more evidence of the claimant not being a credible witness.

The claimant also testified that he was never told not to use the torch to cut open the tops of the barrels. However, the barrels had a warning label on them not to use a torch to open them, and the claimant admitted that he did not read any of the labels on the barrel before putting the flame to it. Furthermore, he did not open the cap on the top of the barrel to vent it. The evidence demonstrates that the claimant had previously been directed to use an air chisel to open the barrels, but he denied this. The respondents offered the testimony of Mr. Eastwold as well as the testimony of Mr. Greg Aaron in support of the assertion that the claimant was given specific instructions regarding the proper cutting of the barrels. Mr. Aaron testified to wit:

Q Were you present at any point when Steve Eastwold instructed Greg Prock regarding how to take the tops off barrels?

A Yes.

MR. SPENCER: Objection, Your Honor, to the question because the only relevant date is the November 1st of '07 date and he just said he

was not there that day.

THE COURT: Okay.
Overruled. Answer the
question.

A Yes, I was.

Q All right. Will you explain what
Steve Eastwold said to Greg Prock
regarding how to open the barrels?

A He told us to use a pneumatic air
chisel to cut off the tops of the
barrels because they were safer to cut
off that way.

Q Okay. And how does this air
chisel work? What do you do with it?

A You hook an air line on the end of
the pneumatic gun and it's got a little
chisel on the end and you put it
against the side of the barrel and pull
the trigger and it cuts a little hole,
and then you just keep going around the
edge of the barrel with it and it coils
up the metal on the side, and it leaves
a pretty smooth cut on top.

Q Okay. Kind of like a can opener,
a big can opener?

A Pretty much, yeah.

Q Okay. And are you positive that
Steve Eastwold explained the fact that
he needed to use an air chisel to Greg
Prock?

A Yes.

Q Did Steve Eastwold illustrate or
show Greg how to use it?

A Yes.

Therefore, when we consider all of the evidence in the record, we do not find the claimant to be a credible witness. The claimant lied about being shown how to use the air chisel. He lied about where he was when Mr. Eastwold told him what to do with the barrels. The claimant's lack of personal safety is evident by his failure to even read the warning labels. Finally, we give no credit to his testimony he quit smoking pot as his reasoning for quitting smoking pot two weeks prior cannot be verified in any way, shape or form. We are not persuaded by claimant's testimony that he always used a torch to remove the tops off the barrels as evidence that his marijuana use did not contribute to his injury. On the contrary, this evidence supports the fact of claimant's admitted long-term marijuana use and his lack of personal safety. The claimant had marijuana or its metabolic derivative in his body at the time of the accident. Therefore, under the law, it is presumed that this illegal drug use substantially occasioned his injury. The only evidence that it did not was claimant's unsubstantiated testimony that he always used a torch to open barrels and that he had not smoked marijuana

for over a week. For those reasons set forth above, we do not find the claimant's testimony to be credible. Therefore, we find that the claimant has failed to successfully rebut the statutory presumption. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

On appeal, the claimant raises a new issue arguing that if the Commission reverses the Administrative Law Judge, the claimant's due process rights are violated because the Administrative Law Judge's finding is based on credibility. Essentially, the claimant is arguing that the Commission violates the claimant's right to due process if it reverses a finding of credibility made by any Administrative Law Judge. We find the argument has no merit as this issue has previously been addressed by the Court of Appeals in Stiger v. State Line Tire Service, 72 Ark. App. 250, 35 S.W.3d 335 (2000). In Stiger, the Court stated:

By allowing the Commission to "review the evidence or, if deemed advisable, hear the parties, their representatives, and witnesses," Ark. Code Ann. § 11-9-704 (b)(6)(A) (Repl. 1996) adequately protects a claimant's due-process rights. 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.

See also; Stutzman v. Baxter Healthcare, 99 Ark. App. 19, 256 S.W.3d 524 (2007) and Toia v. HTI Logistics 100 Ark. App. 314, 28 S.W.3d 334 (2007).

Therefore, we hereby deny and dismiss this claim.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. The majority states: "The only evidence in this case to rebut the presumption is the claimant and Mr. Edminston's denial of smoking marijuana." This statement is contrary to the evidence of record. In addition to the claimant's testimony, Mr. Didway, Mr. Edminston, and Mr. Eastwold all testified that they saw the claimant on the morning of the accident and observed that he was not impaired in any form or fashion. I find that the claimant has successfully rebutted the presumption that the accident was caused by the use of marijuana, and I must respectfully dissent from the majority's reversal of the Administrative Law Judge's award of benefits.

The claimant had worked for the respondent-employer for approximately six years. The claimant admitted that he smoked marijuana while at home with a group of friends a couple of weeks before the work-related incident. He also agreed that he frequently smokes "pot" after work, but he denied having smoked marijuana on the day of the explosion. In addition to this, the claimant denied being high or intoxicated on alcohol, crack, meth, cocaine, or any other drug on the morning of his accidental injury.

Moreover, there were no witnesses who observed the claimant smoking marijuana on the date of the November 1, 2007 explosion. Nor were there any witnesses, (to wit: Mr. Didway, Mr. Edminston, and Mr. Eastwold) who observed any "impairment" on the claimant's part as a result of marijuana and/or any other drug intoxication. In fact, Mr. Eastwold testified that, had the claimant appeared intoxicated, he would not have allowed him to continue working. I also think it is noteworthy that there were no witnesses who had ever previously observed the claimant to be "impaired" while at work.

While I recognize that there was testimony elicited from Mr. Eastwold regarding the claimant and Mr. Edminston being in the claimant's personal vehicle when he gave them instructions to cut the barrels, which suggests that they had the opportunity to smoke marijuana, considering all of the aforementioned evidence to the contrary, it would require conjecture and speculation to conclude the claimant and Mr. Edminston smoked marijuana that morning. However, conjecture and speculation can never supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979).

With respect to cutting the lids from barrels, the

claimant credibly testified that he has always used a cutting torch to cut the lids off of barrels and has not ever opened them using any other method. This testimony was corroborated by Mr. Edminston, who was also injured during the incident. In addition, Mr. Didway also testified that he has observed the claimant using a cutting torch to open barrels, at least, on one occasion.

Although the claimant denied being instructed by Mr. Eastwold to use an air chisel to cut open barrels, both Mr. Eastwold and Mr. Aaron credibly testified that the claimant had been instructed to use a chisel to cut lids from barrels rather than a torch. Mr. Aaron specifically testified that after being given this directive, the claimant commented on how much quicker it was to cut the lid from the barrels using a torch. The testimony of Mr. Eastwold and Mr. Aaron demonstrates that the claimant had been instructed to use a chisel to cut the lids from the barrels. Significantly, the warning label on the barrels prohibits the use of this method, as well as the use of a cutting torch.

Considering that none of the witnesses observed the claimant using marijuana or otherwise under the influence of marijuana at any time on the day of the

explosion, and that the claimant credibly denied having used marijuana on the day of the incident, I am persuaded that any assertion or finding that the claimant's accidental injury was the result of any "impairment" on the part of the claimant would be based on speculation and conjecture, which can never supply the place of proof. Id.

In other words, the preponderance of the credible evidence demonstrates that the claimant's injury was the result of the claimant's attempt to accomplish his assigned job task in a quick and convenient manner and not the result of "impaired judgement", caused by the use of marijuana. Accordingly, I find, as did the Administrative Law Judge, that the claimant has rebutted the presumption that his injury was substantially occasioned by the use of an illegal drug. I find that the claimant suffered compensable injuries, in the form of severe burns to his body (legs, hands, face and arms) when the barrel he was attempting to cut the lid from with a cutting torch exploded, while working for the respondent-employer on November 1, 2007. In making this finding, I find instructive the Arkansas Court of Appeals decision in Apple Tree Service, Inc. v. Grimes, 94 Ark. App. 190, 228 S.W.3d 515 (2006); and the Full Commission's finding under similar facts as set forth in

Garrett v. Jack Yates Drywall, Arkansas Workers'
Compensation Commission, F404635 (May 24, 2005).

For the aforementioned reasons, I must
respectfully dissent.

PHILIP A. HOOD, Commissioner