

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704493

ALDOLFO RIOJAS,
EMPLOYEE

CLAIMANT

BUTTERBALL TURKEY,
EMPLOYER

RESPONDENT

ACE AMERICAN INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 5, 2009

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

Claimant represented by the HONORABLE CONRAD T. ODOM,
Attorney at Law, Fayetteville, Arkansas.

Respondent represented by the HONORABLE CURTIS L. NEBBEN,
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed July 3, 2008. The administrative law judge
found that the claimant proved he sustained compensable
injuries. The administrative law judge found that the
claimant proved he was entitled to reasonably necessary
medical treatment and temporary total disability benefits.

After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion.

I. HISTORY

Adolfo Riojas, age 32, testified that he had been employed with Butterball Turkey. Mr. Riojas testified that he worked in shipping, where his duties included driving a forklift and scanning. The claimant's work shift began at 11 p.m. and ended at 8:30 a.m. The parties stipulated that the employment relationship existed on April 24, 2007. The claimant testified through an interpreter:

Q. What did you injure?

A. The accident with a forklift....

Q. What - what were you doing when it happened?

A. I was scanning a pallet.

Q. All right. And then what happened?

A. A coworker showed up, and we had - a coworker had shown up. We had gone out on a break. We came back in, and the coworker came back, and he just got on the forklift. Did not have a license. I told him, "You don't have a license. Get down." One of the guys that drove the forklift left the key in there. He saw the key, got on, turned it on, and backed up. I was just standing behind.

Q. Okay. And so you - you were standing and scanning?

A. Yes. Yes.

Q. And the forklift ran over you?

A. Correct, and got my foot.

Q. Okay. Did it - did it back over you, or was it going forward? How - how did that happen?

A. The forklift was stopped with the turn broken completely. And the - the - the friend got on, hit the accelerator, and it did like this, came back, came back (indicating).

Q. And what - what part caught your leg?

A. The wheel....

Q. And - and what happened when the wheel caught your leg?

A. I told him to stop. He stopped, and he got real nervous. It had just gotten the tip of the boot. And so I said, "Stop." That boot has protection. No problem. And when he saw me, he got nervous and backed it up even more, and I went like this (indicating).

Q. You - you fell backwards?

A. Yes. Because if I had stayed up, it would've been worse. I threw myself back....

Q. Was your foot caught by - under the forklift?

A. Yes, that's true.

Q. Okay. And it ended up injuring your whole right leg. Is that correct?

A. From here to here (indicating)....

Q. When the forklift - before the forklift ran over you, you said that you had been on break.

A. Yes, yes, that's true.

Q. And you'd been back to work about ten minutes?

A. The break starts at five. Came back to work, 5:30.

Q. Okay. And it was ten minutes after that that it happened?

A. Correct.

Q. And you were - were you doing your job when the forklift hit you?

A. Yes, that's true.

Q. And that job was scanning?

A. Correct.

Jim Gilbert testified that he was the safety and health manager for Butterball, LLC. Mr. Gilbert testified for the respondents:

Q. Did you ever - on or about April 24th, 2007, were you ever informed of any type of incident involving Mr. Riojas?

A. Yes, I was....Someone had called me in the nurses' station, and told me there was an accident in the boxing department.

Q. Okay. Upon hearing this news, what did you do?

A. I immediately donned my helmet and went toward the boxing department....

Q. When you went out there, did you have a chance to observe Mr. Riojas?

A. They were already transporting him back to the medical department in a wheelchair.

Q. Okay. Did you ever talk to Mr. Riojas through the interpreter?

A. No, other than just asking him how he was and things like that.

Q. Okay. As far as an accident investigation, I don't want - I don't want you to say anything that you - the people you talked to, but did you inspect the forklift in question?

A. Yes.

Q. Okay. Did you happen to notice if that forklift had a load on it at the time you inspected it?

A. No, it did not.

Q. Okay. And what did you inspect of the forklift?

A. Inspected the brakes, steering mechanism, the backup alarm, the flashing light, typical forklift inspection that we do. There's about 12 different criteria....

Q. Did you find anything wrong with that forklift at the time of the accident -

A. No, I did not....

Q. Do you have to be licensed to be a forklift operator?

A. Yes.

The claimant was admitted to North Arkansas Regional Medical Center on April 24, 2007:

This is a 29-year-old native Guatemalan who works a (sic) the Butterball Turkey Company. He was run over by a forklift there. The forklift went over

his right leg and he had extreme pain in that leg. He was brought to the ER where x-rays revealed a bimalleolar fracture of the right ankle. He had extreme bruising, ecchymosis, and fracture blisters already forming over his leg. He has a large effusion of his knee joint. We CT scanned the knee and MRI'd his knee and he has a severe tibial bruise. Ligaments and meniscus are intact. He does not seem to have any significant internal derangement of his knee except for the severe bruising of the bone and the hemarthrosis.

A chart noted on April 24, 2007 indicated, "Patient was standing at his job on the production line at Butterball when the forklift that was passing by him caught his right leg....Accidentally knocked to ground in collision with forklift at work at Butterball was standing when caught in right iliac/posterior upper leg area by forklift passing by which twisted right leg and pushed him off his feet."

The claimant underwent surgery to his right lower extremity. The discharge diagnosis on May 14, 2007 included compartment syndrome of the right leg, bimalleolar fracture, and tibial bruise.

The claimant's testimony indicated that he attempted to return to work after approximately six weeks, but that the respondents terminated his employment. The claimant testified that he began working for another employer in mid-August 2007.

A pre-hearing order was filed on August 29, 2007. The claimant contended, among other things, that he "sustained a compensable injury to his right leg when a co-worker ran over him in a forklift. Claimant was hospitalized and has sought extensive medical treatment from an orthopedic doctor in Berryville. Claimant has been off work since the incident and has been under doctor's care and is entitled to temporary total disability benefits."

The respondents contended that the claimant "did not sustain an injury arising out of and in the course of his employment as defined by the Arkansas Workers' Compensation Act. The respondents' defense include (sic), but is not limited to, the allegation that the claimant was engaged in horseplay and not performing employment services at the time of the incident of April 24, 2007."

The parties agreed to litigate the following issues:
"1. Compensability of the claimant's injury to his right leg. 2. Claimant's entitlement to related medical. 3. Temporary total disability from April 25, 2007, to a date to be determined. 4. Attorney's fees. 5. Horseplay defense."

On April 21, 2008, the parties deposed Graciano Torres, an employee in the respondent-employer's packaging department. The respondents' attorney questioned Mr.

Torres:

Q. Now, did you see this accident with Mr. Riojas and Jason Luna on April 24, 2007?

A. Yes.

Q. Do you know that time that accident happened?

A. Around 5:30....

Q. Where were you at the time this accident occurred?

A. Walking, walking to the brine....

Q. Tell me what you witnessed.

A. Okay. Well, like I told you before, when I was walking down, he was pulling him from the smock. He was going backward and forward and backward and then he makes about one or two turns.

Q. Okay. Let's slow down a second. You said someone was pulling someone by the smock. Is that right?

A. Mr. Riojas was pulling. The driver was riding - the other guy was driving - I forgot his name.

Q. Jason Luna?

A. Jason Luna, yeah.

Q. So Mr. Riojas was pulling Mr. Luna's smock?

A. Yes.

Q. And do you know why he was pulling his smock?

A. No. I don't know.

Q. Could you tell if Mr. Riojas appeared angry or happy or sad or could you tell?

A. He was acting like angry, angry.

Q. And the forklift driver, Mr. Luna, what was he doing?

A. He was driving the forklift....He was moving forward and then backwards and then he made a couple of turns.

Q. And then what happened?

A. And he went on back and then the accident happened.

Q. The forklift was going back when the accident happened?

A. Yes.

Q. Could you tell or were you able to see what Mr. Riojas was doing at the time the forklift hit him?

A. No. I didn't see because the forklift was in front of me.

Q. So you didn't see what Mr. Riojas was doing at the time of the accident?

A. No.

The administrative law judge found that the claimant proved he sustained compensable injuries and that the injuries "were not occasioned by any horseplay." The

administrative law judge found that the claimant proved he was entitled to reasonably necessary medical treatment and temporary total disability benefits. The respondents appeal to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-102(4) (Repl. 2002) provides:

(A) "Compensable injury" means:

(i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]
...

(B) "Compensable injury" does not include:

(i) Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of nonemployment-related hostility or animus of one, both, or all of the combatants and which said assault or combat amounts to a deviation from customary duties; further, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries;
(iii) Injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated[.]

The claimant has the burden of proving that he sustained an injury while engaged in the performance of employment services rather than while engaged in horseplay.

Morales v. Martinez, 88 Ark. App. 274, 198 S.W.3d 134 (2004). See also *Mize v. Resource Power, Inc.*, 99 Ark. App. 415, ___ S.W.3d ___ (2007).

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, an administrative law judge found that the claimant proved he sustained compensable injuries, and that the claimant's injuries were not occasioned by horseplay. The Full Commission affirms this finding. The evidence demonstrates that the claimant was performing employment services, i.e., scanning, when another worker ran over him with a forklift. It is within the Commission's province to determine witness credibility and the weight to be given to each witness' testimony. *Mize*,

supra, citing *Johnson v. Riceland Foods*, 47 Ark. App. 71, 884 S.W.2d 626 (1994). The medical records in the present matter corroborated the claimant's testimony. Neither the medical records nor the testimony of Jim Gilbert corroborated Graciano Torres' deposition testimony. Further, even if Torres did truthfully testify that the claimant was angrily pulling on Luna's smock while Luna was on the forklift, Torres admitted that he did not actually witness the accident.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained an accidental injury causing physical harm to the claimant's right lower extremity. The accidental injury arose out of and in the course of employment, required medical services, and resulted in disability. The injury was caused by a specific incident and was identifiable by time and place of occurrence. The claimant established a compensable injury by medical evidence supported by objective findings, including evidence of a bimalleolar fracture and tibial bruise. The evidence does not demonstrate that the claimant's injuries were caused by horseplay. The claimant proved that the medical treatment of record was reasonably

necessary pursuant to Ark. Code Ann. §11-9-508(a) (Repl. 2002). The claimant proved he was entitled to temporary total disability benefits beginning April 25, 2007 until the date that he returned to work for another employer in August 2007. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715 (Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

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. In my opinion, the claimant has failed to meet his burden of proof.

My review of the evidence reveals that the claimant was engaged in horse play at the time of the accident. Although the claimant contends that he was not engaged in horse play at the time of the accident, his testimony is in conflict with the testimony of Mr. Jim Gilbert and Mr. Graciano Torres. The claimant testified that he merely told Mr. Jason Luna, the co-employee who was driving the fork lift, that he would have to get down because he did not have a license. The claimant was bent over scanning when Mr. Luna backed over his foot. The claimant testified that he told Mr. Luna to stop but Mr. Luna panicked and ran the fork lift further up the claimant's leg. The claimant testified that the fork lift did not have its back up alarm system in operation at the time of the accident. However, Mr. Gilbert inspected the alarm and testified that it was in operation when he inspected the fork lift after the claimant left for the hospital. In addition, Mr. Gilbert testified that he had checked the maintenance records and no work had been done on the alarms nor had any

problems been reported with the fork lift on the date of the accident.

The testimony of Mr. Torres is also telling. Mr. Torres testified that the claimant was pulling Mr. Luna's smock. He also testified that Mr. Luna was driving the fork lift backward and forward and making turns with the fork lift and he backed up over the claimant. The claimant testified that he merely talked to Mr. Luna and denied that he was poking or pulling on him or that he was chasing Mr. Luna or that Mr. Luna was driving in circles. I give more weight to the testimony of Mr. Torres who is a unbiased witness to the incident. 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.

Therefore, after considering the fact that the back up alarm was functional on the fork lift after the incident and the testimony of Mr. Torres that the

claimant was pulling on Mr. Luna's smock and Mr. Luna was driving in circles, forward and backwards, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury and was not engaged in horse play at the time of the accident. Accordingly, I find that the claimant was engaged in horse play at the time of the incident and would therefore deny benefits. Therefore, I must respectfully dissent from the majority's award of benefits.

KAREN H. McKINNEY, Commissioner