NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F907043

DANIEL FREEMAN, EMPLOYEE CLAIMANT

FIVE RIVERS MEDICAL CENTER,
EMPLOYER RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER/TPA RESPONDENT

OPINION FILED DECEMBER 2, 2010

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

Claimant represented by the HONORABLE JOHN BARTTELT, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE GUY ALTON WADE, 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 8, 2010. 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. On July 12, 2009, the employee-employer relationship existed between the parties, during which time the claimant earned an average weekly wage of

$332.29, which generates weekly compensation benefits of $222.00/$166.00, for temporary total/permanent partial disability.

3. On July 12, 2009, the claimant sustained an injury to his low back arising out of and in the course of his employment as a result of a specific incident.

4. The claimant was temporarily totally disabled for the periods July 16, 2009 through July 21, 2009, and from October 28, 2009, and continuing through the end of his healing period, a date to be determined.

5. The claimant was temporarily partially disabled for the period July 21, 2009, and continuing through October 27, 2009.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of July 12, 2009.

7. The respondents have controverted this claim in its entirety.

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 8, 2010, 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 opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Based upon my de novo review of the record, I find that the claimant failed to meet his burden of proof.

The claimant was employed by the respondent employer as a CNA. The claimant began working for the respondent employer on November of 2008, after having moved to Arkansas in 2007. The claimant suffers from Fibromyalgia and has been diagnosed with anxiety.

On the evening of July 12, 2009, the claimant began work at 7:00 p.m. and was to work until 7:00 a.m. The claimant worked that night in the behavioral health unit.

The claimant testified that he was putting patients to bed that evening and was helping transfer a patient that was a double amputee. The claimant and another CNA, Sheena Denny, were transferring the patient from his wheelchair to the bed. Ms. Denny was not strong enough to support the patient’s weight. Instead of dropping the patient, the claimant completed the

transfer. The claimant testified that the patient "shook" which caused the claimant to adjust his body and caused the alleged injury. The claimant testified he felt a "snap" or a "pinch" in the left side of his lower back.

The claimant testified that he thought is was a muscle strain that would go away. After completion of the transfers and everything was done, the claimant asked to go home. He reported leaving less than 30 minutes after this incident. In that time, the claimant completed his charting, removed garbage from the rooms and made sure the rooms were clean.

The claimant testified that he did not report to anybody at the hospital that he had injured himself. The claimant considered this a "normal strain" and not something to report.

The claimant was off work for two days and then returned to work on the 16th. The claimant was sore and stiff, but did not believe he was seriously hurt. When the claimant returned on the 16th, he was doing his normal day-to-day rounds. The claimant testified that his pain steadily grew more painful to the point he was vomiting. The pain was in the low back area. The claimant informed his charge nurse, Sandy Croney, of the pain and that his left leg was not functioning properly.

The claimant was told to go to the emergency room. In the emergency room, the claimant was examined and instructed to fill out the workers' compensation forms. While in the emergency room, X-rays were taken and the claimant reported receiving medications "very possibly some Hydrocodone and Flexeril". He was then sent home for the rest of his shift.

The claimant was sent for follow-up with Dr. Baltz by the director of nursing. An MRI was later performed on July 27, 2009. Within a few days, the claimant was returned to work, restricted duty. The claimant's lifting was limited to 25 pounds and time restraints were placed on standing and walking. The claimant was provided work within these restrictions. The claimant continued to complain of pain in his left leg and was using a wheelchair and cane. The claimant testified he could not sit or stand for any length of time without extreme pain.

The claimant then testified regarding a subsequent incident at work. In one incident, the claimant was assisting a patient with bathing and the patient went into respiratory distress. The claimant testified that this event caused extreme pain in his back. The claimant was instructed by the supervisor to

go to the emergency room and additional paperwork was completed.

The claimant acknowledged having a conversation with a workers' compensation adjuster. During the first conversation, the claimant testified that it was recorded as he answered questions from the adjuster. The claimant was instructed that an investigation of his injury was taking place. The claimant was later instructed that his claim had been denied. He was told he could seek medical treatment on his own.

The claimant continued work until seen by Dr. Tuck on October 28. The claimant claims that at that time, his left leg did not function properly. Up to that point, the claimant had been working at a desk position putting papers in the files, answering call lights and the telephone.

The claimant saw Dr. Tuck on one occasion. The claimant has not received any medical bills from Dr. Tuck and that treatment was covered by health insurance. The claimant has not been examined by any other physicians since he saw Dr. Tuck with respect to his back except his personal physician, Dr. Guntharp.

Over the past few months, the claimant reported that his left leg will support him most of the

time now, but that he still has trouble. His back, however, is better. The claimant testified that he does not believe that the improvement would allow him to return to work as a CNA. The claimant also testified that he did not know of any other work that he was qualified to perform.

The claimant admitted having been to the emergency room several times during his employment with the respondent employer. The claimant claims that not all of these visits were work related. The claimant was seen for abscess tooth problems twice and chest pain.

There were several incidents that the claimant went to the emergency room where he reported a work-related event. One was a slip and fall on hand sanitizing foam after leaving a patient’s room. The claimant claims that he did not believe this event warranted a visit to the emergency room but was informed by his supervisor to go anyway. While in the emergency room, workers’ compensation paperwork was completed. This incident happened toward the end of the claimant’s shift and he was permitted to leave.

The next incident was in the behavioral health unit. A patient became extremely agitated and hit the claimant in the face. Bernice Howell was the RN supervisor and indicated that the claimant needed to go

to the emergency room, even though he did not feel it was necessary. It is of note that Workers' Compensation claim forms were completed.

With respect to the alleged incident on July 12, the claimant reported feeling a "pop or something" in his back. He did not go to the emergency room because he did not believe it was anything serious.

When the claimant was questioned regarding whether or not he reported the injury on July 12, 2008, the claimant's testimony was equivicable at best:

> Q Sure. You didn't have a conversation with anyone that was present on the night of July 12 of 2009 that you were having any kind of problems with your body or your back with regard to an event that happened on your shift that day?
>
> A I may have mentioned something casually, but it was fairly common for all of us to say something like that.
>
> Q But you didn't tell anybody you hurt your back or heard a pop or you felt anything as a result of transferring a patient, correct?
>
> A I believe I was jokingly put that I believed I'd pulled a muscle.
>
> Q Okay. So now, you've told them you jokingly pulled a muscle.
>
> A It was casually.

> Q Well, you told us a minute ago, you didn't tell anybody before I ever asked you.
>
> A You asked me if I'd reported an injury and, no, I did not. I did not believe anything serious had happened.

The claimant then acknowledged that the only person he would have talked to about anything would have been Sheena, the CNA, not Ms. Howell, the charge nurse. And Sheena was not his supervisor.

In order to leave early, the claimant was required to get permission from the charge nurse. On the evening of July 12, the charge nurse was Ms. Howell. The claimant testified that he had to talk to Bernice in order to be able to leave. When asked if he ever indicated to Ms. Howell that he had to leave because he felt like he had hurt his back, the claimant testified "I don't believe so, no." The claimant did not ever indicate that he had to leave because he could not perform his duties the rest of the night. Further, the claimant did not ever indicate to her that the reason he had to leave had anything to do with the census. The claimant was then asked specifically:

> Q Did you indicate to her that you needed to leave because you already had an appointment

scheduled with the doctor the next day?

A I may have mentioned something about census, but I don't remember. And I don't believe so about the doctor's appointment, but is was a year ago, so -- but I don't believe so.

The claimant was then questioned further regarding reporting.

Q Okay. Well, and you keep saying it was a year ago, I don't remember, but you understand it would be easy if we had documentation of an injury occurring on July 12, correct?

A Absolutely.

Q It would be easier if you'd been evaluated, correct?

A Yes, sir.

Q It would have been easier having been in management before to have reported something that happened on July 12th, correct?

A Yes, sir.

Q We can't because it wasn't; is that right?

A Yes, sir.

The claimant offered the testimony of Sheena Denny, CNA. Ms. Denny was working with the claimant on

the night of July 12, 2009. She testified that she remembered a lifting event with the claimant but she denied that the claimant told her that he was injured. She denied that he was having any problems. When questioned about the claimant leaving early, she stated that he told them he had a doctor's appointment the next morning and wanted to get some rest.

The respondents offered the testimony of Bernice Howell. Ms. Howell was the charge nurse on the behavioral unit that night, and she is an RN. Ms. Howell acknowledged that the claimant worked for her during that time and that he was a very good employee and she liked having him on the unit because he worked hard. She testified that she was not aware that the claimant was injured. She stated that the claimant did not indicate to her that he had any problems or complaints.

Mr. Alvin Taylor, Director of Human Resources for the respondent employer testified that he handles all new employee orientations. He indicated that the claimant was given a handbook which included a discussion of work related injuries and responsibilities if you were injured. The claimant alleged that Mr. Taylor told him that his health insurance had lapsed when Mr. Taylor asked him to fill out the FMLA paperwork. The claimant never returned the paperwork to

Mr. Taylor. Mr. Taylor denied that he told the claimant that his health insurance had lapsed. He stated that he never had a conversation with the claimant indicating that the claimant no longer had health insurance before the claimant was terminated on May 19, 2010, via letter.

The respondents offered the testimony of Mr. Larry Lawrence, Director of the behavioral unit at the hospital for the respondent employer. Mr. Lawrence was unaware of the claimant's alleged injury of July 12, 2009, until he was contacted by the claimant.

Ark. Code Ann. §11-9-102(4)(A)(i)(Supp. 2005) defines "compensable injury" as "[a]n 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. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "in the course of employment" when it occurs within the time

and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer’s interest directly or indirectly. City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987).

It appears that the claimant’s testimony is completely inconsistent with his statements and actions before, during and after the alleged injury. For instance, initially, the claimant was asked about the state of his health on direct examination. In response, the claimant reported that he was in “good health.” While in this claimed “good health”, the claimant testified that he had been diagnosed with fibromyalgia but, was then cut short by his attorney when he attempted to describe that it was a “neurological...” and caused muscle pain. In addition, the claimant also indicated that he has problems with “anxiety”. Both of these conditions pre-existed his employment with the respondent employer. The claimant was then asked by counsel if he took “medications for either” of those conditions. The claimant reported that he did not. The claimant made no distinction as to whether the “medications” were prescription or over the counter.

The claimant was again asked about these conditions and when confronted with the evidence that he

was taking Tylenol, Motrin, Amoxicillin, and Ultram, the claimant responded that these medications were "over the counter medicines." The claimant reluctantly admitted that he was taking some of those medications for his fibromyalgia condition, which he had previously disputed. The claimant likewise subsequently acknowledged the prior description of fibromyalgia as "chronic widespread muscle pain."

The claimant was clearly trying to downplay his fibromyalgia condition and whether it actively required any treatment. When confronted with records noting the conditions and medications, the claimant was forced to admit that the prior denial was not correct and that the established condition did warrant taking medications, that he had previously denied. In my opinion, this calls the claimant's credibility into serious consideration.

There are more examples of the claimant's inconsistent testimony. On direct-examination, the claimant testified that he did not report to anyone at the hospital that he had injured himself. On cross-examination, however, the claimant's testimony became much more unclear. The claimant acknowledged that before going to work for the respondent employer, he went through orientation and received a copy of the employee

handbook which included the information on what to do if injured on the job and importance of reporting an injury. In addition, the claimant had also been in management, and he understood the importance of reporting any injury.

The claimant was asked whether or not he mentioned anything to the CNA that was reportedly with him on the evening of July 12, The claimant responded "I believe I did, yes." This is obviously different from the claimant's testimony on direct examination where he denied any report. Ms. Denny, the CNA with the claimant, testified that she does not remember the claimant saying anything to her about an injury or problems he was having. Ms. Denny testified that she did not hear a pop or anything in the claimant's back. The claimant did not go out of the room stooped over or act like he was having any kind of problem with his back. The claimant did not tell her he had hurt his back. If the claimant had, she stated that he would have been sent to the emergency room and completed any necessary workers' compensation paperwork.

The claimant was then asked whether or not he reported any kind of pop or any kind of problem with his back or leg on July 12th to the charge nurse. The claimant responded "No, I did not." The claimant was

then referred to a statement he gave to the workers' comp adjuster on July 28, 2009. The claimant was asked essentially the same question about reporting by the adjuster. The claimant responded to the adjuster instead that he "mentioned it casually to his charge nurse", Ms. Howell. When asked about this inconsistency at the hearing and whether or not the claimant did or did not report it to Ms. Howell, the claimant then claimed "I do not believe so."

Ms. Howell testified that she was working with the claimant on the evening of July 12, 2009 and that she was not ever made aware the claimant was injured that night. Likewise, Ms. Howell testified that she did not notice a change in the claimant's condition from the time he got to work until he left.

The claimant was questioned regarding an event which took place on January 10, 2009, wherein the claimant was alleged to have been punched in the face. The claimant testified that he did not want to report that event because he did not think he was injured. The claimant's charge nurse, his supervisor instructed him, however, to be checked out in the emergency room and to complete the paperwork. The claimant acknowledged that he knew, at least based on what had happened in the

past, that the hospital wanted to know if somebody claimed they were injured on the job.

A second event occurred on January 24, 2009, when the claimant indicated his right toes and foot were hurt when he slipped and fell. At that time, the claimant was again instructed by the charge nurse to go to the emergency room for evaluation and fill out the paperwork. In my opinion, based on these two events, the claimant knew that the hospital wanted to know about any incident regardless of whether the claimant thought he was injured or not.

In the present case, the claimant claimed he felt a pop in his low back but he did not feel it was necessary to tell anybody other than his claimed "casual" mention to the charge nurse. The claimant then indicated that he may have also "casually" stated it to Ms. Denny, the CNA, as well. The claimant did not go have it checked out in the emergency room, however, and did not complete any paperwork. Both Ms. Denny and Ms. Howell, testified that the claimant never reported an injury or indicated that he was in any type of pain. In fact, both testified that they observed the claimant and that he did not exhibit any kind of problems before he left.

It is of note, that the claimant had worked in a number of different jobs as a manager/supervisor in the past. He reluctantly admitted that he would want an employee to report to him if they were injured lifting a patient. In addition, the claimant was involved in two incidents at work six months before the alleged claim in this case. In both incidents, the claimant did not believe he was injured but he was required to be seen in the emergency room for evaluation and workers' compensation paperwork was completed.

Further, the claimant testified that after the alleged lifting event on July 12, 2009, that he only remained at work "less than 30 minutes." He claimed he left "because of the behavioral health unit, my duties were done for the evening, and I asked permission to leave." However, in his deposition, the claimant testified that the reason he left was, "I would have put them over census for staffing and I was allowed to go home." When asked about this discrepancy, the claimant indicated it was very possible that he would have put them over census. The claimant acknowledged that he was scheduled to work a 12-hour shift and was not scheduled to leave until the end of that shift the next morning. The claimant was then asked if he told anybody he needed to leave because he had a doctor's appointment the next

day. The claimant testified "I don't believe so. It's been almost a year. I -- I can't say for sure, but I don't believe I did. Then incident happened quite awhile ago."

The inconsistencies continue as Ms. Denny testified that the claimant told her he wanted to leave because he had an appointment the next morning for some tests and wanted to get some sleep. Ms. Howell testified that the claimant asked to go home early indicating he had a doctor's appointment the next morning.

Moreover, the claimant was also questioned about the treatment he had received from Dr. Tuck and whether or not he had been examined by any other physicians with regard to his back. The claimant testified that the only other physician that had treated him after Dr. Tuck was his personal physician, Dr. Guntharp. However, the claimant indicated that he only saw Dr. Guntharp whenever he was "ill" and that Dr. Guntharp did not treat his back.

The claimant was questioned about why he did not use his health insurance after the claim was denied to see Dr. Tuck for additional treatment. The claimant claimed that his health insurance deductible was the reason. When this was questioned since the claimant had clearly been using his health insurance to obtain

treatment, the claimant then claimed that instead, he was told that he no longer had health insurance by Alvin Taylor. Mr. Taylor testified that he did not tell the claimant he no longer had health insurance.

In my opinion, the claimant's attempts to respond to the inconsistencies by claiming that he was "good worker, does a good job" is simply an attempt to overcome unexplained inconsistencies in his testimony. The evidence demonstrates that the claimant had previously worked in management, and supervised employees, and knew the need to report an injury at work. He had also been involved in several instances, both before and after the alleged injury and reported those injuries even if however minor they might be. The claimant did not report the incident which is the subject of this claim. The claimant is simply not credible. 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); Scarbough 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).

Simply put, based upon my de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. The only proof provided that the claimant sustained an injury is the claimant’s own self-serving testimony which contains numerous inconsistencies. The individuals working with the claimant on the night of this alleged incident did not observe any problems and their recollection of the events regarding why the claimant left are significantly different than what the claimant testified to. Therefore, I cannot find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury on July 12, 2009. Accordingly, for those reasons set forth above, I must respectfully dissent from the majority opinion.

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KAREN H. McKINNEY, Commissioner