

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F810133

TIFFANIE LERICOS,
EMPLOYEE

CLAIMANT

HOMESTYLE ASSISTED LIVING, INC.,
EMPLOYER

RESPONDENT

GUARANTEE INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 24, 2010

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

Claimant represented by the HONORABLE EVELYN BROOKS,
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 May 12, 2010. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 6, 2010, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her mid back on August 2008.

3. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her low back injury of August 28, 2008.

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 May 12, 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).

Pursuant to A.C.A §11-9-715(a) (1) (B) (ii), attorney fees are awarded "only on the amount of compensation for

indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a) (4).

IT IS SO ORDERED.

A. WATSON BELL, 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 she was entitled to additional medical treatment. In my opinion, the claimant has failed to meet her burden of proof.

The evidence demonstrates that the claimant sustained an admittedly compensable lumbar strain on August 28, 2008. On November 7, 2008, the claimant was released with no restrictions to return to work. The claimant returned to work for the respondent employer

but left the employment in January of 2009 due to reasons unrelated to her injury.

In October of 2009, the claimant sought medical treatment. The claimant complained she was having back problems and reported on October 18, 2009 that she had an accident at work a year ago but the pain went away and came back three months ago. In the same medical report, the doctor noted that the claimant had back pain since the beginning of school. The claimant had returned to nursing school after she left working for the respondent employer. She testified her pain never went away after the compensable lumbar strain.

After reviewing the record, I find that the claimant's 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); 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).

There are significant examples of the claimant's untruthfulness. At the hearing, the claimant testified that she was never released for full duty. However, the medical records demonstrate that the claimant was released to full duty on November 7, 2008. Further, when the claimant went to work for the respondent employer, she wrote a letter and enclosed her resume. That resume states that the claimant attended the University of South Carolina and had a 3.7 grade point average. However, the claimant actually attended Greenville Technical College in South Carolina where her grade point average was 2.7. She also indicated that she maintained a GPA of 3.7 at the University of Arkansas. However, the claimant's GPA was lower than that. After the claimant left the respondent employer, she began watching the child of a friend. The claimant was sent interrogatories where she was asked to give information for the couple whose child she watched. She stated that she did not have any contact information for them. However, the claimant's husband worked with the gentleman every day and he knew how to get in touch with them.

When I consider the claimant's untruthfulness, as noted above, as well as the claimant's medical records which indicate that the claimant did not seek medical treatment for over 11 months, and the initial medical records from October of 2009 that the claimant's pain started "three months ago", I cannot find that the claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment. Accordingly, for all the reasons set forth herein, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER