James A. DUTY *v.* STATE of Arkansas

CA CR 92-1392 871 S.W.2d 400

Court of Appeals of Arkansas
Division II
Opinion delivered February 9, 1994

[redacted]

Appellant, pro se.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant, James A. Duty, was found guilty by the circuit court, sitting without a jury, of speeding and driving under a suspended driver's license, for which he was fined $50.00 and $500.00, respectively, and ordered to pay court costs. Appellant raises several arguments on appeal. We find sufficient merit in one of his points to warrant reversal and remand for a new trial.

We first consider appellant's argument that he was denied his constitutional right to a jury trial. Arkansas law gives every criminal defendant the right to a jury trial. The right "shall remain inviolate" unless "waived by the parties . . . in the manner prescribed by law." Ark. Const. art 2, §§ 7, 10; *see Winkle* v. *State*, 310 Ark. 713, 841 S.W.2d 589 (1992). The criminal defendant is not required to demand a jury trial, and the contemporaneous objection rule is inapplicable to the failure to afford one a trial by jury. *Calnan* v. *State*, 310 Ark. 744, 841 S.W.2d 593 (1992). "The burden is on the trial court to assure that, if there is to be a waiver of the right to a jury trial in a criminal case, it be done in accordance with the Rule by which we have implemented our Constitution." *Id.*, 310 Ark. at 749, 841 S.W.2d at 596. In order for a defendant to waive his right to a jury trial, he must personally make an express declaration in writing or in open court.[1] Ark. R. Crim. P. 31.2; *Calnan* v. *State, supra.* A waiver is the intentional relinquishment of a known right. *Win-*

[1]In misdemeanor cases, where only a fine is imposed by the court, a jury trial may be waived by the defendant's attorney. Ark. R. Crim. P. 31.3. However, this rule is not applicable to the case before us as appellant was not represented by counsel.

kle v. *State, supra; Calnan* v. *State, supra.* For a waiver to exist, there must be a "voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered." *Franklin* v. *State*, 251 Ark. 223, 229, 471 S.W.2d 760, 764 (1971). Furthermore, the waiver of a jury trial must be knowingly, intelligently, and voluntarily made, and such must be demonstrated on the record or by the evidence. See *Williamson* v. *Lockhart*, 636 F. Supp. 1298 (E.D. Ark. 1986); *see also Dranow* v. *United States*, 325 F.2d 481 (8th Cir. 1963). A person makes a knowing and intelligent waiver when the person knows that the right exists and has adequate knowledge upon which to make an intelligent decision. *Franklin* v. *State, supra.*

In the record now before us, the following discussion took place well into the trial, just before the State rested its case:

> THE COURT: . . . I just noticed in the file that there was a demand for a jury trial by the defendant, at which time the State advised the defendant, I believe, and advised the Court that it was not seeking any incarceration in the —
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> [PROSECUTING ATTORNEY]: That's correct. We'd waive any jail time.
>
> THE COURT: — in the event of a conviction in this case. And, as I understand it, the defendant has withdrawn his request for a jury trial. Is that —
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> [PROSECUTING ATTORNEY]: That's correct, Your Honor. We would waive any requirement for —
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> THE COURT: Is that correct, Mr. Duty?
>
> [APPELLANT]: That's the way that I understood it when I left Mr. Harper's office.

Appellant argues that he was erroneously led to believe that he had no constitutional right to a jury trial if no incarceration was imposed. He further argues that he responded only to the remarks concerning the potential for incarceration, not to the issue of a jury trial.

From our reading of the foregoing, we cannot conclude that it constitutes an "express declaration" by appellant of an "intentional relinquishment" of his right to a jury trial. *See Calnan* v. *State, supra.* Two separate questions (the possibility of

incarceration and waiver of a jury trial) were being discussed at the same time, and appellant's response to the court was ambiguous at best. Therefore, we reverse and remand for a new trial.

Appellant, who proceeded *pro se*, also argues that he was denied his right to appointed counsel at the trial. We cannot agree. An indigent defendant does not have a right to appointed counsel in a misdemeanor case unless there is a sentence to imprisonment. *Scott* v. *Illinois*, 440 U.S. 367 (1979); *Worthington* v. *State*, 301 Ark. 354, 786 S.W.2d 117 (1990); Ark. R. Crim. P. 8.2(b). Assuming for the purposes of this argument that appellant was indigent, the trial court did not err in not affording appellant an attorney as there was no sentence to incarceration.

Appellant next contends that the trial court erred in denying his motion for a continuance made just before trial. As the basis for this motion, appellant stated that he thought that a plea bargain agreement had been reached; thus, he had failed to obtain the presence of a material witness and was unprepared for trial. Although we find no abuse of discretion in the trial court's denial of the motion, we do not address this matter further as it is not likely to occur again on retrial.

Appellant also argues that the trial judge erred in not disqualifying himself from presiding over appellant's case. Appellant moved for the trial judge's recusal, stating that the judge was prejudiced against him and that the judge could be called as a material witness. Appellant stated that in speaking with the court on his first motion for a continuance, the court appeared to appellant to be prejudiced against him. Appellant further stated that the trial judge would be called as a material witness to testify to the fact that appellant had contacted the judge years earlier, while the judge was in private practice, for legal representation and the judge refused.

A judge's recusal is discretionary, and his decision will not be reversed absent a showing of an abuse of discretion. *Woods* v. *State*, 278 Ark. 271, 644 S.W.2d 937 (1983); *Korolko* v. *Korolko*, 33 Ark. App. 194, 803 S.W.2d 948 (1991); *Chancellor* v. *State*, 14 Ark. App. 64, 684 S.W.2d 831 (1985). Further, judges are presumed to be impartial and the party seeking disqualification bears a substantial burden in proving otherwise. *Chancellor* v. *State, supra*.

From our review of the record before us, we find no evidence of bias or prejudice. At the trial, the judge stated that he was not prejudiced against the appellant and was unfamiliar with the facts of the case. The Arkansas Supreme Court, in *Roe* v. *Dietrich*, 310 Ark. 54, 835 S.W.2d 289 (1992), stated that Canon 3.C(1) of the Arkansas Code of Judicial Conduct, which requires recusal for bias and personal knowledge of the facts, does not preclude participation of a judge who has obtained knowledge of facts through previous judicial participation in it. The fact that a judge may have an opinion concerning a case does not dictate that a recusal is required. *Rush* v. *Wallace*, 23 Ark. App. 61, 742 S.W.2d 952 (1988). In that instance, whether recusal is required lies within the judge's conscience. *Allen* v. *Kizer*, 294 Ark. 1, 740 S.W.2d 137 (1987); *Rush* v. *Wallace, supra.*

When it becomes necessary for a judge to testify as a material witness, the judge must recuse himself. Arkansas Code of Judicial Conduct, Canon 3.C(1)(d)(iv). However, the fact that a judge improperly fails to recuse himself does not result in reversible error unless there is a showing of prejudice from the failure to recuse. *Elmore* v. *State*, 13 Ark. App. 221, 682 S.W.2d 758 (1985). From our review of the record, appellant has not shown how the fact that the appellant contacted the judge years earlier, when the judge was in private practice, for legal representation, would be relevant to this case. Nor has appellant shown how the judge would be a necessary and material witness in the present case. Finally, appellant has not shown how he was prejudiced by the judge's failure to recuse. From the review of the record, we cannot conclude that the judge abused his discretion in failing to recuse.

Appellant finally argues that the trial court erred in imposing upon appellant the maximum fine for driving under a suspended driver's license. There is no dispute that the fines imposed here were within statutory limits. Appellant contends that the court erroneously failed to consider his financial status when imposing sentence.

Appellant's reliance on *Drain* v. *State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984) is misplaced. *Drain* concerned revocation of a suspended sentence and imposition of a sentence to imprisonment for the defendant's failure to pay a fine, and is inapposite to the facts of this case, which involves the initial sentencing. Appellant's argument that the trial court was required to

consider his financial condition is premature. If appellant should fail to pay his fines, and he is ordered to show cause why he should not be imprisoned for non-payment, his ability to pay should be considered at that time. *See* Ark. Code Ann. 5-4-203 (Repl. 1993). We cannot conclude that the trial court abused its discretion in fining appellant.

Reversed and remanded.

ROBBINS and ROGERS, JJ., agree.

Donna Sue REAMS *v.* STATE of Arkansas

CA CR 93-312 870 S.W.2d 404

Court of Appeals of Arkansas
Division II
Opinion delivered February 9, 1994
[Rehearing denied March 16, 1994.]

Martin E. Lilly, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. Appellant was convicted by a jury of battery in the first degree and permitting abuse of a child. She was sentenced to twenty years on the battery charge and ten years for permitting abuse of a child, each sentence to run concurrently. On appeal, appellant argues that the evidence was insufficient with regard to both convictions. We disagree and affirm.

On October 27, 1991, appellant and Dan Hamblen took their five-week-old son to the emergency room at Methodist Hospital in Jonesboro. It was discovered that the child had two broken legs, bruises covering the palms of his hands, bruises on his left ear, the back of his neck, upper arms, abdomen and his back.

Also, the child had a dislocated hip, cigarette burns on his arm and a cerebral edema.

Ms. Tammy Summer, a licensed practical nurse at Methodist Hospital, testified that the child was brought into the hospital with bruises completely covering the palms of his hands, left ear, back of his neck, upper arms, abdomen and chest. Ms. Summer stated that whenever anyone would approach his crib or touch him, the child would jerk and shake from the top of his head to the bottom of his feet as if he were frightened.

Terri Wilkins, pediatric nursing coordinator at Methodist Hospital, testified that the child had numerous bruises and explained that the bluish color of the bruising indicated that they were done within the week. Ms. Wilkins also stated that the child was underweight, had soft tissue injuries, fractures, a scratch mark on his back, cigarette burns, a dislocated hip and a cerebral edema.

Dr. John Woloszyn testified that the child's injuries were caused by child abuse. He examined the baby's legs and discovered two broken bones in both legs. According to Dr. Woloszyn, it would have taken great force to have broken the child's legs. He described the condition of the baby's brain as having a hydroma caused by violent shaking. He also noted that no new bruises appeared while the child was in the hospital.

Dr. L.K. Austin, a pediatrician, testified that he observed the baby the night he was brought into the emergency room. According to Dr. Austin, appellant stated that the child had fallen out of his crib. Dr. Austin opined that, after observing the bruising and broken legs of the five-week-old baby, he believed the child had been abused. Dr. Austin also testified that it would require extreme force to cause bruising of the kind found on this child. He also stated that the fractures of the legs could not have been done accidentally.

Appellant testified that she had exclusive control of her son. She stated that she was home with the baby all day and that she and Mr. Hamblen were with him at night. Appellant also admitted that she was the only one in the house that smoked. Appellant denied any involvement or knowledge concerning the injuries to her child. However, appellant admitted lying to Deputy Mox-

ley when she said she did not know what happened to her baby. She admitted telling Charlie Beal of the Arkansas State Police that she saw Dan Hamblen shake the baby and yell at the child.

Virginia Breckle, the baby's grandmother, testified that she took care of the baby for twenty minutes when he was four weeks old, and other than that, appellant and Dan Hamblen had exclusive control of the child.

Debbie Shelton, the child's paternal aunt, testified that appellant stated that the baby has never been with anyone else. Appellant also stated, according to Ms. Shelton, that "if one of us had to go down, we've got our story straight." Ms. Shelton obtained custody of the child after he left the hospital. Ms. Shelton testified that when she first had custody of the baby he was jumpy when not held close and would cry out and scream.

On appeal, appellant argues that there is no substantial evidence that she was the one that harmed the child and thus there is no substantial evidence to support the battery conviction. Noting that the proof was entirely circumstantial, she asserts that the evidence must be consistent with the guilt of the accused and inconsistent with any other reasonable hypothesis. While the evidence is admittedly circumstantial, we believe it is sufficient to support the jury's verdict.

The decision in *Payne* v. *State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987), also involved the question whether there was substantial evidence to support a conviction for battery in the first degree of a child. In *Payne*, Bruce Payne was convicted of the first degree battery of an 11-month-old child. The child was taken to the office of Dr. Young by Mr. Payne and the child's mother, Shelly Bailey. The child had a broken neck, bruises on her head, face, tongue, forearm, chest, abdomen, shoulder, hip and genitals. She also suffered from multiple rib fractures. Dr. Young opined that the child suffered from battered child syndrome. Mr. Payne gave a statement in which he said that the child fell down some rock steps and a day later fell off the couch. Dr. Fulbright, a neurosurgeon, opined that Mr. Payne's explanation of what occurred was not consistent with the child's injuries. Dr. Woody, a pediatric neurologist, testified that the injury was not the result of an accident and that the type of force required to produce the neck

injury was a direct blow to the neck with a baseball bat. We found the circumstantial evidence sufficient to support the verdict of guilt.

Also, in the case of *Deviney* v. *State*, 14 Ark. App. 70, 685 S.W.2d 179 (1985), a 16-month-old child died from a fractured skull which was the result of child abuse. In that case, there were no witnesses, the parents had exclusive control of the child, and the medical examiner also found broken bones in the child's arm as well as bruises on the body. The medical examiner testified that the injuries could not have occurred from falling down steps, as the Devineys contended. From the facts in that case, we found that the jury was justified in rendering its guilty verdicts.

Arkansas Code Annotated § 5-13-201(a)(3) (1993) provides that:

> (a) A person commits battery in the first degree if:
>
> (3) He causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life.

The responsibility of the appellate court is to determine whether the verdict is supported by substantial evidence, which means whether the jury could have reached its conclusion without having to resort to speculation or conjecture. *Watson* v. *State*, 290 Ark. 484, 720 S.W.2d 310 (1986). The fact that evidence is circumstantial, however, does not render it insubstantial. Where circumstantial evidence alone is relied upon, it must exclude every other reasonable hypothesis but the guilt of the accused. The question whether circumstantial evidence excludes every other reasonable hypothesis other than guilt is usually reserved for the jury. *Deviney* v. *State*, 14 Ark. App. 70, 685 S.W.2d 179. The jury is not required to believe the accused's version of the events because she is the person most interested in the outcome. *Irvin* v. *State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989). The jury is permitted to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. It is only when circumstantial evidence leaves the jury solely to speculation and conjecture that it is insufficient as a matter of law. The test is whether there was substantial evidence to support the verdict when the evidence is viewed

in the light most favorable to the State. *Deviney* v. *State*, 14 Ark. App. 70, 685 S.W. 2d 179. In addition, a jury may consider and give weight to any false and improbable statements made by an accused in explaining suspicious circumstances. *Payne* v. *State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987).

When we consider the appellant's improbable statements in this case along with the nature of the injuries to the child, the medical evidence, opinions of the physicians and the appellant's opportunity, we are persuaded that, taken together, the evidence is sufficient to constitute substantial evidence of guilt.

Appellant also challenges the sufficiency of the evidence with regard to the conviction for permitting child abuse.

Arkansas Code Annotated § 5-27-221 (1993) provides:

> (a)(1) A person commits the offense of permitting abuse of a child if, being a parent, guardian, or person legally charged with the care or custody of a child, he recklessly fails to take action to prevent the abuse of a child who is less than eleven (11) years old.
>
> (2) It is a defense to a prosecution for the offense of permitting abuse of a child if the parent, guardian, or person legally charged with the care or custody of the child takes immediate steps to end the abuse of the child, including prompt notification of medical or law enforcement authorities, upon first knowing or having good reason to know that abuse has occurred.

Appellant testified that she saw Mr. Hamblen shake the child on three separate occasions. With regard to the last episode, appellant stated that Mr. Hamblen shook the baby so hard it scared her. She also testified that she observed the bruises and cigarette burn on the child but did not ask how the injuries occurred. Appellant admitted seeing the bruises on her baby's palms but thought he "squeezed himself". She noticed red marks on his arms on Tuesday prior to going to the hospital on Sunday and did nothing about it. She thought the redness was from Dan Hamblen or herself handling the child too roughly. Appellant testified that she was with her child at all times except for twen-

ty minutes when he was with his grandmother. Dr. Woloszyn testified that a child five-weeks old would have expressed pain when his legs were broken. Based on the evidence in the record, we cannot say there is no substantial evidence to support the jury's verdict.

Affirmed.

JENNINGS, C.J., and PITTMAN, J., agree.

Willie Keith PAIGE *v.* STATE of Arkansas

CA CR 93-275 870 S.W.2d 771

Court of Appeals of Arkansas
En Banc
Opinion delivered February 16, 1994

James P. Massey, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted by a jury of second degree murder and sentenced to twenty years in the Arkansas Department of Correction and fined $15,000.00. On appeal, he argues that the evidence is insufficient to support his conviction. We affirm.

In reviewing the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State and affirm if the verdict is supported by substantial evidence. *LaRue* v. *State*, 34 Ark. App. 131, 806 S.W.2d 35 (1991). Substantial evidence is evidence which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resort to speculation or conjecture. *Kendrick* v. *State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992). In determining the sufficiency of the evidence, we do not weigh the evidence on one side against the other but simply determine whether the evidence will support the verdict. *Ward* v. *State*, 35 Ark. App. 148,

816 S.W.2d 173 (1991). The fact that evidence is circumstantial does not render it insubstantial as the law makes no distinction between direct evidence of a fact and circumstances from which it may be inferred. *Edwards* v. *State*, 40 Ark. App. 114, 842 S.W.2d 459 (1992). To be sufficient to sustain a conviction, the circumstantial evidence must exclude every other reasonable hypothesis consistent with innocence. *Sheridan* v. *State*, 313 Ark. 23, 852 S.W.2d 772 (1993). This becomes a question for the fact-finder to determine. *Id.*

A person commits murder in the second degree if he knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann. § 5-10-103(a)(1) (Repl. 1993). A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. Further, a person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result. Ark. Code Ann. § 5-2-202(2) (Repl. 1993).

Earsie Flowers testified that on October 10, 1991, he witnessed a vehicle swerve off the road and collide with a telephone pole. James Johnson, a paramedic with MEMS, responded to the accident. He testified that he found the victim in the driver's seat of the car, and that the victim was not breathing, had no pulse, and was bleeding from his head. He further testified that, prior to moving the victim, he observed a gun between the victim's legs. Officer David Burns testified that when he responded to the accident, he made contact with the appellant who was sitting on the passenger side of the front seat. He stated that he noticed blood on the appellant's hands and the left side and back of the appellant's head. Officer Burns testified that he observed the gun on the seat between the victim's legs, somewhat under one leg. He stated that he retrieved the weapon and turned it over to Detective Tracy Roulston.

Detective Roulston testified that he investigated the incident, collected the evidence, and processed the crime scene. He stated there were blood splatters on the left outside of the vehicle which traveled from a front to back direction which indicated that the car was moving at the time they were made. He tes-

tified that he recovered one expended .380 cartridge casing from the front passenger floorboard and a bullet from the headliner of the vehicle above the driver's seat. He testified he also recovered a .380 automatic pistol from Officer Burns. Ronald Andrejack, a firearms examiner, testified that he determined that the .380 pistol was operable, that the discharged bullet was fired from the pistol, and that the discharged cartridge casing was fired in the pistol.

David De Jong, a forensic pathologist, testified that he performed an autopsy on the victim. He testified that the victim died from a gunshot wound to the right temple. He stated that the wound was a contact wound which indicated that the gun was held right against the head when fired. He testified that the bullet went through the brain and exited on the left side of the head. He further testified that the victim's wound was consistent with a wound made by a .380 caliber bullet.

Lisa Sakevicius, a criminalist with the Arkansas State Crime Laboratory, testified that the appellant and the victim both tested positive for gunshot residue. She stated that a person who tested positive had either discharged a weapon, was at close range when the weapon discharged, or had handled a recently discharged firearm. She testified that it was possible from the levels analyzed from the results of the appellant's kit that he could have fired a weapon. She testified that the appellant's right and left hands tested positive, with the highest levels on the back of the right hand. She said that it was unlikely that the level of residue on his right hand was deposited from picking up a recently discharged weapon for only a minute.

Nawodney Thomas testified that on the night of the shooting, the victim and the appellant came to his house. He stated that the victim pulled his pistol out and waved it at the appellant and then put it back in the car. He stated that the appellant then grabbed the gun, said, "I told you don't play," and shot it over the victim's head. He further stated that the appellant was upset that the victim had pointed the gun at him.

The appellant gave a taped statement to Detective Roulston which was played for the jury. The appellant stated that on the day of the shooting, the victim retrieved a .380 pistol from a

pawn shop. He stated that the victim later test fired the gun. Afterwards, he and the victim went riding around in the victim's vehicle. He testified that at one point they took Nawodney riding around with them. He testified that they went to get something to eat and that he fell asleep in the car. The appellant stated that he awoke when the vehicle crashed. He said that he shook the victim and because he would not wake up, he thought the victim had been knocked out. He stated that only the two of them were in the car. He further stated that he did not hear a gunshot and that he did not know how the victim had been shot. He said that in his opinion someone shot the victim from outside the vehicle and that the .380 was not the weapon used. He further stated that the only time he handled the pistol that day was when he picked it up with his right hand and handed it to the victim. He said that he had it in his hand for thirty seconds to a minute. He also stated that he did not fire the gun that day and that he had not had an altercation or conflict with the victim.

The appellant contends that the State failed to produce substantial evidence from which the jury could reach its conclusion without having to resort to speculation or conjecture. We disagree. The evidence reveals that the victim was killed by a gunshot wound to the head which was made when the gun was pressed to the right side of the victim's head. The appellant was the only other person in the vehicle at the time the victim died, and the evidence indicates that the victim was shot with the .380 pistol found in the vehicle. Other testimony reveals that there had been an altercation or disagreement between the victim and the appellant and that the appellant had fired the gun in the car over the head of the victim. Although the appellant testified that he only handled the gun for a short moment and had not fired it that day, the trier of fact was not required to believe his testimony, since he was probably the person most interested in the outcome of the trial. *King* v. *State*, 42 Ark. App. 97, 854 S.W.2d 362 (1993). Furthermore, the testimony of Ms. Sakevicius indicates that the amount of gunshot residue on the appellant's hands was not consistent with picking up a gun and only holding it for a moment. The appellant also testified that he slept despite there being gunfire to his immediate left and that he thought someone from outside the vehicle had shot the victim. A defendant's improbable explanations of incriminating circumstances are admis-

sible as proof of guilt. *Edwards, supra.* Although the evidence in the case at bar was circumstantial, we hold that reasonable minds could reach the conclusion, without resort to speculation or conjecture, that the appellant shot the victim, thereby causing his death. Accordingly, we affirm.

Affirmed.

ROBBINS and MAYFIELD, JJ., dissent.

JOHN B. ROBBINS, Judge, dissenting. I must dissent from the majority opinion of this court which today holds that the second degree murder conviction of William Keith Paige is supported by substantial evidence.

Mr. Paige was the sole passenger in an automobile being driven by Herbert Waits on McCain Boulevard in North Little Rock. The auto was seen careening off the road and colliding with a telephone pole. Waits was dead when removed from the vehicle. The cause of death was a single gunshot from Waits' .380 caliber pistol while pressed against Waits' right temple. The pistol was found in the car seat between Waits' legs. The Arkansas State Crime Lab found gunshot residue on both of Waits' hands and both of Paige's hands.

The only reasonable inference which can be drawn from these facts is that one of these two men was suicidal. Either Waits shot himself, or Paige shot Waits while their auto was traveling down McCain Boulevard, which would be tantamount to a suicide attempt. There is absolutely no evidence that Paige had ever threatened suicide or given any indication that he was suicidal. There was testimony, however, that Waits was despondent because his wife had left him and had attempted suicide about two years earlier, and only three weeks earlier his wife left him again and Waits mentioned that he might attempt suicide again. There was further testimony that only some two or three hours prior to his death, Waits placed his gun to his head and said "You know, death ain't nothing but a word. I'll kill myself. I don't care."

Furthermore, there was no proof of any motive for Paige to kill Waits. These men worked together and were close friends. Paige had drunk fourteen cans of beer and a pint of E&J (brandy) that evening and had passed out in the passenger's seat of the

car. Under these circumstances his failure to recall having fired Waits' pistol earlier that evening is not unreasonable.

While it is true the jury must determine whether the circumstantial evidence is sufficient to exclude every other reasonable hypothesis consistent with a defendant's innocence, it is insufficient as a matter of law when the circumstantial evidence leaves the jury solely to speculation and conjecture as to a defendant's guilt. *See Hutcherson* v. *State*, 34 Ark. App. 113, 806 S.W.2d 29 (1991). This is such a case. There is no substantial evidence, direct or circumstantial, which would enable a jury to find Paige guilty of murder. I would reverse.

MAYFIELD, J., joins in this dissent.

Walter KITCHENS *v.* John EVANS
and Sheldon Baum

CA 93-171 870 S.W.2d 767

Court of Appeals of Arkansas
Division II
Opinion delivered February 16, 1994

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Bramblett & Pratt, by: *James M. Pratt, Jr.*, for appellant.

Spencer, Spencer, Depper & Guthrie, by: *David F. Guthrie*, for appellees.

JOHN B. ROBBINS, Judge. The appellant, Walter Kitchens, appeals from an order of the circuit court of Calhoun County awarding $114,620.00 plus interest and costs to appellees, John Evans and Sheldon Baum, who are assignees of claims by three medical facilities for medical services provided to Kitchens. On appeal, Kitchens contends that the court erred in finding that the debt, barred by the statute of limitations, had been revived by his conduct and erred in determining the amount of the judgment. We reverse and dismiss.

The record shows that on July 31, 1989, John Evans and Sheldon Baum filed a complaint reflecting six medical facilities as plaintiffs which alleged that Kitchens owed a total of $143,422.63 for medical services provided by the facilities. On September 22, 1989, Kitchens answered that the statute of limitations barred collection of any such debts. On January 22, 1990, the court granted John Evans' motion to be substituted as plaintiff and dismissed claims concerning three of the medical facilities. On April 3, 1990, Sheldon Baum was joined as a plaintiff in the action.

Kitchens testified at the hearing on this matter that in a 1983 accident involving a Honda three-wheeler he sustained a spinal cord injury causing paralysis and that from 1983 through 1986 he received medical treatment from facilities in Arkansas, Texas, and Oklahoma. He stated that during this time he filed a lawsuit in Texas against American Honda Motor Company (Honda) seek-

ing, inter alia, reasonable medical expenses and that eventually the case was settled out of court. During this same period, he was involved in a divorce proceeding in Texas with his wife, Etta Kitchens. Kitchens testified that under the terms of the 1985 divorce decree, he agreed to pay "[a]ny hospital, doctor, and/or medical bills incurred by [Kitchens] regardless of when incurred."

John Evans testified that through his association with Etta Kitchens, he learned about Kitchens' injury and the lawsuit. He stated that he and Sheldon Baum contacted the three medical facilities and obtained assignments of Kitchens' medical bills. The assignments from the Texas Institute for Research and Rehabilitation (TIRR), the Texas Rehabilitation Commission (TRC), and the City of Faith Hospital (CFH), which were purchased for approximately $26,500.00, represent $114,620.00 in medical bills.

Kitchens testified that he had never received a bill from TIRR or TRC. He stated that he received a bill from CFH in 1987 but later had received a letter from Medicare stating that Medicare had paid a portion of that bill. The record includes a copy of a bill from CFH, dated April 8, 1988, which reflects a balance of zero. Kitchens testified that he thought all medical bills had been paid, and he denied knowing that he owed money to the three facilities.

In a letter opinion denying Kitchens' motion for summary judgment, the court stated:

> Clearly, all of the claims in question are barred by the statutes of limitations. What, if anything, has occurred that would revive these debts? Arkansas law addresses acknowledgment by a debtor as in some situations to be sufficient. *McHenry* v. *Littleton*, 237 Ark. 483, 374 S.W.2d 171 (1964).
>
> In the McHenry case, supra, the Court pointed out that acknowledgment need not affirmatively express an intention to pay the debt but that the debtor recognizes the debt as a subsisting obligation and further make no statement repelling the presumption that he intends to pay.
>
> Mr. Kitchens generally acknowledged debts for medical services in his personal injury suit against Honda. As such

> he recognized, generally, such obligations and had made no indication, other than in this lawsuit, that he does not intend to pay.

In an order filed on July 20, 1992, the court stated:

> The amounts of the assigned accounts for which [appellees] seek judgment against [Kitchens] are Texas Rehabilitation Commission — $52,379.00, the Institution of Rehabilitation and Research — $31,110.60, and the City of Faith Hospital — $31,131.35. The defense that the City of Faith Hospital account had a zero balance after payment by Medicaid is dismissed as said account was assigned to [appellees] for valuable consideration.

Kitchens first argues that the trial court erred in failing to find this action barred by Ark. Code Ann. § 16-56-106 (1987), which provides as follows:

> (a) No action shall be brought to recover charges for medical services performed or provided prior to April 1, 1985, by a physician or other medical service provider after the expiration of a period of eighteen (18) months from the date the services were performed or provided.
>
> (b) No action shall be brought to recover charges for medical services performed or provided after March 31, 1985, by a physician or other medical service provider after the expiration of a period of two (2) years from the date the services were performed or provided or from the date of the most recent partial payment for the services, whichever is later.

The trial court agreed that the action was barred by the above statute of limitations but found that the lawsuit filed by Kitchens, in which he sought damages that included his medical expenses, demonstrated his acknowledgment of the debt in issue and therefore had revived the debt. Kitchens contends his action was not sufficient to revive the debt.

Actions sufficient to revive a barred debt were discussed by the supreme court in *Morris* v. *Carr*, 77 Ark. 228 (1905), as follows:

> The Supreme Court of the United States in *Shepard* v. *Thompson*, 122 U.S. 231, uses this language: "The statute of limitations is to be upheld and enforced, not as resting only on a presumption of payment from lapse of time, but, according to its intent and object, as a statute of repose. The original debt, indeed, is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete. But, in order to continue or revive the cause of action after it would otherwise have been barred by the statute, there must be either an express promise of the debtor to pay the debt, or else an express acknowledgment of the debt, from which his promise to pay may be inferred. A mere acknowledgment, though in writing, of the debt as having once existed is not sufficient to raise an implication of such a new promise. To have this effect, there must be a distinct and unequivocal acknowledgment of the debt as still substituting as a personal obligation of the debtor.'
>
> . . .
>
> In *Ringo* v. *Brooks*, 26 Ark. 541, where it was held that the acknowledgment was not sufficient because it did not point out the debt, and was made to a stranger, Judge SEARLE, in discussing the facts of that case, said: "Like all other acknowledgments and promises having legal force and sanction, they must be made to a party in interest; to the person to whom the debt is due, or one authorized to act for him, and *with the intent at the time to pay it*." The court in that case did not say, nor did the court mean, nor was it necessary to hold, that such intention to pay must be expressed in the acknowledgment. All that case meant to hold was that the acknowledgment should be made to the party in interest, and be of such unequivocal character as to recognize the indebtedness as a subsisting obligation, and that there should be nothing in the face of the writing or written evidence of acknowledgment to repel the presumption of an intention to pay which the law raises by such acknowledgments.

77 Ark. at 232-33. In *Morris* v. *Carr*, cited above, the appellee

wrote the appellant asking if the appellant wanted to pay off a promissory note or use the money for another year. The court found that when the appellant responded that "he would retain the money," he clearly acknowledged the debt as a subsisting obligation. The court stated that it found no proof to overturn the trial court's finding that the above language was not accompanied by anything negativing the presumption of an intention to pay the debt.

In *Schaefer* v. *Baker*, 181 Ark. 620, 27 S.W.2d 83 (1930), the appellant took title by inheritance to an encumbered piece of real estate. The court found the obligation revived when she wrote a letter advising the creditor that she was not in a position to pay her father's debt at that time and stating "please advise me what to do." The court found that she not only acknowledged the lien against the property but promised to discharge it.

In *McHenry* v. *Littleton*, 237 Ark. 483, 374 S.W.2d 171 (1964), a lender brought suit to foreclose a mortgage upon land owned by a husband and wife. In response to a letter from the lender, the couple sent the lender a money order and the wife stated in the accompanying letter: "I am hoping to be able to pay the account in full in the near future. I thought when I talked with [you] last that I would soon be able to pay you every penny on my account at once, but have been disappointed." Some months later, the wife offered by letter to pay on the account and added: "I cannot pay it all now." The court found these letters were sufficient acknowledgments to revive the debt.

In *Wright* v. *Wright*, 279 Ark. 35, 648 S.W.2d 473 (1983), a father sought repayment of a $10,000.00 loan to his son and daughter-in-law. The son and his wife used the $10,000.00 as payment on land they bought from M. J. Graham. When the father inquired about repayment of the loan, the son and his wife wrote in a letter to the father:

> Concerning the 10,000. We can't get it from Mr. M. J. Graham because he is 6 ft. under the ground.
>
> You have a monthly income if you can't live on it then we think you should go to a rest home and live. They will take care of you for the income you receive.

The court held that the letter did not recognize the indebtedness as a subsisting obligation and, therefore, fell short of providing a revival by acknowledgment.

In the case at bar, the trial court found that by filing the suit against Honda, Kitchens recognized "generally" his obligation to pay the bills in issue. We conclude from our review of the cases discussed above that this court must determine if the filing of the suit or the agreement incorporated into the divorce decree was (1) an express promise to pay the debts or an express acknowledgment of the debts from which Kitchens' promise to pay may be inferred, and (2) an acknowledgment of the specific debts asserted to "the party in interest" or to "the person to whom the debt is due." This standard also has been stated as follows: "In order to take the debt out of the statute or to avoid prescription, the acknowledgment or promise must be made, not to a stranger, but to the creditor himself or to someone acting for him, or with the intention that it be communicated to the creditor." 54 C.J.S. *Limitations of Actions* § 262 (1987). In applying the principles set forth in the above authorities, we find that Kitchens' actions in the case at bar fall far short of providing a revival of the debts. Neither the filing of the lawsuit nor the language in the divorce decree constitutes an acknowledgment of the specific debts to the specific creditors. Because we reverse and dismiss on Kitchens' first point, we need not address his second point for reversal.

Appellees contend that should this court find that Kitchens' actions did not revive the debt, the court then must affirm the trial court's order pursuant to one of three alternative theories. First, appellees contend this court should apply a different statute of limitations. Appellees argue that because Kitchens agreed in the property settlement incorporated into the divorce decree that he would be responsible for any medical debts he incurred, the proper statute to be applied is Ark. Code Ann. § 16-56-114 (1987), which provides: "Actions on all judgments and decrees shall be commenced within ten (10) years after the cause of action shall accrue, and not afterward." We do not agree. There is no evidence that the subject medical service providers were parties to Kitchens' divorce action. Creditors are not ordinarily parties to a divorce action and are not, therefore, bound by an order regarding the parties' debts. *See Hackett* v. *Hackett*, 278

Ark. 82, 643 S.W.2d 560 (1982). Appellees, as assignees of these medical bills, did not and could not sue to enforce Kitchens' divorce decree. They brought their action to recover judgment for medical bills. The supreme court has determined that the General Assembly intended § 16-56-106 to cover all actions brought to recover charges for medical services. *See Ballheimer* v. *Serv. Fin. Corp.*, 292 Ark. 92, 728 S.W.2d 178 (1987).

Appellees also assert the doctrine of estoppel as an alternative basis for affirming the trial court's order. We note that:

> In general, a court may exercise its equitable jurisdiction and apply the doctrine of estoppel under appropriate facts to preclude [a party] from utilizing the statute of limitations as a bar, even in the absence of an express statutory basis for tolling the period. In particular, estoppel precludes [a party] from asserting the statute of limitations when his actions have fraudulently or inequitably invited [a party] to delay commencing legal action until the relevant statute of limitations has expired, or when [the other party] has done anything that would lull [a party] into inaction so that his vigilance is relaxed.
>
> Before estoppel can toll the statute of limitations, the party to be estopped must be apprised of the facts; the other party must be ignorant of the true state of facts, and the party to be estopped must have acted so that the other party had a right to believe that the party intended its conduct to be acted upon; and the other party relied on the conduct to its prejudice.
>
> Estoppel to plead limitations may arise from agreement of the parties, or from [the party's] conduct or representations, including those of his agent or representative, or even from his silence when under an affirmative duty to speak. The issue is whether the conduct and representations of the party are so unfair and misleading as to outbalance the public's interest in setting a limitation on bringing actions.

54 C.J.S. *Limitations of Actions* § 24 (1987). Appellees have

failed to demonstrate that Kitchens invited them to delay legal action or lulled them into inaction.

Finally, appellees contend that because TRC is a governmental agency, its account is not even subject to a statute of limitations defense. However, "[t]he immunity of the state from application of the statutes of limitation does not extend to its assignee or transferee who is seeking to enforce rights purely for his private benefit." 54 C.J.S. *Limitations of Actions* § 20 (1987). *See also Brookfield* v. *Rock Island Improvement Co.*, 205 Ark. 573, 169 S.W.2d 662 (1945).

Reversed and dismissed.

PITTMAN and ROGERS, JJ., agree.

Joe Don JONES *v.* STATE of Arkansas

CA CR 93-78 871 S.W.2d 403

Court of Appeals of Arkansas
Division II
Opinion delivered February 23, 1994

La Jeana Jones, for appellant.

Winston Bryant, Att'y Gen., by: *Cathy Derden*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant, Joe Don Jones, appeals from his conviction at a jury trial of criminal conspiracy to commit capital murder, for which he was sentenced to fifteen years in the Arkansas Department of Correction. He contends that the trial court erred in denying his motion for a directed verdict; in denying his motion to suppress; in allowing the State to use a peremptory strike to excuse a black male from the jury; in admitting into evidence a beer can and a sponge; in allowing two expert witnesses to testify about the beer can and sponge; and in

denying appellant's two motions for mistrial. We affirm.

We first consider appellant's argument that the trial court erred in denying his motion for a directed verdict of acquittal. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Shamlin* v. *State*, 23 Ark. App. 39, 743 S.W.2d 1 (1988). On appeal, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the State, and will affirm if the finding of guilt is supported by substantial evidence. *Smith* v. *State*, 34 Ark. App. 150, 806 S.W.2d 391 (1991). Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without requiring resort to speculation or conjecture. *Leach* v. *State*, 38 Ark. App. 117, 831 S.W.2d 615 (1992).

Appellant is a former DeQueen, Arkansas, police officer. He resigned in 1991. At the time of his alleged crime, Tim Litchford was a police officer with the same department. Officer Litchford testified that, while they worked together, he and appellant had conversations about the lax security at Lewis Food Center and how easy it would be to kill and rob the owner as he left the store at night. Litchford testified that he received a phone call from appellant on February 8, 1992. According to Litchford, appellant asked him to recall their prior discussions about robbing the Lewis Food Center and stated, "Well, I am fixing to do it." When Litchford asked appellant if he were serious, appellant replied, "You're God-damned right I'm serious." Appellant stated that he had obtained a .22 rifle but needed a scope for it. Litchford agreed to try to find a scope and to meet with appellant the following day. Litchford then reported his conversation with appellant to his police chief, who in turn contacted the Arkansas State Police.

On February 10, 1992, Officer Litchford, wired with a body microphone, went to appellant's apartment. They discussed how the store owner would be killed, how to dispose of the body, and whether the crime should be committed on a week night or a Saturday night. Officer Litchford again agreed to try to find a rifle scope, and appellant agreed to wait at least two days while Litchford sought it. They also discussed how the planned crime was a two-man job, how they would mount the scope on the rifle, how much money they thought they would get, and how they

would have to burn any checks that were taken during the robbery.

On February 12, 1992, Officer Litchford returned to appellant's apartment with a rifle scope. Appellant opened the door, Litchford handed the scope to him, and appellant took it. At that point, appellant and his girlfriend, Donna Bobb, were arrested, and appellant's apartment was searched pursuant to a warrant.

A person commits capital murder if, with the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person. Ark. Code Ann. § 5-10-101(a)(4) (Supp. 1991).

> A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense:
>
> (1) He agrees with another person or other persons:
>
> (A) That one (1) or more of them will engage in conduct that constitutes that offense; or
>
> (B) That he will aid in the planning or commission of that criminal offense; and
>
> (2) He or another person with whom he conspires does any overt act in pursuance of the conspiracy.

Ark. Code Ann. § 5-3-401 (1987). Under this section, the State was required to prove that there was an agreement by the parties to commit the crime and that one of the conspirators did at least a minimal act in furtherance of that agreement. *Lee* v. *State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989); *Guinn* v. *State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987). It is well settled that a conspiracy may be proved by circumstances and the inferences to be drawn from the course of conduct of the alleged conspirators. *Lee* v. *State, supra*; *Shamlin* v. *State*, 23 Ark. App. 39, 743 S.W.2d 1 (1988). Furthermore, it is not a defense to a prosecution for conspiracy that the person with whom the defendant conspires is immune to prosecution or has feigned agreement. Ark. Code Ann. § 5-3-103(b)(2) (1987); *Guinn* v. *State, supra.*

From our review of the record, we cannot conclude

that appellant's conviction for conspiracy to commit capital murder is not supported by substantial evidence. While the agreement between appellant and Officer Litchford may not have been expressly stated in so many words, the substance of their conversation and the inferences to be drawn therefrom were sufficient to demonstrate an agreement between them to kill and rob another person. The fact that Officer Litchford stated on cross-examination that he had no real intention of actually carrying out the murder provides appellant no defense. Ark. Code Ann. § 5-3-103(b)(2) and Commentary thereto; *Guinn* v. *State, supra.* And Officer Litchford's procurement of a rifle scope as requested by appellant and appellant's acceptance of it is sufficient proof of an overt act in furtherance of their agreement.

Appellant next contends that the trial court erred in denying his motion to suppress evidence obtained from his apartment during a search pursuant to a warrant. He contends that, because it mistakenly listed his apartment as "4A" instead of "4B," the warrant failed to describe his apartment with sufficient particularity. Under the circumstances of this case, we find no error.

The Fourth Amendment to the United States Constitution provides in pertinent part that no search warrants shall issue except those "particularly describing the place to be searched." Likewise, Rule 13.2 of the Arkansas Rules of Criminal Procedure provides that all warrants shall describe with particularity the location and designation of the places to be searched. The requirement of particularity is to avoid the risk of the wrong property being searched or seized. *Watson* v. *State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

> The test for determining the sufficiency of the description of the place to be searched is whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.

Pike v. *State*, 30 Ark. App. 107, 110, 783 S.W.2d 70, 72 (1990) (quoting *Lyons* v. *Robinson*, 783 F.2d 737 (8th Cir. 1985)). Search warrants should not be subjected to a hypercritical view in deter-

mining whether they meet constitutional requirements, and the sufficiency of the description to permit identification of the premises with certainty by appropriate effort and inquiry must be decided in light of the particular facts and circumstances of each case. *Perez* v. *State*, 249 Ark. 1111, 463 S.W.2d 394 (1971); *Pike* v. *State, supra.*

Here, appellant lived in a building made up of four apartments. The warrant incorrectly showed appellant's apartment as 4A when in fact he lived in apartment 4B. In all other respects, however, the warrant correctly described the place to be searched. It gave detailed directions as to how to get to the building, it correctly described the building, and it stated that the apartment to be searched was that of appellant, Joe Don Jones, and Donna Bobb. Moreover, Officer Litchford both applied for and participated in executing the warrant. He testified that the incorrect apartment number in the warrant was merely a typographical error. He clearly knew appellant and the particular apartment in which appellant lived. The same was true of several of the other police officers involved in executing the warrant, including one who actually lived in another apartment in the same building. Under these circumstances, we conclude that a mistaken search was unlikely and that the incorrect apartment number in the warrant was not a fatal defect. *See Lyons* v. *Robinson*, 783 F.2d 737 (8th Cir. 1985); *Pike* v. *State, supra.*

Appellant, a white male, next argues that the trial court erred in allowing the State to use a peremptory strike to excuse a black male from the jury. We cannot agree.

In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that the Equal Protection Clause forbids a prosecutor from using peremptory challenges to exclude potential jurors of the defendant's race solely on account of their race. In *Powers* v. *Ohio*, 499 U.S. 400 (1991), the Court held that a criminal defendant has standing to object to race-based peremptory challenges regardless of whether the defendant and the excluded jurors share the same race. The initial burden is on the defendant to establish a prima facie case of unconstitutional discrimination by showing facts and circumstances that give rise to an inference of discriminatory purpose in the exercise of peremptory challenges. If the defendant succeeds in making a

prima facie case, the burden shifts to the State to show that the challenges were not based upon race. If the defendant establishes a prima facie case *and* the State fails to give a satisfactory, racially neutral explanation for the exclusion, the court must then conduct a "sensitive inquiry" into the matter. *Franklin* v. *State*, 314 Ark. 329, 863 S.W.2d 268 (1993); *Hollamon* v. *State*, 312 Ark. 48, 846 S.W.2d 663 (1993). On appeal, we will not reverse a trial court's findings regarding the sufficiency of the prosecutor's explanation unless those findings are clearly against the preponderance of the evidence. *Colbert* v. *State*, 304 Ark. 250, 801 S.W.2d 643 (1990); *Kidd* v. *State*, 24 Ark. App. 55, 748 S.W.2d 38 (1988).

In this case, we cannot conclude that the trial court erred in denying appellant's *Batson* motion. Clearly, the burden was upon appellant to establish a prima facie case of purposeful discrimination. On appeal, the burden is on an appellant to bring up a record sufficient to demonstrate error. *Irvin* v. *State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989). The abstract is the record on appeal. *Id.* Here, the parties' abstracts show that the State moved to excuse potential juror Ernest Greenlee, a black man, by a peremptory strike. When appellant objected under *Batson*, one of the prosecuting attorneys stated that he had represented Mr. Greenlee in the past, that there had been "friction" between them at times during that relationship, and that on one occasion Mr. Greenlee had even become "accusatory" of the prosecuting attorney. The trial court ruled that, while the explanation would not support a strike for cause, it was racially neutral and sufficient to support a peremptory strike. Neither party's abstract shows whether there were other blacks in the jury pool, whether there was a pattern of strikes against blacks, whether any black jurors were seated, or that there was any racially-based questioning during voir dire. *See Wainwright* v. *State*, 302 Ark. 371, 790 S.W.2d 420 (1990); *Givens* v. *State*, 42 Ark. App. 173, 856 S.W.2d 33 (1993). Nor is there any indication of racial overtones associated with either the crime or the trial. *See Franklin* v. *State, supra.*

From our review of this record, we cannot conclude that appellant established a prima facie case. However, even assuming that he did, the State offered a racially neutral explanation for the strike of Mr. Greenlee, and we cannot conclude that the trial court clearly erred in finding that explanation sufficient.

Appellant next contends that the trial court erred in allowing the introduction of State's exhibits 3 and 4, a beer can with a hole in it and a sponge that had been inside the can. It was the State's position that appellant had experimented with using these items as a silencer for his rifle. Appellant contends that the exhibits were inadmissible because: (1) they were discovered as the result of a custodial statement given by appellant's girlfriend, Donna Bobb, after she was arrested without probable cause; (2) Ms. Bobb's statement telling the officers where to find the can and sponge was hearsay and not within any exception to the hearsay rule; and (3) without any evidence linking the two items to appellant, they were simply irrelevant.

The fact that Ms. Bobb's arrest may have been without probable cause, standing alone, would not serve to prohibit use of her custodial statement, or evidence discovered as a result thereof, against appellant. Fourth Amendment rights are personal, and appellant cannot vicariously assert the Fourth Amendment rights of Ms. Bobb. *Burkhardt* v. *State*, 301 Ark. 543, 785 S.W.2d 460 (1990); *Gass* v. *State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986).

We agree with appellant that a statement or a confession offered against the accused in a criminal case, made by a codefendant or other person implicating both herself and the accused, is not within the "statement against interest" exception to the hearsay rule. Ark. R. Evid. 804(b)(3). However, appellant's argument based on that rule is unavailing. The trial court excluded any evidence of Ms. Bobb's statement implicating appellant. The witness through whom the exhibits were introduced stated only that Ms. Bobb described the items and showed the police where the items could be found. No "statement" by Ms. Bobb was offered by the State to prove "the truth of the matter asserted therein." Therefore, there was no violation of the hearsay rule. *See* Ark. R. Evid. 801(c).

We do not address appellant's argument that the exhibits were irrelevant. Appellant first objected to introduction of the exhibits prior to trial. He made the two arguments discussed immediately above and also argued that, without Ms. Bobb's statement to link the items to appellant, the exhibits would be irrelevant. The court reserved ruling on the relevancy objection at that

time and instructed him to make his objection "as it comes up." When the evidence was subsequently referred to and offered for admission, appellant restated his first two arguments. However, the abstract fails to disclose that appellant either restated or obtained a ruling on his relevancy objection. Under the circumstances, we conclude that appellant has failed to preserve the issue for appeal. *See Vickers* v. *State*, 313 Ark. 64, 852 S.W.2d 787 (1993); *Walker* v. *State*, 301 Ark. 218, 783 S.W.2d 44 (1990).

Appellant also argues that the trial court erred in allowing two employees of the Arkansas State Crime Laboratory to testify about the beer can and the sponge. Lisa Sakevicius, a criminalist, testified that the beer can contained pieces of sponge and that a gun had been fired through the can and sponge at contact range. Berwin Monroe, a firearms expert, testified as to his experience with silencers and explained how the can and sponge could be used as a silencer to lessen the sound of a gunshot. Appellant argues that, because it was error to allow the can and sponge to be introduced, "it follows that it was also error to allow expert testimony regarding those objects." We find no error.

First, we find no objection by appellant to the testimony of either Ms. Sakevicius or Mr. Monroe, and we need not address his argument. During Monroe's testimony, appellant did state his understanding of the court's prior ruling regarding introduction of the exhibits, and the court corrected appellant's misunderstanding by restating its prior ruling. However, such a comment or statement by appellant did not constitute an objection to the testimony. *See Boone* v. *State*, 282 Ark. 274, 668 S.W.2d 17 (1984).

Nevertheless, there is no merit in appellant's contention. All but one of appellant's arguments on this point were decided adversely to him in our discussion regarding the issue of introduction of the exhibits. We need not repeat that discussion here. The one additional argument made under this point is that the probative value of the testimony was substantially outweighed by the possibility of prejudice. *See* Ark. R. Evid. 403. However, that argument was not made below and will not be addressed on appeal. *Segerstrom* v. *State*, 301 Ark. 314, 783

S.W.2d 847 (1990); *Skiver* v. *State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992).

Appellant finally contends that the trial court erred in denying his two motions for mistrial made during the testimony of DeQueen Police Chief Jim Smith. In explaining how the police came into possession of the beer can, sponge, and a plastic Diet Coke bottle, Chief Smith stated that Ms. Bobb "told us where they were" and "showed us where to find them." Appellant's motion for mistrial, alleging violation of the court's order prohibiting proof of Ms. Bobb's statements implicating appellant, was denied. Chief Smith later testified, "The investigation early on had revealed that [appellant] experimented with manufactured silencers." Appellant again moved for a mistrial, contending that Chief Smith's "investigation" in this sense could only have referred to Ms. Bobb's excluded statements. Again, appellant's motion was denied.

A mistrial is a drastic remedy and should be granted only upon the occurrence of an error so prejudicial that justice cannot be served by continuing the trial. *Pickens* v. *State*, 301 Ark. 244, 783 S.W.2d 341 (1990). The trial court is in a superior position to determine the possibility of prejudice, and its decision will not be reversed in the absence of a manifest abuse of discretion. *Haynes* v. *State*, 311 Ark. 651, 846 S.W.2d 179 (1993).

Clearly, there was no error in denying appellant's first motion. As we have already said, appellant cannot vicariously assert Ms. Bobb's Fourth Amendment rights, proof that Ms. Bobb told and showed the police where to find the items includes no hearsay, and Chief Smith's statement was not violative of the court's earlier order. In response to appellant's second motion, the prosecutor stated that the source for the testimony about appellant's experimentation was the audio tape of Officer Litchford's conversation with appellant. That tape, made before Ms. Bobb's statement and before discovery of the alleged silencers, included appellant expressing his concern over the noise that a gunshot would cause, followed by Officer Litchford's question to appellant, "Well, what about what you were talking about with the cans?" From our review, we cannot conclude that Chief Smith's testimony was referring to Ms. Bobb's state-

ment. However, even if the testimony should not have been admitted, we cannot conclude that the trial court abused its discretion in finding that this isolated statement did not warrant the drastic remedy of a mistrial.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

ARKANSAS STATE POLICE *v.* Edward DAVIS

CA 93-355 870 S.W.2d 408

Court of Appeals of Arkansas
Division II
Opinion delivered February 23, 1994
[Supplemental Opinion on Denial of Rehearing
July 6, 1994.*]

*Mayfield, J., dissents.

Frank GoBell, of the Public Employee Claims Division, for appellants.

Compton, Prewett, Thomas, & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the administrative law judge's opinion. The ALJ found that appellee was entitled to recover temporary total disability benefits from January 20, 1991, the day after he last received his regular salary, through January 12, 1992. On appeal, appellants contend that there is no substantial evidence to support the Commission's decision. Appellee cross-appeals arguing that there is no substantial evidence to support the Commission's finding that he was not a lent employee of the Drug Task Force (DTF) or El Dorado Police Department. We reverse with respect to the issue on direct appeal, and affirm the issue on cross-appeal.

Appellee, Edward Davis, is a police officer with the Arkansas State Police. He was working in the narcotics division prior to the time of his injury. Part of appellant's duties as an Arkansas State Police officer included assisting the DTF in the control of illegal drug activities in the thirteenth judicial district. On July 30, 1990, appellee was placed on suspension with pay and a written notice of suspension was provided to appellee specifically instructing him not to engage in any enforcement action during the suspension period. On or about December 10th through the 13th, 1990, during his suspension period, appellee received information from one of his informants that a drug shipment was arriving in El Dorado. Appellee relayed this information to the DTF. On the day the drug shipment was expected to arrive, appellee contacted the DTF. Appellee was requested by the DTF to go with them to the suspected house. During the service of the warrant, appellee was shot in the chest. Compensation for appellee's ensuing injuries was controverted by the appellants. The Commission awarded benefits.

Appellants contend that appellee was not acting in the course and scope of his employment when he was injured because he was performing enforcement actions which were prohibited under his rules of suspension. Appellants argue that appellee was voluntarily providing assistance to the DTF and El Dorado Police Department outside his duties as an officer of the Arkansas State Police. The Commission found that the actions taken by appellee

advanced the interest of his employer even though the conduct took place during a prohibited time. The Commission thus reasoned that appellee was acting within the course and scope of his employment with the Arkansas State Police when the injury occurred.

When reviewing the sufficiency of the evidence to support a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if the Commission's decision is supported by substantial evidence. *Wright* v. *ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. *Willmon* v. *Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992). These rules insulate the Commission from judicial review and properly so, as it is a specialist in this area and we are not. But a total insulation would obviously render our function in these cases meaningless. *Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987).

Section 31.00 of 1A A. Larson, *The Law of Workmen's Compensation* (1993) provides that "[w]hen the misconduct involves a prohibited overstepping of the boundaries defining the ultimate work to be done by the claimant, the prohibited act is outside the course of employment." Likewise, § 31.14(a) provides that:

> It has already been observed that the modern tendency is to bring within the course of employment services outside regular duties performed in good faith to advance the employer's interests, even if this involves doing an unrelated job falling within the province of a coemployee. This, of course, assumes that no prohibition is thereby infringed. But if the unrelated job is positively forbidden, all connection with the course of the claimant's own employment disappears, for he has stepped outside the boundaries defining, not his method of working, but the ultimate work for which he is employed.

Larson's discusses the case of *Fowler* v. *Baalmann*, 361 Mo. 204, 234 S.W.2d 11 (1950), which applies the principles above. We find the case of *Fowler* illustrative. In that case, the decedent, James Fowler, a flight instructor for Baalmann, Inc., was forbidden to fly on a particular night of bad weather by his superior and was aware that the flight had been canceled. However, the decedent proceeded with the flight which resulted in his death. In denying benefits the Missouri Supreme Court observed:

> Mere disobedience of an order as to the detail of the work in hand or the mere breach of a rule as to the manner of performing the work are not generally sufficient to deprive an employee of his right to compensation so long as he does not go out of the sphere of his employment. But compensation cannot be allowed when the employee goes outside of the sphere and scope of his employment and is injured in connection with an activity he has been expressly forbidden to undertake.
>
> . . .
>
> An employer has the unqualified right to limit the scope of a servant's employment and activity and to determine what an employee shall or shall not do. The employer likewise has the unqualified right to determine when an employee shall do a certain thing. The prohibition which the employer laid down in this case (the direct order expressly canceling the flight) goes deeper into the relationship of the parties than any mere rule, for it severed utterly and terminated completely the employer-employee relationship for the day.

In this case, the record reveals that appellee was placed on suspension and was specifically prohibited from engaging in enforcement action. However, appellee provided the DTF information related to a drug bust and participated in the execution of the search warrant. Appellee testified that during his suspension he maintained contact with his informants and forwarded that information to the DTF. Appellee also admitted that he wrote out the search warrant used in the drug bust and that he accompanied officers to the house.

Mike Hall, sergeant for the Arkansas State Police, testified that maintaining contact and keeping one's network of informants active, are law enforcement activities. He also stated that he would have reprimanded appellee had he known that appellee was engaged in this type of activity during the suspension period.

The record clearly reflects that appellee was prohibited from performing his duties as an officer because of the suspension. Under these circumstances, appellee was engaged in a prohibited act not only forbidden by his written suspension but unknown to and unaccepted by Mike Hall, his superior. Consequently, appellee was outside the scope and course of his employment when he was injured. Therefore, we do not think fair-minded persons with the same facts before them could have reached the same conclusion as the Commission.

On cross-appeal, appellee contends that there is no substantial evidence to support the Commission's finding that he was not a lent employee of the DTF and the El Dorado Police Department.

In the case of *Howe Lbr. Co.* v. *Parnell*, 243 Ark. 686, 421 S.W.2d 621 (1967), the supreme court stated:

> When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if
>
> > (a) The employee has made a contract of hire, express or implied, with the special employer;
> >
> > (b) The work being done is essentially that of the special employer; and
> >
> > (c) The special employer has the right to control the details of the work.

The record reveals that the Arkansas State Police did not lend appellee to the DTF during his suspension nor had any knowledge that appellee was assisting the DTF during his suspension. Sergeant Hall testified that he was unaware that appellee was engaged in the activities he was performing during his suspension. Again, Sergeant Hall stated that he would have reprimanded the appellee if he had known. In fact, the record reveals that

appellee was reprimanded for his participation in the drug raid in violation of his written rules of suspension. Jerry Bradshaw, a lieutenant with the Arkansas State Police, testified that during all times appellee was subject to the control of the State Police.

Appellee argues however that a contract of hire was formed when Officer Robert Gorum requested appellee's assistance on the night of the drug raid because chiefs of police have the authority to draft citizens into service under Ark. Code Ann. § 14-52-202(c) (Supp. 1993).

It is apparent from the record that Officer Gorum was not a chief of police during the time appellee was requested to participate in the execution of the search warrant. It was established during Officer Gorum's testimony that, at the time of the raid, he was not a chief of police, but a close personal friend of appellee. Therefore, appellee's reliance on Ark. Code Ann. § 14-52-202(c) is misplaced.

The record further reveals that the parties stipulated that appellee was an employee of the Arkansas State Police at the time of his injury. The record also reflects that appellee was not receiving a salary from the DTF or the El Dorado Police Department and he only provided assistance to the DTF if he was available to do so. Also, appellee testified that *he* contacted the DTF to provide them with information from his informant. Appellee also testified that he was not under direct control of anyone on the DTF or the El Dorado Police Department.

Based on this evidence, the Commission determined that appellee was not a lent employee. The Commission found that there was not a contract of hire and that appellee was at all relevant times solely the employee of the Arkansas State Police. After reviewing the record, we cannot say there is no substantial evidence to support the Commission's decision.

Reversed on appeal; affirmed on cross-appeal.

PITTMAN and ROBBINS, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
JULY 6, 1994

879 S.W.2d 473

Frank Gobel, for appellant.

Floyd Thomas and *Chris Bradley*, for appellee.

PER CURIAM. Petition for rehearing is denied.

MELVIN MAYFIELD, Judge, dissenting. I would grant the appellee's motion for rehearing. This is an appeal from the Workers' Compensation Commission in which this court reversed the Commission's award holding that appellee, an officer with the Arkansas State Police, was entitled to benefits because of an injury received while assisting other law enforcement officers serve a search warrant.

This court reversed the Commission's decision, *see Arkansas State Police* v. *Davis*, 45 Ark. App. 40, 870 S.W.2d 408 (1994), on the basis that appellee, who was on temporary administrative suspension at that time, was outside the scope and course of his employment.

The Commission, however, affirmed and adopted the administrative law judge's decision which held:

> The question to be determined is not whether Davis was engaged in an activity prohibited by his employer at the time of his injury. The question is whether or not the employee's conduct was of a nature that advanced the general interests of his employer even though it may have taken place during a prohibited time period. *See* 1A *Larson Workers' Compensation*, Section 31.24. I find that Davis' actions in maintaining his confidential sources and passing that information on to the proper authorities and, at the request of those authorities, accompanying them for the service of the search warrant, and his attempts to aid his fellow officers when shots were fired did advance the interests of the Arkansas State Police in enforcing drug laws. As was admitted by the Arkansas State Police, but for the suspension with pay, Davis' actions were exactly

> those he would have been required to do in carrying out his regular job duties.

The evidence, in my opinion, clearly supports the law judge's decision, and his opinion was adopted by the Commission. The law judge's opinion relies on section 31.24 of Larson's publication on workers' compensation law. This court's opinion takes the view taken by the case of *Fowler* v. *Baalmann*, 361 Mo. 204, 234 S.W.2d 11 (1950), cited by Larson. However, Larson does not indicate that he agrees with the *Fowler* decision, and he states:

> With this case may be compared a Texas case in which an instructor-pilot was killed while giving a student-flyer a lesson a day after his employer had ordered him to return the plane to its homefield. It was held that his death was nevertheless in the course of his employment. The court said:
>
> > If it were a part of Boggs' business as employee to give flying lessons, then the fact that he disobeyed instructions to return the plane at the time he was directed to do so did not remove him from the course of his employment.

1A Larson, *Workmen's Compensation Law*, § 31.24 at 6-34 (1993).

The evidence in this case shows that, although the appellee was on suspension at the time he was injured, his confidential informants continued to give him information, which he passed on to other officers working on the Drug Task Force, and that an informant said it would be necessary for appellant to be at the house to be searched in order for the officers to discover where the drugs were hidden. While at this house, during the time the officers were attempting to execute the search warrant, the appellee was hit by a shot fired through the door by someone in the house.

Under these circumstances, the Commission found that the *act* of helping his fellow officers was not prohibited; it was only the *time* at which the act was done. This was an issue of fact and the Commission's finding is supported by substantial evidence.

I would grant rehearing.

COOPER, J., joins.

Winston BRYANT, Attorney General *v.*
ARKANSAS PUBLIC SERVICE COMMISSION

CA 93-210 870 S.W.2d 775

Court of Appeals of Arkansas
Opinion delivered February 23, 1994

Winston Bryant, Att'y Gen., by: *Suzanne Autley*, Asst. Att'y Gen., for appellant.

George Vena, for appellee PSC.

Gary Wann, for appellee Southwestern Bell.

PER CURIAM. The Arkansas Public Service Commission (Commission) and Southwestern Bell Telephone Company (Southwestern Bell) filed a joint motion with this court to dismiss the Attorney General's appeal of Order No. 4 of the Arkansas Public Service Commission. In Order No. 4, the Commission held that it was in the public interest to allow Southwestern Bell to offer Caller-ID service in the Arkadelphia and West Memphis

areas for a one-year trial period. The Commission also ordered Southwestern Bell to take affirmative action prior to the expiration of the trial period to either continue or discontinue the Caller-ID service. The Attorney General appealed from this order, contending the Commission's establishment of a one-year trial period for Caller-ID service was not supported by substantial evidence. Subsequent to the filing of the Attorney General's appeal, the Commission by an order in another docket approved permanent Caller-ID service, and the one-year trial period expired. As a result of these occurrences, the Commission and Southwestern Bell have moved to dismiss the Attorney General's appeal of Order No. 4, contending that his appeal is now moot. We agree.

The only action the Commission took in Order No. 4 was to establish a one-year trial period for Caller-ID service. That trial period has now expired, and therefore, any rulings this Court might make in regard to Order No. 4 would have no effect. It is the duty of the court to decide actual controversies by a judgment which can be carried into effect and not give opinions upon abstract propositions or declare principles of law which cannot affect the matter in issue. *Netherton* v. *Baldor Electric Co.*, 232 Ark. 940, 942, 341 S.W.2d 57 (1960). An issue is moot when it has no legal effect on an existing controversy; *Killam* v. *Texas Oil and Gas Corp.*, 303 Ark. 547, 556-57, 798 S.W.2d 419 (1990); it is one in which a decision of the court on appeal could not afford the appellant any relief. *Dotson* v. *Ritchie*, 211 Ark. 789, 795, 202 S.W.2d 603 (1947).

We also note that, in earlier pleadings filed in this appeal, the Attorney General stated that his appeal would be moot at the end of the trial period. A party litigant is bound by his own pleadings and cannot maintain a position inconsistent therewith. *International Harvester Co.* v. *Burks Motor, Inc.*, 252 Ark. 816, 821, 481 S.W.2d 351 (1972).

Accordingly, the joint motion of the Commission and Southwestern Bell is granted, and the appeal of the Attorney General is dismissed.

Jack E. HARDISON and Gloria D. Hardison *v.*
Michael JACKSON and Cathy Jackson

CA 93-382 871 S.W.2d 410

Court of Appeals of Arkansas
Division II
Opinion delivered March 2, 1994

Jeff Duty, for appellants.

Matthews, Campbell & Rhoads, P.A., by: *George R. Rhoads* and *Richard J. Stocker*, for appellees.

JOHN MAUZY PITTMAN, Judge. Appellees, Michael and Cathy Jackson, sued appellants for $1,200.00, which they alleged was due them on their contract to paint appellants' house. The trial court awarded appellees judgment for this amount together with $1,500.00 in attorney's fees after finding appellants had not proved their defense of accord and satisfaction. On appeal, appellants claim that the trial court erred in not holding that appellees' acceptance of appellants' check of $460.50 operated as an accord and satisfaction of their claim against appellants. They also argue that the court erred in awarding attorney's fees. Appellees con-

tend on cross-appeal that the attorney's fees awarded them were unreasonably low. We agree with appellants and therefore reverse on appeal. Because the issue raised by appellees then becomes moot, we dismiss the cross-appeal.

On September 30, 1991, appellees submitted an oral bid of $2,450.00 to paint the inside of appellants' house. The bid was accepted by appellants, and they advanced appellees $750.00 of their fee. After appellees began painting the house, a dispute arose as to whether certain work was included within the parties' agreement and when the work was to be completed. Appellants contend they were forced to cancel an open house because the work was not completed by an October 12 deadline. Appellees argue, however, that the painting was completed by October 6. There was also a dispute regarding the quality of appellees' work and the amount of work that was included in the agreement.

On October 19, appellee Mike Jackson attended the auction of appellants' house in order to be paid the remainder of appellees' fee. Appellants' real estate agent, Larry Boling, met with Jackson and advised him that appellants refused to pay him any more money but later returned and told him that appellants had agreed to pay him $500.00. After some discussion, Jackson agreed to take appellants' check for $460.50.[1] Jackson was then given a check on which was written "Pd. in full for painting." Several days later, Jackson scratched out the "Pd. in full" notation and inserted the words "Mike Jackson payment not made in full" and cashed it.

Appellees later filed suit for the $1,200.00 balance they alleged was due them under the parties' oral agreement. Appellants defended that appellees' acceptance of their $460.50 check operated as an accord and satisfaction of their claim. After a trial on the merits, the chancellor held that appellants had not proved their defense of accord and satisfaction and awarded appellees judgment of $1,200.00 and attorney's fees of $1,500.00.

On appeal, appellants claim appellees' acceptance of their check bearing the notation "Pd. in full for painting" is an accord

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[1]Although the parties agreed to a payment of $500.00, the check was written for $460.50 because certain items Jackson purchased at the auction were deducted from it.

and satisfaction of appellees' claim. Appellees cross-appeal that the trial court erred in not awarding them the entire $5,050.00 they claimed in attorney's fees.

An accord and satisfaction generally involves a settlement in which one party agrees to pay and the other to receive a different consideration or a sum less than the amount to which the latter is or considers himself entitled. *Dyke Indus., Inc.* v. *Waldrop*, 16 Ark. App. 125, 697 S.W.2d 936 (1985). There must be a disputed amount involved and a consent to accept less than the amount in settlement of the whole before acceptance of the lesser amount can be an accord and satisfaction, *id.; Mademoiselle Fashions, Inc.* v. *Buccaneer Sportswear, Inc.*, 11 Ark. App. 158, 668 S.W.2d 45 (1984); and, while it is not necessary that the dispute or controversy be well founded, it is necessary that it be made in good faith. *Widmer* v. *Gibble Oil Co.*, 243 Ark. 735, 421 S.W.2d 886 (1967).

Generally, acceptance by a creditor of a check offered by the debtor in full payment of a disputed claim is an accord and satisfaction of the claim. *Dyke Indus., Inc.* v. *Waldrop, supra.* A payee is estopped to deny an account has been paid in full where, after a dispute as to the amount due, a payee accepts and cashes a check that recites it is in settlement of the account. *See Market Produce Co.* v. *Holland*, 183 Ark. 711, 38 S.W.2d 317 (1931), where the supreme court stated:

> "It is true that, in order to constitute an accord and satisfaction, it is necessary that the offer of the payment should be made by one party in full satisfaction of the demand, and should be accepted as such by the other. But when the claim is disputed and unliquidated, and a less amount than is demanded is offered in full payment, the question as to whether the creditor in such case does so agree to accept the amount offered in full satisfaction of his demand is a mixed question of law and fact. If the offer or tender is accompanied by declarations and acts so as to amount to a condition that, if the creditor accepts the amount offered, it must be in satisfaction of his demand, and the creditor understands therefrom that, if he takes it subject to that condition, then an acceptance by the creditor will estop him from denying that he has agreed to accept the amount

> in full payment of his demand. His action in accepting the tender under such conditions will speak, and his words of protest only will not avail him."

Id. at 713-14, 38 S.W.2d at 318 (quoting *Barham* v. *Bank of Delight*, 94 Ark. 158, 162, 126 S.W. 394, 395 (1910)).

Pillow v. *Thermogas Co. of Walnut Ridge*, 6 Ark. App. 402, 644 S.W.2d 292 (1982), is similar to the case at bar. There, the appellee accepted a check and scratched through the notation on the check "acc in full" and wrote "check not accepted in full payment of account" and signed and cashed it. The trial judge held the appellee was entitled to judgment for the difference between the full amount he claimed and the amount paid by the check from the appellants. On appeal, this court reversed, holding that the appellee's unilateral alteration of the check was of no legal consequence and that he had the option of accepting the check as tendered or of returning it. We stated:

> [W]e hold that the acceptance by a creditor of a check offered by the debtor in full payment of a disputed claim is an accord and satisfaction of the claim. A unilateral action by the creditor in protest or an attempted reservation of rights by the alteration of a check offered as payment in full is of no legal consequence.

Id. at 404-05, 644 S.W.2d at 294.

In 1991, these general rules concerning accord and satisfaction by use of an instrument were codified at Ark. Code Ann. § 4-3-311 (Repl. 1991), which provides in part:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
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> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the

effect that the instrument was tendered as full satisfaction of the claim.

In the case at bar, the chancellor found that "this dispute raised by the [appellants] was raised by [appellants] after the contract amount was due and owing," and used this finding as the basis for holding that appellants had not proved their defense of accord and satisfaction. We cannot agree that this finding is supported by the evidence. Furthermore, it is not conclusive of whether appellants proved their defense of accord and satisfaction. It is the circumstances that exist when the payment for the lesser amount is received that determine whether an accord and satisfaction has been reached. Here, it is uncontested that a dispute existed between the parties at the time appellees accepted and obtained payment of appellants' check. Both parties admitted that there was some disagreement as to what work was supposed to be performed under the contract and the time frame in which it was to be completed. Appellee Mike Jackson admitted there was some controversy as to whether appellees were supposed to paint the vents and the inside of the kitchen cabinets and that appellees were unable to finish painting the garage because there was large machinery preventing them from getting to all the walls. He also stated that, on the day he came back to wash appellants' house prior to the auction, appellant Hardison told him to leave, that the work should have been already completed, and that appellees were not getting paid.

Appellant Jack Hardison testified that appellees were supposed to paint the insides of the cabinets, that the paint job was shoddy, and that appellees left paint on the wall plugs, the stained wood, the window sills, the glass, the ceilings, the floors, and the carpet. He stated that the job was to be completed by October 12 but their equipment was still there on that date. He stated the next time he saw Jackson, on the 17th or 18th when Jackson came out to spray down the house, he told him that the house had already been sprayed and there was nothing further for appellees to do.

In reference to the $460.50 check appellants gave appellees, Hardison testified that, on the day of the auction, Jackson came to the auction and sent Larry Boling over to appellants for his money. He stated that he told Boling that Jackson had been over-

paid with the $750.00 as far as he was concerned but that Boling convinced him to pay Jackson $500.00 more. He stated he gave Boling a check on which his wife had written "Pd. in full for painting" to give Jackson.

Larry Boling testified that it was explained to appellees that the house needed to be ready for the open house, that he had trouble getting Jackson to start work, that Jackson knew Mr. Hardison was not happy with the work, and that Jackson and Hardison argued every time they were together. He stated that, when Jackson came to the auction, he told him the Hardisons were not willing to pay him the full amount but he could get him $500.00 and that Jackson replied to go ahead and give him his money and he would go. He stated that Jackson did not say anything about going to court when he accepted the $460.50 check.

Jackson testified that he returned on the day of the auction and Larry Boling told him that appellants were displeased with the work, that they had an offer they would make him, and that was all they were going to pay. He stated that he told Boling that he had given appellants plenty of time to let him know if there was a problem and Boling then went to talk to appellants. He stated that Boling then returned and told him that appellants would pay him $500.00 but that was all they would pay, and that it was "either take it or leave it." Jackson testified he told Boling to tell appellants to give him the $500.00 and that Mrs. Hardison then gave him a check on which she had written "Pd. in full for painting." He stated he told Mrs. Hardison and Boling that it was not over and he was going to get the rest of his money.

On appeal, chancery cases are tried *de novo* on the record. Nevertheless, we will not reverse the findings of the chancellor unless they are clearly erroneous or clearly against the preponderance of the evidence. *Summers* v. *Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.; see also McGarrah* v. *Southwestern Glass Co.*, 41 Ark. App. 215, 852 S.W.2d 328 (1993).

Here, the uncontroverted evidence plainly shows that appellants disputed the amount they owed appellees when appellee

accepted appellants' check. We therefore conclude that appellants proved their defense of accord and satisfaction and the chancellor's award of damages and attorney's fees in favor of appellees is clearly erroneous.

The judgment for damages and attorney's fees in favor of appellees is reversed and dismissed. Because appellees' cross-appeal for additional attorney's fees is predicated on their having prevailed on their contract claim against appellants, *see* Ark. Code Ann. § 16-22-308 (Supp. 1991), and we have reversed that judgment, appellees' cross-appeal is rendered moot.

Reversed on appeal; dismissed on cross-appeal.

ROBBINS and ROGERS, JJ., agree.

Winston BRYANT, Attorney General *v.*
ARKANSAS PUBLIC SERVICE COMMISSION

CA 93-211 871 S.W.2d 414

Court of Appeals of Arkansas
En Banc
Opinion delivered March 2, 1994

Winston Bryant, Att'y Gen., by: *Shirley E. Guntharp*, Deputy Att'y Gen., for appellant.

Lee McCulloch, for appellee.

JOHN B. ROBBINS, Judge. The Attorney General (AG) appeals a decision of the Arkansas Public Service Commission (Commission), in which the Commission refused to render a finding on the AG's motion to disclose documents that the Commission had placed under seal by protective order. The AG contends that the Commission failed to make a specific factual determination that the documents were not subject to disclosure as required by Ark. Code Ann. § 23-2-316 (1987) and § 23-2-421(a) (1987). We agree and therefore reverse and remand.

Arkansas Power and Light Company (AP&L) and St. Vincent Infirmary Medical Center (St. Vincent) entered into an incentive rate agreement whereby AP&L offered St. Vincent a special rate in return for St. Vincent's agreement to continue to purchase its energy needs from AP&L rather than obtain it from co-generation. The agreement required the approval of the Commission, and in July 1992, AP&L filed an application with the Commission requesting that it approve the incentive rate contract. In

connection with this proceeding, AP&L filed a motion for a protective order of disclosure pertaining to certain exhibits and workpapers provided by St. Vincent. AP&L claimed that these documents were confidential and disclosure of them could harm St. Vincent and requested that disclosure of the confidential information be limited to persons working directly on this Docket. The Commission's staff (Staff) responded to AP&L's motion, stating that it did not object to entry of the protective order but reserving the right to contest it at a future date. The Commission then entered Order No. 1, which granted AP&L's motion for a protective order. Order No. 1 provided:

> On July 13, 1992, Arkansas Power & Light Company (AP&L or Company) and St. Vincent Infirmary Medical Center (St. Vincent) filed in this Docket its Motion For Protective Order Of Non-Disclosure (Motion) pursuant to Ark. Code Ann. Section 23-2-316 and 13.05 of the Commission Rules of Practice and Procedure, requesting that the Commission enter a Protective Order prohibiting any disclosure to the general public . . . . In their Motion, AP&L and St. Vincent's state that the exhibits and workpapers contain proprietary, confidential, and sensitive information that has not been previously disclosed by St. Vincent and has been maintained as confidential by AP&L pursuant to contractual commitment and that the release of this material would damage St. Vincent's competitive position by providing unfair advantage to its competitors. In addition, AP&L and St. Vincent's allege that the public disclosure of the information contained in the exhibits and workpapers may cause security concerns or problems because it contains certain physical descriptions and locations of equipment which is critical to the daily operation of a hospital and to which access is controlled.
>
> On July 21, 1992, Staff filed its Staff Response To Motion For Protective Order of Non-Disclosure (Staff Response). Staff stated that it will not be able to review the exhibits and workpapers absent a Protective Order. Staff stated that based upon the representation that the information is proprietary, Staff does not object to the Commission entering a Protective Order for the exhibits and workpapers if Staff is reserved the right to contest at a

future date, upon reasonable notice, AP&L's and St. Vincent's entitlement to a Protective Order for all or portions of the information.

Having considered the matter, it is the finding of the Commission that the Motion For Protective Order For Non-Disclosure filed by Arkansas Power & Light Company and St. Vincent Infirmary Medical Center on July 13, 1992, should be granted subject to the reservation of the right to contest Arkansas Power & Light Company's entitlement to such Protective Order at a later date by Staff.

Subsequent to the entry of Order No. 1, the AG notified the Commission of its intent to participate in the Commission Docket pursuant to Act 39 of 1981. By motion, the AG argued that AP&L and St. Vincent had offered no compelling reasons for shielding the information and that it is in the public interest to make available for public scrutiny the documents from which the public's rates may be set. The AG requested clarification of Commission Order No. 1 and disclosure of the protected information. The Commission then entered Order No. 6, directing all parties who wished to respond to the AG's motion to do so by a certain date and scheduling a hearing on the motion. Arkansas Electric Energy Consumers (AEEC) and Arkansas Gas Consumers (AGC) responded that almost all the information the AG sought had already been disclosed and that the remainder of the information should be kept confidential. AP&L and Staff also responded that the AG's motion should be denied.

At a hearing held on the AG's motion for disclosure, John Talpas, vice president of manufacturing for Great Lakes Chemical Corporation; Neal Jansonius, of AP&L; and Larry Whitt, senior vice president of engineering for St. Vincent's Infirmary, testified as to the necessity of maintaining the protective order. Talpas testified regarding a similar protective order, which had been entered when AP&L and Great Lakes Chemical Corporation sought the Commission's approval of an incentive rate contract. He stated that disclosure to the public of Great Lakes' protected information would have given its competitors valuable insights into Great Lakes' operations and methodology, which would have placed Great Lakes at a distinct disadvantage in competitive bidding. He also testified that he would not have pro-

vided sufficient information to AP&L to allow it to make a co-generation deferral offer if he had known Great Lakes' protected information could be disclosed.

Neal Jansonius testified that the AP&L tariffs are on file with the Commission; that the rate St. Vincent will be assessed under the proposed contract has also been filed as part of the public record; but that AP&L has always kept confidential the electricity usage of its individual customers. He testified that the purpose of its rate agreement with St. Vincent was to retain St. Vincent as a full requirement customer and that AP&L would lose $1,500,000.00 in revenue if St. Vincent begins co-generation. He also testified that AP&L would lose its ability to negotiate co-generation deferral contracts with its customers in the future if the AG's motion for disclosure is granted.

Larry Whitt testified that St. Vincent had decided to co-generate its own electrical needs until AP&L offered to enter into the present contract. He stated that, in order for AP&L to offer the special rate, it was necessary for St. Vincent to give AP&L considerable confidential information which he refused to do until AP&L advised him the Commission had authority to issue a protective order. He testified that St. Vincent's co-generation study, which the AG wants disclosed to the public, was developed at considerable cost and that energy usage is very detailed in the study. He stated that the data contained in the study could be manipulated to ascertain the costs of certain factors used in delivering a day of patient care and releasing this information would allow all entities competing with St. Vincent to have information not otherwise available to them. This would clearly put St. Vincent's competitors in a better pricing position than they are now. He further stated that he would have broken off negotiations with AP&L if he had been aware that this information could be disclosed to the public.

Staff agreed with AP&L and St. Vincent that the AG's motion for disclosure should be denied. Staff counsel Lee McCulloch testified regarding the concerns Staff would have if companies such as St. Vincent are forced to make public information the companies believe they are entitled to keep confidential. He testified that the loss of St. Vincent from the AP&L system would have an immediate and large impact on current AP&L customers

and that this possibility causes Staff grave concern for AP&L ratepayers. He stated that Staff's position is that the Commission should continue to proceed as it has in the past rather than put a chill factor in the mind of certain industries when they look at Arkansas as a place to provide jobs and make their products.

The only testimony the AG offered in support of its motion was that of John Watkins, a professor of law for the University of Arkansas. He testified that, in his opinion, a competitor could not use St. Vincent's current electrical usage to determine St. Vincent's costs of delivering a patient a day of care, and the fact that the Commission's decision in this proceeding may affect electric rates of other AP&L customers plainly points out the public's interest in disclosure.

On December 23, 1992, after finding the agreement to be in the public interest, the Commission entered Order No. 7, which approved the agreement between AP&L and St. Vincent, but made no finding on the AG's motion to lift the protective order. The AG petitioned the Commission for rehearing of Order No. 7 to obtain a ruling on his motion, but the petition was deemed denied after thirty days. The AG then filed his notice of appeal.

On appeal, the AG does not contest the Commission's approval of the incentive rate agreement between AP&L and St. Vincent but appeals the Commission's refusal to lift its protective order. He contends that the Commission erred in entering the protective order because it failed to make specific findings that the documents are nondisclosable based upon the information in the record and further because the entry of the protective order is not supported by substantial evidence. He argues that, under sections 23-2-421(a) and 23-2-316 and Commission Practice & Procedure Rule 13.05(b), it was necessary for the Commission to find either that it was in the public interest or necessary to protect proprietary facts or trade secrets of the utility in order to seal the documents. Because no such finding was made by the Commission, the AG asserts the issue must be remanded for such a determination.

Arkansas Code Annotated § 23-2-316 concerns records of the Commission and provides:

> (a) All facts and information, including all reports,

records, files, books, accounts, papers, and memoranda in the possession of the commission, shall be public and open to public inspection at all reasonable times.

(b)(1) Whenever the commission determines it to be necessary in the interest of the public or, as to proprietary facts or trade secrets, in the interest of the utility to withhold such facts and information from the public, the commission shall do so.

(2) The commission may take such action in the nature of, but not limited to, issuing protective orders, temporarily or permanently sealing records, or making other appropriate orders to prevent or otherwise limit public disclosure of facts and information.

Commission Rule 13.05(b) provides the procedure for entering a protective order:

> A party seeking a protective order (movant) shall bear the burden of establishing by a preponderance of the evidence that disclosure of the information would have one or more of the following consequences:
>
> (1) The movant could suffer material damage to its competitive or financial position;
>
> (2) A trade secret of the movant would be revealed;
>
> (3) The public interest would be impaired by release of the information;
>
> (4) The information has no relevance to deciding the issues in the case at hand.

Section 23-2-421 concerns findings and orders of the Commission, and subsection (a) of this section requires that the Commission's decision be in sufficient detail to enable any court in which any action of the Commission is involved to determine the controverted question presented by the proceeding.

■ We agree with the AG that the Commission failed to make any factual determination in support of its issuance of a

protective order as required by § 23-2-421(a). In Order No. 1, establishing the protective order, the Commission merely recited what AP&L and St. Vincent alleged in their motion and that Staff had no objection to such an order. Assuming without deciding that Order No. 1 was sufficient under § 23-2-421(a) because at the time there was no dispute as to the entry of the protective order, it was not sufficient once the AG contested the protective order.

The Commission argues that its conclusion to issue a protective order is supported by substantial evidence as required by Ark. Code Ann. § 23-2-423(c)(3) (1987). On review, however, this court must determine, not whether the conclusions of the Commission are supported by substantial evidence, but whether its findings of fact are so supported. *See Arkansas Pub. Serv. Comm'n* v. *Continental Tel. Co.*, 262 Ark. 821, 829, 561 S.W.2d 645, 650 (1978). We must first know what the finding is before we can give it conclusive weight. *Id.; AT&T Communications of the Southwest, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 126, 131, 843 S.W.2d 855, 858 (1992). Courts cannot perform the reviewing functions assigned to them in the absence of adequate and complete findings by the Commission on all essential elements pertinent to the determination. *See Arkansas Pub. Serv. Comm.* v. *Continental Tel. Co.*, 262 Ark. at 829, 561 S.W.2d at 649.

The Commission states that the Commission's expertise, along with Staff's assertions and the testimony of the witnesses, provide sufficient reason for the issuance of the protective order. An argument similar to this was made without success in *Arkansas Public Service Commission* v. *Continental Telephone Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978), where the supreme court responded:

> The commission has urged that the findings are sufficient because there is evidence from which it could reach the conclusions it stated. But it is not the function of the courts to evaluate the evidence, to draw inferences from it or to read its implications into the statement of the ultimate conclusion. The courts are not authorized under a statute like ours to make findings which should have been made by the commission.

262 Ark. at 830, 561 S.W.2d at 650 (citations omitted).

Our decision here is in agreement with other jurisdictions that also require their utility commissions to make findings sufficient for an adequate and meaningful review. See *State Utilities Commission* v. *AT&T Communications of Southern States, Inc.*, 321 N.C. 586, 364 S.E.2d 386 (1988), where the court held that failure of the commission to include all necessary findings of fact and details is an error of law and a basis for remand under North Carolina law because it frustrates appellate review. Courts cannot perform the reviewing function which the legislature has assigned to them in the absence of adequate findings; it must be possible for the reviewing court to measure the findings against the evidence from which they were educed. *Southwestern Bell Tel. Co.* v. *State Corp. Comm'n*, 192 Kan. 39, 386 P.2d 515, 524 (1963). In *Town of New Shoreham* v. *Rhode Island Public Utilities Commission*, 464 A.2d 730 (R.I. 1983), the Rhode Island Supreme Court stated:

> This court does not sit as a factfinder; our role is "to determine whether the commission's decision and order are lawful and reasonable and whether its findings are fairly and substantially supported by legal evidence and substantially specific to enable us to ascertain if the facts upon which they are premised afford a reasonable basis for the result reached." *Rhode Island Consumers' Council* v. *Smith*, 111 R.I. at 277, [302 A.2d 757, 762 (1973)]. However, if the commission fails to set forth sufficiently the findings and the evidentiary basis upon which it rests its decision, we shall not speculate thereon or search the record for supporting evidence or reasons, nor shall we decide what is proper. Instead, we shall remand the case in order to provide the commission an opportunity to fulfill its obligations in a supplementary or additional decision. *Id.* at 278, 302 A.2d at 763.

Town of New Shoreham v. *Rhode Island Pub. Util. Comm'n*, 464 A.2d at 732. See also *Petition of New England Tel. & Tel. Co.*, 115 Vt. 494, 66 A.2d 135 (1949), in which the Supreme Court of Vermont held that the requirement that the public service commission make its findings of fact imposes upon the commission the duty to sift the evidence and state the facts, and when the essential findings have not been made, the court is unable to act as factfinder but must instead remand the case for such findings.

Accordingly, we must reverse and remand for a decision based upon findings of fact so that a meaningful review of the Commission's decision can be made. Because we are remanding for adequate findings, we are unable to address the AG's second argument that the Commission's decision is not supported by substantial evidence.

AP&L argues that we should not decide this case because the issue of whether the Commission erred in entering the protective order is now moot. AP&L first notes that, although the AG maintains the protected information should be disclosed to the public, he has refused to review the information even though the Commission's order allows him to do so. AP&L also notes that the AG has not appealed the Commission's approval of the rate agreement between it and St. Vincent and, therefore, disclosure of the protected information will have no legal effect.

An issue is moot when it has no legal effect on an existing controversy. *Killam* v. *Texas Oil and Gas Corp.*, 303 Ark. 547, 556-57, 798 S.W.2d 419, 424 (1990). It is the duty of the court to decide actual controversies by a judgment which can be carried into effect and not give opinions upon abstract propositions or declare principles of law which cannot affect the matter in issue. *Netherton* v. *Baldor Electric Co.*, 232 Ark. 940, 942, 341 S.W.2d 57, 58 (1960).

We agree with AP&L that disclosure of the protected information in the case at bar cannot affect the outcome of the approval of the contract between AP&L and St. Vincent. Nevertheless, we are convinced that the issue of whether it is in the public interest to protect certain information in this type of proceeding is a question likely to be repeated in future cases. AP&L's witness Neal Jansonius testified that St. Vincent's contract is the seventh self-generation deferral contract that the Commission has been asked to approve since 1986. Staff witness Lee McCulloch testified that a specific rate contract will be filed with the Commission for an industry locating in Little Rock which will bring 500 jobs. He stated that, in order to attract the industry to Little Rock, the industry was given a special rate, which the Commission will be asked to approve, and was assured that the information would be kept confidential.

Of course, the issue of whether certain information in a particular proceeding before the Commission should be protected will depend on the facts of each case. Nevertheless, the method by which the Commission grants or denies a protective order is a question of public interest, and for that reason, we have chosen to address the AG's argument.

Although the appellate court normally decides only cases and controversies which will actually affect the rights of litigants; when an issue is subject to repetition and tends to expire before review can be had, the court may decide a moot issue. *Nathaniel* v. *Forrest City School Dist. No. 7*, 300 Ark. 513, 515, 780 S.W.2d 539, 540 (1989). *See also Colorado-Ute Elec.* v. *Public Utilities Comm'n of Colorado*, 760 P.2d 627, 633 (Colo. 1988), appeal dismissed, 489 U.S. 1061 (1989).

We therefore reverse and remand for findings consistent with this opinion.

ROGERS, J., concurs.

COOPER and MAYFIELD, JJ., dissent.

JUDITH ROGERS, Judge, concurring. I feel compelled to address the Attorney General's failure to review the protected material at issue in this case. The Commission in its order clearly acknowledged the Attorney General's right to review the material, yet the Attorney General, who is charged with representing and disseminating information to rate payers and advocating the lowest reasonable utility rates pursuant to Ark. Code Ann. § 23-4-305 (1987), just as clearly chose not to review that material. He also chose not to carefully peruse this data and decide which material should be made available to the public. It is conceivable that if all parties had reviewed this material, the Commission would have been aided in a more effective review and in making specific findings, and that the reversal of this appeal could have been avoided by the Attorney General taking this simple interim step.

I wish to make it clear that I recognize the difficulty that would be inherent in trying to separate the merits of a public utility appeal, such as this one, from the political climate from which the appeal may come. Nevertheless, courts are an inap-

propriate arena for solving most of these problems and it would be less costly and more efficient if we could address cases solely on their legal merits.

I must also point out that, although I agree with the majority that this Court cannot perform its reviewing function in the absence of adequate and complete findings by the Commission, remand of this appeal is a futile gesture. After undisputed evidence was presented to it, the Commission granted the protective order. The Commission then heard additional testimony before it denied the Attorney General's request to lift the protective order. Therefore, it cannot be argued that the Commission entered the protective order arbitrarily without any evidentiary foundation. The issue before this Court is not one in which we need detailed factual findings in order to be able to determine how the Commission arrived at its ruling. Rather, the finding needed here is whether the Commission found the evidence supported the entry of the protective order. The fact that the Commission did not articulate its findings does not diminish the order's clear implication that the Commission found such evidence to exist.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from the majority's opinion because, first, I think the issue decided is, to me, clearly moot, and secondly, this Court is far too busy to issue advisory opinions on questions which are moot. The Attorney General has not appealed the Commission's approval of the incentive rate agreement between AP&L and St. Vincent, and therefore any action this Court takes can have no possible effect on the outcome of this case. A case becomes moot when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. *Frisby* v. *Strong School District*, 282 Ark. 81, 82, 666 S.W.2d 391, 392 (1984). This is such a case. Nevertheless, the majority has remanded this case for the Commission to make findings of fact as to whether the protective order should be lifted.

The majority acknowledges that it is this Court's duty to decide actual controversies that can be carried into effect. It justifies its ruling here, however, by stating the question of the appropriateness of a protective order is likely to arise in future proceedings. I agree that the Commission is likely to be faced with future requests for protective orders, in the case at bar, and it is

likewise true that we do sometimes render decisions despite the mootness of the issue when doing so might avert future litigation. *See Bynum* v. *Savage*, 312 Ark. 137, 847 S.W.2d 705 (1993). I fail to understand, however, how any decision of this Court can avoid future litigation surrounding these orders when the majority readily admits the issue of whether certain information in a particular proceeding should be protected will depend on the facts of each case. Under these circumstances, the special criteria favoring decision of moot issues are absent, and the case should therefore be dismissed. *Westark Christian Action Council* v. *Stodola*, 312 Ark. 249, 848 S.W.2d 935 (1993). Clearly, the only effect of this appeal is to cause this Court to waste valuable time on an issue which is moot.

For the foregoing reasons, I would dismiss.

MAYFIELD, J., joins in this dissent.

Debra ROGERS *v.* DARLING STORE FIXTURES

CA 93-349 870 S.W.2d 776

Court of Appeals of Arkansas
Division I
Opinion delivered March 2, 1994

Russell J. Byrne, for appellant.

Penix, Penix & Lusby, by: *Richard Lusby*, for appellee.

MELVIN MAYFIELD, Judge. The claimant Debra Rogers has appealed a decision of the Workers' Compensation Commission. Rogers, a 36-year-old woman with an eighth grade education, worked for appellee as a packer. On July 17, 1989, she reached across a table to pick up a frame and felt a popping, burning sensation in her neck. She reported the injury and went to the doctor the same day. Dr. Mark Baltz prescribed muscle relaxants and kept appellant off work for a few days. She was subsequently returned to work on light duty but none was available, so she went back to packing. Two weeks later she was laid off. After drawing unemployment compensation for five weeks, she reported she was physically unable to work.

Appellant's injury resulted in neck pain, muscle spasms, tension headaches, and depression. Since 1989 appellant has been treated with numerous medications; a great deal of physical therapy; and a TENS unit. Nothing has eased her pain for long. Four different doctors, some who examined appellant at the request of appellee, recommended that appellant go through a program at a chronic-pain clinic where she could receive psychological counseling as well as physical treatment.

The administrative law judge held that appellant was entitled to temporary total disability from the date of her last unemployment compensation through February 20, 1992; all medical expenses; six weeks of temporary total disability while vocational rehabilitation was explored; psychological counseling; and ten percent anatomical disability. Appellee-employer appealed to the full Commission on the grounds that the award of "additional temporary total disability, medical benefits, psychological counseling and other benefits is not supported by a preponderance of the evidence." The Commission affirmed the award of

temporary total disability through February 20, 1992, but said it was improper for the law judge to award such disability while rehabilitation was being explored because "that issue was not before the Administrative Law Judge." The Commission also stated:

> Although it might be argued that we should award expenses for a chronic pain clinic, we find no merit to that argument. Although that was an issue which was raised by the claimant before the Administrative Law Judge, the Administrative Law Judge did not award benefits for a chronic pain clinic. Claimant did not appeal the Administrative Law Judge's decision. Instead, claimant contends in her brief to this Commission that the Administrative Law Judge's opinion should be affirmed in all respects. Given the fact that the claimant did not appeal the issue of the pain clinic, it would not be proper for this Commission to now consider it on appeal.

We think the Commission erred in holding that it would not be proper for it to consider the "issue of the pain clinic." The Commission concedes the issue was before the law judge. The employer's notice of appeal stated, in effect, that none of the benefits allowed by the law judge was supported by the evidence. The law judge's opinion noted the pain-clinic issue but found that "this money could best be spent in a program of vocational rehabilitation, reasonable psychological counseling with anti-depressant medication." We agree with the dissenting commissioner who said "instead of awarding benefits for multidisciplined chronic-pain clinic, where psychological and psychiatric counseling would be provided, the administrative law judge simply found that claimant was entitled to a reasonable period of psychological counseling." Therefore, when the employer appealed that holding to the full Commission we think the pain-clinic issue was properly before the Commission. In *White* v. *Air Systems, Inc.*, 33 Ark. App. 56, 800 S.W.2d 726 (1990), we said:

> The Commission's decision to limit review to the second element of the *Shippers* defense was wrong for two reasons. First, the doctrine of res judicata applies only to final orders or adjudications, and the filing of a petition for review with the full Commission within 30 days pre-

> vents the order of the administrative law judge from becoming final.
>
> Second, the petition for review filed by the appellees did not limit the issues to be presented to the Commission: instead, the issue before the Commission, as presented in the petition for review, was whether "the findings and award of the administrative law judge are contrary to the law and the evidence." Although the Commission has the statutory authority to require that parties specify all the issues to be presented for review, it also has the statutory duty to decide the issue before it on the basis of the record as a whole, and to decide the facts de novo. The petition for review in the case at bar called into question the administrative law judge's award and all the findings on which it was based. Although the appellant did not file a petition for cross appeal as he was permitted to under Ark. Code Ann. § 11-9-711 (1987), no cross appeal was necessary because the appellant had prevailed before the administrative law judge and sought no affirmative relief before the Commission.

33 Ark. App. at 59-60, 800 S.W.2d at 728 (citations omitted).

In the present case we think the Commission should have considered the pain-clinic issue. Therefore, we reverse and remand this matter to the Commission for further action not inconsistent with this opinion. In that regard we call the Commission's attention to the fact that there are also other issues that may need to be decided on remand. For example, medical expenses, disability for the healing period, and the percent of anatomical disability.

Reversed and remanded.

JENNINGS, C.J. and COOPER, J., agree.

Francis G. ARMSTRONG *v.* STATE of Arkansas

CA CR 93-125 871 S.W.2d 420

Court of Appeals of Arkansas
En Banc
Opinion delivered March 9, 1994

[redacted]

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[redacted]

[redacted]

Bill J. Davis, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Francis G. Armstrong appeals from his convictions at a jury trial of arson and burglary, for which he was sentenced to concurrent terms of twelve and seven years, respectively, in the Arkansas Department of Correction. We find sufficient merit in one of appellant's multiple points for appeal to warrant reversal and remand for a new trial.

Appellant first argues that the evidence was insufficient to support the findings of guilt and that the trial court erred in denying his motion for directed verdicts. We do not agree.

Appellant was charged and convicted of burglary and arson in connection with the entry into, and burning of, the home of Percy and Louise Hall. Appellant's motions for directed verdicts, properly made at the close of the State's case and at the close of all the evidence, were challenges to the sufficiency of the evidence. *Walker* v. *State*, 308 Ark. 495, 825 S.W.2d 822 (1992). In reviewing the sufficiency of the evidence on appeal, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the State and will affirm if there is any substantial evidence to support the finding of guilt. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). Substantial evidence is evidence of such force and character that it will, with reasonable and material certainty, compel a conclusion one way or the other. Smith v. State, 308 Ark. 390, 824 S.W.2d 838 (1992). Circumstantial evidence may constitute substantial evidence. *Hill* v. *State*, 299 Ark. 327, 773 S.W.2d 424 (1989). While circumstantial evidence must exclude every other reasonable hypothesis consistent with innocence, this becomes a question for the factfinder to determine. *Bennett* v. *State*, 308 Ark. 393, 825 S.W.2d 560 (1992).

On December 17, 1991, the home of Percy and Louise Hall was partially burned. Ms. Hall is appellant's former wife. On the morning of the fire, no one had been at home since approximately 7:30. The fire was reported at 10:33 a.m., and the fire truck was en route to the scene by 10:38. An investigation indicated that the fire started at a single source in the bathroom near a wall separating the bathroom and kitchen. Glenn Sligh, an Arkansas State Police investigator, ruled out a nearby water heater as the cause of the fire and opined that the fire was of incendiary origin. The only evidence of burglary was that someone entered the

house to start the fire. *See* Ark. Code Ann. § 5-39-101(1) (1987). Investigator Sligh testified that the bathroom door had been closed. Sligh further testified that closing the door would cause the fire to burn slowly, thus indicating that an arsonist would be allowed to escape before the fire was detected. Sligh collected debris samples and sent them to the Arkansas State Crime Laboratory where they were analyzed by Ann Hoff. Ms. Hoff testified that when she tested the material, she found residue of ethyl alcohol, a fast-burning accelerant.

Danny Joe Armstrong, appellant's twelve-year-old son, testified that appellant had threatened to burn the Halls' house when he learned that his former wife had married Mr. Hall. Danny also testified that a key to the house was kept in a flower bed near the house.

Mary Coon testified that she rented a room in her trailer to appellant in late 1989 or 1990 and that he had told her that he could burn a house without leaving a trace by using alcohol. Ms. Coon testified that appellant offered to burn her trailer in that manner. She also stated that she had heard appellant say that he would like to burn the Halls' house.

Gladys Hudson testified that she saw a tall, lean man wearing dark clothing and a hat walk away from the Halls' house at approximately 9:55 to 10:00 on the morning of the fire. Mrs. Hudson could not identify this individual as appellant.

Fire Chief Troy Alphin testified that the fire truck had already been dispatched to the Hall's property when he arrived at the fire station. He stated that while en route to the fire scene, he met appellant, who was driving in the opposite direction from the Halls' home. He stated that this occurred no later than 11:00 a.m.

Appellant testified that, when Chief Alphin asked him about the fire, he waived his rights and made a statement. He denied setting the fire. He testified that on the morning of the fire he drove to the C & D Grocery for coffee. He testified that he left the store at around 8:45 a.m. Appellant stated that he then drove directly to the home of Ed and Sue Cross, less than a mile away. He testified that he had been at the Crosses' home for thirty to forty minutes when the fire truck passed, and that he stayed there drinking coffee until approximately 11:00 a.m. Appellant testi-

fied that the feelings between the Halls and him were bitter, and that his son was under their influence and was not truthful in his testimony.

The Crosses' home is approximately one-half mile from the Halls' home. Sue Cross testified that she thought appellant arrived at her house between 9:30 and 10:00 a.m., but that it could have been as late as 10:15. She testified that he left at approximately 11:00 a.m. She heard the fire truck, which passed between 10:30 and 10:45, and stated that appellant left her home fifteen to twenty minutes later.

Appellant contends that his son's testimony was not worthy of belief because he was "under the complete control" of the Halls, who had bitter feelings toward appellant. He discounts Ms. Coon's testimony because she "obvious[ly]" did not like appellant and was a friend to the Halls. He also argues that there was no direct evidence that he was closer than one-half mile from the Halls' home, and points out that his version of his whereabouts was corroborated by Ms. Cross.

Under our standard of review, we do not weigh the evidence favorable to the State against that favorable to an accused. *Tiller* v. *State*, 42 Ark. App. 64, 864 S.W.2d 730 (1993). The credibility of the witnesses and the weight to be given to their testimony are matters solely within the province of the jury. *Atkins* v. *State*, 310 Ark. 295, 836 S.W.2d 367 (1992). Moreover, the jury is free to accept those portions of the testimony that it finds worthy of belief and reject those portions deemed false. *Brown* v. *State*, 278 Ark. 604, 648 S.W.2d 67 (1983). On appeal, it is permissible to consider only that proof that tends to support the finding of guilt. *Tiller* v. *State, supra.*

From our review of the record, we cannot conclude that the trial court erred in denying appellant's motions for directed verdicts. Clearly, the expert testimony that the fire was of incendiary origin and the evidence that someone had entered the house in order to start the fire was sufficient to support the findings that burglary and arson had been committed. We also conclude that the issue of appellant's responsibility for the crimes was properly submitted to the jury in light of the circumstantial evidence in this case, including the threats appellant made to his

son and Mary Coon; appellant's offer to burn Ms. Coon's trailer by using alcohol; evidence that ethyl alcohol was used as an accelerant in this case; evidence that the fire burned slowly at first, causing a delay in its being detected and reported; and the improbability of appellant's testimony that he drove directly from the grocery store to the Crosses' home less than one mile away, and his resulting unexplained location and activities for a crucial period of time, when one considers appellant's testimony that he left the store at 8:45 and Ms. Cross's testimony that he did not arrive at her home until between 9:30 and 10:15.

At trial, the State moved in limine to prohibit appellant from introducing evidence of earlier fire losses experienced by Percy Hall. Appellant proffered Hall's testimony. Hall admitted that the 1991 fire for which appellant was being tried was the third residential fire that he (Hall) had suffered in the last seven years. Although he denied having set any of the fires, he admitted that a former girlfriend had given a statement implicating him in one of them. Hall also admitted that he had tried to implicate appellant in one of the two prior fires. Hall stated that he was insured for the first two fire losses. He stated that he had no insurance on the last structure, but admitted that his wife collected $3,100.00 under a policy covering her personal belongings. Finding that appellant had no evidence that Hall had set the previous fires, the trial court held the proffered evidence irrelevant and granted the States's motion in limine.

Appellant argues that proof of Hall's three residential fires within seven years was clearly relevant to the issues in this case and could have served to create in the jury a reasonable doubt as to appellant's guilt. We agree and reverse and remand on this point.

Rule 401 of the Arkansas Rules of Evidence provides that relevant evidence is evidence having any tendency to make the existence of any fact of consequence more probable or less probable than it would be without the evidence. Rule 403 provides that, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Determining the relevance of evidence and gauging its probative value against unfair prejudice are matters within the trial court's

discretion, the exercise of which will not be reversed on appeal in the absence of abuse. *Smith* v. *State*, 33 Ark. App. 37, 801 S.W.2d 655 (1990).

We agree with the State and the trial court that there was no direct evidence that Hall deliberately set the previous fires. Nevertheless, it cannot be denied that the occurrence of the previous fires was relevant. In order to convict appellant, the jury was required to find beyond a reasonable doubt that appellant had entered the Hall's home for the purpose of committing an offense, that the fire was deliberately set, and that appellant was the person who set it. Where, as here, circumstantial evidence is relied on, the jury must also determine that the evidence excludes every reasonable hypothesis consistent with the accused's innocence. The very fact that this alleged victim had recently suffered two residential fires of unexplained origin certainly had a tendency to make it less probable either that this third fire was deliberately set or, even if it was incendiary, that appellant was the person who set it. To deny appellant the opportunity to present evidence of even the occurrence of the prior fires denied him one significant chance of both raising a reasonable doubt as to his guilt and presenting a reasonable hypothesis consistent with his innocence. We must conclude that the trial court erred in finding the evidence irrelevant to the issues in the case.

Nor can we agree with the State that the evidence was inadmissible under Ark. R. Evid. 404(b). That rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

First, we cannot agree that the evidence was necessarily offered as proof of a crime, wrong, or act by Hall or to prove his character. As noted above, the very *occurrence* of the relatively recent prior incidents of fire was relevant. Second, even if offered as evidence of Hall's intentional acts or his carelessness with fire, the prior fires would be independently relevant. Where the issue of whether a fire was set deliberately in order to claim insurance is

material, the existence of other fires, if not too remote in time or dissimilar in circumstances, may be admissible as relevant to show motive or intent. *See Johnson* v. *Truck Insurance Exchange*, 285 Ark. 479, 688 S.W.2d 728 (1985). Likewise, we think that, where it is material whether a criminal defendant has intentionally burned a third person's property, proof that the third person has suffered prior unintentional fires is relevant to show the existence of yet another mistake or accident.

We cannot agree, however, with appellant's argument that the trial court erred in refusing to admit evidence that appellant's truck burned while he was in jail or that a tractor belonging to Sherry Frisby burned the day she posted a bond to secure appellant's pretrial release from jail. Appellant has neither cited authority nor made a convincing argument on this point, *see Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988), and we cannot conclude that the trial court erred in finding this evidence irrelevant.

Appellant next contends that the trial court erred in denying his motion to dismiss because of improper use of the prosecutor's subpoena power and his motion to obtain copies of the prosecutor's notes taken during questioning of the persons subpoenaed. Appellant argued at trial that the prosecutor used her subpoena power to interview certain witnesses within two weeks before trial and claimed that their testimony was tainted as a result of intimidation. He also complained that the subpoena power was a tool not provided to a defendant and that its use by the prosecutor therefore violated the Supreme Court's decision in *Wardius* v. *Oregon*, 412 U.S. 470 (1973). The prosecutor stated that these witnesses were subpoenaed as part of an on-going investigation in an attempt to determine if there were validity to defense claims that Hall had burned his home. When the court asked appellant's counsel which of the witnesses he contended had been intimidated, counsel supplied no names and could not indicate how their testimony was tainted. The trial judge stated that he did not think the law provided for dismissal of the prosecution as a remedy. He stated that appellant's counsel was free to "make a record, . . . to question these witnesses and see what their reaction is." He then stated that he could not grant the motion "at this time." Appellant then asked that the prosecutor be ordered to deliver copies of her notes taken during the interviews. This request was denied.

We first note that appellant cites no authority for the proposition that dismissal of the prosecution would be an appropriate remedy for an alleged unequal discovery scheme or misuse of a prosecutor's subpoena power. In any event, we could not conclude from this record that any prejudicial error occurred. Appellant's reliance on *Wardius* v. *Oregon, supra*, is misplaced. As noted by our supreme court in *Hoggard* v. *State*, 277 Ark. 117, 640 S.W.2d 102 (1982), *Wardius* dealt with whether an Oregon statute giving the prosecution the right of discovery from the defendant's alibi witnesses was constitutional in light of the fact that Oregon did not require the State to reveal the names and addresses of its witnesses or even provide a bill of particulars. "The test was said to be whether Oregon law gave the accused reciprocal rights of discovery from prosecution witnesses and, finding such rights to be lacking, the Oregon statute was struck down." 277 Ark. at 121, 640 S.W.2d at 105.

Here, the only witnesses in question were those who had been subpoenaed and interviewed by the prosecutor. However, of those persons, all but one were called as witnesses at trial by appellant, not the State. The one witness called by the State was Gladys Hudson. Ms. Hudson testified only that she saw a tall, lean man walking away from the Halls' home shortly before it was reported to be on fire. She could not identify appellant as the man she saw, and we can find no reference in the record to any physical description of appellant. Nor has appellant, at any time, claimed any surprise by Ms. Hudson's testimony. Moreover, although the trial court offered appellant the opportunity to question the witnesses regarding his claim of intimidation, appellant did not use the opportunity, and he points us to nothing in his abstract to indicate that any witness's testimony changed after being interviewed by the prosecutor. Under these circumstances, we conclude that appellant has failed to show any prejudicial error. *See Parker* v. *State*, 292 Ark. 421, 731 S.W.2d 756 (1987); *Alford* v. *State*, 291 Ark. 243, 724 S.W.2d 151 (1987).

Also unavailing is appellant's argument that the trial court erred under Ark. R. Crim. P. 17.1 in denying his motion seeking the prosecutor's notes. Ordinarily, the prosecuting attorney need not furnish the defendant with statements taken pursuant to a subpoena, but must only disclose any material information within the prosecutor's knowledge, possession, or control, which

would tend to negate the defendant's guilt of the offense charged or to reduce any resulting punishment. Ark. R. Crim. P. 17.1(d). Because, as discussed above, appellant has failed to show how any information acquired by the State prejudiced his defense, we find no error. *See Parker* v. *State, supra; Alford* v. *State, supra.*

Appellant next contends that the trial court erred in denying his motion in limine by which he sought to exclude any reference to his conviction, two weeks prior to this trial, for possession of marijuana with intent to deliver. Appellant also contends that the trial court erred in allowing the State to cross-examine him about the circumstances surrounding that offense. We find no error.

The trial judge ruled that the prosecutor could ask about appellant's conviction under Ark. R. Evid. 609(a). However, the court reserved ruling on the admissibility of the circumstances surrounding the offense, but instructed the prosecutor not to ask questions concerning events leading up to the conviction without first approaching the bench to advise the court of the questions to be asked. Appellant testified on direct examination that he had recently purchased marijuana and pleaded guilty to the felony of possession of a controlled substance with intent to deliver. On cross-examination by the prosecutor, appellant stated that he had intended to give the marijuana he purchased to another person, but he denied that other person was James Cross, the son of defense witnesses Ed and Sue Cross. Appellant admitted; however, that James Cross was with him when he purchased the marijuana. The prosecuting attorney asked these questions without having first approached the bench as previously ordered. However, appellant did not object or move for a mistrial.

The supreme court has recently held that a party whose motion in limine has been denied does not waive his objection by being the first to broach the subject of the motion when examining a witness. *Burnett* v. *Fowler*, 315 Ark. 646, 869 S.W.2d 694 (1994). Nevertheless, we cannot agree with appellant that the trial court erred in ruling proof of the prior conviction admissible. Rule 609(a) of the Arkansas Rules of Evidence provides that proof that a witness has been convicted of a felony is admissible for the purpose of attacking the witness's credibility if the court determines that the probative value of the

conviction outweighs its prejudicial effect. This determination is discretionary with the trial court, whose decision will not be reversed in the absence of abuse. *Bell* v. *State*, 6 Ark. App. 388, 644 S.W.2d 601 (1982). From our review of the record, we cannot conclude that the trial court abused its discretion in permitting evidence of appellant's conviction here. In light of the fact that the court initially reserved ruling on whether the State could question appellant about any particulars of the offense, and the fact that appellant wholly failed to object or obtain a ruling at the time the State asked such questions, we find that appellant has failed to preserve this second aspect of his argument. *See Vickers* v. *State*, 313 Ark. 64, 852 S.W.2d 787 (1993); *Walker* v. *State*, 301 Ark. 218, 783 S.W.2d 44 (1990).

Appellant also argues that the court failed to address and make a ruling as to the specific factors set out in *Bell* v. *State, supra*, in determining whether the probative value of the appellant's prior conviction outweighed its prejudicial effect. Appellant failed to make any such request of the trial court. Moreover, appellant cites no authority, and we know of none, requiring that the court specifically address or rule on those individual factors.

Finally, appellant contends that the trial court erred by denying his proffered, non-model jury instruction on the common law presumption against arson. Instructions that do not conform to the model instructions should be given only when the trial court finds that the model instructions do not adequately state the law or do not contain a necessary instruction on the subject. *Ross* v. *State*, 300 Ark. 369, 779 S.W.2d 161 (1989). Here, the trial judge specifically found that the model instructions adequately stated the law. Appellant, however, has failed to abstract the instructions given, our review of which is necessary in order to determine whether they adequately covered the issue addressed in appellant's proffered instruction. On this record, we cannot say that the trial court erred in refusing the appellant's jury instruction. *See id.*

Reversed and remanded.

COOPER and MAYFIELD, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I dissent because I

believe that the evidence is insufficient to sustain the appellant's convictions of burglary and arson. I submit that there is sufficient evidence from the record for the jury to find that the Hall residence partially burned on December 17, 1991; that the fire started as a result of arson, with ethyl-alcohol used as the accelerant; that the appellant had been heard to threaten to burn the Hall house; that the appellant had offered to burn his landlord's trailer a year or two earlier, said that he could do it without a trace using alcohol, and told the landlord that he would like to burn the Hall house; that a tall lean man wearing dark clothing and a hat walked away from the Hall house about 10:00 a.m. on the morning of the fire; and that the fire chief met the appellant on a road some miles from the fire scene around 11:00 a.m.

However, even conceding that the State proved the facts enumerated above, I submit that the evidence is insufficient because there is not one scintilla of evidence that would permit a rational trier of fact to conclude that the appellant ever entered the Hall residence.

Due process requires the State to prove beyond a reasonable doubt every element of the crime charged. *In re Winship*, 397 U.S. 358 (1970). Arkansas Code Annotated § 5-39-201 (1987) provides that burglary is committed when a person enters or remains unlawfully in an occupiable structure with the purpose of committing an offense punishable by imprisonment. Entry into a building and specific criminal intent are clearly essential elements of the crime of burglary. *Norton* v. *State*, 271 Ark. 451, 609 S.W.2d 1 (1980); *Selph* v. *State*, 264 Ark. 197, 570 S.W.2d 256 (1978). Furthermore, a defendant's mere presence at the scene of a fire is insufficient to establish that the defendant intentionally set it. *See Bray* v. *State*, 12 Ark. App. 53, 670 S.W.2d 822 (1984).

Where a defendant's fingerprint was found on a piece of glass outside a broken kitchen window and a television set was stolen from inside the house, this Court held that evidence was insufficient to support a finding that the appellant ever entered the victim's house. We held that such a finding would be based on speculation and conjecture. We also noted that the fingerprint was the *only* evidence connecting the appellant with the crime. *Holloway* v. *State*, 11 Ark. App. 69, 666 S.W.2d 410 (1984).

However, fingerprints found *inside* a building have been held sufficient to prove entry. *Brown* v. *State*, 310 Ark. 428, 837 S.W.2d 457 (1992); *Howard* v. *State*, 286 Ark. 479, 695 S.W.2d 375 (1985); *Ebsen* v. *State*, 249 Ark. 477, 459 S.W.2d 548 (1970). In *Ward* v. *Lockhart*, 481 F.2d 844 (8th Cir. 1988), the United States Court of Appeals, Eighth Circuit, held in a habeas corpus proceeding that a burglary conviction had to be reversed because there was no evidence of entry, even in the face of the appellant's possession of band instruments recently stolen from a school.[1] The *Ward* case is significant because its facts are perfectly analogous to those presented in the case at bar. Although the Eighth Circuit noted that there was sufficient evidence to support a conviction for theft of property or theft by receiving, it nevertheless held that the evidence was insufficient to permit a legal inference that Ward was also guilty of burglary because there was no evidence to establish entry, which is an essential element of that offense. I think it is especially important to note that the Eighth Circuit arrived at this result despite evidence that Ward fled after being questioned concerning his ownership of the instruments. Flight is evidence of intent, as are the threats made by the appellant in the case at bar, but this evidence of intent was nevertheless insufficient to establish entry, as would be necessary to sustain the burglary conviction in *Ward. See Ward* v. *Lockhart, supra.*

I concede that the appellant in the case at bar said he knew how to burn a house without a trace, said he wanted to burn the Hall house, threatened to do so, that someone did commit arson (presumably the unidentified man seen leaving the house), and that the appellant was within a couple of miles of the fire scene. Nevertheless, in the absence of even a shred of evidence to prove the appellant ever set foot in the Hall house the day of the fire, the appellant's burglary conviction is not supported by substantial evidence. *See Ward* v. *Lockhart, supra.* Furthermore, because it is clear that the appellant could not commit the arson without also committing burglary, reversal of his burglary conviction requires reversal of his conviction for arson as well.

MAYFIELD, J., joins in this dissent.

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[1]This Court had affirmed the conviction by a 3-3 vote, 8 Ark. App. 209, 649 S.W.2d 849; and the Arkansas Supreme Court had affirmed by a 5-2 vote, 280 Ark. 353, 658 S.W.2d 379 (1983).

Ira THURMAN *v.* CLARKE INDUSTRIES, INC.

CA 93-195 872 S.W.2d 418

Court of Appeals of Arkansas
En Banc
Opinion delivered March 16, 1994
[Rehearing denied April 13, 1994.*]

*Mayfield, J., would grant rehearing.

Evelyn E. Brooks, for appellant.

Boswell, Tucker & Brewster, by: *W. Lee Tucker*, for appellee.

JOHN MAUZY PITTMAN, Judge. Ira Thurman appeals from an order of the Arkansas Workers' Compensation Commission awarding him permanent partial disability benefits in an amount equal to a twenty-five percent impairment to his left lower extremity. Appellant contends that the Commission erred in finding that his healing period had ended and in denying his claim for additional temporary total and temporary partial disability benefits. We affirm.

On October 10, 1988, appellant suffered a compensable injury to his left knee. Temporary total disability benefits were

paid by appellee until November 13, 1989. Those benefits were discontinued when appellant refused to undergo the arthroscopic knee surgery that had been recommended by his treating physicians. Appellant then filed a claim for additional temporary total disability benefits. The Commission found that appellant's refusal to have surgery was unreasonable and, in reliance on Ark. Code Ann. § 11-9-512 (1987), denied appellant's claim for any additional benefits. Section 11-9-512 provides as follows:

> Except in cases of hernia, which are specifically covered by § 11-9-523, where an injured person unreasonably refuses to submit to a surgical operation which has been advised by at least two (2) qualified physicians and where the recommended operation does not involve unreasonable risk of life or additional serious physical impairment, the Commission, in fixing the amount of compensation, may take into consideration such refusal to submit to the advised operation.

Appellant appealed to this court. *See Thurman* v. *Clarke Industries, Inc.*, 35 Ark. App. 171, 819 S.W.2d 286 (1991). We noted that, although all four of appellant's physicians had at one time recommended that appellant submit to surgery, three of the four "later retracted their recommendation of surgery on the ground that appellant's subjective fear of surgery was so great as to jeopardize the chances of success." *Id.* at 173, 819 S.W.2d at 287. Therefore, we found that there was no substantial evidence that surgery was in fact recommended by at least two physicians and concluded that § 11-9-512 was inapplicable. We held that "the Commission erred in taking the appellant's refusal to submit to surgery into consideration in fixing the amount of his compensation" and remanded the case to the Commission for "further proceedings not inconsistent with this opinion." *Id.* at 173, 819 S.W.2d at 287.

On remand, appellant contended that he was entitled to temporary total benefits from November 13, 1989, through May 25, 1990 (when he began driving a school bus part-time), and temporary partial benefits from May 25, 1990, through a date yet to be determined. Alternatively, appellant contended that, if the Commission found that his healing period had ended, he was entitled to permanent partial disability benefits.

In its opinion, the Commission acknowledged this court's decision in *Thurman I* and correctly described our holding. The Commission then proceeded to determine appellant's entitlement to additional temporary disability benefits. The Commission found that, without the arthroscopic knee surgery, appellant's healing period had ended on August 28, 1989, and, therefore, that he was not entitled to any additional temporary benefits. The Commission further found, in accordance with the opinion of appellant's treating physician, that appellant had a twenty-five percent permanent impairment to the left lower extremity and awarded him permanent partial disability benefits therefor.

On appeal, appellant contends that the Commission erred in finding that he was not entitled to additional temporary disability benefits. He argues that there is no substantial evidence to support the Commission's finding that his healing period had ended and that the Commission violated this court's decision in *Thurman I* by considering his refusal to have knee surgery. We find no merit in either argument.

Temporary disability is that period within the healing period in which an employee suffers a total or partial incapacity to earn wages. *Arkansas State Highway and Transportation Dep't* v. *Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Arkansas Highway and Transportation Dep't* v. *McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.*; *Mad Butcher, Inc.* v. *Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. *Arkansas Highway and Transportation Dep't* v. *McWilliams, supra; J.A. Riggs Tractor Co.* v. *Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

The determination of when the healing period ends is a factual determination to be made by the Commission. *Arkansas Highway and Transportation Dep't* v. *McWilliams, supra; Mad Butcher, Inc.* v. *Parker, supra.* Where the sufficiency

of the evidence to support the Commission's findings of fact is challenged, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings. We must uphold those findings unless there is no substantial evidence to support them. *Arkansas Highway and Transportation Dep't* v. *McWilliams, supra.*

Here, as early as August 28, 1989, Dr. Melvin Mumme opined that, without surgery, appellant would experience no further recovery. In light of appellant's refusal to accept that one remaining form of treatment, Dr. Mumme went ahead and assigned appellant a permanent impairment rating. His report stated:

> I have told the patient that he probably needs to consider having an arthroscopy of his knee to evaluate for internal derangement and tear of the medial meniscus. He does not want to consider this. I would not expect him to recover further as it has been 10 months. His limitation *without* correcting his knee derangement would be *25%* on the basis of his motion. . . . *With* arthroscopy and correction of what we think is a torn meniscus the patient's impairment would be expected to be approximately *10%.*

(Emphasis added.) The report of Dr. Richard Back, a psychologist who evaluated appellant in January 1990, stated that "[t]here is no successful treatment available for this patient's phobia [of having surgery] under the existing conditions." At the hearing on remand, appellant testified that his condition was no better or worse than it was at the time of the original hearing. He also testified that he was still unwilling to undergo surgery.

From our review of the record, we cannot conclude that there is no substantial evidence to support the Commission's finding that appellant's healing period ended August 28, 1989. On that date, Dr. Mumme stated that there was no treatment available for appellant's condition, other than surgery, and that without surgery appellant could expect no further recovery. Since that time, no treatment for the healing or improvement of appellant's condition has been administered. While undergoing surgery might still improve appellant's condition, surgery was in no way a realistic possibility at the time of the most recent hearing, nor had it been since at least the time of Dr. Mumme's report. We con-

clude that the mere existence of one remaining form of treatment does not prohibit a finding that a claimant's healing period has ended when the claimant steadfastly refuses to undergo that treatment. *See Savage Welding Supplies* v. *Industrial Commission*, 120 Ariz. 592, 587 P.2d 778 (1978); *Crabtree* v. *Beech Aircraft Corp.*, 229 Kan. 440, 625 P.2d 453 (1981); *Brown Shoe Co.* v. *Pipes*, 581 S.W.2d 140 (Tenn. 1979). Were surgery to continue to be a reasonable and necessary treatment option and were appellant to change his mind and submit to surgery, he could be entitled to additional temporary benefits during his recovery. *See Elk Roofing Co.* v. *Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987) (it is possible for there to be a second, distinct healing period after the original one has ended).

Appellant next contends that the Commission erred in considering appellant's refusal of surgery. Although appellant cites no authority and does not use the phrase "law of the case," it appears as though he is arguing that our decision in *Thurman I* became law of the case and that the Commission violated our order by considering, for any purpose, appellant's decision not to have surgery. We find no error.

The doctrine of *res judicata*, which is applicable to decisions of the Workers' Compensation Commission, forbids the reopening of matters once judicially determined by competent authority. *Lunsford* v. *Rich Mountain Electric Coop.*, 38 Ark. App. 188, 832 S.W.2d 291 (1992). Moreover, matters decided on a prior appeal to this court are the law of the case and govern our actions on a subsequent appeal to the extent that we are bound by them even if we were inclined at the latter time to say that we had been wrong initially. *Id.*

Neither of these principles serve to require reversal of the case before us. In *Thurman I*, we held § 11-9-512 inapplicable to appellant's case because there was no evidence that at least two physicians were recommending that appellant have surgery. Accordingly, we held that the Commission erred in taking appellant's refusal to submit to surgery into consideration "in fixing the amount" of compensation to which he might be entitled. The Commission's action on remand in no way violated our prior decision. Stated simply, the Commission did not consider appellant's refusal in fixing the *amount* of his compensa-

tion. This is evidenced by the fact that the Commission's award was based on its acceptance of the twenty-five percent impairment from which appellant's treating physician opined appellant was actually suffering (*i.e.*, without the surgery) rather than the lesser ten percent impairment from which he would suffer if he underwent the surgery. The Commission considered appellant's refusal, completely independent of § 11-9-512, only for the purposes of deciding whether his healing period had ended and, therefore, determining the *type* of disability benefits (temporary or permanent) to which he was entitled. Clearly, the Commission's original order did not find that appellant remained within his healing period and our order in *Thurman I* did not limit the Commission to awarding appellant temporary benefits on remand. We conclude that the Commission committed no error.

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the majority opinion in this case because it allows the Commission to do exactly what we said in our first opinion that the Commission could not do. That opinion said, "we hold that the Commission erred in taking the appellant's refusal to submit to surgery into consideration in fixing the amount of his compensation." *Thurman* v. *Clarke Industries, Inc.*, 35 Ark. App. 171, 173, 819 S.W.2d 286, 287 (1991). Yet, in spite of that specific holding, the majority opinion affirms the Commission decision which states on the fourth page that:

> Claimant contends that he is entitled to additional benefits because he has not reached the end of his healing period and that he needs psychological treatment to overcome his phobia of surgery. However, it is apparent from a review of the claimant's testimony that he does not desire to undergo surgery, regardless of the circumstances.

Obviously, the Commission took into consideration the claimant's refusal to submit to surgery. The majority opinion says this was permissible because the Commission did not take that refusal into consideration "in fixing the amount" of compensation to which appellant might be entitled. Not only is this a distinction without a difference — the majority recognize that

appellant is seeking "additional temporary total and temporary partial disability benefits" — but this view is contrary to the statutory and case law with regard to medical services. *See* Ark. Code Ann. § 11-9-102(9) (1987) and Ark. Code Ann. § 11-9-102(6) (Supp. 1993); *Brooks* v. *Arkansas-Best Freight System, Inc.*, 247 Ark. 61, 64, 444 S.W.2d 246, 248 (1969) (medical services are included in the statutory definition of "compensation").

After we remanded this case, the claimant's attorney told the administrative law judge at the hearing held on February 11, 1992, that:

> [O]ur position is that he has not reached maximum medical healing. In other words, he may have reached — may or may not have if he had had the surgery, but he didn't have the surgery, and until we can deal with the phobia, assuming we can deal with the phobia, that he's entitled to continuing temporary partial benefits.

Actually, the law judge did not come to grips with the phobia issue presented, and the Commission indicated that it did not read all of the appellant's testimony on this point. Appellant testified that he had discussed the phobia with Dr. Back (the record shows this was a clinical psychologist) in January of 1990, but the doctor said it was not amenable to treatment *at that time*. However, appellant said he had not been back to see Dr. Back in the two years since then; that he did not have the money to see him; that he was willing to see him if the insurance company would pay for it; and that he might now undergo the surgery if he was treated for the phobia and the doctors felt they could perform the surgery.

Thus, the Commission was not accurate in saying that appellant would not undergo surgery "regardless of circumstances." The Commission's "alternative" finding was that claimant's fear of surgery was not caused or aggravated by his compensable injury and the employer would therefore not be liable for the treatment of the phobia. No authority is given for that "alternative" holding and neither the appellee nor the majority opinion in this court comes to grips with this issue. The appellant, however, raises that issue, and just before his conclusion, the third point of his summary is as follows:

3. Mr. Thurman's healing period will not extend indefinitely. When there is nothing that can reasonably be done to improve Mr. Thurman's knee. . . to make him as good as he can get. . . his healing period will end.

All Mr. Thurman asks toward that end is that he be allowed psychological counseling for a reasonable period of time to explore his phobia of surgery, so that he might be able to undergo surgery and recover from his knee injury.

If, after counseling, he still refuses surgery, his healing period would end because he would have reached maximum recovery.

I would reverse and remand this case with directions to the Commission to provide the appellant the psychological counseling he wants and obviously needs. The issue of the end of the healing period and entitlement to temporary and permanent disability would have to wait until the conclusion of a reasonable period of counseling.

Sherry J. MORGAN *v.* DESHA COUNTY
TAX ASSESSOR'S OFFICE

CA 93-3405 871 S.W.2d 429

Court of Appeals of Arkansas
Division I
Opinion delivered March 16, 1994

Philip M. Wilson, P.A., by: *Lana Parks Davis*, for appellant.

Bridges, Young, Matthews & Drake, by: *Michael J. Dennis*, for appellee.

JAMES R. COOPER, Judge. This is an appeal from the Workers' Compensation Commission's decision finding that the appellant failed to prove that certain medical treatment was reasonable and necessary for her compensable injury. On appeal, the appellant contends that the Commission's decision is not supported by substantial evidence. We agree and reverse and remand for the reasons discussed herein.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Garrett* v. *Sears, Roebuck & Co.*, 43 Ark. App. 37, 858 S.W.2d 146 (1993). However, this standard must not totally insulate the Commission from judicial review and render this Court's function in these cases meaningless. *Wade* v. *Mr. C. Cavenaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988). We will reverse a decision of the Commission when we are convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *Price* v. *Little Rock Packaging Co.*, 42 Ark.

App. 238, 856 S.W.2d 317 (1993).

The appellant sustained a compensable injury on October 18, 1990. She was initially treated by Dr. R.L. Turney and was subsequently referred to Dr. P.B. Simpson, Jr., a neurosurgeon. On November 20, 1990, Dr. Simpson performed a myelogram and a post myelogram CT scan which revealed a herniated nucleus pulposus at C5-6, along with cervical spondylosis. On November 26, 1990, Dr. Simpson performed a diskectomy at C5-6 with an anterior cervical fusion. On December 2, 1990, Dr. Simpson performed another myelogram and post myelogram CT scan which revealed minimal indentation of the thecal sac at C4-C5 and C5-C6, along with mild root swelling at those levels. The appellant suffered a grand mal seizure after the second myelogram. She was discharged from the hospital on December 5, 1990. The appellant returned to Dr. Turney and Dr. Simpson for regular follow-up visits and continued treatment.

The appellant petitioned for a change of physicians, or in the alternative, for an independent medical examination. An independent medical examination was completed by Dr. Robert Abraham, a neurosurgeon, on August 30, 1991. After reviewing the appellant's radiographic studies, he opined that the appellant had right cervical radiculopathy and recommended a conservative course of treatment. The appellant's final visit with Dr. Simpson was on January 20, 1992, at which time Dr. Simpson concluded that no further treatment was needed. He indicated that he was not impressed with the appellant's symptomatology. Dr. Simpson assigned an impairment rating of 15% to the appellant's body as a whole and released her from his care.

Dr. Turney subsequently referred the appellant to Dr. Ray Jouett, who examined the appellant on March 11, 1992. Dr. Jouett found that an MRI revealed some spondylosis at C5-6 and opined that the appellant may not have had a good fusion at that level. Consequently, Dr. Jouett referred her to one of his associates, Dr. David L. Reding, who performed additional surgery on the appellant.

The administrative law judge awarded the appellant temporary total disability benefits and found that the medical treatment rendered by Dr. Ray Jouett and Dr. David Reding was com-

pensable as authorized referrals for reasonable and necessary treatment from the appellant's authorized treating physician, Dr. Turney. The Commission reversed the ALJ's decision and found that the appellant failed to prove by a preponderance of the evidence that the treatment provided by Dr. Jouett and Dr. Reding was reasonably necessary for the treatment of her compensable injury. In doing so, the Commission found it unnecessary to address the other findings of the ALJ.[1]

The Commission found that the record contained only minimal evidence of the services provided by Dr. Jouett and Dr. Reding. It noted that the findings of Dr. Jouett and Dr. Reding which were in the record were consistent with the findings of Dr. Simpson and Dr. Abraham and, based on essentially the same findings, both Dr. Simpson and Dr. Abraham concluded that the surgery was not indicated. The Commission further noted that Dr. Reding indicated that the decision to operate was based on the failure of other forms of treatment to relieve the appellant's condition. The Commission placed greater weight on the opinions of Dr. Simpson and Dr. Abraham.

However, although Dr. Abraham recommended conservative treatment for the appellant, he did not suggest that further treatment was not in order. Dr. Simpson's office notes indicate that the appellant continued to experience pain in her neck which radiated into her right shoulder, arm, and hand. Even Dr. Simpson recommended that the appellant undergo another myelogram in order to discover the cause of her continued complaints of pain. However, the appellant testified that she was afraid to submit to another myelogram because of the seizure she previously experienced. Apparently, the conservative treatment of the appellant was not improving her condition. Dr. Reding found the appellant's diagnostic studies indicated a pseudoarthrosis at C5-6 with persistent osteophyte on her right side. He opined that this was probably causing her persistent pain syndrome. He repeated her decompression and fusion and noted that she seemed to do well with the procedure. We do not think that fair-minded persons with the same facts before them could have concluded that the appellant failed to prove by a preponderance of the evi-

[1]We note that the Commission did not make any determination regarding the appellant's award of temporary total disability benefits.

dence that the medical treatment by Dr. Jouett and Dr. Reding was reasonable and necessary. We therefore reverse the Commission's finding in this regard and remand to the Commission for review of the remaining issues.

Reversed and remanded.

PITTMAN and MAYFIELD, JJ., agree.

Lorrie A. ROWLETT *v.* DIRECTOR, Arkansas Employment Security Department and the Front Page Cafe

E 93-45 872 S.W.2d 83

Court of Appeals of Arkansas
Division I
Opinion delivered March 16, 1994

Leif Hamman, for appellant.

Allan Pruitt, for appellee.

JAMES R. COOPER, Judge. The appellant in this unemployment compensation case quit her job as waitress for the appellee, The Front Page Cafe, because her husband was ordered to report to Fort Stuart, Georgia, for active duty in the United States Army. Subsequently, the appellant filed a claim for unemployment benefits which was denied. On November 9, 1992, the denial of unemployment benefits was affirmed by the Board of Review.

For reversal, the appellant contends that the Board of Review erred in finding that she voluntarily left her work without good cause related to the work; alternatively, the appellant contends that the Board erred in failing to find that she left her employment because of a personal emergency. We affirm.

Pursuant to Ark. Code Ann. § 11-10-513(a)(1) (1987), a worker who left his last work voluntarily and without good cause connected with the work is disqualified for benefits. The appellant argues that there is good cause connected with the work under the foregoing statute by virtue of the distance between Georgia, where her husband has been stationed, and her former place of employment in Jonesboro, Arkansas. Although we agree that, under normal conditions, a distance of several hundred miles between home and work would make commuting unreasonable, we do not agree that the Board erred in denying benefits. The term "good cause," means a justifiable reason for not accepting the particular job offered; to constitute good cause, the reason for refusal must not be arbitrary or capricious and the reasons must be connected with the work itself; while personal factors may be considered in determining whether there is good cause, they are

not controlling or dispositive of the issue. *Wacaster* v. *Daniels*, 270 Ark. 190, 603 S.W.2d 907 (1980).

In the case at bar, it is clear that the place of employment did not move. Instead, the great increase in distance between the appellant's home and work was caused by a personal factor, the Army's transfer of her husband to a new duty station in Georgia. Other courts faced with analogous issues have held that a claimant's voluntary termination of her employment in order to follow her husband, transferred by the military, is properly characterized as voluntary termination for personal reasons. *See Department of the Air Force* v. *Unemployment Appeals Commission*, 486 So.2d 632 (Fla. App. 1986). Under these circumstances, we hold that the Board did not err in finding that the appellant voluntarily left her work without good cause related to the work.

Nor do we agree that the Board erred in failing to find that the appellant left her employment because of a personal emergency. Prior to July 1, 1983, Arkansas' Employment Security Law excepted from disqualification claimants who voluntarily left their work to accompany a spouse in a new place of residence. Ark. Stat. Ann. § 81-1106 (Repl. 1976). However, Act 482 of 1983 declared this provision to be ineffective after July 1, 1983. Given the legislature's clear statement that circumstances such as those presented in the case at bar would no longer constitute an exception to the statutory requirement that benefits are not payable to a person who voluntarily leaves his work without good cause connected with the work, we cannot say that the Board erred in finding that these circumstances did not constitute a personal emergency so as to entitle the appellant to unemployment benefits.

Affirmed.

ROBBINS and MAYFIELD, JJ., agree.

Tamara McCARTY *v.* BOARD OF TRUSTEES of the Little Rock Police Pension Fund

CA 92-1240 872 S.W.2d 74

Court of Appeals of Arkansas
En Banc
Opinion delivered March 16, 1994

Lavey & Burnett, by: *John L. Burnett*, for appellant.

Arnold, Grobmyer & Haley, by: *Robert R. Ross*, for appellee.

MELVIN MAYFIELD, Judge. This appeal seeks to reverse a decision of the Board of Trustees of the Little Rock Police Pension and Relief Fund which denied the appellant's application for disability retirement benefits.

The record on appeal is unusual in that it contains no testimony, and there is really no disagreement as to the facts. The facts are disclosed by the minutes of the meetings held by the Board of Trustees and a few letters and documents considered by the Board. Because of the difficulty in assimilating the information scattered throughout the record, this opinion will at times make reference to pages of the record. Appellant's abstract, however, is very complete, contains a helpful index, is in sequence with the record, gives adequate reference to the page numbers of the record, and abstracts the matters referred to in this opinion.

Appellant, Tamara McCarty, was a licensed police officer in the City of Little Rock when she received a series of on-the-job injuries. On March 21, 1988, the appellant filed a claim for retirement benefits with the Board. The statutory provisions which deal with police pension funds for cities of the first class are found in Ark. Code Ann. §§ 24-11-401 through -433 (Repl. 1992).

Section 24-11-423(a)(1) provides in relevant part:

> If any member of the police department shall become physically or mentally permanently disabled, and this fact is certified to by the physician on the board of trustees, he shall be entitled to retire and receive a pension as provided herein.

It is contended by the appellee Board that the appellant's claim was denied by the Board at its meeting on May 12, 1988 (R. 63), but the Board admits that the matter was subsequently reconsidered and finally denied at a Board meeting held on April 12, 1990. (R. 8-11). That decision was appealed to the Circuit Court of Pulaski County by a petition (R.3) and a notice of appeal (R.1) filed with the clerk of that court on May 14, 1990. Under the Administrative Procedure Act, which both parties agree is applicable, proceedings for review of the Board's decision "shall be instituted by filing a petition, within thirty (30) days after service upon petitioner of the agency's final decision." Ark. Code Ann. § 25-15-212(b)(1) (Repl. 1992).

Whether notice of appeal was timely filed is not discussed by either party. We note, however, that the record does not disclose when the Board's decision of April 12, 1990, was served on the appellant. The minutes of that meeting (R.8-11) do not show that either the appellant or her attorney was present, but even if the decision was served on her on April 12, the calendar for 1990 — of which we take judicial notice — shows that the thirtieth day thereafter was May 12, 1990, and that this was a Saturday. Under Rule 9 of our Rules of Appellate Procedure whenever any day for taking action under the rules falls on a Saturday or Sunday the time is extended until the next business day — which in this case was Monday, May 14. We have held that the specific provision in the Workers' Compensation Act providing that a notice of appeal may be filed within thirty days of the "receipt" of the order or award of the Commission controls rather than the provision in Rule 4 of the Rules of Appellate Procedure that requires the notice of appeal to be filed within thirty days from the "entry" of the judgment appealed from. *See Sunbelt Couriers* v. *McCartney*, 31 Ark. App. 8, 786 S.W.2d 121 (1990). However, there is no provision in the Workers' Compensation Act or the Administrative Procedure Act that conflicts

with the provision in Rule 9 of the Rules of Appellate Procedure that extends the time for filing the notice of appeal to the next business day when the last day for filing falls on a Saturday or Sunday. We think that provision should be followed here. Therefore, even if the Board's decision was served on appellant the day her claim was denied, the petition and notice of appeal filed on Monday — May 14 — would be timely. Moreover, if the Board's decision was not served until the day after the Board met on April 12, the thirtieth day after service would fall on May 13, which was a Sunday. Since Ark. Code Ann. § 16-10-114 (1987) provides that no court shall be open or transact business on Sunday (except to receive a verdict or discharge a jury), we believe that this statute, which is a general statute, would apply and allow the petition and notice of appeal filed on the next Monday — May 14 — to be timely filed. Thus, whether the Board's decision was served on appellant on April 12 or April 13, the petition and notice of appeal filed on May 14, 1990, was timely filed.

The Pulaski County Circuit Court ultimately affirmed the Board's decision and this is an appeal from that decision. The petition for judicial review (R. 3) alleged that after the appellant filed her claim on March 21, 1988, Dr. John Watkins (who, the record shows and the parties agree, was at that time the physician representative of the Board) advised the Board that appellant could perform satisfactorily a variety of jobs within the Little Rock Police Department, and based upon that information, appellant's claim was denied. However, it was also alleged that on June 27, 1988, the appellant was terminated from the department for being unable to perform her duties satisfactorily because of her disability; that in April of 1989, the Board reconsidered appellant's claim; and that after appellant was examined by various physicians, Dr. C.E. Ballard (who had replaced Dr. John Watkins as the physician representative of the Board) submitted a letter dated March 2, 1990, stating that in his opinion the appellant was *unable* to perform her duties as a police officer "as currently described." The petition also alleged that under Ark. Code Ann. § 24-11-423(a)(1) (Repl. 1992) when a member of the police department becomes disabled and this fact is certified to by the physician on the Board, the police officer shall be entitled to receive a pension. And the petition for judicial review asked that

the circuit court reverse the Board's decision which refused to grant the appellant a disability pension.

The record on appeal at that time consisted of the appellant's notice of appeal and petition for judicial review, the Board's response, and the minutes of the April 12, 1990, Board meeting. The Board's response admitted all the allegations in the appellant's petition except the allegation that appellant was entitled to disability benefits, but the response affirmatively stated that the letter submitted by Dr. Ballard on March 2, 1990, "is based upon standards which were developed and put in place by the City of Little Rock Police Department after the initial determination of Officer McCarty was made and are therefore irrelevant and inapplicable to the facts at hand."

Based upon the record described above (R.1-15), the circuit court entered an order (R.16-17) remanding the matter to the Board because the court could not determine what "standard, if any, was applied" by the Board in determining whether or not the appellant was disabled. The court remanded with directions for the Board to comply with the provisions of Ark. Code Ann. § 25-15-210(b)(2) (Repl. 1992) which provides that the Board's decision "shall include findings of fact and conclusions of law . . . accompanied by a concise and explicit statement of the underlying facts supporting the findings." This order was entered on February 15, 1991, and it stated that a time to accomplish its directions "is not established, but it ought to be done as early as convenient to the Board, its attorneys, and the applicant and her attorney."

It appears from the record that the Board met on March 14, 1991, heard a discussion from its attorney about the court's order and remand for a written finding of facts, and approved findings as presented by its attorney. (R.125-26). Those findings, however, were not filed with the court until a "Supplemental Record" was filed on May 22, 1992. In the meanwhile, the appellant filed, on March 18, 1992, an "Amended Complaint and Petition for Judicial Review," which contained 62 paragraphs of factual allegations. (R.20-43). These paragraphs are actually a chronological listing of the events that had occurred pertaining to the appellant's claim. They set out the dates of meetings of the Board and brief summaries of what occurred at those meetings as disclosed by the minutes attached as exhibits to the amended complaint

and petition for review. Some factual conclusions are alleged, but they do not appear to be in dispute. The exhibits to the amendment appear to have been eliminated by the clerk of the circuit court to avoid duplication, but they appear to be in the record as part of the supplemental record. This is made fairly clear by appellant's abstract.

The supplemental record filed on May 22, 1992, contains a page entitled "Supplemental Record" which states that it is filed for the Board, by its counsel, and with the agreement of the appellant, by her counsel, and that there is submitted "the attached documents as the Supplemental Record on appeal in conformity with the directions of the court." Counsel for both parties have signed this page. (R. 58). In spite of the filing of this supplemental record by the Board, it later filed a brief with the circuit court in which it stated:

> Defendant objects to the inclusion of all the documents attached to plaintiff's amended petition for judicial review as part of the record. Defendant has no objection to the supplemental record filed on May 22, 1992, being included as part of this record since those items could properly be considered responsive to the plaintiff's original notice of appeal as being "attachments pertaining to this case."

(R. 144). It is unclear just what portion of the record as filed in this court was objected to by the appellee Board, and the objection is not abstracted by either party and no reference is made to it by the briefs filed by the parties in this (appellate) court. We, therefore, think that any part of the record filed may be considered by us.

We come now to a discussion of the merits of this appeal. The findings (R. 133-36) made by the Board after remand by the circuit court are as follows:

> 1. On March 21, 1988, Tamara McCarty made application to the Little Rock Police Pension Board for disability retirement benefits. Officer McCarty's application was based upon a series of on-the-job injuries, the last of which occurred in April, 1987.

2. Officer McCarty's application and medical reports were submitted to John G. Watkins, III, M.D. for evaluation and response.

3. Dr. Watkins, in evaluating Officer McCarty relied upon job descriptions which were supplied to him by Captain Tim Dailey, the training officer for the Little Rock Police Department. The descriptions purported to be the then existing job descriptions for the Little Rock Police Department.

4. Dr. Watkins, following consultation with Officer McCarty's physician, Dr. Robert Abraham, determined that Officer McCarty could perform certain of the job assignments described in the information provided to him and that therefore she was not disabled. Dr. Watkins' letter to the Board dated May 12, 1988, and an affidavit which was executed by him shortly thereafter are attached marked exhibits "A" and "B", respectively, and incorporated by reference herein.

5. Officer McCarty was denied retirement based upon the criteria then in place at the Little Rock Police Department.

6. Officer McCarty was terminated by the Little Rock Police Department on June 27, 1988. That decision has been appealed through the Little Rock Civil Service Commission and through the Circuit Court of Pulaski County and has been affirmed on each appeal.

7. On April 25, 1989, Dr. Watkins moved that an independent evaluation of Officer McCarty be done after Chief Louie Caudell had established guidelines for the physical requirements for officers. Thereupon, Dr. Watkins resigned from the Board.

8. On June 8, 1989, a new physician member was selected and the matter was assigned to him for evaluation.

9. On March 15, 1990, Dr. C.E. Ballard, the new physician member of the Board, presented his findings as follows:

(a) Under the earlier job description used by Dr. Watkins, he (Dr. Ballard) would not disagree with Dr. Watkins' determination that Officer McCarty was *not* disabled.

(b) Under the *new* job descriptions Dr. Ballard would be compelled to find that Officer McCarty is disabled.

The entire matter was tabled by the Board at that meeting.

10. On April 12, 1990, the question of Officer McCarty's retirement was presented and the benefits were again denied.

The Board also made conclusions of law as follows:

11. Officer Tamara McCarty applied for retirement benefits on March 21, 1988. Her rights to such benefits were fixed by the standards and conditions existing at that time.

12. Job descriptions were supplied to John G. Watkins, III, M.D. by Captain Tim Dailey of the Little Rock Police Department which were represented to be the existing job descriptions for the Little Rock Police Department. Those job descriptions constituted the Little Rock Police Pension Board standards for determining disability at that time.

13. Officer McCarty was terminated from the Little Rock Police Department following this determination. The Board reconsidered her application for retirement benefits in March 1990, and denied them based upon the standards of disability found in the job descriptions which were in effect at the time of her original application. Those standards are found in the letter of May 12, 1988, from Dr. John G. Watkins to the Board.

14. Tamara McCarty is not disabled pursuant to Ark. Code Ann. § 24-11-423 and pursuant to the standards which were applied by the Board in March 1988.

The appellant argues on appeal to this court that the Board's decision is "unsupported by substantial evidence, arbitrary and capricious, and made upon unlawful procedure." Under

the Administrative Procedure Act, Ark. Code Ann. § 25-15-212(h) (Repl. 1992), it is provided that on appeal to circuit court the agency decision appealed from may be reversed or modified if the appellant's substantial rights have been prejudiced because the findings, conclusions, or decisions of the agency are

> (3) Made upon unlawful procedure;
>
> . . . .
>
> (5) Not supported by substantial evidence of record, or
>
> (6) Arbitrary, capricious, or characterized by abuse of discretion.

Both parties agree that "we review the decision of the board or agency, not the decision of the circuit court." *Arkansas Alcoholic Beverage Control Division* v. *Person*, 309 Ark. 588, 832 S.W.2d 249 (1992). The appellant argues that when the Board in May of 1988 denied her claim for disability retirement benefits its decision was based upon job descriptions furnished the Board by Captain Tim Dailey, the training officer for the Little Rock Police Department, which purported to be in effect at that time but which, in fact, were not in effect. In that regard, we note the conceded fact that in June of 1988, after the Board had denied her application in May of 1988, she was terminated by the police department for being unable to perform her duties satisfactorily because of her disability. We next note that the minutes of the Board's meeting of April 25, 1989 (R. 84), show that Tom Dalton, Chairman, called a special meeting of the Board because the city attorney's office had presented to Dalton "concerns that they might have as it relates to decisions being made on disability retirements." The minutes show that the Board voted to "obtain an independent evaluation of Mrs. Tamara McCarty [appellant] and Officer Ralph Howell" after the police chief had made a complete listing of the physical requirements which officers must pass. And, as noted in the findings of fact, Dr. Watkins thereupon resigned from the Board. His letter of resignation is in the record following the minutes of the April 1989 meeting (R. 85), and it states that he is resigning "due to lack of an objective set of physical measuring guidelines" which makes it impossible "to adequately advise the Little Rock Police Pension Board regard-

ing disability."

We then note that after the Board approved Dr. C.E. Ballard as the physician member of the Board on June 8, 1989 (R. 86), the Pension Clerk wrote the appellant on July 31, 1989, to advise that the Board had asked their medical representative to "secure a second opinion" regarding her back problem, and Dr. Ballard wanted appellant to contact Dr. John Adametz for an appointment as soon as possible. (R. 88). We then note that Dr. Ballard, in a letter to the Board dated March 2, 1990, wrote "it is my opinion that [the appellant] is disabled to perform her duties as currently described." (R. 99). Also, we note that the minutes of the March 15, 1990, Board meeting state that it was agreed to employ "outside counsel" to advise the Board on appellant's application for disability benefits. (R. 103).

We think it also significant that the record contains a memorandum to the Board from the city attorney dated March 28, 1990. (R. 105-10). This memo stated that the city attorney encourages the Board to obtain additional counsel but that "as an initial matter, I must mention that review of this case necessitates a parallel review of the Ralph Howell case." (R. 105). It pointed out that the Board had voted on June 8, 1989, to review both cases and had on November 9, 1989, voted to allow Howell a disability pension. (R. 105-06). A chronological statement of events is then set out. (R. 106-07). The city attorney's memorandum concludes with a discussion which points out that at the time of the applications of Howell and appellant the police department had a policy, as set out in a memo from the police chief (R. 110), that light duty work would be discontinued where no compelling need existed, and an officer who could not "perform his duties unrestricted" would be placed on sick leave or leave without pay. The city attorney's memo states that the appellant's termination was on that basis and that the appellee Board and the police department should use the same criteria.

When the circuit court remanded this case for the trial court to make findings of fact and conclusions of law (R. 16-17), the court said that it would be "illogical" for the Board and the police department to have different standards for the physical requirements of the police officers, and if one of them sets standards and the other one does not — it would be reasonable to conclude that

the non-acting one would have adopted the standard of the acting one.

After the findings were made by the Board and the matter was again submitted to the circuit court, the Board's decision was affirmed with the simple statement that a review of the record and the findings and conclusions filed by the Board "confirm that McCarty received a fair hearing and that substantial evidence of record supports the decision." (R. 254-55). The notice of appeal from that order states that the appeal is based on the points which we have previously set out in this opinion.

On pages 4 and 5 of the Board's brief in this court it argues in support of its decision (and the circuit court's affirmance of that decision) as follows:

> Therefore, the question becomes what job description should apply; those which were presented without objection to the Board in March 1988 or the policy adopted by the police department following the determination made by the Board. . . .
>
> Just as a pension plan member's rights to benefits become fixed when that member has vested in the system, the plan's obligations are fixed at the time application for benefits is made. . . .
>
> Officer McCarty allowed the Board to make its decision based upon job descriptions which were presented to it without objection. No effort was made until almost two years later to have the Board reconsider and apply a different set of job descriptions. Because the time for appeal of that decision had run, the basis for that decision had become *res judicata.*

We do not agree that the record supports the Board's argument. To the contrary, the record shows that when appellant made her application for pension benefits in March of 1988, the Board's decision was based upon job descriptions furnished the Board by the training officer for the police department, Tim Dailey, which were not, in fact, in effect at that time. The minutes (R. 63) of the May 12, 1988, meeting, at which the Board denied the appellant's application, show that its decision was based upon

a letter from its physician representative, Dr. Watkins. His letter follows the minutes of the meeting (R. 64) and attached the job descriptions he had used. However, there is no substantial evidence to support a decision that those job descriptions were in effect in May of 1988. The memorandum (R. 105-09) of March 28, 1990, by the city attorney, Mark Stodola, attached a letter from the police chief dated June 14, 1984, which was prior to appellant's application for retirement in March of 1988, in which the chief stated that "light duty" work assignment had been discontinued. To show that there really were no "light duty" assignments, and that the appellant was actually disabled in May of 1988 when the Board denied her application for disability benefits, we have the fact that on June 27, 1988, she was terminated "as being unable to perform the duties of her office satisfactorily because of her disability." In its response to appellant's petition for judicial review, the Board admitted that this was true. (R. 6). Then after a special Board meeting on April 25, 1989, the Board on its own motion voted to reconsider appellant's application. It then employed "outside counsel" to advise it in regard to appellant's application for disability benefits, and at the meeting on April 12, 1990, outside counsel, Mr. Ross, met with the Board.

The minutes of that meeting (R. 117-24), at which appellant's application was reconsidered, show the Board understood that the job descriptions it used when it denied appellant's application back in May of 1988 were not actually in effect at that time. The chairman, Tom Dalton, stated (R. 120) that they "were not active, accurate job descriptions," and the real discussion was whether the Board could have used a different standard. Mr. Furlow asked Mr. Ross, the Board's attorney, if the job descriptions the Board had acted upon could "be the same thing as accepting the job descriptions as the Board's job description". (R. 121). Another member, Mr. Pryor, asked if the job descriptions furnished the Board back in May of 1988 could be "at least standards by which it was judging disability at that time." (R. 121). The attorney's answer was "Obviously, that's what it would have to be." (R. 121).

To determine whether a decision is supported by substantial evidence, we review the record as a whole, and to establish the absence of substantial evidence to support the decision

the appellant must show that the proof before the administrative board was so nearly undisputed that fair-minded minds could not have reached its conclusions. *Wright* v. *Arkansas State Plant Board*, 311 Ark. 125, 842 S.W.2d 42 (1992). In the present case, we think the record as a whole contains proof so nearly undisputed that fair-minded minds could not reach a conclusion that the appellant was not disabled in May of 1988 from performing the duties of her job with the police department.

We come now to the real basis of the Board's decision. This is found in paragraph 12 of its findings of fact and conclusions of law dated March 11, 1991. (R. 133-36). This finding, under the heading "Conclusions of Law" states:

> 12. Job descriptions were supplied to John G. Watkins, III, M.D. by Captain Tim Dailey of the Little Rock Police Department which were represented to be the existing job descriptions for the Little Rock Police Department. These job descriptions constituted the Little Rock Police *Pension* Board standards for determining disability at that time.

(R. 135) (emphasis added). This conclusion of law presents another point relied upon for reversal by the appellant: "The Board's decision was made upon unlawful procedure."

We first consider the conclusion, reached by paragraph 12 of the Board's findings of fact and conclusions of law, that the Board used *as its own standards* the job descriptions used by Dr. Watkins when he wrote to the Board (R. 64) on May 12, 1988, that the appellant could perform some of the jobs described in the police department's job descriptions attached to his letter. Also, we compare paragraph 12 with paragraph 5 of the Board's findings of fact and conclusions of law. Paragraph 5 states in reference to Dr. Watkins' letter (which is mentioned in paragraph 4) that "Officer McCarty was denied retirement based upon the criteria then in place at the *Little Rock Police Department*." (Emphasis supplied). Obviously, the only way, under the evidence in this case, for the Board to have its own standards is for the Board to have adopted the standards of the department. If that occurred, it must have been at the meeting of the Board on April 12, 1990, (R. 117), at which Mr. Furlow and Mr. Pryor asked the Board's counsel, Mr. Ross, if the Board could adopt the

police department's standards as its own, and Mr. Ross said "that's what it would have to be." (R. 121). The problem with this, however, is that the department's standard in May of 1988, when the Board denied appellant's application, was "no light duty," and under that standard the appellant was entitled to disability retirement. On the other hand, if the Board was adopting on April 12, 1990, standards different from the police department's standards in effect in May of 1988, this would be a retroactive, after-the-fact process, and the Board's decision based on such standards would be clearly made upon unlawful procedure. In *Jones* v. *Cheney*, 253 Ark. 926, 489 S.W.2d 785 (1973), the court said that where the legislature of a state creates a retirement system to which employees contribute, the legislature may not constitutionally impair the rights of those employees by legislation enacted after their rights become vested. Here, under Ark. Code Ann. § 24-11-413 (Repl. 1992) police employees contribute to the pension fund by payroll deductions. Thus, the Board in the present case could not adopt new standards in April of 1990 to apply to the application for retirement benefits which the appellant made in 1988.

The appellant's third point for reversal of the Board's decision is that it was arbitrary, capricious, or characterized by abuse of discretion. On this point, we call attention to the fact that the record shows that in his memo of March 28, 1990, the city attorney informed the Board it should consider the fact that it had at a meeting on April 25, 1989, voted to reconsider the applications for disability retirement of both appellant and Officer Ralph Howell, and the Board had granted Howell's application. (R. 107). It is clearly implied in the memo that the city attorney thought the two cases were governed by the same rules — he said the review of the appellant's case "necessitates a parallel review of the Ralph Howell case" (R. 105) and that the "no-light duty" policy in place and practice since 1984 applied to both appellant and Howell (R. 107). In the case of *City of Little Rock* v. *Martin*, 244 Ark. 323, 424 S.W.2d 869 (1968), the court said it was arbitrary to shunt aside an application for retirement pay while granting benefits to others in a identical category. Thus, appellant's argument that the Board's decision in the present case was arbitrary has merit.

The appellee Board argues that because the appellant did not

appeal from the Board's May 12, 1988, decision, that decision is *res judicata* and she cannot relitigate her claim. We do not agree.

First, we point out that the Board at a special meeting on April 25, 1989, (R. 84), on motion by its chairman, voted to obtain "an independent evaluation" of the appellant after having obtained from the police chief "a complete listing of definite physical parameters which every sworn officer on the force can pass at this time who is not on limited or declared light duty status." In February of 1990, the city attorney sent the Board a memo and attached a copy of the job requirements of the police department. (R. 92-97). The memo quoted and called special attention to a provision that said the officers "must be able, physically and mentally, to perform at all times all duties required of any sworn officer in any job assignment, including but not limited to effecting the arrest of a violent, resisting subject." It should be again noted that the city attorney in his memo dated March 28, 1990, advised the Board that the police department's policy on light duty "has been codified since April 1989, but has been officially in place by custom or practice since Chief Simpson's tenure [and] covers both Ms. McCarty's application and Mr. Howell's application." (R. 107). Attached to the memo is the memo from Chief Simpson dated June 14, 1984, which states that "several weeks ago a decision was made to discontinue light duty work assignment except in limited circumstances." (R. 110).

Therefore, reconsideration of appellant's application was granted by the Board. Nothing in the Administrative Procedure Act, Ark. Code Ann. § 25-15-201 through -214 (Repl. 1992), provides that an agency cannot reconsider its own decision. In *North Hills Memorial Gardens* v. *Simpson*, 238 Ark. 184, 381 S.W.2d 462 (1964), the court said:

> It is first contended by the applicant that the board's original denial of Rest Hill's application for a permit is *res judicata*. It is true that when an administrative board acts judicially or quasi judicially its decision may be res judicata in a second proceeding involving the same question. We are not convinced, however, that all the technical rules that make up the common-law doctrine of *res judicata* should apply with equal force to administrative proceedings.

238 Ark. at 185, 381 S.W.2d 464 (citation omitted). Other courts have made the same holding. *See Purter* v. *Heckler*, 771 F.2d 682, 691 (3d Cir. 1985) ("when *res judicata* is applied in the context of administrative proceedings under the Act, it is not encrusted with the rigid finality that characterizes its application in purely judicial proceedings."). In *Hall* v. *City of Seattle*, 602 P.2d 366, 369 (Wash. App. 1979), the court said:

> We think the proper view is that expressed by the Supreme Court of Minnesota in an analogous case:
>
> > Where through fraud, mistake, or misconception of facts the commissioner enters an order which he promptly recognizes may be in error, there is no good reason why, on discovering the error, he should not, after due and prompt notice to the interested parties, correct it.

We think the reasoning in *Hall* is particularly applicable to the case before us. Here, the Board made a mistake or misconception of facts and applied standards to the appellant's application that were not in force at the time. Upon discovering that mistake or misconception, the Board reconsidered its decision. We think that was proper and its May of 1988 decision did not prevent its reconsideration of the application in April of 1990. In fact, we think it would have been arbitrary, capricious, and an abuse of discretion if the Board had not reconsidered the application. The problem is — the Board did not make the right decision on reconsideration, and we must reverse the decision made.

Secondly, on the *res judicata* issue, long before the adoption of the Arkansas Rules of Civil Procedure and its requirement in Rule 8 that *res judicata* is an affirmative defense which must be pleaded, this was the rule in Arkansas. *See Kendrick* v. *Brown*, 211 Ark. 196, 199 S.W.2d 740 (1947); *Widmer* v. *Wood*, 243 Ark. 617, 421 S.W.2d 872 (1967). This rule also applies in administrative hearings. *See Poulin* v. *Bowen*, 817 F.2d 865, 869 (D.C. Cir. 1987). In the present case *res judicata* was not raised at the April 12, 1990, hearing before the Board. Indeed, the Board held that reconsideration hearing at its own initiative and thus waived the defense of *res judicata* even if the doctrine applied. *Poulin* v. *Bowen, supra*. Furthermore, when the appellant appealed

from the Board's April 12, 1990, decision the Board filed an answer to the appellant's petition for judicial review and that answer made no mention of a *res judicata* defense.

In sum, we find that there is no substantial evidence to support the Board's decision to deny appellant's application for retirement benefits. We also find that decision, under the circumstances here, to have been arbitrary and capricious. The case, however, was fully developed before the Board and we find that the evidence is so nearly undisputed that fair-minded minds could only conclude that appellant's application should be granted. Therefore, we remand to the circuit court with directions that it remand to the Board with directions that the Board approve appellant's application.

Reversed and remanded.

JENNINGS, C.J., dissents.

PITTMAN, J., not participating.

JOHN E. JENNINGS, Chief Judge, dissenting. If this were a matter of first impression it certainly would seem the fair thing to do to let this officer receive a pension, to the extent that we can glean the circumstances of this case from the record. The problem, however, is that we are an appellate court bound by certain strictures, imposed by statute or decision, which regulate our proper function on appeal. We are not a "knight-errant, roaming at will" with the power to right every wrong, real or imagined. *See* Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921).

In the case at bar the board declined to award disability retirement benefits to the appellant in April 1989. Indeed, the board had no authority to do otherwise since by statute such benefits may not be awarded unless the physician member on the board of trustees certifies that the officer is physically permanently disabled. *See* Ark. Code Ann. § 24-11-423(a)(1). No appeal was taken from the board's decision, nor does there appear to have been a request under the statute for a second evaluation by another physician. In February of 1990 appellant retained counsel who wrote a letter to the board requesting "reconsideration."

As I understand the majority opinion it is the board's refusal

to award pension benefits to the appellant in this "reconsideration" proceeding that the court finds to be arbitrary and capricious and not supported by substantial evidence. In my view the court merely substitutes its judgment for that of the board. This we cannot do. *Cf. Helena-West Helena Sch. Dist.* v. *Davis*, 40 Ark. App. 161, 843 S.W.2d 873 (1992).

Equally troubling is the majority's willingness to explore the record in an attempt to discover error. In *Johnson* v. *State*, 17 Ark. App. 125, 704 S.W.2d 647 (1986), we said:

> On appeal the abstract of the record constitutes the record and the appellate court considers only that which is contained in the abstract. We have often stated that where the appellant's abstract does not contain the testimony on which he bases his argument we will not explore the record for prejudicial error.

The majority's extensive references to the transcript leave no doubt that we are abandoning the rule, at least in this particular case.

For the reasons stated, I respectfully dissent.

Walter Richmond HAYNES *v.* STATE of Arkansas

CA CR 93-552 872 S.W.2d 85

Court of Appeals of Arkansas
Division I
Opinion delivered March 16, 1994

Jan Thornton, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. On appeal from municipal court, the appellant, Walter Richmond Haynes, was convicted in a jury trial of driving while intoxicated, driving on a suspended license and carrying a weapon. For DWI, appellant was sentenced to a year in the county jail, assessed a fine of $1,000 and his driver's license was suspended for a period of 120 days. For driving on a suspended license, he was sentenced to six months in jail and fined $500. For carrying a weapon, appellant was sentenced to a year in jail with a fine of $1,000. As his sole issue, appellant contends that the trial court erred in denying his motion to withdraw the appeal from municipal court. We find no error and affirm.

On July 22, 1992, the appellant was found guilty of the abovementioned offenses in the Union County Municipal Court. Appellant thereafter perfected an appeal to the Circuit Court of Union County. Immediately before the trial began, on March 11, 1993, appellant moved to dismiss the appeal from municipal court. The prosecution objected to a dismissal, stating that it was prepared for trial and that the county had gone to great expense in summoning a jury. The trial court declined appellant's request to withdraw the appeal, a jury was impaneled and the case proceeded to trial.

On appeal, appellant contends that he possessed an unqualified right to dismiss the appeal. In so arguing, appellant concedes that his contention is contrary to the supreme court's opinion in *Newberry* v. *State*, 261 Ark. 648, 551 S.W.2d 199 (1977), where it was held that the dismissal of such an appeal is a decision lying within the discretion of the circuit judge, and not a matter subject to the unilateral control of the accused. The court explained:

> The court did not abuse its discretion in denying the motion to dismiss the appeal. When an appeal takes a case to a purely appellate court, for a review of the judgment of a trial court, the appellant has a right to dismiss the appeal and submit to the judgment, if there is no prejudice to the appellee. But when the appeal is to an intermediate court for a trial de novo, the prosecution is as much a party to the transaction as it was in the court below. The intermediate court, and not the accused, is then vested with the power of dismissal. The court might, for example, find the original sentence to be inappropriate or think a trial to be a necessary step toward discouraging dilatory appeals. In the case at bar we perceive no basis for saying that the circuit judge abused his discretion in the matter.

Id. at 649, 551 S.W.2d at 200 (citations omitted).

While appellant acknowledges the *Newberry* decision, he nevertheless argues that the opinion is inconsistent with provisions of the Arkansas Constitution which repose in the individual the right to a jury trial, and the right to a public and speedy trial. This argument, however, was not presented to the trial court, and thus it is not preserved for appeal. Under our well-settled rule, this court does not consider issues raised for the first time on appeal. *Skiver* v. *State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992). Even constitutional issues may not be raised for the first time on appeal. *Duvall* v. *State*, 41 Ark. App. 148, 852 S.W.2d 144 (1993). We otherwise cannot conclude that the trial court abused its discretion in refusing to dismiss the appeal, and we affirm.

Affirmed.

PITTMAN and COOPER, JJ., agree.

Wesley TRIBBLE *v.* HEARTLAND EXPRESS and Credit General Insurance Company

CA 94-148 872 S.W.2d 86

Court of Appeals of Arkansas
Opinion delivered March 16, 1994

Donald Frazier, for appellant.

Ralph R. Wilson, for appellee.

PER CURIAM. The appellant in this workers' compensation case filed a timely notice of appeal from a decision of the Arkansas Workers' Compensation Commission, but tendered the record to the Clerk of this Court more than ninety days from the filing of the notice of appeal. The Clerk refused to file the record, and the appellant has filed a motion for a rule to require that it be filed.

The record on appeal from the Workers' Compensation Commission must be filed in the Court of Appeals within ninety days from the filing of the notice of appeal, as is required in other civil actions. *Davis* v. *C & M Tractor Co.*, 2 Ark. App. 150, 617 S.W.2d 382 (1981). In support of his motion, the appel-

lant asserts that the record was not timely filed because he was not notified that the record was available until he received a letter from the Commission dated January 13, 1994, four days before the ninety-day period expired. However, we find these circumstances to be insufficient grounds for the appellant's motion for a rule on the Clerk.

The responsibility for seeing that the record on appeal is timely filed lies with the appellant or his attorney, and cannot be shifted to the court appealed from or its staff. *Id.; see Johnson* v. *Carpenter*, 290 Ark. 255, 718 S.W.2d 434 (1986). We have said that, in civil cases, the failure to discharge that responsibility is excused only by the most extraordinary circumstances. *Davis* v. *C & M Tractor Co., supra.* No such circumstances have been presented in the case at bar, and the appellant's motion is consequently denied.

However, we want to call attention to our opinion in *Evans* v. *Northwest Tire Service*, 21 Ark. App. 75, 728 S.W.2d 523 (1987). There, we pointed out that the Arkansas Supreme Court had issued a per curiam providing that in appeals from administrative agency or commission cases, the Clerk of this Court, before the time for filing the record expires, may issue a writ of certiorari which would allow additional time to file the record on appeal. That rule now appears as Rule 3-5 of the Rules of the Arkansas Supreme Court and Court of Appeals.

Motion for Rule on the Clerk denied.

HARRINGTON CONSTRUCTION CO., et al. *v.*
David WILLIAMS

CA 93-239 872 S.W.2d 426

Court of Appeals of Arkansas
En Banc
Opinion delivered March 23, 1994
[Rehearing denied April 20, 1994.*]

*Mayfield, J., would grant rehearing.

Barber, McCaskill, Amsler, Jones & Hale, P.A., for appellant.

Lane, Muse, Arman & Pullen, for appellee.

JAMES R. COOPER, Judge. The appellee in this workers' compensation case was employed by Harrington Construction Company as a cement finisher. He filed a claim for benefits contending that he developed contact dermatitis in January 1991 because of his exposure to concrete, and asserting entitlement to temporary disability benefits. Prior to the hearing on the merits of the case, the administrative law judge mailed the employer's insurance carrier a notice regarding pre-hearing procedures to be followed, including the requirement that certain information be disclosed; the notice stated that failure to do so in a timely manner might result in a party being foreclosed from asserting claims and defenses. Subsequently, the administrative law judge entered an order finding that the employer's insurance carrier had failed to comply with the pre-hearing procedure and would therefore be foreclosed from presenting any defenses at the hearing. The appellants' motion to set aside that order was denied and, after a hearing on the merits, the administrative law judge found that the appellee sustained a compensable injury entitling him to temporary total disability benefits from July 15, 1991, through October 7, 1991, and temporary partial disability benefits from October 7, 1991, until a date yet to be determined. After a *de novo* review, the Workers' Compensation Commission found that the administrative law judge correctly precluded the insurance carrier from asserting defenses based upon the carrier's failure to respond to the pre-hearing information filing, and that the appellee had met his burden of

proving by clear and convincing evidence that he had contracted an occupational disease entitling him to temporary total and temporary partial disability benefits. From that decision, comes this appeal.

For reversal, the appellants contend that the administrative law judge lacked the authority to enter an order precluding them from asserting a defense or offering evidence, and that this order was in any event a manifest abuse of discretion which requires reversal. The appellants also contend that the Commission's finding that the appellee contracted an occupational disease entitling him to temporary total and temporary partial disability benefits is not supported by substantial evidence. We do not agree, and we affirm.

We first address the appellants' contention that neither the administrative law judge nor the Workers' Compensation Commission had the authority to enter the order precluding them from asserting a defense or offering evidence at the hearing. From the record, it appears that the administrative law judge mailed the employer's insurance carrier a notice on September 9, 1991, which detailed the pre-hearing procedures to be followed and stated that a party failing to complete the disclosures in a timely manner might be foreclosed from asserting claims and defenses. The insurance carrier failed to comply with the pre-hearing notice and, on November 13, 1991, the administrative law judge warned the insurance carrier that it would be precluded from presenting evidence to defend against the claim unless a response was filed within fifteen days. Although the carrier acknowledged receipt of that letter, it nevertheless failed to respond to the pre-hearing information request within the additional fifteen day period granted by the administrative law judge.

We think that the circumstances of the case at bar are analogous to those presented in *Loosey* v. *Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988), in which we affirmed the dismissal of an employee's claim on the ground that he failed to answer interrogatories. In *Loosey, supra*, we held that the Commission was authorized to make rules governing discovery, and that the administrative law judge had the authority to make orders pertaining to discovery. Pursuant to Ark. Code Ann. § 11-9-205(a)(1)(A) (1987), the Workers' Compensation

Commission is specifically authorized to make such rules and regulations as may be found necessary to carry out its duties. Subsection (C) of that statute charges the referee with the duty of conducting hearings, investigations, and making such orders as are required by any of the Commission's rules. Rule 16 of the Workers' Compensation Commission allows the Commission to order the depositions of any party or witness, and to order any other discovery procedure.

In *Loosey, supra*, the Commission dismissed an employee's claim with prejudice because he failed to answer interrogatories propounded by the employer. Despite the highly remedial purpose of the Workers' Compensation Act and our obligation to construe any ambiguities in the Act in favor of the workers for whose benefit it was adopted, *see Osmose Wood Preserving* v. *Jones*, 40 Ark. App. 190, 843 S.W.2d 875 (1992), we upheld the dismissal of the employee's claim for failure to timely answer the employer's interrogatories, noting that the employee failed to answer the interrogatories in a timely manner despite an order of the administrative law judge which permitted him additional time to do so. *Loosey*, 232 Ark. App. at 141.

The case at bar presents similar facts in that the appellant was likewise informed that certain disclosures were required and that failure to do so in a timely manner might result in it being precluded from asserting any claims and defenses, the appellant failed to meet the deadline and was given additional time by the administrative law judge, and the appellant nevertheless failed either to make the required disclosures or request an additional extension before the expiration of the extended deadline. The disclosures in the case at bar were to be completed before the pretrial conference. The Commission is specifically authorized to make such investigation as it considers necessary in respect to a claim, Ark. Code Ann. § 11-9-704(b)(1) (1987), and the pretrial conference procedure itself is a relatively recent addition to the Workers' Compensation Act which was designed to provide an opportunity for early resolution of some or all of the issues present at the time. Ark. Code Ann. § 11-9-703(2) (Supp. 1993). This is in keeping with the spirit of the Workers' Compensation law which is, *inter alia*, to afford those who are injured a form of relief which is both simple and speedy. *See Cook* v. *Southwestern Bell Telephone Co.*, 21 Ark. App. 29, 727 S.W.2d 862 (1987).

The appellant was notified that failure to complete the disclosures in a timely manner could result in the sanction which ultimately was imposed, thus satisfying due process. *See Loosey, supra.* We think it clear that the specific authority to investigate claims granted to the Commission carries also the authority to make such orders and impose such sanctions as are reasonably necessary to carry out that purpose. Although it is argued that the sanction imposed was unduly harsh, it was much milder than the dismissal of the worker's claim which was affirmed for a similar example of nonfeasance in *Loosey, supra.* We hold that the administrative law judge possessed the authority to enter an order precluding the appellants from asserting a defense or offering evidence by virtue of the specific statutory authorization permitting the Commission to investigate claims and to make such rules and regulations as are necessary to carry out its duties.

Nor do we find merit in the appellants' argument that the order precluding them from asserting any defense or introducing any evidence at the hearing was based on a pattern of conduct established by the insurance carrier, and that the record contains no evidence to establish any such pattern of conduct. We disagree with the appellants' argument because it is clear from the record that the administrative law judge's order was based squarely on the insurance carrier's failure to respond to the request for prehearing information in the case at bar. The reference to a "pattern of conduct" took place in the context of the following exchange between the administrative law judge and the attorney the appellants employed on the eve of the hearing:

> JUDGE STILES: And I have reviewed the motion and the supporting affidavit of Mr. Fleming, and I will deny the motion, Mr. Henry, but I want to just make it clear for purposes of this record, ordinarily I would not be so inflexible about these things, but in this particular case, because U.S.F. & G. not only failed to respond to the initial Request for Prehearing Information and did not take advantage of the additional time given them, I want it to be clear that the reason for my inflexibility this morning runs to U.S.F. & G. and not to this very able attorney that they have hired at the last minute.

MR. HENRY: Well, of course, my position is the same, Your Honor.

JUDGE STILES: And I want to make one further statement, just so I don't look like an absolute ogre about this. It's not just this case, and I've had some conversation with both respective counsel about this, there is a pattern of conduct that's been established by this particular carrier with other cases, so hopefully this will be a sufficient attention-getter that this will not occur in the future.

I'm sorry to have to do this to you, Mr. Henry. You and I have been working opposite sides of this thing for the last fourteen-and-a-half years, you always do an admirable job, and I hope you understand that I'm not personally trying to skin the bark off your tree, but I am skinning it off your client.

When read in context, we think that the administrative law judge's reference to a "pattern of conduct" was not the basis of his order *per se*, but instead was an aside in the nature of a personal explanation to a respected attorney with whom the judge had a work relationship of long standing. Furthermore, our review is addressed to the sufficiency of the findings of the Workers' Compensation Commission rather than to the remarks of administrative law judges, and no such "pattern of conduct" is mentioned in the Commission's opinion, which found that the appellant insurance carrier was correctly precluded from asserting defenses by virtue of its failure to respond to the prehearing information filing in the case at bar. We find no error on this point.

Finally, we address the appellants' contention that there is no substantial evidence to support the Commission's finding that the appellee contracted an occupational disease entitling him to temporary disability benefits.

■ When reviewing the sufficiency of the evidence to support a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if the Commission's decision is supported by substantial evidence. *Wright* v. *ABC Air, Inc.*, 44 Ark. App. 5, 864

S.W.2d 871 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

Viewed in the light most favorable to the Commission's findings, the evidence shows that the appellee was employed by the appellant construction company as a cement finisher. During the course of his employment with the appellant construction company, the appellee noticed itching and redness on his feet and hands. Although the appellee originally thought that the condition was athlete's foot and therefore did not seek medical treatment, the appellee did inform his employer that he was having difficulty and sought medical treatment from Dr. Gehrki, a general practitioner, on May 13, 1991. The appellee was diagnosed with contact dermatitis due to secondary concrete exposure. Although the appellee quit working for the appellant construction company on the day he first saw Dr. Gehrki, and was subsequently employed for approximately two months by another party as a concrete finisher, there was evidence that the appellee was not exposed to concrete in his work for the second employer because he wore rubber boots and gloves that protected him from the concrete; in contrast, the record shows that, while working for the appellant construction company, the appellee had holes in his rubber boots and wore no rubber gloves. Furthermore, there was evidence that, while still employed by the appellant construction company, the appellee was sufficiently disabled that his supervisor noticed that he was "hopping" at work due to his discomfort. Finally, although there was evidence that the appellee was subsequently employed by Johnny Bean, there was also evidence that Mr. Bean permitted the appellee an extremely flexible work schedule, permitting the appellee up to a week at a time to recover from the lesions which periodically erupt on his hands and feet because of his occupational disease.

Viewing this evidence, as we must, in the light most favorable to the Commission's findings, we cannot say that the findings of occupational disease entitling the appellee to temporary disability benefits were not supported by substantial evidence.

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the result reached or the reasoning employed by the majority opinion in this case. The law judge precluded the insurance carrier for the employer from presenting a defense against the appellee's claim for workers' compensation. The reason given by the law judge for this drastic action was that the insurance company (appellant) had not complied with the judge's prehearing requirements. In affirming that action, the majority opinion has overlooked a basic element in the process by which workers' compensation cases are decided.

Many years ago, the Arkansas Supreme Court pointed out that it is the duty of the Workers' Compensation Commission to make findings according to the preponderance of the evidence and not whether there is any substantial evidence to support the findings of the referee (now the administrative law judge). *Moss* v. *El Dorado Drilling Co.*, 237 Ark. 80, 81, 371 S.W.2d 528 (1963). In *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 495, 579 S.W.2d 360, 362 (1979), the court said "we give the law judge's findings no weight whatever," And the Arkansas Court of Appeals recognized this principle in the early days of its operation. *See Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981).

In the present case, as the majority opinion states, the appellant failed to comply with the prehearing procedures as detailed in the law judge's notice and failed again to furnish information within fifteen days as requested by a letter from the law judge. As a result, the law judge entered an order which precluded the appellant from presenting *any* defense to the appellee's claim. However, the appellant filed a motion to set aside the law judge's order, and the motion attached an affidavit by appellant's claims manager. At the hearing before the law judge the appellant's motion was denied, and appellant made a proffer of evidence it would have offered. In refusing to set aside his order and refusing to allow the appellant to assert a defense, the law judge stated, as set out in the majority opinion:

> [J]ust so I don't look like an absolute ogre about this, It's not just this case, and I've had some conversation with both respective counsel about this, there is a pattern of conduct that's been established by this particular carrier

with other cases, so hopefully this will be a sufficient attention-getter that this will not occur in the future.

I turn now to the opinion of the full Commission which affirmed the law judge's decision. That opinion states that after a *de novo* review of the entire record the Commission finds that the claimant has met his burden of proof by clear and convincing evidence (this being the standard of proof necessary to show that the claimant had sustained an occupational disease as he claimed). In order to be clear on the point of this dissent, I note that there was, of course, no evidence and no defense allowed by the appellant to the claimant's claim. The point of this dissent, however, is that the full Commission did not make a finding of fact on the law judge's refusal to allow a defense to be made by the appellant. The only reference to that point in the opinion of the Commission is as follows:

> On September 9, 1991, an administrative law judge mailed the respondent carrier a notice regarding the prehearing procedures to be followed. The notice stated that a party failing to complete the disclosures in a timely manner might be foreclosed from asserting claims and defenses. Several weeks later the carrier had not complied with the prehearing notice and on November 13, 1991, the administrative law judge noticed their failure to comply. The administrative law judge warned the respondent carrier that it would be precluded from presenting evidence to defend against the claim unless a response was filed within 15 days. The carrier acknowledged receipt of that letter but did not respond. *We find under the facts in this case that the administrative law judge correctly precluded the respondent carrier from asserting defenses based upon its failure to respond to the prehearing information filing.*

(Emphasis added.)

I submit that the opinion of the full Commission does not meet the requirement of the cases, cited above in this dissent, that the Commission must make findings of its own to support its decision and not merely find that the law judge acted correctly. In *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986), the Commission adopted the law judge's

opinion which stated "I believe it clear that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional benefits . . . ." 18 Ark. App. at 22, 709 S.W.2d at 109. This court reversed and remanded that case for the Commission to make "specific findings" upon which it relied to support its decision. We said:

> The Commission made no findings as to whether appellant sustained a compensable injury, or when the healing period ended if there was a compensable injury, or whether she was disabled at the time of hearing, and if so, what was the cause of the disability. We are simply unable to tell from the record upon what factual basis the claim was denied. Therefore, we are unable to tell whether or not the law was or was not properly applied by the Commission.

Id.

Here, the Commission's finding that the law judge "correctly precluded the respondent carrier from asserting defenses based upon its failure to respond to the prehearing information filing" does not, in my view, make a specific finding that allows us to determine "whether or not the law was or was not properly applied by the Commission." The majority opinion does not, in my view, touch that problem. It simply states that the Commission (and by inference, the law judge) has authority to "make such orders and impose such sanctions as are reasonably necessary" to investigate claims and provide speedy relief. However, the Commission did not find that the law judge correctly precluded the carrier in this case from asserting a defense because it would have hindered or unduly delayed the resolution of appellee's claim. The affidavit of appellant's claims manager states that a significant administrative change was made at its Little Rock office in September of 1991; that this caused some difficulty in establishing new operating procedures for processing claims; and that a processing mistake had apparently occurred in the handling of the claim in this case. Neither the law judge or the Commission even mentioned this point. Moreover, the affidavit stated that the appellant had filed a response to the prehearing order on December 9, 1991, which was prior to the hear-

ing on the merits on January 3, 1992. While this was not within the fifteen-day limit set by the law judge, the Commission made no mention of this fact and certainly did not hold that the failure to timely respond would have caused a delay in deciding the appellee's claim.

In *Cagle Fabricating and Steel, Inc.* v. *Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992), the Arkansas Supreme Court cited our case of *Jones* v. *Tyson Foods, Inc.*, 26 Ark. App. 51, 759 S.W.2d 578 (1988), where we remanded to the Commission because it did not make specific findings that we could review. Our supreme court in *Cagle* said the Commission's language in that case was similar to that the Commission used in *Jones* in that it "does not detail or analyze the facts upon which it is based." 309 Ark. 369, 830 S.W.2d 859. Therefore, the supreme court ordered the case remanded for a new decision based upon specific findings.

While it is true that we will in an appropriate case affirm the Commission if its decision has the effect of adopting the findings and conclusions of the administrative law judge, *see Arkansas Department of Health* v. *Williams*, 43 Ark. App. 169, 180, 863 S.W.2d 583, 589 (1993), in the present case the law judge based his decision on his statement (previously quoted in this dissent) that "It's not just this case . . . there is a pattern of conduct that's been established by this particular carrier with other cases, so hopefully this will be a sufficient attention-getter that this will not occur in the future." Although, the majority opinion does not think this was "the basis of his order *per se*," there is no other statement of specific facts relied upon by the law judge for the imposition of his sanction barring the appellant from presenting a defense to the appellee's claim. Since we review the Commission's decision and not the law judge's decision, I think we should remand to the Commission for it to make specific factual findings to enable us to determine whether or not the law was or was not properly applied by the Commission. Especially is that true here where it seems clear, at least to me, that the law judge based his decisions upon some past — but not detailed or in evidence — conduct of the appellant.

The majority cites our case of *Loosey* v. *Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988), as author-

ity for its decision in the present case. That case, however, makes no point of the lack of specific findings, but to the contrary, the opinion states that "we cannot say the Commission's order is not supported by the record." 23 Ark. App. at 141, 744 S.W.2d at 404. Apparently, the record disclosed sufficient findings made by the Commission to enable us to determine that the Commission's decision was supported by the record. Even, if we were wrong — it does not give us license to be wrong again.

I dissent from the failure of the Court to remand this case to the Commission for specific findings which we can review on appeal.

HELENA CONTRACTING COMPANY and
Argonaut Insurance Company *v.* Clevester WILLIAMS

CA 93-250 872 S.W.2d 423

Court of Appeals of Arkansas
En Banc
Opinion delivered March 23, 1994
[Rehearing denied May 18, 1994.*]

*Pittman and Robbins, JJ., would grant rehearing.

Friday, Eldredge & Clark, by: *Calvin J. Hall*, for appellants.

JAMES R. COOPER, Judge. The appellee in this workers' compensation case sustained a compensable injury on September 26, 1983, when he was hit by a cotton trailer in the course of his employment with the appellant contracting company. The appellants accepted the claim as compensable and paid compensation until a dispute arose in 1985. The appellee filed a claim for additional compensation on July 2, 1985, and, after a hearing, was awarded additional compensation on February 4, 1986. Although the appellee continued to receive medical treatment for his compensable injury at least once each year, the appellants discontinued payment of disability benefits and payment for medical treatments provided after July 26, 1988. The appellee sought the resumption of benefits by a claim filed with the Workers' Compensation Commission on January 31, 1990. The appellants responded by asserting that the claim was barred by the statute of limitations, Ark. Code Ann. § 11-9-702(b). The Commission found that the appellee's claim was not barred, holding that the statute of limitations had been tolled by the appellants' claim for additional compensation previously filed

in 1985. From that decision, comes this appeal.

For reversal, the appellants contend that the Commission erred in concluding that the appellee's claim is not barred by the statute of limitations found in Ark. Code Ann. § 11-9-702(b). We affirm.

The statute relied upon by the Commission, Ark. Code Ann. § 11-9-702(b) (Supp. 1993), provides that claims for additional compensation shall be barred unless filed within one year from the date of the last payment of compensation, or two years from the date of the injury, whichever is greater. The appellants argue that the Commission erroneously concluded that a prior claim for additional compensation has the effect of tolling the statute of limitations indefinitely. We do not address the issue of whether a timely claim for additional compensation tolls the statute of limitations forever, because we do not think that the claim filed on January 31, 1990, constituted a claim for "additional compensation" so as to be subject to the limitations period stated in Ark. Code Ann. § 11-9-702(b). There is nothing in the record before us to show that the award of compensation made pursuant to the Commission's order of February 4, 1986, had expired, or that the cessation of benefits by the appellants was sanctioned in any form. Instead, it is clear from the record that the appellants simply refused to continue the payment of benefits previously awarded by the Commission pursuant to its order of February 1986. Furthermore, it is clear that the order appealed from merely awarded temporary total disability and medical benefits related to the compensable injury. Given that the appellee was already entitled to those benefits by virtue of the Commission's 1986 order, we think that the Commission erred in concluding that the appellee's claim was one for "additional" compensation so as to be subject to the limitations periods provided for in § 11-9-702(b). Instead, we regard the appellee's claim as one for enforcement of the Commission's previous order, rather than a request for additional compensation, and we hold that the claim was therefore not barred by § 11-9-702(b). Because the Commission arrived at the same result, its decision is affirmed.

Affirmed.

ROGERS, J., agrees.

JENNINGS, C.J., and MAYFIELD, J., concur.

PITTMAN and ROBBINS, JJ., dissent.

JOHN E. JENNINGS, Chief Judge, concurring. I concur in the affirmance of this case because I agree with the Commission that its disposition is governed by three of our cases: *Arkansas Power & Light Co.* v. *Giles*, 20 Ark. App. 154, 725 S.W.2d 583 (1987); *Sisney* v. *Leisure Lodges, Inc.*, 17 Ark. App. 96, 704 S.W.2d 173 (1986); *Bledsoe* v. *Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984). The problem is not whether the filing of a claim for additional compensation tolls the statute (it does under the decisions decided above), but rather when the statute begins to run anew.

Obviously the statute of limitations does not begin to run once again in a workers' compensation case merely because a hearing is held. We know that multiple hearings over an extended period of time are not unusual in workers' compensation cases. Nor does the entry of an order necessarily cause the statute to begin to run again. I do agree that an order which clearly and finally disposes of the claim would cause a new period of limitations to begin to run. An example of such an order would be an order of dismissal. Such an order may be sought by either party when a claim for benefits is not being actively prosecuted. *See* WCC Rule 13 (1991).

Because the last order entered in the case at bar is not one that finally disposes of all aspects of the claim, the Commission was correct, in my view, to hold that the issue was governed by the *Bledsoe* line of cases.

MELVIN MAYFIELD, Judge, concurring. I concur with the opinion of Judge Cooper affirming the decision of the Workers' Compensation Commission in this case. That view, in my judgment, makes it unnecessary to discuss the view presented by the dissenting opinion. However, I think the concurring opinion by Chief Judge Jennings correctly answers the view presented by the dissent. Under either view, the decision reached is one of law — not fact — and the Commission's decision should be affirmed.

JOHN B. ROBBINS, Judge, dissenting. I respectfully dissent from the majority opinion of this court which today affirms a decision of the Workers' Compensation Commission. The Commission held that the claim of Clevester Williams for additional

benefits filed in 1985 tolled the statute of limitations indefinitely. Consequently, the employer, Helena Contracting Company, could not rely on the statute of limitations in defending a second claim for additional benefits filed in 1990, even though more than two years had elapsed since the date of the injury, and more than one year since the last payment of compensation to the claimant.

The Commission's opinion and order cites three cases from this court as controlling its decision. *Arkansas Power & Light Co.* v. *Giles*, 20 Ark. App. 154, 725 S.W.2d 583 (1987); *Sisney* v. *Leisure Lodges Inc.*, 17 Ark. App. 96, 704 S.W.2d 173 (1986); *Bledsoe* v. *Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984). As the Commission notes, in each of these cases a timely claim for additional compensation was filed, and in each case we held that the timely filed claim tolled the statute of limitations and prevented the statute from barring a subsequent request for additional benefits. However, there is a very significant distinction between the circumstances in those three cases and the case at bar. Here, the first claim for additional benefits was heard by the Commission's administrative law judge and an award of benefits was made. In *Giles*, *Sisney*, and *Bledsoe*, no action had been taken on the first claim for additional benefits and it was pending when the second claim for additional benefits was filed. We have never held that a request for additional benefits continues to toll the statute of limitation after the claim is heard by the Commission and decided.

The applicable limitation for claims for additional compensation is set forth in Ark. Code Ann. § 11-9-702(b):

> TIME FOR FILING FOR ADDITIONAL COMPENSATION. In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one (1) year from the date of the last payment of compensation, or two (2) years from the date of the injury, whichever is greater. . . .

If a timely claim for additional compensation is filed, the statute is tolled as to any later claim for additional benefits, *see Giles, Sisney, Bledsoe*, but *only until* the Commission decides the first claim for additional benefits. If and when the first claim is decided,

any claim for additional compensation thereafter is barred by the statute unless filed with the Commission within one year from the date of last payment of compensation, or two years from the date of the injury, whichever is later.

The claimant, Mr. Williams, was granted a hearing on his first claim for additional benefits on August 28, 1985, and was awarded benefits by order filed on February 4, 1986. Helena provided benefits pursuant to this award through July 26, 1988. Mr. Williams' next claim for additional benefits was not filed until January 31, 1990. The statute began running on the second claim on July 26, 1988, and became a bar to any subsequent claim for additional benefits on July 26, 1989. Consequently, the statute of limitations effectively barred Williams' January 31, 1990, claim. The Commission erred in holding that it did not.

The majority of this court choose to not address the issue raised by the appellants on appeal; preferring to characterize Williams' claim as a request to enforce the Commission's previous order of February 4, 1986. Consequently, they rationalize that appellee's claim was not one for "additional" compensation. This characterization is contrary to the views of the Administrative Law Judge and the full Commission. The Administrative Law Judge's opinion recites that:

> The claimant contended that he is entitled to additional medical benefits and is also entitled to additional temporary total disability benefits for 1988 through a yet to be determined period of time.

The opinion of the full Commission speaks to the claim as follows:

> Consequently, in the present claim, we are constrained by the Court's decisions to find that the July 2, 1985, claim for additional benefits tolled the Statute of Limitations with regard to subsequent claims for additional compensation, including the claim currently before the Commission.

This recharacterization is made without citation of authority or any reference to any other statute of limitations which might pro-

vide a longer period for filing requests for the "enforcement of the Commission's previous order."

The majority opinion implies that the Administrative Law Judge's order of February 4, 1986, to pay appellee's "reasonable and necessary medical and related expenses" and "additional temporary total disability benefits for the period beginning June 4, 1985, and continuing through an undetermined day" is absolute and Williams need only seek enforcement of the order to recover from the appellants, rather than request additional benefits. The majority observes that:

> There is nothing in the record before us to show that the award of compensation made pursuant to the Commission's order of February 4, 1986, had expired, or that the cessation of benefits by the appellants was sanctioned in any form.

However, the record reflects that the Administrative Law Judge's decision, adopted by the full Commission and now before us on appeal, held that Williams' healing period and entitlement to temporary total disability benefits ended on February 15, 1988, *prior* to May 30, 1988, through which date appellants paid temporary total benefits and long before Williams filed his subject request. While the Commission awarded additional medical expense benefits, appellants were not required to pay any further temporary total benefits, notwithstanding the February 4, 1986 order.

PITTMAN, J., joins in this dissent.

CHAMBERLAIN GROUP, et al. *v.* Al RIOS, Sr.
and Second Injury Fund

CA 93-503 871 S.W.2d 595

Court of Appeals of Arkansas
Division II
Opinion delivered March 23, 1994

Matthews, Sanders, Liles & Sayes, by: *Gail O. Matthews* and *Marci Talbot Liles*, for appellants.

Terry Pence, for appellees.

JOHN B. ROBBINS, Judge. The Chamberlain Group (Chamberlain) appeals an order of the Arkansas Workers' Compensation Commission which found that the Second Injury Fund was not liable in this case. Appellant Chamberlain argues on appeal that the Second Injury Fund's liability should have been determined on the date Mr. Al Rios, Sr., appellee, became permanently and totally disabled, rather than on the date of the actual injury. Chamberlain also contends that the Commission erred in holding that the Second Injury Fund had no liability under the facts of this case, challenging whether there was substantial evidence to support its decision. We find no error and affirm.

The parties in this case stipulated that an employee-employer relationship existed on November 1, 1988, and that Mr. Rios sustained a compensable injury on that date. It was further stipulated that Mr. Rios sustained a 20% impairment to the body as a whole resulting from that injury, and that he was permanently and totally disabled. Mr. Rios had two back surgeries as a result of his 1988 injury, one in 1989, and another in 1990. Evidence before the Commission also indicated that Mr. Rios had been diagnosed with diabetes approximately fifteen years earlier.

Chamberlain contends that Rios' diabetes constituted an impairment and combined with his work-related injury to render him totally disabled. Consequently, Chamberlain argues, it should be liable only for 20% of Rios' disability benefits which are attributable to his 20% anatomical impairment, and the Second Injury Fund is responsible for the balance.

The first issue raised by Chamberlain is that the presence of a preexisting impairment sufficient to trigger Second Injury Fund liability should be determined as of the date Mr. Rios became permanently and totally disabled, two and one-half years after the date of the actual injury. However, the applicable statute, Ark. Code Ann. § 11-9-525 (1987), requires the impairment to predate the work-related injury by providing the following:

> (b)(1) Commencing January 1, 1981, all cases of permanent disability or impairment where there has been *previous* disability or impairment shall be compensated as herein provided.
>
> (3) If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a *subsequent* compensable injury. . .
>
> (5) If the *previous* disability or impairment, whether from compensable injury or otherwise, and the *last* injury together result in permanent total disability, . . .

(Emphasis added.) The Arkansas Supreme Court has also recognized in this context that an impairment must pre-date the compensable work-related injury, by setting forth three basic requirements for Second Injury Fund liability:

> It is clear that liability of the Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at the present place of employment. Second, *prior* to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

(Emphasis added.) *Mid-State Constr. Co.* v. *Second Injury Fund*, 295 Ark. 1, 5, 746 S.W.2d 539, 541 (1988).

As pointed out above, the parties in this case stipulated that Mr. Rios sustained his work-related injury on November 1, 1988. Chamberlain cannot object to a stipulation made before the Commission for the first time on appeal. *Death & Perm. Total Disab. Fund* v. *Whirlpool*, 39 Ark. App. 62, 837 S.W.2d 293 (1992).

In addressing Second Injury Fund liability, the determination of whether an employee suffered a preexisting impairment in addition to any disability which resulted from a work-related injury is a factual one and is to be made by the Commission. Both the Administrative Law Judge and the Commission found that Mr. Rios did not suffer from a disability or impairment prior to November 1, 1988. The evidence presented showed Mr. Rios' diabetes was totally controlled by medication prior to his 1988 injury, and did not in any way affect his work. The Commission has the duty of weighing the medical evidence as it does any other evidence, and resolving any conflicts is a question of fact for the Commission. *CDI Contractors* v. *McHale*, 41 Ark. App. 57, 848 S.W.2d 941 (1993). The Commission's decision on this issue is supported by substantial evidence. We find no merit in Chamberlain's first argument.

Chamberlain also argues on appeal that the Commission erred in finding that the Second Injury Fund had no liability under the facts of this case, challenging whether there was substantial evidence to support its decision. On appeal of Workers' Compensation Commission decisions, this court reviews the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. *Arkansas Highway & Transp. Dep't.* v. *McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). We must uphold the Commission's decision if it is supported by substantial evidence. *Id.* If reasonable minds could have reached the Commission's conclusion then we must affirm. *Id.*

In order for the Second Injury Fund to have liability the three prerequisites as set out above in *Mid-State Constr. Co.*, 295 Ark. 1 (1988), must be met. Both the Administrative Law Judge

and Commission found that Mr. Rios did not have a disability or impairment *prior* to his injury in 1988. As explained above, that decision is supported by substantial evidence. Therefore, Chamberlain has failed to meet the second requirement in *Mid-State*, i.e., "prior to that injury the employee must have had a permanent partial disability or impairment."

The Commission found that Mr. Rios' diabetes did not affect his ability to work before his 1988 injury. Dr. Martin A. Koehn in a July 22, 1991, report stated:

> You have indicated that you felt Mr. Rios may be partially disabled on the basis of his diabetic condition. In my opinion, as far as his work has been concerned, I feel that his diabetes and his diabetic peripheral neuropathy have not contributed to his disability. As you are probably aware, he has had diabetes for a number of years and has been able to work with it while undergoing treatment. He has *now developed some peripheral neuropathy secondary to his diabetes*, manifested by numbness and tingling and paresthesias in his feet and lower legs. This, however, *has not affected his work or his disability.*

(Emphasis added.) As pointed out in the Administrative Law Judge's opinion which the Commission adopted, there was no evidence that Mr. Rios' preexisting diabetes affected his ability to work prior to his admitted compensable injury on November 1, 1988. Although Dr. Fletcher gave a different opinion as to Mr. Rios' diabetes and its effect on him, the Commission has the duty of weighing the medical evidence, and if the evidence is conflicting, the resolution of the conflict is a question of fact for the Commission. *Mack* v. *Tyson Foods, Inc.*, 28 Ark. App. 229, 771 S.W.2d 794 (1989). The Commission's conclusion that there is no Second Injury Fund liability is supported by substantial evidence.

Affirmed.

JENNINGS, C.J., and MAYFIELD, J., agree.

Terry HARDIN and Danny J. Fields *v.*
STATE of Arkansas

CA CR 93-259 872 S.W.2d 861

Court of Appeals of Arkansas
Division I
Opinion delivered March 23, 1994

Lohnes T. Tiner, for appellant.

Winston Bryant, Att'y Gen., by: *Teena L. White*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellants Terry Hardin and Danny J. Fields were tried for first degree murder along with Toby Hardin, Jr. and Jackie Hardin. The jury found Toby Hardin, Jr. not guilty; Jackie Hardin guilty of second degree murder; and both appellants guilty of manslaughter. Each appellant was sentenced to three years in the Arkansas Department of Correction. On appeal they argue only that the trial court erred in refusing to grant a mistrial after the judge made a statement in the presence of the jury which, they contend, was a comment on the testimony.

Mistrial is an extreme and drastic remedy and is proper only if the action on which it is predicated has infected the trial with so much prejudice to the defendant that justice cannot be served by a continuation of the trial. *Pickens* v. *State*, 301 Ark. 244, 783 S.W.2d 341 (1990). Since the trial judge is in a superior position to assess the possibility of prejudice, he is vested with great discretion in acting on motions for mistrial, and this court will reverse only where that discretion is manifestly abused. *Jimenez* v. *State*, 24 Ark. App. 76, 749 S.W.2d 331 (1988). In addition, a mistrial should be granted only when any possible prejudice cannot be removed by an admonition to the jury. *Wheat* v. *State*, 295 Ark. 178, 747 S.W.2d 112 (1988).

The facts in this case are not crucial to the determination of the issue on appeal. Briefly, the defendants were all present at the home of Ricky Hargo in the early hours of the morning of December 29, 1991. There was a fight and Hargo was stabbed in the throat with a knife, causing his death.

Appellant Terry Hardin was testifying for the defense when the following exchange took place.

BY MR. TINER [DEFENSE COUNSEL]

Q. Now, you said that you knew you were on Ricky Hargo's property?

A. Yes, sir.

Q. You knew your wife was over there, too, didn't you?

A. Yes, I did.

Q. And you knew that she really didn't have any business over there?

A. Yes, sir, I knew that.

Q. And that bothered you?

A. Yes, sir, it did, bad.

MR. HUNTER [PROSECUTOR]: Your Honor, will the Court caution Mr. Tiner about leading this witness? Let the witness testify.

THE COURT: Yes, Mr. Tiner, avoid leading.

MR. TINER CONTINUING:

Q. Would you tell us, please, whether or not it bothered you to know that your wife—

MR. HUNTER: That's repetitious, Your Honor. The witness has already answered that question.

MR. TINER: Well, I hadn't finished my question, Judge.

THE COURT: I think it's been asked and answered. You told him and he ratified. So, let's move it on.

MR. TINER: Let me have— I believe I have a motion I need to make, Judge.

THE COURT: All right.

(THEREUPON, the following conference was had at the bench outside the hearing of the jury.)

MR. TINER: At this time the defendant would move for a mistrial for the reason that the Court has stated that I told the defendant something and that is a comment on the evidence and that is highly prejudicial and we are asking for a mistrial at this time because the Court made a comment upon the evidence.

THE COURT: Your motion for a mistrial is denied. Mr. Tiner, you have been throughout all these defense witnesses['] testimony leading grossly. For example, you asked this witness—

> MR. TINER: Wait, wait. Judge, I don't need this in here. If you're going to proceed with this I'd rather we be in chambers.
>
> THE COURT: Nobody can hear this excepting you. You told this witness, did you see Ricky jump off the porch onto him and stab Jackie. He says no, I didn't see that, but that's grossly leading and you have been grossly leading permitting and inviting them to answer or ratify. It was not a comment on the evidence, it's merely a ruling on your admission and a caution against repeated leading.

Appellants argue that the statement the judge made was a comment on the evidence and warranted a mistrial. Appellants take the position that "I think it's been asked and answered," indicates that the unfinished question has been answered; and that, "You told him and he ratified," is a comment on the evidence. Appellants say it is a comment on the way the evidence is being elicited and a comment that would tend to indicate to the jury that counsel was telling the witness what to say. Further, appellants argue, by using the word "ratify" instead of the word "answer" the court commented not only upon the evidence but upon the weight of the evidence. They contend there is a significant difference between telling the jury that a witness testified to a fact and saying that a witness ratified a fact.

In support of this argument appellants cite *West* v. *State*, 255 Ark. 668, 501 S.W.2d 771 (1973); *Oglesby* v. *State*, 299 Ark. 403, 773 S.W.2d 443 (1989); *Jones* v. *State*, 301 Ark. 530, 785 S.W.2d 218 (1990); *Chapman* v. *State*, 257 Ark. 415, 516 S.W.2d 598 (1974); and *McAlister* v. *State*, 206 Ark. 998, 178 S.W.2d 67 (1944). These cases are distinguishable.

In *West* v. *State, supra*, the trial court had directly questioned a witness. The Arkansas Supreme Court reversed the conviction because of a question by the trial judge. The court said:

> Even though we are confident that the judge in this case had no intention of invading the province of the jury in its evaluation of Stracener's credibility and weighing his testimony, the question "How much were you paid to come up with this information?" could only have the effect of

> intimating that the trial judge believed the witness' testimony was of questionable value.

255 Ark. at 673, 501 S.W.2d at 774.

In *Oglesby* v. *State, supra*, an obscenity case, during the viewing of certain pornographic films the trial judge, within the hearing of the jury, said, "I'm feeling ill. How much longer[?]" In reversing, our supreme court stated:

> No principle is better settled than that a judge presiding at a trial should manifest the most impartial fairness in the conduct of the case. In recognition of the great influence a trial judge has on a jury, we have stated that the judge should refrain from impatient remarks or unnecessary comments which may tend to result prejudicially to a litigant or which might intend to influence the minds of the jury. A comment by the trial judge expressing his opinion as to facts or evidence presented to the jury is reversible error.
>
> . . . As the trial judge instructed and the state argued in this case, two of the elements of the crime with which the appellants were charged — promoting obscene materials — require that the jury find that the materials depict in a patently offensive manner sexual conduct, and appeals to the prurient interest of the average person. The trial judge's comment obviously reflected his own feelings on these legal aspects in the case, and as a consequence, may have influenced the jury's decision.

299 Ark. at 407, 773 S.W.2d at 444-45. (Citations omitted.)

In *Jones* v. *State, supra*, during voir dire of the jury, the trial judge told a potential juror, whose car had been burglarized, that the attorney general had said it would be against the law to shoot someone who was breaking into your car, but the judge said he did not think that was the law. He then asked the jury panel how many of them would convict someone who shot another person caught breaking into their car. The Arkansas Supreme Court held the judge's comments constituted "error *per se*." It stated:

> We have consistently acknowledged the great influence that a trial judge has on jurors. He must, therefore, refrain

> from impatient remarks or unnecessary comments which might indicate his personal feelings or which might tend to influence the minds of jurors to the prejudice of a litigant.
>
> The trial judge is the one person who controls the conduct of all participants in the course of a trial, from beginning to end, and instructs the jury regarding the law which must be applied to the facts. Hence, a judge presiding at a trial should manifest the most impartial fairness in the conduct of the case.

301 Ark. at 533-34, 785 S.W.2d at 220. (Citations omitted.)

In *Chapman* v. *State, supra*, there was friction between the trial judge and the defendants' attorneys. Most of the conflicts between court and counsel took place outside the presence of the jury, but there were two exchanges that were witnessed by the jury. Confusion arose about the exhibit numbers of certain pictures and the court said, "Now, Mr. [Defense attorney], you know how to conduct yourself in court." Our supreme court said that there was no basis for the court's implication that the attorney had not conducted himself with propriety. The second incident occurred while another defense attorney was questioning a police officer.

> Q. So up to the point where he took his shirt off, in your judgment, he had not done anything to cause you to arrest him?
>
> THE COURT: The witness will not answer the question. It is repetitious. It is not a matter for the judgment of this witness, but it is a matter from all the facts that the jury will determine.

257 Ark. at 419, 516 S.W.2d at 601. Our supreme court held that the motion for mistrial should have been granted. It stated:

> As we said in *Western Coal & Mining Co.* v. *Kranc*, 193 Ark. 426, 100 S.W.2d 676 (1937), and repeated in *McAlister* v. *State*, 206 Ark. 998, 178 S.W.2d 67 (1944): "No principle is better settled than that a judge presiding at a trial should manifest the most impartial fairness in the conduct of the case. Because of his great influence with the

> jury, he should refrain from impatient remarks or unnecessary comments which may tend to result prejudicially to a litigant or which might tend to influence the minds of the jury."
>
> In the case at bar the trial judge's reprimand in each instance was unnecessarily severe and critical, as there had been no conduct on the part of counsel calling for such a rebuke.

257 Ark. at 420, 516 S.W.2d at 602.

In *McAlister* v. *State, supra*, the trial court told counsel within the hearing of the jury, "To grant your motion would be just silly," and, when counsel objected to the remarks of the court, "I am not going to put up with any more of this foolishness." 206 Ark. at 1002, 178 S.W.2d at 69. The Arkansas Supreme Court held that the unfortunate wording could lead the jury to believe that the motion was silly and that the court was belittling the motion and holding counsel up to ridicule for having made it; therefore, it was a reflection upon counsel's knowledge and skill as an attorney and indicated that he was guilty of improper conduct. Furthermore, when counsel objected to the judge's remarks, his comment constituted an unmerited reprimand and prejudicial error calling for reversal. 206 Ark. at 1003, 178 S.W.2d at 69.

It has been held, however, that remarks by the trial judge which are not inaccurate in summing up the proof, do not constitute a comment on the evidence. *Weatherford* v. *State*, 286 Ark. 376, 692 S.W.2d 605 (1985). *See also, Hill* v. *State*, 258 Ark. 164, 522 S.W.2d 660 (1975), in which it was held that the State's characterization of appellant, who was fairly active in the sale of marijuana, as a "drug pusher" was a fair comment on the evidence; and *Conley* v. *State*, 267 Ark. 713, 590 S.W.2d 66 (1979), where the Arkansas Court of Appeals held that where the trial court's remarks were merely a restatement of the witness's testimony and did not constitute a comment on the evidence.

It has also been held that a comment by the trial judge is not prejudicial when the evidence of guilt is overwhelming. *Harris* v. *State*, 273 Ark. 355, 620 S.W.2d 289 (1981). There, at the beginning of a thirteen-year-old girl's testimony, she had to be

calmed down by the trial judge. When her testimony was concluded the judge told her, "You did a good job." Appellant sought a mistrial arguing that this was a comment on the child's credibility. Our supreme court held that because the evidence against the appellant was overwhelming and the child was not a "material witness" any possible error was harmless when considered in the context of the entire record. The court cited the test set out in *Walker* v. *Bishop*, 408 F.2d 1378 (8th Cir. 1969).

> [T]he only way to ascertain the true meaning or import of any isolated remark is to consider it in the light and context in which it is uttered. This is just plain common sense as well as good law.

273 Ark. at 357, 620 S.W.2d at 290.

Here, we do not think the cases cited by appellants require reversal of their convictions. The trial court accurately stated that the question had been asked and answered several times and that the appellant had admitted it bothered him that his wife was with another man. Appellants make much of the usage of the word, "ratified." According to Black's Law Dictionary 1135 (5th ed. 1979), "ratify" means "To approve and sanction; to make valid; to confirm; to give sanction to. See *Approval; Confirm; Ratification.*" Under the circumstances in this case, we do not believe the use of the word "ratified" prejudiced the appellants, and we do not think the trial court erred in refusing to grant a mistrial.

Affirmed.

JENNINGS, C.J., and COOPER, J., agree.

J B DRILLING CO. and Silvey Companies *v.*
Arthur (Larry) LAWRENCE

CA 93-335 873 S.W.2d 817

Court of Appeals of Arkansas
Division II
Opinion delivered March 30, 1994
[Supplemental Opinion on Denial of Rehearing
May 11, 1994.]

Daily, West, Core, Coffman & Canfield, by: *Eldon F. Coffman* and *Douglas M. Carson*, for appellants.

Bethell, Callaway, Robertson, Beasley & Cowan, by: *John R. Beasley*, for appellee.

JOHN MAUZY PITTMAN, Judge. Appellants, J B Drilling Company and Silvey Companies, appeal from a decision of the Workers' Compensation Commission which found that appellee was entitled to compensation for an additional 2% permanent physical impairment and for a 15% loss in wage-earning capacity after suffering a recurrence of a prior compensable injury. Appellants contend that the Commission misapplied Ark. Code Ann. § 11-9-522 (1987) in making the 15% wage-loss disability award. We affirm.

Appellee sustained a compensable injury to his back on September 1, 1987, while working for appellant J B Drilling. He subsequently underwent surgery and was assigned an anatomical impairment rating of 15% to the body as a whole by his treating physician. Appellants paid appellee permanent partial disability benefits based on that rating. Appellee neither sought nor received benefits in excess of his percentage of permanent physical impairment at that time, as he returned to work for J B Drilling in January 1988 at essentially the same wages he was receiving before the injury. In August 1989, appellee voluntarily terminated his employment. In December 1989, appellee suffered an exacerbation of the problems associated with his 1987 compensable injury, and a second back surgery was required as a result. Appellee then filed a claim for additional benefits for increased physical impairment and benefits for his loss in earning capacity. Appellee testified that after the second surgery he was more limited than before in how long he could sit or stand, that he could not do any of the jobs he did before, and was no longer able to lift the weights or drive the mileage that had been required by his job with appellant J B Drilling. Medical evidence from appellee's treating physician, Dr. Paul Raby, indicated that appellee's physical condition had worsened after the 1989 incident and resulting second surgery. Dr. Raby attributed a loss in appellee's range of motion to the latter incident and placed restrictions on appellee's bending, stooping, and lifting. Dr. Raby opined that appellee now suffers an anatomical impairment of 17% to the body as a whole, 15% attributable to the September 1987 initial injury and 2% attributable to the December 1989 episode.

The Commission found that appellee had suffered a recurrence of his original compensable injury, and that appellants remained liable therefor. The Commission found, in accordance with Dr. Raby's opinion, that appellee had suffered an additional 2% physical impairment as a result of the recurrence. After discussing appellee's age, education, and limited work experience, together with his present limited physical abilities, the Commission also found that appellee had suffered an additional 15% wage-loss disability. The Commission found that the diminished physical abilities that adversely affected appellee's wage-earning capacity had occurred *after* he had voluntarily left his employment with J B Drilling, and thus concluded that appellants were liable to appellee for an additional permanent partial disability of 17% to the body as a whole (*i.e.*, the 2% additional physical impairment and the 15% wage-loss disability).

On appeal, appellants contend that the Commission erred as a matter of law in making the award of benefits for appellee's loss in earning capacity. Appellants argue that any award for wage-loss disability must be based solely on the 2% anatomical impairment rating associated with the 1989 recurrence. They contend that because appellee returned to work after his initial injury and because he voluntarily terminated that employment, he is absolutely barred from ever having the original 15% anatomical impairment considered in determining the existence or extent of any wage-loss disability. We cannot agree.

Appellants rely on Ark. Code Ann. § 11-9-522(b) and (c)(2). Section 11-9-522(b) (1987) states:

> In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. *However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial*

> *disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.* [Emphasis added.]

Section 11-9-522(c)(2) (1987) states in pertinent part:

> Included in the stated intent of this section is to enable an employer to reduce or diminish payments of benefits for . . . disability in excess of permanent physical impairment, *which, in fact, no longer exists, or exists because of discharge for misconduct in connection with the work, or because the employee left his work voluntarily and without good cause connected with the work.* [Emphasis added.]

Appellants essentially argue that, under § 11-9-522(b), a claimant who has once returned to work at equal or greater wages is permanently barred from receiving benefits for a loss in earning capacity associated with the injury that gave rise to the initial claim, regardless of whether that renewed employment should cease. However, this is precisely the same interpretation of the statute that we found erroneous in *Belcher* v. *Holiday Inn*, 43 Ark. App. 157, 868 S.W.2d 87 (1993). There, we noted that § 11-9-522(b) prohibits a claimant from receiving wage-loss only "so long as" he has returned to work, obtained other employment, or has a bona fide and reasonable offer of employment. We also noted that the legislature's intent that the bar against wage-loss benefits be other than permanent was implied in the provision for reconsideration of disability rating based on changed circumstances found in § 11-9-522(d).

Appellants' argument under § 11-9-522(c)(2) is similar to the argument made under subsection (b). Appellants contend that subsection (c)(2) serves to bar permanently a claimant from receiving wage-loss disability benefits if subsequent to a compensable injury the claimant voluntarily terminates his employment without good cause connected with the work. We think appellants' interpretation of this subsection is erroneous as well.

Section 11-9-522(c)(2) states that benefits for wage-loss disability are barred thereunder only when such disability "exists . . . because" the claimant left his work voluntarily and without good cause. In other words, a claimant will be barred

from receiving benefits for wage-loss disability under subsection (c)(2) if, but for his voluntary termination of his employment, he would still be employed and thus barred from receiving such benefits because of the provisions of subsection (b). Significantly, appellee neither sought nor received benefits for wage-loss disability for the period between his voluntary termination of employment and the recurrence of his injury. Rather, benefits for wage-loss disability were sought and awarded only for the period after he suffered the recurrence, an intervening event that the Commission found increased appellee's physical impairment and adversely affected his capacity to earn wages. The Commission found that, after the recurrence and resulting second surgery, appellee was incapable of performing the duties of his former employment with appellant J B Drilling; therefore, he would not still be employed in that capacity even had he not voluntarily quit, and is consequently not barred from receiving wage-loss disability benefits by the provisions of subsection (c)(2).

We cannot conclude that the Commission's 15% wage-loss disability award does not comport with Ark. Code Ann. § 11-9-522, and its decision is affirmed.

Affirmed.

ROBBINS and ROGERS, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
MAY 11, 1994

Eldon Coffman, for appellant.

John Beasley, for appellee.

JOHN MAUZY PITTMAN, Judge. We recently affirmed an award of benefits to the appellee in this case. *See J B Drilling Co.* v. *Lawrence*, 45 Ark. App. 157, 873 S.W.2d 817 (1994). The appellants have filed a petition for rehearing in which they essentially attempt to reargue the case. This, of course, is an inappropriate subject for a petition for rehearing. Ark. R. Sup. Ct. 2-3(g); *Nard* v. *State*, 304 Ark. 163-A, 801 S.W.2d 634 (1991) (supp. op. on reh'g).

However, we feel compelled to respond to that part of appellants' petition in which they argue that "Appellee had the burden of proving . . . that no other job, at equal or higher pay, was available with Appellant [J B Drilling Services]." This is an incorrect statement of the law. Once it was shown that appellee had suffered a recurrence of his compensable injury and as a result could no longer perform the duties of his former job with appellant J B Drilling, which the Commission found to be the case, it was *appellants'* burden to prove appellee's receipt of a bona fide offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident. *See* Ark. Code Ann. § 11-9-522(c)(1) (1987); *Cook* v. *Alcoa*, 35 Ark. App. 16, 811 S.W.2d 329 (1991). However, as appellants concede in their petition, the record is silent regarding the availability and offer of any such job.

Petition for rehearing denied.

Jim BRUNSON *v.* STATE of Arkansas

CA CR 93-563 873 S.W.2d 562

Court of Appeals of Arkansas
Division I
Opinion delivered March 30, 1994

Robert N. Jeffrey, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with two counts of delivery of a controlled substance. After a jury trial, he was found guilty of two misdemeanor counts of possession of a controlled substance. He was sentenced to a term of eighteen months probation with fourteen days in the Grant County Jail, and fined $2,000.00 to be paid at the rate of $100.00 per month. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in denying his motion for a directed verdict due to the insufficiency of the evidence. We do not agree.

An appeal from the denial of a motion for a directed verdict is a challenge to the sufficiency of the evidence, and the test for determining the sufficiency of the evidence in a criminal case is whether there is substantial evidence to support the verdict. *Cleveland* v. *State*, 315 Ark. 91, 865 S.W.2d 285 (1994). In making our review, we do not weigh the evidence favorable to the State against any conflicting evidence favorable to the accused, but instead we review the evidence in the light most favorable to the State and affirm if the finding of guilt is supported by substantial evidence. *Lowe* v. *State*, 36 Ark. App. 85, 819 S.W.2d 23 (1991). Substantial evidence is evidence which is forceful enough to compel a conclusion one way or the other without resorting to suspicion or conjecture. *Cleveland* v. *State, supra.*

Viewing the evidence in the light most favorable to the appellee, the record shows that Larry Witcher, a confidential

informant, testified that he purchased marijuana from the appellant while in Sheridan on September 27, 1991. Mr. Witcher also stated that, during one purchase, he made a recording of the transaction which was later transcribed. The transcription of this recording, which was included in the record, is partially inaudible. Nevertheless, the audible portions of the transcription tend to support Mr. Witcher's testimony to the effect that he purchased marijuana from the appellant on two separate occasions on the day in question.

The appellant's argument is ultimately addressed to the credibility of the confidential informant. He argues that the jury's guilty verdicts for possession of marijuana, rather than the greater offense of delivery with which the appellant was charged, indicates that the jury found that the testimony of the confidential informant lacked credibility. In essence, the appellant argues that, because the jury found the confidential informant's testimony to lack sufficient credibility to support the charge of delivery of a controlled substance, it necessarily follows that the same testimony lacks the requisite weight to support a conviction for the lesser included offense of possession of a controlled substance. We do not agree. It is not the function of the appellate court to weigh the evidence. Instead, that function is entrusted to the jury, which may accept or reject any part of a witness's testimony; when it has done so, we are bound by the jury's conclusion concerning a witness's credibility. *Harris* v. *State*, 291 Ark. 504, 726 S.W.2d 267 (1987). We have no right to disregard the testimony of a witness after the jury has given it full credence, at least where it cannot be said with assurance that it was inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon. *Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980). None of these circumstances apply to the testimony of the confidential informant in the case at bar, and we consequently affirm the appellant's conviction.

Nevertheless, we find it necessary to modify the sentence imposed by the trial court because our review of the record has disclosed a sentencing error. When a trial court has imposed an illegal sentence on a defendant, we will review it regardless of whether an objection was raised below, and we may raise the issue on our own. *See Jones* v. *State*, 27 Ark. App. 24, 765 S.W.2d

15 (1989). An illegal sentence is one which is illegal "on its face." *Id.* In the case at bar, the appellant was convicted of two counts of misdemeanor possession of marijuana, and was sentenced to eighteen months probation. However, pursuant to Ark. Code Ann. § 5-4-403(c)(2) (Repl. 1993), the aggregate of consecutive terms for misdemeanors shall not exceed one year. This one-year maximum is applicable to the appellant's probationary sentence by virtue of Ark. Code Ann. § 5-4-306(a) (Repl. 1993), which provides that a period of probation shall not exceed the maximum jail or prison sentence allowable for the offense charged. Consequently, the probationary period imposed by the trial court exceeds the maximum allowable by six months. Therefore, although we affirm the appellant's conviction, we modify the sentence imposed by the trial court so as to reduce the appellant's probationary period to one year.

Affirmed as modified.

PITTMAN and ROGERS, JJ., agree.

Kimberly Dawn RILEY (Alley) *v.* Kenny Ray RILEY

CA 93-864 873 S.W.2d 564

Court of Appeals of Arkansas
En Banc
Opinion delivered March 30, 1994

Victoria K. Cochran, for appellant.

Billy J. Allred, for appellee.

JOHN B. ROBBINS, Judge. Appellant Kimberly Riley (Alley) appeals from the chancellor's decision granting Kenny Riley's petition for a change of custody. The parties in this case were divorced by decree in January of 1992, wherein by agreement

Kimberly Riley was granted primary custody of the parties' two children. For reversal, Mrs. Alley contends that the chancellor erred in finding a change in circumstances which would warrant changing custody of the minor children from their mother to their father. Based on our de novo review of the record, we cannot agree with appellant's argument and affirm the chancellor's order.

At the hearing on Mr. Riley's petition for change of custody, he testified that his former wife, Mrs. Alley, had taken the two children and moved to North Carolina in early January 1993. A short time before this occurred he questioned Mrs. Alley about rumors that she might be leaving town, which she denied. Mr. Riley testified that he went to pick up the children for his weekend visitation and Mrs. Alley failed to appear with the children. Evidence showed that Mr. Riley contacted James Allen, who was living with Mrs. Alley and her new husband, and learned that Mrs. Alley had taken the children and moved away. Allen failed to inform Mr. Riley of Mrs. Alley's whereabouts even though Allen had this information. Mr. Riley finally found out where Mrs. Alley had moved by contacting the local court.

Testimony presented in this case showed that Mr. Riley maintained close ties with his children before they were taken from the state. He testified that he exercised his visitation rights on a regular basis and often took the children to visit their grandparents, as well as great grandparents, aunts and uncles, and great aunts and uncles. Mr. Riley had no visitation or contact with his children between the time Mrs. Alley moved away in early January, and the time of the hearing. Upon questioning by the court, Mrs. Alley acknowledged that she had returned to the state on two separate occasions but did not bring the children for their father to visit on either occasion.

Mr. Riley testified that he remarried on January 1, 1993, to Angela. He testified that the children enjoyed being with Angela during visitation and his daughter especially enjoyed her company. Angela Riley testified that she loved her new husband's children and that she wanted to help him rear them if he was awarded custody. Mr. Riley testified that he was employed by the Arkansas Highway Department and had been so employed for approximately five (5) years. He testified that he had plenty

of room in his home for the children and had a large yard in which they could play.

Testimony presented on behalf of Mrs. Alley showed that she also had remarried and was living with the children and her new husband, Cory Alley, in Mooresville, North Carolina. Evidence presented showed that Mr. Alley's family resided in the Mooresville area and that his family treated the children well. She testified that she moved to North Carolina so her new husband could find better paying employment. She also testified that she was currently working in a convenience store and was earning six dollars per hour. Evidence showed that Mrs. Alley and her new husband could now afford to rent a new mobile home in which to reside and that the children had a large yard in which to play. On cross-examination, Mrs. Alley admitted that she left Arkansas in a rush and that she left her new address with the circuit clerk so she could receive her child support checks from Mr. Riley. She testified that she did not try to contact her former husband after leaving the state nor when she returned in February to pick up the remainder of their belongings. Evidence showed that she was only in Huntsville during her quick trip in February from eleven o'clock one evening until approximately five o'clock the next morning.

On appeal, Mrs. Alley contends that the chancellor erred in finding such a change in circumstances existed as would warrant changing custody of the children. There is a two-step process through which a court must proceed in deciding a petition for change of custody. First, the chancellor must determine whether there has been a significant change in the circumstances of the parties since the most recent custody decree. We observed in *Anderson* v. *Anderson*, 43 Ark. App. 194, 197, 863 S.W.2d 325, 327 (1993), that "[a] change in custody cannot be made without showing a change in circumstances from those existing at the time the original order was made as the original decree constitutes a final adjudication of the issue." If the chancellor finds that a significant change in circumstances has occurred, the court must then decide custody placement with the primary consideration being the best interest of the children. *Anderson* v. *Anderson, supra; Bennett* v. *Hollowell*, 31 Ark. App. 209, 792 S.W.2d 338 (1990); *Carter* v. *Carter*, 19 Ark. App. 242, 719 S.W.2d 704 (1986).

Mrs. Alley does not actually argue that there has not been a significant change in circumstances. The evidence clearly showed several significant changes in circumstances, including Mr. Riley's remarriage, Mrs. Alley's remarriage, and Mrs. Alley's removal of the children several hundred miles from Madison County, Arkansas, where the children's father and extended family reside. Mrs. Alley's argument is that under these changed circumstances the court erred in concluding that it was now in the best interest of the children to be in their father's custody.

Upon a de novo review of chancery cases, we do not disturb the chancellor's findings unless they are clearly against the preponderance of the evidence. *Riddle* v. *Riddle*, 28 Ark. App. 344, 755 S.W.2d 513 (1989). Chancellors in child custody cases must utilize to the fullest extent their superior position, ability, and opportunity to observe the parties to decide what is in the best interest of the children. *Id.* Since the question of the preponderance of the evidence turns largely upon the credibility of the witnesses, we must defer to the superior position of the chancellor. *Thigpen* v. *Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987). Child custody awards are not made or changed to award or punish either party. *Watts* v. *Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986).

The chancellor specifically found "that there has been a substantial change in circumstances in the interest of the children." He further stated, "I'm not punishing [Mrs. Alley], but in the interest of the children, I find that they have substantial roots here in Huntsville, Arkansas." Evidence indicated the children had close family ties and family support in Arkansas. After careful consideration of the evidence in this case, we cannot say that the chancellor's decision was clearly against a preponderance of the evidence or clearly erroneous.

The dissenting opinion suggests that we are departing from our recent decision in *Staab* v. *Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994). The short answer to this is that the holding in *Staab* has no relevance in a change of custody case. In *Staab* we set forth standards which a chancellor should consider when deciding a request by a custodial parent to relocate with a minor child outside the jurisdiction of the court. There was no petition by the non-custodial parent for a change of custody involved in

Staab. The sole issue was whether the custodial parent's petition to move from Arkansas with the minor child should be granted.

Here, the non-custodial parent is seeking a change of custody of his minor children. The issue is not what is in the best interest of the family unit consisting of the custodial mother and the minor children. Once the court found that there had been significant changes in the circumstances of the parties and children, the chancellor was required to address the sole issue of determining the best interests of the children, not the children and their mother, and not the children and their father. It is a completely different issue from that presented by a petition for removal of a minor child from the jurisdiction of the court.

Affirmed.

MAYFIELD and COOPER, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. The parties to this appeal were divorced by a decree entered on January 17, 1992. The decree provided that the "care, custody, and control" of the two minor children would be with the mother "pursuant to" the Child Custody and Property Settlement Agreement entered into by the parties, and neither the agreement nor the decree contained any prohibition against moving the children to another state. The evidence shows that both parents remarried and in January of 1993 the mother and her new husband moved with the children to North Carolina where the husband had found a better job than he had in Arkansas. In February of 1993, the father filed a petition to change the custody of the children to him. On April 9, 1993, the father's petition was granted, and the mother has appealed.

Although the facts are not complicated, I am unable to understand the basis of the majority opinion's affirmance of the trial court's decision. The opinion states that the appellant "does not actually argue that there has not been a significant change in circumstances," but her "argument is that under these changed circumstances the court erred in concluding that it is now in the best interest of the children to be in their father's custody."

Having clearly set out the pivotal issue raised by the appellant, the majority opinion then sums up its de novo review of

what is in the best interest of the children by stating that "since the question of the preponderance of the evidence turns largely upon the credibility of the witnesses, we must defer to the superior position of the chancellor."

At this point it seems reasonable to consider exactly what the chancellor said when, after hearing and seeing the witnesses, he made the decision which the majority opinion has affirmed. At the conclusion of the hearing, the chancellor stated, in pertinent part, as follows:

> The real issue here today is this: Is taking two minor children away from their roots here in Huntsville, Arkansas, off to a foreign place, that is, to the State of North Carolina, is that in the best interest of the children and is it in the best interest of the children the way they've been kept and treated during that period of time and the Court can answer that question straight forward and say it's not in their best interest under the circumstances. Mrs. Alley, your grabbing those children up and running, as you said, you were in such a rush to leave, without taking them by to see their Daddy and without telling their Daddy where they are going to be, was awful selfish on your part. That was not in their best interest at all. Your getting in North Carolina, getting a house out there and then not notifying Daddy and telling him where the children were, what the circumstances were, that's not in the children's best interest at all. Your refusing and failing to bring those children here for their visits and, as you understand that the Decree said you were to have them here for their visits every other weekend and you thumbed your nose at the Court and said, "I'm in North Carolina and the children are happy." That's not in their best interest to do such a thing as that. Your coming back to Arkansas and picking up furniture and not bringing those children back down to see their Dad, that was not in their best interest at all. Your coming here today and saying, "I don't have the money to bring those children here", that's not in their interest at all; that's in your own selfish interest. Now the Court finds that there has been a substantial change in circumstances in the interest of the children. I'm not punishing you, but in the interest of the children, I find that they have substantial roots here in Huntsville, Arkansas.

> Their grandparents are here, they've got aunts and uncles here, their Daddy is here. Based upon that, the Court finds that the custody of these children should be changed from that of the mother to that of the father.

Now I understand what the chancellor said, and I understand why the majority opinion pointed out that the chancellor said he was not punishing the appellant for moving to North Carolina with her new husband. Moreover, it is not my purpose to point out that one could take a much more benign view of the appellant's action than did the chancellor. Clearly the fact that the appellee admitted he was behind on his child support, had not carried health insurance on the children (as the divorce decree and settlement agreement required) for the first year after the divorce, and that he had filed for bankruptcy would indicate that the appellant's action in moving to another state where her new husband could get a better job might well be justified. Also, there is evidence that the appellant did not simply disappear with the children but left ample information of her move from which the appellee could, and did, learn of their whereabouts very soon after her move. The record also shows that less than four months after the appellee moved, she was back in Arkansas at the hearing on appellee's petition to change custody. And it is understandable that the appellant might not have the money to bring the children back with her on the two trips she made back here to get the rest of her furniture and to attend the hearing on the petition to change custody.

But, the point of this dissent — and what I do not understand — is that the chancellor's decision was based solely on the finding that it was not in the children's best interest to move them to another state, and the majority opinion fails to follow our very recent opinion in *Staab* v. *Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994). In that case we said:

> The first issue that we must consider in this case is the standard to be applied by a trial court in determining when a custodial parent may relocate outside the jurisdiction of the court. Obviously, there can be no precise formula that will resolve each case. Until now, while expressing concern for the non-custodial parents' rights of visitation, our courts have said little more than that "the parent having custody

> of a child is ordinarily entitled to move to another state and to take the child to the new domicile." *Ising* v. *Ward*, 231 Ark. 767, 768, 332 S.W.2d 495 (1960); *Gooch* v. *Seamans*, 6 Ark. App. 219, 220, 639 S.W.2d 541 (1982). While we believe with the chancellor that achieving the "best interest of the child" remains the ultimate objective in resolving all child custody and related matters, we believe that the standard must be more specific and instructive to address relocation disputes. In particular, we think it important to note that determining a child's best interests in the context of a relocation dispute requires consideration of issues that are not necessarily the same as in custody cases or more ordinary visitation cases.

44 Ark. App. at 132-33; 868 S.W.2d at 519. We then said that *D'Onofrio* v. *D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27, *aff'd* 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976), "perhaps the leading case on custodial parent relocation and which we find persuasive," had discussed this issue as follows:

> The children, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together. The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interest of the children. It is in the context of what is best for that family unit that the precise nature and terms of visitation and changes in visitation by the noncustodial parent must be considered.

D'Onofrio, 365 A.2d at 29-30.

44 Ark. App. at 133, 868 S.W.2d at 519.

It is clear, however, that the majority opinion in the present case gave no consideration to the *D'Onofrio* case — did not even cite it — despite the fact that we said in *Staab* v. *Hurst* that the chancellor there "made his determination of the child's best interest without appropriate consideration of the interests and well-being of the custodial parent" and that the case "should be remanded for the chancellor to have the opportunity to decide the issues in

accordance with the standards set forth in this opinion." 44 Ark. App. at 135, 868 S.W.2d at 520. Thus, I do not understand why the majority opinion in the present case does not follow our *Staab* v. *Hurst* case. I did not participate in the *Staab* case, but this court handed it down, and our supreme court has said "it is necessary as a matter of public policy to uphold prior decisions unless great injury or injustice would result." *See Independence Federal Bank* v. *Paine Webber*, 302 Ark. 324, 331-32, 789 S.W.2d 725, 730 (1990). If the majority in today's case thinks the *D'Onofrio* standard adopted in *Staab* should now be overruled because great injury or injustice will otherwise result, the majority opinion does not so state.

Moreover, *Staab* cited *Antonacci* v. *Antonacci*, 222 Ark. 881, 263 S.W.2d 484 (1954), and the appellant's brief in the case now before us also cited *Antonacci* and argued that it is similar to the case now before us because in both cases the custodial parent moved to another state "to make more money so she could better take care of her children." The *Staab* case was not cited in appellant's brief, but the brief was written before *Staab* was decided.

The majority opinion in today's case states that it has no relevance to *Staab* because there the custodial parent was seeking permission to move to another state and here the custodial parent had already moved to another state. If today's case does not involve the best interest of the children and if that issue was not involved in *Staab*, then I am even less able to understand the majority opinion than I thought. I am sorry, but in all due respect I see no meaningful difference in the two situations.

Since this case was decided before *Staab* and the chancellor could not know of that decision, I would remand this case, as we did the *Staab* case, for the chancellor to consider the standards set out in *Staab*.

COOPER, J., joins in this dissent.

Johnnie L. WILSON *v.* CARGILL, INC.

CA 93-400 873 S.W.2d 171

Court of Appeals of Arkansas
Division I
Opinion delivered April 6, 1994

Woodruff Law Firm, by: *Marsha C. Woodruff*, for appellant.

Mashburn & Taylor, by: *Scott E. Smith* and *Lindlee Baker Norvell*, for appellee.

JAMES R. COOPER, Judge. The appellant appeals from a decision of the Workers' Compensation Commission finding that he failed to prove by a preponderance of the evidence that he is permanently and totally disabled and that he is entitled to a wage loss disability of only twenty percent. For reversal, the appellant contends that the Commission erred in finding that he failed to prove that he is permanently totally disabled, in finding that the doctrine of res judicata applied to a factual finding of the ALJ, and in awarding a wage loss disability of twenty percent. The appellee cross-appeals, contending that the Commission erred in its determination of wage loss disability. Because we agree with the appellant's second contention, we reverse and remand.

The appellant sustained a compensable injury to his back on May 27, 1990, while working for the appellee. Dr. Carl Kendrick diagnosed the appellant as having spondylolysis unilaterally at L5-S1. The appellant was treated conservatively without surgery. He completed a work-hardening program and a functional capacity evaluation. On July 15, 1991, Dr. Susan Raben determined that the appellant had a fifteen percent permanent physical impairment rating. On January 14, 1992, Dr. Ralph G. Laraiso performed a disability determination and gave the appellant an eight percent permanent physical impairment rating. The ALJ found that the appellant was entitled to temporary total disability benefits from May 28, 1990, through July 15, 1991, to a permanent physical impairment rating of eight percent and to wage loss disability of eight percent. The Commission affirmed the ALJ's finding that the appellant failed to prove that he is permanently totally disabled but modified the decision to find that the appellant suffered a loss in wage earning capacity in an amount equal to twenty percent to the body as a whole. In its opinion, the Commission stated:

> The Administrative Law Judge made a specific factual finding that the claimant's anatomical impairment equaled 8% to the body as a whole. Claimant did not appeal that finding; therefore, it is *res judicata* and this Commission is bound by that finding.

The Commission erred in holding that it was bound by the ALJ's factual finding. The Arkansas Workers' Compensation Commission is not an appellate court. *White* v. *Air Sys-*

tems, Inc., 33 Ark. App. 56, 800 S.W.2d 726 (1990). It is, instead, the fact finder, and as such has a duty and statutory obligation to make specific findings of fact on *de novo* review based on the record as a whole, and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence. *Id.* In his notice of appeal to the Commission, the appellant contended that the "decision of the Administrative Law Judge is not supported by substantial evidence and is in fact, contrary to the preponderance of the evidence." Although the Commission has the statutory authority to require that parties specify all the issues to be presented for review, it also has the statutory duty to decide the issues before it on the basis of the record as a whole and to decide the facts *de novo*. *Id.* Furthermore, the doctrine of res judicata applies only to final orders or adjudications and the filing of a petition for review with the full Commission within thirty days prevents the order of the ALJ from becoming final. *Id.*; Ark. Code Ann. § 11-9-711(a)(1) (1987).

In the case at bar, the notice of appeal called into question the ALJ's decision and all the findings on which it was based. Therefore, we believe the Commission should have considered the issue of the appellant's permanent physical impairment rating. *See Rogers* v. *Darling Store Fixtures*, 45 Ark. App. 68, 870 S.W.2d 776 (1994). Accordingly, we reverse and remand to the Commission for further action not inconsistent with this opinion. Given our resolution of this issue, we do not address the other arguments advanced by the appellant since the appellant's physical impairment is an element to be considered in determining the other issues on appeal. *See Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961).

Reversed and remanded.

JENNINGS, C.J., and MAYFIELD, J., agree.

Joseph BOND and James Bond *v.*
STATE of Arkansas

CA CR 93-542 873 S.W.2d 569

Court of Appeals of Arkansas
Division II
Opinion delivered April 6, 1994

[redacted]

Randy Rainwater, for appellant.

Winston Bryant, Att'y Gen., by: *Cathy Derden*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant Joseph Bond was convicted by a jury of possession of a controlled substance (marijuana) and possession with intent to use drug paraphernalia. He was sentenced to serve one year in the county jail and a fine of $1,000.00 on the possession of a controlled substance conviction and to serve four years in the Arkansas Department of Correction and a fine of $5,000.00 on the possession with intent to use drug paraphernalia conviction. Of course the misdemeanor sentence of imprisonment will be satisfied by service of the felony sentence of imprisonment, Ark. Code Ann. § 5-4-403(c)(1) (1987), and the trial court's judgment so indicates.

Appellant James Bond was convicted by a jury of possession with intent to deliver a controlled substance (marijuana) and possession with intent to use drug paraphernalia. He was sentenced to serve four years in the Arkansas Department of Cor-

rection and a fine of $5,000.00 on the possession with intent to deliver a controlled substance conviction and to serve four years in the Arkansas Department of Correction and a fine of $5,000.00 on the possession with intent to use drug paraphernalia conviction. Those sentences were made to run concurrently.

Randy Gibbins, a Polk County Deputy Sheriff, testified that at 1:20 a.m. on a Saturday morning in August of 1992, while on a routine patrol performing security checks on a school, he noticed a vehicle approaching him. Without signaling, the vehicle turned in front of the school gym. The officer turned behind the vehicle, noticed that the left rear taillight was broken out, and also recognized the vehicle. The officer testified he knew both of the Bond boys and had warned James Bond on two separate occasions about the broken taillight on the vehicle. The officer said that he made a routine traffic stop and that James was driving and Joseph was on the passenger side.

The officer also testified that when he walked up to the vehicle, he noticed that James appeared somewhat intoxicated, and there was an odor that he attributed to the drinking of an alcoholic beverage, and another odor that he attributed to the smoking of marijuana. The officer asked James to exit the vehicle and then noticed a small brass pipe, which he recognized to be drug paraphernalia, lying next to Joseph's leg in the seat. Officer Gibbins asked Joseph to step out of the vehicle and, when he did, a wine cooler bottle fell out into the street. The officer testified that expecting to find more alcohol in the vehicle he looked in the back floor board area and saw a brown paper sack about the size that would normally contain a six pack of wine coolers, beer, coke or something of that kind behind the driver's seat. He said he opened the back door; looked inside the sack expecting to find some alcohol; found green vegetable matter that later proved to be 1.4 ounces of marijuana; and then placed appellants under arrest for possessing marijuana.

The second argument in appellants' brief is that the evidence is insufficient to support their convictions, and the trial court erred in denying their motions for a directed verdict. We address this argument first. *See Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984).

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *McIntosh* v. *State*, 296 Ark. 167, 753 S.W.2d 273 (1988). In resolving the question of the sufficiency of the evidence in a criminal case, we view the evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the decision of the trier of fact. *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty and precision, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Williams* v. *State*, 298 Ark. 484, 768 S.W.2d 539 (1989); *Ryan*, supra. The fact that evidence is circumstantial does not render it insubstantial. *Small* v. *State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982). Also, possession of marijuana in an amount more than one ounce creates a rebuttable presumption that it is possessed with an intent to deliver. Ark. Code Ann. § 5-64-401(d) (Repl. 1993).

Appellants contend the evidence is not sufficient because the State failed to prove that either appellant possessed the marijuana. Each appellant argues that he did not own the marijuana, but neither argues that the marijuana belonged to the other.

In *Plotts* v. *State*, 297 Ark. 66, 759 S.W.2d 793 (1988), our supreme court stated:

> Other courts have held that the prosecution can sufficiently link an accused to contraband found in an automobile jointly occupied by more than one person by showing additional facts and circumstances indicating the accused's knowledge and control of the contraband, such as the contraband's being (1) in plain view; (2) on the defendant's person or with his personal effects; or (3) found on the same side of the car seat as the defendant was sitting or in immediate proximity to him. Other facts include the accused (4) being the owner of the automobile in question or exercising dominion and control over it; and (5) acting suspiciously before or during arrest.

297 Ark. at 70, 759 S.W.2d at 795 (citations omitted.)

Applying *Plotts* to the instant case there are factors

in addition to the joint occupancy of the vehicle, from which the jury could find that appellants had joint control and dominion over the contraband. First, as to the small brass pipe, it was found in plain view and it was found in the front seat in immediate proximity to both appellants. Secondly, an additional factor, which links both appellants to the marijuana and from which constructive possession could be found, is that marijuana was in the back seat behind the driver's seat in an area most easily accessible to Joseph, the passenger, but also accessible to James, the driver. Finally, there is Officer Gibbins' testimony that when he walked up to the vehicle he noticed an odor he attributed to the smoking of marijuana, and both appellants appeared to have glassy eyes.

We think these factors are sufficient to support a finding that both appellants possessed the contraband and sufficient to sustain their convictions.

The first argument in appellants' brief is the trial court erred by allowing the testimony of Delores Baker, who was not listed by the State as a witness in response to appellants' discovery motion, to prove the chain of custody of the evidence.

Arkansas Rule of Criminal Procedure 17.1(a)(i) provides that the prosecutor should disclose, upon request, the names and addresses of the witnesses he intends to call at trial. Rule 19.7 provides for sanctions for failure to comply with the discovery rules; the sanctions include ordering the party to permit discovery; granting a continuance; prohibiting the party from introducing into evidence the material not disclosed; or entering such other order as is deemed proper under the circumstances.

Here, after appellants objected to Ms. Baker's testimony, the prosecutor stated in a discussion at the bench that Ms. Baker's name appeared upon the applications sent to the crime lab that were furnished to appellants during discovery; that appellants' counsel had personal contact with Ms. Baker during the period of discovery; that appellants' counsel accompanied Ms. Baker to have the evidence weighed; and that appellants' counsel knew that Ms. Baker was in custody of the evidence. The trial court stated that if counsel showed genuine surprise, it would probably sustain the objection, but that there was no surprise

shown. The trial court denied the motion on that basis, and the appellants have not argued on appeal that they were surprised by the testimony of this witness. Under the circumstances, we cannot say Ms. Baker's testimony prejudiced appellants' case. *See Brooks* v. *State*, 308 Ark. 660, 670, 827 S.W.2d 119 (1992); *Marx* v. *State*, 291 Ark. 325, 334, 724 S.W.2d 456 (1987).

Finally, appellants argue that the trial court erred in denying their motion to suppress as evidence the pipe and marijuana which were obtained from a vehicular search conducted without consent or a search warrant. Appellants argue they were stopped for a taillight violation; that the officer could search the vehicle only for such things which were connected with the offense for which they were arrested; that no alcohol-related arrest was made; and therefore the officers could not search for alcohol in the vehicle. Appellants also argue there was no evidence that they were armed; therefore, the officers could not search for weapons.

In reviewing a trial court's ruling on a motion to suppress evidence, we make an independent determination based on the totality of the circumstances and reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Campbell* v. *State*, 294 Ark. 639, 746 S.W.2d 37 (1988). A police officer may conduct a warrantless search of a vehicle if he has reasonable cause to believe the vehicle contains contraband. *Rowland* v. *State*, 262 Ark. 783, 561 S.W.2d 304 (1978); Ark. R. Crim. P. 14.1. Reasonable cause exists when the facts and circumstances within the officer's knowledge, or of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Perez* v. *State*, 260 Ark. 438, 541 S.W.2d 915 (1976).

Here, appellants do not argue that the police officer did not have a valid reason to stop the vehicle in which they were riding.

At the hearing on appellants' motion to suppress, Officer Gibbins testified that when he approached the vehicle he smelled the strong odor of alcoholic beverages and a slight odor of what he was not "100% sure" was marijuana. He said he asked the subject to step out of the car and then noticed a brass pipe which he recognized as being used to smoke marijuana next to

the passenger's leg. Under the plain view doctrine, seized evidence is admissible when the initial intrusion was lawful; the discovery of the evidence was inadvertent; and the incriminating nature of the evidence was immediately apparent. *Munguia* v. *State*, 22 Ark. App. 187, 737 S.W.2d 658 (1987). Therefore, the trial court did not err in failing to grant appellants' motion to suppress the brass pipe.

Moreover, after the officer recognized the small brass pipe as narcotics paraphernalia, the officer then had probable cause for believing that other areas in the car might contain contraband. *Cook* v. *State*, 293 Ark. 103, 732 S.W.2d 462 (1987).

Further, prior to searching the car, the officer arrested appellants for possession of marijuana and drug paraphernalia. An officer, incident to an arrest, may contemporaneously search a vehicle, including the passenger compartment and any containers found within the passenger compartment, and seize things subject to seizure if the circumstances of the arrest justify a reasonable belief on the part of the officer that the vehicle contains things which are connected with the offense for which the arrest is made. *Campbell* v. *State, supra.*

Finally, the officer smelled an odor which he attributed to the drinking of alcoholic beverages, and he testified that when Joseph exited the vehicle, a wine cooler bottle fell out into the street. The officer said that he noticed a sack on the rear floorboard and felt there was alcohol in the sack. He picked up the sack, noticed it was light to the touch and did not have alcohol bottles in it, but contained what he believed to be marijuana.

Under the circumstances, we think the trial court was correct in denying appellants' motion to suppress the pipe and the marijuana.

Affirmed.

JENNINGS, C.J., and ROBBINS, J., agree.

CONWAY PRINTING COMPANY, INC. *v.*
Willie HIGDON

CA 93-489 873 S.W.2d 172

Court of Appeals of Arkansas
Division I
Opinion delivered April 6, 1994
[Supplemental Opinion on Denial of Rehearing
June 29, 1994.*]

*Pittman, Robbins, and Rogers, JJ., would grant rehearing.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jim Tilley*, for appellant.

Disability Associates, by: *David M. Hendrix*, for appellee.

MELVIN MAYFIELD, Judge. The issue in this appeal from a decision of the Workers' Compensation Commission involves the statute of limitations. It was submitted on the following stipulations:

> 1. The Claimant sustained a compensable injury during the course and scope of his employment on or about October 26, 1987 and his wages were such as to entitle him to a compensation rate in the amount of $189.
>
> 2. The Claimant was treated for his back injury by Dr. Edward H. Saer and Dr. Saer assessed a permanent partial impairment rating of 10 percent to the body as a whole on February 7, 1990.
>
> 3. Check number 331035-1 from USF&G was sent to Willie Higdon on March 1, 1990 in the amount of $6,930 which paid the 45 weeks of permanent partial disability benefits in a lump sum.
>
> 4. The Claimant was seen by Dr. Saer on September 11, 1990, and this bill was paid by the Respondent/Carrier.
>
> 5. The Claimant returned to Dr. Saer for treatment on September 11, 1991, and this bill was controverted by the Respondents since the Claimant had not received any medical care or treatment between September 11, 1990, and September 11, 1991. The Respondents deny the charges for the September 11, 1991, office visit based on Ark. Code Ann. § 11-9-702(4)(b) and *Cheshire* v. *Foam Molding Co.*, 37 Ark. App. 78 (1992).

A claim for additional benefits was filed with the Commission on January 14, 1992.

The administrative law judge held that the statute of limitations began running either on September 11, 1990, the date of the last visit of appellee to Dr. Saer, or on December 18, 1990,

which would represent the last date of installment payment if the permanent partial disability benefits had been paid in installments rather than in lump sum. Either way, according to the law judge, the January 1992 filing of the claim was untimely.

The Commission unanimously reversed, stating:

> Claimant sustained a compensable injury on October 26, 1987. On February 7, 1990, claimant's treating physician assessed claimant's permanent anatomical impairment at 10% to the body as a whole. These permanent disability benefits were paid in a lump sum. However, had the payments been made in installments only as they accrue, the last payment of benefits would have been on December 18, 1990. Thus, pursuant to *Southern Cotton Oil Co.* v. *Friar*, 247 Ark. 98, 444 S.W.2d 556 (1969), the statute of limitations commenced to run on December 18, 1990. Claimant returned to see Dr. Saer, his treating physician, on September 11, 1991. Respondent controverted this visit by alleging that the statute of limitations had run. Claimant filed his claim for additional benefits on January 14, 1992.
>
> It is important to remember that respondent did not controvert the September 1991 visit as being unreasonable and unnecessary but solely on the basis of the statute of limitations. If respondent believed this visit to Dr. Saer was unreasonable and/or unnecessary, it could have, and should have, so alleged before the Administrative Law Judge. Thus, we will not remand this case to the Administrative Law Judge for a determination of an issue not raised by respondent, particularly when to do so would be based solely on unsubstantiated, entirely speculative argument. Additionally, respondent does not allege lack of knowledge of this visit. Therefore, the September 1991 visit tolled the statute of limitations until September 1992. The claim for additional benefits filed in January 1992 is easily within the one year statute of limitations.
>
> For the foregoing reasons, we reverse the opinion of the Administrative Law Judge finding that this claim for additional benefits is barred by the statute of limitations.

Arkansas Code Annotated Section 11-9-702(b) (1987), provides in pertinent part:

> TIME FOR FILING ADDITIONAL COMPENSATION. In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation, or two (2) years from the date of the injury, whichever is greater.

Appellant argues on appeal that the Commission erred in ruling that the claim for additional benefits was timely filed. Appellant contends that the "operative factor" in tolling the statute of limitations is the filing date of the claim and the burden is on the claimant to timely file for additional benefits. It cites *St. John* v. *Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983). While that case does say that the burden is on the claimant to file a timely claim for additional benefits it says nothing about the "operative factor" being the filing date.

Because the claim for additional compensation was filed on January 14, 1992, and the injury occurred on October 26, 1987, obviously more than two years prior to the filing, the question is whether the claim was filed within one year from the date of the last payment of compensation. The last payment of compensation has been equated with the date of the furnishing of medical services. *Heflin* v. *Pepsi Cola Bottling Co.*, 244 Ark. 195, 424 S.W.2d 365 (1968); *Phillips* v. *Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Cheshire* v. *Foam Molding Co.*, 37 Ark. App. 78, 822 S.W.2d 412 (1992).

Appellant concedes that *Southern Cotton Oil Co.* v. *Friar*, 247 Ark. 98, 444 S.W.2d 556 (1969), cited by the Commission, holds that the statute of limitations commences to run only from the date the last payment would have been due if the lump sum payment for permanent partial disability had been paid in installments. Even so, appellant argues, the claim for additional benefits would have been untimely because it was not filed until January 14, 1992, more than one year past the December 1990 date of last payment. And appellant contends the Commission erred in holding that the "Claimant's medical treatment

rendered in September of 1991, which Respondent controverted, renewed the one-year period of limitation." It contends this conflicts with the case law holding that to toll the statute of limitations the employer must have knowingly and voluntarily furnished the medical services. *Superior Federal Savings and Loan Assoc.* v. *Shelby*, 265 Ark. 599, 580 S.W.2d 201 (1979); *McFall* v. *U.S. Tobacco Co.*, 246 Ark. 43, 436 S.W.2d 838 (1969).

The Commission held, however, that appellant's failure to controvert at the hearing before the administrative law judge the September 1991 visit as unreasonable and unnecessary prevented, under the circumstances here, the issue to be considered in the appeal to the Commission. Therefore, the visit to the doctor tolled the statute of limitations, and the claim for additional benefits filed on January 14, 1992, was timely filed. We find the Commission's reasoning persuasive.

Affirmed.

JENNINGS, C.J., and COOPER, J., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
JUNE 29, 1994

878 S.W.2d 4

James Tilley, for appellant.

David Hendrix, for appellee.

MELVIN MAYFIELD, Judge. The appellant has filed a petition for rehearing of our opinion handed down on April 6, 1994. (*Conway Printing Co., Inc.* v. *Higdon*, 45 Ark. App. 185, 873 S.W.2d 172 (1994)). The appellee has filed a response asserting that the petition presents no new issues to the court. The court en banc agrees and denies the petition for rehearing; however, the division that issued the original opinion issues this supplemental opinion for clarification.

First, in our original opinion we stated that the administrative law judge held that the statute of limitations began running "either on September 11, 1990, the date of the last visit of appellee to Dr. Saer, or on December 18, 1990, which would represent the last date of installment payment." We note that what the law judge actually said was that the statute began running "from the September 11, 1990, office visit to Dr. Saer or from the last date an installment of indemnity benefits would have been made on

December 18, 1990." And the law judge held that "under either theory of recovery, the January 1992, filing of a claim for additional benefits, is untimely." The Commission, however, did not agree with the law judge and we agreed with the Commission.

Second, our misstatement, however, has no effect on the outcome of this case. On March 1, 1990, appellant's carrier sent a check to the appellee in the amount of $6,930.00 which paid 45 weeks of permanent partial disability benefits in a lump sum. If this lump sum had been paid in installments, the last payment would have been December 18, 1990. Thus, the statute of limitations commenced to run on December 18, 1990. *Cotton Oil Co.* v. *Friar*, 247 Ark. 98, 444 S.W.2d 556 (1969).

Within one year thereafter, specifically on September 11, 1991, appellee returned to see Dr. Saer. The claim giving rise to this appeal was filed on January 14, 1992, well within one year of September 11, 1991, and the September 1990 visit to Dr. Saer is not important on the issue here. But the appellant argues that September 11, 1991, is not the operative date because appellant controverted "the medical expenses related to this visit." However, we do not believe the appellant can start the running of the statute of limitations by refusing to pay what it owes. And, as the Commission found in its opinion, appellant did not controvert the claim on the basis that the September 1991 visit was unreasonable and unnecessary, but solely on the basis of the statute of limitations. Nor has appellant argued on appeal that appellee's treatment was not reasonable and necessary, and under our statute, an employer shall promptly provide such medical service as may be reasonably necessary for the treatment of the injury received by the employee. Ark. Code Ann. § 11-9-508(a) (1987).

In its petition for rehearing the appellant has argued that our decision will allow a claimant to extend the statute of limitations to infinity simply by visiting his physician and filing his claim within a year of each visit. We note, however, that such visits could extend the statute of limitations only if the visits were reasonable and necessary for the treatment of the claimant's injury.

Appellant also argues that the September 1991 visit

cannot be considered "payment of compensation" because the appellant did not knowingly furnish the medical services rendered on September 11, 1991. However, the Commission found that appellant did not allege lack of knowledge of the visit. Because there is no evidence in the record for us to review on this issue we cannot say the Commission was wrong in its finding.

Thus, the Commission's decision is affirmed.

JENNINGS, C.J., and COOPER, J., agree, PITTMAN, ROBBINS, and ROGERS, JJ., would grant rehearing.

Andrea Jane (Benton) COGGINS *v.*
William John BENTON

CA 94-192 873 S.W.2d 820

Court of Appeals of Arkansas
En Banc
Opinion delivered April 13, 1994

Norman Wilbur, for appellant.

Larry Dean Kissee, for appellee.

PER CURIAM. The appellee has filed a motion to dismiss the above appeal because the transcript was not filed within seven months from the entry of the judgment from which the appeal was taken as required by Rule 5(b) of the Rules of Appellate Procedure. The problem comes from the fact that the transcript was not completed by the court reporter in time to be filed within the seven-month period.

We find the motion to dismiss must be granted. It has been held that in the absence of unavoidable casualty an appeal should be dismissed when the record is filed outside the seven-month period. *Pierce* v. *Pierce*, 238 Ark. 46, 377 S.W.2d 868 (1964); *see also Thomas* v. *Arkansas State Plant Board*, 254 Ark. 997-A, 497 S.W.2d 9 (1973).

Here, the trial court extended the time for filing the record to a time which was outside the seven-month period, but the court had no authority to take that action. In the case of *In Re Estate of Wilkinson*, 311 Ark. 311, 843 S.W.2d 316 (1992), the supreme

court said, "when an appellant seeks an extension of time beyond the seven months to file his or her record, his or her remedy is to file a partial record in the supreme court and seek an extension for a compelling reason, such as unavoidable casualty." *See also* Arkansas Supreme Court and Court of Appeals Rule 3-5, which was formerly Rule 26, and the case of *Evans* v. *Northwest Tire Service*, 21 Ark. App. 75, 728 S.W.2d 523 (1987).

COOPER, J., not participating.