[redacted]

[redacted]

[redacted]

[redacted]

HARTFORD INSURANCE COMPANY of the Midwest *v.*
Damon BREWER and Carolyn Brewer

CA 95-237 922 S.W.2d 360

Court of Appeals of Arkansas
En Banc
Opinion delivered May 29, 1996

Anderson & Kilpatrick, by: *Michael E. Aud*, for appellant.

Helen Rice Grinder, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant, Hartford Insurance Company, appeals from an order granting summary judgment in favor of appellees, Damon and Carolyn Brewer, on their claim to entitlement to the proceeds of an insurance policy issued by appellant. Appellant contends that the trial court erred in granting appellees' motion for summary judgment and instead should have awarded summary judgment to appellant. For the reasons that follow, we affirm.

Although the record in this case is sketchy at best, the parties seem to agree upon certain facts. In December 1990, appellee Damon Brewer's mother, Ethel Brewer, died intestate, leaving a residence in Conway to vest in her heirs by operation of law. *See* Ark. Code Ann. § 28-9-203(c) (1987). In July 1991, appellant issued a homeowner's insurance policy covering the property through June 1992. Apparently, the named insured was the "Estate of Ethel Brewer." On February 3, 1992, the other heirs of the decedent transferred all their interest in the property to appellees, who are husband and wife. Twelve days later, the property burned. Appellees then sought to collect under the policy issued by appellant. The claim was denied, and appellees filed this action, in their individual capacities only, in circuit court. After initial pleadings were filed, both appellant and appellees filed motions for summary judgment. The court granted appellees' motion and awarded them judgment for $38,500.00 under the policy, attorney's fees, and a twelve-percent penalty.

On appeal, appellant argues that the trial court erred because the named insured, the "Estate of Ethel Brewer," had no insurable interest at the time of the loss as required by Ark. Code Ann. § 23-79-104 (Repl. 1992). While appellant seems to concede that the estate had an insurable interest at the time that the policy was issued and that the appellees had an insurable interest at the time of the loss, appellant specifically argues that an estate is a legal entity separate and distinct from a decedent's individual heirs and that "it is not enough to have an insurable interest in property unless the person or persons having such interest also are specifically named as insureds." In other words, it is appellant's argument that appellees had no contract of insurance with appellant, and that appellant was

entitled to judgment as a matter of law. Appellees respond that, "[s]ince the heirs of Ethel Brewer already had whatever interest they were to obtain from her estate when the estate became the named beneficiary, it is clear that the policy must be read to cover the heirs of the estate and, by conveyance, to [cover] Damon and Carolyn Brewer."

Summary judgment is an extreme remedy and should be granted only when there are no genuine issues of material fact left to be determined and when the case can be decided as a matter of law. *Cherepski* v. *Walker*, 323 Ark. 43, 913 S.W.2d 761 (1996). In light of the record with which we have been presented, however, we are unable to reach the merits of appellant's argument. Although we are essentially being asked to construe a written contract of insurance so as to reverse a circuit court's solemn judgment thereon, the contract appears neither in the abstract nor even in the record.[1] It is axiomatic that, to determine rights and duties under a contract, we must determine the intent of the parties. This is not to be accomplished through the establishment of a judicial inquisition, but instead by examining the written agreement to construe it and declare its legal effect. *Duvall* v. *Massachusetts Indemnity and Life Insurance Co.*, 295 Ark. 412, 748 S.W.2d 650 (1988); *Floyd* v. *Otter Creek Homeowners Association*, 23 Ark. App. 31, 742 S.W.2d 120 (1988). It is well settled that the intent of the parties is to be determined from the whole context of the agreement; the court must consider the instrument in its entirety. *Continental Casualty Co.* v. *Davidson*, 250 Ark. 35, 463 S.W.2d 652 (1971); *Fowler* v. *Unionaid Life Insurance Co.*, 180 Ark. 140, 20 S.W.2d 611 (1929); *Floyd* v. *Otter Creek Homeowners Association, supra.* Clearly, it is an appellant's burden to bring up a record sufficient to demonstrate error. *McAdams* v. *Automotive Rentals, Inc.*, 324 Ark. 332, 924 S.W.2d 464 (op. del. May 6, 1996); *May Construction Co., Inc.* v. *Benton School District No. 8*, 320 Ark. 147, 895 S.W.2d 521 (1995); *Young* v. *Young*, 316 Ark. 456, 872 S.W.2d 856 (1994). Without the contract in question, which may have spoken in any number of ways to the issue of the person or persons entitled to the policy proceeds, we cannot determine whether the trial court erred. Therefore, we conclude

[1] The dissent's characterization of this defect as nothing more than an "abstracting error" is specious.

that appellant has failed in its burden, and we affirm.[2]

Affirmed.

ROGERS, J., agrees.

JENNINGS, C.J., concurs.

MAYFIELD, NEAL, and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting.

"A blind man should not judge of colors." Proverb

The majority would affirm this patently wrong result due to an abstracting error. The Arkansas Supreme Court has repeatedly held that even an abstract that falls considerably short of the requirements of Rule 4-2 may not be "flagrantly" deficient. *Linder* v. *Howard*, 296 Ark. 414, 757 S.W.2d 549 (1988); Ark. Sup. Ct. R. 4-2(b)(2); see also *Haynes* v. *State*, 309 Ark. 583, 832 S.W.2d 479 (1992); *Goodloe* v. *Goodloe*, 253 Ark. 550, 487 S.W.2d 593 (1972). The balance of the parties' briefs may overcome the deficiency and provide the court with the matters "necessary to an understanding of all questions presented to the court for decision." Ark. Sup. Ct. R. 4-2(a)(6); *Fight* v. *State*, 314 Ark. 438, 863 S.W.2d 800 (1993); *Haynes* v. *State*, 309 Ark. 583, 832 S.W.2d 479 (1992).

Here, the homeowner's insurance policy at issue was not included in the record or abstracted. However, the issue on appeal has nothing to do with the existence or the basic terms of the contract. Indeed, the parties agree to all the material issues surrounding the contract. The narrow question on appeal is whether the named insured ("The Estate of Ethel Brewer") continued to have an insurable interest or, more specifically, whether summary judgment on this question was proper given the factual state of the record. I contend that the absence of the contract in the record was not fatal, given the parties' apparent stipulations regarding the contract, and that we should have properly proceeded to the issue of summary judgment.

---

[2] The dissenting judges assert that necessary facts and parties are absent, and advocate remand for further factual development and joinder of the estate as a party. This displays a fundamental misapprehension of the scope of our review and the role of appellate courts in general. Essentially, the dissent would have us *sua sponte* order joinder of a "party" that may not exist in order to determine the answer to a question that the actual parties have not asked.

With regard to summary judgment, I disagree with the result reached in this case and the reasoning announced in the prevailing opinion because it is clear that genuine issues of material fact exist that preclude entry of summary judgment. It is equally clear that no accurate determination can be made that either party is entitled to judgment, as a matter of law or otherwise, until those factual issues are resolved. Therefore, the trial court should not have entered summary judgment in favor of appellees in the face of the clear and time-honored principle affirmed by Rule 56 of the Arkansas Rules of Civil Procedure. The same logic compelled denial of the appellant's summary-judgment motion.

We must remember that the object of summary judgment proceedings is not to try the issues, but to determine if there are any issues to be tried, and if there is any doubt whatsoever, the motion for summary judgment should be denied. *Rowland* v. *Gastroenterology Assocs.*, 280 Ark. 278, 657 S.W.2d 536 (1983); *Walker* v. *Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981). That is why courts have consistently stated that summary judgment is an extreme remedy which should only be allowed when it is clear that there is no issue of fact to be litigated. *Lee* v. *John Doe*, 274 Ark. 467, 626 S.W.2d 353 (1981); *McCaleb* v. *National Bank of Commerce*, 25 Ark. App. 53, 752 S.W.2d 54 (1988). This case demonstrates what can happen when parties and courts forget or ignore this fundamental rationale.

The parties agree that appellant issued its policy covering the residence in question to an insured known as the "Estate of Ethel Brewer." Appellant claims that its insured lost any insurable interest in the property once the heirs at law sold their respective interests to Damon Brewer and his wife. Neither party before us is the Estate of Ethel Brewer. The record contains nothing that suggests the status of the Estate of Ethel Brewer. Neither the trial judge nor this court knows the status of the Estate of Ethel Brewer. Especially important is whether the Estate of Ethel Brewer has claims pending against it that might be satisfied by the proceeds of the insurance policy. Whether the Estate is open or closed, whether claims are pending against it and, if so, in what amounts, whether the Estate has somehow transferred any interest that it may have in the policy proceeds to appellees, and whether Damon Brewer is entitled to recover, personally, from appellant based upon an insurance policy issued to somebody else known as the Estate of Ethel Brewer, are

questions that should be resolved before a court of law orders appellant to give insurance proceeds payable on a policy in the name of the Estate to anybody else. But instead of joining the Estate in this litigation and developing the evidence on these issues, the parties have presented this case for summary adjudication with nothing in the record concerning any of them. The trial court improperly gave the imprimatur of legitimacy to their efforts by granting appellees' summary-judgment motion, and now the result announced in the prevailing opinion compounds the error.

None of the aforementioned basic questions were raised by either party at the trial level or on this appeal. Of course, appellant has an interest in paying nothing to anybody, so it can hardly be expected to raise the possibly legitimate interest of the named insured to defeat its position. Appellees appear interested in recovering the policy proceeds in their personal capacities; otherwise Damon Brewer would have made certain that the Estate of Ethel Brewer was joined in the lawsuit. As matters now stand, the record does not contain any fact showing what right the Estate has to the policy proceeds, whether it has an insurable interest that justifies a finding that supports recovery, or whether it has an insurable interest but is otherwise precluded from recovery. One thing is certain, the parties to this appeal have done everything but join the insured, the only party in the world whose interest is questioned in the appeal.

I would reverse and remand this case to the trial court for further proceedings, beginning with joinder of the Estate of Ethel Brewer. If the Estate is not a necessary party to this lawsuit to determine who gets the proceeds of its insurance policy, if any proceeds are payable, then appellees have plainly failed to demonstrate how the Estate became disqualified. At minimum, the status of the Estate of Ethel Brewer is a matter to be proved in order to determine whether the Estate has an insurable interest represented by the proceeds of the insurance policy that appellant issued to it and for which premiums were paid. After all, the question raised by appellant's summary-judgment motion was whether the Estate (rather than appellees) had an insurable interest at the time of the loss. If there were any questions of fact to be tried on that point, summary-judgment was inappropriate.

Appellees do not resolve the issue of the Estate's insurable interest by their argument that they purchased the interests of the

other heirs at law. The law in Arkansas and elsewhere is that an insurable interest may continue even after a transfer of ownership. *Hartford Fire Ins. Co.* v. *Stanley*, 7 Ark. App. 94, 644 S.W.2d 628 (1983); Appleman, *Insurance Law and Practice*, § 2181 (citing cases where a vendor retains an insurable interest if he has indebtedness, some other lien, or a reversion interest in the property or if the contract for sale is forfeitable, or if the vendor remains in possession, or where the deed has been placed in escrow.) Arkansas is in accord with the general rule that coverage under a fire-insurance policy is personal to the insured and for its benefit only. *Echo, Inc.* v. *Stafford*, 21 Ark. App. 201, 730 S.W.2d 913 (1987). Insurance contracts do not run with the property. *Fireman's Fund Ins. Co.* v. *Rogers*, 18 Ark. App. 142, 712 S.W.2d 311 (1986). Consequently, when the insured parts with its interest in the property, the insurance policy is no longer in effect. *Appleman, supra*, § 2241; 44 C.J.S. §§ 229, 233. This explains why one must determine whether the Estate retained any cognizable interest in the property after appellees acquired the interests of the other heirs at law. If it did not, appellees are entitled to nothing.

Neither the record in this case nor the abstract presented on this appeal indicates the status of the Estate. It is certainly conceivable that the Estate may retain some inchoate or reversionary interest in the property that was insured pending its closure despite the actions by the heirs at law to transfer their respective interests to appellees. If the Estate indeed has an insurable interest, then nothing explains why appellees are entitled to be paid the full amount of the policy proceeds. After all, when the fire occurred the policy was, without question, yet effective with the Estate as the named insured. Thus, the policy proceeds would reasonably inure to the Estate until there were no outstanding claims or legal challenges pending, and then to the heirs at law pro rata. Given that the heirs at law had transferred their interests to appellees, this would mean that appellees would recover after the factual issues inherent in the case had been resolved, rather than reap a recovery without regard to the Estate's status and conceivable interest.

Unless one embraces the inaccurate notion that the heirs at law can properly and effectively contract among themselves to dispose of property within an estate that may be subject to the claims of creditors without leave of a probate court, there is no reason to accept the appellees' position that they are, for purposes of this

litigation, the same as the Estate of Ethel Brewer. The record certainly does not contain anything that supports that conclusion. "Estate" and "heirs" are not equivalent terms. *Black's Law Dictionary* 548 (6th ed. 1990) (citing *Martin* v. *Hale*, 167 Tenn. 438, 71 S.W.2d 211 (1934). There is nothing in the record showing that the Estate released any interest that it had in the insured property to appellees. The record does not include any order from the probate court demonstrating that appellees have been authorized to pursue a claim to recover these insurance proceeds in their personal capacities. Even if appellees made premium payments, it is obvious that the insurance was obtained for the benefit of the Estate. This would mean that appellees would be entitled to recover the amount paid for the premiums from the Estate. It does not mean that appellees would divest the Estate of any interest that it otherwise held in the property that was insured.

Ordinarily, where a contract exists between A and B, before C can recover money allegedly due under the contract, C must prove how she has succeeded to rights belonging to A or B. One would think that where neither A nor B stipulates that C has the right to recover, a trial would be necessary to settle the question. Yet today, we decide that C (appellees) was entitled to judgment without trial — even in the face of argument from A (appellant) that B (The Estate of Ethel Brewer) had no insurable interest whatsoever and without concern for whatever rights B might have. If this case had proceeded to trial and produced no proof about the Estate's interest in the insurance policy after the fire loss, appellant would have been entitled to a directed verdict in its favor. It is mind-boggling how appellant can now be held to the bizarre result of summary judgment in appellees' favor when it would have deserved the opposite result on a motion for directed verdict at trial.

In sum, whether a party has an insurable interest in property is ordinarily a question of fact. *Colorado Farm Bureau Mut. Ins. Co.* v. *CAT Continental, Inc.*, 649 F. Supp. 49 (D. Colo. 1986). The trial court granted summary judgment for appellees, denied the summary judgment motion filed by appellant, and announced in its amended order of February 13, 1995, that "the Court doth find that the Plaintiff's (sic) had, at the time of the loss of the dwelling located at 1923 Simms Street, Conway, Arkansas, an insurable interest . . . ." However, there are no facts in the record showing how appellees (plaintiffs below) acquired the insurable interest held

by the Estate of Ethel Brewer, or even that they did acquire it. As the proverb quoted at the beginning of this opinion suggests, one must first see before judging. In this case the trial court and this court are blind concerning crucial, fact-intensive issues on which the parties appear strangely eager to avoid developing proof so that a court can render an informed judgment. Therefore, it was error to grant summary judgment on the motion of either party.

MAYFIELD and NEAL, JJ., join in this dissent.

Jeffrey ADAIR *v.* Julie ADAIR

CA 95-485 923 S.W.2d 286

Court of Appeals of Arkansas
Division III
Opinion delivered May 29, 1996

Paul A. Schmidt & Associates, by: *Paul A. Schmidt*, for appellant.

Michael Knollmeyer, for appellee.

JOHN B. ROBBINS, Judge. This appeal results from an order of the Lonoke County Chancery Court that increased appellant's

child-support obligation and ordered appellant to pay appellee $11,570.00 for his failure to make the parties' Chapter 13 bankruptcy payments as ordered by the court. Appellant, Jeffrey Adair, does not challenge the chancellor's increase in his child-support obligation on appeal; however, he does contend that the award of $11,570.00 to appellee is clearly erroneous. We agree and therefore reverse in part.

The parties to this appeal were divorced in October 1987, and appellee, Julie Adair, was awarded custody of the parties' two minor children. In the divorce decree, the chancellor noted that the parties' joint debts, house and property, were subject to a Chapter 13 bankruptcy petition and ordered appellant to make the weekly $168.00 Chapter 13 payments under the plan in lieu of paying child support. Approximately six months after the decree was entered, appellant stopped making the bankruptcy payments, and the bankruptcy petition was subsequently dismissed. Sometime thereafter, appellant began paying appellee $62.50 in weekly child support.

In May 1994, appellee filed a motion to increase child support and a motion to have appellant held in contempt for his refusal to comply with the portion of the divorce decree that ordered him to make the Chapter 13 payments. After a hearing on these motions, the chancellor set appellant's child-support obligation at $116.00 per week and awarded appellee judgment against appellant in the amount of $11,570.00 because of appellant's failure to make the Chapter 13 payments as ordered by the court.

On appeal, appellant claims that the $11,570.00 award to appellee is clearly erroneous. The only evidence appellee offered concerning the bankruptcy petition was her testimony that the Chapter 13 petition was filed while the parties were separated but still married; that appellant was ordered to make the bankruptcy payments by their divorce decree; and that the case was dismissed for lack of payment after six months. There was no evidence that appellee had paid any creditors included in the bankruptcy petition or that she had even been contacted by these creditors. In sum, appellee offered no evidence that she had suffered any injury as a result of the dismissal of the bankruptcy petition. Had there been such evidence, this court would have no hesitation in affirming an award to appellee to reimburse her for those amounts. The issue before us, however, is whether the award to appellee is clearly erroneous, and because there is no evidence to support such an

award, we must conclude that it is. Accordingly, we must reverse the $11,570.00 award to appellee.

On appeal, chancery cases are tried *de novo* on the record, and the findings of the chancellor will not be reversed unless they are clearly erroneous or clearly against the preponderance of the evidence. *Hardison* v. *Jackson*, 45 Ark. App. 49, 55, 871 S.W.2d 410, 413 (1994).

Affirmed in part; reversed in part.

COOPER and MAYFIELD, JJ., agree.

Tammy Chambers STONE *v.* Keith STEED

CA 95-977 923 S.W.2d 282

Court of Appeals of Arkansas
Division III
Opinion delivered May 29, 1996

Dowd, Harrelson, Moore & Giles, by: *Gene Harrelson*, for appellant.

Wilson, Walker & Short, by: *Charles M. Walker*, for appellee.

JOHN B. ROBBINS, Judge. This is an appeal from a decision of the Hempstead County Chancery Court, which awarded appellee Keith Steed custody of the parties' minor child, Kelsey. Appellant Tammy Chambers Stone contends on appeal that the chancellor erred in allowing into evidence testimony concerning misdemeanor convictions of "non-party" individuals to show their bad character or reputation. Appellant also contends that the chancellor's finding that a material change in circumstances occurred which justified a change of custody was against the preponderance of the evidence. We find no errors and affirm.

On March 4, 1991, a paternity complaint was filed by the Arkansas Department of Human Services Child Support Enforcement Unit which alleged that appellee Keith Steed was Kelsey's

father. In February 1992, a judgment of paternity was entered finding that the appellee was the father of Kelsey and awarded him liberal visitation. The evidence showed that appellee exercised his visitation on a regular basis and paid child support.

On May 1, 1995, appellee filed a petition to change custody in which he alleged a change in circumstances which necessitated that he be awarded custody. The petition included an affidavit from Cindy White, appellant's sister, in which it was alleged that Kelsey's health and welfare was being endangered because of the activities of appellant and Randal Stone, the man with whom she was living. Appellant married Stone twelve days prior to the hearing. On June 12, 1995, the chancellor found a material change in circumstances had occurred and that it was in Kelsey's best interest that custody be awarded to the appellee, her biological father. From that decision comes this appeal.

Appellant first contends on appeal that the chancellor erred in allowing testimony concerning misdemeanor convictions of "non-party" individuals to show their bad character or reputation. At the hearing before the trial court, the appellee introduced testimony from the Hempstead County Municipal Court Clerk, Jo Ann Lively, that certain individuals who had been seen "hanging out" at the appellant's house had prior misdemeanor convictions. Appellant objected and the court ruled as follows:

> The reputation for being a law-abiding character perhaps. The Court having weighed the probative value on the issue of whether unwholesome or improper influences are present or have been present in the home finds that the probative value of these misdemeanors or uncharged conduct outweighs any prejudice to the individuals who are admittedly not on trial or being charged with criminal conduct. The objection is overruled.

After the chancellor overruled appellant's objection, Ms. Lively testified about two misdemeanor convictions that appellant's new husband had received: possession of a controlled substance, and harassment. Ms. Lively also testified that another person, who frequented appellant's residence, had been convicted of assault in the second degree. Appellant stipulated that Charles Bomar, who also had been seen at her residence, had been found guilty of two counts of possession of a controlled substance (marijuana) with intent to

deliver and had served time in the penitentiary.

Proof presented on behalf of the appellee included testimony that certain individuals had been seen in the appellant's home smoking marijuana while the child was present. Appellee presented this testimony to show that certain individuals who frequented the appellant's home had bad character and reputations, and that it was not in the child's best interest to be around such individuals.

As the trial court correctly ruled, the misdemeanor convictions were neither used for impeachment purposes nor against a person on trial for criminal conduct. The persons found guilty of the misdemeanors were not on trial and were not even called as witnesses. Consequently, the prejudice, against which the rules of evidence seek to protect, was not present. The exceptions to the general rule of character evidence, set out in Ark. R. Evid. 404(1) and (2), have been held inapplicable to civil cases. *Brown* v. *Conway*, 300 Ark. 567, 781 S.W.2d 12 (1989). The court in *Brown* went on to state that the use "of the words 'accused' and 'prosecution' means that these two exceptions should be applied only in criminal cases." In *James* v. *James*, 29 Ark. App. 226, 780 S.W.2d 346 (1989), we found that evidence concerning the moral character of a parent is relevant to the best interest of the child and the issue of parental custody. The evidence of misdemeanor convictions reflected on appellant's morality in allowing persons of questionable reputation and character to be around her child. Such information was relevant in deciding the best interest of the child and who should have custody. The chancellor did not abuse his discretion in allowing the testimony.

The appellant secondly contends that the chancellor's finding that a material change in circumstances had occurred which justified a change in custody was against a preponderance of the evidence. Appellant argues that she could spend more time with the child because both the appellee and his present wife work. She also alleges that the accusations of her drug use and the bad reputations of individuals "hanging around" her home were unfounded in the evidence. She contends that the evidence was insufficient to show a change in circumstances which would justify a change in custody.

We have stated many times that a material change in circumstances must be shown before a court can modify an order

regarding child custody, and the party seeking modification has the burden of showing such a change. *Jones* v. *Jones*, 51 Ark. App. 24, 907 S.W.2d 745 (1995). As in all custody cases, the primary consideration is the welfare and best interest of the child; all other considerations are secondary. *Hoing* v. *Hoing*, 28 Ark. App. 340, 775 S.W.2d 81 (1989). Custody awards are not made or changed to gratify the desires of either parent, or to reward or punish either of them. *Fitzpatrick* v. *Fitzpatrick*, 29 Ark. App. 38, 776 S.W.2d 836 (1989). Although we review chancery cases de novo, the chancellor's findings will not be disturbed unless clearly against the preponderance of the evidence. *Id.* Since the question of the preponderance of the evidence turns largely on the credibility of witnesses, the appellate court defers to the superior position of the chancellor, especially so in those cases involving custody. *Hoing* v. *Hoing*, *supra.*

Appellee Keith Steed testified that he has exercised his visitation with Kelsey on a regular basis. Appellee is married and has one child with his current wife, Terry, who also has three children from a previous marriage. Appellee and Terry testified that the child would be well cared for in their home and that they had plenty of space for her.

Appellee testified that he became concerned for the child's welfare when appellant began living with Randal Stone, her current husband. Appellee testified, without objection, that when he returned the child after visitation he observed individuals at appellant's home who had been arrested for marijuana use and other strangers whose identity was unknown to him. Appellee testified that, just prior to filing the petition in question, he was returning the child and observed appellant to be "wasted." He testified that appellant was covered in mud, had a scar between her eyes, never spoke to the child, and never even raised her head to acknowledge their presence. Appellee testified that he believed that appellant was "wasted" and "high on something." Appellee also testified, without objection, that appellant's husband, Randal Stone, had pulled a gun on the appellant and put it to her head while the child was present.

Appellant's husband, Randal Stone, testified that he had had many problems with appellant's mother. He testified that he had been convicted of several crimes in which the appellant's mother was the victim, including assault and criminal mischief. Mr. Stone admitted that he had previously been convicted of possession of a controlled substance and had "smoked a little pot" in the past. Mr.

Stone also admitted that several individuals, whose previous convictions were testified to, had been to his home where the child in question was residing. Mr. Stone denied ever having pulled a gun or knife on the appellant.

Cindy White, appellant's sister, testified on behalf of appellee. She testified that Mr. Stone had beaten the appellant and she was concerned for the child's welfare. Ms. White testified that she had personally observed Mr. Stone use marijuana several times at his home when both the appellant and the child were present. She went on to testify that she observed several people at the appellant's home who had reputations for being "dopeheads." The municipal court clerk testified that several of the people Ms. White had seen in appellant's home had previous misdemeanor convictions.

The chancellor made his ruling in part as follows:

> Clearly, if the testimony presented by Mr. Steed's side of the case is believable there are material changes and material concerns that require, or certainly suggest, custody should change, and I do find that those witnesses, including but not exclusively Ms. White, were very believable, and I do believe them. Really, on a case like this, largely it turns on credibility or believability. I do believe that there were circumstances, including marijuana use, in at least close enough proximity to the child to put her at risk of physical harm while people were intoxicated, and certainly, the example of what society really finds to be criminal behavior. It's wrong. There are other concerns, and this record is complete. Custody will transfer to Mr. Steed. I believe certainly full, and for the child's benefit liberal visitation should be afforded, but with some structures, and those would be that none of the named felons, or the named felon or those identified as having broken the law in front of, in the household should be allowed to be around the child during periods of visitation, with the exception of Mr. Stone.

Based on the chancellor's assessment of credibility and the evidence before him, we believe the chancellor correctly found that a material change in circumstances had occurred which warranted a change in custody. We do not believe the chancellor's decision that it was in the child's best interest for appellee to have custody was clearly against a preponderance of the evidence.

Affirmed.

ROGERS and NEAL, JJ., agree.

Donald Wayne BOYD *v.* STATE of Arkansas

CA CR 95-740 922 S.W.2d 357

Court of Appeals of Arkansas
Division III
Opinion delivered May 29, 1996

William R. Simpson, Jr., Public Defender, by: *C. Joseph Cordi, Jr.*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant Donald Wayne Boyd was found guilty by a jury of aggravated robbery and theft of property. His only argument on appeal is that the evidence was insufficient to

convict him of aggravated robbery.

■ 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.*

At trial, Johnny Ray Johnson testified that on May 4, 1994, between 3:45 and 4:00 a.m., he woke up to see his car backing out of the driveway. He said he went out on the front porch and yelled, "Hey, where are you going with my car?" He then heard a shot, which he thought was directed at him, and he ran back into the house. Johnson said it was too dark for him to see how many people were in the car, and he could not determine whether they were black or white, male or female.

After the car left, Mr. Johnson went across the street to his mother's house. She had heard the shot and had seen the commotion. They got into her car and went looking for his car. They came upon some police officers and reported that the car had been stolen. Johnson described his car as a black, four door, 1986 Fleetwood Cadillac, with the right headlight broken out, and the license number OYT-517. Johnson said he bought the car in early 1992 for about $9,000. He said it was in excellent condition except for the broken headlight. Johnson also testified that the car was not for sale, but he had been offered as much as $3,500 for it. Later, the police called him and said they had located his car; however, it was demolished.

Lucille Robinson, Johnson's mother, corroborated his testimony. She testified that she had got up about 4:00 a.m. to go to the bathroom and heard a shot. She looked out the window and saw her son's car back out of his driveway, hit the opposite curb, go forward and hit the other curb, and drive off. She said she knew her son was not driving like that, and she saw him on his front porch. They then went to look for the car and reported the theft to police.

Detective Chris Oldham, a Little Rock police officer, testified that he heard a police broadcast about the stolen car at approxi-

mately 4:00 a.m., and he saw the car coming toward him shortly thereafter. He described a high-speed chase through the eastern section of Little Rock in which the stolen vehicle ran a red light and a stop sign. The chase ended when the driver lost control of the vehicle and slammed into a telephone pole. The officer testified that as he approached the vehicle, a black handgun was thrown from the driver's side into the field adjacent to the telephone pole. According to Detective Oldham, the driver had a cut on his forehead but was talking and alert, and appeared to be in good condition. He got the driver out of the vehicle, handcuffed him, and placed him in a police car to be transported to the police station. He then retrieved the gun, which was a .45-caliber automatic weapon with two rounds in the clip and one in the chamber. Detective Oldham identified the appellant as the driver of the stolen car.

Detective Marty Garrison testified that he came into contact with appellant when he was brought to the Little Rock police station in the early morning hours of May 4, 1994. Garrison said he advised appellant of his Miranda rights and got the impression that appellant understood them, but appellant refused to sign the rights form or the waiver, and said, "I'm not going to sign anything," but said, "I'll tell you what happened," and asked, "What do you want to know?" In response to the officer's questions, the appellant said that he got the gun from the car but did not shoot at the owner. He said he "shot in the air." Detective Garrison said appellant answered all his questions and never asked for an attorney.

When the State rested, counsel for appellant made a motion for directed verdict on both counts. He said that when the shot was fired the theft was completed, and he was not resisting immediate apprehension. He contended that the most the evidence would support was a theft and possibly an aggravated assault. The motion for directed verdict was denied, and the defense then rested and renewed its motion for directed verdict.

Arkansas Code Annotated § 5-12-102 (Repl. 1993) defines robbery as follows:

> (a) A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.

Ark. Code Ann. § 5-12-101 (Repl. 1993) defines physical force as

"any bodily impact, restraint, or confinement or the threat thereof." Ark. Code Ann. § 5-12-103, Aggravated robbery, provides:

> (a) A person commits aggravated robbery if he commits robbery as defined in 5-12-102, and he:
>
> (1) Is armed with a deadly weapon or represents by word or conduct that he is so armed; or
>
> (2) Inflicts or attempts to inflict death or serious physical injury upon another person.

On appeal appellant argues:

> It is clear that the appellant neither used nor threatened to use the gun while taking possession of the car. Mr. Johnson was asleep inside his house when the car was taken. The appellant was already in possession of the car by the time Mr. Johnson was aware that it was being stolen. Therefore, the offense of theft was completed before the shot was fired.
>
> There was evidence that the appellant shot the gun when Mr. Johnson yelled for him to stop. However, Mr. Johnson was not, at that time, attempting to apprehend the appellant. He was on his porch when he heard the shot. The only action that he had taken at that point was to yell, "Hey, where are you going with my car[?]" Yelling at a thief does not amount to an attempt to apprehend one. Therefore, if the appellant had fired a shot at that point he did not do so in an attempt to resist apprehension because nobody was attempting to apprehend him at that point. [Transcript references omitted.]

Appellee contends that theft is a continuing offense according to *Findley* v. *State*, 300 Ark. 265, 778 S.W.2d 624 (1989), and *Hall* v. *State*, 299 Ark. 209, 772 S.W.2d 317 (1989). In *Findley*, the appellant argued that the state's proof established no more than a theft by Findley of Phillips' $1,700 followed by a murder four days later — too distant, he maintained, for compliance with the requirement of the robbery statute that the use of force occur "immediately thereafter." The Arkansas Supreme Court replied:

> But, as we have noted, the evidence was such that the jury could infer that Findley killed Phillips either to obtain the funds or to silence Phillips when he demanded the return of

> his money. In *Hall* v. *State*, 299 Ark. 209, 772 S.W.2d 317 (1989), we considered an analogous challenge to the applicability of the first degree murder statute, Ark. Code Ann. § 5-10-102 (1987), which defines the offense as including a death occurring during "immediate flight" from the commission of a felony. Hall was seen by the police driving a car which had been stolen five days earlier. Hall sped away and in the ensuing chase he struck and killed a pedestrian. Hall was convicted of first degree murder, theft by receiving and fleeing. His arguments on appeal included the proposition that because the theft had occurred five days earlier, he was not in "immediate flight" from the commission of a felony. This court rejected that premise on the reasoning that theft by receiving was a continuing offense, citing *State* v. *Reeves*, 264 Ark. 622, 574 S.W.2d 647 (1978).

300 Ark. at 274, 778 S.W.2d at 627.

Relying on these cases, appellee submits that appellant is in error in his assertion that the theft had ended when he employed the deadly weapon since theft is a continuing offense. In addition, appellee argues, even if it is assumed that the theft ended before appellant utilized his deadly weapon, viewing the evidence in the light most favorable to the State, there is substantial evidence that the deadly weapon was employed to resist apprehension. Although appellant contends that the owner was not attempting to apprehend him, it is certainly a fair inference that appellant employed the weapon as a means of avoiding arrest.

Appellant admitted he took Johnson's car from his driveway and fired a shot while leaving. We cannot break crimes down into component parts microseconds apart. The theft began when appellant got into the victim's car and continued until appellant hit the telephone pole and was apprehended by police.

Affirmed.

COOPER and ROBBINS, JJ., agree.

Douglas EASTERLING, Appellant *v.* Mark WEEDMAN, Jr., Appellee/Cross-Appellant *v.* Metropolitan Life Insurance Company and Financial Benefit Life Insurance Company, Cross-Appellees

CA 95-14 922 S.W.2d 735

Court of Appeals of Arkansas
Division II
Opinion delivered May 29, 1996

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Richard C. Kalkbrenner* and *Scott M. Strauss*, for appellant.

Elrod Law Firm, by: *John R. Elrod* and *Ruth A. Wisener*, for appellee/cross-appellant.

Alvin Pasternak, Christine Meyers, and *Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.*, by: *Marshall S. Ney*, for cross-appellee Metropolitan Life Ins. Co.

Robinson, Staley & Marshall, by: *Robert L. Robinson, Jr.*, and *Patricia Stanley Luppen*, for cross-appellee Financial Benefit Life Ins. Co.

WENDELL L. GRIFFEN, Judge. Following a trial on May 25 and 26, 1994, in the Pulaski Circuit Court, Fifth Division, a jury returned verdicts upon written interrogatories that Mark Weedman, Sr., deceased, intended that his son Mark Weedman, Jr., be the beneficiary of a $200,000 annuity issued by Financial Benefit Life Insurance Company, and that Douglas Easterling, the insurance agent who sold the annuity, negligently failed to implement that intent. The jury also found that Mark Weedman, Jr., was entitled to recover $225,692.04 in damages from Easterling because of his negligence concerning the Financial Benefit Life Insurance annuity. The jury further found that Mark Weedman, Sr., intended for Mark Weedman, Jr., to be the beneficiary of a $300,000 annuity issued by Metropolitan Life Insurance Company, and that Douglas Easterling had failed to implement that intent. The jury assessed Weedman's damages for that negligence at $332,718.42. The trial court entered judgment in favor of Weedman and against Easterling for $558,410.46 in damages, prejudgment interest of $120,058.15, plus court costs of $45.00.

Easterling has appealed from the judgment entered against him and in favor of Weedman upon the verdicts, and contends that the trial judge erred by excluding proffered testimony concerning the decedent's intent to give Weedman anything. Easterling also asserts that the trial judge erred by admitting into evidence a probate court estate inventory regarding the Estate of Inza Weedman, the decedent's widow, for the purpose of proving Weedman's damages. On cross-appeal, Weedman contends that the trial judge erred by granting summary judgment in favor of Financial Benefit Life Insurance Company and by granting a pretrial motion for dismissal filed by Metropolitan Life Insurance Company.

We hold that the trial court erred by excluding testimony from Easterling, Delores Waymire, and Hazel Cruthirds concerning the decedent's intent not to give anything to Weedman, and that it erred by receiving the probate inventory into evidence. As to the cross-appeal, we hold that the trial court committed no error in granting the dismissal motion filed by cross-appellee Metropolitan Life Insurance Company. However, we hold that the trial court erred when it granted summary judgment in favor of Financial Benefit Life Insurance Company. Therefore, we reverse and remand for new trial as to Easterling's direct appeal, reverse and remand for new trial as to Weedman's cross-appeal regarding Financial Benefit Life Insurance Company, and affirm as to Weedman's cross-appeal regarding Metropolitan Life Insurance Company.

FACTUAL HISTORY

In October 1987, Mark Weedman, Sr., purchased a $300,000 annuity from Metropolitan Life Insurance Company. In December 1988, the decedent purchased a $200,000 flexible premium annuity from Financial Benefit Life Insurance Company. Douglas Easterling sold both contracts to the decedent in his capacity as a licensed insurance agent appointed by Metropolitan Life Insurance Company and Financial Benefit Life Insurance Company. In January 1989, the decedent exercised the right to receive payments under the Metropolitan annuity. Mark Weedman, Sr., died February 17, 1990, survived by his widow, Inza Weedman, and his son, Mark Weedman, Jr., Inza Weedman, the decedent's fifth wife and Mark Weedman's step-mother, died on March 21, 1990, slightly more than a month later, and was survived by her sister, Hazel Cruthirds, and her brother, William (Bill) Selby.

Mark Weedman, Sr., died intestate, and Inza Weedman inherited the bulk of his estate. After Mark Weedman, Sr., died, his son discovered that the proceeds from the Metropolitan Life and Financial Benefit annuities were paid to Inza Weedman. This lawsuit arose from the dispute over the proceeds from those annuities and the confusion that exists because of the alleged negligence by Easterling in completing the annuity applications. Mark Weedman, Jr., is identified on each application as the annuitant (the person by whose life the term of the contract is measured). The application for the Financial Benefit flexible premium annuity contains the name of Mark Weedman or Inza Weedman as the beneficiary, and does not indicate which Mark Weedman was intended (Mark

Weedman, Sr., or Mark Weedman, Jr.). That application listed Mark D. Weedman as the annuitant and contains a signature purporting to be that of Mark Weedman as annuitant. Easterling signed appellee Weedman's name as annuitant without Weedman's knowledge or consent. Although he listed appellee Weedman as the annuitant, Easterling inserted the decedent Weedman's social security number on the Financial Benefit annuity application in the space that provided for the annuitant's social security number.

Easterling also prepared a request for an optional income plan for the Metropolitan annuity in January 1989. That request listed "Mark Weedman" as payee, and listed Mark or Inza Weedman, father and stepmother of the payee, as contingent payees. It also showed the payee's date of birth to be 1-11-27 (that of appellee Weedman), but showed the payee's address as 715 North University in Little Rock, an address where appellee Weedman had not lived since 1950. The request that Easterling prepared contains the purported signature of Mark Weedman as payee, and his correct birth date. However, appellee Weedman denied signing the request, consenting to his signature being placed on the application, or knowing that the request had been made. He also never received monthly payments from the Metropolitan annuity.

Appellee Weedman, acting in his personal capacity and as personal representative of the estate of decedent Weedman, sued Easterling, Metropolitan Life, and Financial Benefit in an declaratory judgment action, and alleged that because of the negligence, fraud, and misrepresentation of Easterling in his capacity as agent for Metropolitan Life and Financial Benefit, all benefits payable under the annuities had been wrongfully paid to other parties, including the administrator of Inza Weedman's estate. Appellee Weedman contended that the benefits payable under the annuities were intended by decedent Weedman to go to appellee Weedman after the deaths of Mark Weedman, Sr., and Inza Weedman, and he requested that the court determine the rights to those benefits. Alternately, appellee Weedman contended that the annuities should be reformed to carry out the intent of the owner (decedent Weedman) that appellee Weedman receive the benefits upon the death of Mark Weedman, Sr., and Inza Weedman. Easterling denied the allegations of fraud, misrepresentation, and negligence. Financial Benefit and Metropolitan Life denied liability to appellee Weedman on theories of vicarious liability. As trial approached, Financial

Benefit filed a motion for summary judgment, and Metropolitan Life filed a motion to dismiss. The trial court granted both motions. For sake of clarity, we shall first address the issues in the appeal, followed by those presented by the cross-appeal.

EASTERLING'S APPEAL

Hearsay Testimony.

Easterling argues that the trial court erred by excluding his testimony concerning whether the decedent Weedman intended for appellee Weedman to receive the proceeds from the annuities. Before the trial began, the trial judge ruled that Easterling would not be allowed to testify about statements made by the decedent to the effect that he was purchasing the annuities to protect his wife (Inza Weedman), and that he did not want his son (appellee Weedman) to receive anything. As the trial judge observed, the decedent's intent was the crux of the lawsuit. A proffer was made of Easterling's excluded testimony based upon the hearsay objection by appellee Weedman. Easterling's proffered and excluded testimony, given during questioning by his counsel, was as follows:

> Q. Mr. Easterling, when you met with Mark, Sr., and Inza in connection with the application for the Metropolitan annuity, did you attempt to discover from Mark, Sr., and Inza Weedman their intent with regard to the ownership and beneficiary interest of that annuity?
>
> A. Yes.
>
> Q. Did they expressly tell you what their intent was?
>
> A. Their express intent was this was for the sole purpose of them and them only.
>
> Q. And what (sic) was that intent expressed to you?
>
> A. The intent was expressed that they were the sole owners and beneficiaries and future users of this annuity.
>
> Q. Did they express any intent with regard to Mark, Jr., having an ownership interest?
>
> A. Yes.
>
> Q. What was that intent?

A. The intent was that he was not to even know that it existed, much less have any interest, future interest.

Q. So I would assume your testimony would also be that they expressed it was their intent that Mark, Jr., wouldn't serve as a beneficiary or payee of the Metropolitan annuity?

A. True, yes.

. . .

Q. Did you have similar discussions with Mr. Weedman at the time the supplemental income policy under the Metropolitan annuity was taken out?

A. Yes.

Q. I'm talking about when that Metropolitan annuity was converted to a monthly pay. Okay. What intent did Mark, Sr., express to you?

A. First of all, that he wanted a monthly income stream and that it was his purpose and Inza's purpose. He may have asked the question, in fact, he did, what happens if something happened to me, and I said, it would continue the income stream for Inza.

Q. Now, in connection with the Financial Benefit annuity, did you have similar discussions with Mark about the ownership interest and the beneficiary interest under that annuity?

A. Yes.

Q. Can you tell me what Mark, Sr.'s, expressed intent was in regard with that annuity in connection with the ownership and the beneficiary's interest?

A. For simplistic sake, he wanted it done just like the other one. He didn't want anyone else to know. It was for the ownership and use of himself and Inza.

Q. Did Mark, Sr., ever indicate to you his intentions with regard to Mark, Jr. In connection with the Financial Benefit policy, or Financial Benefit annuity, rather?

A. I'm sorry. Will you ask that question—I'm sorry, I didn't - I'm sorry, will you ask the question - I'm sorry.

Q. Uh-huh. Did Mark, Sr., in connection with the Financial Benefit annuity, give you any indication that he ever wanted Mark, Jr., to have any rights as owner or beneficiary under that policy?

A. No.

Q. By no, are you telling me he told you that he did not want Mark, Jr., to have any benefits of ownership or any benefits as a beneficiary?

A. Yes.

Easterling also made a proffer concerning the substance of the testimony that would have been given by Hazel Cruthirds, Inza Weedman's sister. The proffer regarding the testimony from Cruthirds was as follows:

MR. STRAUSS (counsel for Easterling): Your Honor, we anticipate that, if allowed to — if she had been allowed to testify, Mrs. Cruthirds' testimony would have been that, in her presence, Mark Weedman, Sr., had made numerous disparaging remarks about Mark Weedman, Jr., including remarks much like, I don't want him to get any of my money, I don't want him to have anything of mine. There were numerous remarks of this nature, Your Honor, and we contend that they reflect an intent or a state of mind and, therefore, constitutes an exception to the hearsay rule.

Easterling also proffered testimony from Delores Waymire, a bank officer who had sold the decedent certificates of deposit and had discussed with him what would happen to those funds in the event that he predeceased his wife. The proffered testimony from Waymire was as follows:

Q. When you first met with Mr. Mark and were discussing with him the different investment options that he had, I believe that you testified that you disclosed to him that there were five options, three of which you've already testified to. What were the other two investment options regarding CD's that you discussed with Mark, Sr., and Ms. Inza?

A. Mr. Mark had indicated that the funds were to be solely his or Ms. Inza's. To eliminate any other part of the estate from obtaining any funds, the CD issued in one person's name; a for instance, Mr. Mark, Sr., the — any other family members, if that went into — if it was issued in his name only, then the other family members could come in on that estate and obtain those funds. Mr. Mark had on numerous occasions indicated that he did not want Mark, Jr., to have, I quote, "a damn thing of his." So, with the insurance of account, it had to be in — he had to have a will to eliminate this possibility, and that's where the will came into existence.

Q. Now, let me summarize or try to summarize what you've told us about the five accounts, and if I go wrong, let me know. You've testified that there are three accounts that a depositor can take out without the necessity of writing a will, and one would be a joint account, one would be an account in the name of the husband payable on death to the wife, the third one would be an account in the name of the wife payable on death to the husband?

A. Right.

Q. I think your testimony is that a depositor can have two more accounts insured up to $100,000 each if there is a will. And the way those accounts would be handled would be in the name of the individual husband and the other account would be in the name of the individual wife. Is —

A. That is correct.

Q. So after that discussion — There were five CD's issued. Is that right?

A. That is right.

Q. And I — Is it your testimony that the fourth and the fifth CD's were named — were titled individually in Mr. Mark's name and individually in Ms. Inza's name?

A. That is correct.

Q. Was the will executed at the time those fourth and fifth CD's were issued?

A. Yes, sir.

Q. So when Mr. Mark and Ms. Inza came in with their handwritten wills, they also came in with money to open up two additional accounts. Is that right?

A. Yes, sir.

Q. Do you recall the amounts of those accounts?

A. Ninety-five thousand.

Q. Ninety-five thousand dollars each?

A. Each, each. Yes, sir.

Q. At the time that Mr. Mark and Ms. Inza came in asking you to be a witness on their will, did they tell you what the contents of that will were?

A. Mr. Mark had indicated that he wanted everything that he had to go to Ms. Inza, this he had mentioned previously, and everything that was Ms. Inza's was to go to him, eliminating Mark, Jr.

Q. Was there a specific reference in this conversation to Mark Weedman, Jr.?

A. Yes, sir.

Q. By whom?

A. Mr. Mark indicating he wanted to invest more money with us, but was there any way that he could do so and eliminate him. So, and —

Q. Now, when you say eliminate "him" ..

A. Mark, Jr. And I told him, I asked him at that point, did he have a will, and he said no. And I told him that the only way would be for him to have a will and he said, write me one, and I said, I can't do it. And I said, I can give you a copy of my will and you can use that as — to go by to write your own will, but you must mention Mark, Jr.'s, name in the will.

Q. You explained that to him?

A. Yes, sir.

Q. That he needed to mention Mark, Jr., in the will?

A. In the will.

> Q. Now, that was a meeting prior to the date that you actually witnessed the wills, right?
>
> A. It — right.
>
> Q. Were there any discussions about Mark, Jr., at the time the wills were executed?
>
> A. No, sir.
>
> . . .
>
> Q. How did you become aware that he had a child?
>
> A. I mentioned — He was asking about insurance of accounts again.
>
> Q. Okay, that — Okay.
>
> A. And I mentioned that he could have one covered under he (sic) with a child and he immediately became very enraged, he said, I don't want — I have a son, but I don't want him to get a damn thing of mine. He said he's lazy and he's no good and we never hear from him and we don't want him to have any money.

Appellee Weedman objected to the foregoing testimony on hearsay grounds. He also objected to Easterling's proffered testimony concerning the decedent's intent to leave nothing to his son on the ground that it was inadmissible pursuant to Rule 403 of the Arkansas Rules of Evidence because its probative value was outweighed by its prejudicial effect.

[redacted] Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, that is offered in evidence to prove the truth of the matter asserted. Ark. R. Evid. 801(c). Hearsay is not admissible except as provided by law or by the rules of evidence. Ark. R. Evid. 802. Appellee Weedman argued successfully at trial and contends in response to Easterling's appeal that the testimony from Easterling, Cruthirds, and Waymire was hearsay that is not excepted from the general rule of inadmissibility. Easterling argues, on the other hand, that statements made by the decedent concerning his intent insofar as appellee Weedman's beneficiary status on the annuities amount to admissions of a party opponent because appellee Weedman sued as personal representative of the decedent's estate as well as in his individual capacity. To

that extent, Easterling maintains that the admissibility of the testimony concerning the decedent's intent is governed by Rule 801(d)(2) of the Rules of Evidence, which states:

> Statements Which Are Not Hearsay. A statement is not hearsay if: . . . (2) Admission by party-opponent. The statement is offered against a party and is (i) his own statement, in either his individual or a representative capacity, (ii) a statement of which he has manifested his adoption or belief in its truth, (iii) a statement by a person authorized by him to make a statement concerning the subject, (iv) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

We hold that the testimony by Easterling concerning the decedent's statements to him that he did not want his son to be beneficiary or payee as to the annuities was not hearsay and, therefore, was improperly excluded. The decedent was the owner of the annuities in question. He made the purported statements to Easterling concerning his intentions that his son not benefit from the annuities, and that the annuities benefit his wife. The decedent's statement was against the interest of his estate because the estate would not benefit from the annuities upon the decedent's death based upon his decision to name his wife as the beneficiary. As personal representative of the decedent's estate and as the decedent's heir at law, appellee Weedman was a party against whose interest the decedent's statements were directed.

To this extent, this case is similar to that of *Inmon* v. *Southwest Auto Supply, Inc.*, 268 Ark. 1140, 599 S.W.2d 420 (Ark. App. 1980). That case involved a lawsuit against a man who wrote a check on a partnership account to settle a personal debt, and told the creditor's manager to apply the partnership check to his past due personal account. The trial court allowed the creditor's manager to testify concerning the man's directions to apply the partnership check to his personal account. Our court upheld that ruling on appeal in an opinion written by Judge Marian Penix that concluded that the testimony from the creditor's manager was not hearsay concerning the declarations by the debtor because he was an agent of the partnership, made the statement directing the application for the payment from partnership funds while the partnership existed, and

the statement was against the interest of the partnership. For similar reasons, we find that the testimony from Easterling concerning the decedent's statements that appellee Weedman was not to benefit from the annuities involved in this litigation was not hearsay, and was, therefore, admissible pursuant to Rule 801(d)(2) of the Rules of Evidence.

Although the proffered testimony from Hazel Cruthirds and Delores Waymire concerning the decedent's statements to them concerning his desire that his son receive none of his property did not address the annuities, that testimony should not have been excluded. Rule 803(3) of our Rules of Evidence states:

> Rule 803. Hearsay exceptions — Availability of declarant immaterial. — The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, . . .

The core of this litigation is whether the decedent intended to make appellee Weedman the beneficiary or payee for the annuities. The testimony from Cruthirds and Waymire regarding the decedent's statements that appellee Weedman receive none of his assets is both admissible to show his then existing intent not to give appellee Weedman anything, as well as his motive for deciding as he did. In *Greenwood* v. *Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979), a dispute arose concerning the validity of an instrument that the testator signed leaving all his property to his second wife if she survived him. The instrument was in the handwriting of the second wife, and its validity was challenged by the testator's first wife on behalf of a minor adopted child of the first marriage. After the probate court upheld the will against challenges of lack of testamentary capacity and undue influence, the challenger contended on appeal, in part, that testimony by the second wife regarding the testator's statements made as to his intent was inadmissible. The Supreme Court refused to even consider that assertion because Rule 803(3) permits such statements concerning present intent. We believe that the Rule applies to the proffered testimony from Cruthirds and Waymire in this case.

The Rule 403 Objection.

The trial court also sustained Weedman's objection to Easterling's testimony about the decedent's statements concerning the identity of the beneficiary for the annuities based upon Rule 403 of the Rules of Evidence. That rule provides that relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. Relevant evidence may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. *Gruzen* v. *State*, 267 Ark. 380, 591 S.W.2d 342 (1979), *cert. denied*, 449 U.S. 852 (1980), 459 U.S. 1020 (1982). The trial court has discretion in determining the relevance of evidence and in gauging its probative value against unfair prejudice, and its decision on such a matter will not be reversed absent abuse of that discretion. *Robinson* v. *State*, 314 Ark. 243, 861 S.W.2d 548 (1993). The prejudice referred to in Rule 403 denotes the effect of the evidence upon the jury, not the party opposed to it. *Sasser* v. *State*, 321 Ark. 438, 902 S.W.2d 773 (1995).

After reviewing the record of Easterling's proffered testimony, we conclude that it was an abuse of discretion for the trial court to exclude his testimony concerning the decedent's statements about the intended beneficiary of the annuities. Easterling was accused of having negligently prepared the applications for the annuities so that the decedent's alleged intent to benefit his son, appellee Weedman, was frustrated, resulting in monetary damage to the son. In order to render a verdict, the jury had to first decide whether the decedent intended to benefit his son insofar as the proceeds from the annuities were concerned. This necessarily meant that evidence relevant to the decedent's intent, and especially his intent toward benefiting his son as opposed to his wife, was quite relevant for the jury to consider. As we observed in another context, the probative value of evidence correlates inversely to the availability of other means of proving the issue for which the allegedly prejudicial evidence is offered. *Smith* v. *State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986). Under Rule 403, the probative value and alleged unfair prejudice of the evidence in question must somehow be assessed, and these values must be compared to determine which will advance the search for truth. Based on that comparison, the proffered evidence may be admitted or rejected.

The only other evidence of the decedent's beneficiary intent concerning the annuities aside from Easterling's testimony was the annuity applications. Easterling completed the applications and discussed their contents with the decedent. Whether he misrepresented the decedent's intent by his mistakes was for the jury to decide. But the jury had the right to know what the decedent had told Easterling he wanted done with the annuity proceeds upon his death. Easterling's testimony would have been unfavorable to appellee Weedman; however, that did not render it prejudicial to the jury, confusing, misleading, or burdensome to the trial process.

The Inza Weedman Estate Inventory.

Easterling also argues that the trial court erred when it admitted a probate inventory from the estate of Inza Weedman into evidence over his hearsay objection. Inza Weedman died within a month of her husband's death, and her estate received the benefits from the annuities involved in this litigation. Appellee Weedman offered a certified copy of the probate inventory into evidence in an effort to show the extent of his damages, and relies upon Rule 902(4) of the Rules of Evidence in support of the trial court's decision in favor of its admissibility. That rule, however, deals with the authenticity of documents, not admissibility.[1] As Easterling correctly contends, Rule 902 does not except any document from the rules concerning hearsay. Authentic documents that constitute out of court statements offered for the truth of the matters asserted in them are merely hearsay and, pursuant to Rule 802, are inadmissible unless covered by an exception to the rules concerning hearsay evidence or by other law.

Appellee Weedman contends that the probate inventory was properly admitted pursuant to Rule 803(8), which provides that public records and reports that set forth the regularly conducted and

---

[1] Rule 902(4) reads:

Self-authentication. — Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) [of Rule 902], or complying with any law of the United States or of this State.

recorded activities of a public office or agency are not excluded by the hearsay rule.[2] However, the public records and reports exception to the general rule excluding hearsay evidence applies to public records and reports of governmental offices and agencies as to their activities. The exception exists because the law deems the reports from governmental offices concerning their regularly conducted and recorded activities to be trustworthy statements of what was done in the public interest. Private parties may not bootstrap what amounts to hearsay about private conduct merely by getting a private report of that conduct filed at a courthouse. The probate inventory was filed in a public office, to be sure, but it was not a record of or statement about anything that a public official or agency had done. It was, at most, a statement by Patrick J. Morrison, the administrator of Inza Weedman's estate, concerning the property that Inza Weedman owned when she died. The inventory was offered to prove, as true, that Inza Weedman's intangible personal property included the Financial Benefit Life Annuity with a net value of $225,692.04, and the Metropolitan Life Annuity having a value of $332,718.42.

Even if a representative from the office of the probate clerk had been present to testify, any testimony about the specifics of the inventory (and especially these annuities) would have been hearsay. The probate clerk had not observed or done anything regarding the annuities. The most that the clerk had done was to receive the administrator's inventory and file-stamp it. That effort did not cause the inventory to be evidence of the probate clerk's knowledge concerning the material issue of whether Inza Weedman's estate owned the proceeds from the annuities. Thus, the public records and reports exception was not met, and the inventory was improperly admitted.

---

[2] Rule 803(8) reads, in pertinent part:

Hearsay exceptions — Availability of declarant immaterial. — The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) Public records and reports. To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

WEEDMAN'S CROSS APPEAL

Financial Benefit's Summary Judgment.

Weedman contends that the trial court erred by granting Financial Benefit's motion for summary judgment. Financial Benefit filed the motion, supported by the affidavit of Jennifer Asewicz, its Assistant Vice-President, and contended that because Easterling was an independent contractor there was no basis for holding Financial Benefit vicariously liable for his negligence. In her affidavit, Asewicz asserted that Easterling was paid on commission, that no taxes or Social Security deductions were made from his earnings, that he was not provided workers' compensation or errors and omissions coverage, and that he signed a contract that described his relationship with Financial Benefit as that of independent contractor rather than employee. Weedman contends that genuine issues of material fact were created by the conflicting provisions of the Managing General Agent Agreement that Easterling executed.

Of course, the object of summary judgment proceedings is not to try the issues, but to determine if there are issues to be tried, and if there is any doubt whatsoever, the motion for summary judgment should be denied. *Walker* v. *Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981). On appellate review we must review the evidence in the light most favorable to the party against whom summary judgment was granted. *Young* v. *Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994). The burden of proving that there is no genuine issue of material fact is upon the movant, and all proof submitted must be viewed in a light most favorable to the party resisting the motion. Any doubts and inferences must be resolved against the moving party. *Pinkston* v. *Lovell*, 296 Ark. 543, 759 S.W.2d 20 (1988).

The question of duty owed by one person to another is ordinarily one of law. However, when the matter of a legal duty is the subject of a contract which is ambiguous as to the parties' intent, a question of fact is presented. *Elkins* v. *Arkla, Inc.*, 312 Ark. 280, 849 S.W.2d 489 (1993). That case involved review of an appeal from the entry of summary judgment in favor of a defendant in a wrongful death case brought by the administratrix of the estate of a construction worker whose employer had contracted with Arkla, Inc., to lay a pipe. The worker died when a 10-foot-deep ditch in which he was working collapsed and suffocated him.

Arkla moved for summary judgment and argued that the construction company for whom the plaintiff's decedent worked was an independent contractor responsible for supervising the job, thereby relieving Arkla of a duty to the decedent to assure that the work was performed safely. The trial court granted summary judgment. The Supreme Court reversed and remanded in an opinion written by Justice Newbern that contains the following pertinent statement:

> Even though the owner of a construction project hires an independent contractor to do the work, the owner may retain the right and duty to supervise to the extent that it becomes responsible for injury resulting from negligence in performance of the work.

The Restatement (Second) of Torts § 414 (1965), provides:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

As Comment C to that section states,

> In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. *There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.*

312 Ark. at 282 (emphasis in opinion). The Supreme Court determined in *Elkins* that although some of the contractual provisions appeared to support Arkla's argument that it had limited supervisory authority, other provisions appeared to give Arkla general authority to supervise the details of the work. Justice Newbern also observed that the Supreme Court has found in other cases that a contract

with an independent contractor presented a question of fact with respect to the duty to supervise. *See Erhart* v. *Hummonds*, 232 Ark. 133, 334 S.W.2d 869 (1960); *see also Walker* v. *Wittenberg, et al.*, 241 Ark. 525, 412 S.W.2d 62 (1966).

We believe that the holding in *Elkins* and the cases cited therein apply to this case. Granted, Article 2 of the Managing General Agent Agreement that Easterling signed with Financial Benefit provides that nothing in that agreement shall be construed to create the relationship of employer-employee or principal and agent between Financial Benefit and Easterling (referred to in the agreement as "the Agency"), and that Easterling's relationship to Financial Benefit shall only be as an independent contractor. However, Article 3 of the agreement provides that Easterling (as the Agency) "shall be subject to rules and regulations as from time to time may be issued by Financial." The fact asserted by Asewicz in her affidavit (that Financial Benefit never directed or supervised the means and manner of Easterling's performance or his conduct) may support the argument that the agreement did not require such supervision or direction, but the apparent inconsistency between the provisions rendered them ambiguous on the question and made summary judgment inappropriate.

Even if the jury agreed with Financial Benefit that Easterling was an independent contractor, a genuine issue of material fact remained whether Financial Benefit had been negligent in supervising him, particularly where it had retained the right to issue rules and regulations concerning his conduct in procuring applications for the annuity policy that the decedent purchased through Easterling. The jury might have concluded that retention of the right to issue rules and regulations included the right to issue such rules and regulations necessary to prevent the kind of mistakes that appellee Weedman accused Easterling of making. It might have concluded that the retained right to issue rules and regulations did not go that far at all. However, that is the kind of inference drawing and proof weighing that belongs to the trier of fact and which makes summary judgment inappropriate.

The Metropolitan Motion to Dismiss.

The final issue on Weedman's cross-appeal involves the trial court's decision granting the motion to dismiss by Metropolitan Life Insurance Company. Pursuant to Rule 12(b)(6) of the

Arkansas Rules of Civil Procedure, Metropolitan moved to dismiss certain counts of Weedman's First Amended Complaint that alleged statutory liability of insurance companies for acts, omissions, or representations of agents. Alternatively, Metropolitan Life moved that Weedman be ordered to provide a more definite statement pursuant to Rule 12(e), including a citation to the statute relied upon. Weedman did not file a response to the motion to dismiss, and cited no statute that imposes liability on an insurer for the acts of its agent. The trial court ruled that no such statute existed, and granted the dismissal motion. We will not address the merits of that ruling because Weedman has neither cited us to authority nor put forth an argument concerning it in his cross-appeal. It is well settled that appellate courts will not consider a point raised on appeal where the appealing party does not cite authority for it, makes no convincing argument on it, and it is readily apparent that the argument has no validity. *Mikel* v. *Hubbard*, 317 Ark. 125, 876 S.W.2d 558 (1994). Therefore, we affirm, as to Weedman's cross-appeal, the trial court's ruling that granted the motion to dismiss filed by Metropolitan Life.

SUMMARY

We hold that the trial court erred by excluding the testimony from Easterling, Hazel Cruthirds, and Delores Waymire concerning the decedent's intent, and that it erred by admitting into evidence the probate inventory of Inza Weedman's estate over Easterling's hearsay objection. Therefore, we reverse and remand as to Easterling's appeal. We further hold that the trial court erred in granting summary judgment in favor of Financial Benefit because a genuine issue of material fact existed regarding Financial Benefit's duty to supervise Easterling, even if the jury deemed him to be an independent contractor. Hence, we reverse and remand on Weedman's cross-appeal as to Financial Benefit. However, we affirm the trial court's decision to grant the motion to dismiss by Metropolitan Life because Weedman has failed to cite any authority and offer argument on that point.

PITTMAN and MAYFIELD, JJ., agree.

Marion Fulton BROWN *v.* STATE of Arkansas

CA CR 94-1392 924 S.W.2d 251

Court of Appeals of Arkansas
Division I
Opinion delivered June 5, 1996

[redacted]

Tim Buckley, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted in a jury trial of committing permanent detention or restraint in violation of Arkansas Code Annotated § 5-11-106 (Repl. 1993). He was sentenced to seven years in the Arkansas Department of Correction. On appeal, he argues that the trial court violated Rules 401 and 403 of the Arkansas Rules of Evidence by admitting into evidence a statement in which he confessed to killing the victim; that the

statement should have been suppressed because it was obtained after a pretextual arrest; that the statement should have been suppressed because it was obtained in violation of Rule 2.3 of the Arkansas Rules of Criminal Procedure; that the trial court erred in denying his motion for a directed verdict; and that the trial court abused its discretion in refusing to order a new trial pursuant to his request for relief under a writ of error *coram nobis*. We affirm.

For his fourth argument, the appellant contends that the trial court erred in denying his motion for a directed verdict. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Durham* v. *State*, 320 Ark. 689, 899 S.W.2d 470 (1995). Preservation of the appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of trial errors. *Byrum* v. *State*, 318 Ark. 87, 884 S.W.2d 248 (1994).

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).

The victim, Leslie Akee Robie, is a mentally retarded woman who has a seizure disorder. The testimony indicated that Ms. Robie had to take daily medication in order to prevent potentially fatal seizures. The victim was born in 1957 and her mother, Reva Akee, is her legal guardian. Ms. Robie's brother, Robert Akee, also assisted in supervising her. As a result of her disabilities, Ms. Robie was under twenty-four-hour supervision of employees from a company called Lifestyles, Inc., in Fayetteville, Arkansas. Lifestyles is a program designed to mainstream handicapped persons.

According to the employees of Lifestyles, as well as the victim's mother and brother, Ms. Robie is incompetent to make major decisions for herself and is not allowed to make decisions regarding out-of-town travel. The testimony indicated, however, that Ms. Robie is capable of making some decisions regarding her daily activities and that she was employed through the Lifestyles program. The employees of Lifestyles testified that they assisted Ms. Robie in

reading, shopping for groceries, maintaining personal hygiene, taking medication and behaving appropriately.

In November 1993, the appellant began spending time with Ms. Robie and expressed a desire to marry her. Lisa Marie Bostik, an employee of Lifestyles, testified that she suspected Ms. Robie was planning to sneak out of her apartment on the morning of December 16, 1993. Ms. Robie did leave her apartment early that morning with the appellant without notifying her mother or any employee of Lifestyles. Before leaving town, the appellant and Ms. Robie stopped by the appellant's apartment to say goodbye to his roommate, George Maddock. Mr. Maddock testified that they told him they were going to Bakersfield, Oregon.

The appellant and Ms. Robie actually went to the West Memphis area where he obtained employment doing various odd jobs. The appellant testified that it was Ms. Robie's idea to leave Fayetteville. He stated that she did not express a desire to return and that had she done so, he would have returned her to her home. He testified that they were at a truck stop on December 24, when Ms. Robie decided to leave with a truck driver. The appellant subsequently returned alone to Fayetteville on December 25. The appellant testified that he was not aware that Ms. Robie has a legal guardian but stated he was aware that she is mentally retarded.

After his return to Fayetteville, the appellant initially related to Officer Robert Turberville that the victim was alive and that she had left with the truck driver. However, Officer Turberville testified that the appellant gave several statements which included different accounts regarding his involvement in Ms. Robie's disappearance after he was arrested in March 1994. Officer Turberville testified that the appellant stated that Ms. Robie had actually been abducted by the truck driver and then later stated that she disappeared in the middle of the night after going to the restroom.

Officer Gary Crews also questioned the appellant after his arrest. He testified that at one point during the interview, the appellant began crying and admitted killing Ms. Robie. Officer Crews stated that the appellant explained that he and Ms. Robie argued over a radio, that he struck her in self-defense, and that she fell to the ground striking the back of her head. The appellant told Officer Crews that he performed CPR on Ms. Robie but that he could not revive her. The appellant stated that he then dug a

shallow grave, placed the body in the grave and covered it with dirt. The appellant also drew a map indicating the location of the body. Officer Crews further testified that he, other police officers, and the appellant went to the West Memphis area but were unable to locate the body after a search.

Officer Crews testified that the appellant then recanted his story and stated instead that he had buried the body by the Mississippi River. Officer Crews testified that the appellant directed him to a specific location but they were again unable to find the body. The appellant testified that he made the different statements regarding Ms. Robie's disappearance because he was afraid of the police.[1]

The appellant argues that the State failed to prove that he did not intend to return or release Ms. Robie. Arkansas Code Annotated § 5-11-106 (Repl. 1993) provides:

> (a) A person commits the offense of permanent detention or restraint if, without consent and without lawful authority, he restrains a person with the purpose of holding or concealing him:
>
> (1) Without ever releasing him; or
>
> (2) Without ever returning him to the person or institution from whose lawful custody he was taken.

Intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances surrounding the crime. *Missildine* v. *State*, 314 Ark. 500, 863 S.W.2d 813 (1993). The jury is allowed to draw upon its own common knowledge and experience to infer intent from the circumstances. *Tiller* v. *State*, 42 Ark. App. 64, 854 S.W.2d 730 (1993). Because of the difficulty in ascertaining a person's intent, a presumption exists that a person intends the natural and probable consequences of his acts. *Kendrick* v. *State*, *supra*.

Here, the evidence shows that the appellant and the victim left town in the middle of the night. The victim, due to her disabilities, could not lawfully consent to the departure and the appellant did not receive permission from Ms. Robie's guardian to take her away. Further, the appellant returned to Fayetteville with-

[1] Ms. Robie was subsequently found alive in Wyoming.

out Ms. Robie. There was evidence before the jury that the appellant gave several different accounts regarding Ms. Robie's disappearance and that he confessed to killing her and disposing of her body. Thus, we find that there was sufficient evidence for the jury to infer that the appellant intended to take Ms. Robie away with the purpose of not releasing her or returning her to her legal guardian. Thus, we find the evidence sufficient to support the appellant's conviction for permanent detention or restraint.

The appellant next contends that his statement in which he confessed to killing Ms. Robie is irrelevant and that its probative value was substantially outweighed by the danger of unfair prejudice. Relevant evidence means any evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ark. R. Evid. 401. 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. Ark. R. Evid. 403. 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 absent a showing of an abuse of that discretion. *Armstrong* v. *State*, 45 Ark. App. 72, 871 S.W.2d 420 (1994).

Here, the appellant's statement was relevant to the circumstances surrounding the crime and was probative of his intent to not release or return Ms. Robie. Although his statement in which he admitted killing her may have been prejudicial, its probative value is not substantially outweighed by the danger of unfair prejudice. Thus, we cannot find that the trial court abused its discretion.

The appellant next argues that any statements he gave after being arrested should have been suppressed because his arrest for various traffic violations was pretextual. Officer Turberville testified that he attempted to question the appellant several times during the investigation but that the appellant did not keep his scheduled appointments. Officer Turberville stated he was aware that the appellant had a suspended driver's license and that he did not have any vehicle insurance. Officer Turberville testified that he stopped the appellant while he was driving in order to take him into custody; however, he explained that he did so in order to speak with

the appellant regarding Ms. Robie's disappearance. Officer Turberville further testified that he advised the appellant of his *Miranda* rights and that the appellant gave his statement voluntarily.

In reviewing a trial court's decision to deny an appellant's motion to suppress, this Court makes an independent determination based on the totality of the circumstances and will reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Roark* v. *State*, 46 Ark. App. 49, 876 S.W.2d 596 (1994).

Pretextual arrests are unreasonable under the Fourth Amendment. *Mings* v. *State*, 318 Ark. 201, 884 S.W.2d 596 (1994). An ulterior motive does not in itself render an arrest pretextual when there is a valid overt reason to make the arrest. *Id.* The reasoning is that the arrest for the overt violation would have taken place in any event; thus, there is no reason to bring the Fourth Amendment and the exclusionary doctrine into play. *Id.* The test is whether a "reasonable officer" would have made the traffic stop — not whether the particular officer would have made the stop absent his ulterior motive. *Miller* v. *State*, 44 Ark. App. 112, 868 S.W.2d 510 (1993), *cert. denied*, 114 S.Ct. 2137 (1994).

Officer Turberville testified that he arrested the appellant for the traffic violations for the specific purpose of questioning him about Ms. Robie's disappearance. However, the arrest is not tainted by this fact so long as the arrest would have been carried out anyway. *See Miller* v. *State*, *supra*. Here, Officer Turberville knew that the appellant was driving without vehicle insurance and without a valid driver's license. Thus, a valid objective reason existed for the stop and arrest. *See* Ark. Code Ann. § 27-16-303(a)(1) (Repl. 1994); Ark. R. Crim. P. 4.1(a)(iii). Therefore, the trial court correctly refused to suppress the appellant's statement on the ground that his arrest was pretextual.

The appellant also argues that any statements he made after his arrest should be suppressed because Officer Turberville did not comply with Arkansas Rule of Criminal Procedure 2.3. This rule requires an officer who asks a person to come to a police station to take reasonable steps to make clear that there is no legal obligation to comply with such a request.

As discussed under the previous point, the appellant was lawfully arrested for driving with a suspended driver's license. Thus,

the facts in the case at bar do not come within the ambit of Rule 2.3 and consequently no violation of that rule occurred.

The appellant asserts that the police officers failed to take reasonable steps to make it clear to him that he was under no obligation to talk to them about Ms. Robie. However, Officer Turberville testified that he advised the appellant of his *Miranda* rights, that the appellant waived them and that he voluntarily gave a statement. Thus, the appellant was informed of his right to remain silent. Moreover, the knowledge of an individual of all the crimes for which he is being investigated is not relevant to a valid waiver of his *Miranda* rights. *Colorado* v. *Spring*, 479 U.S. 564 (1987).

For his final argument, the appellant contends that the trial court abused its discretion in refusing to order a new trial pursuant to his petition for a writ of error *coram nobis*. The appellant filed his petition after the victim was found to be living in Wyoming and subsequently returned to Fayetteville. An affidavit by Officer Turberville, who interviewed Ms. Robie, stated that she could not remember any of the events leading to her disappearance or how she came to be in Wyoming.

The trial court denied the appellant's petition for a writ of error *coram nobis*. The appellant then sought review of the trial court's denial of his petition to this Court under a petition for a writ of certiorari. *See Penn* v. *State*, 282 Ark. 571, 670 S.W.2d 426 (1984). We denied the appellant's petition on May 17, 1995; thus, we have previously reviewed and rejected the appellant's argument.

Affirmed.

ROBBINS and STROUD, JJ., agree.

Calvin GREEN *v.* SMITH & SCOTT LOGGING

CA 95-724 922 S.W.2d 746

Court of Appeals of Arkansas
En Banc
Opinion delivered June 5, 1996

Denver L. Thornton, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this workers' compensation case sustained a scheduled injury resulting in 10% impairment to his left arm. He filed a workers' compensation claim seeking benefits for permanent total disability. In addition, he argued that the denial of wage-loss benefits in scheduled injury cases where less than total disability is sustained is an unconstitutional denial of equal protection. The Commission found that the appellant failed to prove that he was permanently and totally disabled, but did not rule on the constitutional issue. From that decision, comes this appeal.

For reversal, the appellant contends that the denial of wage-loss benefits in scheduled injury cases is violative of the Equal Protection Clause of the Fourteenth Amendment of the United

States Constitution. We remand for the Commission to consider the constitutional issue raised by the appellant.

■ We have consistently held that constitutional issues must be raised before the Commission in order to preserve them for appeal to this Court. *See, e.g., Shaw* v. *Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991); *Johnson* v. *Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989); *International Paper Co.* v. *McBride*, 12 Ark. App. 400, 678 S.W.2d 375 (1984). The cases have not, however, been consistent with regard to the Commission's authority and duty to decide such constitutional issues. In *International Paper Co.* v. *McBride, supra*, we decided the constitutional question although the Commission had declined to rule on the issue when it was raised before them. In *Quinn* v. *Webb Wheel*, 52 Ark. App. 208, 915 S.W.2d 740 (1996), we held that it was necessary to obtain a ruling on the constitutional issue from the Commission in order to preserve the question for appellate review.

■ We think it important to clarify, for the benefit of the Commission and the bar, the manner in which constitutional issues are to be preserved for review by this Court. We have observed that constitutional issues which have been raised before but not decided by the Commission are often presented to us in an unfocused state, devoid of the factual development necessary for decision. Consequently, we hold that the Commission is required to rule on constitutional questions that are properly before it.

This procedure was tacitly approved by the Arkansas Supreme Court in *Hamilton* v. *Jeffrey Stone Co.*, 293 Ark. 499, 739 S.W.2d 161 (1987). We believe that requiring the Commission to decide constitutional issues will ensure that the Commission takes a "hard look" at the question, thereby giving us the benefit of its experience and expertise. *See Sierra Club* v. *Robertson*, 784 F.Supp. 593 (W.D. Ark. 1991), *aff'd* 28 F.3d 753 (8th Cir. 1994). Such a requirement would also serve the important purpose of presenting us with fact-findings sufficient to permit the constitutional issues to be decided. This will prevent many needless remands, in keeping with our policy of discouraging piecemeal appeals in workers' compensation case. *See, e.g., Baldor Electric Co.* v. *Jones*, 29 Ark. App. 80, 777 S.W.2d 586 (1979).

■ Because of the inconsistencies in our prior decisions regarding the need to obtain a ruling from the Commission in order

to preserve a constitutional issue for appeal, we think it would be unduly harsh to impose our ruling retrospectively. Therefore, we do not affirm for lack of a ruling, but instead we remand to the Commission for such further proceedings as it deems necessary consistent with this opinion.

Remanded.

PITTMAN, MAYFIELD, STROUD, and GRIFFEN, JJ., agree.

ROBBINS, J., concurs in the result.

JOHN B. ROBBINS, Judge, concurring. I concur with the majority opinion that this matter should be remanded to the Commission. However, I believe that we err in directing the Commission to rule on the constitutionality of a state statute, Ark. Code Ann. § 11-9-521.

In *International Paper Co.* v. *McBride*, 12 Ark. App. 400, 678 S.W.2d 375 (1984), the appellant challenged the constitutionality of a section of the Arkansas Workers' Compensation Act. The Commission declined to rule on the constitutionality issue, and on appeal to us we said:

> [T]he constitutionality of a statute must be raised at the Commission level; however, the ultimate decision upon a statute's constitutionality can only be decided by a court of law. Arkansas Constitution, Article VII, § 1.

12 Ark. App. at 404.

This limitation on the Commission's power is consistent with the general rule that:

> [A]dministrative officers and agencies...have no power or authority to consider or question the constitutionality of an act of the legislature, such as their own enabling legislation, and may not declare unconstitutional the statutes which they are empowered to administer or enforce.

Lincoln v. *Arkansas Public Service Comm.*, 40 Ark. App. 27, 39, 842 S.W.2d 51, 57 (1992), *quoting* from 73 C.J.S. *Public Administrative Law & Procedure* § 65 (1983).

The Wyoming Supreme Court expressed the principle as follows:

> We hold that an administrative agency has no authority to determine the constitutionality of a statute. *Yakima County Clean Air Authority* v. *Glascam Builders, Inc.*, 1975, 85 Wash.2d 255, 534 P.2d 33, 34; *Flint River Mills* v. *Henry*, 1975, 234 Ga. 385, 216 S.E.2d 895, 896-897; *Herrick* v. *Kosydar*, 1975, 44 Ohio St.2d 128, 339 N.E.2d 626, 628; *Bare* v. *Gorton*, 1974, 84 Wash.2d 380, 526 P.2d 379; *Kunzig* v. *Liquor Control Commission*, 1950, 327 Mich. 474, 42 N.W.2d 247; *Central Ohio Cooperative Milk Producers, Inc.* v. *Glander*, Ohio BTA 1949, 92 N.E.2d 834; *Montana Chapter of Association of Civilian Technicians, Inc.* v. *Young*, 9th Cir. 1975, 514 F.2d 1165, 1167; *Finnerty* v. *Cowen*, 2nd Cir. 1974, 508 F.2d 979, 982; *Downen* v. *Warner*, 9th Cir. 1973, 481 F.2d 642, 643; *Simpson* v. *Laprade*, U.S.D.C., W.D.Va.1965, 248 F.Supp. 399, 401; *Panitz* v. *District of Columbia*, 1940, 72 App.D.C. 131, 112 F.2d 39; 3 K. Davis, Administrative Law Treatise, § 20.04 (1958). This is so whether the question is the constitutionality of the statute per se or the constitutionality of the statute as applied.

Belco Petroleum Corp. v. *State Board of Equalization*, 587 P.2d 204, 213 (Wyo. 1978). *And see City of Joplin* v. *Industrial Commission of Missouri*, 329 S.W.2d 687 (Mo. 1959).

Although the ultimate decision on the constitutionality of a provision within the worker's compensation law is a question of law for our court, such determination is not made in isolation from the relevant facts which frame the legal issue. We, however, cannot make factual findings and are dependent on the Commission for the exercise of this function. The Commission has a duty and statutory obligation as fact-finder to make specific findings of fact based on the record as a whole. *Wilson* v. *Cargill, Inc.*, 45 Ark. App. 174, 873 S.W.2d 171 (1994). In order for us to decide a constitutional issue arising in the context of a workers' compensation appeal, the Commission must have decided the foundational facts necessary to frame the question of law.

The instant case presents an example of the need for fact finding preliminary to an ultimate decision on the constitutionality of a statute. The appellant contends that he suffered a scheduled injury and a wage loss. He argues that he was denied equal protection under the Fourteenth Amendment because workers who suffer unscheduled injuries may also recover for wage loss yet he is denied

wage loss because he suffered a scheduled injury. Appellant does not have standing to raise this constitutional issue unless he, as a matter of fact, has suffered a wage loss. The Commission made no finding as to whether appellant has or has not suffered wage loss. Consequently, we lack a foundational fact that must be ascertained before we can address the question of law.

I would remand this case to the Commission for it to make such findings of fact as are necessary for us to decide the constitutional issue. I would not, however, cause Arkansas to become the solitary American jurisdiction which *requires* a state agency to rule upon the constitutionality of a state statute.

Sharron SMITH *v.* GERBER PRODUCTS

CA 95-890 922 S.W.2d 365

Court of Appeals of Arkansas
Division III
Opinion delivered June 5, 1996

Walker Law Firm, by: *Eddie H. Walker, Jr.*, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *James A. Arnold, II*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Sharron Smith suffered a back injury while working for appellee Gerber Products on July 30, 1993. Gerber Products accepted the injury as compensable and covered related medical expenses. However, Gerber Products contested Ms. Smith's claim that she was entitled to permanent disability for her anatomical impairment and wage loss. After a hearing, the Workers' Compensation Commission denied all permanent benefits. Ms. Smith now appeals, arguing that the Commission erred in finding that she failed to prove entitlement to benefits for her permanent impairment. Alternatively, Ms. Smith contends that, even if she is not entitled to permanent impairment benefits, the Commission erred in denying permanent partial wage-loss disability benefits. We find no error and affirm.

When reviewing decisions from 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 supported by substantial evidence. *Welch's Laundry & Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *City of Fort Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached

the same conclusions if presented with the same facts. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

Dr. James Standefer treated Ms. Smith for her back problems and ultimately concluded that she had a 9% impairment to the body as a whole. He noted that she had persistent low back and right hip pain as well as neck and shoulder pain. After conducting diagnostic tests, Dr. Standefer diagnosed a small disc herniation in addition to degenerative changes. He testified that "the degenerative changes definitely preceded the July, 1993 accident."

In denying permanent anatomical benefits, the Commission did not find that Ms. Smith was not permanently anatomically impaired. Rather, it determined that the compensable injury was not the major cause of any permanent impairment. Arkansas Code Annotated § 11-9-102(5)(F)(ii) (Repl. 1996) provides:

> (a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
>
> (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

Arkansas Code Annotated § 11-9-102(14) defines "major cause" as "more than fifty percent (50%) of the cause." The Commission determined that Ms. Smith failed to prove entitlement to benefits for her anatomical impairment rating because she failed to prove that her compensable injury was the major cause of this impairment. Ms. Smith asserts that this finding was erroneous.

■ We find that substantial evidence supports the Commission's finding that Ms. Smith's compensable injury was not the major cause of her permanent impairment. Dr. Standefer, as well as another treating physician, opined that Ms. Smith's complaints of pain were caused by degenerative changes. Although Dr. Standefer concluded that Ms. Smith's back condition was aggravated by her work-related injury, he stated that he would have given Ms. Smith the same work restrictions solely on the basis of the degenerative changes which preceded her injury. Based on this testimony, the

Commission concluded that Ms. Smith's permanent condition was more a result of degeneration than an isolated incident. We find no error in this finding, and thus affirm the Commission's denial of benefits for a permanent impairment.

Ms. Smith's remaining argument is that, even if she is not entitled to permanent impairment benefits, she should have been given wage-loss benefits. She relies on Arkansas Code Annotated § 11-9-522(b)(1) (Repl. 1996) which provides:

> 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.

Without now deciding whether a claimant may ever be entitled to wage-loss benefits in the absence of a compensable physical impairment, we believe Ark. Code Ann. § 11-9-102(5)(F)(ii)(a), quoted above, is dispositive of Ms. Smith's claim. Consequently, because there is substantial evidence to support the Commission's determination that Ms. Smith's compensable injury was not the major cause of her disability she can not be entitled to permanent benefits.

Affirmed.

ROGERS and NEAL, JJ., agree.

DARLING STORE FIXTURES *v.* Rayburn McDONALD

CA 95-902 922 S.W.2d 748

Court of Appeals of Arkansas
Division II
Opinion delivered June 5, 1996

Penix, Penix, Lusby & Nix, by: *Richard Lusby*.

No response.

MELVIN MAYFIELD, Judge. The appellee, Rayburn McDonald, was awarded compensation for a work-related hernia by the administrative law judge, and the Arkansas Workers' Compensation Commission affirmed and adopted the law judge's decision. Appellant has appealed, claiming that appellee failed to meet two of the criteria for a hernia to be compensable: (1) severe pain in the hernial region; and (2) physical distress so severe that it required the attendance of a licensed physician within seventy-two hours.

McDonald, who appeared before the Commission pro se, testified that he was employed by appellant as the lead man over the tool and die room on the second shift, 2:45 p.m. to 12:00 midnight. On July 5, 1994, while several people were on vacation, he was asked to cut some holes in an "Arkwell" fixture. At the hearing McDonald produced a picture of the fixture, which the law judge described in his opinion as depicting "a rather large piece of equipment which appeared quite heavy." McDonald said he had to remove the bolts and dowels and move a part of the fixture to the band saw in order to cut the requested holes. To do this he put his hip under an extruding portion of the fixture and held it against his stomach to lift it to a cart.

When McDonald lifted the fixture he felt a pain, stretching sensation, and burning in his left side where he had previously had surgery for a hernia. McDonald said his supper time was 8:30 — 9:00 p.m., and he thought this happened shortly before 8:30 because he remembered pushing the fixture over to the saw before supper. He then sat down to eat, and during that time the pain and burning in his side eased up. The rest of the night when he would get in a certain position he would feel a sticking or pinching sensation. About 11:00 p.m. he went to the "Arkwell" supervisor and told him of the incident. The supervisor sent him to first aid and said he would be with him in a few minutes. However, the supervisor never came, so about quitting time McDonald went back to the supervisor and was told that he had forgotten about McDonald. The supervisor then called the time officer and had the incident entered in the first aid log. McDonald then went home.

McDonald testified that he felt nothing unusual the next day, but gradually, over the next few days, he developed a bulge which continuously got larger. On July 23 he asked his supervisor to get him an appointment with the human-resource person, Pam Steele. It was several days before he got to see her. He asked her to make him a doctor's appointment but she refused, and she telephoned the appellant's insurance carrier, Sedgwick James. McDonald was interviewed on the telephone and was told that his claim was denied, and they would not send him to a doctor. A few days later he went to his own doctor. At the hearing McDonald said he was waiting to have hernia surgery, and he wanted appellant to pay for it.

Arkansas Code Annotated § 11-9-523 (Repl. 1996) provides in part:

> (a) In all cases of claims for hernia, it shall be shown to the satisfaction of the commission:
>
> (1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;
>
> (2) That there was severe pain in the hernial region;
>
> (3) That the pain caused the employee to cease work immediately;
>
> (4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter; and
>
> (5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.

Appellant's first argument is that there is no substantial evidence to support the finding of the Commission that McDonald met the statutory requirement of severe pain in the hernial region. It contends that McDonald never experienced the "severe pain" required by the second criterion in the hernia statute. McDonald said he felt as if he had "stretched" something, pulled something, that he felt "a slight burning sensation," and a sticking or pinching feeling in certain positions. McDonald also testified that he had previously experienced a double hernia, and it had developed more slowly than the present one did. He said he had a high pain

threshold and never felt excruciating pain, even with the double hernia.

In *Ayres* v. *Historic Preservation Associates,* 24 Ark. App. 40, 747 S.W.2d 587 (1988), this court stated:

> Appellant argues in his fourth point for reversal that the Commission erred in failing to find that he suffered "severe pain in the hernial region" as required by Ark. Code Ann. § 11-9-523(a)(2) (1987). In a statement made to appellee Liberty Mutual Insurance Company's adjuster, appellant described his pain as "sudden" rather than "severe," a word choice the Commission apparently deemed significant. We do not put semantics before substance; it is clear that the Commission's reading of appellant's description of his pain as something less than severe is not supported by substantial evidence.

24 Ark. App. at 47, 747 S.W.2d at 591. And, as noted in *Ayres,* Ark. Code Ann. § 11-9-523(a) provides that each of the five criteria "shall be shown to the satisfaction of the commission." We cannot say that the Commission's finding on this point was not supported by substantial evidence.

Appellant also argues that there is no substantial evidence to support the finding of the Commission that McDonald suffered physical distress which required the attendance of a licensed physician within seventy-two hours. This is the fifth prerequisite for finding a hernia to be compensable. But Ark. Code Ann. § 11-9-523(b)(1) provides:

> In every case of hernia, it shall be the duty of the employer forthwith to provide the necessary and proper medical, surgical, and hospital care and attention to effectuate a cure by radical operation of the hernia, to pay all reasonable expenses in connection therewith, and, in addition, to pay compensation not exceeding a period of twenty six (26) weeks.

Appellant claims that when McDonald told his supervisor he had hurt himself and went to first aid, he was not doing it because he was in such severe pain that he wanted immediate medical care; he was simply following procedure for reporting a claim. Appellant argues that nothing in McDonald's testimony suggests he was in

such physical distress that he required the attention of a physician. In fact, appellant argues, it was two and one-half weeks before McDonald felt the need to see a doctor; that it was several days between the time he asked to see the human-resource director and when he actually saw her; and that even more time elapsed after his claim was refused before he went to his own physician.

Again, the Commission found that this did not bar recovery, and we agree. We have held that we cannot be hypertechnical when construing the statute regarding hernia.

In *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993), we said:

> Arkansas Code Annotated § 11-9-523(a) requires a showing that "the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence." A claimant need not prove that he was *actually* attended by a physician within 72 hours after the injury; instead, the statute provides only that the physical distress following the occurrence of the hernia was such as to *require* the attendance of a physician within the 72-hour-period. *Cagle Fabricating and Steel, Inc.* v. *Patterson*, 36 Ark. App. 49, 819 S.W.2d 14 (1991), *rev'd on other grounds*, 309 Ark. 365, 830 S.W.2d 857 (1992). [Emphasis in the original.]
>
> In the case at bar, the Commission on remand found that the physical distress experienced by the appellee following the occurrence of the hernia was such as to require the attendance of a physician within the 72-hour-period. Although the record shows that the appellee did not seek medical treatment until more than two weeks after the occurrence, the Commission noted that the appellee continued to experience discomfort and periodic episodes of severe pain during this time. The Commission also relied on testimony that the appellee is "stubborn about going to a doctor," and that he did not seek medical attention sooner because he "thought it would work itself out." Viewing the evidence in the light most favorable to the appellee, we cannot say that the Commission erred in finding that the appellee's physical distress was such to require the services of a physician within 72 hours after the occurrence.

42 Ark. App. 172, 856 S.W.2d at 32.

Likewise, in the instant case, McDonald experienced continuing discomfort and a constantly enlarging bulge. The Commission found this to be sufficient to meet the fifth criterion, and we agree.

Affirmed.

COOPER and STROUD, JJ., agree.

Raphael FARMER *v.* STATE of Arkansas

CA CR 95-398 923 S.W.2d 876

Court of Appeals of Arkansas
Division I
Opinion delivered June 12, 1996

Webb & Wyatt, by: *James W. Wyatt*, for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted in a jury trial of delivery of a controlled substance and sentenced to eleven years in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in denying his motion for a new trial because the State failed to disclose that its sole material witness had filed a false police report and had resigned from the police department prior to trial. We agree and reverse and remand.

At the appellant's trial on October 27, 1994, the State's witness, Officer Elliott Johnson, testified that the appellant sold him crack cocaine. Johnson testified that he was investigating narcotics activity in a housing project area on March 9, 1994. He testified that at approximately 5:15 p.m., he and a confidential informant were flagged down by the appellant who was driving a Chevrolet truck with license plate number TWY 553. He testified that he purchased $20.00 worth of crack cocaine from the appellant.

Johnson testified that he saw the appellant driving the same truck again on April 12, 1994. He radioed other officers to stop the appellant's vehicle in order to identify and photograph him. Johnson

testified that there was no doubt that the appellant was the person who sold him the cocaine. Three alibi witnesses testified on the appellant's behalf. During closing arguments, the prosecutor stated:

> Can he [Johnson] make an identification after just looking at somebody for five minutes? Well, yes, I think he can. He's a detective, a professional at that. . . . This is a police officer who is making a buy of cocaine. . . . He would pay attention to that kind of thing. That's what he's trained to do.

The appellant filed a motion for a new trial on December 1, 1994, after discovering that Johnson was not, in fact, a police officer at the time of the trial. Captain Sam Williams of the Little Rock Police Department testified during the hearing on the appellant's motion for a new trial. He testified that on September 11, 1994, Officer Johnson informed a supervisor that his city-supplied car had been stolen out of the driveway of his home in Little Rock. Captain Williams testified that approximately three to four weeks later it was determined that the car had not been stolen but that Johnson had wrecked it in Tunica, Mississippi, and had been unable to return the vehicle to Little Rock. Captain Williams explained that taking the car to Tunica was a violation of police department rules. Captain Williams further testified that Johnson had filed a false police report. Johnson resigned from the Police Department on October 4, 1994, and thus was not employed as a police officer at the time of the trial. The prosecuting attorney admitted at the hearing that it had been discussed prior to trial that Johnson should not be asked at trial where he was employed.

■ The appellant argues that he was prejudiced by the State's failure to disclose that Johnson had filed a false police report and had resigned from the police department because he was prevented from using that information to attack Johnson's credibility. He also argues that the State's failure to disclose this information amounted to prosecutorial misconduct. This second argument, however, was not made to the trial court and hence, it is not preserved for appeal. We do not consider arguments raised for the first time on appeal. *Walker* v. *State*, 314 Ark. 628, 864 S.W.2d 230 (1993).

■ Here, the appellant filed a discovery motion on September 7, 1994. The State did not disclose any information regarding Johnson's resignation although it had knowledge of it prior to trial. Rule 17.1(d) of the Arkansas Rules of Criminal Procedure incor-

porates the due process requirement that evidence favorable to a defendant on issues of guilt or punishment be disclosed by the prosecutor. *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Yates* v. *State*, 303 Ark. 79, 794 S.W.2d 133 (1990). Insofar as the rule requires pretrial disclosure, it represents an extension of the *Brady* mandate. *Yates*, *supra*. The *Brady* rule has been interpreted to include impeachment, as well as exculpatory evidence. *United States* v. *Bagley*, 473 U.S. 667 (1985). Rule 19.2 further imposes a continuing duty on the prosecutor to disclose this information.

If the State fails to provide information pursuant to pretrial discovery procedures, the burden is on the appellant to establish that the omission was sufficient to undermine confidence in the outcome of the trial. *Bray* v. *State*, 322 Ark. 178, 908 S.W.2d 88 (1995). The key in determining whether a reversible discovery violation exists is whether the appellant was prejudiced by the prosecutor's failure to disclose. *Mosley* v. *State*, 323 Ark. 244, 914 S.W.2d 731 (1996).

In the case at bar, the State's case was based upon Johnson's testimony and his identification of the appellant as the person who sold him the crack cocaine. Consequently, the importance of the evidence that would have been used to attack Johnson's credibility cannot be minimized. The appellant's defense depended on bringing into question Johnson's credibility. Furthermore, the evidence of the appellant's guilt is not overwhelming absent Officer Johnson's testimony, *see Hall* v. *State*, 306 Ark. 329, 812 S.W.2d 688 (1991), and given the close proximity of Johnson's resignation to the time of trial, we cannot say that the appellant was not diligent in attempting to discover this information during his own investigation prior to trial. We conclude that the appellant was prejudiced by the State's failure to disclose the information regarding Johnson's resignation, and thus find that the trial court abused its discretion in denying the appellant a new trial.

Reversed and remanded.

ROBBINS and STROUD, JJ., agree.

Betty Carter BRANCH *v.* Kyle Dean CARTER

CA 95-626 923 S.W.2d 874

Court of Appeals of Arkansas
Division III
Opinion delivered June 12, 1996
[Petition for rehearing denied August 14, 1996.]

Dunham & Ramey, P.A., by: *James Dunham*, for appellant.

Hixson & Cleveland Law Office, by: *R.H. "Buddy" Hixson*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Betty Carter Branch and appellee Kyle Carter were divorced on July 19, 1983. Pursuant to the divorce decree, Ms. Branch received custody of their three-year-old daughter and Mr. Carter was ordered to pay child support of $52.00 per week. For the first year following their divorce, Mr. Carter was current on his child-support payments. However, the court records indicate that, since July 19, 1984, Mr. Carter has continued to fall behind on his support obligation. On May 18, 1994, Ms. Branch filed a petition for relief alleging that Mr. Carter was delinquent on his payments. The parties stipulated that Mr. Carter was delinquent in the amount of $12,251.50 for the time period between July 19, 1984, and July 19, 1989, and $7,404.00 for the time period between July 20, 1989, and the date Ms. Branch's petition was filed. The chancery court ordered Mr. Carter to pay $7,404.00 in delinquent child support. However, the court found that collection of delinquent child support which accrued prior to July 20, 1989, was barred by the applicable statute of limitations. Ms. Branch acknowledges that collection of the delinquent child support which accrued prior to July 19, 1986, is time-barred. However, she contends that the support which accrued between July 19, 1986, and July 19, 1989, should not have been barred by the statute of limitations. The parties stipulated that the amount which accrued during this three-year period was $5,562.00, and Ms. Branch appeals, asserting entitlement to this amount. We agree and reverse.

In addressing this issue we have reviewed the recent changes that our legislature has made with regard to the limitations period for the collection of delinquent child support. Prior to 1989, the applicable statute of limitations for arrearages occurring as a result of failure to pay child support was five years. Ark. Code Ann. § 16-56-115 (1987). However, in 1989 the legislature changed the limitations period to ten years. This change was codified at Ark. Code Ann. § 9-14-236 (Supp. 1989). In *Sullivan* v. *Edens*, 304 Ark. 133, 801 S.W.2d 32 (1990), the supreme court held that the ten-

year statute did not apply retroactively, and all child support that had become due prior to the effective date of the 1989 act was still subject to the five-year limitations period. On March 29, 1991, the legislature again modified the limitations period through enactment of Act 870. This act, codified at Ark. Code Ann. § 9-14-236 (Repl. 1993), provides that any child-support action can be "brought at any time up to and including five (5) years beyond the date the child for whose benefit the initial support order was entered reaches eighteen (18) years." The act also provides that the enlarged limitations period "shall retroactively apply to all child support orders now existing."

Act 870 of 1991 was discussed in *Johnson* v. *Lilly*, 308 Ark. 201, 823 S.W.2d 883 (1992). In that case, the supreme court acknowledged that the act applied retroactively. However, quoting *Morton* v. *Tullgren*, 263 Ark. 69, 563 S.W.2d 422 (1978), the court stated:

> [N]o one has any vested right in a statute of limitations until the bar of the statute has become effective. It is also true that the General Assembly may validly enlarge the period of limitations and make the new statute, rather than the old, apply to any cause of action *which has not been barred* at the time the new statute becomes effective.

And see Chunn v. *D'Agostino*, 312 Ark. 141, 847 S.W.2d 699 (1993).

In the present case, the child-support arrearage that accrued between July 19, 1984, and the date the 1989 act became effective was subject to the five-year statute of limitations because the 1989 act did not have retroactive application. However, when the 1991 act, which was retroactive, became effective, its provisions applied to all delinquent child support which was not barred under previous statutes of limitations on the date of its enactment. Any cause of action for delinquent child support which was barred at the time Act 870 went into effect could not be revived by the act. *Chunn* v. *D'Agostino*, *supra*; *Johnson* v. *Lilly*, *supra*. Consequently, at the time Act 870 became effective by an emergency clause on March 29, 1991, Ms. Branch could have brought an action for delinquent child support extending back to March 29, 1986, because an action for these accruals would not have been time-barred under prior law. Therefore, the 1991 act retroactively applies to all delinquent payments which accrued after March 29, 1986.

In her brief, Ms. Branch argues that the applicable statute of limitations does not bar recovery for any arrearage accrued after July 19, 1986. In actuality, only claims for arrearage that accrued prior to March 29, 1986, are time-barred. Nonetheless, we agree with Ms. Branch's specific claim for relief. She contends that she is entitled to unpaid child support which accrued between July 19, 1986, and July 19, 1989. Based on our review, we agree that she is entitled to such an award. Therefore, we reverse and remand to the trial court for an award of support to appellant for this additional period of time, and for the statutory attorney's fee and interest provided under Ark. Code Ann. § 9-14-233 on the total child support owed in the sum of $12,966.00.

Reversed and remanded.

ROGERS and NEAL, JJ., agree.

Sid LYTLE *v.* ARKANSAS TRUCKING SERVICES and Gibraltar National

CA 95-986 923 S.W.2d 292

Court of Appeals of Arkansas
Division II
Opinion delivered June 12, 1996

The Whetstone Law Firm, P.A., by: *Robert H. Montgomery*, for appellant.

Roberts Law Firm, by: *Mike Roberts*, for appellees.

MELVIN MAYFIELD, Judge. Sid Lytle has appealed a decision of the Workers' Compensation Commission which held that he was not acting within the course of his employment when his automobile accident occurred and therefore his claim is not compensable.

The appellant, an over-the-road truck driver, testified that he was injured on July 3, 1992, when he topped a hill on I-20 outside Meridian, Mississippi, and came upon an accident that had already occurred. According to appellant's testimony, he was on his way from Center, Texas, to Metamora, Illinois, to deliver a load for his employer, the appellant. He said that he was scheduled to be in Metamora four days later; that he had an extra two-and-one-half days; and that he was making a side trip to visit friends when the accident occurred. After the visit, appellant planned to go to Metamora and unload.

Appellant testified the appellee is not a routed carrier, and he is paid a flat rate based upon the mileage for each trip. He said his job is to pick up a load on time; get it there on time by the easiest and best route; and that there are no set routes for him to take. He testified further that the shortest route from Center to Metamora is to take Highway 59 from Center to I-30, then to I-40, then to I-55 and then straight up to Metamora which is just outside of Peoria. He testified that he took that route on a previous trip to Metamora passing up I-20, but on this trip he deviated onto I-20 before reaching I-30 and was at least 100 miles out of route when he had the accident.

Mark Bottoms, appellee's dispatch supervisor at the time of the accident, testified that company policy is for the driver to take the shortest route from Point A to Point B; to stay within that route;

and to deliver to the destination. He said the appellee is a routed carrier which means you take the shortest route; that the carrier routes the driver; and that it gives him specific directions. He said the appellant deviated from his specific route on July 3, 1992, when he deviated onto I-20 to Meridian, Mississippi. Bottoms testified he gave the appellant the dispatch on July 3, and appellant did not tell him he was going to take time off to go to Meridian. He said it is the general practice for a driver who has excessive time to call and if there is something en route he wants to do or deviate, appellee is open to working with the driver.

Appellee's "Policies, Procedures and Agreement" states that all trucks are routed over specific routes and that a driver agrees to accept all dispatch as given with no deviation from destination or route specified.

On this evidence the law judge held appellant's injuries were not job related; that appellant was traveling away from his business route; and that his "clearly identifiable" personal side trip was a "substantial deviation" from his business trip and not in the course of his employment. The full Commission affirmed and adopted the law judge's decision.

Appellant argues his claim is compensable under the "dual purpose" doctrine because he was serving both a business and personal motive en route to Meridian.

■ 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. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979).

■ The dual-purpose doctrine is set forth in 1 Larson, *The Law of Workmen's Compensation*, § 18.00 (1990) as follows:

> Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey. This principle applies to out-of-town trips, to trips to and from work, and to miscellaneous errands such as visits to bars or

> restaurants motivated in part by an intention to transact business there.

Arkansas Courts have recognized the "dual purpose" trip doctrine. This rule was adopted by Arkansas in *Martin* v. *Lavender Radio & Supply, Inc.* 228 Ark. 85, 305 S.W.2d 845 (1957), which embraced the "dual purpose" trip doctrine as enunciated by Judge Cardozo in *Marks' Dependents* v. *Gray*, 251 N.Y. 90, 167 N.E. 181 (1929). Our supreme court held Judge Cardozo's reasoning to be persuasive and worthy of adoption and held:

> "The decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils. * * * We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause, * * *" and sufficient within itself to occasion the journey.

228 Ark. at 92, 305 S.W.2d at 849.

The dual-purpose doctrine is one exception to the "going and coming" rule, which generally precludes recovery for an injury sustained while an employee is going to or returning from his place of employment; and a determination that a trip falls within this exception does not end the inquiry but merely serves to label the trip as either business or personal; deviations from the main purpose require a separate inquiry. *See Day* v. *Central Day Care, Inc.*, 38 Ark. App. 241, 833 S.W.2d 783 (1992).

As stated in 1 Larson, *The Law of Workmen's Compensation*, § 19.00 (1990):

> An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial.

Here appellant testified that he was making a side-trip to take time off; that he was on his way to visit a friend when the accident happened; that he left the route to Metamora by deviating onto I-20; and that he was at least 100 miles out of route when he had the accident.

■ We think there is substantial evidence to support the finding of the administrative law judge, which was adopted by the Commission, that the appellant's personal side-trip was a "substantial deviation" from his business trip and that appellant was "not in the course of his employment" when the accident occurred.

■ Appellant also argues that the "personal-comfort doctrine" applies. In 1A Larson, *The Law of Workmen's Compensation*, § 21.00 (1990), Professor Larson states:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

Section 21.10, which analyzes the "personal comfort problem" discusses "such incidental acts as eating, drinking, sleeping, resting, washing, smoking, seeking fresh air, coolness or warmth."

■ In the case at bar, the law judge found that the appellant's deviation was "substantial" and we cannot say that this finding, adopted by the Commission, is not supported by substantial evidence. Therefore, we cannot hold that this deviation was for "such incidental" purposes as discussed by Larson.

Affirmed.

COOPER and STROUD, JJ., agree.

SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY *v.* Calvin PETTIE

CA 95-324 924 S.W.2d 828

Court of Appeals of Arkansas
Division III
Opinion delivered June 12, 1996
Substituted Opinion delivered June 26, 1996

[redacted]

Daggett, Van Dover & Donovan, PLLC, by: *J. Shane Baker*, for appellant.

Easley, Hicky & Cline, by: *Michael Easley*, for appellee.

MELVIN MAYFIELD, Judge. This opinion is substituted for one issued on June 12, 1996, which has been withdrawn. The case is an appeal from a judgment against the appellant holding it liable under the underinsured motorist coverage (UIM) provisions of an insurance policy issued by it. The case was ultimately submitted to the court, without a jury; therefore, any factual determinations are subject to review under the clearly erroneous standard of Rule 52(a) of the Arkansas Rules of Civil Procedure.

In December 1989, appellee, a truck driver, was injured while riding as a passenger in his employer's truck when it ran off the road and overturned in a ravine. At the time of the accident, the truck was being driven by appellee's co-employee, Ronnie McClellan, and appellee was sleeping in the passenger seat. Appellee's injuries occurred during and within the course and scope of his employment. All of appellee's medical expenses were paid by his employer's workers' compensation carrier; however, it was stipulated that appellee was not fully compensated for his injuries by his workers' compensation benefits and that his remaining damages were in excess of $25,000.00.

At the time of the accident, appellee was insured under a policy appellant had issued to appellee's wife that contained a provision for $25,000.00 in UIM coverage. This provision provided:

> In consideration of the premium charged, we will pay damages for bodily injury which a covered person is legally entitled to recover from the owner or operator of an underinsured auto . . . .
>
> . . . .
>
> The Underinsured Motorist coverage does not apply to:
>
> . . . .
>
> 4. any person while occupying or being struck by an

> auto, owned by or furnished for the regular use of a covered person, that is not an insured auto under this endorsement. . . .

Appellee made claim for the $25,000.00 UIM coverage, alleging that the workers' compensation benefits he received from his employer did not compensate him for his pain, suffering, and loss of wages.

Appellant denied appellee's claim, and in September 1993, appellee filed suit. Appellant answered, denying that appellee was entitled to UIM benefits and contending that appellee's workers' compensation was appellee's exclusive remedy. Appellant also claimed that the truck appellee was occupying in the accident was not an "underinsured auto" as defined by the policy.

Subsequently, appellant made a motion for summary judgment, alleging that, under the policy provisions, appellee was not "legally entitled to recover" from either the owner of the vehicle or the operator of the vehicle and that coverage was expressly excluded under the "regular use" exclusion of the UIM endorsement. Appellee denied the motion should be granted and alleged that the "regular use" exclusion was ambiguous and presented a question of fact. The motion was denied and the parties filed a joint motion requesting the court to take the case under consideration and render a final decision based upon the stipulations, briefs, and other evidence before it.

Judgment was subsequently entered by the trial court for the appellee in the amount of $25,000, plus twelve percent penalty and attorney's fee. The trial court: (1) rejected appellant's argument that appellee was not legally entitled to recover against the owner and operator of the vehicle, and rejected appellant's conclusion that appellee had no UIM claim under the policy; (2) rejected appellant's argument that appellee's claim was barred by the statute of limitations; (3) found the exclusion in appellant's policy relating to an "auto owned by or furnished for the regular use of" a covered person was ambiguous and did not preclude coverage under the fact situation; and (4) found that appellee's workers' compensation benefits were sufficient to trigger his rights to recovery under the UIM provision of the policy issued by appellant.

I.

Appellant first argues that the trial court erred as a matter of law in awarding appellee UIM benefits because the exclusive remedy doctrine of workers' compensation law prevents appellee from being "legally entitled to recover" from the owner of the vehicle, and the joint-enterprise doctrine prevents appellee from being "legally entitled to recover" from the operator.

Appellant contends that Ark. Code Ann. § 23-89-209 (Supp. 1995), the Underinsured Motorist Statute, creates a condition precedent that requires the insured to prove that he is "legally entitled to recover" from the owner or operator of another vehicle before UIM benefits can be collected. Moreover, the policy language in the case at bar also uses the phrase "legally entitled to recover." Therefore, the appellant contends that both the statute and the policy require the injured party to prove that the operator or owner of the underinsured vehicle was negligent and underinsured, and also that he has a legally enforceable claim against the owner or operator.

But the appellant's reference to the requirement that UIM coverage only applies when the injured party proves that the operator or owner of the underinsured vehicle was negligent and the injured party is "legally entitled to recover" does not mean that the appellant is contesting in this case the issue of negligence on the part of the driver of the vehicle in which the appellee was riding at the time the appellee was injured. Nowhere in the briefs filed by the appellant is there any suggestion that the driver of the vehicle, which ran off the road while the appellee was sleeping, was not negligent or that his negligence was not the proximate cause of the appellee's injuries.

What the appellant does contend in the instant case, is that Ark. Code Ann. § 11-9-105(a) (Repl. 1996), of the workers' compensation law, bars appellee from being "legally entitled to recover" against the owner of the vehicle because that owner is the appellee's employer, and this section provides that "[t]he rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee . . . ." Also, as to the driver of the vehicle, the appellant contends that workers' compensation is exclusive because *Rea* v. *Fletcher*, 39 Ark. App. 9, 832 S.W.2d 513 (1992),

holds that supervisory as well as non-supervisory employees are immune from suit for negligence in failing to provide a safe place to work. And in addition, according to the appellant, the appellee is barred from recovering from the operator of the vehicle under the "joint-enterprise doctrine."

Therefore, it is the appellant's position that the appellee cannot show he has a "legally enforceable claim" and cannot be considered "legally entitled to recover." Although the appellant relies upon cases from other jurisdictions, we think the Arkansas Supreme Court has decided cases which control the instant case.

In *Hettel* v. *Rye*, 251 Ark. 868, 475 S.W.2d 536 (1972), our supreme court held that the policy requirement that an insured must be legally entitled to recover from an uninsured motorist is intended only to require a showing of fault on the part of the uninsured motorist. The court stated:

> The uninsured motorist clause is intended not to afford coverage to the uninsured motorist but rather to provide protection to the policyholder against the perils of injury by such a motorist. It is generally held that the policy requirement that the insured "be legally entitled to recover" from the uninsured motorist is intended only to require a showing of fault on the part of the latter. Upon that reasoning, in cases directly in point here, it has been held that the policyholder may recover against the insurer even though the statute of limitations has run in favor of the uninsured motorist, or even though the plaintiff has dismissed his suit against the uninsured motorist with prejudice.

251 Ark. 869-70, 475 S.W.2d 537-538 (citations omitted).

In *Travelers Insurance Company* v. *National Farmers Union Property and Casualty Co.*, 252 Ark. 624, 480 S.W.2d 585 (1972), our supreme court held that a provision of uninsured motorist coverage was invalid which provided that any amount payable under that coverage because of bodily injury would be reduced by the amount paid, and the present value of all amounts payable, on account of such injury under any workmen's compensation law. The court recognized that there was a division of authority on the question of the validity of such provisions, 252 Ark. 629-30, 480 S.W.2d 590, but the court concluded:

> The uninsured motorist legislation was passed long after adoption of the Workmen's Compensation Act. When we consider the basic purposes of the latter act, our belief that the legislature did not intend that the Uninsured Motorist Act be the means of discrimination against working people protected under the workmen's compensation laws is strengthened. . . . The right claimed by the [company issuing the policy providing for uninsured motorist coverage] would simply provide it with a windfall in the case of one covered by the workmen's compensation laws. The purpose of the Uninsured Motorist Act was to protect the insured, not the insurer.

252 Ark. 631-32, 480 S.W.2d 591.

In *Gullet* v. *Brown*, 307 Ark. 385, 820 S.W.2d 487 (1991), it was held that workers' compensation benefits were the exclusive remedy of an employee injured in the course of his employment by an uninsured motorist where the uninsured motorist coverage was provided by the *employer's* self-insurance program. But, the court distinguished *Travelers, supra,* because in that case the uninsured motorist coverage was provided by the *employee's* own insurance. Likewise, in the instant case the UIM was carried by the employee.

In *Shepherd* v. *State Auto Property and Casualty Insurance Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993), the supreme court relied on its holding in *Travelers, supra,* in a case involving UIM coverage. In that case, four women were passengers in an automobile when it was struck by the tortfeasor's vehicle. All four women were in the course of their employment at the time of the accident, and three of the women were killed in the accident. The tortfeasor carried $50,000.00 limits for liability coverage, and the vehicle in which the women were riding had UIM coverage of $300,000.00. The personal representatives of the deceased women's estates, and the survivor and her husband filed suit against the tortfeasor and against the appellee for the UIM benefits. Subsequently, a judgment was entered in favor of the appellants against the appellee in the amount of $250,000.00, which included an offset in the amount of the tortfeasor's $50,000.00 policy limits, and also found that the workers' compensation carrier was entitled to a two-thirds workers' compensation lien on the $50,000.00. Thereafter, the appellants filed their notice of appeal, which included their contention that the trial court erred as a matter of law by finding that the appellee

was not liable for a twelve percent penalty on the principal sum of $300,000.00. In addressing this point on appeal, the supreme court stated:

> Secondly, while there may be no Arkansas authority precisely on point with regard to underinsured policies and workers' compensation benefits, we have held that the amount of recovery under the *uninsured* motorist provisions of a liability policy could not be reduced by the amount the injured party received under workers' compensation coverage where the setoff provision reduced the limit of liability under the uninsured motorist coverage. Moreover, in *O'Bar* v. *MFA Mutual Ins. Co.*, 275 Ark. 247, 628 S.W.2d 561 (1982), we held that accidental death benefits should not be reduced because an insured's beneficiaries also received workers' compensation payment for the insured's death and that a clause in a policy denying benefits on such a basis is a violation of public policy.
>
> Underinsured motorist coverage was enacted in this state in 1987 to supplement benefits recovered from a tortfeasor's liability carrier. Ark. Code Ann. § 23-89-209 (1987). We have stated its purpose to be "to provide compensation to the extent of the injury, subject to the policy limit." *Clampit* v. *State*, 309 Ark. 107, 110, 828 S.W.2d 593, 595 (1992).
>
> Even though a precise case applicable to underinsured policies had not been decided at the time State Auto refused to pay underinsured benefits, we believe that the public policy of the state could be sufficiently extrapolated from analogous cases and from the underinsured motorist statute itself. Even with the knowledge of the State's clear public policy, State Auto refused to pay though a demand for payment was made on July 31, 1989. In light of these facts, State Auto's good-faith argument must fail.

312 Ark. 513-14, 850 S.W.2d 329.

We think Arkansas case law interpreting our uninsured and UIM statutes has expressed a public policy that requires coverage in the instant case. UIM coverage applies when the tortfeasor has at least the minimum amount of insurance required by law but not enough to fully compensate the victim, and it is designed to provide

compensation to the extent of the injury, subject to the policy limits. *See State Farm Mutual Automobile Insurance Co.* v. *Beavers*, 321 Ark. 292, 296, 901 S.W.2d 13, 15-16 (1995). The amount of the tortfeasor's coverage has no effect on the appellee's recovery under UIM coverage except that the appellee cannot be reimbursed twice for the same damages. *See American Casualty Co.* v. *Mason*, 312 Ark. 166, 169, 848 S.W.2d 392, 395 (1993), stating that "the changes made to § 23-89-209(a) by Act 209 of 1991, the title of Act 209, and the emergency clause of Act 209, clearly indicate the legislature intended underinsured motorist benefits under Act 335 of 1987 to be provided without regard to the amount of insurance carried by any liable party." 312 Ark. 170, 848 S.W.2d 395.

Therefore, in regard to appellee's UIM insurance coverage, we do not believe that the exclusive remedy provisions of the workers' compensation law bars the appellee from being "legally entitled to recover" against the owner or operator of the vehicle in which the appellee was riding at the time he received the injuries for which he was granted judgment in this case.

Although it may not be clear that the trial court found that the driver of the vehicle in which appellee was riding was negligent and that this was the proximate cause of appellee's injuries, the trial court did specifically reject the appellant's contention that the appellee was not legally entitled to recover against the owner and operator of the vehicle and also specifically rejected appellant's contention that the appellee had no claim under the underinsured motorist coverage of the policy issued by appellant to the appellee.

This case was submitted to the trial court, without a jury. In *Southern Farm Bureau Casualty Insurance Co.* v. *Reed*, 231 Ark. 759, 332 S.W.2d 615 (1960), the trial court, sitting without a jury, entered judgment for the appellee based on a finding that an endorsement to a policy of insurance on an automobile modified the original terms of the policy and was void because the endorsement was without consideration. The Arkansas Supreme Court affirmed the judgment and said:

> While the trial court may have erroneously based its finding and judgment on the ground that the endorsement was void, we hold that the judgment, nevertheless, should be affirmed for the reason that the facts would support a finding that appellee, Reed, was in fact driving his automobile at the

> time of the mishap or accident and therefore the endorsement could not affect his claim for damages. Our rule of long standing in this State is that we will not disturb a correct decision and judgment of a trial court though based on a wrong or insufficient ground.

231 Ark. at 762, 332 S.W.2d at 617 (citations omitted).

Other cases have consistently applied this rule. *See Summers Chevrolet, Inc.* v. *Yell County*, 310 Ark. 1, 4, 832 S.W.2d 486, 488 (1992) ("We will affirm the trial court if it reached the right result, even though it may have announced the wrong reason."). Many other cases have made the same holding. *See also Estate of Gaston* v. *Ford Motor Co.*, 320 Ark. 699, 898 S.W.2d 471 (1995); *Hubbard* v. *Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993); *Tittle* v. *City of Conway*, 268 Ark. 1126, 599 S.W.2d 412 (Ark. App. 1980).

Appellant's contention that the "joint-enterprise doctrine" prevents the appellee from being "legally entitled to recover" against the driver of the vehicle must also be rejected in light of the law as to that doctrine and the evidence in the record that supports the trial court's judgment against the appellant.

■ In *Woodard* v. *Holliday*, 235 Ark. 744, 361 S.W.2d 744 (1962), the court quoted with approval the following statement from *Prosser on Torts* (2d Ed.) § 65:

> "The prevailing view is that a joint enterprise requires something beyond the mere association of the parties for a common end, to show a mutual 'right of control' over the operation of the vehicle — or in other words, an equal right in the passenger to be heard as to the manner in which it is driven. It is not the fact that he does or does not give directions which is important in itself, but rather the understanding between the parties that he has the right to have his wishes respected, to the same extent as the driver. In the absence of circumstances indicating such an understanding, it has been held that . . . fellow servants in the course of their employment, although they may have a common purpose in the ride, are not engaged in a joint enterprise."

235 Ark. at 748, 361 S.W.2d at 746-47.

The court in *Woodard* v. *Holliday* held that the trial court erred in submitting the question of joint enterprise to the jury because

there was not sufficient evidence to support a finding that the appellant Woodard, who was riding as a passenger in the car which hit the appellee's vehicle, had equal right to control the vehicle Woodard was in, even though he and the driver were co-employees. The court cited several cases from other jurisdictions which had made the same holding. In *Prosser And Keeton On The Law of Torts*, § 72, at 519 (Fifth Ed.), the same view is still taken ("fellow servants in the course of their employment, although they may have a common purpose in the ride, are not engaged in a joint enterprise"). The closest the evidence comes to supporting the right to control issue here is appellee's answer of "Yes" to the question of whether he and the driver had an "equal voice in what you were doing and what you wanted to do on the trip." Even if this was sufficient to make a fact question on the issue of joint enterprise, we think the evidence would clearly support a finding that there was no joint enterprise between the appellee and the co-employee who was driving the vehicle they were in at the time the appellee was injured. And, as discussed above, we will affirm the court's judgment if supported by the law and the evidence.

■ Therefore, we do not believe that the joint-enterprise doctrine keeps the appellee in this case from being "legally entitled to recover" against the driver of the vehicle in which the appellee was injured insofar as that provision is used in appellee's UIM insurance coverage.

II.

Appellant's second point contends that the trial court erred in awarding appellee UIM coverage because, at the time he filed his complaint, the applicable statute of limitations barred him from recovering from the owner or operator of the underinsured vehicle. Appellant concludes that, because appellee's tort claim against the owner or operator would be barred by the applicable three-year statute of limitations, it was error to grant him a judgment in this case.

■ But, in the context of the uninsured motorist coverage, the supreme court held in *Hettel* v. *Rye*, *supra*, that a policyholder may recover against the insurer even though the statute of limitations has run in favor of the uninsured motorist or even though the plaintiff has dismissed his suit against the uninsured motorist with prejudice. 251 Ark. at 870, 475 S.W.2d at 538.

III.

Appellant's final point is that the trial court erred in holding that the UIM endorsement relating to an "auto owned or furnished for the regular use of a covered person" was ambiguous and therefore did not preclude UIM coverage. The endorsement in question provides: "The underinsured motorist coverage does not apply to: . . . any person while occupying or being struck by an auto, owned by or furnished for the regular use of a covered person, that is not an insured auto under this endorsement." Appellant claims that the facts established in appellee's deposition (which was made a part of the evidence presented to the trial court) clearly show that the truck he was occupying when the accident occurred was furnished for "his regular use." Appellant concedes in his brief that in *Travelers Indemnity Co. v. Hyde*, 232 Ark. 1020, 342 S.W.2d 295 (1961), and *General Agents Insurance Co. of America* v. *People's Bank & Trust Co.*, 42 Ark. App. 95, 854 S.W.2d 368 (1993), the court found similar provisions to be ambiguous. Nevertheless, he argues that, under the facts of the instant case, the exclusion was not ambiguous. We do not agree.

In *Travelers Indemnity Co.* v. *Hyde, supra*, the supreme court held that a provision which stated "while occupying an automobile . . . furnished for the regular use of either the named insured or any relative, other than an automobile defined herein as an 'owned automobile' " was ambiguous. 232 Ark. at 1022, 342 S.W.2d at 297. Whether an insured's particular use of an automobile furnished by another is a regular use within the meaning of the policy presents a question of fact which calls for an interpretation of the language of the policy relating to the facts involved. 232 Ark. at 1024, 342 S.W.2d at 298. Provisions of a policy of insurance must be construed most strongly against the insurance company that prepared it, and if a reasonable construction could be placed on the contract that would justify recovery, it would be the duty of the court to so construe. *Travelers* v. *Hyde, supra. See also Baskette* v. *Union Life Ins. Co.*, 9 Ark. App. 34, 36, 652 S.W.2d 635 (1983). Here, the term "regular use" is not defined by the policy. The provision in the insurance policy in question was clearly ambiguous; therefore, its meaning presented a question of fact. Under the evidence presented in this appeal, we do not think appellant has demonstrated that the circuit court clearly erred in finding that the vehicle in which the appellee was riding was furnished for his

"regular use" as that phrase was used in the policy here involved.

Affirmed.

COOPER and ROBBINS, JJ., agree.

PILGRIMS PRIDE CORPORATION *v.* JoAnn CALDARERA

CA 95-883 923 S.W.2d 290

Court of Appeals of Arkansas
Division II
Opinion delivered June 12, 1996

The Trammell Law Firm, by: *Robert D. Trammell*, for appellant.

The Whetstone Law Firm, P.A., by: *Gary Davis*, for appellee.

JOHN F. STROUD, JR., Judge. On June 23, 1992, JoAnn Caldarera suffered a knee injury in the poultry processing plant where she worked. She received initial medical treatment through the company physician, but eventually surgery was required. The employer, Pilgrims Pride, contested her claim for workers' compensation benefits. The administrative law judge found the claim compensable and found that she was entitled to temporary total disability benefits from September 1 through November 9, 1992, as well as reasonably necessary medical expenses related to the injury. After conducting a *de novo* review, the Workers' Compensation Commission affirmed and adopted the decision of the law judge. Pilgrims Pride now appeals, contending that the Commission erred in finding that Ms. Caldarera was injured during the course of her employment. We affirm.

A challenge to the Commission's findings constitutes a challenge to the sufficiency of the evidence to sustain the finding. *City of El Dorado* v. *Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). In determining the sufficiency of the evidence to sustain the Commission's factual findings, we review the evidence in the light most favorable to those findings, and we must affirm if there is any substantial evidence to support them. *Id.* We may reverse the Commission's findings only when we are convinced that fair-minded

people with the same facts before them could not have arrived at the conclusion reached by the Commission. *Id.* It is the function of the Commission to draw inferences when testimony is open to more than one interpretation, and when it does, its findings have the force and effect of a jury verdict. *Clark* v. *Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979). Determinations of the weight and credibility of the evidence are exclusively within the province of the Commission. *George W. Jackson Mental Health Ctr.* v. *Lambie*, 49 Ark. App. 139, 898 S.W.2d 479 (1995).

Both the claimant and her son testified at the hearing before the administrative law judge. Their testimony reveals that, immediately before the injury, the claimant was working at her station on the lower floor of the plant, and her son was working on a suspended catwalk above the floor. He was working alone on the chicken-wing machine, which usually was operated by more than one employee. When he could not keep up with the machine, chicken wings began "flying everywhere," and he "hollered for help." The wings hit workers below, including a female co-worker who accused him of throwing them at her. The two exchanged heated words. He said, "You bitch, get up here and help me." She ran up onto the catwalk, swinging her arms, and began hitting him. He put a hand in front of his glasses as her blows approached his face. A crowd gathered to watch, but neither security nor supervisory personnel came, and no one tried to stop the altercation.

The claimant testified that she was doing her job at the chicken-thigh machine on the main floor when this action took place on the catwalk. She saw her son's face redden just before he "reared his fist back like he was going to get her." The claimant screamed, "Don't hit her!" She stated that she left her machine and hurried to the catwalk to see if she could separate them. Her knee injury occurred when she slipped in her wet shoes on a metal step of the catwalk.

■ A claimant seeking benefits must prove by a preponderance of the evidence that the injury arose out of and in the course of the employment. *Deffenbaugh Indus.* v. *Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993). "Arising out of the employment" refers to the origin or cause of the accident while the phrase "in the course of the employment" refers to the time, place, and circumstances under which the injury occurred. *Id.* The test for the course of employment requires that the injury occur within the time and space

boundaries of the employment, while the employee is carrying out the employer's purpose *or advancing the employer's interests directly or indirectly. Id.* (citations omitted) (emphasis added).

Appellant challenges the finding of compensability, relying upon *San Antonio Shoes* v. *Beaty*, 28 Ark. App. 201, 771 S.W.2d 802 (1989), for the proposition that injuries are not compensable when a workplace assault arises out of purely personal reasons. Appellant contends that appellee left her station to pursue an endeavor that was strictly personal and that appellee's actions were not in furtherance of her responsibilities to her employer.

The Commission found that the decision of the administrative law judge was supported by a preponderance of the credible evidence and correctly applied the law. Its opinion included the following conclusions:

> While Ms. Caldarera's movement toward the fight area was not strictly "in furtherance of her employer's business," she was certainly acting in the employer's best interest in trying to stop a fight in which far more grave injuries might have been incurred. . . .

Here appellee testified that she was hurrying to the catwalk to see if she could separate her son and his co-worker, and she stated that she probably would have made efforts to stop the fight even if her son had not been involved. We believe that reasonable minds could reach the Commission's conclusion that appellee's actions were not personal and that she was acting in her employer's best interest when she approached the catwalk and hit her knee. We therefore hold that substantial evidence supports the Commission's finding that appellee sustained a compensable injury.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Frankie G. MILTON *v.* STATE of Arkansas

CA CR 95-776 924 S.W.2d 465

Court of Appeals of Arkansas
Division III
Opinion delivered June 12, 1996

John H. Bradley, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

OLLY NEAL, Judge. Frankie Milton takes this appeal from his first-degree murder conviction which was entered after a bench trial in the Mississippi County Circuit Court. Milton contends that two of the three confessions he made to the Blytheville Police Department were erroneously admitted at his trial, and, therefore, reversal of his conviction is required. We agree with appellant and, accordingly, reverse the conviction.

Milton was initially arrested on July 12, 1994, eight days after police found the body of a woman named Lisa Thomas in a burned-out residence in Blytheville. The victim had been killed by a gunshot wound to her head on July 3, 1994. The day after appellant was arrested near Carlisle, Arkansas, and returned to Blytheville, Milton gave his first custodial statement, in which he denied any involvement in or knowledge of the murder.

On July 15, 1994, at a 9:00 a.m. hearing, the presiding magistrate found probable cause to charge Milton with first-degree murder and contemporaneously appointed the Mississippi County Public Defender's Office to represent appellant. Appellant gave his second statement to police officers later that day and a third on July 18th, three days later. Both the second and third statements were inculpatory. In his second statement, appellant confessed his presence at the crime scene, but claimed that he held the victim's arm while another man fired the fatal shot. In his July 18th statement, appellant admitted he fired the murder weapon.

A formal order appointing the public defender to represent appellant was entered on March 6, 1995, and appellant filed his Motion to Suppress. On March 21st, a *Denno* hearing was conducted on appellant's motion. At the hearing, the State presented the testimony of the officers who interrogated appellant, the magistrate who made the initial appointment of counsel and the Blytheville Municipal Court Deputy Clerk, who was charged with maintaining court records.

Officer James Sanders testified that he, Lieutenant Glen Lester, and Detective Marvin Crawford were all present during the tape-recorded portion of appellant's July 15th interview and that none of the officers threatened, coerced, or made any promises to appellant. Lieutenant Lester, who was present during the entire interview, corroborated Sanders's account of the second interview, and, in addition, testified that he witnessed appellant sign a waiver of rights

form. Lieutenant Lester also testified that he and Detective Crawford were present during the July 18th interview with appellant and that he, Lester, signed as a witness on the third waiver-of-rights form appellant executed. Both Sanders and Lester admitted that Milton never requested that his statement be taken and that all three confessions appellant gave resulted from police-initiated interrogations. All three officers denied knowing that appellant was represented by counsel and claimed that appellant never attempted to invoke his right to have an attorney present.

The Municipal Clerk Deputy, Grace Haney, testified that she specifically remembered appellant's March 15, 1994, probable-cause hearing, but couldn't remember which deputy prosecutor represented the State on that date. According to Ms. Haney, Guy Long, a local attorney, presided over the hearing. Attorney Guy Long, who was also called as a defense witness, admitted that he acted as sitting judge at appellant's probable-cause hearing, and that it was he who made the finding of probable cause to charge appellant with murder in the first degree. Mr. Long stated that he appointed the public defender's office to represent appellant, advised appellant of his right to counsel, and made certain that appellant was aware the public defender had been appointed to represent him. Finally, according to Mr. Long, Deputy Prosecuting Attorney Marvin Childers, who was present, filled out the affidavits necessary for the appointment and Long signed them.

Based on the evidence presented at the hearing, appellant's motion to suppress was denied. After the subsequent trial on the merits before the court, appellant was convicted of the offense of murder in the first degree and sentenced to thirty years in the Arkansas Department of Correction.

Appellant's only argument is that the taking of his second and third statements violated his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel and, therefore, that both statements should have been suppressed. Relying on *Bussard* v. *State*, 295 Ark. 72, 747 S.W.2d 71 (1988) and *Sutherland* v. *State*, 299 Ark. 86, 771 S.W.2d 264 (1989), appellant contends that his Sixth Amendment right to counsel attached upon his arrest, and after counsel had been appointed to represent him he was not subject to further interrogation by the authorities unless he himself initiated that contact.

In reviewing a trial court's denial of a motion to suppress a confession, we view the evidence in the light most favorable to the State and make an independent determination based on the totality of the circumstances of whether the accused knowingly, voluntarily, and intelligently waived his right to remain silent. *Morris* v. *State*, 302 Ark. 532, 792 S.W.2d 288 (1990). We only reverse if the decision to suppress was clearly against the preponderance of the evidence. *Id.*

Appellant is correct in his statements that police-initiated contact is prohibited after a criminal defendant expresses a desire to deal with the police only through counsel and that any subsequent waiver of rights is invalid and renders a resulting confession inadmissible. *See Bussard* v. *State*, 295 Ark. 72, 747 S.W.2d 71 (1988), and *Sutherland* v. *State*, 299 Ark. 86, 771 S.W.2d 264 (1989). In the present case, however, although it is clear from the record that the acting magistrate who presided over appellant's probable-cause hearing designated the Mississippi County public defender's office as counsel for appellant, nothing in the record shows that appellant requested the appointment or ever made any other objective indication that he desired the representation. However, the record does show that a deputy prosecuting attorney was present when an attorney was appointed to represent appellant, and that some representatives of the local police department escorted appellant to the hearing.

The Supreme Court's holding in *Sutherland* seems to indicate that the fact of the appointment is enough by itself to invalidate a subsequent waiver of rights by a defendant where the police initiate the subsequent contact. However, in a more recent case, *Lanes* v. *State*, 53 Ark. App. 266, 922 S.W.2d 349 (1996), we discussed the standards set out in *Michigan* v. *Jackson* and *Edwards* v. *Arizona*, which were relied on in both *Sutherland* and *Bussard*. There, we stated:

> The critical difference...between *Michigan* v. *Jackson* and the case at bar is that in *Jackson*, both *Jackson* and [his co-defendant] *asked* that counsel be appointed to represent them. Here, appellant made no request for counsel and was unaware that counsel had been appointed. In *Moran* v. *Burbine*, 475 U.S. 412, 422 (1986), the Court said, "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity

> to comprehend and knowingly relinquish a constitutional right." (Citations omitted.) We conclude that the trial court's determination that both the waiver and the statement were knowingly given should be affirmed.

This case is distinguishable from *Lanes* in that here, both appellant and the local authorities were aware that the court had provided an attorney for appellant while in *Lanes*, the appellant, not knowing that counsel had been appointed for him, sought other counsel. The record in *Lanes* was also sufficient to establish that none of the interrogating officers had constructive knowledge of the appointment.

Because appellant was aware that he had an attorney and the interrogating officers had at least constructive knowledge of that fact, reversal of appellant's conviction is required.

Reversed and remanded.

ROBBINS and ROGERS, JJ., agree.

Andrea R. COLLINS *v.* Renee TREADWELL

CA 95-409 923 S.W.2d 882

Court of Appeals of Arkansas
Division II
Opinion delivered June 19, 1996

Boswell, Tucker & Brewster, by: *Clark S. Brewster*, for appellant.

John F. Gibson, Jr., for appellee.

JOHN E. JENNINGS, Chief Judge. On September 7, 1994, Renee Treadwell was driving in Monticello, Arkansas. She was struck from behind by a vehicle driven by Andrea Collins. The case was tried to a jury and liability was admitted. The jury returned a verdict for $2,436.06. Later, the trial judge granted Renee Treadwell's motion for a new trial and set the jury verdict aside.

On appeal, Ms. Collins contends that the trial court abused its discretion in granting a new trial. We must agree and reverse.

The trial court is authorized to set aside a jury verdict and grant a new trial when the verdict is clearly against the preponderance of the evidence. *Brown* v. *Wilson*, 282 Ark. 450, 669 S.W.2d 6 (1984). When a motion for new trial is granted, the test on review is whether the judge abused his discretion. *Clayton* v. *Wagnon*, 276 Ark. 124, 633 S.W.2d 19 (1982).

In this case it is clear that the jury's verdict included the cost of repairing appellee's vehicle, $2,093.90; $100.00 for her loss of its use; $199.16 for a cargo cover; and appellee's $43.00 medical bill. The trial judge set the jury verdict aside because he felt that the jury did not properly consider appellee's testimony as to her personal injuries.

After the accident, Ms. Treadwell did not think she was injured and the investigating officer noted the accident involved "property damage only." Ms. Treadwell testified that about three days after the accident she felt pain in her neck. She testified:

> I went to Dr. Peter Go in Dumas. I complained of pain in my neck and lower back. I do not have any permanent injury and the pain is over with. I have a paranoid feeling, because every time I stop, I look in my rearview mirror to make sure that everything is O.K. It is not an unbearable situation. It makes my hands sweat. The amount of my medical bill was $43.00. The bill was incurred on September 9, 1994.

This is all the evidence relating to appellee's injury. There was no evidence that her pain required any medication or treatment. Under these circumstances we are persuaded that setting aside the jury verdict constitutes an abuse of discretion. The trial court may not substitute its view of the evidence for that of the jury. *Ray* v. *Green*, 310 Ark. 571, 839 S.W.2d 515 (1992).

For the reasons stated, the order granting a new trial is reversed.

ROGERS and GRIFFEN, JJ., agree.

CARROLL GENERAL HOSPITAL *v.* Bobby GREEN

CA 95-1032 923 S.W.2d 878

Court of Appeals of Arkansas
Division I
Opinion delivered June 19, 1996

[redacted]

Bassett Law Firm, by: *Curtis L. Nebben*, for appellant.

Adams & Evans, by: *Donald J. Adams*, for appellee.

JOHN MAUZY PITTMAN, Judge. Carroll General Hospital appeals from a decision of the Arkansas Workers' Compensation Commission which found that the compensation benefits payable to appellee as a result of a hernia operation were not limited to twenty-six weeks as provided in the "hernia statute," Ark. Code Ann. § 11-9-523(b)(1) (Repl. 1996), and which found that appellee was entitled to additional temporary total disability benefits. Appellant argues that the Commission's failure to apply the limitation in § 11-9-523 is erroneous as a matter of law and that the award of additional benefits is not supported by substantial evidence. We find no error and affirm.

Appellee suffered a compensable bilateral inguinal hernia, which was surgically repaired by Dr. W. K. Flake on June 30, 1992. Dr. Flake released appellee to return to work without restriction on August 25, 1992. After working for five months, appellee began to have pain in his right groin. Dr. Flake stated that appellee's discomfort was due to a nerve that became entrapped during appellee's hernia surgery. When conservative measures did not relieve appellant's problems, Dr. Flake referred him to Dr. C. R. Magness. Appellant was also evaluated by Dr. E. Stahl. Dr. Stahl referred appellant to Dr. John F. Eidt at UAMS. Appellee was seen by other doctors who agreed with Dr. Flake's conclusions. On August 13, 1993, Dr. Eidt surgically repaired the entrapped nerve. Appellee then sought additional temporary total disability from August 20, 1993.

Compensation for hernia injuries may not exceed a period of twenty-six weeks. Ark. Code Ann. § 11-9-523(b)(1) (Repl. 1996). Appellant argues that the statute is applicable because appellee's entrapped nerve is related to his hernia and that there is no statutory provision for additional benefits for disability resulting from a hernia surgery. The Commission, in finding that the hernia statute was not applicable, stated that appellee's disability resulted from the hernia surgery and was "separate and distinct from the hernia." It held that

a disability resulting from "complications which are a consequence of the occurrence of the hernia but which are separate and distinct from the hernia itself" are not limited to a twenty-six week period as provided in § 11-9-523(b)(1).

The Arkansas Supreme Court has held that a severe or "slow to heal" hernia does not entitle a claimant to compensation benefits beyond the twenty-six week limitation. *Jobe* v. *Capitol Products Corp.*, 230 Ark. 1, 320 S.W.2d 634 (1959). However, if the hernia results in "complications," compensation beyond the twenty-six week limitation may be received. In *Jobe*, the court quoted the Commission, which held: "By 'complications' we mean infection, or damage to bodily organs or structures separated (sic) and distinct from the hernia itself..." *Id.*, 230 Ark. at 2.

Appellant urges us to reverse the Commission's decision based on our ruling in *Tibbs* v. *Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1983). There, the claimant required an additional surgery to remove silk sutures used in the surgery to repair his hernia. Because of the claimant's allergic reaction to the sutures which caused stitch infections, his hernia injury was slow to heal. We held that *Tibbs* was indistinguishable from *Jobe* and limited compensation to the twenty-six week period as provided in the hernia statute. We did so based in part on the medical evidence which did not reveal that the claimant's failure to heal promptly, because of complications from the hernia surgery, caused him to suffer "any greater disability than any other person sustaining a severe hernia injury," and that the claimant failed to prove any disability "separate and distinct from the hernia itself." *Id.*, 9 Ark. App. at 153.

We find *Tibbs*, *supra*, distinguishable from the case now before us. Unlike the claimants in *Jobe* and *Tibbs*, appellee's disability arose from a condition "separate and distinct" from the hernia injury itself, an entrapped nerve, and his failure to heal promptly was not related to the hernia but to damage to a "bodily structure" separate and distinct from the hernia. *Jobe*, 230 Ark. at 2.

Appellant also argues that our holding in *Tibbs* be interpreted as stating that the hernia statute precludes additional compensation for disability resulting from complications from a hernia surgery and is applicable to the case before us. However, in *Tibbs*, complications from the claimant's hernia surgery caused his *hernia*

injury to not heal promptly. Here, the medical evidence was that the entrapped nerve, *not the hernia*, caused appellee to be unable to work. Moreover, the Commission found that appellee's disability resulted from the nerve entrapment and not from the hernia. Therefore, we affirm the Commission's finding that compensation for appellee's disability is not limited by the hernia statute.

Further, the Commission found that appellee's disability was from the hernia surgery and not from the hernia. Dr. David Bauer and Dr. Flake related appellee's condition to the surgery. 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 will 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.* The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993). The Commission's findings on this issue are supported by substantial evidence.

Secondly, appellant argues that appellee's healing period, following the second surgery on August 23, 1993, ended before September 22, 1993, because Dr. Stahl stated that all objective testing was normal. The Commission found that the healing period ended on November 23, 1993, and awarded additional temporary total disability benefits from August 21, 1993, through November 23, 1993.

Appellant also argues that there is no evidence that appellee was unable to work subsequent to August 20, 1993, other than his own testimony, and thus he is not entitled to temporary total disability benefits subsequent to August 20, 1993.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *J.A. Riggs Tractor Co.* v. *Etzhorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990). Arkansas Code Annotated § 11-9-102(13) (Supp. 1995) defines "healing period" as that period for healing of an

injury resulting from an accident.[1] The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Harvest Foods* v. *Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). The determination of when the healing period has ended is a factual determination for the Commission which is affirmed on appeal if supported by substantial evidence. *Id.*

Dr. Bauer's August 18, 1993, report said that appellee's entrapped nerve prevented appellee from working. On August 23, 1993, appellee had a second surgery for the entrapped nerve. Appellee testified that he has not worked anywhere since his August 23, 1993, surgery, has not been released to return to work, and did not think that he was able to perform his previous job with appellant. Appellee said that his right leg is weak and that he is unable to lift any weight or walk a significant distance. Although he helps his wife with some housework, he has to stop and rest.

Appellee continued to receive physical therapy and to be followed by Dr. Stahl after the second surgery. Dr. Stahl's September 22, 1993, report said that appellee was healing well and all objective testing was normal. Dr. Eidt's November 24, 1993, report stated that appellee continued to complain of pain in the right groin which affected his ability to walk and that appellee stated that he was unable to work. The Commission found, based on Dr. Eidt's report and appellee's testimony at the hearing, that the healing period ended on November 23, 1993. We cannot conclude that that finding is not supported by substantial evidence or that the Commission erred in awarding additional temporary total disability benefits.

Affirmed.

NEAL and STROUD, JJ., agree.

---

[1] The definition remained the same when the Workers' Compensation law was amended in 1993.

Mark ABERNATHY *v.* WELDON, WILLIAMS, & LICK, Inc.

CA 95-309 923 S.W.2d 893

Court of Appeals of Arkansas
En Banc
Opinion delivered June 19, 1996
[Petition for rehearing denied August 14, 1996.]

[redacted]

Wright, Lindsey & Jennings, by: *H. Keith Morrison*, for appellant.

Daily, West, Core, Coffman & Canfield, by: *Robert W. Bishop*, for appellee.

JOHN B. ROBBINS, Judge. On June 4, 1992, August in Arkansas, Inc., placed an order for "souvenir-style" tickets with appellee Weldon, Williams, and Lick, Inc. (Weldon), in the amount of $44,766.65. August in Arkansas wanted to purchase the tickets on credit, but Weldon would not furnish the tickets without a personal guaranty of payment. Such a guaranty was received by Weldon, which allegedly bore the signature of August in Arkansas founder Mark Abernathy. After August in Arkansas failed to pay the amount due on the tickets, Weldon sued Mr. Abernathy for the debt. Mr. Abernathy denied ever making or signing the personal guaranty. However, after a bench trial, judgment was entered against Mr. Abernathy in the amount of $54,350.43. This amount included the purchase price, interest, and attorney's fees. Mr. Abernathy now appeals.[1]

---

[1] Weldon argues that Mr. Abernathy's appeal is untimely. The judgment against him was entered on July 20, 1994; Mr. Abernathy filed a "Motion for Reconsideration, or in the Alternative, to Offer Proof" on July 26, 1994; this motion was deemed denied on August 25, 1994 pursuant to Rule 4(c) of the Arkansas Rules of Appellate Procedure; and he then failed to file his notice of appeal until September 26, 1994 — more than thirty days after his motion was deemed denied. We acknowledge that Rule 4(a) of the Arkansas Rules of Appellate Procedure allows an appealing party only thirty days to file a notice of appeal from the date that its post-judgment motion is deemed denied. However, we also note that Rule 9 of the Arkansas Rules of Appellate Procedure provides that, when the last day of such a time period falls on a weekend, the time for filing is extended until the following Monday. In the instant

For reversal, Mr. Abernathy argues that the trial court erroneously excluded the testimony of two of his witnesses. He also argues that the trial court's decision was erroneous because its finding that the signature on the guaranty was his was clearly against the preponderance of the evidence. Finally, Mr. Abernathy asserts that the trial court erred as a matter of law in ruling that, even if the signature on the guaranty was not his, he had ratified the personal guaranty. We find no error and affirm.

Tina Solesbee Clark was the first to testify at trial on behalf of Weldon. She stated that, in June 1992, she was employed with Weldon as a customer services representative. Ms. Clark testified that, during this time, she was involved in negotiations with Brigette Williams, a representative of August in Arkansas. According to Ms. Clark, Ms. Williams placed an order for tickets and requested that the purchase be made on credit. However, Weldon's president, Jim Walcott, denied August in Arkansas' credit application, and advised Ms. Clark to tell Ms. Williams that the tickets could not be provided on credit unless a personal guaranty was provided by Mr. Abernathy. After this information was relayed to Ms. Williams, she faxed to Weldon a document that purported to be a guaranty signed by Mr. Abernathy. This guaranty stated, "I, Mark Abernathy, am the founder and president of August in Arkansas and present myself as guarantor for payment of August in Arkansas festival tickets money."

Terry Vaughan, credit manager for Weldon, testified next. She asserted that she received the fax which purported to be the personal guaranty of Mr. Abernathy. Ms. Vaughan stated that, upon consideration of this document, Weldon decided to extend credit. After the account became delinquent, Ms. Vaughan had a telephone conversation with Mr. Abernathy. According to Ms. Vaughan, this occurred on August 26, 1992, and during the conversation Mr. Abernathy "told me that since he had signed a personal guaranty, that we would be at the top of his list for payment, and he would probably make one the following week." However, no such payment was ever received.

---

case, Mr. Abernathy's notice of appeal was timely because September 24, 1994, fell on a Saturday and his notice of appeal was filed on the following Monday.

Mr. Walcott also testified that he talked with Mr. Abernathy by telephone when the account became delinquent. He stated that, during a conversation on November 13, 1992, Mr. Abernathy acknowledged that he had signed a personal guaranty and was personally liable for the indebtedness. Mr. Walcott further stated that Mr. Abernathy convinced him that everything was being done to make sure that the payment would be made. Although no payment terms were arranged during the conversation, Mr. Walcott stated that Mr. Abernathy's representations convinced him that Mr. Abernathy was going to make the necessary payment.

Mr. Abernathy testified on his own behalf, and he denied having signed the guaranty or giving anyone else permission to do so. He reasoned that the purported guaranty that was faxed to Weldon must have been a forgery, and that he knew nothing about any supposed guaranty until long after the festival. Mr. Abernathy acknowledged speaking with Mr. Walcott in November 1992, but said that he never told Mr. Walcott that he had signed the document or would guarantee the debt. Mr. Abernathy testified that he had never seen or talked with anyone from Weldon prior to the festival, and that he had nothing to do with the credit extended for the purchase of the tickets.

Mr. Abernathy's first argument on appeal is that the trial court erred in excluding the testimony of two of his witnesses. Only four days before the trial was scheduled to begin, Mr. Abernathy supplemented his answers to Weldon's interrogatories, and this supplement contained the names of two additional witnesses, Jackie Michelle and Thomas Vastrick, who were to testify on his behalf. Before the trial began on June 28, 1994, Weldon orally moved in limine to bar the testimony of these two witnesses because their names were not made available in a timely fashion to allow for adequate preparation. Mr. Abernathy responded that Weldon was given adequate notice of the witnesses. The trial court agreed and denied Weldon's motion in limine. However, when Weldon renewed its objection later in the trial, the trial court decided to exclude the testimony of the witnesses because the supplement to Mr. Abernathy's answers to interrogatories was not verified. The supplement was signed by Mr. Abernathy's counsel, but not by Mr. Abernathy. Consequently, the trial court refused to allow the witnesses to testify, and Mr. Abernathy now takes exception to that ruling.

Mr. Abernathy asserts that, while he did not sign the supplement to his answers, this was only a technical error and should not have precluded the witnesses' testimony, particularly in light of the fact that at trial he testified under oath that he approved of the supplement. Mr. Abernathy refers to Rule 37 of the Arkansas Rules of Civil Procedure, which provides certain sanctions for discovery violations. He acknowledges that under the rule, a court may refuse to allow the presentation of certain evidence if it finds that a party has failed to comply with a discovery order or answer interrogatories. However, Mr. Abernathy contends that he answered the interrogatories in a timely fashion, as the trial court originally found. He asserts that the sanctions imposed by the court, which were based solely on the fact that his pleading was unverified, placed form over substance and were unjustified under the circumstances.

Mr. Abernathy further asserts that, had the testimony of the two excluded witnesses been admitted, the outcome of the trial may have been different because their testimony was essential to his defense. An affidavit made by one of the witnesses, Thomas Vastrick, a handwriting expert, was attached to Mr. Abernathy's supplement to his answers. In the affidavit, the expert stated that his analysis of the signature on the purported guaranty, which was faxed to Weldon, was inconclusive. He indicated that, while the signature was similar to that of Mr. Abernathy, he could not rule out forgery or a transfer of the signature from another document because he did not have a copy of the original guaranty. Mr. Abernathy asserts that this evidence and the testimony of the other witness, Jackie Michelle, would have been beneficial to his case, although he does not indicate what the substance of Michelle's testimony would have been.

With respect to Jackie Michelle, we hold that Mr. Abernathy's first argument is precluded from our review because he failed to make a proffer of her testimony at trial. Arkansas Rule of Evidence 103(a)(2) provides that error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected and the "substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." When a party fails to make a proffer of testimony, he may not take issue with its exclusion on appeal. *Carr* v. *General Motors Corp.*, 322 Ark. 664, 911 S.W.2d 575 (1995); *Garner* v. *Kees*, 312 Ark. 251, 848 S.W.2d 423 (1993). In the

case at bar, it is undisputed that no offer of proof was made regarding the excluded testimony of Jackie Michelle. Therefore, any argument about this exclusion was not preserved for our review.

As to the excluded testimony of Thomas Vastrick, we believe that the substance of his testimony was apparent because of his affidavit that was attached to Mr. Abernathy's supplemental answers to interrogatories. However, the gist of his testimony was that he could not determine whether the signature on the guaranty was or was not a forgery. Consequently, even if the trial court erred in excluding this testimony, Mr. Abernathy has failed to demonstrate prejudice. It is no longer presumed that error is prejudicial. *Hibbs* v. *City of Jacksonville*, 24 Ark. App. 111, 749 S.W.2d 350 (1988).

Mr. Abernathy next contends that the trial court's finding that the signature on the guaranty was his was clearly against the preponderance of the evidence. Prior to issuing its ruling, the trial judge stated, "[t]he court believes that this is the signature of Mr. Abernathy or someone has done a good job of forging it." Mr. Abernathy cites Rule 52(a) of the Arkansas Rules of Civil Procedure as authority for the proposition that, after a bench trial, a trial court's findings of fact should be set aside when clearly against the preponderance of the evidence. He asserts that the trial court's ruling on this issue should be reversed pursuant to the above rule.

Although Mr. Abernathy denied signing the guaranty and there were no witnesses to his signing the document, we cannot find that the trial court's ruling on this issue was clearly against the preponderance of the evidence. It is undisputed that Mr. Abernathy was director of development for August in Arkansas and that Weldon would not provide the tickets absent a personal guaranty agreement signed by Mr. Abernathy. While the original guaranty could not be produced at trial, the trial court was presented with a faxed copy which purported to contain Mr. Abernathy's signature. The trial court was able to compare this signature to the signatures on various pleadings filed by Mr. Abernathy in the case, and determined that the signatures matched. From this information, we believe that the trial court could reasonably conclude that Mr. Abernathy signed the guaranty agreement.

Mr. Abernathy's remaining argument is that the trial court erred in finding that he ratified the personal guaranty agreement

through his subsequent telephone conversations with Ms. Vaughan and Mr. Walcott. Specifically, Mr. Abernathy asserts that, absent the finding that he signed the guaranty, he could not be held accountable for the debt because there was insufficient evidence that he ratified a forgery.

We find Mr. Abernathy's final argument to be misplaced. The trial court never made a finding that he ratified a forgery by his subsequent actions. Rather, the trial court stated, "[t]he court further believes that whatever is represented in this Exhibit A was adopted by Mr. Abernathy in subsequent conversations with Mr. Walcott and Ms. Vaughan." This finding was one that the trial court apparently considered in strengthening its opinion that Mr. Abernathy actually signed the guaranty and intended to be bound by it. The trial court believed testimony to the effect that, after the festival, Mr. Abernathy represented that he signed and was bound by a guaranty to cover the indebtedness from the tickets. This is further evidence that Mr. Abernathy was the individual who signed the guaranty agreement. The trial court never found that the signature on the guaranty was a forgery or was not that of Mr. Abernathy, or that any ratification took place in the event that the signature was not his. Thus, we reject his final argument.

Affirmed.

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

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I dissent from the majority opinion because I do not think it was harmless error to exclude the testimony of Thomas Vastrick, the handwriting expert. The appellant's defense at trial was based on his contention that the signature on the faxed guaranty was a forgery. The appellant denied signing the guaranty agreement, and there were no witnesses to his signing the document. He further denied giving anyone permission to sign the document on his behalf. After analyzing the signature on the purported guaranty, Mr. Vastrick was not able to rule out that the signature was a forgery or a transfer of the signature from another document.

There was no other expert testimony before the trier of fact evaluating the authenticity of the signature. Thus, the testimony was not cumulative, and only speculation could lead to the conclu-

sion that the appellant was not prejudiced by the exclusion of this evidence. I fail to see how the appellant was not prejudiced when the excluded evidence pertained to his defense and to the very basis on which the appellant was found liable for the indebtedness. Therefore, I think a substantial right of the appellant was affected by the exclusion of the testimony, and I would reverse and remand for a new trial. *See* Ark. R. Evid. 103(a).

Harold Lee FOXX *v.* AMERICAN TRANSPORTATION

CA 95-218 924 S.W.2d 814

Court of Appeals of Arkansas
En Banc
Substituted Opinion Upon Grant of Petition for Rehearing
delivered June 19, 1996[1]

[1] *Reporter's note*: The original opinion in this case (Robbins, J.), which affirmed the decision of the Arkansas Workers' Compensation Commission, was delivered on February 7, 1996, and was not designated for publication.

The Whetstone Law Firm, P.A., by: *Gary Davis*, for appellant.

Matthews, Sanders & Sayes, by: *Margaret M. Newton* and *Gail O. Matthews*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Harold Lee Foxx sustained a compensable back injury while working for appellee American Transportation in April 1993. American Transportation paid certain benefits, but controverted Mr. Foxx's claim that he had suffered a 5% permanent impairment as a result of his injury. Mr. Foxx filed a claim with the Workers' Compensation Commission, and the Commission ruled that Mr. Foxx failed to prove the alleged 5% impairment. Mr. Foxx now appeals, arguing that the Commission's decision is not supported by substantial evidence. In addition, Mr. Foxx contends that the Commission erred as a matter of law when it relied upon wage-loss disability factors in denying his permanent anatomical impairment rating.

When reviewing decisions from 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 supported by substantial evidence. *Welch's Laundry & Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *City of Fort Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

The evidence in this case shows that Mr. Foxx sustained a knee injury while working for American Transportation on March 15, 1993. Mr. Foxx returned to work and, on April 23, 1993, injured his lower back. When asked how this injury occurred, Mr. Foxx replied, "[p]ossibly bending and stooping, favoring my left knee, the doctors say I pulled the muscles in the left side of my back." He subsequently received medical treatment from Drs. Gil Johnson, Earl Peeples, and Robert McCarron.

Dr. Johnson treated Mr. Foxx four days after his back injury, and indicated that straight leg tests and x-rays were negative. Dr. Johnson diagnosed a lumbar strain, and Mr. Foxx was then attended by Dr. Peeples. Dr. Peeples saw Mr. Foxx in May 1993 and found no definite abnormality. He ultimately determined that Mr. Foxx's healing period ended on June 7, 1993, and rendered the following opinion:

> I do not anticipate the patient would have any permanent impairment of function related to his injury. I do not anticipate any further medical expenses related to his problem.

Dr. McCarron treated Mr. Foxx next, and noted that Mr. Foxx essentially had a normal examination. However, due to urinary symptoms and scrotal pain, Dr. McCarron ordered an MRI which was performed in late June or early July 1993. The MRI revealed a herniated disc at L4-5, and on September 24, 1993, Dr. McCarron estimated a 5% impairment to his body as a whole. It is on this opinion that Mr. Foxx primarily relies.

In addition to the medical evidence, the Commission considered evidence prepared by private investigator Kenneth Jones. Mr.

Jones investigated Mr. Foxx from July 17, 1993, until July 30, 1993. During this time, Mr. Jones prepared a video tape and observed Mr. Foxx operating a mowing service. According to Mr. Jones, he saw Mr. Foxx lift heavy objects, bend down, and run without exhibiting any symptoms of pain or disability. Mr. Foxx was also seen moving a very heavy mower from one location to another. There was further evidence that, during this time, Mr. Foxx was operating a cleaning service which entailed cleaning offices.

In finding that Mr. Foxx failed to prove a 5% permanent anatomical or functional impairment, the Commission weighed the medical evidence along with other evidence of Mr. Foxx's physical capabilities. Although Dr. McCarron assigned a 5% impairment rating, Dr. Johnson failed to assign a rating and Dr. Peeples opined that Mr. Foxx's healing period had ended and that he suffered no permanent functional impairment. The resolution of conflicting medical evidence is a question of fact to be determined by the Commission. *Brantley* v. *Tyson Foods, Inc.*, 48 Ark. App. 27, 888 S.W.2d 543 (1994). In addition to the conflicting medical evidence, the Commission relied on the fact that Mr. Foxx was capable of engaging in relatively heavy labor activities. However, as Mr. Foxx points out, the issue presented to the Commission was whether Mr. Foxx had suffered an anatomical impairment, not whether he had suffered a wage-loss disability. We held in *Second Injury Fund* v. *Fraser-Owens*, 17 Ark. App. 58, 702 S.W.2d 828 (1986), that " 'anatomical impairment' means the anatomical loss as reflected by the common usage of medical impairment ratings." *See Second Injury Fund* v. *Yarbrough*, 19 Ark. App. 354, 721 S.W.2d 686 (1986). The bases for these medical impairment ratings are found generally in *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) published by the American Medical Association. In the introduction to chapter one of this publication, the following definition is found:

> The accurate and proper use of medical information to assess impairment depends on the recognition that, whereas impairment is a medical matter, disability arises out of the interaction between impairment and external demands, especially those of an individual's occupation. As used in the *Guides*, "impairment" means an alteration of an individual's health status that is *assessed by medical means*, "disability," *which is assessed by nonmedical means*, is an alteration of an

> individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements. (Emphasis in original.)

Clearly, the Commission considered Mr. Foxx's capacity to perform strenuous occupational demands in deciding whether he suffered an anatomical impairment. Its opinion included the following:

> Despite all claimant's continued complaints of pain and unknown to his healthcare providers, claimant was working for respondent and ran a cleaning business and lawn care business. Claimant did the cleaning and the yard work himself. He had apparently began these operations while he was off work for the carpal tunnel syndrome. He continued to work after the knee and back difficulties. In fact, claimant's tax return[s] indicate that his cleaning service grossed over $30,000 in 1993.
>
> The evidence shows that claimant was working on lawns with a lawn mower that weighs between 200 and 300 pounds. A videotape illustrates that claimant was quite mobile. He was able to move the lawn mower in and out of a trailer without significant difficulties. There were many other activities on the videotape which indicate that claimant was able to run, jump and actively work.
>
> The preponderance of the evidence does not establish that claimant is entitled to any benefits, even the contingent 5% disability benefits. The Administrative Law Judge apparently relied primarily upon medical reports. However, the videotape indicates that claimant was able to participate in gainful employment at 100% capacity.
>
> Claimant was able to lift mowers and perform many other activities. Therefore, claimant has failed to prove by a preponderance of the credible evidence that he has any impairment. Therefore, we find that respondent should not be liable for a 5% disability rating. When the medical reports, specifically Dr. McCarron's assessment, is weighed against the preponderance of the credible evidence, it is clear that claimant has not sustained a 5% disability rating.

While these evidentiary findings would be highly relevant and

appropriate in determining wage-loss disability, wage-loss disability was not an issue. However, the Commission held that, because Mr. Foxx "was able to participate in gainful employment at 100%," he was not entitled to *any* benefits.

■ We agree with Mr. Foxx that the Commission has blurred the distinction between anatomical impairment and wage-loss. The landmark case of *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961), involved a decision of the Commission which held that evidence other than clinical findings could not be considered to arrive at a rating for permanent partial disability. The supreme court reversed and remanded because disability in excess of anatomical impairment was sought. *See also Ray* v. *Shelmutt Nursing Home*, 246 Ark. 575, 439 S.W.2d 41 (1969). Here, disability (wage-loss) in excess of anatomical impairment has never been sought by Mr. Foxx.

■ While we do not hold that nonmedical proof is wholly irrelevant to the issue of anatomical impairment, the Commission may not arbitrarily disregard a physician's opinion (*Wade* v. *Mr. C. Cavenaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988)), especially when based on objective and measurable findings. Though the opinions of the medical experts conflicted, Dr. McCarron had the benefit of an item of objective medical proof that Dr. Johnson and Dr. Peeples did not. Dr. McCarron reported that an MRI was performed which revealed a herniated disc. The Commission may not have believed Dr. McCarron, or it may have believed that the herniated disc was not caused by the compensable injury, but, if so, it should have said as much.

We remand this proceeding to the Commission for it to make some finding regarding Dr. McCarron's report and the MRI which reflected a herniated disc.

Reversed and remanded.

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

PITTMAN and ROGERS, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. Today this court takes a stroll down the primrose path, lured by a disingenuous argument. By this decision, the majority holds that the Workers' Compensation Commission cannot consider evidence demonstrating the absence of functional incapacity in determining whether or

not a claimant has suffered any degree of permanent disability. In other words, it is being held that the issue of permanent functional or anatomical impairment is a question to be determined purely by expert medical testimony. The majority so holds based only on the dubious authority of two second injury fund cases that touch upon the concept of impairment as it relates to the fund's liability, as well as on an equally dubious reference to an introduction contained in the American Medical Association's *Guides to the Evaluation of Permanent Impairment.* I submit that this decision is unprecedented and contrary to our established law that it is the function of the Commission to weigh all of the evidence, resolve conflicts, and determine the credibility of the witnesses. Therefore, I dissent.

Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. *Johnson* v. *General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.*

In this case, only one of appellee's three physicians was of the opinion that appellant had suffered a permanent impairment stemming from his injury. Even this physician assigned only a minimal rating of five percent. The Commission discounted that opinion based on evidence, unknown to that physician, demonstrating appellant's ability to perform strenuous manual labor without any apparent difficulty. In the videotape that the Commission had before it, appellant was observed operating a yard service and doing such things as lifting heavy machinery, running, and jumping. Appellant was also said to be engaged in cleaning offices. In light of appellant's demonstrated physical capabilities, the Commission gave no weight to the doctor's opinion and concluded that appellant had suffered no functional or anatomical impairment so as to justify an award of permanent disability.

We should be guided in our decision by the standard of review. Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Johnson* v. *American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992). In conducting our review, we have recognized that it is the function

of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Crow* v. *Weyerhaeuser Co.*, 46 Ark. App. 295, 880 S.W.2d 320 (1994). We have said that the Commission has the duty of weighing medical evidence as it does any other evidence, and that resolving any conflict is a question of fact for the Commission. *Id.* We have further recognized that, although the Commission may not arbitrarily disregard the testimony of any witness, it is not bound by medical opinion. *Reeder* v. *Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is also entitled to examine the basis for a doctor's opinion, like that of any other expert, in deciding the weight to which that opinion is entitled. *Id.* The Commission is charged with the duty of translating the evidence into findings of fact. *Johnson* v. *General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

Fairly recently, we have also observed that the Commission is not limited, and never has been limited, to the consideration of medical evidence alone in arriving at its decision as to the *amount* or *extent* of permanent partial disability suffered by an injured employee. *Id.* In *Johnson* v. *General Dynamics*, the Commission had both denied wage loss benefits and found that the claimant had not sustained a permanent anatomical impairment because the evidence failed to include a numerical impairment rating. We upheld the Commission's denial of wage loss benefits, but we reversed the Commission's decision that appellant was not entitled to benefits for permanent anatomical impairment. We held that the absence of a numerical impairment rating was no impediment to a finding of permanent functional impairment. In making that decision, we considered not only medical evidence but also the testimony of the claimant as to her physical limitations resulting from the injury. And also recently, we considered evidence of the appellant's ability to work as a truck driver ten to twelve hours a day, five to six days a week, in sustaining the Commission's denial of permanent partial disability. *Crow* v. *Weyerhaeuser Co.*, *supra*. More to the point, in *Bibler Brothers, Inc.* v. *Ingram*, 266 Ark. 969, 587 S.W.2d 841 (Ark. App. 1979), we expressly approved of the Commission's consideration of lay testimony in addition to the medical evidence in assessing permanent partial impairment. Nevertheless, the majority holds today that the evidence relied upon by the Commission is not pertinent evidence to consider when determining the existence or degree of permanent functional disability, and that such evidence is only relevant to a determination of wage loss. I can find no support

for this proposition.

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. Ark. Code Ann. § 11-9-102(5) (1987).[1] Arkansas Code Annotated § 11-9-522(a) (1987) provides:

> A permanent partial disability not scheduled in § 11-9-521 shall be apportioned to the body as a whole, which shall have a value of four hundred fifty (450) weeks, and there shall be paid compensation to the injured employee for the proportionate loss of use of the body as a whole resulting from the injury.

In *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961), the supreme court held that the legislature's use of the term "loss of the use of the body as a whole" does not mean merely functional disability, but also includes loss of use of the body to earn substantial wages, *i.e.*, wage loss. In so holding, the court relied on a passage from Professor Larson's treatise:

> The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: the first ingredient of disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements or exertions; the second ingredient is de facto inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.

233 Ark. at 787, 346 S.W.2d at 686-87 (quoting A. Larson, *The Law of Workmen's Compensation*, § 57.10). While noting the distinction between physical and wage-loss disability, I can find nothing in Larson's or our case law since the decision in *Glass* v. *Edens* that draws a bright line between the kind of proof that can be considered to support either concept of disability. In no decision, since either *Glass* v. *Edens* or even the inception of our law on workers' compensation, has it ever been held that evidence demonstrating the lack of functional limitation is not relevant to the issue of

[1] This case is governed by the law prior to the 1993 legislative enactment.

functional impairment or disability. Perhaps that is so because common sense dictates a contrary conclusion. While in some instances medical testimony might be considered indispensable, that does not lead to a strict conclusion that non-medical testimony is not relevant to either supplement the medical testimony or to contradict it. Of course, the natural corollary to the decision in this case is that even the claimant's testimony as to his or her physical abilities is not competent evidence for the Commission to consider in assessing functional or anatomical impairment.

It has been held that in examining the record for substantial evidence to support an award or denial of compensation for permanent partial disability, the examination is directed to all the competent evidence and is not confined to the medical evidence alone. *Vaccaro-Grobmeyer Co.* v. *McGarity*, 249 Ark. 1132, 463 S.W.2d 372 (1971). And Larson, as is embodied in our case law, *see, e.g.*, *Reeder* v. *Rheem Mfg. Co.*, *supra*, recognizes that if a Commission wishes to enter an award contradicting the medical testimony, it must take care to show in the record the valid competing evidence or considerations that impelled it to disregard the medical evidence. 2B A. Larson, *The Law of Workmen's Compensation*, § 79.52(d) (1995). That is precisely what the Commission did here. It evaluated the medical testimony assigning a five percent impairment rating against evidence demonstrating that the appellant was not suffering from any degree of functional or anatomical impairment, and it concluded that appellant was not entitled to permanent partial disability benefits. To make that assessment is undeniably within the purview of the Commission, and I cannot say that its disregard of the medical opinion was arbitrary in any way. In sum, the Commission's decision displays a substantial basis for the denial of permanent disability benefits.

Perhaps the majority's confusion stems from the fact that the videotape happens to show appellant performing work-related activities. If so, the majority has missed the point. The point made by the tape is not that appellant can perform his job, but rather that the activities portrayed, regardless of their nature, tend to demonstrate that he is not, in fact, physically impaired in any degree.

To be of the opinion that the Commission is only permitted to consider expert medical opinion and testimony in determining the existence or degree of permanent functional or anatomical impairment is without precedent. To hold that evidence showing the

absence of physical limitation is irrelevant is nothing short of preposterous. With all due respect, such evidence is highly probative in determining the existence or degree of permanent disability. I cannot agree then with this court's erection of a line of demarcation in the kind of proof that can be offered. Furthermore, I seriously question the majority's citation to the AMA Guidelines as authority. Our legislature never adopted those standards and to use what amounts to a preface in that literature to add substance to our body of law is not only misguided but also strikes me as judicial legislation.

In closing, I also take issue with the majority's direction to the Commission on remand. Its discussion of Dr. McCarron's testimony gives the firm impression that the court considers his opinion more worthy of belief. It should go unsaid that it will be for the Commission to decide issues of credibility and weight to be given the various witnesses' testimony.

ROGERS, J., joins in this dissent.

ATKINS NURSING HOME *v.* Carol GRAY

CA 95-920 923 S.W.2d 897

Court of Appeals of Arkansas
Division III
Opinion delivered June 19, 1996

Walter A. Murray, for appellant.

Susan Walker Allen, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the administrative law judge's decision. The ALJ found that on August 20, 1993, appellant sustained a recurrence of her low-back condition, that appellee was responsible for medical expenses and that appellant was entitled to temporary total disability benefits from August 23, 1993, to a date yet to be determined. Also, the Commission determined that Act 796 of 1993 was inapplicable to recurrences of injuries which originally occurred prior to the effective date of Act 796. On appeal, appellant argues that there is no substantial evidence to support the Commission's decision and that the Commission erred in finding that Act 796 was inapplicable. We disagree and affirm.

The record reveals that appellee, age thirty-four, was a certified nurse's aide for appellant. While trying to change linens under a patient, Patsy Price, she sustained an injury to her lower back on July 16, 1992. She experienced a burning sensation in her lower back and reported the incident to LPN, Renee Glenn. She rested over the weekend, missed a day of work and received medical treatment. On Friday, August 20, 1993, while lifting a patient into a shower chair, appellee felt a hot burning sensation in the same area as she had in July of 1992. She completed her shift and rested over the weekend. She returned to work Monday, August 23, and reported the incident to Kay Parker, who assured her that her claim was covered. Later, after appellee had received medical attention, she was informed that the time limit from the first injury had expired and that her claim would not be covered. Subsequently, appellee filed a claim for benefits.

On appeal, appellant argues that there is no substantial evidence to support the Commission's decision that appellee suffered a recurrence of her 1992 injury. We disagree.

■ 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. The issue is not whether we might have reached a different result or whether the evidence would have

supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Harvest Foods* v. *Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for every natural consequence that flows from that injury. If, after the period of initial disability has subsided, the injury flares up without an intervening cause and creates a second disability, it is a mere recurrence, and the employer remains liable. *McDonald Equip. Co.* v. *Turner*, 26 Ark. App. 264, 766 S.W.2d 936 (1989). A recurrence is not a new injury but simply another period of incapacitation resulting from a previous injury. *See Pinkston* v. *General Tire & Rubber Co.*, 30 Ark. App. 46, 782 S.W.2d 375 (1990).

The record reveals that appellee sustained a compensable injury in July of 1992. This injury was a muscle strain with spasm. Appellee testified that she continued to experience soreness with exertion. She said that she would work four days, but would have to lie down and rest the next day. Appellee testified that in March and April of 1993, she became more symptomatic and that she mentioned this to a co-worker, Darlene Epperson. Appellee said that on Friday, August 20, while lifting a patient into a shower chair, she felt a hot burning sensation in the same area as her previous injury.

Appellee was seen by Dr. Dale Barton. Dr. Barton diagnosed back pain with observable muscle spasms and degenerative disc disease at L5-S1. An MRI revealed an abnormality at L4-5. Dr. Barton referred appellee to Dr. Scott M. Schlesinger. Dr. Schlesinger reviewed the MRI and suggested that appellee may have a disc protrusion at L4-5. He recommended a myelogram CT scan, but his evaluation was not completed because the claim was denied, and appellee could not afford the costs.

Ms. Parker testified that appellee came in in 1993 and showed her where she had hurt her back. Ms. Parker said that appellee said it was in the same place as the previous injury.

The ALJ clearly gave great weight to the testimony of appellee in finding that appellee injured her back in 1992, returned to heavy manual labor, remained symptomatic and suffered a recurrence in 1993. The ALJ further found that the 1993 injury was reported and that appellant considered this a recurrence by advising appellee that she did not have to complete another accident form,

by sending her to the company doctor, and by providing light duty. The ALJ concluded that appellee had proven by a preponderance of the credible evidence that appellee had sustained a recurrence of her low back condition on August 20, 1993. Based on the record before us, we cannot say that there is no substantial evidence to support the Commission's finding that appellee sustained a recurrence of her 1992 injury.

For its second point, appellant argues that the Commission erred in finding that Act 796 of 1993 was inapplicable to the facts of this case. We disagree.

As discussed above, a recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Under the general provisions of the 1993 workers' compensation statute chapter nine, subchapter one, it is provided that "the provisions of this act shall apply only to injuries which occur after July 1, 1993." The record clearly reflects that appellee's injury was in 1992 before the enactment of Act 796. Consequently, Act 796 does not apply to this case because appellee did not sustain an injury after July 1, 1993, but merely another period of incapacitation. Therefore, the Commission did not err in determining that the new act did not apply.

Appellant also challenges the Commission's finding that appellee was entitled to medical benefits and temporary total disability benefits.

The Commission directed appellant to pay all reasonable medical expenses associated with appellee's lumbar injury. Appellant argues, under Act 796, that to be entitled to medical benefits appellee would have to show that her compensable injury was the major cause of her disability or need for treatment. Based on our earlier finding that Act 796 does not apply to this case, appellant's argument is without merit.

The Commission also found that appellee was entitled to temporary total disability benefits from August 23, 1993, to a date yet to be determined because she was unable to work and thus remained in her healing period. After reviewing the record, we

cannot say that there is no substantial evidence to support the Commission's decision.

Affirmed.

ROBBINS and NEAL, JJ., agree.

Wilma CROSS *v.* CRAWFORD COUNTY MEMORIAL HOSPITAL

CA 95-721 923 S.W.2d 886

Court of Appeals of Arkansas
En Banc
Opinion delivered June 19, 1996

Walker Law Firm, by: *Eddie H. Walker, Jr.* and *R. Scott Zuerker*, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *E. Diane Graham*, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the administrative law judge's decision denying appellant's claim for wage-loss disability benefits. On appeal, appellant argues that there is no substantial evidence to support the Commission's denial of wage-loss disability benefits. We agree that the Commission's decision cannot stand, and we reverse.

The record reveals that appellant was a fifty-nine-year-old practical nurse who worked for appellee for twenty-four years. She has a seventh grade education and worked her way to the position of nurse's aide. Appellant attended LPN school and passed her state boards before taking the position with appellee. Her duties as a practical nurse included total patient care. She was assigned four or

five patients whom she bathed and fed. She also administered medication to those patients. The record also indicates that appellant's job required heavy lifting and repetitive bending.

On December 9, 1991, she sustained an admittedly compensable injury to her back and was assigned a 10% anatomical impairment rating. Appellee paid temporary partial disability benefits until March 10, 1994, and permanent partial disability benefits based on a 10% permanent physical impairment rating. In June 1994, appellant was laid off along with twenty other employees. Appellant testified that she has sought employment since the lay-off, but she has not been able to find employment.

The medical evidence reflects that appellant was seen by Dr. Richard D. DeKok, Director of Physical Therapy with Crawford Memorial Hospital. On June 28, 1994, Dr. DeKok noted that it was his goal as far back as December 1993 that appellant could increase to an eight-hour light duty shift with certain restrictions. The record indicates, however, that appellant returned to light duty in July 1993, and was provided only a four-hour work day until she was laid off in June of 1994. Appellant testified that she went back to work expecting an eight-hour day, and she did not understand why she was only given four hours. She also said that she never refused to work. Appellant stated that even though the work bothers her physically, she would rather work than draw social security disability.

Appellant also testified that when she returned to light duty in 1993 she discussed attending classes at Westark Community College with Ms. Jo Hilgendorf, appellee's Human Resource Director. Appellant said that she checked the class schedule and contacted Ms. Hilgendorf. According to appellant, Ms. Hilgendorf said that she would "get back with her," but Ms. Hilgendorf never called her back to confirm the courses. Appellant also stated that she was not made aware that appellee would be responsible for the cost of the courses. Appellant filed a claim requesting additional temporary total disability benefits and wage-loss disability benefits.

At the hearing, appellant was the only witness to testify. It was not until approximately nine days after the hearing that Ms. Hilgendorf's deposition was taken. She testified that appellee would cover the costs of courses at Westark College and have a position for appellant if she completed the courses and if a job were available.

Appellant gave a deposition in response to that of Ms. Hilgendorf in which she said that she would be willing to go to Westark College for training in typing and computer skills if appellee shouldered the costs.

The ALJ stated in his opinion:

> If the claimant successfully completes the courses required at Westark Community College and if the respondent/employer rehires the claimant at a wage equal to or greater than the wage she was drawing prior to her injury, then the claimant does not have a wage loss disability. The claimant would argue that if she cannot complete the courses or if the respondent/employer does not re-employ her, then she has a wage loss disability. *It appears to me that the issue of permanency was prematurely addressed.* The issue should have been couched in terms of a request for rehabilitation benefits. It was not, therefore I find that claimant failed to prove by a preponderance of the credible evidence that she has a wage loss disability. (Emphasis added.)

After making a finding that the issue of wage loss was premature, the ALJ summarily denied appellant wage-loss disability because of insufficient credible evidence. It appears from the ALJ's decision that his basis for the denial of wage-loss benefits was that the issue was premature and that the issue should have been "couched in terms of a request for rehabilitation benefits." We find that the ALJ erred in denying appellant wage-loss disability benefits after he determined the issue to be premature. A finding on the issue of wage-loss disability should have been held in abeyance based on the ALJ's finding. Therefore, we reverse the Commission's denial of wage-loss disability benefits in light of its finding that the issue was premature.

We also note, that despite the Commission's finding that the issue of permanency was premature, the Commission failed to make specific findings of fact in determining appellant's entitlement to wage-loss disability benefits. In addition, the limited findings that the Commission did make are not supported by the record.

■ The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters

affecting wage-loss, such as the claimant's age, education, and work experience. *Bradley* v. *Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995). "The employer or his workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee'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 his accident." Ark. Code Ann. § 11-9-522(c)(1) (Repl. 1996).

The ALJ made the following findings regarding wage-loss disability:

> Even prior to the June 1994 layoff the claimant was advised by Jo Hilgendorf, Human Resources Director for Crawford County Memorial Hospital, that Crawford County Memorial Hospital would pay for computer training at Westark Community College which is located in Fort Smith. After schooling she would be employed by the respondent employer in either medical records or admissions. She would also be employed at the same rate of pay she was making prior to her compensable injury. For reasons known only to the claimant, she showed no interest in attending Westark Community College for training.

The ALJ failed to make specific findings with regard to the factors it should have considered when determining the issue of wage-loss disability benefits. The ALJ did not indicate that he considered appellant's age, education, work experience, or medical condition. The Commission adopted that ALJ's decision which failed to make sufficient factual findings that would enable the appellate court to conduct a meaningful review of the Commission's decision. *See Arkansas Dep't of Health* v. *Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993). A specific finding must contain all the specific facts relevant to the contested issue or issues so that the reviewing court may determine whether the Commission has resolved those issues in conformity with the law. *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). In this case, the ALJ failed to make specific findings with regard to the issue of wage-loss disability, and the limited findings that were made do not appear to be supported by the record.[1]

---

[1] The dissent does make specific findings from the evidence in the record to support the

The record reveals that there was no actual offer of employment made by appellee to appellant. Ms. Hilgendorf said that *if* appellant was capable of performing the work, *if* a job was available, and *if* appellant could work eight hours a day then there *may* be a position as a ward secretary or in medical records when the computer equipment arrived. She testified that there was not a job available at the present time based on appellant's current level of experience, education, and medical condition.

Arkansas Code Annotated § 11-9-522(c)(1) places the burden on the employer of providing "a bona fide offer to be employed." This means that there must be an actual offer of employment. *See Weyerhaeuser Co.* v. *McGinnis*, 37 Ark. App. 91, 824 S.W.2d 406 (1992). The evidence in this case does not show that appellant was offered a job. In fact, the evidence shows that any type of job available to appellant was speculative and based on future circumstances. Also, there is *no* evidence in the record indicating what rate of pay appellant would receive if she returned to a job with appellee. Furthermore, in noting that "[f]or reasons known only to the claimant, she showed no interest in attending Westark Community College for training," the ALJ completely disregarded appellant's testimony explaining why she had not attended classes. It would have been appropriate for the ALJ to make a credibility determination with regard to appellant's testimony on this point, but that is not what occurred.

Ordinarily, we would remand a case when the Commission fails to make specific findings to support its conclusion on an issue. However, in this case, the Commission's decision must be reversed because of the Commission's finding that the issue of wage-loss was premature. Consequently, the onus will be on appel-

---

Commission's denial of wage-loss disability. In accusing the majority of not following the appropriate standard of review, the dissent has done exactly what it condemns. The dissent has made credibility determinations, weighed the evidence, and gone to the record to bring forth evidence to support its position. While there may be evidence in the record to support a finding one way or the other, neither the ALJ nor the Commission resolved the wage-loss issue by appropriate findings of fact. *See Sonic Drive Inn* v. *Wade*, 36 Ark. App. 4, 816 S.W.2d 889 (1991). It is not our duty or role on review to go to the record and make those specific findings of fact. Only when the Commission fails in its responsibility to set forth specific findings of fact or when it determines an issue to be premature but then rules on that issue, does it then become our responsibility to correct the Commission's error by either remanding the case or reversing the decision.

lant to file a claim for wage-loss disability at an appropriate time when the issue is ripe for consideration.[2]

Reversed.

COOPER, ROBBINS, and MAYFIELD, JJ., agree.

JENNINGS, C.J., and GRIFFEN, J., dissent.

WENDELL L. GRIFFEN, Judge, dissenting.

She was the daughter of Zeus alone. No mother bore her. Full-grown and in full armor, she sprang from his head.

— Edith Hamilton, *Mythology* 29 (1942)

I respectfully dissent from the court's decision reversing the Commission because I believe that the Commission's decision that appellant failed to prove her entitlement to benefits for diminution of her wage-earning capacity beyond her 10% physical impairment rating is supported by substantial evidence. Appellant is a 59 year-old licensed practical nurse who completed the seventh grade, obtained her GED, and then completed nurses' aide training. She sustained a compensable injury December 10, 1991, and was assigned the impairment rating by her authorized doctor. She sought additional permanent disability benefits for diminution of her capacity to earn wages, and argues that she is unable to work full days and lacks the training for a better paying job. The Commission weighed the evidence on her claim for additional benefits, found that she had failed to meet her burden of proof, and affirmed and adopted the findings and conclusions of the administrative law judge on the wage loss issue. Instead of abiding by the substantial evidence standard of review that applies to workers' compensation cases, the majority has now elevated itself to a super-Commission in order to reverse the Commission. Because I am convinced that the substantial evidence standard deserves more than lip service from the appellate court responsible for deciding the majority of workers' compensation appeals in Arkansas, I write to explain why I cannot join in that decision.

---

[2] The dissent incorrectly notes that this case is remanded to the Commission "so that the parties may develop and present proof about appellant's training and employment." This case is being reversed because an issue was determined to be premature. The burden is on appellant to file a claim in the future if she wishes to seek wage-loss disability benefits.

Appellant's doctor diagnosed her injury as a healing grade II compression fracture of T-10, without neurological defects, and accompanied by osteoporosis. She was also evaluated by a neurosurgeon who opined that she needed to wean herself from a back brace, begin physical therapy, and enter a fitness program to strengthen her back muscles. The director of physical therapy at Crawford Memorial Hospital (where appellant worked) noted that appellant could tolerate an eight-hour light duty work schedule if she avoided heavy lifting and was not restricted to remaining in a fixed position for extended periods of time. The employer returned her to light duty work, but was unable to retain her because of a reduction in its patient census. Appellant was laid off with nineteen other employees due to the decreased patient census in June 1994.

Even before the layoff occurred, appellant had been advised by her employer's human resource director that the employer would pay for her to obtain computer training at Westark Community College, and that she would be employed by the employer after the training to work in either medical records or admissions, and at her pre-injury wage. Appellant made no attempt to enroll in that training, and claims that she did not know about it until the hearing occurred on her claim. Instead, she filed for unemployment benefits several days after the layoff, and was drawing those benefits as of August 15, 1994, when her claim was heard by the administrative law judge. Despite the physical therapy director's indication that she could tolerate an eight-hour light duty work schedule and despite numerous physical therapy record entries indicating that appellant had been encouraged to increase her work hours before the layoff occurred, appellant did not increase the work hours and denied that she had even been encouraged to work longer than five hours a day. Her clinical examinations produced normal MRI and neurological findings, and the medical proof clearly shows that the compression fracture of her thoracic spine had healed.

I review this proof because our substantial evidence standard requires that we do so. We are not required to engage in this review in order to determine whether we would have reached the same result that the Commission reached. It is fundamental law that an appellate court reviews the evidence and all reasonable inferences from it in the light most favorable to the findings of the Workers' Compensation Commission, whose findings will be upheld if there is any substantial evidence to support its result, even if the prepon-

derance of the evidence would support a different result. Because appellate review is not de novo, we are not to be concerned with the weight of the evidence nor the credibility of witnesses. *Hawthorne* v. *Davis*, 268 Ark. 131, 594 S.W.2d 844 (1980). The proposition has been cited so many times that citation is virtually unnecessary that on appeal from a decision of the Commission, the reviewing court is not privileged to consider the evidence de novo or to weigh the evidence, but must give the evidence its strongest probative force in favor of the actions of the Commission, which carry the same weight as a jury verdict. *See O.K. Processing, Inc.* v. *Servold*, 265 Ark. 352, 578 S.W.2d 224 (1979); *Barksdale Lumber Co.* v. *McAnally*, 262 Ark. 379, 557 S.W.2d 868 (1977). On appeal from a decision of the Commission, the evidence must be viewed most favorably to the findings of the Commission, whether they be for the claimant or the employer, and the decision must be affirmed unless there was no substantial evidence to support the Commission's decision. *Turner* v. *Lambert Const. Co.*, 258 Ark. 333, 524 S.W.2d 465 (1975). Where a claimant appeals from an adverse Commission decision, she has the burden of showing that the proof before the Commission was so nearly undisputed that fair-minded persons could not have arrived at the Commission's adverse finding. *Franks* v. *Amoco Chemical Co.*, 253 Ark. 120, 484 S.W.2d 689 (1972).

The clear message from these holdings is that our appellate function in performing substantial evidence review is not to weigh the evidence as if we were the Commission. We do not exist to give losing parties a second chance to meet their burden of proof. Implicit in the substantial evidence standard of review is the view that where a trier of fact is confronted with conflicting evidence capable of supporting more than one conclusion, any conclusion supported by that evidence is reasonable. This is but another way of recognizing that evidence susceptible to more than one conclusion can logically produce different conclusions in the minds of reasonable people. The fact that we might have reached a different result from that reached by the Commission is immaterial and does not warrant reversal if reasonable people could have reached the same result that the Commission reached.

I cannot agree that reasonable persons who were confronted with proof showing that appellant made no effort to pursue retraining, failed to comply with repeated attempts by doctors and physical

therapists to increase her working hours, and promptly applied for unemployment benefits when the layoff occurred could not have concluded that she failed to prove that her capacity to earn her regular wages had been permanently diminished *due to the compression fracture sustained at work.* Indeed, it is noteworthy that the opinion of the Court does not even suggest that the majority holds this view, although that is the upshot of the result. Appellant may have a diminished capacity to earn due to her refusal to aggressively pursue the retraining opportunity. Her earning capacity may be diminished because she is unwilling to wean herself from the back brace that doctors have told her to put aside. Her capacity may be diminished because she is motivated to receive whatever sympathy that one might have for a person claiming to be disabled. But the entity responsible for deciding if she has sustained a permanent diminution in her earning capacity due to the compensable injury is manifestly the Arkansas Workers' Compensation Commission, not the Arkansas Court of Appeals.

The Seventy-Ninth General Assembly apparently contemplated the very type of judicial disregard of the substantial evidence standard and result-oriented decision-making that this case demonstrates when it enacted Act 796 of 1993, and made what many observers may deem drastic changes in Arkansas workers' compensation law. The General Assembly left no doubt why it deemed the changes necessary, because its motivation is bluntly stated at Ark. Code Ann. § 11-9-1001 (Repl. 1996):

> The Seventy-Ninth General Assembly realizes that the Arkansas workers' compensation statutes must be revised and amended from time to time. *Unfortunately, many of the changes made by this act were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually broadened the scope and eroded the purpose of the workers' compensation statutes of this state. . . . In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts . . . or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and not be done by administrative law judges, the Workers' Compensation Commission, or the courts.* (Emphasis added.)

The decision reached in this case is a gross violation of the substantial evidence standard of review that has existed in this state

since 1939 when our workers' compensation scheme took effect. The majority explains its decision by relying upon an observation made by the administrative law judge that appellant's claim for permanent disability benefits for diminution of her earning capacity appeared premature. The law judge made that observation because appellant had not been retrained and had not returned to gainful employment. The result reached by the majority appears prompted by the concern that the Commission prematurely addressed the wage loss disability question, and the appeal is disposed of by remanding the case to the Commission so that the parties may develop and present proof about appellant's training and employment.

The flaw in that reasoning is that appellant did not object to the wage loss issue being adjudicated. To the contrary, she sought the hearing and put this very issue squarely before the Commission. She had ample opportunity to produce whatever proof she could present on the wage loss issue, and by doing so, she was essentially opting to forego rehabilitation. That may have been unwise, but if so, the Court of Appeals has no obligation or right to insulate appellant from the logical consequences of her folly. Moreover, we should not require the winning party to endure the risks, costs, and other burdens of another hearing on the same issue of appellant's wage loss when *no one* objected to the first hearing before the Commission *and no one (including appellant)* has made the Commission's decision to proceed with the hearing an issue for appeal.

We have consistently refused to consider issues on appeal that were not raised below,[1] and the majority has cited no authority for the proposition that a party who knowingly and purposely presents a claim for adjudication can object about the claim being decided. The decision reached is a flagrant departure from one of the most basic principles of appellate review — that failure to make a timely and effective objection at the trial level bars appellate review.

---

[1] The majority, in the past, has not only supported the concept that issue preservation is a hallmark of appellate review, but also has held that workers' compensation cases are no exception to the rule. *See Mecco Seed Co.* v. *London*, 47 Ark. App. 121, 886 S.W.2d 882 (1994); *Reed* v. *Reynolds Metals*, 33 Ark. App. 89, 801 S.W.2d 661 (1991); *Curry* v. *Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990); *McClain* v. *Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989); *Ward* v. *Fayetteville City Hosp.*, 28 Ark. App. 73, 770 S.W.2d 668 (1989); and *Dedmon* v. *Dillard Dept. Stores, Inc.*, 3 Ark. App. 108, 623 S.W.2d 207 (1981).

Like Athena, who was born fully grown and clad in armor from the brow of Zeus, the idea that the Commission prematurely decided appellant's wage loss claim has sprung from the mind of the majority. The employer must find it amazing, but not amusing, that its judges became its adversaries.

I respectfully dissent from the result that is reached, and the reasoning employed to obtain it.

JENNINGS, C.J., joins in this dissent.

FARMLAND INSURANCE COMPANY *v.* Tracy DUBOIS

CA 95-911 923 S.W.2d 883

Court of Appeals of Arkansas
Division III
Opinion delivered June 19, 1996

Womack, Landis, Phelps, McNeill & McDaniel, by: *David Landis* and *Mark Alan Mayfield*, for appellant.

Denver L. Thornton, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the administrative law judge's decision. The ALJ found that appellee sustained a compensable back injury on March 12, 1994, and awarded medical benefits and temporary total disability benefits from March 23, 1994, until a date yet to be determined. On appeal, appellant argues that there is no substantial evidence to support the Commission's decision. We disagree and affirm.

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. The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *St. Vincent Infirmary Med. Ctr.* v. *Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

Appellee testified that while working on Saturday, March 12, 1994, she replaced a canister of coke syrup into a fountain machine and felt a burning pain down her right side to her foot. She said that she informed her co-workers Penny Howie and Janet George of the event. The record reveals that appellee was prescribed medication and was off work until the following Thursday. Appellee testified that while walking to work on March 22, 1994, she again felt burning pain in her right leg. She said that she called Bob Hardin, the regional manager, before going to the emergency room.

Ms. George testified that appellee called her on March 12, 1994, and reported that she had hurt her back.

The Commission found appellee's testimony credible and concluded that the incident on March 12, 1994, aggravated appellee's previous back condition. The Commission specifically found that appellee proved by a preponderance of the evidence that her injury was caused by a specific incident that was identifiable by time and place of occurrence.

On appeal, appellant contends that, because appellant had a preexisting back condition which was aggravated by an incident at work, she must prove that the incident at work was the major cause of her recent disability. We disagree.

Arkansas Code Annotated § 11-9-102(5)(A),(E), and (F) (Repl. 1996) provide in part:

> (5)(A) "Compensable injury" means:
>
> > (i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence;

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(a) ...

(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence;

...

(E) Burden of Proof. The burden of proof of a compensable injury shall be on the employee and shall be as follows:

(i) For injuries falling within the definition of compensable injury under subdivision (5)(A)(i) of this section, the burden of proof shall be a preponderance of the evidence;

(ii) For injuries falling within the definition of compensable injury under subdivision (5)(A)(ii) of this section, the burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

(F) Benefits.

(i) When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided by this chapter.

(ii)(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment,

> permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" means more than fifty percent (50%) of the cause. Ark. Code Ann. § 11-9-102(14)(A) (Repl. 1996).

In this instance, the Commission found evidence that appellee's injury was caused by a specific incident. Therefore, there was no requirement for it to be shown that the compensable injury was the major cause of her disability. Under Ark. Code Ann. § 11-9-102(5)(E)(ii), that becomes a requirement only when the injury was not occasioned by a specific incident. Consequently, we find no merit in appellant's argument.

Also, Ark. Code Ann. §§ 11-9-102(5)(F)(i) & (ii) provide that when an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided by this chapter. It goes on to specifically provide that if any compensable injury combines with a preexisting condition, *permanent* benefits shall be payable only if the compensable injury is the major cause of the permanent disability or need for treatment. Therefore, when a claimant who has sustained a compensable injury is seeking permanent disability benefits there is a requirement to prove that the compensable injury is the major cause of the permanent disability. In this case, appellee was only seeking medical benefits and temporary total disability. Therefore, appellant's argument is misplaced.

Appellant further contends that the Commission erred in finding that appellant's injury was caused by a specific incident when there is an aggravation of a preexisting condition. Appellant argues that an aggravation rules out the possibility that appellee's disability is caused by a single incident. We do not agree with appellant's reasoning.

An aggravation is a new injury resulting from an independent incident. *See Pinkston* v. *General Tire & Rubber Co.*, 30 Ark. App. 46, 782 S.W.2d 375 (1990). The independent incident must be shown to be work-related to establish compensability. In addition, under Ark. Code Ann. § 11-9-102(5)(A)(i), it must be shown that the accidental injury was caused by a specific incident identifiable by time and place of occurrence. In this case, the independent incident was appellee's accident at work of moving the coke canis-

ter. The Commission found, and we have agreed, that the incident was compensable and that it met the definition of an "accidental injury" because it was a specific incident identifiable by time and place of occurrence. Therefore, an aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury and can be caused by a specific incident.

Affirmed.

ROBBINS and NEAL, JJ., agree.

Ezra Earl MAGLOTHIN, Jr. *v.* STATE of Arkansas

CA CR 95-473 924 S.W.2d 468

Court of Appeals of Arkansas
Division III
Opinion delivered June 19, 1996
[Petition for rehearing denied August 14, 1996.]

Woodruff & Huckaby, P.A., by: *Curt Huckaby*, for appellant.

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

JUDITH ROGERS, Judge. Appellant was convicted by a jury of four counts of theft of property and sentenced to twelve years. On appeal, appellant argues that the trial court erred in denying his motion to dismiss. We disagree and affirm.

On November 4, 1993, appellant and his accountant, Glen Reed, were indicted by a federal grand jury charging them with multiple counts of mail fraud, one count of wire fraud, obstruction of justice, theft, and two counts of money laundering. Appellant was acquitted of all charges. At Mr. Reed's trial, appellant testified against Reed and in doing so incriminated himself. Two months later, the State of Arkansas charged appellant with four counts of theft. Appellant filed a pretrial motion to dismiss arguing that he was granted "use immunity" when he testified against his accountant; and therefore, he could not be prosecuted based on any testimony derived from that previous proceeding. Appellant asserted that the state did not have any evidence outside of the immunized testimony to charge him with theft. The trial court denied appellant's motion.

On appeal, appellant argues that the trial court erred in denying his motion to dismiss based on the finding that no immunity was granted. We disagree.

The burden of proving an agreement granting immunity and appellant's compliance with it rested upon appellant. *Young* v. *State*, 316 Ark. 225, 871 S.W.2d 225 (1994). The determination of whether an agreement was reached granting immunity is a question of fact. And the trial court's decision will not be reversed unless clearly against the preponderance of the evidence. *Riddling* v. *State*, 19 Ark. App. 231, 719 S.W.2d 1 (1986).

Title 18 of the United States Code, sections 6002 and 6003(a) provide:

> § 6002. Immunity generally
>
> Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in proceeding before or ancillary to-
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or an information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.
>
> § 6003. Court and grand jury proceedings
>
> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

[redacted] As developed in the context of formal grants of immunity, transactional immunity accords full protection from prosecution for the offense to which the immunized testimony relates. Use immunity is more limited: it prohibits the use, in a criminal prose-

cution, of any evidence derived directly or indirectly from the information provided to the government. *U.S.* v. *Harvey*, 900 F.2d 1253 (8th Cir. 1990).

In this case, it is clear that appellant was not granted immunity under 18 U.S.C. §§ 6002 and 6003; in fact, we agree with the trial court's ruling that appellant has failed to prove that he had an agreement granting any type of immunity.

Appellant's attorney, Jim Rose III, testified that appellant had been placed under subpoena by the U.S. Attorney to testify for the government in the trial of appellant's accountant. Mr. Rose stated that he advised appellant not to testify in the other trial but to assert his Fifth Amendment rights. Mr. Rose continued that he advised U.S. Attorney P.K. Holmes over the phone that appellant was going to assert his Fifth Amendment privilege unless granted "full immunity." Mr. Rose said that the next morning Mr. Holmes offered appellant "use immunity." According to Mr. Rose, he advised appellant to take this immunity and testify. Mr. Rose testified that appellant accepted the "use immunity" offered by Mr. Holmes.

Mr. Holmes testified, however, that he did not recall having any discussion with Mr. Rose about full immunity over the telephone. He did recall speaking with Mr. Rose the afternoon before the trial about full immunity, but said he rejected the request because he was not about to immunize appellant for something "he had no knowledge of." Mr. Holmes stated that he did recall telling Mr. Rose that he had no intention of prosecuting appellant on anything that arose out of the trial testimony. Mr. Holmes testified that he had absolutely no recollection of telling Mr. Rose that he was going to give appellant "use immunity".

Claude Hawkins, co-counsel with Mr. Holmes, testified that he had no understanding that appellant was testifying under a grant of any type of immunity.

Mark Grisham, with the FBI, testified that he was involved in the Glen Reed trial and was present during conversations that Mr. Holmes, Mr. Rose and appellant had prior to appellant's testimony. He said that he had no knowledge of immunity and was not aware that appellant was testifying with immunity.

Judge Franklin Waters, the judge presiding over the Reed trial, was interviewed and stated that he was not aware that appellant was

testifying under any type of immunity when he testified in the Reed case. Judge Waters also submitted an affidavit in which he noted that he did not issue an order granting appellant "use immunity" pursuant to 18 USC § 6002 to compel his testimony.

The trial court found:

> There was never a meeting of the minds in the Court's judgment. The Court is not ruling that there was a Waiver. The Court's ruling is simply there was never any agreement between Mr. Maglothin and the United States Government to immunize his testimony.

Based on the conflicting evidence in the record, we cannot say that the trial court's decision is clearly against the preponderance of the evidence.

Affirmed.

ROBBINS and NEAL, JJ., agree.

David G. JONES *v.* STATE of Arkansas

CA CR 95-555 924 S.W.2d 470

Court of Appeals of Arkansas
En Banc
Opinion delivered June 19, 1996

J.G. Molleston, for appellant.

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

JOHN F. STROUD, JR., Judge. Appellant, David G. Jones, pled guilty to charges of theft, and on March 26, 1987, was placed on probation for five years and ordered to pay a fine of $500, attorney's fees, and court costs. He was not required to make restitution or reparation. On March 6, 1992, the trial court ordered that appellant's probationary period be extended for five years without prejudice to appellant to petition the trial court to terminate the probation upon appellant's compliance with the orders of the trial court. The order noted that appellant had failed to comply with the conditions of probation by not paying the fine and costs previously ordered. On March 20, 1992, the State filed a petition for revocation of probation. On July 30, 1992, appellant filed a motion to dismiss in which he requested the dismissal of the revocation petition filed on March 20, 1992, and the setting aside of the order extending his probation. The trial court's docket sheet shows that on October 25, 1993, the trial court wrote, "Motion to Dismiss granted."

On December 7, 1994, and January 18, 1995, the State filed petitions to revoke appellant's probation. At a revocation hearing held January 26, 1995, appellant argued that his probation should not have been extended, that his July 30, 1992, motion to dismiss was granted by the trial court on October 25, 1993, and that the

petition for revocation should not be considered. The trial judge stated that he did not think that he granted the motion to dismiss on the basis that he lacked authority to extend appellant's probation. He also stated that if he did grant it for that reason, it was in error, as the trial court retains jurisdiction over a probationer until such time as he fully complies with all conditions of his probation. The trial court denied appellant's motion to dismiss the petition to revoke probation because the order extending his probation either for five years or until he complied with the conditions of his probation was valid. At the conclusion of the hearing, the trial court revoked appellant's probation and sentenced him to eight years in the Arkansas Department of Correction.

Appellant first argues that the trial court erred in extending his probation without notice or a hearing. His allegation of prejudice is that he could have argued at such a hearing that the trial court did not have authority to extend his probation. His second argument is that the trial court improperly extended his probation because it lacked the authority to do so. Because we reverse based on appellant's second argument, we do not address his first argument.

Appellee contends that, by analogy to Ark. Code Ann. § 5-4-303(f), our holding in *Basura* v. *City of Springdale*, 47 Ark. App. 66, 884 S.W.2d 629 (1994), that the trial court retains jurisdiction over a criminal defendant until all fines and costs are paid, should permit the trial court to extend probation in cases where the defendant has failed to pay fines and costs. *Basura* does not apply to the facts of this case, and no analogy or inference can be drawn from that holding that would allow Ark. Code Ann. § 5-4-303(f) to apply.

In *Basura*, the defendant was arrested pursuant to a summons issued in accordance with Ark. Code Ann. § 5-4-203 (Repl. 1993) which specifically grants the trial court the authority to enforce payment of fines and costs. The issue presented in that case was whether the trial court retained jurisdiction to enforce payment of fines and costs under Ark. Code Ann. § 5-4-203 until such time that the fines and costs have been paid. The trial court did not attempt to change the defendant's sentence or purport to act under the authority of Ark. Code Ann. § 5-4-303, and our holding in *Basura* was limited to a determination of the trial court's jurisdiction to enforce payment of fines and costs pursuant to Ark. Code Ann. § 5-4-203. Thus, we do not find appellee's reliance on *Basura* persuasive.

The trial court's order extending appellant's probation purports to rely upon Ark. Code Ann. § 5-4-303(f) (1987), which provides:

> If the court has suspended the imposition of a sentence or placed a defendant on probation conditioned upon his making restitution or reparation and the defendant has not satisfactorily made all his payments when the probation period has ended, the court shall have the authority to continue to assert its jurisdiction over the recalcitrant defendant and extend the probation period as it deems necessary or revoke the defendant's suspended sentence.

It is undisputed in this case that appellant was never ordered to pay any restitution or reparations. Thus, Ark. Code Ann. § 5-4-303(f) does not apply to this case, and the trial court erred in relying upon it for its authority to extend appellant's probation for his failure to pay the fine and costs.

We hold that the trial court's order of March 6, 1992, extending appellant's probation was an invalid attempt to modify the original sentence in this case. The trial court's original judgment on appellant's guilty plea sentenced him to probation for five years, a fine of $500, and ordered him to pay attorney's fees and court costs. A guilty plea coupled with a fine and either probation or a suspended imposition of sentence constitutes a conviction, which, in turn, entails execution. *See* Ark. Code Ann. § 5-4-301(d)(1)(Repl. 1993) and *Harmon* v. *State*, 317 Ark. 47, 876 S.W.2d 240 (1994). A trial court cannot modify or amend the original sentence once a valid sentence is put into execution. *DeHart* v. *State*, 312 Ark. 323, 849 S.W.2d 497 (1993). The trial court was without authority to modify appellant's sentence, and the order extending appellant's probation was invalid. Thus, appellant's probationary period expired on March 26, 1992. Likewise, the trial court's purported revocation of appellant's probation on January 26, 1995, was invalid.

Reversed and dismissed.

PITTMAN, NEAL, and GRIFFEN, JJ., agree.

JENNINGS, C.J., and ROGERS, J., concur.

Claude BENNETT *v.* STATE of Arkansas

CA CR 95-451 925 S.W.2d 432

Court of Appeals of Arkansas
Division III
Opinion delivered June 26, 1996

McArthur & Finkelstein, by: *William C. McArthur*, for appellant.

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

JOHN E. JENNINGS, Chief Judge. Claude Bennett was found guilty in Pulaski County Circuit Court of driving while intoxicated. He was sentenced to one year's imprisonment with an additional two years suspended. On appeal, Bennett contends that the trial court erred in denying his motion to dismiss based on a lack of speedy trial. We agree and therefore reverse and dismiss.

Rule 28.1 of the Rules of Criminal Procedure provides that a defendant is entitled to a dismissal if not brought to trial within twelve months. The State concedes that because Bennett was admitted to bail, the speedy-trial time runs from the date of his arrest, June 27, 1993. Rule 28.2(a). Once it has been shown that trial was scheduled to be held after the speedy-trial period had expired, the State has the burden of showing that any delay was the result of the petitioner's conduct or was otherwise legally justified. *Glover* v. *State*, 307 Ark. 1, 817 S.W.2d 409 (1991). The primary burden is on the court and the prosecutor to assure that a case is brought to trial in a timely fashion. A defendant has no duty to bring himself to trial. *Novak* v. *State*, 294 Ark. 120, 741 S.W.2d 243 (1987).

The record in the case at bar can only be described as meager. Appellant was arrested on June 27, 1993. His case was filed in Little Rock Municipal Court. On July 20, 1993, appellant moved to transfer to North Little Rock Municipal Court because of a conflict of interest between his then counsel, Mr. Grasby, and the Little Rock municipal judge. On November 30, 1993, a second motion to transfer was filed by the appellant.

On December 17, 1993, appellant was arraigned in North Little Rock Municipal Court and the case was set for trial on May 24, 1994.[1] On June 22, 1994, the State filed an information against the appellant in Pulaski County Circuit Court. On July 20, 1994, appellant moved for a continuance to hire a new attorney. The continuance was granted until August 16, 1994, at which time appellant was arraigned in circuit court. On September 27, 1994, appellant waived jury trial and his trial was set for November 3, 1994. On November 3, the State moved for a continuance because the breathalyzer machine operator was unavailable. The trial court

[1] Although it was subsequently suggested in circuit court that the case was nol prossed in North Little Rock Municipal Court there is no docket entry to that effect.

continued the case to December 13, 1994. On that date, appellant was tried and found guilty of DWI, fourth offense.

The time from the appellant's arrest until his trial was thus 527 days, well in excess of the 365 days permitted by the rule. The circuit court held that the period of time from July 20, 1993, when appellant first moved to transfer to North Little Rock Municipal Court, until May 24, 1994, the date his trial was set in that court, was excludable. The court's ruling cannot be sustained.

This case is governed, in principle, by *State* v. *McCann*, 313 Ark. 286, 853 S.W.2d 886 (1993). There, McCann, a juvenile, was arrested on October 1, 1991, and charged in circuit court. At his scheduled trial on April 13, 1992, McCann moved to transfer the case to juvenile court and the circuit judge granted the motion. The case was subsequently heard in juvenile court on October 13, 1992.

In *McCann*, the supreme court said:

> The State asks us to interpret this rule so that where, on a juvenile defendant's motion, a circuit court transfers a felony charge over to juvenile court, the entire time during which the case is pending before the circuit court be declared an excludable period under Rule 28.3(a).... [W]e must reject the State's argument.
>
> Under Rule 28.3(a) delays caused by hearings on pretrial motions filed by the defendant are specified as excludable periods. Rule 28.3(a) limits the excludable period caused by a pretrial motion taken under advisement not to exceed thirty days.
>
> As mentioned above, McCann's motion to transfer was not made until the date of trial on April 13, 1992, the circuit court heard his motion and granted it on that same date. A memorandum in the record indicates acceptance of the transfer by the juvenile court on April 14. Applying Rule 28.3(a) to these facts, the only time that is remotely attrituable to McCann and, thus excludable, is the one day between submission of McCann's motion to transfer in one court and acceptance by the receiving court.

If we were to assume that the State is entitled to have excluded thirty days based on appellant's first motion to transfer,

eighteen days as a result of appellant's second motion to transfer, and a total of sixty-six days due to motions for continuance filed by both the State and the appellant in circuit court, the total excludable period of 114 days would leave the time between arrest and trial at more than 400 days, well in excess of the twelve-month limit.

For the reasons stated the judgment of the circuit court is reversed and dismissed.

Reversed and dismissed.

ROGERS and NEAL, JJ., agree.

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

CA 95-448 924 S.W.2d 472

Court of Appeals of Arkansas
En Banc
Opinion delivered June 26, 1996
[Petition for rehearing denied August 14, 1996.*]

*Mayfield and Neal, JJ., would grant.

Winston Bryant, Att'y Gen., by: *Shirley E. Guntharp*, Deputy Att'y Gen., and *Shawn McMurray*, Ass't Att'y Gen., and *Virginia H. Castleberry*, Ass't Att'y Gen., for appellant.

Paul J. Ward, for appellee.

Ann E. Meuleman, *Garry S. Wann*, and *Ivester, Skinner & Camp, P.A.*, by: *H. Edward Skinner*, for Southwestern Bell Telephone Company.

JAMES R. COOPER, Judge. The Attorney General appeals from orders issued by the Arkansas Public Service Commission (Commission) pursuant to an audit of costs allocated to Southwestern Bell Telephone Company (SWBT) by SWBT's parent corporation and affiliates.

To clearly understand the issues presented, we must first discuss findings made by the Commission in a prior docket. In September 1992, Commission Docket No. 92-260-U was initiated by the Commission Staff (Staff) to investigate SWBT's earnings level. Staff filed traditional rate-case testimony in the docket based on a test year of December 31, 1991. Staff concluded from its analysis that SWBT's rates produced earnings in excess of a reasonable revenue requirement. On May 3, 1993, a Stipulation and Agreement (Stipulation) agreed to by Staff, SWBT, AT&T Communications, Sprint Communications Company L.P., GTE Southwest Incorporated, GTE Arkansas Incorporated, and sixteen rural local exchange companies was filed in Docket No. 92-260-U to resolve the issues raised by the investigation. The Stipulation provided that, in lieu of proposed reductions to its rates, SWBT would make an incremental investment of $231 million over a three-year period to upgrade its infrastructure in Arkansas. The Stipulation provided:

> The basic aspects of the [Stipulation] can be summarized as consisting of a significant network modernization plan, conversion to single party service in all exchanges served by SWBT, service to two previously unallocated ter-

> ritories, and recognition of certain financial accounting changes .... This Stipulation and Agreement also contains a redefinition of basic local service for SWBT ... to include single party service with touch-tone and provides for a reduction in the current rates for touch-tone service. It incorporates the elimination of mileage charges for rural customers with the conversion of those exchanges to single party service and implements a reduction of special connection charges for the extension of facilities to rural areas.

The Stipulation also provided for the additional investment to be treated as a part of SWBT's rate base. It further stated:

> The Parties agree that the estimated value of these improvements is $231 million, and the annual revenue requirement effect based on the additional investment and associated costs is approximately $19.3 million. The Parties agree that the $19.3 million annual revenue requirement effect from investment and expenses is offered in lieu of potential reductions to SWBT's existing rates.

In the Stipulation, the parties estimated that the touch-tone rate reduction would reduce SWBT's revenues by $6.1 million annually and that the elimination of Outside the Base Rate Area (OBRA) mileage charges would reduce SWBT's revenues by $8.2 million annually. The parties agreed that Staff's ongoing audit of costs allocated to SWBT's Arkansas division by its parent company and affiliates (the St. Louis audit) would continue until Staff deemed it completed.

Prior to the hearings held to address the Stipulation and the Attorney General's objections to it, the Commission ordered Staff and SWBT to respond by testimony to specific questions about the earnings review and the Stipulation. In addition, the Commission ordered an update of the test-year financial information based on a test year ending May 31, 1993. Forty-seven witnesses testified at the hearings which began on September 14, 1993.

On January 27, 1994, the Commission entered Order No. 38, finding that the Stipulation was in the public interest and approving it with some modifications. In its thirty-seven-page order, the Commission presented a detailed examination and discussion of the testimony and exhibits presented in the docket and concluded:

> The evidence is substantial that the Stipulation as a whole is in the public interest and will serve the needs of the people of Arkansas for a modern telecommunications system capable of carrying the state into the future. The Stipulation is an obvious departure from the normal course of a show cause proceeding to reduce a utilities rates when there is an allegation of overearning. The Stipulation does provide for some reductions in rates but it is novel as a proposal to invest for the future. The customers of SWBT will have access to a modern and more efficient telecommunications system in only three years without having to face increased rates to cover the costs. People in two areas of the state will have telephone service with the ability to call and be called for business, health or personal reasons where no telephone service has been available in the past. Schools and health care facilities will be able to provide more classroom choices, remote services and better quality services with the Distance Learning and Rural Health Care Networks. The state will be more attractive to high-tech industries with the development of fiber parks and a better educated work force through distance learning. For all these benefits to the people of this state, the Stipulation is a reasonable and advantageous resolution of the issues in this docket and is hereby approved.

The Commission also determined that "[t]he public will reap greater long term advantages from infrastructure upgrades than possible from a minor rate adjustment." The Commission noted that the $19.3 million annual revenue requirement effect from the investment and expenses in the Stipulation was offered in lieu of potential reductions of existing rates but also recognized that the Stipulation proposed the elimination and reduction of certain charges. The Commission conditioned its approval of the Stipulation on SWBT's agreement not to request a general change in rates on or before December 31, 1996.

The accounting procedure ordered by the Commission directed SWBT to treat the annual revenue excess of approximately $33 million as a deferred credit accruing interest until the occurrence of a general rate change. At that time, the balance in the deferred account was to be used to reduce any revenue deficiency or increase any revenue excess.

Apart from the Stipulation, the Commission also approved

Staff's recommended change in depreciation rates for analog switching. The Commission noted that, pursuant to the Stipulation, SWBT would be 100 percent digital by the end of 1996, and found that the depreciation expense should be increased to avoid an accumulated depreciation reserve shortfall.

SWBT subsequently filed a motion to clarify the procedure for developing the investment monitoring report, stating that the monitoring and accounting formula should recognize the touch-tone and OBRA mileage revenue reductions and the additional expense resulting from the increased analog switch depreciation rates. Order No. 40 approved SWBT's proposed report with some modifications. The resulting report provided that, on the first day of each month, one-twelfth of the revenue surplus (1/12 of $33,002,130.00) would be credited to the account. In addition, the report provided for the following monthly debits to the account: one-twelfth of the annual revenue requirement associated with the plant placed in service under the plan; the additional depreciation expense associated with the analog switch investment; and the revenue reductions resulting from the touch-tone and OBRA provisions. The report also provided that the revenue generated as a result of the investment would be credited monthly to the account and that interest would be credited or debited to the account based on the balance at that point. The docket remained open for the filing and review of the quarterly reports.

Neither the Attorney General nor any other party appealed from Order Nos. 38 and 40.

The docket that is the subject matter of this appeal is Commission Docket No. 94-169-U (the Audit docket), opened by the Commission on May 24, 1994, in response to Staff's audit of costs allocated or charged to SWBT's Arkansas Division (SWBTA)[1] by Southwestern Bell Corporation. In Order No. 1, the Commission directed Staff to complete the St. Louis audit using a test year compatible with the test year utilized in the Stipulation docket, and established a procedural schedule for filing and reviewing the audit report. The Attorney General also participated in this docket.

---

[1] In portions of this opinion, SWBT is also referred to as SWBTA (i.e. SWBT-Arkansas) because that is how SWBT is referred to by the parties. For purposes of this opinion, SWBT and SWBTA are the same.

The St. Louis audit report was filed by Staff on September 20, 1994. The report recommended that $8,810,114.00 in expenses that had been improperly allocated to SWBTA be disallowed. The report also stated that the audit trail necessary to trace CDP (Cost Distribution Process for Information Services) charged to SWBTA's cost of service by SWB General Headquarters (GHQ) was inadequate; however, that the alternative steps taken were adequate to assess the appropriateness of these expenses for ratemaking purposes. The audit report also included an entry that adjusted accumulated depreciation to recognize the impact of the new analog switch depreciation rate, approved in Order No. 38 of the Stipulation docket. The report stated that the depreciation adjustment, the disallowance of $8,810,114.00 in improperly allocated expenses, and other appropriate adjustments to the test year resulted in a gross revenue excess of $27,768,136.00, and that this revenue excess represented a decrease of $5,233,995.00 from the $33,002,130.00 revenue excess in the Stipulation Docket. The report recommended no change in rates for SWBTA at that time.

On November 3, 1994, Staff and SWBT entered into an Agreement to address Staff's general concerns about allocations and the lack of an audit trail. The Agreement was designed to complete the audit and resolve all issues in the docket and provided that a consultant would be retained to develop an action plan to address Staff's concerns. The Attorney General objected to Staff's failure to recommend a change in SWBT's rates pursuant to the disallowed expenses and objected to the Agreement that was proposed to address Staff's general concerns about the audit process.

In Order No. 14, the Commission responded to the Attorney General's argument and approved the audit report's recommendation of no change in SWBT's rates and approved the proposed Agreement. Order No. 15 denied the Attorney General's application for rehearing. The Attorney General then filed his Notice of Appeal from Order Nos. 14 and 15, raising three general issues: (I) that the Commission's use of the Stipulation docket to avoid reducing SWBT's rates after Staff disallowed $8.8 million in expenses was an abuse of discretion; (II) that the Commission failed to abide by its statutory obligations when it refused to disallow $13.5 million in CDP costs, after it was determined that these costs could not be traced because of an inadequate audit trail; and (III) the Commission erred in refusing to allow the Attorney Gen-

eral to pursue relevant discovery and introduce relevant information.

Our review of appeals from the Commission is limited by the provisions of Arkansas Code Annotated § 23-2-423(c)(3), (4), and (5) (Supp. 1995), which defines the standard of judicial review as determining whether the Commission's findings of fact are supported by substantial evidence, whether the Commission has regularly pursued its authority, and whether the order under review violated any right of the appellant under the laws or the Constitutions of the State of Arkansas or the United States. *Bryant* v. *Arkansas Pub. Serv. Comm'n*, 46 Ark. App. 88, 102, 877 S.W.2d 594 (1994). In *AT&T Communications of the Southwest, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 126, 843 S.W.2d 855 (1992), this Court stated:

> The Arkansas Public Service Commission has broad discretion in exercising its regulatory authority, *Associated Natural Gas Co.* v. *Arkansas Pub. Serv. Comm'n*, 25 Ark. App. 115, 118, 752 S.W.2d 766, 767 (1988), and courts may not pass upon the wisdom of the Commission's actions or say whether the Commission has appropriately exercised its discretion. *Russellville Water Co.* v. *Arkansas Public Serv. Comm'n*, 270 Ark. 584, 588, 606 S.W.2d 552, 554 (1980). It has often been said that, if an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, or discriminatory, then this court must affirm the Commission's actions. *Arkansas Elec. Energy Consumers* v. *Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47, 76, 813 S.W.2d 263, 279 (1991). Nevertheless, it is for the courts to say whether there has been an arbitrary or unwarranted abuse of discretion, even though considerable judicial restraint should be observed in finding such an abuse. *Russellville Water Co.* v. *Arkansas Pub. Serv. Comm'n*, 270 Ark. at 588, 606 S.W.2d 554. Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis, and something more than mere error is necessary to meet the test. *Woodyard* v. *Arkansas Diversified Ins. Co.*, 268 Ark. 94, 97, 594 S.W.2d 13, 15 (1980). To set aside the Commission's action as arbitrary and capricious, the appellant must prove that the action was a willful and unreasoning action, made without consideration and with a disre-

> gard of the facts or circumstances of the case. *Partlow* v. *Arkansas State Police Comm'n*, 271 Ark. 351, 353, 609 S.W.2d 23, 25 (1980). *See also Beverly Enters.-Ark., Inc.* v. *Arkansas Health Servs. Comm'n*, 308 Ark. 221, 230, 824 S.W.2d 363, 367 (1992).

40 Ark. App. at 129-30.

I.

The Attorney General's first argument for reversal relates to the Commission's refusal to lower SWBT's rates pursuant to the finding of a disallowance of $8.8 million in the Audit docket. The underlying premise of his argument is that the Commission erred in its treatment of the accelerated depreciation rates for SWBT's analog switches. Specifically, the Attorney General complains that the Commission erred in comparing SWBT's excess earnings in the Audit docket with SWBT's excess earnings that it approved in the Stipulation docket because the effect of the new depreciation rates was considered in the Audit docket but was not considered in the Stipulation docket. He asserts that the disparate treatment of the rates resulted in ratepayers being denied the benefit of an $8.5 million reduction in SWBT rates.

At the hearing in the Audit docket, the Attorney General presented the testimony of Basil L. Copeland, Jr., an economist specializing in energy and utility economics. Copeland testified that the revenue requirement exhibits from Docket No. 92-260-U (the Stipulation docket) had to be adjusted to recognize the depreciation rate change before considering the St. Louis audit adjustments. He stated in his prepared testimony: "Only *then* do we have a true and accurate picture of how the proposed [St. Louis audit] adjustments impact the level of revenue requirement that has *already* been determined to be just and reasonable." (Emphasis in original.) Copeland testified that the parties to the Stipulation agreed that the proposed investment and expenses had a value of $19.3 million (the $33 million in excess revenues when adjusted for the depreciation change). He contended that the $19.3 million should be compared to the $28 million excess supported by Staff in the Audit docket, which would demonstrate a revenue excess of over $8 million and require a decrease in SWBT's rates.

In rebuttal, Keith R. Mittledorf, a consultant who had recently retired as chief accountant for the Arkansas division of SWBT,

testified for SWBT that his calculations showed a reduction in SWBT's annual excess earnings from approximately $33 million to $28 million. Mittledorf stated that the reduction demonstrated that Arkansas customers would benefit by more than $5 million annually for the three years covered by the Stipulation because those customers were receiving more in revenue reductions and modernization improvements than a pure cost of service determination would provide.

John Stode, Staff telecommunications manager, denied that the parties agreed that the value of the Stipulation was $19.3 million, contending that Copeland's calculations ignored the rate reductions, including $6.1 million in touch-tone reductions and $8.2 million in eliminated mileage charges, and non-priced benefits such as service to two previously unallocated, unserved areas of the state. Stode testified that the Commission's approval of the change in depreciation rates was separate from the approval of the Stipulation and that there was no mention of the change in rates in the Stipulation. He stated that the recommendation of a change in rates was conditioned on the approval of the Stipulation.

In Order No. 14, the Commission addressed the Attorney General's objections in part as follows:

> The [Attorney General's] position that refunds or rate reductions are required as a result of the findings of the St. Louis audit appear to hinge on the [Attorney General's] contention that the value of the Stipulation approved in Docket No. 92-260-U is only $19.3 million, and thus ratepayers have not received a value equal to the amount of excess earnings. The figure of $19.3 million cited by the [Attorney General] is *not* the value of the Stipulation, but rather is the effect on SWBT's revenue requirement of the $231 million in investment and expenses that SWBT agreed to undertake pursuant to the Stipulation. To determine the value of the Stipulation, *all* components of the Stipulation must be considered, including the elimination of [OBRA] mileage charges, the reduction in charges paid by rural SWBT customers, and the rate reduction in touchtone charges for both residential and business customers. While the [Attorney General] may consider approximately $14.3 million in previous rate reductions as inconsequential to this docket, such savings to ratepayers will not be disregarded by

this Commission.

(Emphasis in original.)

The Commission concluded that the $8.8 million in expenses disallowed by Staff in the audit report were exceeded by SWBT's increased depreciation expenses of $13.5 million which was ordered but not recognized in the revenue requirement calculation made in the Stipulation docket. From our review, we conclude that this Commission finding is supported by substantial evidence.

> The Public Service Commission is free, within the strictures of its statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. No public utility has an absolute right to any method of valuation or rate of return, and the PSC has wide discretion in its approach to rate regulation. This court is generally not concerned with the method used by the Commission in calculating rates as long as the Commission's action is based on substantial evidence. It is the result reached, and not the method used, which primarily controls. If the Commission's decision is supported by substantial evidence and the total effect of the rate order is not unjust, unreasonable, unlawful or discriminatory, judicial inquiry terminates. *Southwestern Bell*, 19 Ark. App. at 327, 720 S.W.2d at 927; *Southwestern Bell Tel. Co.* v. *Arkansas Pub. Serv. Comm'n*, 18 Ark. App. 260, 715 S.W.2d 451 (1986); *Walnut Hill Tel.*, 17 Ark. App. at 265, 709 S.W.2d at 99.

Southwestern Bell Tel. Co. v. *Arkansas Pub. Serv. Comm'n*, 24 Ark. App. 142, 144, 751 S.W.2d 8 (1988). The question on review of an administrative board's decision is not whether the evidence would have supported a contrary finding but whether it supports the finding that was made. *Bryant* v. *Arkansas Pub. Serv. Comm'n*, 50 Ark. App. 213, 234, 907 S.W.2d 140 (1995).

In connection with his first point, the Attorney General argues that the Commission refused to reduce SWBT's rates "by arbitrarily and capriciously 'layering' some aspects of [the Stipulation docket] upon the [Audit docket] while not 'layering' other aspects...." The Commission addressed the "layering" argument in Order No. 14 as follows:

> The Commission directed Staff to complete the St. Louis

> audit using the May 31, 1993 test year adopted in [the Stipulation docket], so that a more accurate and final determination of SWBT's test year earnings could be made. The "layering" of these two dockets that the [Attorney General] so strenuously objects to is precisely the purpose of using the same test year. Without the results of all aspects of Staff's review of SWBT's May 31, 1993 test year earnings and expenses, it is not possible to obtain an accurate, complete analysis of SWBT's financial standing.

We agree with SWBT's response that the Audit docket was not a separate and distinct earnings investigation "but merely the concluding and final part" of the investigation begun in the Stipulation docket. In both dockets, the Commission was reviewing evidence of twelve months of historical data from SWBT's books and records for a test year ending May 31, 1993, with adjustments for reasonably known and measurable changes occurring in the *pro forma* year in accordance with Arkansas Code Annotated § 23-4-406 (1987). Order No. 14 of the Audit docket calculated four adjustments to the financial exhibits adopted in the Stipulation docket: $8.8 million in disallowed expenses, $13.5 million in additional depreciation expense, a change in SWBT's intraLATA toll pool revenue, and a change in the federal income tax rate.

The Attorney General also argues that the Commission abused its discretion in holding that Order Nos. 38 and 40 in the Stipulation docket could "cure," or provide a credit for, the revenue excess in the Audit docket. As discussed earlier, it was incumbent upon the Commission to use the entire results of the audit and the revenue requirement impact on SWBT of its orders in the Stipulation docket in assessing the revenue excess. We find no error on this point.

Nor do we agree with the Attorney General's contention that comparing the figures for revenue excess in the Audit and Stipulation dockets is "comparing apples to oranges" and that "fair-minded" persons could not reach a conclusion that it was a meaningful comparison. The Commission points out that the "$33 million was SWBT's revenue excess based on the test year ending 5/31/93 in [the Stipulation docket]. $28 million is the revenue excess based on the same test year when adjusted for the depreciation rate expense, recommended disallowances, toll pool revenue adjustment, and federal income tax rate change." We agree with the

Commission that comparing the $33 million revenue excess to the $28 million revenue excess is comparing the same bottom-line figure with appropriate adjustments.

The Attorney General's argument in the preceding points appears to be premised on the view that, by the agreement of the parties, the value of the Stipulation automatically decreased by the amount of increased depreciation rates ordered, thereby effectively canceling the benefit of the increased depreciation expenses. We do not agree with this argument. The Stipulation was not conditioned on the approval of the new depreciation rates. The Commission certainly had the option of approving or rejecting the recommended rates, and, in Order Nos. 38 and 40, the Commission clearly accepted the $33.6 million value placed on the Stipulation. The parties and the Commission acknowledged in setting the monitoring-report procedure that SWBT was entitled to credit for the accelerated depreciation expense. The Attorney General recognizes the finality of the two orders, and his arguments on appeal about what the Commission could have done or should have done in the Stipulation docket are without merit. Further, we find no merit in the argument that the orders in the Audit docket constitute an impermissible attack on the earlier orders in the Stipulation docket, and we find no merit in the argument that the orders are inconsistent.

It is worth noting that the Attorney General has taken inconsistent positions in the course of this case. In his objection to SWBT's motion to clarify Order No. 38 in the Stipulation docket, the Attorney General clearly recognized that the depreciation rate increase was not a part of the Stipulation. This position is contrary to the position taken by the Attorney General in the Audit docket and on appeal.

Having rejected the Attorney General's view that the value of the Stipulation was reduced from $33 million to $19.3 million, we conclude that the Commission's analysis in the Audit docket was appropriate. The Commission determined that SWBT's excess earnings were increased by the $8.8 million disallowed expense but decreased by the $13.5 million in depreciation expense, resulting in excess earnings of $28.3 million, or approximately $5 million less than the approved excess earnings in the Stipulation docket (the value of the Stipulation). Giving due deference to the expertise of the Commission in rate matters, *see Cullum* v. *Seagull*

Mid-South, Inc., 322 Ark. 190, 194, 907 S.W.2d 741 (1995), we find that the Commission did not err in its treatment of the depreciation expense and the disallowed expense.

The Attorney General next contends that it was error for the Commission not to adopt Copeland's approach to accounting for the depreciation expenses. It is within the province of the Commission, as the trier of fact in rate cases, to decide on the credibility of the witnesses, the reliability of their opinions, and the weight to be given their evidence. The Commission is never compelled to accept the opinion of any witness on any issue before it, nor is the Commission bound to accept one or the other of any conflicting views, opinions, or methodologies. *See Bryant* v. *Arkansas Pub. Serv. Comm'n*, 46 Ark. App. 88, 101, 877 S.W.2d 594 (1994). We find no merit in the Attorney General's argument.

In a related point, the Attorney General argues that the Commission should have adopted Copeland's recommendation on how the deferred-account mechanism could be used to reduce rates by $8.5 million. In the alternative, the Attorney General argues that the Commission should have fully merged or layered the two dockets and amended Order Nos. 38 and 40 of the Stipulation docket to account for the disallowed expenses. Despite the Attorney General's erroneous assertion that Copeland recommended a change in the deferred-account mechanism, the Attorney General never suggested in testimony or argument that the Commission "fully layer" the two dockets and amend Order Nos. 38 or 40 and never suggested prior to the issuance of Order No. 14 in the Audit docket that the Commission revise the deferred-account monitoring reports. We have often stated that we will not address issues on appeal that were not raised below. *See Keesee* v. *Keesee*, 48 Ark. App. 113, 117, 891 S.W.2d 70 (1995); *Arkansas State Highway Comm'n* v. *Lee Wilson and Co.*, 43 Ark. App. 22, 27, 858 S.W.2d 137 (1993); *Arkansas Elec. Energy Consumers* v. *Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47, 66, 813 S.W.2d 263 (1991). Moreover, the Attorney General failed to satisfy Arkansas Code Annotated § 23-2-422(b) (1987), which requires that the application for rehearing set forth specifically the grounds upon which the application is based. This argument is not presented in the application.

The Attorney General also contends that the Commission's orders must be reversed because SWBT's $28 million excess earnings in the Audit docket are unreasonable and are prohibited by

Arkansas Code Annotated § 23-4-103 (1987), which provides that all rates must be just and reasonable. Order Nos. 38 and 40 of the Stipulation docket assessed excess earnings at $33 million, approved the Stipulation, and set the value of the Stipulation. The Attorney General remained silent while that record was closed. Nevertheless, he now seeks to attack those orders.

> The order or determination of an administrative body, acting within its jurisidiction and under authority of law, is not subject to collateral attack. This is so in the absence of fraud or bad faith, or, under some authority, even on the ground of fraud. In this connection, it has been considered that the only method of attack available is by appeal as provided by statute.

73A C.J.S. *Public Administrative Law and Procedure* § 154 (1983). The Attorney General has failed to demonstrate that the orders are subject to collateral attack, and we therefore find no merit in this argument.

The Attorney General further argues that the Commission abandoned the intent of the deferred account by giving SWBT credit for all components of the Stipulation without further study of the monitoring reports, which were not in evidence in the Audit docket. It is his contention that the Commission failed to determine if the ratepayers were receiving the appropriate value from the Stipulation docket. This argument must fail for numerous reasons. Again, we note that the Attorney General failed to appeal the orders entered in the Stipulation docket that established the deferred-account monitoring process. Second, this argument was not presented to the Commission in the Audit docket prior to the Commission's final order. The Attorney General introduced no evidence or testimony regarding the reports, made no arguments regarding the reports, and sought no accounting from the Commission. Finally, this argument was not made in his application for rehearing.

The Attorney General's final point in this argument is that Order No. 14 violates the requirements of Arkansas Code Annotated § 23-2-421(a) (1987), which provides in pertinent part that "[t]he Arkansas Public Service Commission's decision shall 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." The Attorney General argues that the order is defective because the Commission appeared to base its decision both on the "excess value" theory and on a determination that the disallowed expenses in the Audit docket were exceeded by SWBT's increased depreciation expense. The Attorney General refers this Court to *Bryant* v. *Arkansas Pub. Serv. Comm'n*, 45 Ark. App. 56, 63, 871 S.W.2d 414 (1994), where we stated: "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." We have reviewed the Commission's findings and hold that they satisfy the requirements of Section 23-2-421(a) and the case cited above. It is clear from the findings that the Commission relied on all aspects of the test-year data in determining SWBT's financial standing. In addition, it is clear that the Commission considered all components of the Stipulation.

In order to establish an absence of substantial evidence to support the Commission's order, the Attorney General had the burden of showing that the proof before the Commission was so nearly undisputed that fair-minded persons could not reach its conclusion, *see AT&T Communications of the Southwest, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 126, 131, 843 S.W.2d 855 (1992), and we hold that he failed to meet that burden. The Commission's decision is supported by substantial evidence and the total effect of the order is not unjust, unreasonable, unlawful, or discriminatory. We therefore affirm on the Attorney General's first argument.

II.

Next, the Attorney General argues that the Commission erred in failing to disallow $13 million in expenses charged to SWBT-Arkansas (SWBTA) by SWB-General Headquarters (GHQ) because of a lack of a sufficient audit trail to track these expenses to their originating sources. These expenses were entered into the Cost Distribution Process for Information Services (CDP), which is utilized by GHQ to allocate cost for information technology services to the state jurisdictions.

In its audit report, Staff stated that it had been unable to trace any of the CDP charges on SWBTA's books to a specific originating source document, which demonstrated that the CDP process

itself did not provide a comprehensive audit trail. According to the report, however, Staff was able to review the costs prior to entry into the CDP resource pools to determine whether the expense was necessary for providing utility service. Staff stated that, because the identity of the transaction was lost upon entry into the resource pools, "there was no way to determine the proportionate amount that SWBTA ultimately received of each disallowable transaction flowing to CDP." However, it was further stated that, by using the normal GHQ prorate factor to determine the portion attributable to SWBTA, Staff calculated that SWBTA apparently received through the CDP $236,485.00 less expense in the test year than would have been allocated through the normal GHQ prorate process. Staff concluded: "While the lack of a comprehensive audit trail for almost one-third of the expenses flowing to SWBTA from GHQ is very disconcerting, Staff believes that the alternative steps taken were adequate to assess the appropriateness of these expenses for ratemaking purposes."

Basil L. Copeland, Jr., the Attorney General's witness, relied on the audit report in recommending disallowance of the $13 million in expenses because they could not be "adequately verified owing to the lack of a comprehensive audit trail."

Steve Usselmann, SWBT's district manager for financial accounting and reporting, testified that the audit trail necessary to trace costs flowing from the GHQ prorate process and recorded in the Arkansas general ledger was adequate. He explained:

> In accordance with generally accepted auditing standards, an auditor must evaluate the system in determining audit risk. Audit tests are performed through the system or around the system to obtain sufficient, competent, evidential matter as to the appropriateness of the expenses. Auditing through the system constitutes the actual trace of a document from its source to the general ledger. Auditing around the system is a practice which substantiates that a large group of transactions can be traced from one process to the next and that the end result is reasonable when compared to an acceptable alternative. Thus, auditing around the system provides assurance on the reliability of a process. It is quite common to audit around the system in a complex or complicated process.

Usselmann concluded that "the Staff performed audit procedures

which provided the ability to assess the appropriateness of these expenses for ratemaking purposes. In other words, sufficient audit tests were performed by auditing around the system which is an acceptable method of auditing."

Marie James, audit supervisor for the Staff electric section, disagreed with Copeland's suggestion that the costs should be disallowed. She stated that although Staff was concerned about the lack of a comprehensive audit trail, the alternative steps taken were adequate to assess the appropriateness of the expenses for ratemaking purposes. James testified:

> Staff acknowledged in the [audit] report that, with [SWBT's] assistance, Staff successfully traced a selected sample of individual transactions from the special reports to the prorate audit trail report and to the original source documentation necessary to determine if the costs were appropriate for providing utility service. However, in Staff's opinion, the addition of grand totals by originating source and a unique identifying characteristic that flows from report to report would greatly enhance the auditability of SWBT's GHQ expenses, thus Staff's assessment that the audit trail is inadequate.

On November 3, 1994, SWBT and Staff entered into the Agreement "designed to complete the St. Louis Audit and resolve all issues in this Docket." It provided that "[t]he basis of the Agreement is for SWBT and Staff to jointly select a consultant to address Staff's concerns about the lack of an audit trail, the tracking of research and development costs, allocations, and charging directions." It further provided that "[i]t is the intent that the consultant be a firm with nationally recognized credentials and an established reputation for professionalism." SWBT agreed to pay the fee for the consultant. At trial, SWBT stated that it would not attempt to recover the cost from ratepayers.

In rebuttal testimony, Copeland stated that the Agreement served no useful purpose other than to protect SWBT. He stated: "The public gets only what it had a right to expect *as a minimum* to begin with, i.e. further investigation into the lack of auditability of expenses that are being allocated to Arkansas ratepayers." (Emphasis in original.) It was his conclusion that the Agreement should be rejected.

In Order No. 14, the Commission approved the Agreement and stated: "Clearly, ratepayers do benefit when Staff is able to more quickly and thoroughly perform an audit of SWBT's financial performance. Auditing costs incurred by both Staff and SWBT are reduced, and Staff is able to complete its audit more quickly, allowing it to pursue other regulatory obligations." Order No. 15 denied the Attorney General's application for rehearing.

The Attorney General makes three points in his second argument for reversal: (1) the Commission was obligated to accept his recommendation of disallowance of the $13 million in expenses because the amount of charges SWBTA received from the CDP system could not be traced to originating source documents; (2) Staff's position on the treatment of CDP costs was inconsistent with its position on research and development (R&D) costs; and (3) the Commission's findings were inadequate because the Commission refused to state its basis for rejecting the Attorney General's recommendation.

We hold that there was sufficient evidence to support the Commission's decision not to disallow the $13 million in expenses. Both the audit report and Marie James' testimony support a finding that Staff successfully traced a selected sample of individual transactions from the special reports provided by SWBT to the prorate audit trail report and then to the original source documentation necessary to determine whether the costs were appropriate for providing utility service. SWBTA witness Usselmann testified that the approach adopted by Staff, which he referred to as "auditing around a system," was an accepted auditing method. Both James and Usselmann have accounting credentials and audit experience. In contrast, the Attorney General presented the testimony of a witness who lacked accounting credentials, had never participated in a field audit, and did not examine SWBTA's books, but relied entirely on Staff's documents and testimony.

The Attorney General further argues that it was impossible to determine the proportionate amount that SWBTA received of each expense that was disallowed by Staff. We conclude that sufficient evidence was presented to the Commission from which it could approve the amount of expenses that should not be allowed. Staff explained in the audit report that the disallowed expense that SWBTA actually received in the test year was $236,485.00 less using the CDP process than it would have been using the average GHQ

prorate factor for Arkansas. Although we appreciate the Attorney General's concerns regarding the lack of an audit trail, these concerns were addressed in the Agreement, which is lengthy and details specific goals to be met, and provides that SWBTA and Staff jointly will select a consultant to address Staff's concerns about the audit trail and other procedures. Further, it provides that the consultant will operate under the supervision of Staff, with consultation from SWBTA, that SWBTA will pay the fee for the action plan which will be developed, and that the consultant's findings and recommendations will be submitted to the Commission. In Order No. 14, the Commission clearly found that ratepayers would benefit from the consultant's services.

We conclude that the Attorney General has failed to provide either factual or legal support for his argument and hold that the Commission Order No. 14 is neither arbitrary nor capricious. We affirm on this point.

We also find no merit in the Attorney General's contention that Staff's position that SWBTA benefits from the CDP charges contradicts Staff's position on R&D charges. The Commission addressed this contention in Order No. 14:

> Contrary to the [Attorney General's] claim, there is no inconsistency in the treatment of CDP charges and the complete disallowance of [R&D] costs. Staff faced different situations in those areas and treated them differently for legitimate reasons. The audit report stated the R&D costs were not traceable to regulated or nonregulated services. Ratepayers should not pay for unregulated or competitive services. Staff was able to determine that expenses entering the CDP were appropriate for rate recovery.

The Attorney General's final point in this argument is that the Commission erred in refusing to state its basis for rejecting the Attorney General's recommendation. In Order No. 14, the Commission adopted Staff's recommendations regarding the audit report. The Commission also addressed at length the Agreement and the Attorney General's argument that it would provide no benefits. In the application for rehearing, the Attorney General argued that the Commission had failed to rule on his proposed disallowance of the CDP costs. It was his position that the Commission failed to comply with Section 23-2-421(a), which requires a

commission's decision to be in sufficient detail to enable a court to determine the controverted question presented by the proceeding.

To address this point, it is essential that we examine the manner in which the Attorney General presented his opposition to Staff's recommendation in regards to the audit trail and acceptance of the $13 million in expenses. To support his recommendation that the expenses be disallowed, the Attorney General relied on a Staff draft audit report addressing a 1991 test year rather than the 1993 test year that the Commission ordered be used and an internal Staff memorandum addressing the draft report. The Commission excluded the documents and Copeland's conclusions regarding the documents as not relevant to the issues presented in the Audit docket. As discussed later in this opinion, we find no error in the Commission's exclusion of the evidence. As a result of the exclusion, the Attorney General's recommendation was supported solely by Copeland's opinion that: "Since there is no audit trail to track these expenses to their originating source, they should be disallowed and excluded from SWBTA's cost of service." In Order No. 14, the Commission clearly found Copeland's opinions to be unreliable because of his lack of auditing credentials. There was no relevant supporting testimony or exhibit that required further discussion by the Commission.

In Order No. 15, the Commission stated that there was "no requirement that the Commission rule specifically on each and every proposal made by a party or provide each party with a line-by-line critique of its testimony." The Commission noted that the issue was Staff's audit report and whether certain affiliate charges allocated to SWBTA were appropriately charged to Arkansas. Also at issue, the Commission stated, was the Agreement filed by Staff and SWBTA. The Commission further stated: "These issues are fully addressed and resolved in Order No. 14. The Commission addressed the recommendations of the [Attorney General] as a whole and found the recommendations without merit." In Order No. 14, the Commission adopted Staff's recommendations on the $13 million adjustment and then discussed in some detail the proposed Agreement, including the Attorney General's objections to it, and the expected benefits.

We hold that the Commission gave a considered and adequate response to the evidence presented and the arguments advanced.

> It is not required that an administrative agency make findings of fact upon all items of evidence or issues, nor even necessarily to answer each and every contention raised by the parties, but the findings should be sufficient to resolve the material issues, or those raised by the evidence which are relevant to the decision.

73A C.J.S. *Public Administrative Law and Procedure* § 144 (1983). We conclude that the findings made by the Commission are sufficient to inform the parties and this Court of the basis for the Commission's orders and indicate the reasoning by which the Commission reached its decision.

For the foregoing reasons, we affirm as to the Attorney General's second argument.

III.

For his final argument, the Attorney General makes two separate points: (1) he contends that he was denied the opportunity to discover evidence and that Staff was allowed to determine the relevancy of the evidence he sought to discover; and (2) that the Commission refused to allow relevant evidence to be admitted or used for impeachment purposes.

Before we address the merits of these arguments, we note that the Commission and SWBT contend that the Attorney General has failed to preserve these issues for appeal. Specifically, they claim that the Attorney General's notice of appeal failed to reference Order Nos. 5, 6, 11, and 12, as required by Arkansas Code Annotated § 23-2-423 (Supp. 1993), which provides that a party may obtain review of an order in this Court by filing a notice of appeal "stating the nature of the proceeding before the commission, identifying the order complained of and the reasons why the order is claimed to be unlawful, and praying that the order of the commission be modified, remanded, or set aside in whole or in part." They urge that strict compliance with the provisions of this statute is necessary before any order of the Commission may be reviewed by this Court. We hold that the Attorney General has appropriately preserved the above issues for appellate review. In his petition for rehearing of Order No. 14, the Attorney General raised the issue of the Commission's failure to allow him discovery, and this issue was addressed by the Commission in Order No. 15, denying the rehearing petition.

As to the merits, we note that the Audit docket was initiated by the Commission on May 24, 1994, in Order No. 1. In that order, the Commission recognized that Staff had been "in the process of" conducting an audit of Southwestern Bell Corporation (SBC) and that completion of the audit had been pending "too long." The Commission directed Staff to complete the St. Louis audit using a test year ending May 31, 1993. The Commission set a procedural schedule and ordered Staff to file the audit results by September 24, 1994. Prior to the filing of the audit report, the Attorney General had submitted to SWBT requests for data and requests for production of documents. The Attorney General sought, *inter alia*, to obtain SWBT's and SBC's long-range planning documents, budgets, and network transition plans. SWBT objected to these discovery requests, stating in part that most of the information requested had been provided to the Attorney General in the Stipulation docket, that the Attorney General failed to specify what type of plans or budgets he sought, and that the documents lacked relevance because they did not address affiliate transactions or allocation of costs which were the subject of the audit report. In Order No. 5, issued July 19, the Commission found the Attorney General's motion to compel discovery to be untimely and pointed out that the only pending matter in the docket was the Commission's direction to Staff to conduct an audit. The Commission stated:

> Until such time as Staff completes its audit and files its audit report there are no defined issues pending in this Docket. Therefore, it is difficult to understand why the [Attorney General] is conducting discovery at this time or how the [Attorney General] can definitively state what will or will not be relevant to the issues which may be developed as a result of the Staff's audit report.

In Order No. 6, the Commission denied the Attorney General's petition for rehearing but stated that the Attorney General could request additional time for discovery, if needed, after the audit report was filed.

The audit report was filed on September 20, 1994. In a pleading filed on October 20, SWBT objected individually to eleven data requests and eight document requests, filed by the Attorney General on October 12, 1994, contending that the information the Attorney General sought was beyond the scope of the audit and completely unrelated to any issue raised in Staff's audit:

> SWBT objects to this Data Request seeking information beyond the scope of this Docket which involves only SWBT's affiliate transactions and corporate allocations. The Information Network Transition Plan ("INTP") is not relevant to those issues and contains no information concerning or relating to such issues. The INTP does not address the allocation of cost (i.e. expense) between SBC, and it is not relevant to the review or audit of affiliate transactions. The majority of this document discusses SWBT's strategic plans and goals, and it reveals SWBT's assessments of its technological deployment progress in relation to its goals for deployment....

In Order No. 11, the Commission found that, with the issues to be addressed clearly identified for the first time, the scope of the proceeding was established and limited to the specific issues addressed in the audit report. Consequently, the Commission found the Attorney General's motion to compel discovery to be ripe for resolution, but denied the motion, finding that the information sought was outside the scope of the docket. The Attorney General's motion for partial rehearing was denied in Order No. 12:

> The Commission defined the preliminary scope of this Docket in Order No. 1 which directed the General Staff to conduct the "St. Louis Audit" using a test year ending May 31, 1993. The issues and the scope of this Docket were further defined and narrowed by the filing of General Staff's formal audit report on September 20, 1994, in compliance with Order No. 1. The Commission set the scope of the Docket and the Commission determined that the [Attorney General's] discovery exceeded that scope. "Control of the ... extent of discovery rests in the sound discretion of the Commission." Rule 13.02(a), Commission's Rules of Practice and Procedure.
>
> As the General Staff stated in its Response: "The simple fact that the [Attorney General] wishes to address issues the other parties do not consider relevant does not mean that the Attorney General has been denied due process. The Commission is the appropriate body to determine the scope of issues in pending dockets, especially when those dockets were initiated by the Commission."

On appeal, the Attorney General contends that in limiting discovery the Commission failed to follow its own rules, improperly delegated its own function and responsibility, and deprived the Attorney General of his right to due process.

We find no merit to the Attorney General's assertion that the Commission "did not abide by Rule 13.04 of the Commission's Rules of Practice and Procedure, which provides that 'discovery may commence by any party on assignment of a docket number by the Secretary [of the Commission].' " Here, the Commission simply delayed discovery until the audit report was filed and the scope of the docket was set. The Attorney General was allowed to pursue discovery after the filing of the audit report and had the same opportunity to conduct discovery as any other party to the docket. The Attorney General exercised his right to discovery and obviously did not find it necessary to seek additional time to complete discovery. In addition, the Attorney General has failed to demonstrate that he suffered prejudice as a result of the Commission's delay of discovery.

The Attorney General also argues that the Commission erred by delegating to Staff the Commission's responsibility to determine the scope of the docket. He argues that giving one party to the proceeding the right to determine what is relevant, discoverable, and admissible violated his right as the representative of Arkansas ratepayers to be heard and present evidence in support of his position and in rebuttal to the other parties' positions. He argues:

> A fundamental requirement of due process in matters of public utility regulation is a full and fair hearing. *Arkansas Elec. Energy Consumers* v. *Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47, 64, 813 S.W.2d 263 (1991). A full and fair hearing requires "that all whose rights are involved have the opportunity to be heard, to submit evidence and testimony, to examine witnesses, and to present evidence or testimony in rebuttal to adverse positions." *Id.*, citing *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1957). Giving one party to the proceeding the right to determine what is relevant, discoverable and admissible violated the [Attorney General's] right as the representative of ratepayers to be heard and present evidence in support of its position and in rebuttal to the other parties' positions.

The Commission denied that the Attorney General did not receive a fair hearing but also defended its right to determine the scope of its dockets, especially one it initiated:

> The Commission did not, as the [Attorney General] contends, delegate to a party the right to determine what is relevant, discoverable, and admissible. The Commission has broad investigatory authority. Ark. Code Ann. §§ 23-2-306 — 23-2-311 (1987). The [Attorney General] lacks this authority. The witnesses presenting testimony on behalf of Staff had auditing experience and expertise. The [Attorney General's] witness had neither. Just as this Court gives due regard to the expertise of the Commission, *Ark. Elec. Energy Consumers*, 35 Ark. App. at 71, 813 S.W. at 277, citing *Ark. Okla. Gas Corp.* v. *Ark. Pub. Serv. Comm'n.*, 27 Ark. App. 277, 282, 770 S.W.2d 180 (1989), the Commission can give due regard to the expertise of Staff.

The Attorney General acknowledges that the Commission has authority to conduct audits of jurisdictional utilities in accordance with Arkansas Code Annotated § 23-2-310 (1987), and it was the Commission's decision to define the parameters of the docket by what Staff included in its audit report. We hold that the Commission properly exercised its authority and discretion in defining the scope of the docket.

The Attorney General's final point is that the Commission abused its discretion by refusing to admit the following evidence or to allow it to be used for impeachment purposes: a Staff draft audit report addressing a 1991 test year, a memorandum related to the draft audit report prepared by a Staff member and addressed to another Staff member, and Attorney General witness Copeland's testimony regarding the draft audit report and the memorandum.

The excluded draft audit report stated in part that absent an adequate audit trail, "consideration should be given as to whether any SWBTA expenses received through the GHQ prorate process should be recovered through rates paid by Arkansas ratepayers." In the excluded memorandum, a Staff member had stated that "there are significant, serious areas of abuse and potential abuse by Southwestern Bell and its affiliates." The Attorney General sought to introduce these documents at the hearing to show that Staff had changed its position concerning the GHQ costs and lack of an audit

trail.

Staff objected to admitting the documents, pointing out that the report was not a final Staff product and had not been filed or presented to the Commission. Staff witness James discussed the draft audit report in her surrebuttal testimony as follows:

> First, it is obviously not a completed work product, as indicated by the designation of "draft". Second, the purpose of "Staff's Draft Audit" indicated on page ii indicates the "report is designed to provide a guide that will assist Staff, on a going forward basis, in assessing the operations of SWBT...." Third, the draft report covers a different test period, 1991. Some of SWBT's accounting procedures are different for the current test year.

She further stated: "The memorandum in question is simply one person's assessment of a *draft* audit report." (Emphasis in original.)

The Commission granted Staff's motion, finding that the two documents were not relevant to the proceedings before the Commission. The Commission then struck that portion of Attorney General witness Copeland's testimony in which he pointed out that, in the excluded audit report, Staff had considered the possibility of disallowing the expenses and that a Staff member had stated in the memorandum:

> It would appear that the Commission is "at the mercy" of [SWBT] with regard to these GHQ costs unless the Commission takes the position that: The burden of proof regarding these costs rests clearly on the shoulders of [SWBT], and, absent definitive proof regarding the appropriateness of these costs, none will be allowed for ratemaking in Arkansas.

On appeal, the Attorney General argues that the material should have been admitted because the material demonstrates that Staff had altered its positions on whether the costs should be recovered from Arkansas ratepayers and the proper burden of proof concerning the lack of an audit trail. The Attorney General contends that the Commission's failure to allow this evidence violated his right to due process of law because he was unable to use it to impeach Staff witnesses or in support of his position.

In Order No. 15, the Commission addressed this argument of the Attorney General:

> The [Attorney General] now contends that it should have been allowed to use the exhibits to impeach certain Staff witnesses. This is a new allegation by the [Attorney General] which was not raised during the hearing. The [Attorney General] cross-examined the Staff witnesses in the hearing but the [Attorney General] never attempted to use the stricken exhibits or any portion thereof during its cross-examination. The appropriate time to have raised this issue would have been during the hearing if the [Attorney General] had sought to use the stricken exhibits for impeachment purposes. It did not and it is too late to raise the issue after the hearing is concluded and the order entered.

We are not persuaded that the Commission abused its discretion in excluding the report and memorandum or that the Attorney General's rights were violated. The testimony clearly showed that the audit report addressed a test year not in issue in the proceedings; that certain accounting changes had occurred since the report; that the report was a draft report and was never adopted by Staff as its position; and that the memorandum addressing the report simply was one Staff member's opinion of the draft report. Furthermore, the Attorney General never presented the burden-of-proof issue to the Commission, nor did he attempt to impeach the witnesses with the material. These issues and arguments were not timely made and are not preserved for appeal. *See In Re Estate of Spears*, 314 Ark. 54, 61-62, 858 S.W.2d 93 (1993). In addition, the Attorney General's cross-examination of Staff witnesses was not limited, and he elicited testimony from Staff that it previously had considered recommending a disallowance of the costs.

The Attorney General also argues that the Commission erred in striking the portion of Copeland's testimony pertaining to the excluded Staff draft audit report and Staff memorandum. He contends that Copeland's testimony should have been allowed even if the documents were not admissible. In making this argument, he relies on Rule 703 of the Arkansas Rules of Evidence, which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts

or data need not be admissible in evidence.

We reject this argument because we have sustained the Commission's finding that the documents were not relevant to the issue in the proceedings. In addition, the Attorney General failed to demonstrate that a draft audit report based on a different test year and an internal Staff memorandum were "of a type reasonably relied upon by experts in the particular field in forming opinions or references upon the subject," and the Attorney General failed to qualify his witness, an economist, as an expert on the sufficiency of audit trails.

For the reasons stated, we affirm the Commission's orders relating to discovery and the admissibility of evidence.

We have examined the arguments made in Docket No. 94-169-U, and, since we find no error on the points raised on appeal, we affirm.

Affirmed.

ROBBINS, PITTMAN, and STROUD, JJ., agree.

MAYFIELD and NEAL, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I would reverse the Commission's allowance of the $13 million in CDP expense charged to SWBTA by GHQ because SWBTA failed to demonstrate that the charges were just and reasonable as required by Ark. Code Ann. § 23-4-104 (1987). In the audit report, Staff stated that its "primary objective in evaluating the GHQ prorate process was to determine the nature of the costs flowing to SWBTA from GHQ to gain assurance that these costs were appropriate and necessary to provide utility service." Staff admitted in the report that it could not trace any of the CDP charges to the originating source documents and that it was impossible to determine the amount of the CDP charges SWBTA actually received:

> [D]ue to the lack of totals by source code in the FD98-Prorate Audit Trail Report; and as demonstrated by Staff's previous example of the manual calculation necessary to ascertain a total; and due to time constraints, Staff could not verify the accuracy of the information supplied by SWBT. In addition, Staff requested copies of all internal and external audit reports which included a review of the CDP Process.

> [SWBT's] response to Staff ... states "A review of our auditing reports (1988 through 1994) indicates that no audits were performed on the Costs Distribution Chargeback Process.

Notwithstanding the uncontroverted fact that Staff could not trace the CDP costs to their originating sources, the Commission in Order No. 14 failed to address the issue of whether these expenses should be allowed and again refused to do so in Order No. 15.

In affirming this point, the majority relies on Staff's statement in the audit report "that the alternative steps taken were adequate to assess the appropriateness of these expenses for ratemaking purposes," the testimony of Staff witness Marie James, and the testimony of SWBT witness Steve Usselmann. Although the report and James and Usselmann in their testimony conclude that the charges are reasonable, no facts were testified to that demonstrate the reasonableness of the charges for rate-making purposes. Usselmann testified that "auditing around the system" provides assurance on the reliability of the process and is an acceptable method of auditing. He offered no evidence, however, to support his opinion. Apparently, the Commission accepted the conclusions of these witnesses without any supporting evidence because they have "accounting credentials"; whereas, the Attorney General's witness, who challenged the lack of evidence, was a mere economist who specializes in energy and utility economics.

The majority states that the concerns of the Attorney General regarding the lack of an audit trail were addressed in the Agreement that was approved by the Commission in Order Nos. 14 and 15. That Agreement, however, which concerns steps to be taken in the future to ensure the proper verification of such expenses, does not abrogate this Court's duty to determine whether the Commission's findings are supported by substantial evidence and whether the Commission has regularly pursued its authority. *Bryant* v. *Arkansas Pub. Serv. Comm'n*, 50 Ark. App. 213, 219, 907 S.W.2d 140 (1995).

The Commission has wide discretion in choosing its approach to rate regulation, and it is not the function of the appellate court to advise the Commission as to how to make its findings or exercise its discretion. *See Bryant* v. *Arkansas Pub. Serv. Comm'n*, 46 Ark. App. 88, 101, 877 S.W.2d 594 (1994). Nevertheless, on review this Court must determine whether the findings of the Commission are supported by substantial evidence, not whether its conclusions are

supported by substantial evidence. *See Bryant* v. *Arkansas Pub. Serv. Comm'n*, 45 Ark. App. 56, 63, 871 S.W.2d 414 (1994).

Here, the Commission made no finding that the CDP costs were just and reasonable. Nor is there any evidence to support such a finding. Accordingly, I would reverse.

NEAL, J., joins in this dissent.

Eugene Edward CHRISTIAN *v.* STATE of Arkansas

CA CR 95-737 925 S.W.2d 428

Court of Appeals of Arkansas
Division II
Opinion delivered June 26, 1996

William R. Simpson, Jr., Public Defender, by: *C. Renae Ford*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen., Sr. Appellate Advocate for appellee.

JAMES R. COOPER, Judge. The appellant was convicted in a jury trial of theft of property and contributing to the delinquency of a minor. He was sentenced to eight years in the Arkansas Department of Correction for theft of property and sentenced to one year in jail and fined $1,000.00 for contributing to the delinquency of a minor. On appeal, he argues that the trial court erred in admitting evidence of a prior arrest, that the trial court erred in denying his motion for a directed verdict, and that the trial court committed reversible error by admitting hearsay testimony. We affirm.

Initially, the State asserts that the appellant received an illegal sentence because the judgment and commitment order does not reflect that the appellant's sentences are to be served concurrently. However, we will not consider the issue of an illegal sentence on appeal unless the appellant has raised it. *See Bilderback* v. *State*, 319 Ark. 643, 893 S.W.2d 780 (1995).

Although the appellant challenges the denial of his motion for a directed verdict his second argument, preservation of the appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of trial errors. *Byrum* v. *State*, 318 Ark. 87, 884 S.W.2d 248 (1994). The appellant contends that the trial court erred in denying his motion for a directed verdict on the theft of property charge or in reducing the charge to a misdemeanor because the State failed to prove that the

stolen property had a value of more than $200.00. The appellant contends that the State's witness lacked personal knowledge of the value of the merchandise on the date of the theft or at a reasonable time thereafter.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Durham* v. *State*, 320 Ark. 689, 899 S.W.2d 470 (1995). 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).

Theft of property is a Class C felony if the value of the property is less than $2,500.00 but more than $200.00. Ark. Code Ann. § 5-36-103(b)(2)(A) (Repl. 1993). "Value" is defined as the market value of the property at the time and place of the offense or if the market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense. Ark. Code Ann. § 5-36-101(11)(A)(i) & (ii) (Repl. 1993). The State has the burden of establishing the value of the property. *Coley* v. *State*, 302 Ark. 526, 790 S.W.2d 899 (1990). Value may be sufficiently established by circumstances which clearly show a value in excess of the statutory requirement. *Id.* It is the owner's present interest in the property that the law seeks to protect. *Hardrick* v. *State*, 47 Ark. App. 105, 885 S.W.2d 910 (1994). In determining market value, the fact finder may consider when the owner purchased the property and at what price as well as the present cost to replace the property. *Id.*

Debra Young testified that she was employed at Wal-Mart as a UPC (Universal Product Code) clerk. She testified that her duties included checking merchandise prices by conducting a computer inquiry using the merchandise UPC numbers. The computer information reflected the wholesale cost, retail price, and vendor of the merchandise. It also reflected if the merchandise was replenishable and if it was on clearance. She testified that the list of information she obtained from the computer gave the current retail price of the Wal-Mart merchandise. She further testified that the prices had changed or had been reduced since the time of the theft. She did

not, however, testify to what the retail prices were at the time of the theft but she did testify to the wholesale price Wal-Mart paid for each piece of merchandise which totaled approximately $239.00.

Thus, Ms. Young testified that she knew the value of the items and that it was part of her job to be familiar with the cost and retail price of the items through the records in Wal-Mart's computer system. *See Lee* v. *State*, 264 Ark. 384, 571 S.W.2d 603 (1978); *Williams* v. *State*, 29 Ark. App. 61, 781 S.W.2d 37 (1989). Although she did not testify specifically to the retail price of the merchandise at the time of the offense, she did testify to the value of the merchandise based on the cost of the items to Wal-Mart. Thus, we find the evidence sufficient to establish the value of the property and therefore, sufficient to support the appellant's conviction.

The appellant next contends the trial court erred in admitting evidence of his prior arrest in a Wal-Mart store because the prior arrest lacked independent relevance and because the prejudicial effect of the prior arrest substantially outweighed its probative value. The evidence at trial revealed that the appellant and a seven-year-old girl entered a Wal-Mart store in Jacksonville, Arkansas, on April 5, 1994. The appellant placed Wal-Mart merchandise in a bag that he had hidden on his person, gave the bag of merchandise to the girl and instructed her to take it to the car without paying for it. The State presented further evidence that the appellant had committed a similar act in a Wal-Mart store in December of 1993 involving a fourteen-year-old boy.

Rule 404(b) of the Arkansas Rules of Evidence provides:

> Other Crimes, Wrongs, or Acts. 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.

In order for evidence to be admissible under this Rule, it must be independently relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice. *Kennedy* v. *State*, 49 Ark. App. 20, 894 S.W.2d 952 (1995). The admission or rejection of evidence under Rule 404(b) is left to the sound discre-

tion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *Id.* Evidence of a crime other than the one charged may be admitted to show that the appellant committed the crime charged where both crimes followed the same unique method of operation. *Thrash* v. *State*, 291 Ark. 575, 726 S.W.2d 283 (1987). Rule 404(b) does not mention *modus operandi* as one of the bases for introducing evidence of other crimes; however, the list of exceptions to inadmissibility contained in the rule is not an exclusive list but rather represents examples of the types of circumstances where evidence of other crimes or wrongs would be relevant and admissible. *Lindsey* v. *State*, 319 Ark. 132, 890 S.W.2d 584 (1994); *Thrash* v. *State*, *supra*.

The appellant used the same mode of operation in the case at bar as he did in the previous incident. In both incidents the appellant entered a Wal-Mart store with a bag concealed on his person, placed merchandise in the bag, handed the bag to a juvenile and directed the juvenile to leave the store without paying for the merchandise. Thus, the evidence was relevant to show a unique method of operation as well as the appellant's intent, preparation, plan, and absence of mistake or accident in committing the theft and contributing to the delinquency of the minor. We also cannot find that the trial court abused its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice particularly in view of the fact that the appellant failed to request a limiting instruction. Although the appellant was entitled to a cautionary instruction limiting the use of the evidence of his prior crime, he failed to ask for such an instruction and thus, cannot now claim error on appeal. *Lindsey* v. *State*, *supra*; *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

The appellant also argues that Ms. Young's testimony concerning the wholesale prices of the Wal-Mart merchandise was inadmissible hearsay. The appellant made a hearsay objection below when Ms. Young attempted to testify to a price that was listed on a price tag attached to one of the stolen items. The trial court sustained the objection but ruled that Ms. Young could testify to the current wholesale prices of the merchandise. Ms. Young then testified to the wholesale prices of the merchandise using the computer generated UPC list. The appellant did not make a specific hearsay objection to that testimony. In order to preserve an issue for appellate review, the objection below must be specific enough to

apprise the trial court of the particular error about which the appellant complains. *Hooper* v. *State*, 311 Ark. 154, 842 S.W.2d 850 (1992). Thus, the appellant failed to preserve this argument for appeal.

Affirmed.

MAYFIELD and STROUD, JJ., agree.

Laurie WHITE *v.* DIRECTOR, Arkansas Employment Security Department and Duff-Norton Yale Hoists Co.

E 94-297 924 S.W.2d 823

Court of Appeals of Arkansas
En Banc
Opinion delivered June 26, 1996

Trotter Law Firm, P.A., by: *Scott C. Trotter*, for appellant.

Ronald A. Calkins, for appellee Director.

Friday, Eldredge & Clark, by: *James W. Moore* and *Andrew T. Turner*, for appellee Duff-Norton Yale Hoists Co..

JAMES R. COOPER, Judge. The appellant in this unemployment compensation case was employed by the appellee, Duff-Norton Yale Hoists Co., on February 3, 1994. On that date she consented to be tested for drug abuse pursuant to the employer's policy. The employer asserted that her test was positive, and she was subsequently discharged for failure to comply with company policy regarding actions to be taken following a positive drug test. After a hearing, the Board of Review found that the appellant was disqualified for unemployment benefits because she had been discharged for misconduct connected with the work. From that decision, comes this appeal.

For reversal, the appellant contends that there is no substantial evidence to support the Board's finding that she was discharged for misconduct connected with the work. We do not agree, and we affirm.

On appeal, the findings of fact of the Board of Review are conclusive if supported by substantial evidence, i.e., by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *George's Inc.* v. *Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995). Our review is limited to determining whether the Board could reasonably reach its decision upon the evidence before it, and in making that determination, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.*

Viewed in that light, the record shows that the employer's drug policy required employees testing positive for drug use to accept treatment for substance abuse; failure to accept treatment was expressly provided to be insubordination subjecting the employee to discharge. In the event that an employee should disagree with the test results, the policy permitted a second test to be performed at employee expense, using the original specimen, within 30 days of the original test.

In the case at bar, there was evidence that the employer notified the appellant that a positive result was obtained on her drug test, and that the appellant neither obtained a retest within 30 days nor accepted treatment pursuant to the employer's policy. Although there was evidence that would support a finding that the appellant

had not been insubordinate, the scope of our review is limited to determining whether the Board could reasonably reach its decision on the evidence before it. *Perry* v. *Gaddy*, 48 Ark. App. 128, 891 S.W.2d 73 (1995). We hold that it could, and consequently, we must affirm.[1]

Affirmed.

JENNINGS, C.J., and STROUD, J., agree.

MAYFIELD, NEAL, and GRIFFEN, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I agree with, and join in, the dissenting opinion of Judge Griffen in this case. Also, I want to make the following remarks which demonstrate, in my view, that the Board of Review's decision should be reversed.

Laurie White was denied unemployment benefits for eights weeks on a finding that she was discharged from last work for misconduct connected with the work because her urine was positive for amphetamines in violation of the employer's alcohol and drug abuse policy.

The employer, Duff-Norton Yale Hoists, and the Steelworkers Union, had negotiated an alcohol and drug abuse policy which took effect on September 18, 1992. The policy states its purpose as "to provide a safe and productive work environment for all employees," and to "make every effort to have a drug and alcohol free workplace and workforce." [sic] The policy provided that managers and supervisors who had probable cause to suspect that an employee was under the influence of alcohol or controlled substances, or had illegal drugs or alcohol in his or her possession, could ask the employee to take a drug and/or alcohol test. The policy further provides that an employee refusing a test can be discharged, but after a "first time positive result" an employee will be offered rehabilitation, and refusal to accept treatment will be viewed as insubordination and will subject the employee to discharge. And the policy provides that employees disagreeing with test results can, at the employee's expense, have the sample analyzed again. Appellant Laurie White signed an acknowledgment that she had received a

[1] The "facts" referred to in the dissenting opinions, it should be noted, were not facts found by the Board, but consist instead of evidence that the Board had before it to accept or reject. The Board rejected that evidence.

copy of the drug policy on September 24, 1992.

On February 3, 1994, while appellant was off on sick-leave, she was asked to submit a urine specimen for a drug-screening test. Appellant testified at one of the hearings that the personnel manager, Martha Lucas, told her that two doctors had informed her that appellant was "chemically dependent." Appellant signed the consent form at 3:05 p.m. and went to a laboratory in Forrest City to submit a urine specimen. The report from the Forrest City Laboratory states that the collection date was February 3, 1994, at 1600 hours. According to appellant she gave her urine sample to the nurse in an open container and the nurse did not seal it in front of her. Appellant said she did not know what the nurse did with the sample.

On February 14 appellant was told that her urine tested positive for amphetamines. Appellant testified that she had never taken any amphetamines but admitted she was on several prescription drugs, although the only ones she could name were Prozac and Tranzen. Appellant related that she asked Ms. Lucas if she could get another test done and was told she could not. She said Ms. Lucas told her she could either go into a rehabilitation program or be fired. Appellant said she also asked for another test on the original specimen, which was permitted by the written alcohol and drug policy of the company, but Ms. Lucas also told her she could not do that either.

Appellant then hired an attorney, who was apparently able to get the original urine specimen sent to another laboratory, Roche Biomedical Laboratories in Southhaven, Mississippi. The result was sent to appellant's family physician, Dr. Collins Morgan, and is entered into the record. That report also shows appellant's urine was positive for amphetamines.

The record contains the handwritten notes of Ms. Lucas, dated February 1 through 3, 1994, in which she explains that appellant was attempting to check into Greenleaf Hospital in Jonesboro, a psychiatric hospital, for treatment of anorexia. They offered to admit her to the alcohol and drug dependency unit but appellant refused, claiming that she was not drug dependent. These notes also say that appellant was advised that they wanted her to take a drug test, "based upon her absentee record, crying at her work place for no apparent reason, frequent trips to the bathroom."

After a hearing before the Appeal Tribunal, it issued an opinion, dated September 29, 1994, which held that the employer had failed to prove that the claimant had amphetamines in her system in light of her consistent denial that she had ever used amphetamines. The referee said the employer did not present sufficient chain of custody evidence that the results from the laboratory were actually from the urine specimen given by claimant because the employer offered no information on what happened to the claimant's open container of urine between the time the claimant handed it to a hospital employee and when the employer received the original test results. The Appeal Tribunal allowed benefits, but the employer appealed to the Board of Review.

On November 23, 1994, the chairman of the Board of Review issued an opinion in which he held that the appellant was discharged from her last work for misconduct connected with the work. The chairman's opinion states, in part:

> Based on the evidence, the Board of Review finds that the claimant was discharged from last work for misconduct connected with the work. . . . What is controlling is the claimant's failure to abide by the employer's policy and comply with provisions once the employer asserted that it had an initial positive test. One option for the claimant was to enter a rehabilitation program. It is understandable that the claimant would not desire to do so when asserting that the initial test result was erroneous. The other option for the claimant was to effectively pursue, under the employer's policy, retesting of the original specimen. . . . Even if possibly dilatory, the claimant began such a pursuit. However, she did not successfully follow through with that pursuit, and the evidence fails to establish that the employer contributed to the failure of the claimant to successfully complete that option. The Board particularly notes the lack of evidence about what the claimant did after allegedly learning on March 11 that the initial specimen had (purportedly) been destroyed. The evidence does not establish that she did anything, and she should not now be heard to complain about any alleged shortcoming of the employer in administering its policy.

Appellant argues on appeal that "the decision of the Board of Review is not supported by substantial evidence and is contrary to law in that (1) the Board failed to specify what conduct constituted

misconduct according to recognized legal standards and (2) the claimant's actions did not constitute misconduct in connection with work." Appellant submits that because she did not refuse to give a urine specimen for testing and because the employer failed to offer competent evidence of the chain of custody or the procedures of testing and result, it is impossible for the employer to prove the drug policy was violated. Appellant argues that the drug policy and Ms. Lucas's testimony show that to terminate appellant for insubordination for refusing rehabilitation there must have been a positive drug test followed by the same result on a second test on the same sample and then refusal of rehabilitation. Since there was a delay in the second testing of the original sample and the employer then failed to offer appellant rehabilitation before terminating her for insubordination, she was discharged for a reason not constituting misconduct connected with the work.

I think the Board's finding that the appellant failed to follow through on the retest after being told the original specimen had been destroyed is inadequate. The Board has not found conduct of the appellant that was a wilful (1) disregard of the employer's interest, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer had a right to expect of his employees, or (4) disregard of the employee's duties and obligations to his employer. *A. Tenenbaum Co.* v. *Director of Labor*, 32 Ark. App. 43, 796 S.W.2d 348 (1990); *Grace Drilling Co.* v. *Director*, 31 Ark. App. 81, 790 S.W.2d 907 (1990). There must be an element of intent associated with a determination of misconduct. Mere good faith errors in judgment or discretion and unsatisfactory conduct are not considered misconduct unless they are of such a degree of recurrence as to manifest culpability, wrongful intent, evil design, or intentional disregard of an employer's interest. *Grace Drilling Co.* v. *Director*, *supra*; *Sadler* v. *Stiles*, 22 Ark. App. 117, 735 S.W.2d 708 (1987); *Shipley Baking Co.* v. *Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986). There has been no finding whatsoever and, indeed, there is no evidence in the record to support such a finding, that appellant has been guilty of conduct that would fit the above definition of employee misconduct.

I would reverse and remand.

NEAL and GRIFFEN, JJ., join in this dissent.

WENDELL L. GRIFFEN, Judge, dissenting. Although the major-

ity views this case as turning on the fact that appellant "neither obtained a retest within 30 days nor accepted treatment pursuant to the employer's policy" in case of a positive result from an employee's drug test, the clear and uncontradicted proof is that the employer never provided the original specimen within 30 days of the original test. The plain proof is that the appellant disputed the positive drug test, challenged the chain of custody for the original sample, and was told by the personnel manager for appellee that her options were to either enter rehabilitation or be fired. Appellant also testified that she tried to persuade the employer to retest the original sample, but that the personnel manager rejected that request. Furthermore, the personnel manager (Martha Lucas) testified that she did not receive the original test result until the day before the second hearing before the Appeal Tribunal. Neither she nor anybody else associated with the employer have produced the original test specimen so that the appellant's right to obtain a retest could be honored.

The personnel manager testified that appellant had missed quite a number of days from work before February 3, 1994, and there appears to have been some concern that she needed or was contemplating psychiatric hospitalization at that point in time. Although the personnel manager testified that the contemplated hospitalization may have been for treatment of anorexia, there is no verification that appellant was diagnosed with that condition in the record. At any rate, the personnel manager informed appellant that she would be scheduled for a drug test due to her perceived absenteeism problem. Appellant went to the lab at Baptist Hospital in Forrest City on February 3, 1994, and provided a urine specimen, pursuant to directions from the personnel manager who had told her that unless she did so she would be fired immediately. Appellant's undisputed testimony is that she did not seal, initial, or otherwise label the urine specimen and that she did not see anyone else do so. The personnel manager testified that she does not know what happened to the urine specimen, but that the specimen produced a positive result for presence of amphetamines and that appellant was fired because she did not produce a negative result upon retesting of the original specimen. Thus, appellant was terminated for alleged noncompliance with appellee's drug policy in what appears to have been a blatant violation of that policy by her employer. Now our court has decided to uphold the denial of her claim for unemployment benefits based upon the view that there is substantial evidence

supporting the Board of Review's decision that she was discharged from her job because of misconduct connected with the work.

The Arkansas Supreme Court has stated that in keeping with the declaration of the state public policy of providing benefits to workers who are unemployed through no fault of their own, the statutory misconduct provision of the unemployment compensation law must be given an interpretation consistent with that declared policy, and that it should not be so literally construed as to effect a forfeiture of benefits by an employee except in clear cases of misconduct. *Willis Johnson Co.* v. *Daniels*, 269 Ark. 795, 601 S.W.2d 890 (1980). While various definitions of the term "misconduct" have been given by Arkansas courts, it appears generally accepted that a finding of "misconduct" will attach only to conduct evincing an intentional or deliberate violation of employer rules, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design. *Hillman* v. *Arkansas Hwy. & Transp. Dep't*, 39 F.3d 197 (8th Cir. 1994); *see also A. Tennenbaum Co.* v. *Director of Labor*, 32 Ark. App. 43, 796 S.W.2d 348 (1990); *Edwards* v. *Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988).

It is true that the issue of misconduct is a question of fact for the Board of Review, and that, on appeal, the Board's findings are conclusive if supported by substantial evidence. *A. Tennenbaum Co., supra.* The problem with the Board's findings in this case is that any holding of misconduct must rest upon a finding that appellant failed to comply with the employer's drug testing policy requiring her to produce a negative result from the original specimen that produced the positive result. All the evidence on the issue shows that the employer never produced the original specimen for appellant to retest. The employer selected the testing agency. It had the duty to make the original specimen available to appellant so that she could exercise her right to have it retested in connection with her challenge to the positive finding. Having failed to safeguard the original specimen so as to make it available for retesting pursuant to its own policy, the employer is in no position to use appellant's failure to produce a negative result upon a retest that the employer knows cannot be obtained to justify her dismissal.

Stripped of its obligatory references to the standard of review, this result stands for the proposition that an employee can be found guilty of misconduct so as to be disqualified from entitlement to

unemployment benefits where the employer accuses her of violating its drug policy based upon a positive drug test from a specimen that nobody has identified and which the employer cannot find. As if that were not enough, the prevailing opinion also holds that where the employer has deprived the employee of the chance to retest the original specimen, the employer may successfully assert the employee's failure to produce a negative result upon retesting as "misconduct." I cannot agree that fair-minded persons confronted with these facts would characterize appellant's failure to produce a negative result from a specimen that her employer has failed and/or refused to produce for retesting as intentional or deliberate disregard of her job duties and obligations or the employer's interests. Moreover, I reject the notion that the Arkansas General Assembly intended that employees should forfeit their right to unemployment compensation benefits on account of misconduct due to plain proof of such suspicious behavior by an employer.

NEAL and MAYFIELD, JJ., join in this dissent.

Doyne D. BROWN *v.* DIRECTOR, Employment Security Division

E 95-20 924 S.W.2d 492

Court of Appeals of Arkansas
Division II
Opinion delivered June 26, 1996

Jeffrey A. Weber, for appellant.

Allan Pruitt, for appellee.

MELVIN MAYFIELD, Judge. Doyne Brown appeals from a decision of the Arkansas Board of Review which denied his claim for unemployment benefits.

Appellant filed a claim for unemployment benefits on August 8, 1994. On August 30, 1994, appellant completed an "Arkansas Employment Security Department Work Sheet" in which he stated he quit because Larry Sigler questioned him about an insurance claim he submitted for substance abuse treatment; that he felt that this was an invasion of his privacy; and that he felt he could not

continue working under those conditions. He also stated that his wages and working hours had been reduced about a year prior to August 30, 1994.

The agency found that appellant quit his job for undisclosed reasons and denied benefits based upon Ark. Code Ann. § 11-10-513(A)(1) on the finding that appellant left his work voluntarily and without good cause connected with the work.

Appellant appealed to the Appeal Tribunal, and at a hearing held October 19, 1994, appellant testified he walked off the job because he was so outraged he felt it best to say nothing to anyone. He testified he was upset because Mr. Sigler, the employer's president, told him he was not going to pay a health insurance claim. Appellant said Sigler asked about the claim and it was appellant's understanding that this was illegal under the Americans with Disabilities Act. Appellant testified that he had filed two claims for substance abuse treatment approximately eight months previously, and only one was paid. Appellant said the other claim was paid six weeks after he was "constructively discharged." Appellant said he made no effort to discuss the problem with his employer; that he was demoted approximately one year ago because of a substance abuse insurance claim; and although he did not receive a pay cut, his hours were reduced from 47 1/2 to 45 hours per week. Appellant testified further that he was not aware that, under the Americans with Disabilities Act, there are situations where an employer has the right to ask for assurances that an employee is not currently using drugs.

Terry Stalnaker testified he observed the confrontation between Sigler and the appellant; he saw that appellant was very upset; and he saw appellant go out the back door, but he did not hear what was said.

Barbara Brosett, the employer's office manager, testified that the employer was a self-insured company with an administrator. She testified that Sigler has nothing to do with the insurance checks and would not have the authority to stop a claim. She said that on the day in question Sigler opened the mail and said he would ask appellant what he was on. She testified that to her knowledge appellant was not reduced in pay.

The Appeal Tribunal denied benefits on the basis that appellant voluntarily left his last work without good cause connected

with the work within the meaning of the law. The referee held there was insufficient evidence to show that appellant's wages or hours were reduced, but that the evidence shows he primarily quit because he became upset that the employer was questioning him about his condition.

The Board of Review affirmed the decision of the Appeal Tribunal, and found:

> The evidence indicates that the claimant became upset when the president of the company asked him about a claim for drug rehabilitation costs, and walked off the job. He acknowledged that he made no effort to resolve the problem before quitting, because of what he termed his "outrage." . . . The claimant also contended that he was improperly demoted and reduced in pay. He did not testify as to the date that occurred, but information in the record indicates that occurred in 1993. Because of the remoteness in time, the Board cannot see how that could be considered part of the catalyst in his decision to quit on the day he did.

On appeal to this court, the appellant argues that the Board's decision is not supported by substantial evidence.

■ On review of unemployment compensation cases, the factual findings of the Board of Review are conclusive if they are supported by substantial evidence. Substantial evidence is valid, legal and persuasive evidence; such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Victor Industries Corporation* v. *Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981).

Appellant argues he had good cause to resign his employment because he believed his insurance benefits were being wrongly withheld from him. In support of this argument he cites *Young* v. *Everett*, 6 Ark. App. 295, 641 S.W.2d 39 (1982), but that case is factually different from this case. There, the appellant testified that when he was hired the employer agreed to provide expenses for any change in location of the job site. But when the employer's operation was moved to another county, the appellant was told the employer would not pay his out-of-town expenses. Appellant resigned when he discovered his wages would not cover his expenses.

Here, the appellant left his job when he became upset because his employer told him he was not going to pay an insurance claim. However, appellant admitted one claim had already been paid; the other claim was paid six weeks after he quit; and there was evidence that the employer did not have the authority to stop a claim. Moreover, appellant said he did not make an effort to discuss the problem before walking off the job. The taking of appropriate steps to prevent a perceived misconduct from continuing is an element to be considered in determining whether an employee had good cause to quit work. *See Teel* v. *Daniels*, 270 Ark. 766, 606 S.W.2d 151 (Ark. App. 1980).

In the instant case, we think the Board's decision is supported by substantial evidence.

Appellant has also argued that because the record on appeal was not timely filed the appellee should be estopped from denying that appellant is entitled to unemployment benefits. Appellant says he filed his pro se petition for review on January 24, 1995; the agency filed an answer on March 1, 1995; and the transcript of the record was filed August 18, 1995. The appellant argues the record should have been filed within 90 days from the date the petition was filed.

In support of this argument, appellant cites *Wortham* v. *Director of Labor*, 31 Ark. App. 175, 790 S.W.2d 909 (1990), where we issued a writ of certiorari requiring the record to be filed because over five months had passed since the filing of the notice of appeal, and the record was not yet filed. Drawing upon the requirement of the Rules of Appellate Procedure in appeals from circuit and chancery courts, we held that a period of 90 days after the filing of the notice of appeal was a reasonable time in which to file the record in an appeal from the Board of Review. Appellant says the *Wortham* rule is meaningless unless a penalty is enforced against the agency for failure to adhere to the rule.

It is true that the appellee failed to file the transcript of the record in this case until seven months after the date the appellant's petition was filed. The problem is that Ark. Code Ann. § 11-10-529(b)(1) (Repl. 1996) provides that the Director of the Arkansas Employment Security Department shall file a certified copy of the record of the case, including all documents, papers, and a transcript of the testimony, but does not specify a time period in which this

must be done. In *Wortham* we granted a petition for writ of certiorari and ordered that the record be transmitted within 30 days.

Of course, if the Board were the appellant in this case there would be precedent for dismissing the appeal. *See Coggins* v. *Benton*, 45 Ark. App. 189, 873 S.W.2d 820 (1994). And if the director had failed to file the record as required by a writ of certiorari, it would not be improper for sanctions of some kind to be applied. But we do not think that we should, without some advance warning, apply sanctions for simply failing to file the record on appeal within 90 days after the notice of appeal has been filed by a claimant. However, we think it fair to state that this court might in the future consider this opinion sufficient advance warning.

Affirmed.

STROUD and NEAL, JJ., agree.

Louis G. CARRARO, Jr. *v.* DIRECTOR, Employment Security Division

E 95-154 924 S.W.2d 819

Court of Appeals of Arkansas
Division III
Opinion delivered June 26, 1996

MELVIN MAYFIELD, Judge. Appellant, Louis G. Carraro, Jr., appeals a decision of the Arkansas Board of Review which found that he was discharged from his last work for misconduct connected with the work. The appellant is not represented by an attorney and neither party has filed a brief.

Appellant worked for Southwestern Bell for eighteen years. He was discharged for misconduct as a result of his refusal to follow the Employee Assistance Program's (EAP) recommendations under the Workplace Violence Policy.

At the Appeal Tribunal hearing, appellant, a supply attendant who delivered materials for Southwestern Bell, testified that he was asked to submit to EAP counselling because of a misunderstanding which occurred on January 3, 1995, when a co-worker told him to "get off my ass and do my job." Appellant said he came out of his

truck and told his co-worker that "I could rip his head off and shove it down his neck, for him to get away from me, our business was done." Appellant testified it was "just a figure of speech, how can you actually rip somebody's head off and shove it down their neck, it can't be done, I didn't threaten to kick his butt, I didn't threaten to shoot him or anything, you know it just came out of my mouth that way." Appellant's co-worker reported the incident and appellant's supervisor Russell Hannahs told him he was suspended.

Appellant testified that on January 9, 1995, Hannahs told him he would be fired unless he signed a document referred to as "attachment three" relating to EAP counselling. This untitled document is included in the record and is in essence a release. It asks whether appellant "intends to follow the recommendations of the EAP Counselor," and, if he agrees to follow the recommendations, whether he is "getting the help" he needs or is "completing the agreed upon plan of action." The document bears appellant's signature, but the signature line for the EAP Counselor is blank. Appellant testified that he read the document; that he had a union representative with him; that he did not know what the document meant; and that he did not know what he was signing; however, when he was told he would be fired unless he signed, he had no other choice but to sign.

Appellant said he went to counselling, and the counsellor asked inappropriate questions regarding whether he had been fondled, molested, or played with himself. He said he answered all her questions; that on January 10, she referred him to Dr. Owens; and that Dr. Owens asked the same inappropriate questions. Then Dr. Owens told appellant he did not need to see him any more, but appellant had to take a drug test. Appellant said he felt he had some constitutional rights "when it came to that"; that he had been asked a bunch of questions he should not have been asked; and he believed it was time to get his union involved and let them advise him on what to do. He said he told Dr. Owens he was going "straight to my union."

On January 11, 1995, the EAP counsellor called appellant and asked whether he had taken a drug test. Appellant said that he told her he was not refusing anything; that he needed to "let someone know what I need to do on this"; that he was waiting for the union to tell him what to do; and that he would get back to her.

On Friday morning, January 13, the counsellor called again and told appellant he had from 8 a.m. until 10 a.m. to take the test. Appellant said he told her again that he was not refusing to take the test, and he testified that he went to the union hall to ask what he should do and he was told to go home until "you hear from us." Appellant said he went straight home, and at 5 p.m. he received a call from the union telling him he'd been fired because he didn't "take that drug test" and asking whether there was any way he could take a drug test "right now."

Appellant testified that the next morning (Saturday) he went to his doctor's office and had a drug test and took it to the union hall. On Monday he returned to the union hall and was told he needed to go where "they wanted you to take the drug test to begin with." He said that he went and submitted to another test "which was my money" and that he went back to the union hall and gave it to them.

Appellant was fired on January 18, 1995, after a disciplinary hearing. Appellant said he did not inform the board that he had submitted to the test, but they would not let him say anything. He testified that he couldn't believe he was fired and had he been told he would be suspended or fired if he failed to take the test, he would have taken it "right then, immediately." He said the counsellor only said that if he did not take the test she would have "no alternative but to call Legal and say you refused," but nobody said anything about getting fired.

When asked whether he knew that if he didn't follow EAP recommendations he would be dismissed, appellant testified that he feels like he complied with the recommendations. He said that other than taking the drug test he complied one hundred percent. He said he did not refuse to take the test, the union told him to go to the house, and that is exactly what he did.

Russell Hannahs, the appellant's supervisor in material management, testified that he suspended the appellant on January 9, 1995, after another employee reported being threatened. Hannahs said that the employer has a workplace violence policy which states that violence or threats to another employee are prohibited and will be dealt with "accordingly"; that he held an investigatory interview with appellant; and that appellant admitted making the threat. Hannahs said he made the mandatory referral that appellant go to EAP

and follow their recommendations. On Friday evening (January 13) about 7 p.m., Francine Barton, the EAP counselor, called him at home and said appellant had not followed the recommendations given him by EAP, but she did not tell him what appellant failed to do, and he did not inquire. Hannahs said he notified his supervisor and appellant was terminated on January 18, 1995, for "failure to follow the recommendations of the EAP." Hannahs testified further that appellant knew he had to follow the EAP recommendations or be fired.

The Appeal Tribunal granted benefits on the basis that appellant did not willfully or intentionally violate a standard of behavior that the employer had a right to expect. It found that appellant's reliance on the union representative's advice was not unreasonable; that appellant's behavior was a judgment call and not misconduct.

The Board of Review reversed the findings of the Appeal Tribunal holding appellant was discharged for misconduct connected with the work for failure to comply with the recommendations of the employer's EAP. The Board held that appellant's failure to follow the recommendation within the specified time frame resulted in his discharge for willful disregard of the employer's interests, and the appellant's duties and obligations to the employer.

Arkansas Code Annotated § 11-10-514(a)(1) (Repl. 1996) provides that an individual shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work. However, as we explained in *Nibco, Inc.* v. *Metcalf & Daniels*, 1 Ark. App. 114, 613 S.W.2d 612 (1981):

> To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion. There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.

1 Ark. App. at 118, 613 S.W.2d at 614.

On review of unemployment compensation cases, the factual findings of the Board of Review are conclusive if they are

supported by substantial evidence; but that is not to say that our function on appeal is merely to ratify whatever decision is made by the Board of Review. *See Shipley Baking Company* v. *Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986). As we said in *Shipley*, "We are not at liberty to ignore our responsibility to determine whether the standard of review has been met." 17 Ark. App. at 74, 703 S.W.2d at 467. When the Board's decision is not supported by substantial evidence, we will reverse. *Sadler* v. *Stiles*, 22 Ark. App. 117, 735 S.W.2d 708 (1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Victor Industries Corp.* v. *Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981).

After reviewing the evidence, we cannot conclude the Board's finding of misconduct is supported by substantial evidence.

The employer stated that appellant was discharged for "failure to follow the recommendations of the EAP." But, appellant went to counselling with both the counsellor and Dr. Owens, and they both asked what he considered to be inappropriate questions. When Dr. Owens asked him to take a drug test, appellant felt his constitutional rights were threatened and told Dr. Owens he was going "straight to my union." Moreover, it is not disputed that appellant told the counselor he was not refusing to take the test; that he went to the union; and then went "straight home" on the union's advice. While appellant's reliance on the union's advice may have been ill-advised, we do not think this conduct was sufficient for reasonable minds to conclude that appellant's conduct exhibited "an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design."

We finally note that the untitled document referred to as "attachment three" states:

> I hereby relieve and release the Southwestern Bell Telephone Company, my employer if other than the Telephone Company, and the Southwestern Bell Telephone Company EAP personnel from any and all claims, judgements [sic], damages and causes of action arising out of, or in connection with the aforementioned release of information.

Arkansas Employment Security Law provides that "[a]ny agreement by an individual to waive, release, or commute his rights to benefits

or any other rights under this chapter shall be void." Ark. Code Ann. § 11-10-107(a) (Repl. 1996).

The decision of the Board of Review is reversed and remanded for the Board to allow appellant unemployment compensation.

Reversed and remanded.

STROUD and NEAL, JJ., agree.

Eugene and Glenda FIELDS *v.* William and Sharon GINGER

CA 95-153 925 S.W.2d 794

Court of Appeals of Arkansas
En Banc
Opinion delivered June 26, 1996
[Petition for rehearing denied August 14, 1996.*]

*Griffen, J., would grant.

The Rose Law Firm, by: *Herbert C. Rule, III*, for appellants.

Pryor, Barry, Smith, Karber & Alford, by: *Gregory G. Smith*, for appellees.

JUDITH ROGERS, Judge. Appellants appeal from an order granting appellees a nonexclusive easement by prescription in a driveway and also quieting title in appellees to the strip of land lying south of the driveway. On appeal, appellants contend that both findings made by the chancellor are clearly against the preponderance of the evidence. Finding no error in the chancellor's decision, we affirm.

The parties are adjacent landowners. The property they now own was once part of a single, thirteen-acre tract owned by Bill and Mary Harris. The Harrises lived in a home which was situated on the southern two acres, which was separated from the rest of the property by a fence. The entire tract was bordered on the west by Highway 71. When the Harrises purchased the property, access to the home was gained by a circular driveway off a tin-horn from Highway 71. Mr. Harris later constructed an "L" shaped road across the property from Highway 71 to what is known as Commission Road. The road was placed south and parallel to the fence mentioned above, running in an easterly direction from the highway. At a point just beyond the house, the road makes a ninety-degree turn to the north, crosses the fence line and continues until it intersects Commission Road. Mr. Harris put in a gate where the road crossed the fence and placed a lock on it. Mr. Harris also built a concrete pad connecting the road and the home. The driveway in question is that part of the road as it runs from Highway 71 to the house. Grass was allowed to grow over the original circular driveway.

In 1978, the Harrises sold the home and two acres to Harlan and Myra York. In dividing the property, the Harrises retained title to the driveway with the location of the property line being some six feet south of the drive. After the sale, the Harrises rented the home from the Yorks for a year while they built their own home on the northern part of the property, including a separate driveway. During this time, Mr. Harris put in curbs and gutters along the driveway. The Yorks lived in the home and used the drive as the sole access to their property from 1979 to 1986, when the house was sold to the appellees, William and Sharon Ginger. Meanwhile, the Harrises divorced, and Mr. Harris later died in 1990. The Harrises' home was then occupied by their daughter and her husband, Larry and Lynette Denton. Appellants, Eugene and Glenda Fields, bought the northern tract from Mr. Harris's heirs in December of 1991.

Appellees received correspondence from appellant's attorney in

June of 1992 informing them that appellants considered appellee's use of the drive as being permissive. In August of 1992, appellant's attorney wrote another letter informing appellees that the appellant's "future plans for the property are such that it is probable that [appellants] will be closing the driveway." That same month, appellees filed this lawsuit claiming that they had acquired a prescriptive easement in the driveway. Appellees also contended that they had acquired the property south of the fence by adverse possession. The chancellor found that appellees had established their right to a permanent, nonexclusive easement by prescription in the driveway. The chancellor further determined that appellees had acquired the strip of land south of the driveway by adverse possession, but that appellees had failed to establish their claim to the property north of the drive to the fence. In his decision, the chancellor found that appellees had established their adverse claims by tacking their possession onto that of the Yorks.

Appellants first contend that the chancellor erred in finding that appellees had acquired a prescriptive easement in the driveway. Although we review chancery cases *de novo*, we will not reverse a chancellor's findings unless they are clearly against the preponderance of the evidence, or clearly erroneous. *Hutter* v. *Medlock*, 29 Ark. App. 122, 777 S.W.2d 869 (1989).

Myra York testified that the property was not surveyed when she and her husband bought the house from the Harrises in 1978. She said that she believed that everything south of the fence was theirs and that she assumed that the driveway went with the house because there was no other access to the home. She further testified that Mr. Harris told them that the driveway was theirs, saying, "It's your drive." She related that Mr. Harris used the driveway to move equipment to his property and that she did not object to his use of the road. She said that they always got along well and never had any problems with each other. Mrs. York also stated that the Harrises had their own driveway and did not use the drive in question on a regular basis.

Mary Harris related that she and Mr. Harris were divorced in 1986 but that they had dated each other after the divorce until his death in 1990. She testified that when they sold the house to the Yorks they intended to keep the road and property south of the fence for future development. She testified, however, that Mr. Harris told her that "Before seven years is up we've got to sell part of

this road to the Yorks or dedicate it to the county." Mrs. Harris later acknowledged that Mr. Harris was "definitely aware" that the Yorks could claim the drive by adverse possession after a seven-year period and she said that, sometime before she left in 1986, he asked her not to let him forget to do something about it. She said that she was not aware that he had done anything while they were married or during the time that they dated one another.

Appellee William Ginger testified that, at the time of his purchase of the property in 1986, he drove with the realtor up the drive, which was the only means of getting to the house. He said that he saw the fence to the left of the drive and observed that the house was enclosed by fences on all but the western boundary, and he said that he assumed that the area south of the fence, including the driveway, was part of the property he was purchasing. He said that he had used the drive for access to his home since he had bought the house, just as his predecessors in title had done.

Mr. Ginger recalled that Highway 71 was widened to four lanes in 1989. He said that Mr. Harris sought his cooperation in having the road dedicated to the county so that a left-hand turn lane for access to the drive could be placed on Highway 71. Mr. Ginger understood that a turnout could not be constructed for a private road, and he was amenable to the idea thinking it beneficial because it would increase the value of his property and also reduce the risk of having an accident. Ginger said that Mr. Harris also asked him to pay for paving his portion of the road. Ginger stated that the turn lane was built and a stop sign was placed at the opening of the drive by the county. He revealed that, during his discussions with Mr. Harris, a question arose as to who owned the road. Ginger said that he had believed the road was his and he looked at the survey, which had been done at the time he bought the property, and discovered that the Harris's owned the road. He further testified that Mr. Harris had used the road sparingly prior to the placement of the turn lane but that afterwards his use of the road became more frequent. Mr. Ginger said that he did not object because as far as he was concerned the road had been dedicated to the county. He felt that this belief was confirmed when Mr. Harris's daughter and her husband, the Dentons, asked him for permission to relocate their mailboxes onto the road, since the Post Office would not allow mailboxes to be placed on a private drive. He also said that the Dentons asked him for permission to name the road

Dakota Drive, after their son, and for the road to be included in the 911 system, both of which were accomplished.

There was testimony that, although the county treated the drive as a county road, its dedication had never been formally accepted and that it was not, in fact, a county road.

An individual asserting an easement by prescription has the burden of proof to show by a preponderance of the evidence that use of the roadway has been adverse to the owner and his predecessors in title under claim of right for the statutory period. *Wallner* v. *Johnson*, 21 Ark. App. 124, 730 S.W.2d 253 (1987). In contesting the chancellor's decision, appellants contend that the Yorks' and the Gingers' use of the drive was permissive and did not ripen into an adverse right. In so arguing, appellants, as well as the dissent, rely on the familiar rule of law spoken of in the decision of *Manitowoc Remanufacturing, Inc.* v. *Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991), where it is said:

> Overt activity on the part of the user is necessary to make it clear to the owner of the property that an adverse use and claim are being exerted. Mere permissive use of an easement cannot ripen into an adverse claim without clear action placing the owner on notice.

Id. at 275-276, 819 S.W.2d at 278 (citations omitted). However, appellants and the dissent fail to acknowledge that the supreme court has long recognized a variation in the general rule. In *Fullenwider* v. *Kitchens*, 223 Ark. 442, 266 S.W.2d 281 (1954), the court, after reviewing the leading decisions in Arkansas concerning prescriptive rights, stated the exception to the rule as follows:

> A consideration of the many opinions of this court regarding the acquisition of a right-of-way over lands makes it clear, in our opinion, that no real conflict exists. All our opinions are in harmony on one point, *viz.*: Where there is usage of a passageway over land, whether it began by permission or otherwise, if that usage continues openly for seven years after the landowner has actual knowledge that the usage is adverse to his interest or where the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse, then such usage ripens into an absolute right.

Id. at 446, 266 S.W.2d at 283. One of the cases discussed and quoted at length by the court in *Fullenwider* was *McGill* v. *Miller*, 172 Ark. 390, 288 S.W. 932 (1926), a case factually similar to the one at bar. There, the court affirmed the chancellor's grant of a prescriptive easement in an alley to owners of adjoining property. The court said:

> It is true that the use originated as a permissive right and not upon any consideration, but the length of time which it was used without objection is sufficient to show that use was made of the alley by the owners of adjoining property as a matter of right and not as a matter of permission. In other words, the length of time and the circumstances under which the alley was opened were sufficient to establish an adverse use so as to ripen into title by limitation.
>
> It is true that the testimony of McGill establishes the fact that, after he became the owner of the property in 1910, the alley was frequently used, but that there was an embankment at the mouth of the alley, so that it was difficult to use it; and he also testified that one of his neighbors asked permission to dig down the alley and use it for the purpose of hauling manure. He stated that he agreed for his neighbor to so use the alley, but his own testimony shows that the alley was open and plainly marked prior to that time, and was occasionally used. His testimony is not sufficient to show that, prior to that time, during the years that the alley had been open, the use of it had merely been permissive, nor that those who used the alley after he acquired the property did so merely by permission.
>
> We give full recognition to the principle of law established by the numerous decisions cited in the brief of appellants, to the effect that a permissive use cannot ripen into a legal right merely by the lapse of time, but we think that the evidence is sufficient to show that this use was made of the alley as a matter of right and in hostility to the right of the original landowner to close the strip and prevent its use. The open way was for the especial benefit of the owners of adjoining property, and is the only convenient access that they have to their properties, and this confers upon them such special right as enables them to maintain a suit to prevent an obstruction. We think that the chancellor was

> correct in holding that there was an easement for the use of the alley, and that neither McGill or Todd had the legal right to close it.

Id. at 394, 288 S.W. at 934. Given the principles upon which the *McGill* court based its opinion, it was not critical to the decision that there was no evidence of overt activity on the part of the adverse users alerting the owner of their adverse claim. Indeed, this was one of the complaints asserted in the dissenting opinion. *See also Armstrong* v. *McCrary*, 249 Ark. 816, 462 S.W.2d 445 (1971).

■ In *Zunamon* v. *Jones*, 271 Ark. 789, 610 S.W.2d 286 (Ark. App. 1981), we rejected the notion that it was necessary in all cases that persons claiming a prescriptive easement must openly communicate their intention to use the road adversely before a permissive use can ripen into an adverse right. Relying on *Fullenwider* v. *Kitchens*, *supra*, and *McGill* v. *Miller*, *supra*, we recognized that the length of time and the circumstances under which the roadway was opened and used is sufficient to establish an adverse claim, when those circumstances indicate that the true owner knew or should have known that the road was being used adversely. *See also White* v. *Zini*, 39 Ark. App. 83, 838 S.W.2d 370 (1992).

■ The determination of whether the use of a roadway is adverse or permissive presents a question of fact. *Wallner* v. *Johnson*, *supra*. In the case under consideration, it was shown that the driveway was the only means of access to the home. A review of the testimony reveals that, based on the location of the drive, both the Yorks and the Gingers assumed that they owned the driveway, with the Yorks' belief being based in large part on Mr. Harris's representation that the driveway was theirs. The testimony taken as a whole thus strongly indicates that their use of the drive was under a claim of right, as was found by the chancellor. It was also firmly established that Mr. Harris had actual knowledge of their adverse use of the road and, despite that knowledge, he never denied them access to the drive. We also regard as significant the testimony that Mr. Harris sought permission from Mr. Ginger in the effort to dedicate the road to the county, as well as the testimony that he asked Mr. Ginger to contribute to the cost of paving the road. Given the circumstances of this case, we cannot say that the chancellor's decision is clearly against the preponderance of the evidence, or that it is contrary to settled law.

On this point, appellants further argue that the chancellor erred in failing to limit the purposes for which appellants can use the road. This issue was not raised at trial and we decline to address it for the first time on appeal. *Barr* v. *Ark. Blue Cross*, 297 Ark. 262, 761 S.W.2d 174 (1988).

Appellants next argue that the chancellor erred in finding that appellees and their predecessors in title had adversely possessed the strip of land south of the driveway because of Mrs. Harris's testimony that she planted a row of trees there which she watered and tended on a regular basis until 1986. However, there was conflicting evidence as to who maintained this strip of property. Appellees presented testimony that the Yorks and those hired by them mowed the strip, and Mr. Ginger testified he was the only one who mowed the strip from the time he bought the property until the appellants requested that he stop doing so in 1992. There was also evidence that an electric light pole was located on the strip prior to the Gingers' purchase of the property. It was said that the switch for the light was inside the Gingers' house and that they paid for the electricity to the pole. As with the first issue, we cannot say that the chancellor's decision is clearly against the preponderance of the evidence.

Affirmed.

JENNINGS, C.J., and COOPER, ROBBINS and MAYFIELD, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I dissent from this decision because I believe that the chancellor's findings that the appellees acquired a prescriptive easement of a driveway and title by adverse possession to a six-foot strip of adjacent property were clearly against the preponderance of the evidence and, therefore, erroneous. The chancellor made those findings despite uncontradicted proof that the area was originally owned by appellants' predecessors in title who had given appellees' predecessor in title permission to use the driveway and the area adjacent to it. The permissive use never ripened into *adverse* use.

The evidence was that a couple named Harris owned a thirteen-acre parcel of land that included the house in which they lived in the southern part of the parcel. The Harrises decided to build

another house for themselves in the northern section of the tract, but while they still lived in their old house which they were renting from its purchaser (the Yorks) they arranged for a driveway to be cut that would serve their new house. The Harrises sold their house and two acres of land *south* of the driveway to a couple named York, and consented to the Yorks' use of the driveway after the sale even though the driveway was not property included in the sale. In fact, the property line for the two acres that the Yorks bought was 6 feet south of the driveway. A fence ran almost 10 feet north of the driveway. From 1979 until 1986, the Yorks lived in the house south of the driveway and used the driveway with the Harrises' permission.

Following Mr. York's death in 1984, Mrs. York sold the two acres to appellees (Ginger) on July 1, 1986. The Gingers received a survey that clearly showed the boundary to their property as 10 feet south of the private driveway that the Harrises constructed, and that the driveway was fully within the Harrises' property. However, the Gingers did not examine their survey until 1989, after a question arose between Mr. Ginger and Mr. Harris about ownership of the driveway and the property adjacent to it.

In 1991 the Harrises' heirs sold the north eleven-acre tract to appellants (Fieldses). The Fieldses received a survey that accurately depicted the boundary line between their property and that of the Gingers and depicted the accurate location of the private driveway within their property. When the Fieldses learned that the Gingers were not only using the private drive but apparently claiming the property on either side of it, they notified the Gingers by letter from their attorney stating their claim to the property described in their deed from the Harris heirs, and stating that any use of the driveway and property on either side of it by the Gingers was permissive as it had been for nearly 15 years. The Gingers then filed suit to quiet title in the property south of the fence (north of the driveway) by adverse possession, or declaring themselves owners of a permanent easement covering that property and enjoining the Fieldses from interfering with their use of it. The Gingers later amended their complaint to assert ownership under the doctrine of boundary by acquiescence. The Fieldses filed a counterclaim to quiet title that the Gingers denied.

The chancellor found that there was insufficient proof: (1) that the fence north of the private driveway became the boundary line

by acquiescence; (2) that there was an oral agreement that the fence would constitute the boundary line; (3) that the Gingers acquired an easement by necessity along the driveway; or (4) that they had acquired the tract between the northern edge of the driveway and the fence by adverse possession. However, the chancellor found that the Gingers acquired an easement in the driveway by prescription and title to the six-foot strip immediately south of the driveway by adverse possession. The chancellor also quieted title in the Fieldses in the property north of the southern edge of the driveway, subject to the nonexclusive easement to the driveway in favor of the Gingers. This finding was reached by tacking the Gingers' use of the area between the northern edge of their property and the southern edge of the driveway with that of their predecessors, the Yorks.

The elements for a prescriptive easement are essentially the same as for adverse possession except that exclusivity is not required. A claim for prescriptive easement, however, requires something more. The claimant to a prescriptive easement must prove some circumstance or act *in addition to, or in connection with,* the use which indicates that the use was *not merely permissive* because mere permissive use of an easement cannot ripen into an adverse claim without *clear action* placing the owner on notice. *Manitowoc Remanufacturing* v. *Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991)(emphasis added). A line of cases running from *Fullenwider* v. *Kitchens*, 223 Ark. 442, 266 S.W.2d 281 (1954) to *White* v. *Zini*, 39 Ark. App. 83, 838 S.W.2d 370 (1992) establishes that in order to establish a prescriptive easement, the true owner must either know or be presumed to know of the adverse character of the claimant's possession based on the facts and circumstances of the use. An alternative line of cases holds that the claimant must take *affirmative* steps to put the owner on notice of an adverse claim to support a prescriptive easement. *See, e.g., Manitowoc, supra*; *Burdess* v. *Arkansas Power & Light*, 268 Ark. 901, 597 S.W.2d 828 (1980); *Wisdom* v. *Thomas*, 253 Ark. 32, 484 S.W.2d 348 (1972); *Harper* v. *Hannibal*, 241 Ark. 508, 408 S.W.2d 591 (1966); *St. Louis Southwestern Ry. Co.* v. *Wallace*, 217 Ark. 278, 229 S.W.2d 659 (1950). Numerous other jurisdictions follow this principle. *See, e.g., Eileen B. White & Associates.* v. *Gunnells*, 263 Ga. 360, 434 S.E.2d 477 (1993); *Carr* v. *Turner*, 575 So.2d 1066 (Ala. 1991); *Dethlefs* v. *Beau Maison Dev. Corp.*, 511 So.2d 112 (Miss. 1987); *Lorang* v. *Hunt*, 107 Idaho 802, 693 P.2d 448 (1984); *Anson* v. *Tietze*, 354 Mo. 552, 190 S.W.2d 193 (1945);

Moore v. *Day*, 199 App. Div 76, 191 N.Y.S. 731 (1922), aff'd. 235 N.Y. 554, 139 N.E.732 (1923); *see generally* 25 Am. Jur. 2d *Easements and Licenses* §§ 65-67 (1996).

The majority ignores this second line of cases, citing instead cases that base their holdings on alternative reasonings. *See, e.g.*, *McGill, supra*; *Fullenwider, supra*. In virtually every case cited by the majority, the original owner was attempting to block or somehow obstruct the easement in question. These cases also rely heavily on the fact that the easements therein were used by great numbers of people, usually the general public. *See, e.g.*, *McGill, supra*; *Fullenwider, supra*; *Zunamon, supra*. Here, by contrast, the easement stems from an express oral agreement between two neighbors. Moreover, the Fieldses are merely seeking a resolution of the status of the easement. The record reveals no intent to block the Gingers from continuing to use the driveway. To the contrary, the record shows that the Fieldses wrote the Gingers and declared that use of the driveway was acceptable but by permission.

It is easy to reconcile these two lines of cases given the facts of the instant case. The cases relied upon by the majority that hold an owner must know or be presumed to know the adverse character of the claimant's possession are simply inapposite here because the use by the Ginger's and their predecessors in title was never adverse. Additionally, Mrs. Harris' statement that Mr. Harris was aware of a potential prescriptive easement claim as to the driveway cannot be imputed as some form of concession. Adverse possession and prescriptive easements are fact-intensive legal concepts often misunderstood by lawyers and laypersons alike. The law of both prescriptive easements and adverse possession looks to the use of the challenger, not the perceived effect of that use by the owner. In particular, the hostile character of possession is determined by the occupant's own views, actions and intentions and not those of his adversary. *Potlatch Corp.* v. *Hannegan*, 266 Ark. 847, 586 S.W.2d 256 (1979). When the general public makes use of an easement (*see* the cases cited by the majority *infra*) or the owner intentionally places a barricade across the easement, the owner is hard pressed to deny knowledge or the presumption of knowledge of adverse use. Neither of these relevant conditions existed in this case, nor did the parties contend they existed.

In *Harper* v. *Hannibal, supra*, the supreme court cited with approval a Washington case stating that no prescriptive right is

created unless a *"distinct and positive assertion . . . of a right hostile to the owner* [has been asserted]" and the claimant has held possession thereafter for the statutory seven-year period (emphasis added). 241 Ark. at 513, 408 S.W.2d at 593. In fact, a stricter standard applies before a permissive easement will be held converted into a prescriptive easement. Where entry upon the owner's land is permissive, the statute of limitations for a prescriptive easement will not begin to run against the legal owner *until an adverse holding is declared, and notice of such change is brought to the knowledge of the owner. St. Louis Southwestern Ry. Co.* v. *Wallace*, 217 Ark. 278, 229 S.W.2d 659 (1950)(emphasis added). The challenger has the burden of proving a prescriptive easement. *Burdess* v. *Arkansas Power & Light*, 268 Ark. 901, 597 S.W.2d 828 (1980).

The Gingers can point to no overt activity nor any distinct and positive assertion that clearly put the Fieldses or their predecessors on notice concerning their claim of right to a hostile use of the driveway, or the six-foot strip of land south of it that the chancellor found that they have acquired by adverse possession. The only thing that the Gingers did concerning the driveway was to continue to use it the same way that their predecessors (the Yorks) had used it. The Yorks were clearly on notice that the driveway and adjacent property six feet south of it belonged to the Harrises and that they were only permitted to use it. The Harrises and the Yorks mowed the grass south of the driveway. The Harrises planted a row of trees south of the driveway, and Mrs. Harris watered and cared for the trees on a regular basis until she left in 1986. The Gingers brought their suit less than seven years afterwards. Although Mr. Ginger testified to planting Bradford pear trees in 1987, he admitted that his trees were planted along the true property line. That conduct does not constitute clear notice to the true owner of a hostile use consistent with Arkansas law.

The majority cites *Zunamon* for the proposition that one claiming a prescriptive easement need not "communicate" their intent to use the easement adversely. This correctly states the law but misses the point. It not the communication that matters; rather, as *Zunamon* points out, it is the "length of time" and the "circumstances under which the [easement] . . . was used" that establishes adverse use. 271 Ark. at 791, 610 S.W.2d at 288. It is precisely the circumstances surrounding the Gingers' and Yorks' use that distinguish this case. It did not begin, nor did it ever become, adverse.

Counsel for the Gingers was asked at oral argument what conduct by the Gingers or their predecessors amounted to a clear assertion of a hostile claim of right to the disputed area (either the driveway as to the prescriptive easement or the six-foot area south of it as to the property acquired by adverse possession). Counsel was unable to identify any point in time when anything was done that amounted to a hostile claim of right to the property, let alone any time that the required hostile claim was made known or presumed known to the true owners.

The adverse possession claim also fails because the Gingers failed to show the requisite intent on their part or the Yorks' part to hold the six-foot strip adversely. In a claim of adverse possession, intention is a controlling factor, and intention to hold must be clear, distinct and unequivocal. *Dillaha* v. *Temple*, 267 Ark. 793, 590 S.W.2d 331 (1979). Mrs. York's testimony showed equivocal intent. She admitted that she did not know where the true boundary was and only "figured" the fence was the line. Mr. Ginger admitted that he did not know where the property line was until 1989 when the first possibility of a boundary line disagreement arose with Mr. Harris. Only then did Ginger look closely at his survey. Any intent on the Gingers' part to hold adversely was formed in or after 1989, not 1979 as the Gingers claim by virtue of tacking the Yorks' purported adverse use to their own use.

This is not a case of deferring to the findings made by the chancellor. The clear law of Arkansas for decades has required proof of an adverse claim of ownership or right of possession before a claim based on prescriptive easement or adverse possession can be upheld. The appellees concede that their use of the driveway and the property south of it was permissive, and that it was consistent with the permissive use made of that area by their predecessors. Appellees should not acquire title by adverse possession or a prescriptive easement based upon permissive use.

Finally, the policy effects of this case are deeply troubling. Now, an obliging landowner who wants to cordially grant a neighbor some right to use the owner's land will be disinclined towards such a neighborly gesture. If merely granting permissive use in one's land starts the clock for adverse possession or a prescriptive easement without proof of adverse use by the grantee, then adjoining landowners in Arkansas now have a strong disincentive against allowing their neighbors to use their land for any purpose, however

useful. Here, a land owner built a driveway on his own land, subdivided the land but allowed his new neighbor to continue using the driveway indefinitely, and now has been declared to have lost exclusive possession of the driveway plus title to the land next to it. His neighbor's permissive use somehow and at some point — though no one can say when or by what conduct — transformed itself into adverse use. Equity has not been done in this case; rather, we have, in effect, penalized the idea of the good neighbor.

Permissive use cannot ripen into a legal right merely by lapse of time. *McGill* v. *Miller*, 172 Ark. 390, 288 S.W.932 (1926). The only difference between the use of the driveway in 1979 and its use in 1992 is the lapse of time. Rather than standing decades of law regarding adverse possession and prescriptive easements on its head, the chancellor should be reversed, the case should be remanded, and the chancellor should be instructed to enter a decree in favor of the appellants.

Tina D. ROBERSON *v.* STATE of Arkansas

CA CR 95-714 925 S.W.2d 820

Court of Appeals of Arkansas
En Banc
Opinion delivered June 26, 1996

Daniel D. Becker, for appellant.

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

JUDITH ROGERS, Judge. Appellant, Tina Roberson, was convicted by a jury of possession of a controlled substance with intent to deliver and sentenced to twenty-three years in the Arkansas Department of Correction. Prior to trial, appellant filed a motion to suppress the fruits of an alleged illegal search and her subsequent statement. The trial court denied the motion, and it is from that denial that appellant appeals. We affirm.

The record reveals that a Hot Springs officer received a radio broadcast advising the officer to be on the look out for a yellow

Datsun pick-up truck with a certain license plate number, occupied by a white male and black female.[1] The officer was informed that the occupants were suspected of selling stolen jewelry. Lieutenant Bond observed the suspect vehicle and made an investigatory stop. Lieutenant Bond observed a ring box on the front seat of the vehicle. He was questioning the occupants when a back-up officer arrived. The back-up officer conducted a weapons search of appellant and located controlled substances and drug paraphernalia. Appellant was arrested and gave a statement to local Drug Task Force agents.

On appeal, appellant argues that Lieutenant Bond lacked sufficient probable cause or reasonable suspicion to make an investigatory stop of the vehicle in which she was a passenger. Appellant specifically contends that Lieutenant Bond could not have had more than a bare suspicion that the occupants of the vehicle were involved in any criminal activity, either a felony or a misdemeanor.

Rule 3.1 of the Arkansas Rules of Criminal Procedure permits a police officer to stop and detain any person that he reasonably suspects has committed or is about to commit a felony or a misdemeanor involving danger of forcible injury to persons or property, where it is reasonably necessary to obtain or verify the identification of the party or to determine the lawfulness of his conduct. "Reasonable suspicion" means that suspicion based on facts and circumstances which, in and of themselves, may not constitute probable cause to justify a warrantless arrest, but which give rise to a suspicion that is reasonable as opposed to imaginary or conjectural. Ark. R. Crim. P. 2.1; *Folly* v. *State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989). The justification for an investigatory stop depends on whether under the totality of the circumstances the police have a particularized, specific, and articulable reason indicating that the person or vehicle may be involved in criminal activity. *Nottingham* v. *State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989).

[1] This was simply the description broadcast over the radio, and there is no indication that it was intended to convey a malevolent purpose. Nevertheless, the dissent suggests that the report and the actions of the police were racially motivated. While we respect the dissenting judge's sensitivity to such issues, there is nothing in the record to support that conclusion, nor does appellant herself suggest that the color of her skin, or the fact that she was in the company of a white male, played any role in the chain of events culminating in her arrest.

In the *Nottingham* case, an officer received a phone call from the owner of a local Travel Mart alerting him of a possible DWI suspect in a red Ford pickup. The officer proceeded to the area and approached the suspect's vehicle and found him asleep in the truck with a beer can. We found that the information provided by the owner acted as a catalyst for the officer to investigate which the officer had a duty to perform. Thus, we concluded that the officer's actions were justified based upon reasonable suspicion pursuant to Ark. R. Crim. P. 3.1. Also, in the case of *Leopold* v. *State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985), we found that an officer had a reasonable suspicion to make an investigatory stop when he spotted appellants' truck at 2:00 a.m. traveling at ten miles an hour down a gravel road owned by International Paper but open to the public. The officer suspected that appellants could possibly have been headlighting or spotlighting for deer.

The facts presented to the trial court in this case, with all presumptions favorable to the trial court's ruling, *Johnson* v. *State*, 319 Ark. 78, 889 S.W.2d 764 (1994), are these: the owner of Monty's Pawn Shop reported that a white male and black female had tried to pawn some jewelry which appeared to be stolen. A radio dispatch was sent to officers alerting them to "be on the look out for" a yellow Datsun pickup occupied by a white male and black female who had been attempting to sell possibly stolen jewelry. The dispatch described the vehicle, the occupants, and provided the license number of the vehicle.

Lieutenant Bond testified that he received the radio dispatch and subsequently spotted the vehicle matching the description. He testified that he stopped the vehicle because it was his understanding that "they had been down to Monty's Pawn Shop and tried to sell some jewelry that appeared to have been stolen." When asked what gave rise to his suspicion that the individuals were doing something wrong, Lieutenant Bond responded "[w]ell, after thirteen years with the Detective Bureau, we'd dealt with pawn shops quite a bit. They, any time they have someone who comes in there with an obviously expensive piece of jewelry who don't, obviously don't appear to be people who would have this type of jewelry normally, or a large quantity of jewelry and so forth creates, anything of a suspicious nature, they usually give us a call or some of them do." Lieutenant Bond indicated that the pawn shops in the area had provided information in the past of illegal activity being

attempted in their stores. Lieutenant Bond testified that after stopping the truck, he approached the vehicle and noticed a ring box on the front seat. Lieutenant Bond said that he then questioned the occupants of the vehicle.

Appellant argues that the person reporting to the police did not see a crime committed or have knowledge that a crime was being committed. Also, appellant asserts that there was no independent corroboration of the radio dispatch that the occupants of the vehicle were involved in any criminal activity. In arguing that the stop was unreasonable, appellant places great emphasis on the proposition that no one knew that a crime had been committed. However, the Supreme Court noted in *U.S.* v. *Hensley*, 469 U.S. 221 (1985), that "although the officer who issues a wanted bulletin must have a reasonable suspicion sufficient to justify a stop, the officer who acts in reliance on the bulletin is not required to have personal knowledge of the evidence creating a reasonable suspicion." *Id.* at 231. Quoting from the Ninth Circuit, the Supreme Court further expressed "that effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information." *Id.* at 231. Also, in the cases of *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Nottingham*, *supra*; and *Leopold* v. *State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985), no one knew that a crime had been committed. Therefore, it is clear that it has never been a requirement that someone *know* that a crime had been committed before an officer can conduct an investigatory stop. As the Supreme Court noted in *Adams* v. *Williams*, 407 U.S. 143 (1972):

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be more reasonable in light of the facts known to the officer at the time.

As noted in *Terry* v. *Ohio*, 392 U.S. 1 (1968), one general interest present in the context of ongoing or imminent criminal activity is "that of effective crime prevention and detection." In this case, it would have been impossible for the police to determine if the jewelry was stolen before appellant was stopped because the jewelry was in the possession of the suspected individuals. "Restraining police action until after probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee in the interim and to remain at large. Particularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible." *U.S.* v. *Hensley*, 469 U.S. 221, 229 (1985).

Here, Lieutenant Bond not only had the information from the dispatch but he also had personal knowledge that the local pawn shops had given reliable information in the past that was used by the police, and he confirmed the vehicle description, license number and identification of the occupants of the truck. Lieutenant Bond also observed a ring box on the front seat of the individuals' vehicle before questioning the suspects. Based on the totality of the circumstances in this case, we cannot say that the trial court's denial of appellant's motion to suppress was clearly against the preponderance of the evidence. *See Bliss* v. *State*, 33 Ark. App. 121, 802 S.W.2d 479 (1991).

Affirmed.[2]

COOPER, STROUD, and MAYFIELD, JJ., agree.

JENNINGS, C.J., and GRIFFEN, J., dissent.

---

[2] The dissent is simply wrong in suggesting that a case such as this should be dismissed upon reversal. The double jeopardy clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court — whether erroneously or not — would have been sufficient to sustain a guilty verdict. *Nard* v. *State*, 304 Ark. 159, 163-A, 801 S.W.2d 634, 637 (1990) (supplemental opinion denying rehearing). *See also Crutchfield* v. *State*, 306 Ark. 97, 104, 816 S.W.2d 884 (1991) (supplemental opinion granting rehearing). Considering all of the evidence in this case, there is substantial evidence to support the verdict. Consequently, if this court were to reverse based on appellant's claim of trial error, it would be appropriate for this court to remand, leaving it to the prosecution to decide whether or not the appellant is to be retried.

WENDELL L. GRIFFEN, Judge, dissenting.

It is a capital mistake to theorise before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts.

—Sherlock Holmes to Dr. Watson,
from *A Scandal in Bohemia*,
by Sir Arthur Conan Doyle

There is nothing more frightful than an active ignorance.

—Johann Wolfgang von Goethe

Despite the plain requirement that the police have a reasonable suspicion that a person is committing, has committed, or is about to commit a crime before making an investigatory stop, and the equally clear principle that an investigatory stop is a seizure within the Fourth Amendment's protection against unreasonable seizures, today we uphold a stop based upon an unconfirmed report from an unidentified informant that a black woman and a white man were riding a yellow Toyota truck and trying to sell "possibly stolen" jewelry at an unidentified pawn shop. Because the record contains no proof justifying a suspicion that appellant or anyone else had committed, was committing, or was about to commit a crime, I respectfully disagree with the result reached in this case and write to challenge the reasoning beneath it.

Appellant made a timely and proper motion to suppress the evidence obtained when she was searched after the stop as well as her statement to the police. She contended that there was neither probable cause nor reasonable suspicion for stopping the vehicle in which she was riding and detaining her. Her motion was based upon Rules 2.1 and 3.1 of the Arkansas Rules of Criminal Procedure and a clear line of cases that holds that there must be specific, particularized, and articulable reasons indicating that the person or vehicle stopped may be involved in criminal activity in order to justify an investigative stop. *Van Patten* v. *State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985). *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 284 (1982); *Hayes* v. *State*, 269 Ark. 47, 598 S.W.2d 91 (1980). Her motion should have been granted. Her conviction for possession of a controlled substance with intent to deliver should be reversed. The charge against her should be dismissed.

On July 21, 1994, Lieutenant Travis Bond of the Hot Springs

Police Department was on patrol duty in a marked police car when a radio broadcast was issued directing officers to be on the lookout for a yellow Toyota pickup truck occupied by a white male and black female who had been attempting to sell some "possibly stolen jewelry." Although Lieutenant Bond testified at the suppression hearing that he understood that a white male and a black female had been to Monty's Pawn Shop in Hot Springs and that they had tried to sell jewelry that appeared to have been stolen, he admitted that the radio dispatch did not indicate that the source of the tip was Monty's Pawn Shop. The record does not contain the identity of the source of the information that was in the radio dispatch. No testimony was presented from the dispatcher who broadcast the alert. Lieutenant Bond's testimony did not specify what kind of jewelry was involved, its description, or even that a report of stolen jewelry had been received by the police, let alone a report matching anything published in the radio dispatch. He acknowledged that it is customary for people to pawn or sell articles of personal property such as jewelry, and that he could not look at an item of jewelry and determine whether it appeared to be stolen. Bond gave no testimony about any behavior mentioned in the dispatch to justify a suspicion that the persons attempting to sell the jewelry had stolen it. Nevertheless, he stopped a yellow Toyota pickup truck with appellant (a black woman) as its passenger and Lewis Petter (a white man) as its driver.

After stopping the vehicle, Bond noticed a ring box on the front seat of the vehicle; he spoke with Petter about the ring box and the jewelry. Officer Mark Rodenberry then arrived, and frisked Petter and appellant for weapons. During that search, he found a small purse belonging to appellant. A rock of cocaine was inside the purse. Appellant was then arrested. Rodenberry testified at the suppression hearing that, although he was at the stop site for more than twenty minutes, he did not recover any jewelry. The record contains no proof that any jewelry had ever been stolen. None of the police officers who testified at the suppression hearing witnessed a moving traffic violation or any other suspicious activity by appellant, her associate, or the vehicle in which she was a passenger before the stop occurred.

Our standard of review requires that we make an independent determination, based on the totality of the circumstances, in reaching our decision whether evidence obtained by means of a warrant-

less seizure should be suppressed. Under that standard, the trial court's finding is not set aside unless it is found to be clearly against the preponderance of the evidence. *State* v. *Osborn*, 263 Ark. 554, 556 S.W.2d 139 (1978).

The Fourth Amendment to the Constitution of the United States protects the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Pursuant to the holding by the Supreme Court of the United States in *Terry* v. *Ohio*, 392 U.S. 1 (1968), police may stop persons without probable cause under limited circumstances. Nevertheless, it is clear that stopping a vehicle and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment. *See Delaware* v. *Prouse*, 440 U.S. 648 (1979). In *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 284, *cert. denied*, 459 U.S. 882 (1982), the Arkansas Supreme Court stated that the justification for an investigative stop depends upon whether, under the totality of the circumstances, the police have specific, particularized and articulable reasons indicating that the person or vehicle may be involved in criminal activity. That standard is also codified at Rule 3.1 of the Arkansas Rules of Criminal Procedure which states:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

Rule 2.1 of the Rules of Criminal Procedure contains the definition of "reasonable suspicion," and states:

> "Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

In the comment to Rule 2.1, the following factors are listed for determining whether a "reasonable suspicion" exists: (1) The con-

duct and demeanor of a person; (2) the gait and manner of a person; (3) any knowledge the officer may have of a person's background or character; (4) whether a person is carrying anything, and what he is carrying; (5) the manner of a person's dress, including bulges in his clothing, when considered in light of all the other factors; (6) the time of the day or night; (7) any overheard conversation of a person; (8) the particular streets and areas involved; (9) any information received from a third person, whether that person is known or unknown; (10) whether a person is consorting with others whose conduct is "reasonably suspect"; (11) a person's proximity to known criminal conduct; (12) the incidence of crime in the immediate neighborhood; (13) a person's apparent effort to conceal an article; and (14) the apparent effort of a person to avoid identification or confrontation by the police. When these fourteen factors are applied to this case, it becomes obvious that none of them are met and that there is no basis for sustaining the trial court's finding that the police had a reasonable suspicion for stopping the vehicle and then detaining the appellant.

The record contains no proof that appellant's conduct and demeanor was suspicious at any time before the stop took place. Although Lieutenant Bond and Officer Rodenberry testified that they took their actions in stopping and searching appellant based upon the radio dispatch about a black female and a white male who were riding in a Toyota pickup truck and attempting to sell some possibly stolen jewelry, that broadcast did not indicate that any jewelry had been reported as stolen, or even that any jewelry had been identified as missing. There is nothing criminal about trying to sell jewelry at a pawn shop, riding in a Toyota pickup, or associating with white males. All of those activities are manifestly legal. Even the State does not advance the obviously absurd argument that trying to sell jewelry that nobody has reported as stolen is a crime. Jewelry that has not been stolen can be bought and sold without permission from the police or anybody else.

The record contains no proof that the radio broadcast upon which Lieutenant Bond based his investigatory stop described the gait and manner of appellant, her associate, or anyone else at any time whatsoever, and especially at a time relevant to suspecting that somebody was trying to sell anything stolen. Although Bond testified at the suppression hearing that he had encountered appellant on other occasions, he also testified that he did not recognize her

before he stopped the vehicle. Plainly, the second and third factors for determining reasonable suspicion were not met.

Bond and Rodenberry testified that the radio broadcast indicated that a black female and a white male were trying to sell "possibly stolen jewelry." The fourth factor in determining reasonable suspicion (whether a person is carrying anything, and what she is carrying) was not satisfied by that report. At most, the report that people were trying to sell "possibly stolen jewelry" meant that whoever made the report should have been interviewed by the police to determine whether there was reason to suspect that anything had been stolen. After all, "possibly stolen jewelry" means that the jewelry was possibly not stolen at all. Because the record contains no proof that anybody had reported the theft of any jewelry, the total absence of data on this factor could not have produced a "reasonable suspicion." At most, the broadcasted report amounted to the kind of "bare suspicion . . . [and] imaginary or purely conjectural suspicion" that is expressly disfavored in Rule 2.1.

The radio broadcast provided no information to the police regarding the manner of dress of either the white male or the black female, and Lieutenant Bond witnessed nothing about the dress or clothing of appellant or her associate that was suspicious before he stopped the vehicle. There is nothing in the record indicating what time or day that the broadcast was sent, when the information upon which the broadcast was issued first became known to the police, or even what time appellant was stopped. Thus, factors six and seven were not met.

Even if one takes the unwarranted view that the radio dispatch was an overheard conversation within the meaning of the eighth factor for determining reasonable suspicion in Rule 2.1, it remains clear that the dispatch provided no information of suspicious conduct or activity. Again, trying to sell jewelry at a pawn shop (the conduct that was reported during the dispatch) is not a crime in Hot Springs, nor is it criminal for black females to try to sell jewelry, to accompany white males who try to sell jewelry, or to ride in yellow Toyota pickups with white males while attempting to sell jewelry.

The record does not show that the radio dispatch indicated what streets and areas of town were involved in the supposedly

suspicious activity. The record does not specify anything about the information provided by third persons suggesting that those persons observed criminal activity. One would think that if the information upon which the police relied to issue the dispatch leading to the investigatory stop had been specific and had articulated reasons for believing that criminal activity was occurring some place, the police officers who made the stop would have testified about it. To the contrary, three police officers testified that they did not hear the radio broadcast at all (Detective Michael Gregor, Investigator Michael Wright, and Officer Rodenberry). Although Lieutenant Bond testified that his "understanding" was that appellant and her associate had been to Monty's Pawn Shop and tried to sell some jewelry that appeared to have been stolen, he admitted that the radio dispatcher did not indicate that Monty's Pawn Shop was the source of the report or the site where the alleged attempted sale took place. The basis of Bond's "understanding" remains a mystery. None of the officers testified concerning information from third persons that indicated that anybody had knowledge about a past, present, or potential jewelry crime anywhere. Clearly, factors nine and ten were not met.

The tenth factor listed in the comment to Rule 2.1 is whether a person is consorting with others whose conduct is "reasonably suspect." None of the police officers who testified at the suppression hearing indicated that there was anything suspicious about appellant's association with Lewis Petter. Of course, the radio broadcast that prompted Lieutenant Bond to stop and detain appellant and Petter did not identify anybody by name, at least as far as can be determined from the record. Nobody testified that there is a suggestion of criminality whenever unidentified black females are in the company of unidentified white males, or that criminality is suggested by the fact that white males try to sell jewelry while accompanied by black females.

The eleventh factor among those listed in the comment to Rule 2.1 involves a person's proximity to *known criminal conduct.* There was no known criminal conduct involved at the moment of the stop. Indeed, the dispatch characterized the jewelry as "possibly stolen," demonstrating that the nature of appellant's conduct was uncertain in the mind of the unidentified police informant. The record does not contain any proof about the incidence of crime in the neighborhood (factor twelve) because the record does not show

where the supposed effort to sell "possibly stolen" jewelry occurred. Nobody saw appellant or Petter try to conceal anything, and the radio broadcast apparently did not indicate that anyone else had tried to conceal anything (factor thirteen). There was no effort, apparent or otherwise, by appellant or Petter to avoid identification or confrontation by the police (factor fourteen).

It is obvious that none of the factors that are recognized as relevant to determining whether a "reasonable suspicion" exists were present in this case. Appellant and her associate were stopped by Lieutenant Bond and searched by Officer Rodenberry based upon nothing more than the broadcast radio report of a naked suspicion that a white male and a black female had been attempting to sell undescribed jewelry that "possibly" was stolen. Nobody investigated whether the report was valid. Nobody investigated whether anything had been stolen. The record does not indicate whether the jewelry was described during the radio broadcast so that officers in the field would have been able to make a rational judgment about stopping and detaining people who had jewelry in their possession based on the description given. Somebody known to nobody identified in this record apparently contacted the police and shared the suspicion that a white male and a black female were trying to sell to a pawn shop jewelry that was never described and possibly was stolen. If that is not a "bare suspicion" and "an imaginary or purely conjectural suspicion," neither the State nor the majority have offered the slightest explanation how it could be more naked, or what factor(s) provide the covering for its nakedness.

Nottingham v. *State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989), involved a telephoned report by a store owner to a police officer about a possible DWI suspect. The officer went to the location given him by the store owner and observed a vehicle that matched the description given him. The officer observed the vehicle parked in a place that was not normally used by the public, its motor was running, and its occupant appeared to be asleep. The officer observed a beer can positioned between the occupant's legs. The officer was unable to rouse the occupant of the vehicle by tapping on the window of the vehicle. We held, in an opinion authored by Judge Rogers, that "the report from the store owner, *combined with independent observations made by the officer*, clearly constituted reasonable suspicion" that the appellant in that case was involved in

criminal activity. 29 Ark. App. at 101, 778 S.W.2d 632 (emphasis added). In this case, neither the unidentified person whose report to the police prompted the radio broadcast nor anybody else observed facts to create anything beyond the bare suspicion that appellant, her associate, or anyone else was involved in criminal activity.

In *Leopold* v. *State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985), we held that reasonable suspicion was established for an investigatory stop of a vehicle that police officers spotted travelling on a private road at 2:00 a.m. some four to six miles off a main highway and at about ten miles an hour. The officers testified that there had been complaints in the area of people spotlighting or night hunting, of things being stolen, and that people had been growing marijuana in the area. Based upon the suspicion that the occupants of the vehicle were spotlighting for deer, their vehicle was stopped. Of course, night hunting, spotlighting, theft of property, and growing marijuana are criminal offenses and in *Leopold*, the police actually observed the suspicious activity. Moreover, the police had received reports that property had actually been stolen. Here, nobody reported that anything had been stolen, or that anything else defined as criminal had occurred.

Contrary to the suggestion in the majority opinion, this case does not involve an investigatory stop based on direct information of criminal conduct by someone known by the police to have a history of felonious conduct. *Johnson* v. *State*, 319 Ark. 78, 889 S.W.2d 764 (1994), was a case involving an investigatory stop by a police officer after the Fort Smith Police Department received an anonymous call that two people were in a specified motel room selling illegal drugs and using a blue van to make deliveries. The officer knew the appellant to have previous drug arrests and convictions. He saw the appellant leave the motel room and drive off in the blue van. He had received direct and unequivocal information that the appellant was engaged in conduct that is clearly criminal. Here, although Lieutenant Bond knew appellant, he testified that he did not know that she was in the pickup until he stopped it. There is no proof that anyone had done anything illegal, let alone proof of direct information to that effect.

No proof remotely similar to that found to support the investigatory stops in the cases cited by the majority exists in this case. Reasonable suspicion was found in those cases because the conduct observed by the police and reported by others fit the definition of

crimes, whether the police knew the persons stopped were engaged in criminal activity or not. Yet it is a far different matter for the police to seize a person without even a report or observation that the person is engaged in conduct that can be called criminal. As previously mentioned, trying to sell jewelry is not a crime. Nobody reported that persons were committing a crime as in *Johnson* v. *State*. There is no report that thefts had occurred as was the case in *Leopold* v. *State*. The police did not observe appellant doing anything that could be characterized as suspicious as in *Nottingham*. This case did not involve observations by the police of conduct suggestive of preparations for an eventual crime, as when an officer observed three men who appeared to be conducting surveillance of a store in preparation for a robbery. *Terry* v. *Ohio, supra*. In each of those cases there were specific, particularized and articulated facts that created the reasonable suspicion on the part of the police. Likewise, in *Brooks* v. *State*, 40 Ark. App. 208, 845 S.W.2d 530 (1993), we upheld an investigatory stop as based upon reasonable suspicion where a citizen had spoken face to face with a police officer and had related criminal activity (smoking crack cocaine in a car) that he (the citizen) had observed.

In *Kaiser* v. *State*, 296 Ark. 125, 752 S.W.2d 271 (1988), our Supreme Court reversed a drug conviction upon a challenge to an investigatory stop based upon information supplied to the Arkansas State Police by the Missouri State Police who were, in turn, acting upon a confidential informant that the Missouri State Police deemed reliable. The Supreme Court reversed the conviction, despite the fact that certain aspects of the information relied upon by the Arkansas State Police matched that supplied by the Missouri officers, holding that because the record was devoid of testimony showing why the Missouri police deemed their informant reliable, there was insufficient proof to establish that the Arkansas police had a reasonable suspicion for the stop. In the present case, the record is inadequate concerning the source of the information upon which the radio broadcast was based. The police apparently did not know the source, let alone know if it was reliable. Nor did they know any of the details that led the informant to conclude that the ring was "possibly stolen." In short, the record before us falls well below the quantum of evidence that the court found "devoid of testimony" to support reasonable suspicion in *Kaiser*. 296 Ark. at 125, 752 S.W.2d at 274.

Likewise, in *Van Patten* v. *State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985), we reversed and dismissed a conviction for driving while intoxicated, holding that the police stopped the appellant without reasonable suspicion so that the trial court should have suppressed all evidence of the DWI. In writing for the majority in that case, Judge Cloninger stated:

> [W]e do not think Officer Tindle had specific, particular or articulable reasons to suspect that a felony or a misdemeanor involving danger of injury to persons or property had been committed. The radio dispatch that he received was anonymous and it gave extremely general information about a "loud party" and a "brown Jeep." *The officer did not investigate or confirm the complaint before stopping appellant, so he had no reason to suspect that a misdemeanor involving personal [injury] or property damage had been committed by the occupant.* 16 Ark. App. at 86, 697 S.W.2d at 921 (Emphasis added).

The same error occurred in this case. Lieutenant Bond did not investigate or confirm the apparently unverified complaint that a white male and a black female were trying to sell possibly stolen jewelry. He was operating upon an unconfirmed and uninvestigated suspicion that jewelry possibly had been stolen, having no information concerning the description of the jewelry, the identity of the person suspecting that the jewelry possibly was stolen, or that any jewelry had been reported stolen that might have remotely matched the unprovided description of the jewelry that the two people were trying to sell. However, rather than using the phoned report as the basis for investigating the complaint in order to determine if a reasonable basis for suspecting that anything criminal had occurred, the police jumped to the conclusion that two people were suspected of trying to sell stolen jewelry when nobody had confirmed that anything was stolen. Bond testified that he stopped the vehicle to check for the jewelry based upon the information obtained from the radio dispatch that was, in turn, based upon information obtained from somebody else. No supporting facts for the suspicion reported to the police appear in the record. The identity, reliability, or even the existence of the person whose suspicion prompted the radio dispatch cannot be found in the record.

Despite the absence of anything close to an allegation or report of suspected criminal activity and substantiation for the suspicion that anybody had done anything illegal, appellant, her associate, and

the vehicle in which they were riding were seized within the meaning of the Fourth Amendment which protects against unreasonable seizures. The seizure was anything but consistent with good or effective investigatory techniques. As Sherlock Holmes told Dr. Watson, without data, the mind insensibly begins to twist facts to suit theories instead of twisting theories to suit facts. Investigation is the process by which law enforcement agencies and personnel collect the data upon which reasonable suspicion must ultimately rest. Otherwise, law enforcement will amount to little more than rumor-chasing, as was plainly the case in this instance. The police in this case knew only that an informant had supplied general information about a "possible" crime. Lieutenant Bond's testimony proves that he did not know the source of that information. Lieutenant Bond's testimony was that some — though not all — pawn brokers were reliable informants. No proof adduced at trial indicated whether this informant, if a pawn broker at all, was one of the reliable ones or not. The police also did not know why their unidentified and apparently unknown informant believed that anything was "possibly stolen." They never produced a description of the object that their informant reported as having been "possibly stolen." They clearly lacked these vital facts essential to support a reasonable suspicion that a jewelry theft had occurred when the radio dispatch was issued and when Lieutenant Bond made the investigatory stop.

The Fourth Amendment was placed in the Constitution of the United States so that the liberty of persons and their property to exist and move would not be curtailed by such a cavalier approach to law enforcement. If the police do not know enough to tell whether a theft has been reported, how can they know that they are stopping a suspected thief? If they do not have a description of stolen goods, how can they reasonably suspect that a person may possess them? If the police are unwilling or unable to determine whether a theft occurred, and (if so) the description of what was allegedly stolen (rather than "possibly stolen"), why should they be authorized to interfere with the right of persons to go about their affairs? If the police are unwilling to investigate at all to determine whether there is reason to suspect a crime, why should they be allowed to stop people on a bare suspicion under the guise of investigating a reported crime when, in fact, they are chasing the rumor of a reported non-crime? Neither the State nor the majority opinion answers these obvious questions that underlie our Fourth

Amendment freedom from unreasonable seizure. Instead, the result today upholds a patently unreasonable seizure upon the naked "say so" of an unidentified informant whose reliability is unknown and who provided information that is neither specific, particularized, nor articulable as the law requires.

Given the total absence of proof to establish a reasonable suspicion in this case and my view that the police conduct challenged here amounted to what can best be termed "active ignorance," to use the words of Goethe, certain questions can reasonably be raised that, while uncomfortable, are nonetheless relevant to the larger question of the proper limits of law enforcement in our society. One wonders whether the police would have been so cavalier about investigating the unsubstantiated report of "possibly stolen" jewelry if the report had not mentioned that a white male and a black female were attempting to sell "possibly stolen" jewelry. Could the oft-reported and documented tension and suspicion by minority citizens and their neighborhoods toward the police be based on similar incidents of police "investigations" founded upon the naked suspicion of a store owner who may have disapproved of the race of a person? *See Terry* v. *Ohio*, 392 U.S. 1, 14 n.11 (1967). One wonders whether the police would have been as quick to accept the unidentified informant's mere suspicion that a crime had "possibly" occurred and that appellant was a likely suspect if she had been identified as a white female, or a white male, or tastefully dressed, or driving a Mercedes sedan rather than a Toyota pickup.

Perhaps the police would have been equally slipshod in their "investigatory" approach in any case. Perhaps not. Nevertheless, it is understandable that the police are viewed with distrust and hostility in certain quarters of society (including minority communities but by no means limited to them) when the police stop people and frisk them based on nothing but an unverified and unreliable suspicion from some unidentified person. It is understandable that persons who have been subjected to such "investigatory" conduct view the police as an armed occupation force employed to harass the less-favored and disfavored on behalf of a privileged class, rather than a fair-minded and even-handed agency engaged in the honest and diligent effort of criminal investigation and law enforcement for the whole society. This is an unpleasant train of thought, to be sure, but it is an undeniable reality against which the Fourth Amendment requirement of "reasonable suspicion" is intended. In light of the

majority's conclusion that a suspicion wholly lacking in factual support is deemed "reasonable," the wonder is not that the police are viewed with distrust and resentment by some communities, but that there is as much cooperation as currently exists for their efforts in *all* communities. Our decision today will not help matters.

I respectfully dissent from the unfortunate result reached in this case. This case highlights the difference between proper deference to legitimate police investigatory actions and acquiescence by trial and appellate judges to patently unreasonable police conduct. Sadly, I predict that our decision will hinder law enforcement efforts by further alienating the police from the people they are supposed to protect and serve as those people will conclude that the right to be left alone is not one that the police are obligated to respect.

Alton Levern BRUNSON *v.* STATE of Arkansas

CA CR 95-628 925 S.W.2d 434

Court of Appeals of Arkansas
En Banc
Opinion delivered June 26, 1996

William R. Simpson, Jr., Public Defender, by: *Kent C. Krause*, Deputy Public Defender, for appellant.

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

WENDELL L. GRIFFEN, Judge. Alton Levern Brunson has appealed his conviction after a bench trial in the Pulaski County Circuit Court on the charges of misdemeanor possession of a controlled substance (marijuana) and felony possession of a controlled substance (cocaine). Appellant argues that the police officer who searched his person without a warrant lacked probable cause to believe that he had committed a felony, thereby making his arrest and search unlawful, and appellant contends that the trial court erred by denying his motion to suppress the evidence obtained from the search. We hold that appellant's motion to suppress should have been granted because the warrantless search lacked probable cause, thereby making the fruit of the search illegal under the Fourth Amendment to the Constitution of the United States. Therefore, we reverse the conviction.

Appellant was one of four people riding in a car around 1:30 a.m. on March 19, 1994, in North Little Rock when Officer John Breckton of the North Little Rock Police Department stopped the car because it was playing music too loudly in violation of a city noise ordinance. Officer Breckton testified that as he approached the driver's side of the car, he smelled the odor of marijuana, so he ordered the occupants from the car. Appellant was seated in the rear seat on the passenger side, and exited the car as ordered. Officer Breckton then performed a pat-down search of the occupants, including appellant, in a search for drugs.[1] Based upon the items

---

[1] The officer testified at trial, in pertinent part, as follows:

> As I walked up to the driver's side and approached the vehicle I smelled an odor of marijuana coming from the vehicle. After I smelled this odor of marijuana, I had the occupants of the car step out of the vehicle. The defendant was in the rear passenger side seat. When I came in contact with him I proceeded to search him. I did this because I had a suspicion that there was marijuana in the . . . because of the smell, we searched all the occupants of the vehicle. I performed a search of his person, a pat-down search, where I found a small quantity of marijuana in his left front pants pocket. I found that and a package of cigarette rolling papers in the same

found during the search, appellant was charged. He moved to suppress the evidence seized during the search of his person on the ground that the search was unlawful. The trial court denied the motion to suppress, and found him guilty. The misdemeanor sentence was merged with the felony, and appellant was fined $250, placed on probation for five years, and ordered to pay court costs.

In reviewing the denial of a motion to suppress evidence, the appellate court makes an independent determination based on the totality of the circumstances and reverses the decision only if the trial court's ruling was clearly against the preponderance of the evidence or was clearly erroneous. *Mounts* v. *State*, 48 Ark. App. 1, 888 S.W.2d 321 (1994); *Houston* v. *State*, 41 Ark. App. 67, 848 S.W.2d 430 (1993). We have reviewed the evidence in light of this standard, and conclude that the trial court's denial of appellant's motion to suppress was clearly erroneous, thereby compelling reversal.

The Fourth Amendment to the Constitution of the United States protects persons from unreasonable searches and seizures.[2] This constitutional guarantee means that appellant's motion to suppress requires analysis of several factors: (1) whether he was searched based upon a warrant; (2) if not, whether the warrantless search was based upon probable cause; and (3) if that was not the case, whether the warrantless search was incidental to a contemporaneous lawful arrest. None of these factors apply to this case. Instead, the State argues that the motion to suppress was properly denied because appellant was bodily searched incidental to a vehicular search for contraband that the officer reasonably believed might have been contained in the vehicle in which he was a passenger pursuant to Rule 14.1 of the Arkansas Rules of Criminal Procedure. Rule 14.1 applies to vehicular searches, and states, in pertinent part:

---

pocket. At that time I place him under arrest. I continued the search and in the cargo pocket of his left leg, the pocket lower down, there were two rocks of suspected crack cocaine.

[2] The text of the Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

> (a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is: (i) on a public way or waters or other area open to the public; . . .
>
> (b) If the officer does not find the things subject to seizure by his search of the vehicle, and if: (i) the things subject to seizure are of such a size and nature that they could be concealed on the person; and (ii) the officer has reason to suspect that one (1) or more of the occupants of the vehicle may have the things subject to seizure so concealed; the officer may search the suspected occupants. . .

The evidence does not support the State's reliance upon Rule 14.1 and the cases that have applied it. There is no proof that Officer Breckton searched the vehicle after he smelled marijuana but before searching appellant. Rule 14.1 explicitly conditions a search of the occupants of a vehicle in which an officer believes things subject to seizure may be found on a prior search of the vehicle. The vehicular search must not produce the things that the officer reasonably believes are subject to seizure and which are of the size and nature that the officer has reason to suspect that one or more of the occupants of the vehicle may have concealed on his or her person.

The State cannot rely upon Rule 14.1(b) to justify the search of appellant's person where the clear proof shows that Officer Breckton made no effort to search the vehicle for the marijuana that he believed that he smelled. To rule otherwise would render the introductory clause of Rule 14.1(b) a nullity, and would essentially license officers to perform warrantless searches of persons traveling the streets and highways of Arkansas even where the officers lacked probable cause to believe that those persons were guilty of anything more than riding in a vehicle. Indeed, if Officer Breckton did smell the odor of marijuana as he approached the vehicle on the driver's side, it is at least odd that he conducted no search for marijuana in the vehicle before searching its occupants, or afterwards as far as can be determined from the record.

There is no evidence indicating how the officer

formed a reasonable suspicion that appellant, in particular, had concealed any contraband given that the officer detected the marijuana odor as he approached the driver's side of the vehicle whereas appellant was seated in the rear, and on the opposite side. Rule 2.1 of the Arkansas Rules of Criminal Procedure defines "reasonable suspicion" as suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion. Reasonable suspicion for detaining persons under Rule 3.1 of the Rules of Criminal Procedure and conducting weapons searches under Rule 3.4 (the stop and frisk situation not involved in this case) is different from probable cause for an arrest or for a warrantless search. Probable cause for an arrest means a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves and existing at the time the arrest is made which justify a cautious and prudent police officer in believing that the accused committed a felony, although this does not require the quantum of proof necessary to support a conviction. *Reed* v. *State*, 9 Ark. App. 164, 656 S.W.2d 249 (1983). Accepting the assertion that Officer Breckton smelled marijuana as he approached the driver's side of the vehicle and, therefore, had reasonable cause to conduct a warrantless search of the vehicle does not authorize us to ignore the plain language of Rule 14.1 requiring that the officer first search the vehicle and fail to find the things believed subject to seizure before proceeding to search the occupants.

Although the dissenting members of our panel would uphold the trial court's denial of appellant's motion to suppress by viewing the search as one incidental to a contemporaneous arrest, we do not share their reasoning. It is true that pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure, a law enforcement officer lawfully present in any place may, in the performance of his or her duties, conduct what is known as an investigatory stop and briefly detain any person reasonably suspected of committing, having committed, or about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or appropriation of or damage to property, if stopping and detaining that person is reasonably necessary to either obtain or verify the identification of the person or to determine the lawfulness of his or her conduct. Moreover, when a law enforcement officer who has detained a person in

connection with an investigatory stop reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or a designee may search the outer clothing of the person detained and seize any weapon or other dangerous thing which may be used against the officer or others. Ark. R. Crim. P., Rule 3.4. Neither of these situations existed in this case.

Rule 4.1 of the Arkansas Rules of Criminal Procedure provides that a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that the person arrested has committed a felony, a traffic offense involving either death or physical injury to a person, damage to property, or driving while under the influence of any intoxicating liquor or drug, as well as any violation of law in the officer's presence. There is no evidence before us showing that Officer Breckton saw appellant commit any violation of the law, not to mention an offense covered by that rule.

We have also reviewed Rule 12.1 of the Rules of Criminal Procedure to determine whether the search in this case can be upheld as incidental to appellant's arrest. That rule provides that an officer making a lawful arrest may conduct a warrantless search of the person or property of the accused for only four purposes: (1) to protect the officer, the accused, or others; (2) to prevent the accused from escaping; (3) to furnish appropriate custodial care if the accused is jailed; or (4) to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense. But if Officer Breckton lacked probable cause for arresting appellant, he manifestly lacked a reasonable basis for searching him. Nothing resembling probable cause existed until the officer searched appellant's pocket and found the marijuana. The officer admitted that he searched appellant and the other occupants of the vehicle because he had smelled marijuana. As the United States Supreme Court emphasized in *Sibron* v. *New York*, 392 U.S. 40 (1968), it is axiomatic that an incident search may not precede an arrest and serve as part of its justification.

Officer Breckton had observed nothing about appellant's behavior or appearance before performing the search that created a reasonable basis for suspecting that appellant had done anything deserving arrest, let alone concealed contraband on his person. This factor distinguishes this case from those where evidence was seized

after a search prompted by the officer who saw the defendant attempt to conceal suspicious material after the officer had detected the odor of marijuana. *Crail* v. *State*, 309 Ark. 120, 827 S.W.2d 157 (1992). He did not perform the pat-down search of appellant based upon a reasonable concern that appellant was armed as was done in *Jackson* v. *State*, 34 Ark. App. 4, 804 S.W.2d 735 (1991). Appellant had committed no crime in the officer's presence. Assuming that the officer smelled the odor of marijuana smoke, possession of marijuana would have been a misdemeanor, so the search cannot be sustained as one incidental to arresting appellant for a felony. The crack cocaine was not found until after appellant had already been arrested for misdemeanor possession of marijuana, having been searched without probable cause for believing that he had committed any crime. Based on the facts known to Officer Breckton before appellant was searched, appellant should not have been searched because there was nothing beyond a naked hunch for believing that he had committed a crime or that he possessed contraband.

In order to justify the intrusion into personal privacy caused when agents of the government handle persons and their effects, the government agent must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *Terry* v. *Ohio*, 392 U.S. 1 (1968). The requisite cause justifying an arrest is not the same as that proof necessary to support a conviction. *Burks* v. *State*, 293 Ark. 374, 738 S.W.2d 399 (1987). However, it is well settled that absent a valid arrest and probable cause to make a warrantless search, evidence seized as the result of the warrantless search of the defendant's person is obtained illegally. *United States* v. *Di Re*, 332 U.S. 581 (1948). If persons can be arrested and searched without a warrant and without probable cause, then the Fourth Amendment rings hollow indeed when it guarantees persons the right to be secure in their persons against unreasonable searches and seizures. Riding in a car that is playing loud music is not a crime, let alone a felony, even if the car smells like marijuana. Persons riding vehicles on the streets, roads, and highways of this state have a reasonable expectation that they will not be forced to submit to invasion of their privacy merely because the police are zealous to combat the evil of illegal drugs.

Because there was no probable cause for arresting appellant and searching him, it follows that the evidence seized because

of the illegal search should have been suppressed pursuant to his motion. Since the decision by the United States Supreme Court in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the sanction for illegal searches has been to exclude illegally obtained evidence in state criminal cases. The exclusion of evidence obtained due to illegal searches in this nation dates back to 1914 when the United States Supreme Court made the following statement in *Weeks* v. *United States*, 232 U.S. 383 (1914):

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Id. 232 U.S. at 393. Justice Clark, in writing for the majority in *Mapp* v. *Ohio*, stated: "The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." 367 U.S. 659, (quoting *Olmstead* v. *United States*) 277 U.S. at 438. As Justice Brandeis, dissenting, said in *Olmstead*:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

Based upon our independent determination of the totality of the circumstances surrounding appellant's search and arrest, and after viewing the evidence in the light favorable to the State as required by our standard of review, we conclude that Officer Breckton lacked probable cause for arresting appellant and conducting a warrantless search of his person. Hence, the search was prohibited by the Fourth Amendment, the evidence seized thereby was obtained illegally, and the trial court's denial of appel-

lant's motion to suppress the evidence obtained in the illegal search was clearly erroneous.

Reversed and remanded.

COOPER, ROBBINS, and MAYFIELD, JJ., agree.

JENNINGS, C.J., and ROGERS, J., dissent.

JUDITH ROGERS, Judge, dissenting. I cannot disagree with the majority's conclusion that the search of appellant's person cannot be justified under Ark. R. Crim. P. 3.4, because the officer candidly stated in his testimony that he was not conducting a protective search for weapons. Nor do I disagree with the majority's holding that the search cannot be upheld under Ark. R. Crim. P. 14.1(b), for the simple reason that the officer did not search the vehicle prior to the search of appellant's person as is contemplated by that rule. However, I cannot agree with the majority's decision that the odor of marijuana did not provide sufficient reasonable cause to authorize the arrest of appellant. Therefore, I dissent.

Rule 4.1(a)(iii) of the Arkansas Rules of Criminal Procedure provides that a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed any violation of the law in the officer's presence. Reasonable, or probable, cause for a warrantless arrest exists when the facts and circumstances within an officer's knowledge are sufficient to permit a person of reasonable caution to believe that an offense has been committed or is being committed by the person arrested. *Hudson* v. *State*, 316 Ark. 360, 872 S.W.2d 68 (1994); *Mock* v. *State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987). Probable cause to arrest does not require the degree of proof sufficient to sustain a conviction. *Hudson* v. *State*, *supra*. Our courts have committed themselves to the reasonable, common-sense approach to these determinations and arrests are to be appraised from the viewpoint of prudent and cautious police officers at the time the arrest is made. *Gass* v. *State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986). Furthermore, Rule 4.1(c) provides that an arrest shall not be deemed to have been made on insufficient cause solely on the ground that the officer is unable to determine the particular offense which may have been committed.

Rule 12.1(d) provides that an officer who is making a lawful arrest may, without a search warrant, conduct a search of the person

or property of the accused to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of the crime, or other things criminally possessed or used in conjunction with the offense. A search is valid as incident to a lawful arrest even if it is conducted before the actual arrest, provided that the arrest and search are substantially contemporaneous and there was probable cause to arrest prior to the search. *Johnson* v. *State*, 21 Ark. App. 211, 730 S.W.2d 517 (1987). Warrantless arrests are presumptively legal, *Freeman* v. *State*, 6 Ark. App. 240, 640 S.W.2d 456 (1982), and in arrest cases, all presumptions on appeal are favorable to the trial court's ruling and the burden of establishing error rests on the appellant. *Gaylor* v. *State*, 284 Ark. 215, 681 S.W.2d 348 (1984).

The search in this instance was substantially contemporaneous with appellant's arrest. Therefore, the issue in this case is whether the odor of marijuana gave the officer reasonable cause to believe that appellant was committing a crime in his presence. The trial court so concluded, and in reviewing a trial court's decision to deny an appellant's motion to suppress evidence, this court makes an independent determination based on the totality of the circumstances and reverses only if it is clearly against the preponderance of the evidence. *Bonebrake* v. *State*, 51 Ark. App. 81, 915 S.W.2d 723 (1995).

The Supreme Court in *Johnson* v. *United States*, 333 U.S. 10 (1948), observed that probable cause can be established by a police officer relying on his sense of smell. The Court rejected the defendant's contention:

> ... that odors cannot be evidence sufficient to constitute probable cause grounds for any search.... If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of the most persuasive character.

Id. at 13. Although the *Johnson* court was speaking in terms of probable cause sufficient to justify the issuance of a search warrant, its reasoning is not wholly inapposite here. While the two represent distinct concepts, our supreme court has recognized that the same

standards govern reasonable cause or probable cause determinations, whether the question concerns the validity of an arrest or the validity of a search and seizure. *Hudson* v. *State*, *supra*.

Although completely ignored by the majority, there is a body of law pertaining to probable cause determinations based on the odor of marijuana. A review of these decisions reveals that there is some controversy as to whether or not the odor of burned marijuana, standing alone,[1] supplies sufficient probable cause for a search of an automobile or for the arrest of its occupants. However, there appears to be less debate when the odor of unburned marijuana is at issue. In *People* v. *Hilber*, 269 N.W.2d 159 (Mich. 1978), the Supreme Court of Michigan found a distinction between the two types of odors and the inferences to be drawn from their detection. The court observed that the odor of unburned marijuana indicated the actual presence of marijuana and thus would support a finding of probable cause.[2] In a plurality decision, however, the court struck down the search of a vehicle based solely upon the smell of burned marijuana, reasoning that such an odor was only indicative of the presence of marijuana some time in the past.[3]

Yet, a different result was reached in *State* v. *Reuben* 612 P.2d 1071 (Ariz. Ct. App. 1980), where it was held that the odor of burned marijuana provided probable cause for the search of a vehicle. The court so held in reliance on a previous decision of its own supreme court in *State* v. *Decker*, 580 P.2d 333 (Ariz. 1978), where it was said:

> Even if the smell of burned marijuana has a lingering effect, as is urged, we think that a man of reasonable pru-

---

[1] In some cases, the odor of marijuana combined with other circumstances has been deemed sufficient to support a finding of probable cause for an arrest. *See e.g. State* v. *Valenzuela*, 589 P.2d 1306 (Ariz. 1979); *State* v. *Medders*, 266 S.E.2d 331 (Ga. Ct. App. 1980). In *Adams* v. *State*, 26 Ark. App. 15, 758 S.W.2d 709 (1988), we held that the odor of marijuana and the officer's observation of appellant stuffing something down his pants resulted in probable cause for an arrest.

[2] We have held that the odor of marijuana emanating from a vehicle provides probable cause for the search of the vehicle. *Lopez* v. *State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989). *See also State* v. *Greenwood*, 268 S.E.2d 835 (N.C. Ct. App. 1980).

[3] *See also State* v. *Schoendaller*, 578 P.2d 730 (Mont. 1978) (odor of burned marijuana not sufficient to support a finding of probable cause).

> dence, upon smelling the odor of burned marijuana, would believe that marijuana is present.

Id. at 335-36.

In *State* v. *Judge*, 645 A.2d 1224 (N.J. Super. Ct. App. Div. 1994), it was determined that the odor of burnt marijuana in a vehicle satisfied the requirement of probable cause for an arrest. There, the court rejected the distinction recognized in *People* v. *Hilber*, *supra*, and held that the odor of burned marijuana creates the inference that marijuana is physically present in the vehicle, and on the persons occupying the vehicle.

Likewise, in *State* v. *Hammond*, 603 P.2d 377 (Wash. Ct. App. 1979), it was held that probable cause existed to arrest an occupant of an automobile based on the odor of burned marijuana emanating from the vehicle. The court observed that:

> An officer is entitled to rely on his senses in determining whether contraband is present in a vehicle. If the contraband is seen or smelled, the officer is not required to close his eyes or nostrils, walk away, and leave the contraband where he sees or smells it.

Id. at 378 (*quoting State* v. *Romonto*, 212 N.W.2d 641, 644 (Neb. 1973)). In concluding that the aroma of burned marijuana established probable cause for the arrest of a vehicle's occupants, the *Hammond* court was also persuaded by the decision in *Dixon* v. *State*, 343 So.2d 1345 (Fla. Dist. Ct. App. 1977). There it was held that the odor of burned marijuana and smoke emanating from a vehicle constituted probable cause to believe that each occupant of the car may have had actual or constructive possession of marijuana, thus justifying the arrest of the vehicle's occupants.[4]

The officer in this case testified that he smelled the odor of marijuana coming from the vehicle.[5] It was 1:00 a.m., and the officer had just legitimately stopped the vehicle for playing loud music in violation of a city ordinance prohibiting raucous noise. Under the totality of the circumstances and under a practical and

---

[4] *See also State* v. *Mitchell*, 482 N.W.2d 364 (Wis. 1992); *State* v. *Greenslit*, 559 A.2d 672 (Vt. 1989).

[5] Appellant has not challenged the officer's qualifications in detecting the odor of marijuana.

common-sense approach, and with due consideration of the opinions from other courts, I conclude that the officer was justified in making an arrest. The odor of marijuana arouses more than a "naked hunch" that criminal activity is afoot. As is shown here, to a trained police officer the odor of marijuana emanating from the closed environment of an automobile gives rise to the reasonable inference that marijuana is present in the vehicle. And, operating under that rational inference, it is also logical to believe that any one of the passengers is in possession of the prohibited substance. Of course, possession of marijuana is unlawful. Ark. Code Ann. § 5-64-401 (Supp. 1995). It should not be said then that the officer did not have reasonable cause to believe that a violation of our law was being committed in his presence. It was simply not necessary for the officer to be certain beyond a reasonable doubt. Nor is it reasonable or realistic to expect an officer to be able to pinpoint the offender with the accuracy of a dog trained in the detection of narcotics. All that is required under the law is a reasonable belief as viewed from the standpoint of a prudent police officer. I cannot say that the evidence in this case does not satisfy that test; therefore, I would sustain the trial court's denial of the motion to suppress.

JENNINGS, C.J., joins in this dissent.

BETHEL BAPTIST CHURCH, et al. *v.* CHURCH MUTUAL INSURANCE COMPANY

CA 95-197 924 S.W.2d 494

Court of Appeals of Arkansas
Division I
Opinion delivered June 26, 1996

Wright, Lindsey & Jennings, by: *Wendell L. Griffen* and *Troy A. Price*, for appellants.

Laser, Wilson, Bufford & Watts, P.A., by: *Richard N. Watts*, for appellee.

JACK W. HOLT, JR., Special Judge. Trustees on behalf of Bethel Missionary Baptist Church (Bethel Church) sued its property and liability carrier, Church Mutual Insurance Company (Church Mutual), for breach of contract and bad faith in not paying a fire loss that Bethel Church sustained to its building and property. After conducting a hearing on Church Mutual's motion to dismiss, the trial court entered an order dismissing Bethel Church's complaint without prejudice. An appeal followed, and an opinion was filed and published by the Arkansas Court of Appeals. Petition for rehearing was granted, and the Court's opinion was vacated on May 8, 1996, and the appeal reinstated. As a result, we now have before us the question as to whether or not the trial court abused its discretion in dismissing Bethel Church's lawsuit. The answer is yes.

In December 1990, the parties entered into a property and liability contract. In February 1993, while the policy was still in effect, Bethel Church sustained $80,000 in damage to its building and an additional $20,000 in property damage as a result of a fire. The loss was timely reported; however, disagreements arose over certain provisions of the policy relating to the insurance company's investigation of the fire and the conducting of examinations of certain individuals under oath. Unable to resolve the dispute, Bethel Church filed its complaint alleging a breach of contract by refusing to pay its claim and that Church Mutual had exercised bad faith in its refusal to pay the claim.

After receiving the briefs for the parties and conducting a hearing on Bethel Church's motion to dismiss, the trial court entered the following order: "Presently before this Court is [Church Mutual's] motion to dismiss. After consideration of the arguments of counsel, and a review of the evidence, the Court finds that the complaint should be dismissed without prejudice."

Although the trial court failed to mention its authority for dismissing Bethel Church's complaint, it is obvious to us that it was responding to Church Mutual's formal "Motion to Dismiss" and "Brief in Support of Motion to Dismiss," which brings into play Ark. R. Civ. P. 12(b)(6) inasmuch as the court used Rule 12(b)(6) language in its discussion as to whether or not the complaint was sufficient and in ultimately dismissing the lawsuit. *See Poston* v. *Fears*, 318 Ark. 659, 662, 887 S.W.2d 520 (1994).

Arkansas Rule of Civil Procedure 12(b)(6) provides the

authority for the trial court to grant such a dismissal. However, in determining whether to dismiss a complaint under this rule, it is improper for the trial court to look beyond the complaint to decide the motion to dismiss, *Guthrie* v. *Tyson Foods, Inc.*, 285 Ark. 95, 96, 685 S.W.2d 164 (1985), and for this reason, we disregard the fact that the trial court may have done so.

Simply put, in order to properly dismiss the complaint, the trial court would had to have found that the complaining parties either (1) failed to state general facts upon which relief could have been granted or (2) failed to include specific facts pertaining to one or more of the elements of one of its claims after accepting all facts contained in the complaint as true and in the light most favorable to the nonmoving party. *See Perrodin* v. *Rooker*, 322 Ark. 117, 120, 908 S.W.2d 85 (1995). This was not done.

Arkansas Rule of Civil Procedure 8(a) provides that a pleading "shall contain (1) a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief, and (2) a demand for the relief to which the pleader considers himself entitled." In addition, it is well recognized that pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them. *Deitsch* v. *Tillery*, 309 Ark. 401, 405, 833 S.W.2d 760 (1992).

Bethel Church has asserted claims for breach of contract of insurance and bad faith on the part of Church Mutual. In both instances, requirements were met. Examination of the pleadings reflect that the complaint asserted jurisdiction, venue, the existence of a valid and enforceable contract between the parties, the obligations of the insurance carrier, a claim of violations by the carrier, and damages resulting to the claimant from the breach. *See Rabalaias* v. *Barnett*, 284 Ark. 527, 528-29, 683 S.W.2d 919 (1985). Likewise, the elements for a claim for bad faith were properly pled: affirmative misconduct by the insurance company, in bad faith, and malicious or oppressive attempt to avoid liability under the policy. *See Williams* v. *Joyner-Cranford-Burke Constr. Co.*, 285 Ark. 134, 139, 685 S.W.2d 503 (1985).

Church Mutual's contention that it cannot be sued for breach of contract because a condition precedent in the contract has not been complied with is of no moment. The complaints filed on

behalf of Bethel Church state causes of action for which relief may be granted. Thus, the trial court was wrong in granting Church Mutual's motion to dismiss.

Church Mutual further argues that the dismissal without prejudice is not a final order and is not appealable, citing numerous authorities to the effect that the test of finality, and thus of appealability, is whether the order ends the litigation or a substantial branch of it. Suffice it to say that the dismissal of this lawsuit ended the litigation. The trial court's order is appealable.

Reversed and remanded.

LESSENBERRY and PRICE, Special Judges, agree.

Evelyn LINDSEY *v.* STATE of Arkansas

CA CR 95-565 925 S.W.2d 441

Court of Appeals of Arkansas
Division II
Opinion delivered July 3, 1996

William M. Pearson, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Chief Judge. Evelyn Lindsey was found guilty by a Pope County jury of sexual abuse in the first degree and sentenced to a term of ten years in the department of correction. At trial, the State presented evidence that appellant had sexual contact with her stepdaughters, B.L. and C.L. For reversal, appellant contends that the trial court erred in not granting a directed verdict because jurisdiction was lacking and that the trial court erred in

refusing to admit the testimony of Rennie Bowles, the children's aunt. We conclude that the failure to admit Ms. Bowles's testimony was error and reverse and remand.

Arkansas Code Annotated section 5-1-111 (1987) provides that a conviction may not be had unless jurisdiction and venue are proved beyond a reasonable doubt. The statute also provides that "the State is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue." There is a presumption that venue was properly laid. *Higgins* v. *State*, 317 Ark. 555, 879 S.W.2d 424 (1994).

Before the State is called upon to offer any evidence on the question of jurisdiction, there must be positive evidence that the offense occurred outside the jurisdiction of the court. *DeWitt* v. *State*, 306 Ark. 559, 815 S.W.2d 942 (1991). It is generally accepted that if the requisite elements of the crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction. *Glisson* v. *State*, 286 Ark. 329, 692 S.W.2d 227 (1985). The test is whether the record contains substantial evidence showing that the offense, or elements of it, occurred within the jurisdiction and venue of the court. *See Gardner* v. *State*, 263 Ark. 739, 569 S.W.2d 74 (1978).

In the case at bar, B.L. testified that the sexual abuse took place in Russellville. This constitutes substantial evidence that venue was properly laid in Pope County.

At a pretrial hearing under the Rape Shield Statute, Ark. Code Ann. § 16-42-101, appellant called Rennie Bowles, the children's aunt. Ms. Bowles testified:

> I asked B.L. about the accusations she made, and she said that Evelyn made her suck her tits and kiss her private parts. This is the only conversation I had with B.L. I asked her if it was true and she put her head down and started crying. I told her if it is not, you know, tell me the truth, and she said that she lied. I asked her why and she said because she was mad at Evelyn.

The trial court made no ruling at that time on whether the evidence was barred under the Rape Shield Statute.

At trial, appellant called Rennie Bowles as a witness and the court held that the testimony of Ms. Bowles would be barred under

the Rape Shield Statute. The State takes no position as to the propriety of the court's ruling, but contends only that Ms. Bowles's testimony was not properly proffered. Rule 103 of the Arkansas Rules of Evidence provides, in part:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> . . .
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> (b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

Rule 102 of the Rules of Evidence provides that the rule shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined.

A proffer is required for two reasons: first, so that the trial court may be aware of the nature of the evidence; and second, to enable the appellate court to decide whether the evidence should have been admitted and, if so, whether the error in excluding it may have been harmless. In the case at bar, when the record is viewed in context, it is clear that the trial court and counsel knew exactly what testimony they were talking about when the court made its ruling. Ms. Bowles's proposed testimony was already in the record and there was no need, under the circumstances, to repeat it. In the language of the rule, the substance of the evidence was apparent and the proffer was adequate.

The Rape Shield Statute, Ark. Code Ann. § 16-42-101 (Repl. 1994), provides in pertinent part:

> (b) In any criminal prosecution under §§ 5-14-102 — 5-14-110, or for criminal attempt to commit, criminal solicitation

> to commit, or criminal conspiracy to commit an offense defined in any of those sections, opinion evidence, reputation evidence, or evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person, evidence of a victim's prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true, or evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegations is not admissible by the defendant, either through direct examination of any defense witness or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.

The statute simply has no application to a prior inconsistent statement made by the victim as to the offense charged. Ms. Bowles's testimony that the victim recanted was clearly relevant for impeachment purposes and should have been admitted. Finally, given the critical nature of B.L.'s testimony, we cannot say that the error was harmless.

For the reasons stated this case is reversed and remanded to the trial court for a new trial.

Reversed and remanded.

ROGERS and GRIFFEN, JJ., agree.

Houston WILLIAMS and Kathlene Williams *v.*
STATE of Arkansas

CA CR 94-894 927 S.W.2d 812

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1996
[Petition for rehearing denied August 14, 1996.*]

*Pittman, Stroud, and Griffen, JJ., would grant.

Kent McLemore and *Finch & Gartin*, by: *Jay T. Finch*, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen. and Senior Appellate Advocate, for appellee.

JOHN E. JENNINGS, Chief Judge. Houston Williams and Kathlene Williams, husband and wife, were each convicted of conspiracy to deliver methamphetamine. They each appeal from their convictions. Houston Williams argues three points on appeal: (1) that the trial court erred in failing to grant his motion for directed verdict in that the evidence was insufficient because Henry

Glosemeyer and his wife Terry Glosemeyer were accomplices and their testimony was uncorroborated; (2) that the trial court erred in refusing to instruct the jury that Henry and Terry Glosemeyer were accomplices as a matter of law whose testimony must be corroborated; and (3) that the trial court erred in failing to grant appellants' motions to dismiss for double jeopardy. Kathlene Williams argues these same points, and also that the trial court erred in refusing to sever her trial from that of her husband; the court erred in refusing to grant a mistrial after the prosecutor referred to facts outside of the record; the court erred in preventing her cross-examination of Henry Glosemeyer; and the court erred in allowing evidence of her previous conviction for enhancement purposes at sentencing. We affirm as to both appellants on all issues.

SUFFICIENCY OF THE EVIDENCE

We first address appellants' arguments concerning their motion for directed verdict, as they involve a challenge to the sufficiency of the evidence. *Goins* v. *State*, 318 Ark. 689, 890 S.W.2d 602 (1995); *Martin* v. *State*, 316 Ark. 715, 875 S.W.2d 81 (1994); *Coleman* v. *State*, 315 Ark. 610, 869 S.W.2d 713 (1994). The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the verdict. Substantial evidence is evidence forceful enough to compel a conclusion one way or another without suspicion or conjecture. *Owens* v. *State*, 313 Ark. 520, 856 S.W.2d 288 (1993). In determining the sufficiency of the evidence, we review the proof in the light most favorable to the State, considering only that evidence which tends to support the verdict. *Gunter* v. *State*, 313 Ark. 504, 857 S.W.2d 156 (1993).

Viewed in the light most favorable to the State, the following evidence was presented at trial. Henry Glosemeyer testified that he and Terry Glosemeyer met Houston Williams and Kathlene Williams around Thanksgiving of 1991 when they were all working for a trucking company. Henry Glosemeyer was aware that the Williamses were behind in their house payments. He had a Mac Ten .9mm semi-automatic handgun that he wanted to get rid of, and he suggested that Houston Williams take the weapon to California and either sell it or trade it for drugs so that they could split the proceeds. Glosemeyer testified that Williams took the weapon to California and when he returned he gave Glosemeyer a quarter ounce of methamphetamine in return. Just before Christmas of 1991, the Williamses lost their job with the trucking company.

Glosemeyer testified that he and Terry continued to have contact with the Williamses, living out of a bedroom and staying at their residence just about every weekend when they came through. Glosemeyer testified that the Williamses would make trips to California to obtain drugs and were making their living collecting unemployment and dealing drugs. He testified that he and Terry used drugs at the Williams' residence. In April 1992, Henry and Terry Glosemeyer quit their job with the trucking company and moved into the Williams' residence full time, where they all did drugs regularly. He testified that they had numerous conversations about buying, selling, and using drugs. He testified that Houston Williams, sometimes accompanied by his wife Kathlene, would make a trip to California every four to six weeks to procure more drugs. On one trip, the Williamses took Henry Glosemeyer's personal pickup truck to California to procure drugs. Glosemeyer testified that Terry moved out of the Williams' residence in either June or July, but he continued to live there until September 1992. During the time he was living with the Williamses he saw people come to the house to talk to the Williamses about drugs. He testified that people came to the house and they all did drugs and there was constant conversation about selling drugs and that both Houston and Kathlene were part of the conversations. Henry Glosemeyer testified that even after he moved out of the Williams' house he continued to be involved with drugs and with the Williamses. In November of that year, Glosemeyer began to sell quantities of methamphetamine to another truck driver he knew. He testified that he got the drugs from Houston and gave the money to both Houston and Kathlene. Glosemeyer continued to sell drugs that he got from Houston Williams until February 22, 1993, when he was arrested leaving the Williams' house with two ounces of methamphetamine in his truck. After his arrest, Glosemeyer cooperated fully with the police and told them about the Williamses and his own role in the drug trade. He testified that before his arrest he had been waiting for Williams to return from a trip to California that he had made in Glosemeyer's truck, and that Williams had told Glosemeyer he was to pick up four pounds of methamphetamine in California. Glosemeyer testified that at this time "I was a major distributor for him."

Terry Glosemeyer testified about meeting the Williamses, moving in with them, and their collective drug use. She testified that they all used methamphetamine, but she never bought drugs

from Houston and Kathlene Williams. She testified that Henry did buy drugs from the Williamses and that she had witnessed Houston and Kathlene sell drugs to other people. Terry Glosemeyer testified that on one occasion she and Kathlene took some methamphetamine, mixed it with Inositol, and put it in bags. On another occasion, she testified that she counted between eight and ten thousand dollars in cash for Houston before a trip to California to buy drugs. She testified that after her husband was arrested on February 22, 1993, eight days later when he was out of jail they went to the Williams' house. Terry testified that she slept on the couch that night and when she woke in the morning, she heard conversations in the house between Houston Williams, Richie Dickson, and Ron Fox. They were discussing the location of methamphetamine that they had hidden. She believed the drugs they were talking about were the last shipment that Houston had brought in.

Detective Allen McCarty testified that he had been involved in an investigation of Houston and Kathlene Williams involving their distribution of methamphetamine. He first received information regarding Houston Williams in November 1992. He eventually interviewed a confidential informant named Fred Colvin. Colvin told him that a person living in West Fork named Houston Williams was making approximately three trips a month to California, was buying drugs, and bringing them back to northwest Arkansas for distribution. In February 1993, after receiving information from a detective with the Ninth Judicial Drug Task Force, McCarty and members of the Fourth Judicial Drug Task Force set up surveillance of the Williams' residence. They saw Henry Glosemeyer drive to the Williams' residence, and then leave. A few hours later a red pickup arrived at the residence driven by Glosemeyer. About 8:30 p.m., they observed the pickup leave the residence driven by Glosemeyer. The truck was stopped and Glosemeyer consented to a search, which produced two ounces of methamphetamine. After Glosemeyer's arrest, he indicated that he had gotten the drugs from Houston Williams.

■ We hold that there was substantial evidence presented at trial to support the jury's verdict. Because the trial court ruled that Henry and Terry Glosemeyer were not accomplices as a matter of law, there was no requirement of corroborating evidence to send the case to the jury for deliberation. *See King* v. *State*, 323 Ark. 671,

916 S.W.2d 732 (1996). The trial court did not err in denying the appellants' motions for directed verdict.

ACCOMPLICES AS A MATTER OF LAW

Both appellants contend that the trial court erred in not holding that both Henry and Terry Glosemeyer were accomplices to the conspiracy as a matter of law. We cannot agree. Arkansas Code Annotated section 5-2-403 provides, in part:

> A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he...aids, agrees to aid, or attempts to aid the other person in planning or committing it.

In the case at bar the trial court gave AMCI 2d 403, which allowed the jury to determine whether the Glosemeyers were accomplices to the conspiracy and therefore whether corroboration was required. The "Note on Use" to AMCI 2d 403 states that the instruction should be given when an alleged accomplice has testified and the sufficiency of the corroborating evidence presents an issue of fact for the jury. The court should not instruct the jury that a certain witness is an accomplice if there is any dispute in the testimony upon that point. *Odom* v. *State*, 259 Ark. 429, 533 S.W.2d 514 (1976). Whether a witness is an accomplice is ordinarily a mixed question of law and fact, to be submitted to the jury. *Odom* v. *State*, *supra*. The problem here cannot be adequately understood without some discussion of the nature of the crime of conspiracy. Professor Lafave states:

> As courts have so often said, the agreement is the "essence" or "gist" of the crime of conspiracy.
>
> . . . .
>
> Because most conspiracies are clandestine in nature, the prosecution is seldom able to present direct evidence of the agreement. Courts have been sympathetic to this problem, and it is thus well established that the prosecution may "rely on inferences drawn from the course of conduct of the alleged conspirators." This notion has been traced to an oft-quoted instruction in an 1837 English case, where the judge told the jury: "If you find that these two persons pursued by

> their acts the same object, often by the same means, one performing part of an act and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object."

2 Wayne R. LaFave and Austin W. Scott Jr., *Substantive Criminal Law* § 6.4 (1986).

In the case at bar, the Williamses were charged with conspiring to deliver methamphetamine in northwest Arkansas. Although there was considerable evidence of criminal activity on their part, there was no direct evidence of the actual agreement between them. The jury in the case at bar was permitted to draw such an inference. Likewise, there is abundant evidence that the Glosemeyers were involved in all sorts of criminal activities with the Williamses, but again there is no direct evidence of their agreement in the charged conspiracy. If different inferences may reasonably be drawn from the proof regarding complicity, the question of accomplice status is one for the jury. *See* 75A Am. Jur. 2d *Trial* § 822 (1991). Our courts have repeatedly said that the drawing of inferences is for the trier of fact. *See Core* v. *State*, 265 Ark. 409, 578 S.W.2d 581 (1979); *Crow* v. *State*, 248 Ark. 1051, 455 S.W.2d 89 (1970); *Lewis* v. *State*, 7 Ark. App. 38, 644 S.W.2d 303 (1982).

While we agree that the jury could readily infer, in the case at bar, that the Glosemeyers were accomplices to the conspiracy, we cannot say the court erred in submitting the question to them.

DOUBLE JEOPARDY

Prior to this trial on charges of conspiracy to distribute methamphetamine, both Houston and Kathlene Williams were convicted in a separate trial of possession of methamphetamine with intent to deliver. They argue that Ark. Code Ann. § 5-1-113 provides them with an affirmative defense to the second prosecution, and cite *Tackett* v. *State*, 294 Ark. 609, 745 S.W.2d 625 (1988), in support. They also argue that the doctrine of merger prohibits the second prosecution, citing *Elsey* v. *State*, 47 Ark. 572, 2 S.W. 337 (1886). Arkansas Code Annotated section 5-1-113 provides in pertinent part:

> A former prosecution is an affirmative defense to a subsequent prosecution for a different offense under the following circumstances:
>
> (1) The former prosecution resulted in...a conviction...and the subsequent prosecution is for:
>
> . . . .
>
> (B) An offense based on the same conduct, unless:
>
> (i) The offense of which the defendant was formerly convicted...and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of the offenses is intended to prevent a substantially different harm or evil; or
>
> (ii) The second offense was not consummated when the former trial began.

In *Tackett* v. *State*, 294 Ark. 609, 745 S.W.2d 625 (1988), the defendant was convicted of manslaughter in the death of one victim while a second victim of the same incident remained in a coma. After the second victim died, defendant's subsequent prosecution for her death was held not to be barred because the second offense was not consummated when the former trial began. In the case at bar, appellants argue that the charges in the first trial and the charges of conspiracy in the subsequent trial arose out of the same conduct, and the "not yet consummated" exception does not apply because all of the activities constituting the elements of the conspiracy charges had been consummated before the first trial began.

While accurate as far as it goes, appellants' argument overlooks the other exception, contained in subsection (1)(B)(i). The offense of possession with intent to deliver and the offense of conspiracy to distribute "each requires proof of a fact not required by the other and the law defining each of the offenses is intended to prevent a substantially different harm or evil." Arkansas Code Annotated section 5-1-110(a)(2) provides that when the same conduct of a defendant may establish more than one offense, the defendant may be prosecuted for each such offense but may not be convicted of more than one offense if one offense consists only of a conspiracy to commit the other. By allowing prosecution for both conspiracy and the underlying offense, this section does not merge the inchoate offense into the ultimate offense as was the law in *Elsey*

v. *State*. However, as the Original Commentary to this section of the Code illustrates, the use of the word "only" is significant. As the Commentary points out:

> [I]t restrict[s] application of the subsection in the conspiracy context to the situation where the consummated offense was the sole object of the conspiracy. If the defendant conspired to commit a continuing series of offenses, he may be convicted of both the conspiracy and a completed offense committed pursuant to the conspiracy. For example, the person who agrees with others to engage in the continuing sale and distribution of drugs may be convicted of both conspiracy and a completed drug sale.

We found this reasoning persuasive in *Lee* v. *State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989), where we held that § 5-1-110 did not prohibit convictions for both delivery of a controlled substance and conspiracy to deliver. The same reasoning is applicable to the case before us. While in a sense both the offenses of possession of methamphetamine with intent to deliver and conspiracy to distribute methamphetamine may be based on the same conduct, each requires proof of a fact not required by the other; therefore the affirmative defense of § 5-1-113 does not apply. Nor does § 5-1-110 prevent conviction for both offenses, as the conspiracy that was the subject of the conviction in the case at bar was not only a conspiracy to commit the other offense of possession with intent to deliver on February 23, 1993, that was the subject of the prior conviction. The conspiracy was to engage in the continuing sale and distribution of methamphetamine over the course of more than a year. The appellants' conviction on the conspiracy charge did not violate the principle of double jeopardy.

SEVERANCE

The remaining arguments are made solely by appellant Kathlene Williams. She argues that the trial court erred when it refused to sever her case from that of her husband, as the evidence against him was so much stronger than that against her.

■■ In order to preserve for appeal a trial court's denial of a motion to sever, the defendant must renew the motion at the close of all the evidence. Ark. R. Crim. P. 22.1(b). General renewals of motions, that do not make clear to the court the grounds relied upon, have been held insufficient to preserve the issue for

appeal. *See Goins* v. *State*, 318 Ark. 689, 890 S.W.2d 602 (1995); *Jacobs* v. *State*, 317 Ark. 454, 878 S.W.2d 734 (1994); *Wynn* v. *State*, 316 Ark. 414, 871 S.W.2d 593 (1994). In the case at bar, appellant's counsel stated to the court, "[I]n order to preserve my motion for severance I have to reurge it." Even if this is considered sufficient to preserve the issue, we recognize that the trial court has broad discretion in determining whether to grant or deny a motion to sever. *Rockett* v. *State*, 319 Ark. 335, 891 S.W.2d 366 (1995). While there may have been some disparity in the quantity and quality of evidence presented against the two appellants, there was evidence presented that went specifically to the conduct of Kathlene as well as to that of Houston. We note that the jury was appropriately instructed to consider the evidence for or against each of them separately, and to render verdicts accordingly. We find no abuse of discretion in refusal of the motion to sever.

MOTION FOR MISTRIAL —
PROSECUTOR'S CLOSING ARGUMENT

Appellant Kathlene Williams argues that the trial court erred in failing to grant a mistrial for some of the prosecutor's remarks made during closing argument. In referring to defense counsels' questioning of Henry Glosemeyer about his incentive to testify because of the charges pending against him, the prosecutor stated "you're looking at the person who makes that decision, and he doesn't know what's going to happen." Appellant's counsel objected to the prosecutor's referring to information not in evidence, and was overruled. Again, the prosecutor stated that Glosemeyer never testified what "deal" he had with the prosecutor, "because there ain't none." Again, the same objection was overruled. The prosecutor then referred to statements made by Fred Colvin, another defendant, implying that they may possibly have been induced to avoid the appellants "messing with his friends or messing with him." Appellant's counsel objected again on grounds that the prosecutor had argued facts not in evidence and asked that the jury be admonished not to consider the statements. The trial court responded that the jury had been instructed that arguments are not evidence. Counsel then asked for mistrial, which was denied.

Mistrial is an extreme remedy to which the court should resort only when there has been an error so prejudicial that justice cannot be served by continuing the trial. *King* v. *State*, 317

Ark. 293, 877 S.W.2d 583 (1994). Counsel are given leeway in closing argument to argue plausible inferences that can be drawn from the testimony, and the trial court has a wide latitude of discretion in controlling the arguments of counsel. *Littlepage* v. *State*, 314 Ark. 361, 863 S.W.2d 276 (1993). While the prosecutor's comments were outside of the evidence, the jury was instructed that closing arguments were not evidence. We will not overturn the trial court's ruling absent clear abuse, and we do not find such manifest abuse of discretion here.

LIMITATION OF CROSS-EXAMINATION

Appellant Kathlene Williams argues that the trial court erred in disallowing her cross-examination of Henry Glosemeyer regarding "the extent to which his deal to testify favorably for the State might be motivated by what he faced if convicted." She argues that her cross-examination was attempting to show that he had ample motive to testify favorably for the State.

Glosemeyer testified that he had been in trouble for methamphetamine twice before, had been to prison, and did not want to go back. He indicated that in a prior case he had testified for the prosecution and had gotten probation. He testified that he was being prosecuted for possession with intent to deliver and faced the possibility of a life sentence. He acknowledged that his case had been continued a number of times for the purpose of seeing the outcome of appellants' trial. He admitted that he was "testifying in order to do as much as I can to help myself"; that there was "no doubt about the fact that I am seeking favorable consideration for my testimony[;] I want leniency"; and that "I will come in and say anything to prevent myself from sitting in that defense chair as long as its the truth."

When the prosecutor objected to appellant's counsel's attempt on cross-examination to ask more about the possible sentence Glosemeyer faced, counsel made an offer of proof in which he had Glosemeyer admit that thirty years in prison would deprive him of the opportunity to earn forty hours a week of minimum wage; that Glosemeyer did not want his child to have to visit him in prison; and that he did not want to be deprived of his freedom. The court indicated to counsel that the substance of the proffer was irrelevant, redundant, and repetitive. We agree. Glosemeyer's motives for testifying favorably for the State were clear, and appel-

lant has not shown how she was prejudiced by the court's curtailment of her repetitive cross-examination.

ENHANCEMENT

Appellant's final argument is that it was error for the court to allow evidence of her previous conviction for possession with intent to deliver for enhancement purposes at sentencing. She argues that as the two convictions arose from a single act it was fundamentally unfair to use one to enhance punishment for the other, citing *Tackett* v. *State*, 298 Ark. 20, 766 S.W.2d 410 (1989). In that case the supreme court held that enhancement of punishment was directed towards habitual offenders, and because Tackett was convicted on two manslaughter charges arising out of a single criminal act, there was nothing habitual about his conduct and it would contravene fundamental fairness to treat him as an habitual offender. In contrast, appellant was convicted of conspiracy to distribute methamphetamine as an ongoing course of conduct, with her prior conviction for possession with intent to deliver representing a single episode therein. We do not perceive the same fundamental unfairness in addressing her habitual conduct through use of enhancement.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

PITTMAN, STROUD, and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I dissent from the result announced in the prevailing opinion and its underlying reasoning. It is statutory law that a felony conviction cannot rest on the uncorroborated testimony of an accomplice. Ark. Code Ann. § 16-89-111(e)(1)(1987). Arkansas law also holds that a person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he aids, agrees to aid, or attempts to aid the other person. Ark. Code Ann. § 5-2-403(a)(2)(Repl. 1993). The Arkansas Model Jury Instructions provide for accomplice status to be determined either as a matter of law (AMCI 402), or by the jury as a matter of fact (AMCI 403). Futhermore, the law is clear that accomplice liability as a matter of law can exist in cases involving criminal conspiracy. *Strickland* v. *State*, 16 Ark. App. 293, 701 S.W.2d 127 (1985); *Shrader* v. *State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984);

Cate v. *State*, 270 Ark. 972, 606 S.W.2d 764 (1980). In this case, both instructions were submitted by the parties, and the trial judge issued AMCI 403, thereby allowing the jury to determine the status of Henry and Terri Glosemeyer as accomplices to the conspiracy to distribute methamphetamine with Houston and Kathlene Williams.

Appellants argue that both Henry and Terri Glosemeyer should have been declared accomplices as a matter of law because they aided the appellants in their drug distributing enterprise, and if that argument is valid, then the testimony from both Henry and Terri Glosemeyer should have been corroborated by non-accomplice sources. Appellants are correct. Where the facts concerning one's status as an accomplice are in dispute, whether one is an accomplice is a jury question that plainly warrants giving AMCI 403. *Robinson v. State*, 11 Ark. App. 18, 665 S.W.2d 890 (1984). In order for one to be determined an accomplice as a matter of law, the evidence supporting that finding must be conclusive or indisputable. *Clements* v. *State*, 303 Ark. 319, 796 S.W.2d 839 (1990).

The proof concerning conduct by Henry Glosemeyer aiding the conspiracy to distribute methamphetamine is clear and undisputed. He provided a gun to Houston Williams so that it could be traded for drugs. He acted as a distributor of methamphetamine for Houston Williams for a period of time. Henry Glosemeyer also knowingly and willfully provided his truck so that Houston Williams could haul methamphetamine from California to Arkansas for distribution. These facts are conclusive proof that Henry Glosemeyer aided, agreed to aid, and attempted to aid a conspiracy to distribute methamphetamine.

Likewise, the evidence shows that Terri Glosemeyer knowingly financed her husband's involvement in the methamphetamine distribution enterprise with Houston Williams by giving her pay check to Henry Glosemeyer so that he could use the proceeds from it to purchase methamphetamine from Houston Williams for distribution. The undisputed proof is that Terri Glosemeyer did this over a period of several weeks. There was also undisputed proof that she willingly assisted in bagging methamphetamine for distribution with Kathlene Williams, and that she helped Houston Williams count money to be used for purchasing methamphetamine.

Thus, the proof that Henry and Terri Glosemeyer aided, agreed to aid, or attempted to aid Houston and Kathlene Williams

in a conspiracy to distribute methamphetamine was both plain and uncontroverted so as to be conclusive, thereby justifying the jury instruction that they were accomplices as a matter of law (AMCI 402). There is no proof otherwise that would have justified submitting the question of their accomplice status to the jury as an issue of fact.

In *Strickland* v. *State*, *supra*, we held that it was error for a trial court to fail to instruct on accomplice liability as a matter of law in a criminal conspiracy where the alleged accomplice invested money in a drug manufacturing scheme, but later took his money back. We decided that the "overt act" of paying the money was already complete so as to seal the fate of the alleged accomplice. Applying the clear holding of *Strickland* to the facts before us, it is obvious that any of the acts by either Henry or Terri Glosemeyer was sufficient to establish accomplice liability in the conspiracy based on the notion that the acts were aiding the conspiracy to distribute methamphetamine. Certainly the combined actions demonstrate an unmistakable pattern of complicity to the conspiracy.

It follows, therefore, that the conspiracy case against appellants cannot stand. Because both Glosemeyers should have been declared accomplices to the conspiracy as a matter of law, neither of them could provide the requisite corroborating testimony for the other in order to establish the felony charge of conspiracy to distribute methamphetamine. Ark. Code Ann. § 16-89-111(e)(1). The only other proof against appellants on the conspiracy charge came from police officers who obtained their information directly from the Glosemeyers or from Fred Colvin. Colvin was a co-conspirator who ironically was determined an accomplice as a matter of law by the trial court based solely on his affidavit at a suppression hearing that he had participated in the methamphetamine distribution enterprise with Houston Williams. Counsel for the State candidly admitted at oral argument that he was unable to explain why Terri Glosemeyer should not have been deemed an accomplice as a matter of law given that Colvin was declared to be one, and that there was no factual basis in the record for distinguishing their status. At any rate, it is clear that there is no corroborating testimony supporting the conspiracy charge in this record when one excludes the testimony from the Glosemeyers, Colvin, and the police officers whose only knowledge of the conspiracy consists of information received from the accomplices. Therefore, the convic-

tions should be reversed, and the case dismissed.

Although the prevailing opinion reasons that the trial court properly submitted the accomplice liability issue to the jury, neither that opinion nor the State has advanced a plausible explanation why we have a model jury instruction providing for declaration of accomplice liability as a matter of law (AMCI 402) if we are never to apply it to cases where proof of the conduct showing complicity in a conspiracy is conclusive. Conspiracy cases are not exempt from the requirement that testimony from an accomplice be corroborated by a non-accomplice, nor are they exempt from accomplice status being declared as a matter of law where proof of complicity is conclusive. I would, therefore, follow our clear holding in *Strickland, supra,* and reverse and dismiss this case.

I am authorized to state that Pittman and Stroud, JJ., join in this opinion.

Tommy STAFFORD *v.* ARKMO LUMBER COMPANY

CA 94-1373 925 S.W.2d 170

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1996

William F. Sherman, for appellant.

Walter A. Murray, for appellee.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Robert L. Henry, III* and *Christopher Gomlicker*, for appellee Diamond Constr. Co.

JOHN MAUZY PITTMAN, Judge. Tommy Stafford appeals from an order of the Arkansas Workers' Compensation Commission denying additional temporary total disability benefits and medical benefits arguing lack of support by substantial evidence.

Appellant sustained a compensable injury to his left shoulder on August 2, 1986, while working for Arkmo Lumber Company. He was treated by Dr. Joe W. Crow, an orthopedic surgeon, who performed an acromioplasty on appellant's left shoulder and assigned a 20 percent impairment rating when he released appellant on September 9, 1987, to return to work with lifting restrictions. On December 16, 1988, while working for Diamond Constructing Company, appellant sustained a compensable injury to his neck and back. Appellant stated that before the 1988 injury, his shoulder was

"stiff" but he was able to work without problems. However, after the 1988 injury, he began having pain in his left shoulder. Appellant returned to Dr. Crow for treatment, who opined that the 1988 injury was a new injury rather than a recurrence. Appellant became dissatisfied with Dr. Crow's treatment. The administrative law judge appointed Dr. William F. Blankenship to be appellant's treating physician. Dr. Blankenship provided conservative treatment, physical therapy and injections, and conducted numerous diagnostic tests, such as an EMG and nerve conduction studies. On January 8, 1990, Dr. Blankenship released appellant to return to work with restrictions of no sweeping, mopping, lifting in excess of twenty pounds or overhead lifting. Dr. Blankenship thought that appellant could perform some limited work and that no further medical treatment was needed.

Subsequent to being released by Dr. Blankenship, appellant continued to have complaints and in 1990 sought treatment at UAMS. There, appellant was treated by several physicians. Dr. Samuel Agnew performed a second acromioplasty on November 4, 1992, which alleviated appellant's symptoms. Following the surgery, appellant sought additional temporary total disability benefits from January 1, 1990, to April 1993, medical benefits for treatment from UAMS, and a retroactive change of physician to Dr. Agnew.

The Commission found that appellant failed to prove that his treatment from UAMS was causally related to either compensable injury or to the surgery following the 1986 injury. 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 will 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.* The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Cagle Fabricating & Steel, Inc.* v. *Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993). Moreover, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict.

McClain v. *Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Dr. Agnew's December 9, 1992, report stated: (1) that a May 9, 1991, examination revealed recurrent impingement syndrome of appellant's left shoulder, (2) that a repeat acromioplasty was performed November 4, 1992, and (3) that there was no indication that the acromioplasty performed by Dr. Crow after the 1986 injury was inadequate. He further stated, "It cannot be determined with any degree of reasonable certainty as to what event caused the recurrent or persistent symptoms.... Specifically, one cannot determine whether the accident of August 1986, December 16, 1988, or the surgery of Dr. Crow specifically is the event. One can state with reasonable assurity that all three play in some part to [appellant's] overall complaints." Dr. J. M. Grunwald, a physician at UAMS who treated appellant, stated in a September 19, 1990, report that "there is no way to decide if the orthopedic problem which [appellant] has is related to or caused by his work related injury or if they were caused by Dr. Crow's treatment surgery. I do not feel that Dr. Crow's surgery was inadequate or substandard." He further said, "There is no way to decide which part of the symptoms that [appellant] is presenting with is related to his first and which part is related to his second accident." Lastly, Dr. James Blankenship, a UAMS physician, said in a March 23, 1993, report that appellant has two cysts which are almost certainly congenital and which are believed to be causing some of appellant's complaints.

Appellant argues that Dr. Agnew's opinion should be interpreted to mean that both compensable injuries and the first surgery played a part in his need for the second surgery although Dr. Agnew could not say which one precipitated his condition. He also contends that causation was established because the second surgery in November 1992 alleviated his problems.

The interpretation of medical opinion was for the Commission, and we cannot say that the Commission's finding that a causal connection between his medical treatment and the compensable injuries was not established is not supported by substantial evidence. Therefore, we decline to address appellant's arguments concerning a change of physician to Dr. Agnew.

Appellant also argues that he is entitled to temporary total disability benefits from January 1, 1990. The Commission found that appellant failed to prove that he was unable to perform employ-

ment subsequent to January 1990 and that the medical and lay testimony indicated that appellant had reached a plateau of recovery and was performing some gainful employment.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *J. A. Riggs Tractor Co.* v. *Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990). After Dr. William Blankenship's release to return to work with restrictions on January 8, 1990, appellant testified that he returned to his employer who did not have any work available within the restrictions. Appellant said that had there been a job available, he would have tried to do it. Appellant stated that he has not sought employment anywhere since his second injury in December 1988. However, the record shows that from at least 1990 to 1992, appellant operated a lawn care business. Appellant said that he could do only two or three yards each week, never worked more than four hours a day, only did a dozen yards in 1991 and earned less than $600 a year in the business. Our review indicates that the Commission's findings and decision to deny temporary total disability benefits is supported by substantial evidence.

Affirmed.

JENNINGS, C.J., and GRIFFEN, NEAL, and ROGERS, JJ., agree.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. This case has been in this court before. In an opinion styled *Stafford* v. *Diamond Construction Co., et al.*, 31 Ark. App. 215, 793 S.W.2d 109 (1990) (Mayfield dissenting), we granted the appellees' motion to dismiss the appeal on the basis that the order the appellant attempted to appeal was not a final, appealable order. Although the style of that case does not specifically name "Arkmo Lumber Company" as an appellee, that appellee was included in the designation "et al."

Thus, there are two appellees in this case. This results from the fact, as the majority opinion points out, that the appellant sustained a compensable injury in August 1986, while working for Arkmo Lumber Company, and sustained another compensable injury in December 1988, while working for Diamond Construction Company. The notice of appeal from the decision of the Commission in this case names both companies as appellees, and both of them have filed briefs.

In order to focus on the points that are involved in this appeal, it is not necessary to recite all of the details of the long and complex history of the case. A short summary, taken from the helpful "Introduction" to the "Argument" in the brief of the appellee Diamond Construction Company, discloses that after appellant's compensable injury in August 1986, he was treated and had surgery on his left shoulder by Dr. Crow, was paid temporary total benefits for some period, and was paid for a permanent partial disability of 20 percent to the arm. And on December 16, 1988, while working for Diamond Construction Company, the appellant sustained a compensable aggravation of his left shoulder. As a result of this disability, he was paid temporary total disability benefits from December 17, 1988, until January 8, 1990, when he was released by Dr. Blankenship. In addition to these benefits, the medical expenses associated with the care of Dr. Crow and Dr. Blankenship have been paid.

The appellant, however, contends in this appeal (1) that he should be paid temporary total benefits for the period from January 8, 1990, to April 1993, (2) that the administrative law judge erred in selecting Dr. Blankenship as appellant's one-time-only change of physician, and the Commission should have allowed a change to UAMS, and (3) that the medical bills of UAMS and all the physicians who rendered medical services to the appellant should be paid.

The issue concerning the change of physician to Dr. Blankenship is the issue that appellant attempted to appeal in *Stafford* v. *Diamond Construction Co. et al., supra.* The majority opinion in that case stated:

> The appellant . . . petitioned the Workers' Compensation Commission for a change of physician. The petition was granted and a new physician was appointed by the administrative law judge (ALJ). Apparently dissatisfied with ALJ's choice of physician, the appellant appealed to the full Commission contending that he never agreed to the procedure by which the new physician was selected, and the Commission affirmed the ALJ's decision. . . .
>
> . . . Here, the appellant obtained the relief he sought before the Commission . . . and we consider the dispute concerning the method by which the new physician was selected to be interlocutory and incidental in nature. With-

> out expressing an opinion on the finality or appealability of an order denying a change of physician, we hold that, on these facts, the order granting a change of physician is not appealable by the petitioning party at this time.

31 Ark. App. at 216, 793 S.W.2d at 110.

This point, therefore, is now before this Court in this appeal. Prior to the first appeal, which we dismissed, the full Commission had held that the ALJ's order was appealable on the basis that it raised an issue to a "separable branch of the litigation," and the ALJ's order was affirmed. However, after this court held that the Commission's order affirming the ALJ's decision was not appealable, the Commission in the decision now before this court again passed on the change-of-physician issue and again affirmed the ALJ's order on that point. The Commission treated the issue as involving a request for a "retroactive change of physician," and held that "claimant failed to prove by a preponderance of the credible evidence that he is entitled to another change of physician . . . ."

This issue is not discussed by the majority opinion; however, it is fully argued in the appellant's brief which points out that on April 19, 1989, the appellant requested a change of physician from Dr. Crow; that on May 9, 1989, the ALJ suggested that the necessity of a hearing could be obviated by allowing him to select an independent examiner; that on June 12, 1989, appellee Diamond Construction, through its attorney, wrote the ALJ and suggested that he enter an order granting a change of physician to a "doctor selected by you"; that on June 16, 1989, appellant's attorney wrote the ALJ that he was in the process of attempting to ascertain the appellant's wishes regarding the ALJ's suggestion, but in a postscript to the letter, the attorney stated, "Since dictating this letter, I have now talked with my client and I now have the authority to agree that you may select the physician to be the change of physicians for [the appellant]."

But the appellant's argument goes on to point out that on the day after appellant's attorney received the ALJ's order filed June 15, 1989, which said that the appellant would be evaluated and treated by Dr. Blankenship and that this would be the one-time-only change under Ark. Code Ann. § 11-9-514(a)(2) (1987), the appellant's attorney hand delivered a letter to the ALJ stating that the earlier letter of the attorney mailed on June 16, 1989, should be

ignored because it "has been superseded by this letter."

Then on June 29, 1989, a hearing was held on this issue by the ALJ who held on July 11, 1989, that the evidence established that the appellant's attorney agreed to the procedure by which a change of physician was made and only objected when he found out that Dr. Blankenship had been selected by the ALJ. Finding that the selection had been made in accordance with the law, and that Dr. Blankenship was a licensed and qualified orthopedic surgeon, the ALJ refused to change his selection.

Appellant argues that there was no agreement that the ALJ could select a one-time-only change of physician; that the full Commission should have allowed appellant to present evidence on this issue; that Dr. Blankenship was a "conservative" physician; and that the appellant was entitled to "reasonable medical care."

Because the above point is closely connected with appellant's other two points in this appeal, I want to discuss the other points now and then come back to the change-of-physician point.

The majority opinion relies upon a report by Dr. Agnew — a doctor at the University of Arkansas For Medical Sciences (UAMS) to whom appellant went after he stopped seeing Dr. Blankenship — to support the holding by the majority that the Commission's decision in this case should be affirmed. The majority opinion states that because the "Commission's finding that a causal connection between [Agnew's] medical treatment and the compensable injuries was not established" is supported by substantial evidence, "we decline to address appellant's arguments concerning a change of physician to Dr. Agnew."

Of course, as the appellant points out in his brief, it should make no difference in evaluating the testimony of Dr. Agnew whether or not his treatment was authorized by the ALJ. *See Markham* v. *K-Mart Corp.*, 4 Ark. App. 310, 630 S.W.2d 550 (1982), citing 2 Larson, *The Law of Workmen's Compensation* § 61.12 (j), at 10-902 (1996), where it is said that "the reports of an unauthorized doctor must be considered in determining extent of disability."

Therefore, putting this matter in proper perspective, we have a worker who admittedly has received two compensable injuries to his left shoulder and has been paid compensation benefits for both of them. After the last injury on December 16, 1988, he received

temporary total disability until January 8, 1990, when he was released by Dr. Blankenship. He then goes to see Dr. Agnew who in a report of December 9, 1992, traces the appellant's medical history and the fact that a left acromioplasty was performed in 1988 while appellant was under the care of Dr. Crow. Dr. Agnew's report also points out that this procedure gave appellant some relief for a period but that he came to UAMS in 1990 complaining of shoulder and parascapular pain. He was started, the report continues, "on local modalities and shoulder girdle strengthening exercises" and that, on or about May 9, 1991, a repeat clinical evaluation was consistent with findings of "recurrent impingement syndrome of his left shoulder and possible AC joint arthritis."

Without setting out the complete report of Dr. Agnew, we quote the following pertinent statements:

> At that time, he was seen by other members of the trauma service, whereby a distal clavicle resection and possible repeat acromioplasty was recommended. Attempts to aid Mr. Stafford with this surgical procedure were unsuccessful due to the inability to obtain hospital admission for Mr. Stafford because of the lack of available hospital beds.
>
> . . . .
>
> On September 10, 1992 Mr. Stafford was seen back in the orthopaedic clinic after having successfully completed an arthrogram which revealed a rotator cuff tear. It was based on his clinical findings and the arthrogram report that repeat acromioplasty was recommended and scheduled.
>
> On November 4, 1992 Mr. Stafford underwent a repeat or revision acromioplasty with [debridement] of his muscular rotator cuff and repair of an erosive type defect in his rotator cuff. On clinical exam at the time of surgery there was no overt evidence of significant pathology and the acromioclavicular joints of this was not addressed surgically. At the present time, Mr. Stafford has been followed on a consistent basis by both myself and the orthopaedic office as well as members of the physical therapy rehabilitation service [and] continues to make increasing gains in his strength and motion.

And in answers to specific questions that the appellant's attor-

ney had addressed to Dr. Agnew, the following answers from his report are quoted:

> Item 2: It cannot be determined with any degree of reasonable certainty as to what event caused the recurrent or persistent symptoms that Mr. Stafford sought our medical attention. Specifically, one cannot determine whether the accident of August 1986, December 16, 1988, or the surgery of Dr. Crow specifically is the event. One can state with reasonable assurity that all three play in some part to Mr. Stafford's overall complaints.
>
> Item 6: Mr. Stafford is still in the healing, recuperative, or rehabilitative phase of his most recent surgery. It is anticipated that with continued rehabilitation that Mr. Stafford should regain approximately 90% function in a painless manner to his entire arm. . . .

The opinion of the Commission, the briefs of both appellees, and the majority opinion all rely heavily upon one statement made in Dr. Agnew's report to support the finding of the Commission that the evidence does not show that the care and treatment rendered by UAMS (which includes Dr. Agnew) was causally connected to the appellant's work-related injury. That one statement is the answer quoted above in "Item 2." I do not believe, however, that a common-sense reading of that statement could reach the conclusion that Dr. Agnew either said or believed that there was no causal connection between the appellant's work-related injuries and the treatment by Dr. Crow and the treatment and the surgical procedure afforded appellant by UAMS.

The report of Dr. Agnew reasonably and logically traces the factual history of the appellant's injuries and medical treatment. The report explains why and how a repeat acromioplasty was recommended and performed and the anticipated recovery and 90 percent "function in a painless manner" that will likely result from the treatment provided by UAMS. This surgical procedure was performed in November 1992. At the hearing before the ALJ on June 1, 1993, the appellant testified that after this surgery the stinging, burning pain he had in his arm and hand was gone; that the popping he had in his arm and shoulder was gone; that his shoulder is now fine; and that he is now able to work and is trying to "draw me up" a business working on yards and landscaping.

So the appellant, who admittedly sustained compensable injuries to his left shoulder in 1986 and 1988, had a left acromioplasty in 1988 while under the care of Dr. Crow; was in the care of Dr. Blankenship from July 1989 to January 1990; was released to return to work with some lifting and arm-raising restrictions; and was terminated by his employer because there was no work available with those restrictions. At that point, the appellant went to the University Hospital where he saw Dr. J.M. Grunwald. This eventually resulted in the repeat acromioplasty, relief from previous symptoms, and a much brighter outlook for this now forty-three-year-old manual laborer.

But the majority opinion holds that the appellant loses his claim for temporary disability payments because Dr. Blankenship thought his healing period ended in January 1990, and because Dr. Agnew said in "Item 2" of his report that he could not determine "whether the accident of August 1986, December 16, 1988, or the surgery of Dr. Crow" was the specific "event" that "caused the recurrent or persistent symptoms" for which appellant sought treatment at UAMS. Overlooked by the Commission and this court's majority opinion — and skipped over lightly by the appellees — is Dr. Agnew's concluding sentence in "Item 2," that "One can state with reasonable assurity *that all three play in some part* to Mr. Stafford's overall complaint." Actually, Dr. Agnew's statements in "Item 2" of his report lend much more support to a finding that the care and treatment rendered to appellant by UAMS *was* casually connected to his work-related injuries then they do to the contrary finding made by the Commission. And it is obvious that Dr. Blankenship who testified by deposition that he last saw the appellant on January 29, 1990, could not dispute the findings and surgical procedure described in Dr. Agnew's report of December 9, 1992, and could not deny that the appellant's symptoms have dramatically improved since he has been under UAMS care and treatment.

As a legal matter "it is not essential that the causal relationship between the accident and the disability be established by medical evidence . . . or that the evidence be medically certain." *Crain Burton Ford Co.* v. *Rogers*, 12 Ark. App. 246, 248, 674 S.W.2d 944, 946 (1984). *See also Gerber Products* v. *McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). (It should be noted that the change made by Act 796 of 1993, which modified Ark. Code Ann. § 11-9-102 (16) (Repl. 1996) to require that medical opinions be stated with a

reasonable degree of medical certainty, does not apply to the present case where the last injury occurred in 1988.) Moreover, we have also held that "if the original injury is compensable, every natural consequence from it is also compensable." *Hubley* v. *Best Western Governor's Inn*, 52 Ark. App. 226, 232, 916 S.W.2d 143, 146 (1996).

And in simple fact, the Commission's finding that the care and treatment rendered to appellant by UAMS was not causally connected to his work-related injuries is not supported by substantial evidence because fair-minded persons with the same evidence before them could not have reached the same conclusion. In that situation it is our duty to reverse the Commission's finding. *Kuhn* v. *Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 162 (1996); *see also Morgan* v. *Desha County Tax Assessor's Office*, 45 Ark. 95, 871 S.W.2d 429 (1994).

Therefore, I would reverse the Commission's decision that appellant is not entitled to temporary total benefits during the healing period that followed the surgical procedure he received at UAMS in November 1992. The number of days of temporary total disability within that healing period is not a matter that we can determine from the record on appeal, and I would remand to the Commission for a determination of that issue.

As to payment of the medical bills of UAMS and the physicians who performed services for appellant after he was released by Dr. Blankenship, the appellees argue that under Ark. Code Ann. § 11-9-514(a)(1) and (2) (Supp. 1996) the appellant had a one-time-only change of physician from Dr. Crow to Dr. Blankenship, and that to require the payment of the UAMS bills (including the physicians) would constitute a retroactive change of physician contrary to section 11-9-514. I think this argument, under my view of this case, is not on point. Neither is the appellant's argument on point in contending that the ALJ erred in selecting Dr. Blankenship as the physician to replace Dr. Crow. Of course, the appellees are not obligated to pay the medical bills of UAMS and Dr. Agnew unless those bills are for medical care and attention causally connected to appellant's compensable injuries. But having decided that such a connection exists, then the only question left is whether the bills are for medical care and attention that was reasonable and necessary for the treatment of the compensable injuries.

In my view, after Dr. Blankenship released the appellant to return to work and saw appellant for the last time on January 8, 1990, the provisions of Ark. Code Ann. § 11-9-514(a) (1) and (2) no longer applied. At that point the statute that applied was Ark. Code Ann. § 11-9-508(a) and (b), which on the date of appellant's compensable injuries, as well as on January 8, 1992, provided that the employer shall provide for the medical services that are "reasonably necessary in connection with the injury received by the employee," and if the employer fails to provide such services within a reasonable time after knowledge of such injuries the Commission may direct that they be paid by the employer; and that the employer is also liable for emergency treatment rendered an employee as is reasonably necessary in connection with a compensable injury.

The case of *Universal Underwriters Ins. Co.* v. *Bussey*, 17 Ark. App. 47, 703 S.W.2d 459 (1986), deals with the situation discussed in the preceding paragraph of this opinion and is authority for the position I take with regard to what is referred to in this case as the UAMS bills. Of course, it would be necessary to remand for the Commission to determine the amount of the medical bills that should be paid for the care and treatment of the appellant after January 8, 1990.

Therefore, I would reverse and remand for the purposes indicated in this opinion.

William Lance McNEELY *v.* STATE of Arkansas

CA CR 95-602 925 S.W.2d 177

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1996

Dennis R. Morlock, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen., Sr. Appellate Advocate for appellee.

JAMES R. COOPER, Judge. The appellant was convicted in a jury trial of possession of a controlled substance and possession of drug paraphernalia. He was sentenced to one year in the county jail and fined $500.00 and was sentenced to six years in the Arkansas Department of Correction and fined $5,000.00, respectively. On appeal, the appellant argues that the trial court erred in denying his motion to suppress without conducting an evidentiary hearing on the motion. We affirm.[1]

The appellant filed a motion to suppress on August 16, 1994. The trial court entered an order denying the motion to suppress after the appellant did not appear at the hearing held on November 2, 1994. On appeal, the appellant contends that the trial court erred in denying his motion without conducting a hearing because the State had the burden of proving the validity of the search and seizure. However, the appellant failed to raise this objection below.

Prior to trial, the appellant's trial counsel stated:

> We have a — we filed a Motion to Suppress the marijuana and the, well, just the marijuana in this case. We were set for a hearing, I think it was about a week ago yesterday. The defendant did not show up and that Motion to Suppress

[1] The State asserts that we must dismiss the appellant's appeal because he did not file a notice of appeal subsequent to the entry of an amended judgment and commitment order. The initial judgment and commitment order was entered on November 10, 1994, and the appellant filed his notice of appeal on November 14, 1994. The trial court entered an amended judgment and commitment order on November 16, 1994, which did not modify the appellant's sentence but merely set out the presumptive sentence in the appropriate space on the order. However, the trial court subsequently recalled the amended commitment order. Thus, it was not necessary for the appellant to file a new notice of appeal.

was denied.

> Let me raise a Motion in Limine based largely on the same issue before the Court to deny — to suppress the introduction of the marijuana, let's see. . . based on . . . it is reported to me that Samantha Stevens was the person who opened the door and allowed the police officers into the apartment. The basis of our Motion in Limine to Suppress [is] that she had no authority to consent to the police officers to enter without a search warrant.

The appellant's argument on appeal was not made to the trial court and hence it is not preserved for appeal. *Walker* v. *State*, 314 Ark. 628, 864 S.W.2d 230 (1993). This Court does not address arguments raised for the first time on appeal. *Williams* v. *State*, 320 Ark. 211, 895 S.W.2d 913 (1995). Moreover, the proponent of a motion to suppress has the initial burden of establishing that his own Fourth Amendment rights have been violated by the challenged search or seizure. *Myers* v. *State*, 46 Ark. App. 227, 878 S.W.2d 424 (1994).

Affirmed.

PITTMAN, ROBBINS, STROUD, and NEAL, JJ., agree.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree to affirm this case at this point. The appellant, who has been paralyzed and confined to a wheelchair for ten years as the result of an injury suffered when he broke his neck diving into water to save a friend, is thirty years old; lives with his mother; and smokes a little marijuana to help him live during the day and relax enough to sleep during the night. One day, while he was visiting in the apartment of his girl friend, four police officers burst into the apartment, with weapons drawn, arrested the appellant, and seized the ounce and one-half of marijuana and some drug paraphernalia he had in a bag lying beside his wheelchair.

After a trial by jury, which finally returned a guilty verdict after being read the "dynamite" instruction, the appellant was sentenced as stated in the majority opinion.

The trouble I have with this case is that appellant's attorney filed a motion to suppress which was set for hearing prior to trial but appellant did not appear, and the trial court entered an order

denying the motion. Then, when counsel made a motion at the start of the trial to suppress the marijuana seized, the court denied that motion because the appellant did not appear at the suppression hearing on the day the hearing had been set.

The majority opinion affirms the judgment based on the position that the appellant did not argue that the trial court should still hear the motion but only argued the merits of the motion. The appellant contends that his right to be free from unreasonable searches and seizures guaranteed under the Fifth Amendment to the United States Constitution, as well as his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, should afford him a hearing on his motion at some point.

In *Bell* v. *State*, 324 Ark. 258, 920 S.W.2d 821 (1996), the Arkansas Supreme Court considered a case where a police officer was not present to testify at a hearing to suppress any statements the appellant had made as the result of an interrogation at which the absent officer asked questions of the appellant. Our supreme court held that the State had the burden to produce the officer at the hearing or explain his absence. Because it did neither, the court remanded for a new hearing on the suppression motion. It did not grant a new trial and stated a new trial would only be granted if the trial court found the confession of the appellant to be involuntary.

I understand that there are different circumstances in this case and the *Bell* case, but when the question of effectiveness of counsel, basic constitutional rights, and notions of fair play are considered, I think we should follow the procedure here that was used in *Bell*.

Therefore, I dissent.

Charles L. NIX *v.* STATE of Arkansas

CA CR 95-254 925 S.W.2d 802

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1996

Stuart Vess, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y

Gen., for appellee.

JAMES R. COOPER, Judge. The appellant entered a negotiated plea of guilty to theft of property, a Class C felony. He was sentenced to three years' probation, fined $100, and ordered to pay court costs and restitution. The parties agreed to a separate restitution hearing in which the trial court ordered restitution in the amount of $19,500.00. On appeal, the appellant argues that the trial court erred in determining the amount of restitution. We affirm.[1]

The victim, Kelly Jones, testified that four of her horses were stolen in July 1993. She testified that two of the horses were registered Arabians and the other two were registered quarter horses. She stated that all the horses had been professionally trained and were show horses. Ms. Jones testified that one of the Arabians was a black bay mare worth $5,000. The other Arabian was a white stallion also valued at $5,000. Ms. Jones testified that her parents had given her one of the quarter horses which was a high point show mare. She testified that her parents paid $2,950 for the horse and she estimated its value at $3,500. Ms. Jones further testified that the fourth horse was a three-year-old palomino filly out of the highest point palomino in the American Quarter Horse Association. She stated that she borrowed $7,000 from her father to purchase the horse and had been offered $10,000 for it. The victim's father confirmed that he loaned her $7,000 for the purchase of the palomino quarter horse. Ms. Jones further testified that she also lost $1,750 in stud fees.

Ms. Jones's ex-husband testified that the horses were worth less than the amounts testified to by Ms. Jones. The appellant testified that he had sold the stolen horses for $1,600. He further testified that he made approximately $1,500 to $1,700 a month which was used to support himself, his wife, and three children.

In determining the amount of restitution, the trial court allowed $3,000 for each Arabian horse, $3,500 for one quarter horse and $10,000 for the second quarter horse. The appellant

[1] The State questions whether the appellant may bring this appeal from his guilty plea. However, because the appeal does not constitute a review of the guilty plea itself, we conclude that the appellant is not precluded from bringing an appeal challenging the restitution. *See Hill* v. *State*, 318 Ark. 408, 887 S.W.2d 275 (1994); *State* v. *Sherman*, 303 Ark. 284, 796 S.W.2d 339 (1990).

argues that it was error to consider the victim's testimony to the amount of restitution. However, this argument was not made to the trial court. Our law is well established that arguments not raised at trial will not be addressed for the first time on appeal, and that parties cannot change the grounds for an objection on appeal, but are bound on appeal by the scope and nature of the objections and arguments presented at trial. *Campbell* v. *State*, 319 Ark. 332, 891 S.W.2d 55 (1995).

Theft of property is a Class C felony if the value of the property is less than $2500 but more than $200. Ark. Code Ann § 5-36-103 (b)(2)(A) (Repl. 1993). The appellant contends that the amount of restitution could not exceed $2500 because he entered a plea of guilty to a Class C felony theft of property. However, the appellant has not cited any authority to support this argument. Assignments of error unsupported by convincing argument or authority are not considered on appeal. *Scroggins* v. *State*, 312 Ark. 106, 848 S.W.2d 400 (1993). Moreover, restitution is meant, as far as is practicable, to make the victim whole with respect to the financial injury suffered. *See* Ark. Code Ann. §§ 16-90-301 to -306 (1987). Here, there was evidence that the victim sustained damages in excess of $2500 as a result of the theft; consequently, we hold that the evidence is sufficient to support the trial court's order of restitution.

The appellant also asserts that the trial court failed to consider the amount he could afford to pay in determining the amount of restitution. We disagree. The trial court heard testimony about the appellant's income and financial responsibilities. The trial court's order noted that the appellant would have to make only reasonable monthly payments. We note that a trial court retains jurisdiction beyond the term of a suspended or probated sentence until any fine, costs, or restitution is paid. *See Basura* v. *City of Springdale*, 47 Ark. App. 66, 884 S.W.2d 629 (1994). Thus, the term of the appellant's restitution payments may be longer than his thirty-six months' probation. Accordingly, we find no error and affirm.

Affirmed.

STROUD, GRIFFEN, ROGERS, and ROBBINS, JJ., agree.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the majority opinion in this case.

The appellant entered a plea of guilty to the charge of theft of property having a value in excess of $200, and was sentenced to three years' probation, and restitution in an amount to be determined pursuant to a hearing. There was no agreement as to the amount of restitution to be paid, and after a hearing the trial court ordered restitution in the amount of $19,500.

Ark. Code Ann. § 16-90-301 (1987) provides:

> The General Assembly recognizes that many innocent persons suffer injury, death, property damage, and resultant financial hardship because of crimes committed in this state and that there is a genuine need in this state to establish a method whereby the responsible offender, *as far as practicable*, may be required to make restitution to his victim so as to make that victim whole with respect to the financial injury suffered. [Emphasis added.]

And Ark. Code Ann. § 16-90-303(a) (1987) (now repealed) provides:

> If a defendant pleads guilty or is found guilty of a criminal offense, the trial court of criminal jurisdiction shall, in addition to imposition of sentence, enter a monetary judgment against the defendant in an amount of restitution or reparation from the offender to the victim that will totally *or partially* compensate the victim for his personal injury or loss or damage to his property caused by the criminal act of the offender. [Emphasis added.]

The appellant testified that he supports five people including three children between the ages of five and nine; that his wife does not have a job; and that he makes approximately $1,500 to $1,700 per month. Based on this evidence I do not believe it is practicable for appellant to pay $19,500 during the term of his probation.

It is true, as the majority notes, that a trial court retains jurisdiction beyond the terms of a suspended sentence until any restitution is paid, and it is possible that the trial court might extend appellant's restitution payments for longer than his probation. However, it is equally possible that the trial court might revoke appellant's probation, and I am unwilling to speculate that the "term of

appellant's restitution payments may be longer than his thirty-six months' probation."

Moreover, under our statutes, the trial court may order an amount of restitution that will only *partially* compensate the victim for his personal injury or loss or damage to his property caused by the criminal act of the offender.

Here, Ms. Jones testified that the value of the horses was between $19,500 and $22,500, but except for the palomino filly offered no evidence as to how she arrived at that value. We do not know whether that value represents the amount the horses would have brought in a sale between a willing buyer and seller or some other "value" Ms. Jones placed upon the horses. And, although Ms. Jones said she had documents to show what was paid for the horses, she did not bring them to the hearing. Also, there was evidence that when appellant sold the horses he received a check for only $1,600.

At the hearing, Ms. Jones's ex-husband testified that the black Arabian was purchased for $1,000 and was given to Mrs. Jones by his father; the white Arabian was a foal of the black Arabian and was worth about $500; one quarter horse was purchased for $3,500 several years before; and the second quarter horse was purchased for $2,500.

These amounts total $7,500, and I would reduce the restitution in this case to that amount. Not only do I think that is the highest amount justified by the evidence, I think the evidence also indicates that the amount set by the trial court will either be a disappointment to the victim (because it will never be paid or will be paid in small amounts over a long period of years) or the appellant will be pushed into other crime in an attempt to pay the large amount fixed as restitution for this one.

Therefore, I dissent.

Marla RAMEY *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and Allstate Insurance Company

CA 95-696 924 S.W.2d 835

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1996

Blackman Law Firm, by: *Keith Blackman*, for appellant.

Barrett & Deacon, by: *Paul D. Waddell* and *D. P. Marshall, Jr.*, for appellee Allstate Ins. Co.

Laser, Wilson, Bufford & Watts, P.A., by: *Sam Laser* and *Brian Allen Brown*, for appellee State Farm Mut. Automobile Ins. Co.

JAMES R. COOPER, Judge. The appellant, Marla Ramey, was injured when her automobile collided with a vehicle driven by Ricky Wooten. Mr. Wooten's insurer, Allstate, contacted the appellant and negotiated a settlement of her property damage claim, but no settlement was reached concerning her personal injury claim. Subsequently, the appellant sued Mr. Wooten. Neither the appellant nor Mr. Wooten notified Allstate that a suit had been filed. Mr. Wooten failed to answer or appear, and a default judgment in the amount of $50,000 was entered for the appellant. Allstate was subsequently contacted but refused to pay the judgment amount because Mr. Wooten had failed to provide it with notice that a suit had been filed. The appellant then requested payment under the uninsured motorist provision of her own insurance policy with the appellee State Farm, but State Farm refused payment on the ground that Mr. Wooten was not an uninsured motorist by virtue of his coverage with Allstate.

The appellant sued State Farm, alleging that Mr. Wooten was uninsured within the meaning of her uninsured motorist policy with State Farm. She subsequently amended her complaint to include Allstate as an additional defendant under the theory that the appellant was a third-party beneficiary of Mr. Wooten's policy with Allstate. State Farm and Allstate filed reciprocal motions for summary judgment. The trial court concluded that Allstate was liable to the appellant because it had knowledge of the appellant's claim against its insured and, on that basis, dismissed the complaint against State Farm. The appellant went to trial against Allstate and, at the conclusion of the evidence, Allstate moved for a directed verdict on the same grounds previously rejected by the trial court in the context of its motion for summary judgment, i.e., that it was not liable because its insured failed to comply with the policy provision requiring him to inform the insurer that suit had been filed. At this point, the trial court granted the motion, leaving the appellant with no recovery from either insurer. From that decision comes this

appeal.

For reversal, the appellant contends that the trial court erred in dismissing State Farm from the action; granting Allstate's motion for a directed verdict; refusing to allow her to present rebuttal evidence regarding her injuries; allowing the adjuster to testify concerning the policy terms; and allowing the adjuster to testify on the basis of documents not maintained by her.

■ We first address the appellant's contention that the trial court erred in granting Allstate's motion for a directed verdict because we find it to be dispositive. We find no merit in the appellant's argument that Allstate's coverage became absolute upon the occurrence of an accident under Ark. Code Ann. § 27-19-713(f)(1) (Repl. 1994). That statutory section is part of the Motor Vehicle Safety Responsibility Act, which has no applicability to an insurance policy where, as here, the pleadings fail to indicate that the policy in question had been used as proof of financial responsibility at the time the accident occurred. *See Aetna Cas. & Sur. Co.* v. *Simpson*, 228 Ark. 157, 306 S.W.2d 117 (1957).

■ Nor do we agree with the appellant's argument that the trial court erred in granting a directed verdict in favor of Allstate because Allstate failed to present proof concerning the reason for Mr. Wooten's failure to give notice that a suit had been filed. This argument is based on *Shelter Mut. Ins. Co.* v. *Page*, 316 Ark. 623, 873 S.W.2d 534 (1994), which held that, where an insurer seeks to avoid liability based on a breach of the policy's cooperation clause resulting from the insured's failure to appear at trial, the insurer must show that it exercised due diligence to locate the insured or to find the reason for the insured's absence. However, the situation in *Page* is distinguishable from the case at bar because the insurer in *Page* knew that suit had been filed and in fact appeared at trial, whereas in the case at bar, Allstate was not present at trial and was notified of the suit only after a default judgment had been entered against its insured. Furthermore, the policy provision at issue in the case at bar was not the "cooperation" clause at issue in *Page*, but was instead a provision requiring the insured to immediately inform the insurer in the event that the insured is sued as the result of an auto accident. As a general rule, there can be no waiver of an insured's noncompliance with such a provision where the insurer does not have knowledge of all the material facts. *See generally*, 14 *Couch on Insurance 2d* § 51:204 *et seq.* (Rev. ed. 1982). In the case at bar it is undisputed

that Allstate was unaware that the suit was filed. The purpose of provisions requiring the insured to inform the insurer of suits filed is to afford the insurer the opportunity to defend on the merits of the case. *See M.F.A. Mut. Ins. Co.* v. *White*, 232 Ark. 28, 334 S.W.2d 686 (1960). Allstate was afforded no such opportunity, and we hold that the trial court did not err in granting Allstate's motion for a directed verdict.

Given our resolution of the foregoing issue, we conclude that the trial court erred in granting summary judgment in favor of State Farm. Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Dickson* v. *Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988). Contrary to the trial court's conclusion based on its erroneous construction of the Allstate policy, there remained genuine issues of material fact as to whether Mr. Wooten was an uninsured motorist as defined in the State Farm policy. Consequently, we reverse on this point and remand for further consistent proceedings.

Insofar as the remaining points for reversal are all evidentiary issues relating to Allstate, they will not recur on retrial and we need not address them.[1]

Affirmed in part, reversed in part, and remanded.

JENNINGS, C.J., PITTMAN, and ROBBINS, JJ., agree on affirming as to Allstate.

MAYFIELD and STROUD, JJ., concur as to Allstate.

JENNINGS, C.J., PITTMAN, ROBBINS, and STROUD, JJ., agree to reverse and remand as to State Farm.

MAYFIELD, J., dissents as to State Farm.

---

[1] State Farm has moved to strike portions of Allstate's brief on the ground that they constitute a request for affirmative relief that is improper in the absence of a cross appeal by Allstate. Although we grant the motion, we note that the practical effect of our order is minimal because the appellant properly requested the identical relief sought by Allstate.

Glen ESTES *v.* CEDAR CHEMICALS

CA 95-594 925 S.W.2d 444

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1996
[Petition for rehearing denied August 14, 1996.*]

*Mayfield, J., would grant.

The Whetstone Law Firm, P.A., by *Gary Davis*, for appellant.

Laser, Wilson, Bufford & Watts, P.A., by: *Frank B. Newell*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Glen Estes suffered a compensable shoulder injury and burns while working for appellee Cedar Chemical Company on September 25, 1989. Appellee accepted responsibility for a 19% permanent impairment rating, but Mr. Estes filed for additional benefits, specifically contending that he was entitled to a 25% increase in compensation because his injuries resulted from a safety violation by the appellee. He also claimed that he was entitled to wage-loss benefits in excess of his permanent anatomical impairment rating. The Commission denied Mr. Estes' claim for additional benefits, finding that he failed to prove a safety violation by clear and convincing evidence, and that he failed to establish entitlement to wage-loss benefits because he had the ability to return to work for the appellee at the same wages he was earning prior to the accident. Mr. Estes now appeals, asserting that neither of these findings was supported by substantial evidence. We affirm.

When reviewing decisions from 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 supported by substantial evidence. *Welch's Laundry & Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *City of Fort Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

Mr. Estes testified on his own behalf that he began working for

the appellee in 1984 as a lead operator. He stated that, at the time of the accident, he was earning $11.43 per hour and working about 10 hours of overtime per week. His job included filling large drums with agricultural chemicals. These chemicals were contained in a reactor that was about two stories in height.

On September 25, 1989, Mr. Estes was working in close proximity to the reactor when it ignited. Upon noticing the ignition, Mr. Estes tried to run to safety. However, before he could clear the area the reactor exploded and knocked him down. As a result, he received severe burns and a shoulder injury. The medical evidence showed that he is 17% anatomically impaired as a result of the burns and 2% anatomically impaired because of the shoulder injury.

Mr. Estes acknowledged that an OSHA investigation of the accident did not establish a cause for the explosion. However, he noted that he was working alone at the time of the accident and the normal procedure was to work in two-man shifts. He testified that, because he was working alone, he was unable to monitor the temperature of the reactor. In addition, Mr. Estes asserted that, immediately prior to his work shift, a nickel-sized hole in the reactor had been repaired with a product called Devcon. He stated that this product is supposed to dry in 24 hours, but that a heat lamp was placed inside the reactor which purported to cure the Devcon in only 6 hours.

Since the accident, Mr. Estes has returned to work for the appellee as a storeroom clerk at exactly the same hourly rate that he was making before the injury. However, he testified that he now receives little or no overtime. Mr. Estes acknowledged that the appellee has offered him his old job of lead operator and that he is probably able to physically perform the job. Nevertheless, he declined to accept a job as lead operator for fear of another accident.

For reversal, Mr. Estes first argues that he should have been awarded a 25% increase in compensation because his injuries were the result of a safety violation. He cites Arkansas Code Annotated § 11-9-503 (1987), which provides:

> Where established by clear and convincing evidence that an injury or death is caused in substantial part by the failure of an employer to comply with an Arkansas statute or

> official regulation pertaining to the health or safety of employees, compensation provided for by § 11-9-501 (a)-(d) shall be increased by twenty-five percent (25%).

Mr. Estes also refers to Arkansas Code Annotated § 11-2-117 (1987), which provides that an employer has a duty to provide a "safe work place." He now contends that the court erred in refusing to allow the statutory award because he proved by clear and convincing evidence that his injury was substantially occasioned by his employer's failure to provide a safe work place.

Specifically, Mr. Estes points to the OSHA investigative report. This report identifies three possible causes of the explosion: (1) faulty repair of the hole in the reactor, (2) introduction of other material in the reactor, or (3) overheating of the reactor. Mr. Estes argues that any of the above three causes would amount to a safety violation. According to Mr. Estes, the faulty repair of the hole and the introduction of foreign material into the reactor would both constitute safety violations. Also, he contends that overheating would constitute a safety infraction because the appellee never instructed its employees about the dangers of overheating and he was working alone on the day of the accident, thus preventing him from adequately monitoring the temperature.

Mr. Estes fails to recognize that, in later OSHA reports, the first two possibilities for the explosion were ruled out. Thus, it would appear that the most likely cause of the explosion was overheating. If this was the cause, it would seem that a safety violation may have taken place. This is because, after the OSHA investigation, OSHA advised appellee that it had failed to properly clarify to employees the hazards of extreme temperatures. In fact, there was evidence that an alarm was going off before the accident which indicated a high temperature, but that Mr. Estes continued to work under the assumption that the high temperature caused no threat. Even if employees had been informed about this danger, Mr. Estes may have had a difficult time avoiding injury because he was working alone and could not properly monitor the temperature.

Despite the fact that the appellee may have failed to educate its employees as to the hazards of overheating, the specific cause of the explosion was never isolated in the OSHA reports. An OSHA report listed three possible causes for the accident, but it also

stated that these were only the "three main areas of potential cause." It is possible that something else caused the accident and was not discovered, and because the specific cause of the accident was never ascertained with any degree of certainty, we cannot say that substantial evidence does not support the Commission's finding that Mr. Estes failed to meet his burden of proving by clear and convincing evidence that his injuries were substantially occasioned by a safety violation.

Mr. Estes' remaining argument is that the Commission erred in finding that he was not entitled to wage-loss compensation. He notes that, while he is now working at the same hourly rate as before the accident, he has lost income because he no longer works overtime. Mr. Estes asserts that it is of no consequence that he is probably physically able to perform his old job because his reasonable fear of another accident prohibits him from doing so.

Had the appellee not offered Mr. Estes his former job upon completion of his healing period, he would have had a claim for wage-loss disability due to the reduced hours that he is able to work as a storeroom clerk. Nevertheless, the appellee has established that, by offering him his former job, it has presented Mr. Estes with a "bona fide and reasonably attainable offer" to be re-employed at the same weekly wage as he was receiving before the accident pursuant to Ark. Code Ann. § 11-9-522(b) (1987). Mr. Estes claims that he is mentally incapable of returning to that job. However, he presented no medical evidence to support his claim that his psychological condition prevents him from doing so. Significantly, Mr. Estes never alleged a compensable psychological injury. The appellee did all that it was required to do by offering Mr. Estes his former job and the Commission correctly determined that Mr. Estes could have returned to it had he so desired. Thus, he was given a bona fide offer of attainable employment at the same wages, and is not entitled to wage-loss disability benefits.

Affirmed.

PITTMAN, STROUD, and NEAL, JJ., agree.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the majority opinion in this case.

Glen Estes, the claimant-appellant, was severely burned when

a chemical reactor exploded and almost completely destroyed the multi-story building he was working in.

The administrative law judge held that (1) appellant had failed to demonstrate, by clear and convincing evidence, that his injury was caused by the failure of the employer to provide a safe work environment; and (2) appellant had returned to work for appellee earning the same wages he earned at the time of the accident and, therefore, was not entitled to wage-loss disability in excess of his permanent anatomical impairment. The Commission affirmed and adopted the opinion of the administrative law judge.

I agree to affirm on point one because it is a question of fact for the Commission. However, the appellant also argues that the Commission's denial of wage-loss disability is not supported by substantial evidence, and I cannot agree to affirm on that point.

Appellant testified that at the time of the accident he was making $10.93 per hour, plus an additional fifty cents an hour, normally worked 42 1/2 hours per week at a minimum, and, in addition, he worked 20 to 25 hours overtime every week. When he returned to work after his injury he asked not to be assigned back to the reactor because he had a terrible fear of being in another explosion. He was then given a job as a storeroom clerk and was also paid $10.93, plus fifty cents an hour; however, as a storeroom clerk, he got no raises and no overtime pay.

Appellant also testified that if he had continued working as a reactor operator, his salary would have been over $12 an hour by the time of the hearing. Appellant argues that while his hourly rate of pay is the same as when he was injured, his wages are not the same because he no longer gets overtime and raises.

Arkansas Code Annotated § 11-9-522(b) (1987) provides in part:

> 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.]

Relying on the above statute, the appellee argues that the appellant was offered his old job as lead reactor operator, but appellant turned it down. However, Ark. Code Ann. § 11-9-522(b) also provides that an employee shall not be entitled to wage-loss disability if he "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." I do not agree that the offer to return appellant to the job where the reactor exploded, destroyed the multi-story building in which it was housed, severely burned the appellant, and caused him a permanent anatomical impairment was a "reasonably obtainable" job offer.

Moreover, Ark. Code Ann. § 11-9-522(c)(1) provides that the employer or its insurance carrier "shall have the burden of proving the employee'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."

We will, of course, uphold the findings of the Commission if there is substantial evidence to support those findings; but substantial evidence exists only where reasonable minds could reach the same conclusion reached by the Commission, and reversal is proper if fair-minded persons considering the same facts could not have reached the same conclusion. *Kuhn* v. *Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 162 (1996); *Price* v. *Little Rock Packing Co.*, 42 Ark. App. 238, 856 S.W.2d 317 (1993).

I do not believe that the appellee in this case has carried the burden of showing that fair-minded persons would conclude from the facts in this case that the appellee's offer to let the appellant go back to work as a lead reactor operator constituted a "reasonably obtainable" offer. While the old job may have been *obtainable*, I do not think it is *reasonable* to expect an employee to go back to the job on the reactor which he fears may blow up again. Therefore, from the employee's viewpoint, the old job is not *reasonably* obtainable, and I do not believe that the employer proved otherwise.

Therefore, I dissent.

COOPER, J., joins in this dissent.

SOUTHERN HOSPITALITIES d/b/a Quality Inn, et al. *v.* Lorie BRITAIN

CA 95-710 925 S.W.2d 810

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1996

[redacted]

Frye & Boyce, P.A., by: *Mary A. Jones*, for appellants.

Lane, Muse, Arman & Pullen, by: *Donald C. Pullen*, for appellee.

JOHN B. ROBBINS, Judge. Lorie Britain brought a workers' compensation claim against Southern Hospitalities, alleging that she sustained a work-related back injury on July 3, 1993. The Commission found that Ms. Britain failed to prove a compensable injury and thus denied her claim for temporary total disability benefits. However, the Commission also held that Southern Hospitalities was responsible for medical treatment provided by Dr. Bruce Smith. Southern Hospitalities now appeals, arguing that the Commission erred in holding it liable for any medical expenses. On cross-appeal, Ms. Britain contends that the Commission erred in concluding that she failed to prove a compensable injury. We affirm on appeal and on cross-appeal. Specifically, we hold that Ms. Britain cannot prevail on cross-appeal because substantial evidence supports the Commission's finding that she failed to establish a compensable injury under the new requirements set forth by Act 796 of 1993. Despite the fact that Ms. Britain cannot sustain her claim for a compensable injury, we agree with the Commission's ruling that Southern Hospitality is responsible for those medical expenses which were incurred by Ms. Britain at her employer's direction.

When reviewing decisions from 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 supported by substantial evidence.

Welch's Laundry & Cleaners v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *City of Fort Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

The facts of this case are as follows. On July 3, 1993, Ms. Britain was working in the laundry room for Southern Hospitalities pulling towels from a washer when she felt a pain in her lower back and right leg. Ms. Britain reported her injury to a co-worker, and later informed management about the injury. She continued working that day, but took some pain medication for relief and did not do any more lifting. After work, she was examined by a doctor at a local hospital and was told that she appeared to have a lumbar strain. The doctor prescribed muscle relaxers and pain pills. Ms. Britain returned to the hospital two or three days later when her pain persisted, and was referred to Dr. James Arthur, a neurosurgeon. However, a representative from the employer's compensation insurer informed her that she was not authorized to be treated by Dr. Arthur, and directed her to consult Dr. Bruce Smith, an orthopedic surgeon.

Ms. Britain complied with the direction from the compensation insurer to consult Dr. Smith, and he examined her on July 22, 1993. Dr. Smith diagnosed a mild back sprain, prescribed more pain medication and muscle relaxers, and directed her to return to work and contact him if she had any problems. Ms. Britain attempted to return to work but, after working for only a few hours, began experiencing additional pain in her lower back and legs. She telephoned Dr. Smith's office, reported her symptoms, and was told to remain off work until an MRI study of her lumbar spine could be performed. That study was performed on August 11, 1993, and indicated evidence of a prior surgery. However, no recurrent disc herniation was detected, and no nerve-root impingement was found. Based upon that study, Dr. Smith released Ms. Britain to return to work effective August 12, 1993, without restrictions, and released her from care. On September 8, 1993, Dr. Smith again released Ms. Britain to work, but this time he directed that she restrict her lifting to no more than thirty pounds. Ms. Britain

returned to work following the August 11, 1993, study and examination and continued to work through September 16, 1993, when she was fired.

It is undisputed that Southern Hospitalities accepted Ms. Britain's July 3, 1993, back sprain as compensable, and that it paid for the medical treatment that Ms. Britain received from the hospital and paid temporary total disability benefits through July 21, 1993. The parties stipulated that an incident occurred on July 3, 1993, which Ms. Britain immediately reported as a work-related injury. The Commission found that the appellants initially accepted responsibility for the claim. Furthermore, it is undisputed that Southern Hospitalities and its insurance carrier refused to authorize medical treatment by Dr. Arthur, but instead directed Ms. Britain to obtain treatment from Dr. Smith. Nonetheless, Southern Hospitalities denied liability for any of Ms. Britain's medical care, including the cost of Dr. Smith's services and the MRI study that she received under his care, as well as her claim for temporary total disability benefits associated with the time that she was off work pursuant to Dr. Smith's direction. Southern Hospitalities denied Ms. Britain's claim by contending that her injury was not supported by objective findings so that it was not a "compensable injury" within the meaning of various provisions of Ark. Code Ann. § 11-9-102 (Repl. 1996), as amended by Section 2 of Act 796 of 1993.

As the Commission noted in its opinion, the only positive medical finding resulting from any of the examinations of Ms. Britain was that of lumbar tenderness. Following an examination which revealed a good range of motion and a negative straight leg-raising maneuver, Dr. Smith opined that Ms. Britain sustained a "mild sprain." An MRI was also performed, but the results were negative. Under the new act, a compensable injury must be established by medical evidence supported by "objective findings," which are findings "which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(5)(D) (Repl. 1996); Ark. Code Ann. § 11-9-102(16)(A)(i) (Repl. 1996). The burden of proof of a compensable injury is on the employee. Ark. Code Ann. § 11-9-102(5)(E) (Repl. 1996). In the instant case, the Commission correctly concluded that the medical evidence was not supported by "objective findings," and that Ms. Britain thus failed to establish entitlement to compensation for a compensable injury.

After deciding to deny Ms. Britain's claim for compensability,

the Commission nevertheless awarded benefits against the appellants for medical expenses incurred under the treatment of Dr. Smith. In doing so, the Commission explained:

> [W]e note that the respondents are seeking to avoid liability for medical treatment which was provided to the claimant at their direction during the time that they accepted the compensability of the claim. In this regard, the respondents initially accepted the compensability of this claim, and they accepted responsibility for the medical services provided to the claimant by and at the direction of Dr. Smith. Consequently, we find that they cannot now deny liability for those services, including liability for the expenses for the MRI.

An employer is generally only responsible for medical expenses when an employee is determined to have suffered a compensable injury. *See* Ark. Code Ann. § 11-9-102(5)(F)(i) (Repl. 1996). However, in this case the employer directed Ms. Britain to see Dr. Smith and led Ms. Britain to reasonably believe that such treatment would be covered by workers' compensation. Although the Commission did not specifically state that it was invoking the equitable doctrine of estoppel, it is implicit in its opinion that it did so. In *Snow* v. *Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985), we set out the elements of estoppel as follows:

> 1) The party to be estopped must know the facts; 2) he or she must intend that his or her conduct shall be acted upon or must act so that the party asserting the estoppel has a right to believe the other party so intended; 3) the party asserting the estoppel must be ignorant of the true facts; and 4) the party asserting the estoppel must rely on the other party's conduct to his or her injury.

The facts of this case constitute substantial evidence in support of the Commission's decision. The employer is estopped from denying responsibility for the cost of treatment rendered by Dr. Smith notwithstanding the fact that Ms. Britain's back injury was ultimately deemed to be noncompensable. Southern Hospitalities directed Ms. Britain to visit a specific physician and represented that it was accepting her injury as compensable, thus prompting Britain to visit Dr. Smith and incur medical expenses. The Commission did not err in concluding that these expenses should be borne by the

appellants.

Affirmed on direct appeal.

ROGERS, J., agrees.

MAYFIELD and GRIFFEN, JJ., concur.

JENNINGS, C.J., and COOPER, J., dissent.

Affirmed on cross-appeal.

ROGERS, J., agrees.

JENNINGS, C.J., and COOPER J., concur.

MAYFIELD and GRIFFEN, JJ., dissent.

JOHN E. JENNINGS, Chief Judge, concurring in part and dissenting in part. I concur in the court's affirmance on cross-appeal. I agree with Judge Robbins that the Commission's finding that Ms. Britain's injury is not "compensable" under the new act is supported by substantial evidence.

I cannot agree that the case can be affirmed on direct appeal, however. There are several problems with affirming on an estoppel theory. First, the Commission did not make a specific finding that the employer was estopped. Estoppel is ordinarily a question of fact. *See Dickson* v. *Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988). Second, Ark. Code Ann. § 11-9-508(a) requires the employer to provide medical services. I do not understand how the employer can be estopped by doing something the statute requires.

Finally, Ark. Code Ann. § 11-9-510 expressly provides that there is no liability here. "The employer shall not be liable for any of the payments provided for in §§ 11-9-508 — 11-9-516 in the case of a contest of liability where the Commission shall decide that the injury does not come within the provisions of this chapter." My conclusion is that, under the new act, we have no choice but to reverse on direct appeal, and for that reason I respectfully dissent. I concur in the court's affirmance on cross-appeal.

COOPER, J., joins in this concurrence and dissent.

WENDELL L. GRIFFEN, Judge, concurring in part and dissenting in part. Is a low-back strain that a worker suffers while performing her job and which her employer acknowledges as having occurred within the scope of and arising out of her employment a "compen-

sable injury" within the meaning of the changes to the Arkansas Workers' Compensation Law enacted as Act 796 of 1993? This is the question presented by this case of first impression under the 1993 changes. Although one might first think that this question is easily answered given the history of workers' compensation in Arkansas, this case shows that the definition of "compensable injury" under the new act may pose somewhat novel and nagging difficulties to employers, injured workers, the Workers' Compensation Commission, and this court.

Southern Hospitalities d/b/a Quality Inn [hereinafter "Southern Hospitalities"] and Union Standard Insurance Company (its workers' compensation insurer) have appealed the March 18, 1995, decision by the Workers' Compensation Commission holding that Lorie Britain was entitled to medical benefits under the Workers' Compensation Law arising from a back injury that Britain suffered on July 3, 1993, even though the Commission found her injury non-compensable. Britain has cross-appealed from the Commission's decision denying her claim for temporary total disability benefits associated with that injury based upon its determination of non-compensability. We conclude that the Commission's decision finding Southern Hospitalities liable for the cost of the medical services and treatment that Britain received is supported by substantial evidence. Therefore, we would affirm on the appeal. However, that part of the Commission's decision finding that Britain failed to prove that she sustained a compensable injury is not supported by substantial evidence. Thus, we would reverse the decision denying Britain's claim for temporary total disability benefits, and we would remand the case to the Commission so that an order awarding those benefits can be entered.

The facts are essentially undisputed. On July 3, 1993, Britain was working in the laundry room for Southern Hospitalities pulling towels from a washer when she felt a sharp pain in her lower back and down her right leg. She reported her injury to a co-worker, and she informed management about the injury. She continued working that day, but took some pain medication for relief and did not do any more lifting that day. After work she went to a local hospital, was examined by a doctor there and told that she appeared to have a lumbar strain, and was prescribed muscle relaxers and pain pills. Britain returned to the hospital two or three days later when her pain persisted, and was referred to a local neurosurgeon, Dr.

James Arthur. However, a representative from the employer's compensation insurer informed her that she was not authorized to be treated by Dr. Arthur, and directed her to consult Dr. Bruce Smith, an orthopedic surgeon, instead. Britain had formerly been a patient under Dr. Smith's care for another back injury that occurred when she worked for a different employer.

Britain complied with the direction from the compensation insurer to consult Dr. Smith, who examined her on July 22, 1993. He diagnosed a mild back sprain, prescribed more pain medication and muscle relaxers, and directed her to return to work and contact him if she had any problems. Britain attempted to return to work but began experiencing additional pain in her lower back and legs after working for less than three hours. She telephoned Dr. Smith's office, reported her symptoms, and was told to remain off work until a magnetic resonance imaging (MRI) study of her lumbar spine could be performed. That study, performed on August 11, 1993, produced findings of desiccation of Britain's intervertebral disc at L5-S1, slight bulging of the disc on the right at that level, and post-surgical scarring on the right at that level. No recurrent disc herniation was detected, and no nerve-root impingement was found in that study. Based upon that study, Dr. Smith released Britain to return to work effective August 12, 1993, without restrictions, and released her from care. On September 8, 1993, Dr. Smith again released Britain to work, but this time he directed that she restrict her lifting to no more than thirty pounds. Britain returned to work following the August 11, 1993, study and examination and worked through September 16, 1993, when she was fired. She brought a claim for workers' compensation benefits related to the medical treatment that she received, including the cost of the MRI study, as well as for temporary total disability benefits related to the time that she was off work as directed by Dr. Smith from July 22 to August 12, 1993. She subsequently obtained work from a different employer.

It is undisputed that Southern Hospitalities accepted Britain's July 3, 1993, back sprain as compensable, and that it paid, through its insurance carrier, for the medical treatment that Britain received from the hospital and paid temporary total disability benefits through July 21, 1993. The parties stipulated that an incident occurred on July 3, 1993, which Britain immediately reported as a work-related injury, and that the incident arose out of and occurred

in the course of her employment. The Commission found that the appellants initially accepted responsibility for the claim. Furthermore, it is undisputed that Southern Hospitalities and its insurance carrier refused to authorize medical treatment by Dr. Arthur, but instead directed Britain to obtain treatment from Dr. Smith. Nevertheless, Southern Hospitalities denied liability under the Workers' Compensation Law concerning the cost of *all of* Britain's medical care, including the cost of Dr. Smith's services and the MRI study that she received under his care, as well as her claim for temporary total disability benefits associated with the time that she was off work pursuant to Dr. Smith's direction. Southern Hospitalities denied Britain's claim by contending that her injury was not supported by objective findings so that it was not a "compensable injury" within the meaning of various provisions of Ark. Code Ann. § 11-9-102 (Repl. 1996) as amended by Section 2 of Act 796 of 1993.

An administrative law judge found that Britain did sustain a "compensable injury," and awarded her temporary total disability benefits for the period in question plus her medical expenses and a controverted attorney's fee. Southern Hospitalities appealed that determination to the Commission, which affirmed the award of medical benefits because Southern Hospitalities initially accepted the claim as compensable and accepted responsibility for the medical services provided to Britain by Dr. Smith at its direction. However, the Commission reversed the award of temporary total disability benefits from July 22 to August 12, 1993, and the finding that Britain sustained a compensable injury, holding that she failed to establish a compensable injury with medical evidence supported by objective findings as defined by Ark. Code Ann. § 11-9-102(16)(Repl. 1996). Southern Hospitalities has appealed from the decision holding it liable for all medical benefits, including the MRI expense and the cost of Dr. Smith's care. Britain has cross-appealed from the decision holding that she failed to prove that she sustained a compensable injury.

Our task on appellate review of decisions by the Workers' Compensation Commission is to review the evidence and all reasonable inferences from it in the light most favorable to the Commission's findings, and we must uphold the Commission's findings if there is any substantial evidence to support them, even if the preponderance of the evidence would indicate a different result. *Tahu-*

tini v. *Tastybird Foods*, 18 Ark. App. 82, 711 S.W.2d 173 (1986). In order to reverse a decision of the Commission, we must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Franklin Collier Farms* v. *Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986). We are required to give findings of fact by the Commission the same force and effect as a jury's verdict when they are supported by substantial evidence. *General Indus.* v. *Gipson*, 22 Ark. App. 219, 738 S.W.2d 104 (1987).

Thus, as to the appeal, our concern is whether the Commission's decision holding Southern Hospitalities liable for Britain's medical expenses upon a finding it accepted the compensability for her claim during the time that the services were provided is supported by substantial evidence. As to the cross-appeal, we review to determine whether the Commission's finding that Britain failed to prove that she suffered a compensable injury as that term is defined by the Workers' Compensation Law, as amended by Act 796 of 1993, is supported by substantial evidence.

Under prior law, Arkansas defined an injury for purposes of workers' compensation benefits to mean an accidental injury arising out of and in the course of employment. Ark. Code Ann. § 11-9-102(4) (1987). However, the Arkansas General Assembly rewrote the definition of injury when it enacted Act 796 in 1993, and specified the meaning of "compensable injury," at Ark. Code Ann. § 11-9-102(5)(A) (Repl. 1996). For our purposes in this appeal, the operative statutory definition is found at § 11-9-102(5)(A)(i), which reads, in pertinent part, as follows:

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

That definition must also be understood in light of § 11-9-102(5)(D) (Repl. 1996) which provides that a compensable injury must be established by medical evidence, supported by "objective findings" as defined in § 11-9-102(16)(A), which reads as follows:

(i) "Objective findings" are those findings which cannot come under the voluntary control of the patient.

(ii) When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain; for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg-raising tests or range-of-motion tests shall not be considered objective findings.

Because we would hold that Britain suffered a compensable injury within the meaning of the foregoing statutory definitions, we have no difficulty concluding — indeed, it logically follows — that there is substantial evidence to support the Commission's decision that Southern Hospitalities is liable for the cost of the medical services and treatment that Britain obtained. Britain's claim is governed by § 11-9-102(5)(A)(i), which expressly defines compensable injury to mean accidental injury causing internal or external physical harm to the body, arising out of and in the course of employment, and which requires medical services or results in disability or death. There is no argument about whether Britain's injury was accidental because the parties agree that it arose from a specific incident and is identifiable by time and place of occurrence. There is no dispute that the July 3, 1993, incident involving the pulling of towels from a washer was the precipitating incident for Britain's injury, although Southern Hospitalities argued before the Commission that her symptoms following that incident were merely a recurrence of her previous back problems from an injury sustained under different employment. As already indicated, Britain's condition required medical services on July 3, 1993, and it resulted in her inability to work. Her condition required medical services thereafter, as proven by the fact that she returned to the hospital for additional examination, was prescribed medication for pain relief and muscle relaxers, and had been referred by the hospital to Dr. Arthur, a neurosurgeon. The fact that Southern Hospitalities, through its workers' compensation insurer, directed Britain to be examined by Dr. Bruce Smith rather than Dr. Arthur is additional proof that her condition required medical services. Dr. Smith diagnosed her condition as a lumbar strain, prescribed medication, and eventually directed her to refrain from working because of her increased symptoms of lower-back and right-leg pain. These facts

are established by Britain's testimony. They are also proven by the medical records related to Britain's treatment on July 3 and 7, 1993, as well as Dr. Smith's clinic notes and other records beginning with his treatment on July 22, 1993, and continuing through his return to work slip dated September 8, 1993.

There is no medical evidence in the record that questions the fact that Britain sustained internal physical harm to her body (in the form of a lumbar strain diagnosed by Dr. Smith and by the doctors that treated Britain before he did). Similarly, there is no evidence questioning whether her lumbar strain required medical services. The fact that she was off work because of the lumbar strain is also undisputed. Based upon these undisputed facts, we are driven to conclude that reasonable minds could not have decided that Britain did not suffer a compensable injury.

Southern Hospitalities contends that Britain did not suffer a compensable injury because the medical evidence is not supported by "objective findings." Operating from that reasoning, the argument proceeds that because Britain did not suffer a compensable injury, the employer cannot be held liable for medical treatment and services under the Workers' Compensation Law. Southern Hospitalities disputes the Commission's decision holding it liable for the cost of Britain's medical treatment, including the treatment and services she received from Dr. Smith and at his direction, by arguing that it merely authorized Britain to obtain that treatment, but that it did not accept responsibility for paying for it. None of this reasoning is persuasive.

There is no proof before us that Britain's lumbar strain — the medical condition diagnosed by every doctor that examined her — comes under her voluntary control. The medical evidence shows that she initially complained of pain along the right side of her back running to her right buttock and leg, and that she described the pain as a pulling type. Although she had good range of motion in the lumbar spine, negative straight leg raising, and normal neurological findings when Dr. Smith examined her on July 22, 1993, Dr. Smith unequivocally stated that she had suffered a mild sprain for which he recommended conservative treatment. If the record contained proof that the medical findings associated with Britain's back sprain were under her voluntary control, we would have no difficulty affirming the Commission's decision that she had not suffered a compensable injury based upon the substantial evidence

standard of review. But we do not read the governing provisions of § 11-9-102 on this issue as constituting a wholesale exclusion of back sprains.

Objective findings are those that cannot come within the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16) (Repl. 1996). A patient with a strained back can voluntarily control her responses to pain associated with the sprain, to be sure, but that is manifestly different from being able to voluntarily control the pain itself and the stretching of the muscles affected. It is important to note that Act 796 only provides that pain may not be considered "when determining physical or anatomical impairment." Ark. Code Ann. § 11-9-102(16)(A)(ii) (Repl. 1996). The inquiry to determine impairment is distinct from the more fundamental inquiry to determine compensability in the first instance.

The General Assembly has never eliminated pain as a consideration when the issue is compensability, either by enacting Act 796 or otherwise. Act 796 clearly eliminated pain as a factor for determining impairment as shown at Ark. Code Ann § 11-9-102(16)(A)(ii). Likewise, at §§ 11-9-521(h)(1)(B) and 11-9-522(g)(1)(B) (Repl. 1996), pain has been eliminated as a basis for an impairment-rating guide that the Commission was required to adopt pursuant to Act 796. However, the General Assembly has not eliminated pain as a factor for determining compensability in strains. The clearest proof that it has not is found at Ark. Code Ann. § 11-9-523 (Repl. 1996), which provides for the compensability of hernia injuries. That statute and its predecessors include the existence of pain as a valid factor for determining compensability. Indeed, the statute requires affirmative proof that the claimant suffered severe pain in the hernial region, "that the pain caused the employee to cease work immediately," and that "the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence." Section 11-9-521(a). Proof of pain is required in "all cases of claims for hernia" which also requires proof that hernia occurred immediately following the result of sudden effort, *severe strain*, or the application of force directly to the abdominal wall. *Id.*

The Workers' Compensation Law has included the foregoing proof requirement regarding pain for the abdominal-strain condition known as hernia since 1948, when Arkansas adopted its work-

ers' compensation scheme. The General Assembly has always known that pain is a required element of proof for hernia claims, and that other sprain or strain injuries — including back strains such as suffered by Britain in the present case — are typically characterized by the presence of pain as a diagnostic finding and have repeatedly been upheld as compensable. If the General Assembly intended to change more than forty years of Arkansas law and eliminate pain as a permissible factor for determining compensability in workers' compensation cases involving strains, it clearly could have done so by using plain language to that effect in Act 796. Instead, the General Assembly did nothing to legislate strains and sprains out of our Workers' Compensation Law. It left the hernia statute unchanged regarding the requirement that pain be shown to establish compensability. It expressly declared pain to be an impermissible factor only for determining impairment. At Ark. Code Ann. § 11-9-704(c)(3), the General Assembly directed that administrative law judges, the Commission, "*and any* (sic) *reviewing* courts shall construe the provisions of this chapter strictly." (emphasis added). Moreover, at § 11-9-1001 the General Assembly served notice to the Commission and the courts that any changes to the Workers' Compensation Law were its exclusive business, by the following unmistakable language:

> When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so. It is the specific intent of the Seventy-Ninth General Assembly to repeal, annul, and hold for naught all prior opinions or decisions of any administrative law judge, the Workers' Compensation Commission, or courts of this state contrary to or in conflict with any provision *in this act. In the future, if such things as the . . . extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.*

Therefore, to conclude that Britain's strain was somehow unproven requires that one dismiss the opinion of every doctor that treated her injury. It further requires us to judicially legislate pain out of the permitted factors that may be considered when compensability

determinations are made and legislate back strains out of the medical conditions covered by the Workers' Compensation Law, despite the fact that the General Assembly has flatly declared that it alone will decide if "any physical condition, injury, or disease should be excluded from" coverage under the Workers' Compensation Law.

We also find the employer's argument concerning its liability for Britain's medical treatments and their cost to be fundamentally flawed. Ark. Code Ann. § 11-9-508(a) (1996) requires that an employer promptly provide for an injured employee such medical, surgical, hospital, chiropractic, and other medical treatment as may be reasonably necessary in connection with an injury received by the employee. Neither that statute nor anything else in the Workers' Compensation Law obligates an employer to provide and pay for treatment for conditions that are not ultimately found to be compensable. Workers' compensation is a scheme of social legislation aimed at protecting employees from the disabling consequences and financial costs of injuries that are work-related. The Seventy-Ninth General Assembly made this point plain at Section 35 of Act 796, codified as Ark. Code Ann. § 11-9-1001 (Repl. 1996), which includes the following pertinent observation:

> The Seventy-Ninth General Assembly realizes that the Arkansas workers' compensation statutes must be revised and amended from time to time. Unfortunately, many of the changes made by this act were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually broadened the scope and eroded the purpose of the workers' compensation statutes of this state. The Seventy-Ninth General Assembly intends to restate that *the major and controlling purpose of workers' compensation is to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force* . . . . (emphasis added).

In view of this plain expression of legislative intent that workers' compensation benefits are intended to pay the cost of reasonable and necessary medical expenses that result from injuries and diseases arising out of and in the course of the employment, we cannot read the statutory duty imposed by § 11-9-508(a) to mean that the obligation to provide prompt and reasonably necessary

services and treatment for a compensable injury does not include liability for the cost of the services and treatment. If workers' compensation benefits are intended to provide payment for injuries arising out of and in the course of the employment, including the cost of reasonable and necessary medical expenses associated with those injuries, then the statutory duty imposed by that section of the workers' compensation law simply means that an employer has a duty to provide and is liable to pay the cost of reasonable and necessary medical expenses associated with work-related injuries. The appellants here have made no claim that the medical expenses were not reasonable and necessary. The idea that the General Assembly intended by the workers' compensation scheme to impose the cost of medical care and treatment upon an employer for an injury that does not arise out of and occur in the course of the employment where the employer has disputed the injury is beyond rational belief, in addition to being contrary to the explicit declaration of legislative intent that accompanied Act 796.

Any lingering doubt about this issue is resolved by reference to Ark. Code Ann. § 11-9-510 (Repl. 1996) which states that the employer "shall not be liable for *any of the payments provided for in §§ 11-9-508 — 11-9-516 in the case of a contest of liability where the Workers' Compensation Commission shall decide that the injury does not come within the provisions of the Workers Compensation Law.*" (emphasis added). Likewise, it is illogical to conclude that a worker who suffers a compensable injury, as we believe Britain did, should be forced to pay the cost of her treatment when her employer knows that the injury was work-related and has directed her to obtain the very treatment for which it refuses to pay.

Accordingly, we find no support for the argument advanced by Southern Hospitalities that authorizing medical services for a compensable injury does not make an employer liable for their costs. If Britain did not sustain a compensable injury then Southern Hospitalities was not liable for the cost of her treatment. Ark. Code Ann. § 11-9-510. (Repl. 1996). However, where Southern Hospitalities authorized the treatment for an injury it initially considered compensable, it also made itself liable for its cost. An employer may authorize treatment and be liable for its cost even when it has not determined an injury to be compensable, as when it is trying to investigate whether a condition may have originated from or been caused by a workplace hazard or condition. As the prevailing opin-

ion indicates, an employer may be estopped to deny liability when it has engaged in a course of conduct that is inconsistent with an attempt to avoid or deny liability for the cost of medical care and treatment. We believe, however, that compensability here has been conclusively established so that the employer should be held liable for all reasonable and necessary medical expenses without resort to the estoppel principle embraced by the prevailing opinion.

It necessarily follows from our conclusion that Britain suffered a compensable injury that the Commission's decision denying her claim for temporary total disability benefits should be reversed because it is not supported by substantial evidence. As we observed in our analysis of the medical benefits issue, all of the evidence conclusively demonstrates that Britain's back strain occurred from her effort of pulling towels from a washer on her job on July 3, 1993. The evidence shows that she was unable to work from July 22 to August 12, 1993, because of the back strain. There is no evidence showing that her incapacity from working occurred due to any other reason.

We are unable to conclude that fair-minded persons faced with this conclusive body of proof could decide that Britain's incapacity to work from July 22 to August 12, 1993, was not caused by her July 3, 1993, back strain that arose out of and occurred in the course of her employment by Southern Hospitalities. Therefore, we would reverse the Commission's decision denying her claim for temporary total disability benefits for that period of time, and would remand the case to the Commission to award the benefits appellee is rightfully due.

We recognize that the changes to the Workers' Compensation Law that were enacted as Act 796 of 1993 were intended to narrow what some observers considered overly broad interpretations of the law, that the law is to be construed strictly, and that Ark. Code Ann. § 11-9-1001 specifies that any alteration of the scope of the law shall be addressed by the General Assembly rather than the courts or the Commission. Our decision today is fully consistent with that legislative intent. Britain's back strain is a compensable injury because there is clear and conclusive proof that it arose out of and occurred in the course of her employment, required medical services, and resulted in disability. Our conclusion on that point is based upon the undisputed medical proof of her condition, and the

total absence of any proof that her medical findings came under her voluntary control.

According to the 1993 Survey of Nonfatal Occupational Injuries and Illnesses published by the Arkansas Department of Labor, sprain and strain was, by far, the leading injury and illness category in every major industry division in Arkansas. The survey also reported that the back and other portions of the trunk were the major parts of the body affected, with sprains accounting for nearly a fourth of the survey case total. Sprains and strains may rely, perhaps more than other maladies, on a claimant's assertion of pain, but we refuse to judicially eliminate pain as a consideration for determining compensability when the Arkansas General Assembly has not done so. In fact, the General Assembly has bluntly declared that the courts shall not exclude any physical condition from coverage (i.e. compensability) under the Workers' Compensation Law because it has reserved the task of narrowing or broadening coverage to itself. *See* Ark. Code Ann. § 11-9-1001 (Repl. 1996). We find no justification for concluding that the General Assembly intended to exclude back strains from being covered by the Workers' Compensation Law.

If the proof presented for sprain and strain injuries is conflicting, the substantial evidence standard of review will result in the Commission's decisions in those cases being affirmed. Where, as here, the proof concerning a sprain or strain is undisputed and unequivocal, we are convinced that a compensable injury has been established entitling the affected worker to the benefits allowed by the Workers' Compensation Law.

We concur in the result affirming the award of the medical benefits, and dissent from the decision holding appellee's injury noncompensable.

I am authorized to state that MAYFIELD, J., agrees with this opinion.

Bill R. JONES *v.* Walter and Belinda RAY

CA 95-562 925 S.W.2d 805

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1996

[redacted]

Murrey L. Grider, for appellant.

Don R. Brown, for appellees.

JUDITH ROGERS, Judge. This case involves a dispute between the buyers and seller of a house. This is an appeal from a decree resolving that dispute wherein the chancellor granted appellee-buyers judgment in the amount of $2,446.49 and ordered appellant-seller to bear the expense of placing the home under a termite contract. Appellant raises two issues on appeal. He contends: (1) that the chancellor erred in granting relief not sought by appellees; and (2) that the chancellor erred in granting the amount and nature of damages awarded. We find no merit in the first issue raised, but we find sufficient merit in a portion of the second issue to remand on that point.

Appellees, Walter and Belinda Ray, purchased a home from appellant, Bill Jones, on May 27, 1993. Thereafter, they filed this suit in equity for the rescission of the purchase agreement. In their complaint, appellees alleged that the house had termite damage, that the sewer was defective and that a weight-bearing wall had settled due to deterioration in the underlying foundation. Appellees further alleged that appellant had concealed these material facts in order to induce their purchase of the house. After a hearing, the chancellor found no fraudulent inducement and concluded that the parties were operating under a mutual mistake of fact regarding the existence of termites and the resulting damage. The chancellor found, however, that this mutual mistake of fact was not substantial enough to warrant rescission of the contract. The court then awarded appellees $2,446.99 for the repair of the termite damage. The chancellor further ordered that the house be inspected for

termites after the completion of the repairs and that "the residence should be placed under a contract at the expense of the [appellant]." This appeal followed.

As his first issue, appellant contends that the chancellor erred in awarding appellees damages when rescission was the only claim for relief sought in their complaint. Appellant contends that appellees elected the remedy of rescission and that he had no notice of a damage claim.[1] We do not find this argument persuasive. The record reflects that appellees, and appellant himself, presented testimony concerning the amount it would cost to repair the termite damage. We have held that, although pleadings are required so that each party will know the issues to be tried and be prepared to offer his proof, Rule 15(b) of the Arkansas Rules of Civil Procedure provides that issues not raised in the pleadings, but tried by express or implied consent of the parties, shall be treated in all respects as if they had been pled. *In re Estate of Tucker*, 46 Ark. App. 32, 881 S.W.2d 226 (1994). Under the circumstances, we conclude that the issue was tried by the implied consent of the parties. Moreover, appellant has failed to cite any authority for the proposition that the chancellor could not make an award of damages to compensate appellees for their loss upon finding that rescission of the contract was not justified under the facts presented at trial. The doctrine of election of remedies applies to remedies, not causes of action. *Smith* v. *Walt Bennett Ford, Inc.*, 314 Ark. 591, 864 S.W.2d 817 (1993). Simply put, it bars more than one recovery on inconsistent remedies. *Cater* v. *Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993). No double recovery has occurred here; therefore, it cannot be said that the doctrine of election of remedies has been offended. A court of equity may fashion any reasonable remedy justified by the proof. *Smith* v. *Eastgate Properties, Inc.*, 312 Ark. 355, 849 S.W.2d 504

[1] Not surprisingly, appellant does not argue in this appeal that the chancellor erred in failing to grant appellees' request for rescission of the contract. Nor have appellees pursued a cross-appeal from the chancellor's decision arguing that their claim for rescission should have been granted. In short, no party in this appeal takes issue with the chancellor's denial of that relief. Consequently, any question of whether the chancellor should or should not have granted rescission is not an issue that is before us. We point this out only as a statement of the obvious, and that statement is not a product of flawed or result-oriented reasoning. More to the point, since the question of rescission is not before us, we are puzzled by the dissent's conclusion that this case ought to be reversed and remanded for the purpose of granting that relief.

(1993). We find no merit in appellant's challenge to the chancellor's ruling.

Appellant also takes issue with the amount of damages awarded by the chancellor, arguing that it exceeded the amount necessary to repair the damage. The chancellor, however, considered the testimony of appellant's witness and disregarded it for the reason that the witness's estimate did not include the cost of repairing the floor. The court found that the repair of the floor was necessary and accepted the estimate of appellees' witness who stated that the total damage could be repaired for $2,446.99. Chancery cases are reviewed *de novo* on appeal, and the appellate court will not disturb the chancellor's findings unless they are clearly against the preponderance of the evidence, giving due deference to the chancellor's superior position to determine the credibility of the witnesses and the weight to be given their testimony. *McClard* v. *McClard*, 50 Ark. App. 189, 901 S.W.2d 33 (1995). We cannot say that the chancellor's finding is clearly erroneous.

Appellant further argues that the chancellor erred in ordering him to bear the expense of keeping the home under a termite contract for an indefinite period. In response, appellees maintain that appellant's interpretation of the order is too broad. We agree that the chancellor's order is not entirely clear on this point. Although we have the power to decide chancery cases *de novo* on the record before us we may, in appropriate cases, remand such cases for further action. Since the chancellor's direction is unclear and the parties themselves dispute its meaning, we think it appropriate to remand for the chancellor to reconsider or clarify his order on this point alone.

Affirmed in part; remanded in part.

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

GRIFFEN and MAYFIELD, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I disagree with the result that the majority has reached in this case and write to explain why I believe that the chancellor's decision should be reversed and the case remanded.

Appellee and his wife contracted to purchase from appellant a house located on an acre of land in Randolph County for $34,500. The sale contract closed on May 27, 1993, with title conveyed by

warranty deed. On March 25, 1994, appellee filed a complaint for rescission, alleging that at the time of the sale, appellants failed to disclose three material facts about the property that would have caused him not to purchase it: (1) the existence of extensive termite damage; (2) a faulty sewer system that did not pass inspection; and (3) a defective weight-bearing wall in the center of the residence that settled because the foundation had deteriorated. The action was tried on December 13, 1994, and the chancellor found that appellant was not at fault concerning installation of a new sewer system. However, he found that the residence suffered from "substantial termite and water damage" at the time of the sale that was unknown to both parties and constituted a mutual mistake of fact. Yet the chancellor concluded that the "mutual mistake of fact was not . . . substantial enough to entitle the [appellees] to rescission of the sale." In lieu of rescission, the chancellor entered a decree directing appellant to accept a repair bid of $2,446.99 for repair of the termite and water damage, to obtain a termite inspection by a licensed contractor after the repairs are completed, and to place the property under a termite contract at the appellant's expense. Appellant challenges this decree and contends that because the chancellor granted relief not sought by appellee and erred in the amount and nature of the damages awarded, reversal is mandated.

Before a mutual mistake will affect the binding force of a contract, the mistake must be of an existing or past material fact that is the basis of the contract. *Mitchell* v. *First Nat'l Bank in Stuttgart*, 293 Ark. 558, 739 S.W.2d 682 (1987). When rescission is based on mutual mistake rather than fraud, the recoveries of the parties are limited to their restitutionary interests. *Carter* v. *Matthews*, 288 Ark. 37, 701 S.W.2d 374 (1986). Although we review chancery cases de novo on the record, the test on review is not whether we are convinced that there is clear and convincing evidence to support the trial judge's findings, but whether we can say that the trial judge's findings were clearly erroneous. *Lambert* v. *Quinn*, 32 Ark. 184, 798 S.W.2d 448 (1990).

I am convinced that the chancellor had no authority to award relief in the nature of damages and specific performance. The complaint was for rescission and restitution of the purchase price, not for specific performance and damages for breach of contract. The remedy of rescission and restitution is inconsistent with either specific performance or damages. The case was pled as one for rescis-

sion and restitution, tried on that basis, and appellee did not move to amend the pleadings to conform to the proof at trial. The inconsistency of the remedies compelled the holding that appellee elected to pursue, and was entitled to be granted, the remedy of rescission and restitution, not specific performance and damages. Therefore, the chancellor's decree directing appellant to effect repairs and pay for them was erroneous.

The chancellor also erred by directing appellant to procure a contract protecting the residence against future termite damage. At most, the parties contracted that appellant would furnish a certificate that the residence was free of termites when the sale occurred. The chancellor decreed, however, that appellant would obtain a contract for future termite protection covering an indefinite period of time. This relief was not only inconsistent with the rescissionary relief sought by the complaint, it went beyond anything that the parties negotiated. The goal of rescission is to return the affected party to the position that it would have enjoyed had no transaction occurred, not to give that party the benefit of a bargain never negotiated. Even if the house had been termite free based upon a termite inspection by a licensed inspector, appellant would not have been liable for the cost of termite protection after the purchase, let alone for an indefinite span of time thereafter.

However well-intentioned the majority may be in reaching its result, this decision suffers from the flaws of result-oriented reasoning. There are no valid grounds to justify a decision granting compensatory and specific performance relief, even on de novo review as we perform on chancery appeals. Nobody sued for damages. Nobody sued for specific performance. The majority attempts to escape these uncontroverted and indisputable realities by stating that appellee filed no cross-appeal challenging the compensatory and specific performance relief that the chancellor granted, and by noting that appellant contested the rescissionary relief that appellees sought at trial. Those observations are correct as far as they go; their flaw is that they do not travel the logical distance required for deciding this appeal. Appellant did contest rescission at trial. Appellees have not filed a cross-appeal. These realities do not alter the fact that nobody sought any relief that the chancellor awarded. Furthermore, nobody ever had a clue — or a rational reason to suspect — that the chancellor contemplated granting that relief. That error is the crux of this appeal. The majority opinion does nothing to

correct it, nor does it provide meaningful guidelines to trial judges and litigants about when and under what circumstances similar results may be upheld in the future.

If notice pleading is to serve its rightful purpose of informing parties and courts what a lawsuit is about, and if courts are bound to hold parties to their pleadings in weighing the evidence in trials, it is both illogical and unfair for courts to disregard the pleadings and the proof and manufacture remedies and facts. Yet that is precisely the result affirmed by this decision. Without warning, the parties received a judicial decision that granted appellees an indefinite termite contract at appellant's expense, enforced a purchase contract for a house they had sued to rescind, and did so on the justification that although there was inescapable proof that a mutual mistake of a material fact occurred (that the house had been certified to be free of termite infestation when there was what the chancellor found to be "substantial termite and water damage"), the mistake was not "substantial enough." Neither the trial court nor the majority opinion explains how a mutual mistake that is not "substantial enough" to justify voiding a transaction and returning the parties to their original position is somehow "substantial enough" to warrant imposing a contractual relationship entirely different from anything that the parties negotiated or from the relief they sought by the litigation.

Rule 5(a) of the Arkansas Rules of Civil Procedure requires that any pleading asserting new or additional claims for relief against any party who has appeared in an action must be served on that party pursuant to the rule concerning service and filing of pleadings. Rule 8(a) requires that all pleadings setting forth a claim for relief shall contain (1) a statement in ordinary and concise language of facts showing that the pleader is entitled to relief, and (2) a demand for the relief to which he considers himself entitled. Rule 8(f) provides that all pleadings shall be liberally construed so as to do substantial justice. The Reporter's Notes to Rule 8 state that the purpose of this rule is to require that pleadings be drafted in such a manner as to give a party fair notice of what the claim is and the grounds upon which it is based. Rule 15(b) provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and that failure by any party to

move to amend the pleadings as may be necessary to cause them to conform to the evidence and to raise the new issues does not affect the result of the trial of those issues.

It is true that the parties introduced proof concerning the cost of correcting the termite damage to the house. That does not warrant the conclusion that they agreed, explicitly or implicitly, to try the case as one for breach of contract and damages. The more realistic conclusion is that the proof was intended to demonstrate the differing views on the extent of termite infestation and damage to show whether it was significant. It is well-settled, after all, that courts will not grant rescission in cases involving insignificant consequences flowing from a mutual mistake of material fact. Dan B. Dobbs, *Law of Remedies* § 12.11(2), at 295 (2d ed. 1993). Therefore, the fact that both parties presented proof regarding the cost of repairing the damage caused by the termite infestation does not justify concluding that they agreed to try the case for damages due to breach of contract — relief that neither of them sought — or a contractual relationship wholly different from the one they negotiated.

Due process — also termed as fundamental fairness — demands that parties at least know in advance of the decision what remedies a court may be contemplating regarding their dispute, even if they necessarily cannot know whether or not the remedies will be obtained or imposed. In this case, neither party knew that the chancellor was contemplating entering an award of damages coupled with a decree of specific performance, and the appellant could not have imagined that the chancellor would order him to pay for termite protection for an indefinite period of time on a termite-infested house that the appellee and his wife indicated they did not want to keep. Based on the result announced by the majority, the parties now must wonder what kind of termite contract they will be likely to get and be ordered to provide on the house that appellees did not want to keep. Other readers of the majority opinion now must wonder when and whether they may be faced with a dispute that will result in unwanted, unsought, and unpleaded relief based upon facts never proved. Rather than subject anybody to either scenario, I would reverse the chancellor's decision and remand the case with instructions to enter a decree grant-

ing rescission of the purchase contract and return of his out-of-pocket costs.

MAYFIELD, J., joins in this dissent.

A. G. WELDON *v.* PIERCE BROTHERS CONSTRUCTION, Employers Mutual Casualty Co., and Second Injury Fund

CA 95-853 925 S.W.2d 179

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1996

James F. Lane, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jim Tilley* and *Julia Busfield*, for appellees.

JOHN F. STROUD, JR., Judge. In August 1989, A. G. Weldon

suffered compensable injuries when he was rear-ended in a company van owned by Voss Heating and Air Conditioning. He received medical treatment and in 1990 underwent lumbar surgery, resulting in restrictions on lifting and preventing a return to his job with Voss. He was rated with a ten percent permanent impairment rating in 1991. Two months later he began working for Pierce Brothers Construction. He was pulling electrical wires through a conduit on September 4, 1991, when he suffered a second back injury. That injury is the subject of Mr. Weldon's appeal to this court. He contends that the Workers' Compensation Commission erred 1) in finding that his September 4, 1991, injury was a recurrence of the August 28, 1989, injury; and 2) in denying his wage loss claim. We affirm.

Appellant did not work after his 1991 injury until March 1992, when he became a gate guard for T and T Security in Poteet, Texas. He quit that job in November 1991 because of his back problems. In December 1993 he began running a computer and maintaining inventory records for Compton's Air Conditioning and Heating in Kerrville, Texas. Because he had no medical insurance, he arranged with his employer to be paid a wage which would not disqualify him from receiving social security and Medicare benefits. He was employed by Compton's in June 1994 when a hearing was held before the administrative law judge on the compensability of the injury Mr. Weldon suffered in 1991 while working for Pierce Brothers.

The Workers' Compensation Commission explained the findings of the law judge by stating: "The Administrative Law Judge held that claimant is entitled to an additional four percent permanent anatomical impairment rating for an overall permanent partial disability of 30 percent and that the Second Injury Fund is liable for the amount of 16 percent." The Workers' Compensation Commission reversed the decision, finding that the determination of the ALJ was not supported by a preponderance of the evidence. The Commission stated:

> A preponderance of the credible evidence indicates that the alleged incident that occurred in 1991 was a recurrence of his 1989 injury. Thus, the Second Injury Fund is not liable. Furthermore, there is insufficient evidence of an increase [sic] disability to hold respondent employer liable [for] any additional benefits. Therefore, we reverse the decision of the

Administrative Law Judge.

> Furthermore . . . a review of the evidence indicates that claimant has set himself up to earn less than [minimum] wage so that he can continue to receive $632 per month in social security benefits. While claimant should be commended for returning to work, claimant should not receive wage loss compensation where he is deliberately contributing to his loss of wage earning capacity. Therefore, we reverse the decision of the Administrative Law Judge.

Appellant's first point is that the Commission erred in finding that the 1991 injury was a recurrence of his 1989 injury. He contends that there were no facts before the Commission from which reasonable minds could have concluded that this was a recurrence rather than an aggravation or a new injury. He points out that nowhere in the testimony or medical records does the term "recurrence" appear, and he has abstracted use of the term "aggravation" by the doctor who performed his surgery.

In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, the appellate court reviews the evidence in the light most favorable to the Commission's findings and affirms if they are supported by substantial evidence. *Grimes* v. *North American Foundry*, 42 Ark. App. 137, 856 S.W.2d 309 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Fort Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). The Court of Appeals does not reverse a decision of the Commission unless it is convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *Wilmond* v. *Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. *Aetna Insurance Co.* v. *Dunlap*, 16 Ark. App. 51, 696 S.W. 2d 771 (1985). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier. *Id.*

The Commission need not base a decision on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of workers' compensation law. *Tyson Foods, Inc.* v. *Watkins*, 31 Ark. App. 230, 792

S.W.2d 348 (1990). As our supreme court has stated:

> The Commission has never been limited to medical evidence only in arriving at its decision as to the amount or extent of a claimant's injury. Rather, we wrote that the Commission should consider all competent evidence, including medical, as well as lay testimony and the testimony of the claimant himself. Further . . . while medical opinions are admissible and frequently helpful in workers' compensation cases, they are not conclusive.

Wade v. *Mr. C. Cavenaugh's*, 298 Ark. 363, 298 S.W.2d 521 (1989) (citations omitted). In fact, it is the duty of the Workers' Compensation Commission to translate the evidence on all issues before it into findings of fact. *Johnson* v. *General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). The specialization and experience of the Commission make it better equipped than this court to analyze and translate evidence into findings of fact. *Second Injury Fund* v. *Robison*, 22 Ark. App. 157, 737 S.W.2D 162 (1987).

Appellant's first point of appeal is that the Commission erred in finding that the 1991 injury was a recurrence of the 1989 injury or the resulting surgery. There was evidence presented at the hearing, however, that appellant had been neither pain free nor without back difficulties after the 1989 accident. His orthopedic surgeon testified that he had assessed appellant's condition after the 1991 injury as strained ligaments and possible flare-up of an epidural scar, and that there were no new restrictions or limitations on appellant's activities from the time he was released after surgery until the last time the surgeon saw him in 1992. Appellant testified that after surgery he was never again one-hundred percent. Appellant's housemate testified that his pain had not gone away nor had he been without problems after the surgery, and that he had never regained his strength and stamina after the 1989 accident. We hold that substantial evidence supports the Commission's finding that the 1991 incident was a recurrence of the 1989 injury rather than an aggravation as contended by appellant.

Appellant's second point of appeal is that the Commission erred in denying his wage loss claim. Wage loss is a component of permanent partial disability benefits under Ark. Code Ann. § 11-9-502(b). A claimant may receive permanent partial disability benefits to the extent that his disability exceeds his percentage of physical

impairment. *Id.* In response to appellant's claim for additional permanent partial disability benefits, the Commission found "there is insufficient evidence of an increase [sic] disability to hold respondent employer liable of [sic] any additional benefits."

In this case, appellant failed to prove that either his degree of permanent physical impairment or his degree of permanent partial disability increased as a result of his recurrence. Therefore, any wage-loss appellant has suffered is a result of his 1989 injury and not his 1991 recurrence. Thus, the Commission's finding that he is not entitled to wage-loss disability is affirmed.

Because we uphold the Commission's finding that appellant sustained a recurrence of his 1989 injury and suffered no additional impairment or disability as a result of that recurrence, we do not address his argument that the Commission erred in considering his deliberate suppression of his wages in determining whether he was entitled to wage-loss disability.

Affirmed.

COOPER, ROBBINS, ROGERS, and NEAL, JJ., agree.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. The appellant-claimant in this workers' compensation case sustained a severe injury to his lower back and neck in a work-related automobile accident when he was rear-ended on August 28, 1989, while employed by Voss Air Conditioning. Eventually surgical intervention was required on appellant's lower back, and he finally joint-petitioned the claim for over $12,000. On September 4, 1991, while working for appellee Pierce Brothers Construction, appellant again hurt his back. He suffered a ligamentous strain and stretching of scar tissue. He filed this claim and the administrative law judge held he was entitled to a 30 percent permanent partial disability. He held Pierce Brothers liable for a 4 percent permanent physical impairment and the Second Injury Fund responsible for a 16 percent permanent partial disability. He also awarded medical benefits and attorney's fees.

The Commission reversed and made the following findings:

> A preponderance of the credible evidence indicates that the alleged incident that occurred in 1991 was a recurrence of the 1989 injury. Thus, the Second Injury Fund is not liable.

> Furthermore, there is insufficient evidence of an increase [sic] disability to hold respondent employer liable [for] any additional benefits. Therefore, we reverse the decision of the Administrative Law Judge.
>
> Furthermore, it should be noted that claimant is presently working. Although claimant contends that he is entitled to wage loss, a review of the evidence indicates that claimant has set himself up to earn less than minimal wage so that he can continue to receive $632 per month in social security benefits. While claimant should be commended for returning to work, claimant should not receive wage loss compensation where he is deliberately contributing to his loss of wage earning capacity. Therefore, we reverse the decision of the Administrative Law Judge.

I think we should reverse and remand because the Commission's opinion does not make sufficient findings that will allow us to conduct a meaningful review of the decision made. I will point out the problems in that regard, but want to first cite some authority for the rule that requires sufficient findings.

In *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 507, 579 S.W.2d 360, 369 (1979), the Arkansas Supreme Court said: "We do not deem a full recitation of the evidence to be required, so long as the commission's findings include a statement of those facts the commission finds to be established by the evidence in sufficient detail that . . . the reviewing court may perform its function to determine whether the commission's findings as to the existence or non-existence of the essential facts are or are not supported by the evidence."

And in *Cagle Fabricating and Steel, Inc.* v. *Patterson*, 309 Ark. 365, 369, 830 S.W.2d 857, 859 (1992), the court cited *Jones* v. *Tyson Foods, Inc.*, 26 Ark. App. 51, 759 S.W.2d 578 (1988), and said that case "held that the Commission's decision did not make specific findings that an appellate court could review." The Arkansas Supreme Court then said the Commission's language in *Cagle* was "similar to that used in *Jones* in that it is conclusory and does not detail or analyze the facts upon which it is based."

See also Wright v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986); *Hardin* v. *Southern Compress Co.*, 34 Ark. App. 208, 810 S.W.2d 501 (1991); and *Cook* v. *Alcoa*, 35 Ark. App. 16,

20-21, 811 S.W.2d 329, 332 (1991), where we said, "In appeals from the Commission, we cannot indulge the presumption used in appeals from trial courts . . . that even if the court is correct for the wrong reason, we will affirm if the judgment is correct."

In the instant case, the injury sustained by the appellant in 1989 while employed by Voss Air Conditioning had been joint-petitioned, so if the 1991 incident, which occurred while working for Pierce Brothers, was a recurrence of the 1989 injury — as the Commission found — then Voss would not be liable because of the joint-petition settlement, and the Second Injury Fund would not be liable because there was no second injury to cause that liability to "kick in." Thus, I wonder why the Commission holds "there is insufficient evidence of an increase [sic] disability to hold respondent employer liable [for] any additional benefits." There is only one employer who is a party in this case — Pierce Brothers Construction — and if the incident which occurred while appellant was working for that employer was a recurrence and not an aggravation — or new injury — then Pierce was clearly not liable, *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983), and the Commission's finding of "insufficient evidence of an increase disability" to hold Pierce liable is indeed a mysterious finding. Of course, if we were free to indulge in the presumption used when reviewing appeals from trial courts, we could probably square the uneven findings, but that is not our role in appeals from the Commission, and we should remand when the language used by the Commission is not sufficient for us to make a meaningful review of the Commission's decision.

In addition, the last paragraph of the Commission's decision concerns wage-loss disability in regard to appellant's acceptance of a wage which was less than he could earn. Again, if the 1991 injury was a recurrence of the 1989 injury, then there can be no liability on the 1991 employer for the 1989 injury because there would be no liability on the 1991 employer for wage-loss disability caused solely by the 1989 injury. But if the Commission is actually adjudicating wage-loss disability in this case, I think the finding that the appellant is not entitled to it because "he is deliberately contributing to his loss of wage earning capacity" overlooks the provisions of Ark. Code Ann. § 11-9-522 (Repl. 1996), which provides in subsection (b) that if an injured employee has returned to work at wages equal to or greater than his average weekly wage at the time

of the injury, he shall not be entitled to a wage-loss disability in addition to his physical impairment rating; however, as provided in subsection (c) it is the burden of the employer or his insurance carrier to prove the conditions set out in (b). For a general discussion of this statute, *see Belcher* v. *Holiday Inn*, 43 Ark. App. 157, 868 S.W.2d 87 (1993); *Weyerhaeuser Co.* v. *McGinnis*, 37 Ark. App. 91, 824 S.W.2d 406 (1992); *Cook* v. *ALCOA*, 35 Ark. App. 16, 811 S.W.2d 329 (1991).

Therefore, while there might be evidence which would support the denial of wage-loss disability, the findings set out in the last paragraph of the Commission's decision do not meet the requirements discussed above for sufficient factual findings that will allow us to make a meaningful review of the Commission's decision.

I would reverse and remand to the Commission with directions that it make sufficient findings of fact that will enable us to review those findings and determine if they support the Commission's decision.

Therefore, I dissent from the majority opinion.

Houston WILLIAMS and Kathlene Williams *v.* STATE of Arkansas

CA CR 94-581 927 S.W.2d 801

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1996

Finch & Gartin, by: *Jay T. Finch* and; *Robert E. Irwin*, for appellants.

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

JOHN F. STROUD, JR., Judge. Kathlene Williams was found guilty of possession of marijuana with intent to deliver and two counts of possession of methamphetamine with intent to deliver. She was sentenced to a total of fifteen years in the Arkansas Department of Correction and a fine of $10,000. She appeals her conviction, asserting that the trial court erred: 1) in failing to grant her motion for a directed verdict; 2) in limiting the scope of cross-examination of a witness; 3) in denying her motion to sever offenses; 4) in denying her motion to suppress evidence found in her purse at the time of her arrest; 5) in denying her motion to suppress evidence obtained in a search of her home; and 6) in allowing the State to reopen its case to introduce additional evidence. Houston Williams was found guilty of possession of marijuana with intent to deliver and possession of methampetamine with intent to deliver and sentenced to a total of thirty years in the Arkansas Department of Correction and a fine of $25,000. He appeals asserting only that the trial court erred in failing to suppress evidence found in a search of his home. We find that the trial court erred in failing to suppress the evidence found in the search of the Williams' home and reverse and remand for a new trial.

On November 12, 1992, the Fayetteville Police Department received information from a confidential informant that Houston Williams was a trafficker of controlled substances who lived at 37 Centerwood in West Fork, Arkansas. According to the informant, Houston Williams traveled to Arizona and California to pick up large amounts of methamphetamine and brought them back to the

Northwest Arkansas area for distribution.

On December 31, 1992, the Fayetteville Post of Duty Drug Enforcement Administration Office received information from Special Agent Johnny Cardinez of the Drug Enforcement Agency in Alpine, Texas, that he had a confidential informant from the Northwest Arkansas area in custody in Alpine, Texas. The informant said that Butch and Kathleen Williams, who lived at 37 Centerwood in West Fork, Arkansas, would travel to Albuquerque, New Mexico, every three weeks and pick up approximately one to two pounds of methamphetamine and cocaine. They would return to West Fork, Arkansas, and distribute the drugs in the Northwest Arkansas area.

On February 22, 1993, at approximately 4:10 p.m., Detective McCarty received a phone call from Detective Scott Rogers of the 19th Judicial District Drug Task Force. Detective Rogers told Detective McCarty that he had just received a phone call from a confidential informant who told him that Henry Glosemeyer was leaving Rogers, Arkansas, with a person named Butch. The CI said that Glosemeyer and Butch were en route to 37 Centerwood in West Fork, Arkansas, where Glosemeyer was to pick up a large amount of methamphetamine. The informant gave Detective Rogers two vehicle descriptions, a red Ford Flareside pickup with license number TWT-932 and a gray Mercury Capri with license number WEI-997. The informant stated that Glosemeyer would then return to Rogers, Arkansas, around 9:00 p.m. to deliver the methamphetamine to his customers.

Upon receiving the information, officers went to the West Fork address. On the way there, Detective McCarty and Sgt. Tabor passed the 1991 gray Mercury Capri bearing Arkansas vehicle license WEI-997, which was southbound into West Fork. Later, the officers saw the car arrive at 37 Centerwood. Over a period of approximately 30 minutes, the officers saw the car leave the house on two occasions. Once it went to a car wash in West Fork; the second time it left southbound on Highway 71.

At approximately 7:30 p.m. on February 22, 1993, the surveillance officers saw a red Ford Flareside pickup arrive at 37 Centerwood in West Fork, Arkansas. The truck remained at the residence until approximately 8:00 p.m. when someone drove it to a church on McKnight Street and dropped off a passenger. The driver

then returned to the Centerwood address where the officers drove by and saw the driver place something behind the front seat of the truck.

On February 22, 1993, at approximately 8:35 p.m., the red Ford Flareside pickup left northbound on Highway 71 heading toward Fayetteville. Fayetteville Police Department Officer Brian Waters was contacted and asked to watch for a red pickup traveling north on Highway 71. Officer Waters, who was stationed on Highway 71 at the south city limits in Fayetteville, saw the truck and visually estimated its speed at 50 miles per hour. He then followed the truck and paced it at 48 miles per hour in a 45 mile per hour zone. Officer Waters continued to pace the truck and verified its speed. He stopped the truck when it went from a 45 mile per hour zone into a 40 mile per hour zone without slowing down.

The driver, Mr. Glosemeyer, was issued a warning for speeding. Officer Waters, noticing that Mr. Glosemeyer appeared nervous, asked him if he was transporting any guns, drugs, stolen property, or large sums of unreported cash. Mr. Glosemeyer said that he was not. Officer Waters asked if he would give consent to a search of the truck, and Mr. Glosemeyer said that he would. Officer Waters then filled out a consent to search form and explained it to Mr. Glosemeyer. He asked Mr. Glosemeyer to read the consent to search form and, if he had no objections, to sign it. Mr. Glosemeyer then read the consent form and signed it.

The officers searched the truck manually, but they did not find any contraband. Then they used a drug dog to search the truck, and the dog gave an active, aggressive alert. A second manual search was conducted, but nothing was found. The officers decided to transport the vehicle to an indoor facility where a thorough search could be conducted. During this search, they found approximately two ounces of a white powder substance under the truck bed mat. Detective McCarty field tested the powder, and it tested positive for the presence of methamphetamine, a Schedule II controlled substance.

The officer read Glosemeyer his Miranda rights. After being Mirandized, Glosemeyer told detective McCarty that he had received an extremely large amount of methamphetamine from Houston Williams over the last year. He said that in the last month he had dealt at least one pound of methamphetamine that he had

gotten from Williams. Glosemeyer stated that Williams borrowed his truck, drove to California, picked up four pounds of methamphetamine, and returned to West Fork, Arkansas, on February 22, 1993. He also said that, on February 22, 1993, he received two ounces of the methamphetamine from Williams at his residence in West Fork, Arkansas.

On February 23, 1993, based on the above information, Officers Norman, Tabor, Lovett, and Nelson arrived at 37 Centerwood at approximately 9:00 a.m. Norman and Tabor knocked on the door and were greeted by Kathlene Williams. Norman and Tabor identified themselves as narcotics officers and asked her if she would let them in to speak to her and her husband, Houston Williams. Kathlene Williams invited all four officers into the house. Norman observed an automatic pistol on top of a dresser located in the living room and immediately took possession of it and disarmed it. At that point, Tabor asked Kathlene Williams if her husband, Houston Williams, was home. She said that he was home but that he was asleep. Officers asked Mrs. Williams to wake him, and she went to the back bedroom and told her husband that the officers were there and wanted to speak with him. Mr. Williams came into the living room with his wife, and the officers immediately identified themselves as narcotics investigators.

Lovett and Nelson went into the kitchen with Mrs. Williams while Norman and Tabor sat in the living room area and spoke with Houston Williams. Norman and Tabor advised him that they were conducting a narcotics investigation which stemmed from the arrest of Henry Glosemeyer. Before asking Mr. Williams any questions, Norman advised him of his Miranda warnings. Mr. Williams agreed to talk with the officers. Mr. Williams denied knowing of any narcotics trafficking. Norman and Tabor told Mr. Williams that they believed that he knew the location of approximately four pounds of methamphetamine he had brought in from California. Mr. Williams again said that he was unaware of what the officers were talking about.

At approximately 10:00 a.m., Ronald Fox, a documented methamphetamine dealer, arrived at the Williamses' home. Tabor intercepted Fox, identified himself as a narcotics investigator, and told him that Houston Williams was under investigation for narcotics trafficking. Mr. Fox decided not to go inside the house, and he left the area.

At approximately 10:45 a.m., Norman asked Houston Williams if he would consent to a search of his residence by the officers. He refused. Houston Williams told the officers that he needed to use the restroom. He went to a restroom connected to his bedroom, and Norman followed him to the restroom and quickly scanned the master bedroom for any weapons. Norman scanned the adjoining bedroom, which had been converted into an office, and saw two handguns. He waited for Houston Williams to leave the restroom and then asked him if the handguns in the office were loaded. Houston Williams said that they were not and stated, "Go ahead and check."

Norman entered the office and checked both weapons to see if they were loaded; they were not. Norman observed a set of scales, sitting on a desk in the room, which were partially hidden by a bag of cookies. Norman moved the bag and saw what appeared to be a white rock sitting on the scales. Norman believed that this was a controlled substance and considered Houston Williams to be under arrest. Norman also saw what appeared to be a plastic bag in a partially opened drawer of the same desk where the scales were located. He opened the drawer and observed what appeared to be a large rock of suspected methamphetamine along with various drug paraphernalia including a mirror with powder residue, a spoon with residue, and several other empty plastic bags. Houston Williams told Norman that the methamphetamine was for his personal use.

While the officers were at the residence with Houston Williams, Lowry of the Drug Enforcement Administration contacted Assistant U.S. Attorney Steven Snyder of the Western District of Arkansas and advised him of the investigation. Snyder told the officers to clear the residence and obtain a search warrant for it. Snyder also authorized the prosecution of Houston Williams, and he was placed under arrest for possession of methamphetamine with the intent to distribute.

The officers obtained a search warrant based on the information obtained from the confidential informants, Henry Glosemeyer, and the officers' investigation of Williams's house. They executed the warrant and seized twenty-nine pieces of evidence.

On February 24, 1993, appellant Kathlene Williams went to court to attempt to post bail for Houston Williams. When she arrived at the courthouse, she was arrested based on the evidence

found during the search of her house the previous day, and her purse was searched incident to her arrest. The officers found .02 ounces of methamphetamine in her purse.

The trial court found both Houston and Kathlene Williams to be indigent and appointed counsel from the Washington County Public Defender's Office. Kathlene Williams obtained separate counsel in July 1993.

Both appellants filed a motion to suppress the evidence seized at their home without a search warrant, and the trial court granted the motion. The trial court denied motions to suppress the evidence seized as a result of the search pursuant to the search warrant. It also denied Kathlene Williams's motion to sever the trial to permit the defendants to be tried separately. The court originally granted her motion to sever the count in the information charging her with possession of methamphetamine as a result of the drugs found in her purse at the courthouse, but it later denied the motion.

At trial, a police officer testified, and the evidence seized as a result of the search of the Williams's house pursuant to the search warrant was admitted. At the close of the State's case, appellants made motions for directed verdicts, contending that there was insufficient evidence to convict them. As part of her motion for directed verdict, Kathlene Williams called attention to the fact that the State failed to have marijuana seized from the house introduced into evidence. The State asked to reopen its case and admit the marijuana, and the court allowed it to reopen its case over appellants' objections.

Kathlene Williams called character witnesses in her behalf, and the State offered the testimony of Terri Glosemeyer, Henry Glosemeyer's wife, in rebuttal. She testified that Kathlene Williams often used drugs with her when they lived together. When Kathlene Williams's attorney tried to cross-examine Terri Glosemeyer, the State objected to the relevance of any questions concerning her relationship with Henry Glosemeyer. The court sustained the objection, in part, by limiting the scope of cross-examination to asking whether she had been given any particular deal by the State for her testimony or any special favors or consideration.

Appellants renewed their motions for directed verdicts at the

close of their cases and again after the rebuttal testimony. The court denied the motions. The jury convicted both appellants of possession of marijuana with intent to deliver and possession of methamphetamine with intent to deliver.

We first consider Kathlene Williams's argument that the trial court erred in failing to grant a directed verdict in her favor on the counts charging her with possession of marijuana and methamphetamine with intent to deliver based on the drugs seized from her home. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Mings* v. *State*, 318 Ark. 201, 884 S.W.2d 596 (1994). We review the sufficiency of the evidence before considering any alleged trial error and in doing so we must consider all the evidence, including any which may have been inadmissible. *Hardrick* v. *State*, 47 Ark. App. 105, 885 S.W.2d 910 (1994). When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the appellee and affirm if the verdict is supported by substantial evidence. *Knight* v. *State*, 51 Ark. App. 60, 908 S.W.2d 664 (1995). Substantial evidence is that 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. *Id.*

Kathlene Williams contends that the State failed to prove that she was in possession of the drugs seized from her home because the only evidence connecting her to the drugs was circumstantial evidence that was also consistent with appellant's lack of knowledge of the drugs. She alleges that there is nothing to link her to the drugs found in her home. She also contends that character evidence is insufficient to convict.

In order to convict a defendant of possession of a controlled substance, the State need not prove that the accused had actual possession of the controlled substance. *Darrough* v. *State*, 322 Ark. 251, 908 S.W.2d 325 (1995). Constructive possession, which is control or the right to control the contraband, is sufficient. *Crossley* v. *State*, 304 Ark. 378, 802 S.W.2d 459 (1991). Constructive possession can be implied where the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control. *Mosley* v. *State*, 40 Ark. App. 154, 844 S.W.2d 378 (1992). However, where the conviction is based on joint occupancy of the premises where contraband is found, the State must prove two elements: (1) that the accused exercised care, control, and

management over the contraband; and (2) that the accused knew that the matter possessed was contraband. *Darrough, supra.* Such control and knowledge can be inferred from the circumstances where there are additional factors linking the accused to the contraband. *Mosley, supra.*

In this case, there is sufficient additional evidence to link Kathlene Williams to the drugs found in her home. At trial, the State introduced several firearms into evidence which were seized from various locations around appellant's house. In addition, the State introduced into evidence marijuana along with rolling papers that were found in a desk drawer in the den of the house. It introduced four bags of methamphetamine, a bottle of Inositol powder, and a set of small plastic scales seized from the middle desk drawer of the desk in the den. It also presented a plastic bag containing powdered methamphetamine and a plastic bag containing a rock of methamphetamine which were seized from a different drawer in the desk. In addition, the State introduced twelve plastic bags of marijuana seized from the freezer part of the refrigerator in the kitchen and a photograph showing a brown paper bag in which the marijuana was found in the freezer. The presence of numerous firearms, drug paraphernalia, and the large quantity of drugs throughout the house in various locations, coupled with testimony by the State's rebuttal witness that she had used methamphetamine on numerous occasions with the appellant in her home and helped her bag the drugs, was sufficient to link her with the contraband. Thus, there was sufficient evidence for the jury to infer that she was in possession of the marijuana and methamphetamine, and there was substantial evidence to support appellant's conviction.

Both appellants argue that the trial court erred in denying their motions to suppress the drugs, drug paraphernalia, and firearms seized from their home during the execution of the search warrant. They claim that the search warrant was invalid under the "fruit of the poisonous tree" doctrine because some of the facts set forth in the affidavit for the search warrant to establish probable cause to search their home were discovered in a previous, unlawful search of their home.

In reviewing a trial court's denial of 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. *Phillips* v.

State, 53 Ark. App. 36, 918 S.W.2d 721 (1996).

The trial court found that the officers' initial intrusion into appellants' home, which yielded information used in the affidavit for the search warrant, was an unlawful search and suppressed the evidence seized in that initial search. The State's position is that the initial intrusion was not an unlawful search because the appellants consented to the officers entering their home and the contraband found in the initial visit to appellants' home was in plain view. Thus, the initial issue we must decide is whether the information contained in the affidavit was the result of an unlawful search.

Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject to a few specifically established and well-delineated exceptions. *Washington* v. *State*, 42 Ark. App. 188, 856 S.W.2d 631 (1993)(citing *California* v. *Acevedo*, 500 U.S. 565 (1991)). The observation of evidence in plain view, however, is not a search and therefore the resulting seizure is not the result of an unreasonable search. *Id.* The requirements of the plain view exception are: (1) the initial intrusion must be lawful; (2) the discovery of the evidence must be inadvertent; and (3) the incriminating nature of the evidence must be immediately apparent. *Stout* v. *State*, 320 Ark. 552, 898 S.W.2d 457 (1995).

In this case, Kathlene Williams consented to the officers' entry into the Williamses' home; thus, the officers' intrusion was lawful. Although the testimony indicates that some of the firearms seized may have been in plain view such that their discovery was inadvertent, other contraband was not. Officer Norman testified that he moved a bag of cookies away from a set of scales in order to see a rock-like substance on the scale. He also said that he opened a desk drawer because he saw the top of a plastic bag hanging out. Upon opening the drawer, he saw what appeared to be methamphetamine and drug paraphernalia. Clearly, Officer Norman's discovery of the methamphetamine was not inadvertent. Thus, the plain view exception to the warrant requirement does not apply to the drugs and drug paraphernalia described in the affidavit for the search warrant.

When he opened the desk drawer and moved the bag away from the scales, Officer Norman conducted a search of appellant's home. He did so without a warrant, and none of the exceptions to

the warrant requirement of the Fourth Amendment apply. Thus, Officer Norman conducted an unlawful search of appellant's home. The information gleaned in this unlawful search was included in Officer Norman's affidavit for the search warrant.

The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search and of testimony concerning knowledge acquired during an unlawful search. *Murray* v. *United States*, 487 U.S. 533 (1988). Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence that is acquired as an indirect result of the unlawful search. *Id.* However, evidence received through an illegal source is admissible if it is also obtained through an independent source. *Id.*

The State argues that application of the independent-source doctrine renders the search of the Williamses' home valid and the evidence seized admissible. The United States Supreme Court addressed a similar situation in *Murray, supra,*and held that the ultimate question that must be addressed is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue. *Murray* has been interpreted to require a two-step analysis in determining whether the search was in fact an independent source. *See, U.S.* v. *Restrepo*, 966 F.2d 964 (5th Cir. 992) and *State* v. *Gulbrandson*, 906 P.2d 579 (Ariz. 1995).

We believe that *Gulbrandson, supra,* sets forth the proper method under *Murray* for determining the validity of a search pursuant to a warrant based on an affidavit that contains information unlawfully obtained. The first step is to excise the illegally obtained information from the affidavit and determine whether the remaining information is sufficient to establish probable cause. The second step is to examine whether the information gained from the illegal entry affected the officers' decision to seek the warrant or the magistrate's decision to grant it.

We find that, when the information obtained by the officers in the initial, unlawful search is excised from the affidavit in this case, there is sufficient information left to constitute probable cause. The officers had information from three different confidential informants over a period of several months indicating that Houston Williams was engaged in methamphetamine trafficking. In addition, Glosemeyer told police that Williams was trafficking in

methamphetamine out of his house. Although the affidavit did not specifically set forth facts that would tend to show the reliability of the informants, the officers corroborated or confirmed many of the tips given by informants. They confirmed the description of the vehicles en route to Williams's home, the identity of the driver of one of the vehicles, and the presence of methamphetamine in one of the vehicles. In addition, Glosemeyer's admission that over a long period and currently he had been buying methamphetamine from the home of Houston Williams implicated that property. Under the "totality of the circumstances" test set forth in *Illinois* v. *Gates*, 462 U.S. 213 (1983), we believe that Norman's affidavit is sufficient to establish probable cause even after the illegally obtained information is excised. Thus, under the first part of the *Murray* analysis, the warrant would be valid.

Under the second part of the *Murray* analysis, we next examine the question of whether the illegal entry affected the officer's decision to seek the warrant. Officer Norman testified that the reason the officers did not get a search warrant before they went to the Williamses' house the first time was because the Prosecuting Attorney of Washington County told them that they did not have enough information to establish probable cause. He said that they gained sufficient additional information during the search to get the search warrant. In light of this testimony by the officer who eventually sought the warrant, we find that his decision to seek the warrant was prompted by what he saw during his initial, unlawful search. Thus, under *Murray* v. *United States*, 487 U.S. 533 (1988), we find that the exclusionary rule mandates exclusion of the evidence seized pursuant to the search warrant. Accordingly, we find that the trial court erred in refusing to suppress the evidence and reverse and remand for a new trial as to both appellants.

Kathlene Williams's argument that the trial court erred in allowing the State to reopen its case to introduce a pound of marijuana into evidence is not likely to recur on retrial; thus, we do not address it. She has, however, raised other allegations of error that are likely to recur on retrial, which we address in order to prevent piecemeal appeals.

Kathlene Williams argues that the trial court erred in limiting the scope of her cross-examination of Terri Glosemeyer. Although this issue may arise on retrial, we are unable to address this argument because she failed to make a sufficient proffer of the

excluded evidence. There is no information in the abstract from which this court can determine the substance of the offer. Appellant's counsel merely stated that he intended to ask questions about Mrs. Glosemeyer's relationship with Mr. Glosemeyer to show that she was biased. There was no proffer of the substance of these questions. There must be a proffer of the evidence that is improperly excluded for us to find error. Ark. R. Evid. 103(a)(2), *Parker* v. *State*, 268 Ark. 441, 597 S.W.2d 586 (1980). Thus, we cannot address this issue. *See Hodge* v. *State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989).

Kathlene Williams also argues that the trial court erred in refusing to sever the offense of possession on the day she was arrested from the possession charge stemming from the search of her house the day before because the second offense was not a part of a single scheme or plan, and evidence of one offense would not be allowed in a separate trial to prove the other offense. She contends that the charges involving the drugs found at her house were independent of the subsequent charge of possession of methamphetamine for the drugs found in her purse at the courthouse. The trial court initially granted her motion to sever, but later denied it.

When offenses are based on the same conduct or a series of acts connected together or constituting parts of a single scheme or plan, they may be joined for trial. *McArdell* v. *State*, 38 Ark. App. 261, 833 S.W.2d 786 (1992). The decision to join or sever offenses is within the discretion of the trial court, and we will not reverse absent an abuse of discretion. *Id.* The State argues that the offenses of possession of methamphetamine and marijuana with intent to deliver occurring on February 23, 1993, and the offense of possession of methamphetamine one day later on February 24, 1993, were part of a single scheme or plan because they involved appellant possessing the same type of controlled substance close in time in the same general area. Appellant argues that this is insufficient and cites *Teas* v. *State*, 266 Ark. 572, 587 S.W.2d 28 (1979), for the proposition that the sale of drugs on two different occasions by a defendant to an informer was insufficient to constitute a single scheme or plan. However, the facts of this case are clearly distinguishable from those present in *Teas*. In *Teas*, *supra*, a confidential informant bought marijuana from the defendant on December 5, 1977, and morphine from the defendant on December 14, 1977. In

this case, Kathlene Williams was found in possession of the same type of drug on the day after the original seizure of contraband from her home. Under these circumstances, we cannot say that the trial court abused its discretion in refusing to sever the offenses. These acts are sufficiently similar in character, location, and time to constitute a continuing course of conduct which, in effect, constituted a single scheme or plan.

Finally, Kathlene Williams contends that the trial court erred in failing to grant her motion to suppress the evidence found in her purse which was searched incident to her arrest. She claims that her arrest was invalid because the probable cause for her arrest was based on evidence obtained when the police executed the invalid search warrant on her home. We agree.

At the time of Kathlene's arrest, the only probable cause that existed for the officers to believe that she had committed or was committing a crime was the information obtained from the unconstitutional search of her home. Thus, her arrest was unlawful. Any evidence obtained as a result of an unconstitutional and unlawful arrest must be excluded at trial unless it falls within one of the exceptions because it is considered fruit of the poisonous tree. *Brown* v. *Illinios*, 422 U.S. 590 (1975); *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Thus, the trial court erred in failing to suppress the methamphetamine found in Kathlene's purse in the search incident to her arrest.

Reversed and remanded.

JENNINGS, C.J., MAYFIELD, NEAL, and GRIFFEN, JJ., agree.

ROBBINS, J., concurs in part, dissents in part.

JOHN B. ROBBINS, Judge, concurring in part, dissenting in part. I concur that this case should be reversed and remanded. However, I would reverse and remand to allow the trial court to make findings of fact in regard to the second step under *Murray* v. *United States*, 487 U.S. 533 (1988).

I agree with the majority's rationale concerning the first step of the *Murray* analysis. The officers had sufficient independent information from other sources, *i.e.*, sources other than the illegally obtained information, that established probable cause for the issuance of the warrant. Those facts are accurately reflected in the majority opinion. However, I believe that based upon the persua-

sive authority of *United States* v. *Restrepo*, 966 F.2d 964 (5th Cir. 1992), cited in the majority opinion, we should reverse and remand.

The second part of the *Murray* analysis is whether or not the illegal entry, and any evidence or information obtained as a result of the illegal entry, affected the officers' decision to seek the warrant. As noted by the majority, the officers did not get a search warrant prior to their first entry into the appellants' home. Although the officers sought assistance from the Washington County prosecutor in obtaining a warrant, he told them that, in his opinion, they did not have enough information to establish probable cause for one. The officers presented the prosecutor with the same information that the majority opinion states was sufficient to establish probable cause.

I believe that the majority opinion goes too far in applying the second part of the *Murray* analysis by effectively making our appellate court a fact-finding court. The majority opinion states that "we find that [the officer's] decision to seek the warrant was prompted by what he saw during his initial, unlawful search." In both *Murray* and *Restrepo* the cases were remanded for the trial courts to consider whether or not the results of the illegal searches prompted or motivated the officers' decision to seek the warrant. In *Restrepo* the court stated that the officers' motivation is a question of fact for the trial court to decide.

In the present case the trial court did not consider whether the results of the illegal first search of appellants' home prompted or motivated the officers' decision to seek the warrant. Such a determination is subjective and must be based on factual matters including statements of the officers or other evidence directly probative of motivation. I believe that the majority has done exactly what the *Restrepo* court warned against by scrutinizing the record for evidence concerning motivation. This is a finding of fact that was not made by the trial court and it is not within our province to make such findings. As noted above, it is clear that the officers were motivated to obtain a warrant prior to the illegal search and only failed to pursue issuance of a warrant because of a prosecutor's opinion, which in hindsight was incorrect. Consequently, some motivation to obtain a warrant existed both before and after the illegal search.

I would reverse and remand for the trial court to resolve this issue by making such findings of fact as are necessary to determine the officers' primary motivation for seeking the warrant in question.

Mary HANSON *v.* AMFUEL and Travelers Insurance Company

CA 95-364 925 S.W.2d 166

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1996

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

Phillip P. Cuffman, for appellees.

WENDELL L. GRIFFEN, Judge. The issue posed by this appeal is whether the decision of the Workers' Compensation Commission denying Mary Hanson's claim for additional medical benefits associated with her March 13, 1989, compensable injury is supported by substantial evidence. Hanson has appealed the Commission's decision and contends that the decision is not supported by substantial evidence. We have reviewed the record and concluded that substantial evidence exists to support the decision. Therefore, we affirm the Commission.

Appellant was working for appellee on or about March 13, 1989, when she spilled methyl ethyl ketone (MEK) on her right leg. She dried the area with a hair dryer pursuant to advice obtained from her supervisor. A blister developed in the area later that day, so appellant consulted Dr. Thomas Pullig, her personal doctor, after work. Dr. Pullig noted in his office chart that appellant had sustained a "chemical dermatitis burn to right anterior leg." The blister resolved within several days, but a small knot later developed in the area and continued growing until March of 1990 when appellant again saw her personal doctor and asked him about the knot. Appellant had been undergoing treatment from the doctor for hyperthyroidism between the time that he first treated the dermatitis burn and March of 1990, but the doctor testified by deposition that he did not recall appellant bringing the knot to his attention until March 5, 1990.

Dr. Pullig referred appellant to Dr. W.J. Giller, an orthopedist, whose initial report dated March 12, 1990, indicated that his impression was that appellant had a mass of the right lower leg of an undetermined etiology. Dr. Giller surgically removed the mass on March 28, 1990, and later recommended that appellant consult Dr. Marshall Cunningham, a plastic surgeon in Shreveport, Louisiana. Dr. Cunningham saw appellant on November 21, 1990, and she told him that the mass developed on her leg after an acid spill.

Appellant's initial medical treatment by Dr. Pullig and Dr. Giller was paid by appellee. However, when appellant sought continued medical treatment for what she contends are the residual effects of the compensable injury, appellee contended that appellant's complaints were unrelated to the compensable injury and, therefore, not compensable. At the hearing of this claim before the administrative law judge, the appellee introduced into evidence a 78-page exhibit that included medical reports from Dr. William Geissel and Dr. Henry Simmons. Neither Dr. Geissel nor Dr. Simmons had treated appellant. However, they had reviewed medical documents related to her dispute with appellee concerning her claim for additional medical treatment.

Appellant now argues that the Commission erred when it affirmed and adopted the decision of the law judge that denied her claim for additional medical benefits. Our task on appeal is to review the evidence and all reasonable inferences that may be deduced from it in the light most favorable to the findings of the Commission. *Mac* v. *Tyson Foods, Inc.*, 28 Ark. App. 229, 771 S.W.2d 794 (1989). On appeal, the issue is not whether we might have reached a different result from that reached by the Commission, or whether the evidence would have supported a contrary finding. If reasonable minds could reach the Commission's decision, we must affirm. *Bradley* v. *Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995).

The upshot of appellant's argument is that the Commission denied her claim for additional medical benefits by relying upon the opinions of Dr. Geissel and Dr. Simmons although those doctors had not treated appellant and had only reviewed medical records provided to them by appellee. Appellant argues that the opinions of doctors who have not treated or examined her cannot be substantial evidence to support denial of her claim in the face of opinion evidence by Dr. Pullig, Dr. Cunningham, and Dr. Ernest Hartmann

(another doctor who actually saw her). It is true that Dr. Pullig stated that his speculation was that the growth at the site of the chemical burn might have been caused by the burn, although he also admitted that he did not know if appellant had suffered a chemical burn that would have resulted in some sort of thickening or growth later occurring. Dr. Cunningham, the plastic surgeon, also opined that his common-sense assessment was that a causal connection existed between the chemical burn and the growth of the knot at the same site several months later.

On the other hand, the May 6, 1991, report from Dr. Henry Simmons, an assistant professor of toxicology at the University of Arkansas for Medical Sciences, included the following statement:

> MEK is a simple ketone which is an irritant to the skin, eyes and mucous membranes. It is not an "acid." It is not an exotic compound about which little is known. Its cutaneous effects are attributable to leaching of fat from the skin which produces an effect similar to that occurring on the hands after the short-term use of gasoline to clean oily parts. Brief exposures to MEK do not characteristically cause deep injury to the skin. This is particularly true when contacts take place a single time, occur on previously normal skin, and do not involve occlusion. In any case, there is no evidence in the record that Ms. Hanson ever had severe damage to her skin in the period immediately after the accident.
>
> Furthermore, I am aware of no literature linking the material to the development of subcutaneous fatty or fibrous tissue such as that contained in Ms. Hanson's surgical specimens.

The responsibility of weighing the conflicting medical evidence and opinions and determining the preponderance of the evidence is not for us to fulfill on appellate review. It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Johnson* v. *Riceland Foods*, 47 Ark. App. 71, 884 S.W.2d 626 (1994). The Commission had the opportunity to consider the disparate opinions from the witnesses concerning whether appellant's growth was caused by her chemical burn, and it decided that appellant had failed to prove by a preponderance of the evidence that the growth was caused by the chemical burn so as to entitle her to additional

medical treatment at appellee's expense. The fact that reasonable minds might have reached a different result does not mean that the result reached by the Commission lacks substantial evidence. We hold that the opinion evidence provided by Dr. Geissel and Dr. Simmons, which rejected a causal relationship between the growth and the chemical burn, constitutes substantial evidence in support of the Commission's decision.

At oral argument, counsel for appellant contended that reversal is mandated because the reports from Dr. Geissel and Dr. Simmons were not verified in compliance with Ark. Code Ann. § 11-9-704(c) (Repl. 1996). Although both counsel were under the impression at oral argument that appellant had objected to the reports from those doctors being received into evidence on that basis, the record clearly indicates otherwise. At page 16 of the record, the following exchange occurred between counsel for appellant and the administrative law judge:

> MR. THOMAS: . . . Your Honor, we object specifically to the reports of Doctor William Geissel and Doctor Harry (sic) Simmons, who simply reviewed documents, medical documents; that we are really not sure exactly what they reviewed. They have never seen Ms. Hanson; never reviewed her case; they simply reviewed certain matters and discussed matters with a rehabilitation nurse, and we don't feel that their reports are entitled to any weight or credibility, and really involve pure speculation and conjecture on their part as to what may be involved in this leg, since they have never seen this lady, and I think their letters are basically in terms of speculation and conjecture, and we don't feel that they are properly admissible in this case, Your Honor.
>
> JUDGE SMITH: Your objection will be taken under advisement, Mr. Thomas. I'll have to look at the reports before I can make a ruling on it.
>
> MR. THOMAS: I understand, Your Honor.

No objection was made before the Commission to the admissibility of the reports from Dr. Geissel and Dr. Simmons because they were unverified. Indeed, the record does not indicate that their authenticity was challenged at all. The objection raised by appellant's counsel was directed to their probative weight, not their

authenticity. As previously mentioned, it is the exclusive function of the Commission to weigh the evidence. Beyond that, issues may not be raised on appeal that have not first been raised and decided below. *Hyde* v. *C.M. Vending Co., Inc.*, 288 Ark. 218, 703 S.W.2d 862 (1986). Therefore, our decision is not based on appellant's new and unpreserved position at oral argument concerning the unverified reports.

Affirmed.

JENNINGS, C.J., and PITTMAN, ROGERS, AND NEAL, JJ., agree.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the majority opinion which affirms the decision of the Commission in this case.

The appellant contends that the methyl ketone (MEK) she spilled on her leg while at work caused a growth which eventually had to be surgically removed. Her doctors could not be sure, but they gave their common-sense opinion that this was the cause of the growth. The evidence on the other side simply relied upon the fact that "the literature" did not suggest that there would be a causal relationship.

This situation has been summarized by Larson as follows:

> [I]f the circumstances themselves are persuasive enough, a conclusion supported by no medical testimony may stand in defiance of medical testimony to the contrary.

2B Larson, *The Law of Workmen's Compensation* § 79.52(a) (1995). A case cited by Larson in support of the above statement is *Riley* v. *Monark Boat Co.*, 269 Ark. 819, 602 S.W.2d 411 (Ark. App. 1980), where the court said: "We are not required to accept medical opinion categorically where there is strong and compelling evidence to the contrary." 269 Ark. at 826, 602 S.W.2d at 415.

Here, I do not think reasonable persons with the same evidence before them would find against the appellant. I believe that reasonable people would agree with the doctors who saw and treated the appellant rather than with the doctors and the professor who never saw her.

Therefore, I dissent.

SOUTHERN STEEL & WIRE *v.* Debra KAHLER

CA 95-919 927 S.W.2d 822

Court of Appeals of Arkansas
Division III
Opinion delivered August 21, 1996

[redacted]

Walter A. Murray, for appellant.

Hough, Hough, & Hughes, P.A., by: *R. Paul Hughes III*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Southern Steel & Wire appeals from a portion of the decision of the Workers' Compensation Commission which held that the appellee Debra Kahler was entitled to wage-loss disability. Appellant contends on appeal that the Commission erred in awarding the appellee wage-loss benefits, arguing that the Commission's holding that appellee was not barred from recovering wage loss under Ark. Code Ann. § 11-9-522(c)(2) for misconduct is not supported by substantial evidence. We affirm.

On appeal in workers' compensation cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if those findings are 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. *Bradley* v. *Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *ITT/Higbie Mfg.* v. *Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1991).

The evidence before the Commission showed that the appellee sustained an admittedly compensable injury to her upper arm and shoulder on February 13, 1993, when she was working for appellant. Appellee was paid appropriate temporary total disability benefits and medical benefits. Appellee was also paid for a permanent anatomical impairment rating to her upper extremity.

Testimony indicated that appellee continued to work for the appellant after her injury, but was "off and on" during her treatment by Dr. Alberty. Testimony further indicated that appellee performed various duties for appellant after her final release from treatment, but she testified that she had difficulties with certain positions to which she was assigned. The appellee was terminated by appellant on October 9, 1993, for what the appellant claimed

was excessive absenteeism.

Appellant controverted any responsibility for the payment of wage-loss disability because appellee had returned to work making the same or higher wages as before her injury. Appellant contended that because appellee was discharged for what appellant considered misconduct due to excessive absenteeism, she was not entitled to wage-loss benefits. Relying on Ark. Code Ann. § 11-9-522(c)(2), appellant argues on appeal that since appellee was discharged for misconduct, she is not entitled to wage-loss disability.

Arkansas Code Annotated section 11-9-522(c) (1987) provides:

> (c)(1) The employer or his workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee'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.
>
> (2) Included in the stated *intent of this section is to enable an employer to reduce or diminish payments of benefits* for a functional disability, 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.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Bradley* v. *Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995). In *Keller* v. *L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992), this court stated that it was the employer's burden to prove that the employee was discharged for misconduct connected to the work. Misconduct has been defined in Employment Security Division cases as meaning more than mere inefficiency or unsatisfactory conduct; it is some act of wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a disregard of the standard of behavior that the employer has a right to expect of his employees. *Baker* v. *Director*, 39 Ark. App. 5, 832 S.W.2d 864 (1992).

The evidence indicated that the appellant's personnel policy provides for termination after nine occurrences. Appellee testified

that she was unable to perform various duties she was assigned by appellant because of pain in her shoulder and arms due to her compensable injury. Appellee testified that approximately half of her absences were attributable to personal sickness and problems with her children and the other half of the absences were attributable to physical difficulties resulting from her compensable injury.

The Commission, which adopted the administrative law judge's opinion, found that the appellee was a credible witness and that her testimony about her absences was accurate. The Commission found that if the appellee's "discharge was for excessive absenteeism not occasioned by the effects of her compensable injuries, it could constitute a 'discharge for misconduct in connection with the work.' " However, the Commission went on to hold that, "If her termination was based (even in part) on absenteeism necessitated by the effects of her compensable injuries, it is [our] opinion that it would not be sufficient to constitute a 'discharge for misconduct in connection with the work.' " The Commission found it was peculiar that the appellee was able to maintain her employment with the appellant for six-and-one-half years and then be terminated for excessive absenteeism less than two months after a final release from her doctor's care. The Commission held that the appellant presented insufficient evidence that the appellee was discharged for misconduct in connection with the work and that she was not precluded from receiving wage-loss benefits.

The Commission found that the appellee was physically restricted in the types of employment she could perform. Appellee was not a high school graduate but was working on her GED at the time of the hearing before the administrative law judge. The Commission found that appellee was well motivated to continue working and that she had sought employment elsewhere. The Commission also found that appellee was pursuing rehabilitation on her own to obtain training in the areas of employment more suited for her current physical restrictions.

■■ The Commission has the duty of weighing the medical evidence as it does any other 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). Because the Commission found that the appellee was a credible witness and her absences were in part due to her compensable injury, the Commission's finding that the appellee was

not properly discharged for misconduct in connection with the work is supported by substantial evidence.

Affirmed.

MAYFIELD and GRIFFEN, JJ., agree.

Gino HILL *v.* STATE of Arkansas

CA CR 95-1023 927 S.W.2d 820

Court of Appeals of Arkansas
Division I
Opinion delivered August 21, 1996

William R. Simpson, Jr., Public Defender; *Tammy Harris*, Deputy Public Defender, by: *Fernando Padilla II*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. Appellant, Gino Hill, was convicted by a jury of delivery of a controlled substance and sentenced to twenty-five years in the Arkansas Department of Correction. On appeal, appellant argues that the trial court erred in improperly limiting appellant's cross-examination of the State's witness, Detective Elliott Johnson, as permitted under Rule 608(b) of the Arkansas Rules of Evidence. We agree and reverse and remand.

Appellant's arrest and subsequent conviction resulted from an undercover drug purchase. The operation was conducted by local police and involved the use of an undercover officer, Detective Johnson. Detective Johnson testified that on February 28, 1994, he made contact with appellant and advised appellant that he wanted to purchase $20 worth of crack cocaine. According to Detective Johnson, appellant handed him one piece of crack cocaine in exchange for the money. At trial, the State only offered the testimony of Detective Tony Brainard, Detective Johnson, and a chemist from the State Crime Laboratory, Michael Stage, who related that the substance in question was cocaine. At the beginning of the trial on February 28, 1995, the State moved in limine to prohibit the defense from referring in any manner to the reason that Detective Johnson left the police force. The trial court granted the

motion.

On appeal, appellant argues that the trial court erred in denying him the opportunity to cross-examine Detective Johnson under Rule 608 concerning a false police report the detective filed with the police department. We agree.

The State responds, however, that appellant proffered no testimony; therefore, we should decline to consider appellant's Rule 608 argument. A proffer is not necessary when the substance of the offer is apparent. *Billett* v. *State*, 317 Ark. 346, 877 S.W.2d 913 (1994). Here, the State filed a motion in limine to exclude the examination of Detective Johnson concerning the reason for his resignation from the police department. Appellant argued that the detective had filed a false police report and had given a false statement regarding his police vehicle being stolen. Appellant also proffered the police report. Under these facts, there is no question about the substance of the testimony. Since the substance of the testimony is clearly apparent, we reach the issue. A.R.E. Rule 103(a)(2).

Rule 608(b) provides in part:

> (b) Specific Instances of Conduct. Specific instances of the conduct of a witness for the purpose of attacking or supporting his credibility ... may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness.

In interpreting this rule, the supreme court has adopted a threefold test for admissibility: (1) the question must be asked in good faith; (2) the probative value must outweigh its prejudicial effect; and (3) the prior conduct must relate to the witness's truthfulness. *Mackey* v. *State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

In this case, the substance of the proffered inquiry involved two instances: one in which Detective Johnson made a false statement to the police department and the other in which Detective Johnson filed a false police report. The police report was proffered. It is clear from the proffered evidence that the intended questioning was being pursued in good faith. Also, it is without question that these instances of misconduct are related to the wit-

ness's veracity and were thus probative of his capacity for truthfulness as required by the rule.

In the case of *Urquhart* v. *State*, 30 Ark. App. 63, 782 S.W.2d 591 (1990), the defendant was convicted after a drug "sting" operation of delivery of a controlled substance. The undercover officer responsible for the purchase was the only witness to testify as to the events of the drug transaction. The defense wished to cross-examine the witness concerning two instances in which the witness made false statements. The trial court did not allow the cross-examination. We reversed and remanded, noting that credibility was a key to the State's case and it was crucial to the appellant's case that he be allowed to conduct as full an impeachment of the witness's credibility as the rules of evidence allow. Therefore, we concluded that the appellant should have been allowed to pursue the line of questioning, and the trial court abused its discretion by limiting cross-examination on the issue.

In this case, Detective Johnson was the only witness to testify to the events of the actual drug purchase. Therefore, appellant should have been allowed to question Detective Johnson concerning his false statement and filing of a false police report. The trial court abused its discretion in limiting the cross-examination; therefore, we reverse and remand.

Reversed and remanded.

PITTMAN and STROUD, JJ., agree.

Deborah Jean VANZANT *v.* James D. PURVIS

CA 95-738 927 S.W.2d 339

Court of Appeals of Arkansas
Division I
Opinion delivered August 21, 1996

The Legal Clinic, by: *Aaron L. Squyres*, for appellant.

Mary E. Green, P.A., for appellee.

JOHN F. STROUD, JR., Judge. Deborah Vanzant appeals from the trial court's denial of her motion to vacate an order granting James Purvis's petition for a change of custody of the parties' minor children. She claims that the trial court erred in finding that she was represented by counsel and that she had been properly served with notice of the petition for change of custody. She also alleges that the trial court erred in refusing to grant a new trial. We agree and reverse.

On August 3, 1988, the District Court of Harrison County, Texas, entered a final decree of divorce, granting an absolute divorce to the parties. The decree granted custody of the parties' minor children to the appellant and ordered the appellee to pay child support in the sum of ninety-five dollars per week.

As a result of the appellee's failure to pay child support as ordered pursuant to the parties' final decree of divorce, the appellant became a recipient of Aid to Families with Dependent Children (AFDC) benefits and subsequently assigned her support rights to the State of Arkansas. On June 16, 1992, an order of registration was entered by the Chancery Court of Washington County, Arkansas, registering the divorce decree. On July 30, 1993, a petition for citation for contempt was filed by the State of Arkansas, Department of Finance and Administration, Division of Revenue, *ex rel.* Deborah Jean Purvis against James D. Purvis, alleging that Mr. Purvis had failed to pay his child-support obligation and had incurred an arrearage in the amount of $18,565.00 as of June 30, 1993. The State also alleged that he should be held in contempt of court as a result of his failure to pay his child-support obligation, and the State should be entitled to a judgment on the total arrearage including a reasonable attorney's fee and costs of the filing of the action.

The petition for citation of contempt was served on the appellee on September 3, 1993, and he subsequently filed a response to the petition for citation of contempt and a counterpetition asking that custody of the parties' minor children be awarded to him. A

summons on the counterpetition for change in custody was prepared and filed with the court but was never served upon the appellant.

On September 7, 1993, the appellant wrote a letter to the Office of Child Support Enforcement advising that her case should be closed "as of today." She was moving to Colorado and left a forwarding address of P.O. Box 26235, Colorado Springs, Colorado 80936. On September 23, 1993, George Butler, the attorney for the Arkansas Child Support Enforcement Unit, filed an answer to counterpetition on behalf of the appellant, denying those material allegations contained in the appellee's counterpetition for change in custody. On September 23, 1993, the attorney for the Child Support Enforcement Unit sent a letter to the appellant at 741 Morningside Drive #3, Fayetteville, Arkansas 72701, with a copy of the answer to counterpetition and a letter advising her that she would need to obtain another attorney to represent her in the matter of child custody.

On October 13, 1993, the Chancery Court of Washington County, Arkansas, entered an order dismissing the petition for citation of contempt on the appellee's motion. On October 6, 1993, the attorney for the Arkansas Child Support Enforcement Unit sent a letter to the appellant at P.O. Box 26235, Colorado Springs, Colorado 80936, advising her that a custody hearing had been scheduled for November 10, 1993, at 10:00 a.m. in the Washington County Courthouse. The letter further advised that the Office of the Child Support Enforcement Unit would not be able to represent her in the matter and that she would need to obtain private counsel. On November 10, 1993, a trial on the merits was held in the Chancery Court of Washington County, Arkansas, on the appellee's counterpetition for change in custody. The appellee appeared in person and by counsel. The appellant did not appear although the attorney for the Arkansas Child Support Enforcement Unit did appear to make a statement to the court. He advised the court that the appellant was not present and in fact had, by letter dated September 7, 1993, asked his office to close her case. He further stated that she had not given him authority to represent her in this matter although he did file an answer to the counterclaim. The court recognized his representation and advocacy to the extent stated and recognized his reply to the counterpetition for the change in custody. The court further stated that as an individual

attorney and as attorney for the Child Support Enforcement Unit, he did not have authority to represent Ms. Vanzant on the counterpetition. Subsequently, evidence and testimony was taken by the court, the appellee was found to have presented a prima facie case for change of custody, and the court granted the appellee custody of the parties' minor children. The attorney for the Arkansas Child Support Enforcement Unit offered no defense, made no cross-examination of any witnesses, and in fact left the courtroom prior to the completion of testimony.

On December 13, 1993, the Chancery Court of Washington County, Arkansas, entered an order and judgment granting judgment in favor of the Arkansas Child Support Enforcement Unit against the appellee in the sum of $3,000.00 for past due child support as of November 30, 1993. The Court further found that this sum did not include any "non-AFDC" arrears and directed the appellee to pay the sum of $25.00 per month until paid in full.

On November 13, 1993, the appellee appeared at appellant's residence in Colorado Springs, Colorado, and took custody of the parties' minor children pursuant to the order of the Chancery Court of Washington County, Arkansas.

On August 15, 1994, the appellant, acting pro se, filed a motion for change of custody in the Chancery Court of Washington County, Arkansas, asking that the custody of the parties' minor children be awarded to her. On January 5, 1995, appellant filed a motion to vacate in the Chancery Court of Washington County, Arkansas, asking that the order entered on November 10, 1993, granting custody of the parties' minor children to the appellee be vacated and a new trial on the merits be set on the appellee's counterpetition for change in custody.

On March 21, 1995, the court denied the motion, finding that the appellant was represented by George Butler in the former proceeding regarding modification of custody and that she was not denied representation before or at the time of the hearing on November 10, 1993.

The appellant's argument on appeal is that the trial court erred in finding that appellee's service of the counterpetition on George Butler, attorney for the State of Arkansas Child Support Enforcement Unit, was sufficient. She argues that the trial court's finding that she was represented by Mr. Butler is incorrect and that it was

error for the trial court to deny her motion to vacate the order.

It is undisputed that the appellee served the counterpetition on Mr. Butler and not on the appellant. The appellant contends that she never received notice of the hearing which was held on November 10, 1993, and that the appellee was required to serve her personally. The appellee claims that service on Mr. Butler was proper under Ark. R. Civ. P. 5(b), which provides:

> Whenever under this rule or any statute, service is required or permitted to be made upon a party represented by an attorney, the service shall be upon the attorney unless the court orders service upon the party himself.

Thus, whether service on Mr. Butler was sufficient depends upon whether he represented appellant.

Mr. Butler was the attorney who filed the original petition for contempt against appellee on behalf of the Arkansas Department of Finance and Administration. The scope of his representation is defined by statute. Arkansas Code Annotated § 9-14-210 provides:

> (d) The State of Arkansas is the real party in interest for purposes of establishing paternity and securing repayment of benefits paid and assigned past due support, future support, and costs in actions brought to establish, modify, or enforce an order of support in any of the following circumstances:
>
> (1) Whenever aid under §§ 20-76-410 or 20-77-109 is provided to a dependent child; or
>
> (2) Whenever a contract and assignment for child support services has been entered into for the establishment or enforcement of a child support obligation for which an assignment under § 20-76-410 is not in effect; or
>
> (3) Whenever duties are imposed on the state pursuant to the Uniform Interstate Family Support Act, § 9-17-101 et seq.
>
> (e)(1) In any action brought to establish paternity, to secure repayment of government benefits paid or assigned child support arrearages, to secure current and future support of children, or to establish, enforce, or modify a child support obligation, the Department of Human Services, the Office

of Child Support Enforcement, or both, or their contractors, may employ attorneys.

(2) An attorney so employed shall represent the interests of the Department of Human Services or the Office of Child Support Enforcement *and does not represent the assignee of an interest set out in subsection (d) of this section.*

(3) Representation by the employed attorney shall not be construed as creating an attorney-client relationship between the attorney and the assignee of an interest set forth in subsection (d) of this section, or with any party or witness to the action, other than the Department of Human Services or the Office of Child Support Enforcement, regardless of the name in which the action is brought.

(Emphasis added.)

In this case, the appellant executed a contract with the Child Support Enforcement Unit to assign her child-support rights. The State filed its petition pursuant to the statute, indicating in the style of the case that it was filed on behalf of the State. Clearly, Mr. Butler was prohibited, by statute, from representing the appellant, and the trial court's finding that he did represent her was erroneous. Because we find that the trial court erred in finding that the appellant was represented by Mr. Butler, it is clear that service of the counterpetition on him by appellee was not valid service under Ark. R. Civ. P. 5.

A judgment rendered without notice to the parties is void. *Sides* v. *Kirchoff*, 316 Ark. 680, 874 S.W.2d 373 (1994). When there has been no proper service and, therefore, no personal jurisdiction over the defendant in a case, any judgment is void ab initio. *Id.* Thus, the original order changing custody of the parties' minor children to the appellee was void ab initio.

Reversed and remanded for action consistent with this opinion.

PITTMAN and ROGERS, JJ., agree.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY *v.* Dorothy LINDSEY, Executrix of the Estate of Mary Ellen Thielemier, Deceased

CA 95-817 926 S.W.2d 850

Court of Appeals of Arkansas
Division III
Opinion delivered August 21, 1996

Snellgrove, Laser, Langley, Lovett & Culpepper, by: *Todd Williams,* for appellant.

Riffel, King & Smith, by: *Jim King,* for appellee.

WENDELL L. GRIFFEN, Judge. State Farm Mutual Automobile Insurance Company ("appellant" or "State Farm") appeals from the

decision by the Randolph County Circuit Court granting summary judgment to Dorothy Lindsey ("appellee" or "Lindsey") for insurance benefits under both the uninsured and the underinsured provisions of an automobile policy. Lindsey's mother was the insured under the policy and was killed in an automobile accident by a uninsured tortfeasor. State Farm paid the $25,000 policy limit under the uninsured motorist provision. Lindsey, as the executrix of her mother's estate, brought this action to also recover under the underinsured provision of the same policy. The trial court granted summary judgment in her favor after both parties filed summary judgment motions. State Farm contends that this case is controlled by *State Farm Mut. Auto. Ins. Co.* v. *Beavers*, 321 Ark. 292, 901 S.W.2d 13 (1995), a decision issued by the supreme court while this appeal was pending. We agree that *Beavers* is dispositive. Accordingly, we reverse and remand with the instruction that summary judgment be entered in favor of State Farm.

As an initial matter, we note that appellant argues in its jurisdictional statement that jurisdiction may properly lie with the supreme court because this case involves the interpretation and construction of an act of the General Assembly. Ark. R. Sup. Ct. 1-2(a)(3). However, we need not interpret Ark. Code Ann. §§ 23-89-209 (Supp. 1995) and 23-89-401—405 (Repl. 1992) (the underinsured and uninsured motorist coverage acts, respectively). *Beavers* has done that for us. Hence, this case requires that we simply apply the relevant case law. Thus, it is properly within our jurisdiction. Ark. R. Sup. Ct. 1-2(a).

The facts in *Beavers* are virtually identical to the instant case. The insured was struck by an uninsured motorist. The State Farm auto policy involved appeared to contain the same uninsured-underinsured provisions. The accident occurred before the 1993 amendment to the Arkansas underinsured motorist statute. Ark. Code Ann. § 23-89-209 (Repl. 1992) (amended by Act 1180 of 1993). The only differences between *Beavers* and the instant case — none of which are relevant — are that State Farm in *Beavers* refused to pay benefits under either the uninsured or the underinsured provisions (State Farm paid the policy limit under the uninsured provision here), and the case went to trial before a jury rather than, as here, being decided on motions for summary judgment.

In a well-researched opinion that relied on law review articles, treatises, and case law from other jurisdictions, the supreme

court stated:

> [I]n following the simple rule of considering this policy's language, including its definition and exclusions, together with the language of the statute, which clearly refers to the tortfeasor's insurance coverage, we must conclude that underinsured coverage does not apply when the insured is struck by an uninsured motorist.

321 Ark. at 297, 901 S.W.2d at 16.

The automobile policy at issue states in clear terms: "an *under*insured motor vehicle does not include a land motor vehicle . . . defined as an *un*insured motor vehicle in your policy." (Emphasis added.) Moreover, the underinsured motorist statute provides: "Coverage of the insured pursuant to underinsured motorist coverage shall not be reduced by *the tortfeasor's insurance coverage*, except to the extent that the injured party would receive compensation in excess of his damages." Ark. Code Ann. § 23-89-209 (Repl. 1992) (emphasis added). We believe that both the Arkansas General Assembly and State Farm intended for uninsured and underinsured coverages to be distinct concepts. In particular, the statute implies that underinsured coverage is not triggered unless the tortfeasor has insurance in the first instance. To allow uninsured and underinsured coverage to apply to the same accident — as appellee would have us hold — would permit a double recovery in the face of clear statutory and policy language to the contrary.

We reverse the summary judgment in favor of appellee. We also remand to the circuit court with the instruction that summary judgment be entered in favor of State Farm.

Reversed and remanded.

MAYFIELD and ROBBINS, JJ., agree.

Chad EVELAND, et al. *v.* STATE of Arkansas

CA CR 93-242 929 S.W.2d 165

Court of Appeals of Arkansas
Division III
Opinion delivered August 28, 1996

Andrew L. Clark, for appellant Chad Eveland.

Phillip M. Hendry, for appellant Scotty Hancock.

Diana M. Maulding, for appellant Charles Provance.

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

JOHN B. ROBBINS, Judge. Chad Eveland, Scotty Hancock, and Charles Provance appeal from a decision of the Randolph County Circuit Court, which ruled on remand from this court that the appellants' motions for separate trials and counsel's motion to be relieved as counsel for two of the appellants were not timely and were denied.[1] We find merit to the appellants' arguments and reverse for a new trial.

The appellants were originally convicted of rape and each was sentenced to ten years in the Arkansas Department of Correction. An appeal was taken, and in an unpublished opinion on December 7, 1994, we remanded the case to the trial court because of the trial court's failure to rule on the appellants' motions for separate trials and counsel's motion to be relieved as counsel. We observed in our 1994 opinion that the trial court was under the misconception that the constitutional prohibition against double

[1] Although the trial judge commented from the bench that he was denying all of these motions, the order filed on March 7, 1995, from which this appeal was taken, only recites that appellants' motions for separate trials were denied and was silent on appellants' motion for separate counsel. However, because it appears that the trial court implicitly denied this motion and since all parties to this appeal treat the motion as having been denied, so do we.

jeopardy would prevent the appellants from being tried again if either motion were granted. We clearly stated in our first opinion that, "[w]hile it is true that jeopardy attaches to the accused when the jury is finally sworn to try the case, the constitutional right against double jeopardy, as is pertinent here, may be invoked to bar a second trial only when the first jury is discharged before the case is completed *without the consent of the defendant*, expressed or implied." We went on to hold that, "since appellants were the moving parties, granting the motions and discharging the jury clearly would not have prevented appellants from being tried for their alleged crimes." *See Wilson* v. *State*, 289 Ark. 141, 712 S.W.2d 654 (1986).

Upon remand, the trial court failed to understand, or at least failed to acknowledge, the authorities we cited that explained why double jeopardy would not act as a bar to a subsequent prosecution. The trial judge referred to our 1994 opinion and stated on the record that "I don't care what they say. What is the, what is the standard law?" We find the trial court's remarks intemperate and disrespectful of our authority. Even if our opinion was erroneous, which it was not, our earlier decision was controlling under the doctrine of the law of the case. *See Christian* v. *State*, 318 Ark. 813, 889 S.W.2d 717 (1994); *Mauppin* v. *State*, 314 Ark. 566, 865 S.W.2d 270 (1993); *Bennett* v. *State*, 308 Ark. 393, 825 S.W.2d 560 (1992); *Findley* v. *State*, 307 Ark. 53, 818 S.W.2d 242 (1991); *Bussard* v. *State*, 300 Ark. 174, 778 S.W.2d 213 (1989). Because the trial court ultimately ruled that the motions were untimely, even though still laboring under the misconception that double jeopardy would bar a new trial, we now review the correctness of those rulings.

A brief recitation of the facts is necessary for a proper understanding of the issues currently on appeal. The appellants were charged with the rape of a thirteen-year-old girl that occurred in August 1990. Shortly after the alleged rape, each of the three appellants gave a statement to the police in which each made certain incriminating statements against the others, as well as statements implicating themselves.

On July 6, 1992, appellants' attorney of record notified the trial court of his suspension from the practice of law. Just prior to the trial, Mr. Cecil Kildow undertook representation of appellants and represented all three of them at trial. During a preliminary hearing prior to selecting the jury, the prosecutor informed the

court that he intended to use the appellants' prior statements for impeachment purposes during cross-examination. Shortly thereafter, but after the jury was selected and sworn, appellants' counsel moved for separate trials and to be relieved as counsel for two of the appellants. Counsel argued that a conflict had arisen in attempting to represent all three appellants because there were potential "defenses that the alleged accomplices could raise that would adversely affect the case of the alleged perpetrator." As discussed above, the trial court ruled that jeopardy had attached and denied the motion. To reiterate our earlier ruling, though jeopardy had attached, the appellants were the moving parties, and double jeopardy would not bar a subsequent prosecution had the trial court granted appellants' motions. On remand the trial court again denied the motions, ruling that they were untimely.

The appellants first contend on appeal that the trial court erred in failing to grant their motions for separate trials. On remand appellants argued that they were entitled to separate trials under Ark. R. Crim. P. 22.3, and argued that they had met certain criteria that are to be considered for a severance, citing *Cloird* v. *State*, 314 Ark. 296, 862 S.W.2d 211 (1993), and *McDaniel* v. *State*, 278 Ark. 631, 648 S.W.2d 57 (1983). Appellants argue that their defenses were antagonistic because of their statements to the police implicating each other. Charles Provance and Chad Eveland also contend that, because the evidence against Scotty Hancock was overwhelming and the evidence against them only minimal, severance should have been granted.

Arkansas Rule of Criminal Procedure 22.3 provides:

> (a) When a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court shall determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court shall require the prosecuting attorney to elect one of the following courses:
>
> (i) a joint trial at which the statement is not admitted into evidence;
>
> (ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted, the statement will not prejudice the moving defendant; or

(iii) severance of the moving defendant.

In *McDaniel* v. *State*, *id.*, the supreme court listed seven factors that a trial court should consider in deciding whether to grant a severance. These factors favoring severance are as follows:

> (1) where defenses are antagonistic; (2) where it is difficult to segregate the evidence; (3) where there is a lack of substantial evidence implicating one defendant except for the accusation of the other defendant; (4) where one defendant could have deprived the other of all peremptory challenges; (5) where if one defendant chooses to testify the other is compelled to do so; (6) where one defendant has no prior criminal record and the other has; (7) where circumstantial evidence against one defendant appears stronger than against the other.

The issue of severance is to be decided on a case-by-case basis considering the totality of the circumstances. *Williams* v. *State*, 304 Ark. 279, 801 S.W.2d 296 (1990). A trial court's decision denying a motion to sever will not be disturbed unless the appellate court finds that there has been an abuse of discretion. *Ford* v. *State*, 296 Ark. 8, 753 S.W.2d 258 (1988). A trial court is said to have abused its discretion when it is manifest from the record that a severance was necessary in order to have a fair determination of an accused's guilt or innocence. *Legg* v. *State*, 262 Ark. 583, 559 S.W.2d 22 (1977).

In the present case, the trial court failed to consider Arkansas Rule of Criminal Procedure 22.3 when it ruled that the appellants' motions were untimely. Furthermore, the trial court did not consider any of the seven factors set forth above that favor severance. The evidence in this case clearly showed that appellants' defenses were antagonistic because their prior statements were used against each other as well as themselves. Both Chad Eveland's and Charles Provance's statements, which were admitted into evidence, stated that their codefendant, Scotty Hancock, had sexual intercourse with the victim. Each of the codefendants' statements contained damaging statements against the others. The victim testified at trial that Charles Provance gave her assistance after the alleged rape occurred. There was clearly a lack of substantial evidence indicating that Charles Provance was an accomplice to the alleged rape. Additionally, all three appellants were called as witnesses in their own

defense, possibly being compelled to testify due to the others testifying and implicating one another.

Based on these three factors favoring severance and the trial court's failure to follow Rule 22.3 to protect the appellants against each other's statements, we believe that the trial court abused its discretion in failing to grant the severance. Trial counsel had only recently been appointed and seems to not have been on notice, prior to trial, of the significance of the appellants' statements, that they were going to be introduced into evidence, and of the conflict in defenses that we believe is apparent from the record.

Appellants secondly contend that the trial court erred in failing to grant Mr. Kildow's motion to withdraw as counsel for two of the appellants. He requested to be relieved as counsel as to Chad Eveland and Charles Provance, stating, "There are potentially defenses that the alleged accomplices could raise that would adversely affect the case of the alleged perpetrator." Appellants argue that the trial court abused its discretion in ruling that the motion was untimely. We agree.

In *White* v. *State*, 39 Ark. App. 52, 837 S.W.2d 479 (1992), we stated that when a conflict of interest exists, the issue is whether the conflict adversely affected counsel's performance. An attorney may represent two or more defendants without such representation constituting a per se violation of the Sixth Amendment right to effective assistance of counsel. *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978). A defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. *Cuyler* v. *Sullivan*, 446 U.S. 333 (1980). If no objection at trial is made, a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Id.* at 349.

In *Holloway* v. *Arkansas*, *supra*, the Supreme Court recognized that defense counsel "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." When a substantial disparity in the evidence exists between the codefendants, it is unusual if an actual conflict does not also exist. *See also Ingle* v. *State*, 294 Ark. 353, 742 S.W.2d 939 (1988). The Supreme Court also stated in *Holloway* that defense attorneys have the obligation to advise the court at once upon discovering a conflict of interest.

In the present case, the sole counsel for the appellants had just recently undertaken their defense. It was only just prior to the jury being sworn that the prosecutor voiced his intent to use the statements in a specific manner. Shortly thereafter counsel moved to sever and to be relieved as counsel because of the conflict of interest.

As pointed out above, the appellants' defenses were antagonistic in certain respects because of their prior statements, and because of their anticipated and actual testimony against each other at trial. There was a large disparity between the evidence against one defendant, Scotty Hancock, who was the alleged "perpetrator," and Charles Provance, who the victim herself acknowledged had assisted her after the rape. Counsel also had a conflict in the defense of the three appellants because of his need to call them to testify in their own respective behalves, yet each contradicted the others' alleged innocence during direct testimony. Furthermore, they implicated each other in their prior statements that were used by the prosecution on cross-examination.

As the Supreme Court stated in *Holloway*, trial counsel was in the best position to evaluate the possible conflicts and requested to be relieved as counsel for two of the appellants. It appears that counsel made his motion in a reasonably timely manner upon learning of the problem. Such a fundamental right to counsel should not have been overlooked by the trial court. We believe that the trial court abused its discretion in denying appellants' motions for separate counsel.

We reverse and remand for a new trial with separate counsel for each respective appellant. The appellants are entitled to separate trials unless they now agree to a consolidated trial.

Reversed and remanded.

GRIFFEN, J., agrees.

MAYFIELD, J., concurs.

Waymond DUGAN *v.* JERRY SWEETSER, INC., and Bituminous Insurance Companies

CA 95-1066 928 S.W.2d 341

Court of Appeals of Arkansas
Division II
Opinion delivered September 11, 1996
[Petition for rehearing denied October 9, 1996.]

Tolley & Brooks, P.A., by: *Jay N. Tolley*, for appellant.

Anderson & Kilpatrick, by: *Randy Murphy*, for appellees.

WENDELL L. GRIFFEN, Judge. Waymond Dugan ("Dugan" or "appellant") suffered an electrical shock on September 7, 1993, while working for his employer, Jerry Sweetster, Inc. ("Sweetster" or "the employer"). Dugan was draining water from a hole with an electric pump when the pump stopped working. When Dugan reached down and touched the pump, he received a shock that lasted about ten seconds. He recalled a small explosion, recalled being knocked backwards, and recalled that he lay on a nearby pipe semiconscious for an estimated 15-20 minutes until help arrived. Dugan was admitted to Washington Regional Medical Center in Fayetteville where he presented with an "entry port" or burn site on his hand, but no exit port.[1] He complained of anxiety and chest pains, but a battery of tests revealed nothing abnormal except for the 3-4 mm burn site on his hand. He remained at the hospital two days for observation and was discharged. Within hours of his discharge, he was readmitted after he began to stutter, had trouble walking, and lost consciousness again.

Dugan was then hospitalized for five days, and more diagnostic tests were performed. A CAT scan, EKG, MRI, and chest x-ray showed no abnormal findings. However, his stuttering and difficulty with walking became more pronounced over time. He was referred to a neurologist, Dr. Brown, and a clinical psychologist, Dr. Back. They agreed that Dugan suffered post-traumatic stress syn-

[1] The medical records clearly show that Dugan had an entry port, although the port was stated to be on his *left* hand in one paragraph but on the *right* hand according to a later paragraph in the same admission report authored by Dr. Bryan Abernathy and dictated on September 11, 1993.

drome, a conversion reaction, and possibly depression — all psychological disorders. Both doctors were uncertain whether Dugan's mental problems were caused by an organic source (i.e. a physical injury) or a psychological source. A speech pathologist opined that appellant's stuttering resulted from an organic source. Over time, Dr. Brown and Dr. Back concluded that Dugan's mental illness was the direct result of the electrical shock.

The employer initially deemed Dugan's problems compensable, but later controverted all benefits related to his psychological problems. The administrative law judge found that Dugan's psychological problems were compensable. The Workers' Compensation Commission (the "Commission") reversed, finding that Dugan failed to prove the requisite physical injury to make a mental injury compensable under Ark. Code Ann. § 11-9-113 (Repl. 1996). We disagree and reverse, holding that the Commission erred when it held that Dugan failed to prove that he received a physical injury so that his mental problems were compensable.

■ Workers' compensation appeals are governed by the substantial-evidence standard of review. *Bradley* v. *Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Couch* v. *First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995). Where the Workers' Compensation Commission has denied a claim, *"substantial evidence"* requires the appellate court to affirm if the Commission's opinion displays a *substantial basis* for the denial of relief. *Bussell* v. *Georgia-Pacific Corp.*, 48 Ark. App. 131, 891 S.W.2d 75 (1995) (emphasis added).

■ One of the significant changes to the Arkansas Workers' Compensation Law made by Act 796 of 1993 was a new section that defined the compensability of mental injury or illness. Prior to Act 796, workers' compensation benefits were upheld for mental illness in a variety of situations ranging from psychological disorders resulting from traumatic physical injury to nontraumatic experiences involving job stress. *See, e.g.*, *Wilson & Co. Inc.* v. *Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968); *George W. Jackson Mental Health Ctr.* v. *Lambie*, 49 Ark. App. 139, 898 S.W.2d 479 (1995); *City of Fort Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992); *Boyd* v. *General Indus.*, 22 Ark. App. 103, 733 S.W.2d 750 (1987). Act 796 narrowed the definition of compensable mental illness or injury as follows:

> (a)(1) A mental injury or illness is not a compensable injury unless it is caused by *physical injury to the employee's body*, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.

Ark. Code Ann. § 11-9-113(a)(1) (Repl. 1996)(emphasis added). We now must interpret this section and, particularly, the term "physical injury" as it relates to compensable psychological injury. Although we are construing an act of the General Assembly, our jurisdiction is proper under Rule 1-2(a)(3) of the Rules of the Supreme Court.

The Commission denied compensation to Dugan because it held that the preponderance of the evidence failed to show "actual demonstrable damage, impairment, wound, or other bodily harm or disorder to the internal or external structure of the body." For this definition of "physical injury," the Commission relied on *Larson's* workers' compensation treatise and other medical and legal dictionaries. The Commission's opinion also imported language from the statutory definition of "compensable injury" which requires medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(5)(D) and (16). We note that Webster's defines injury as simply "harm or damage." *Webster's New World Dictionary and Thesaurus* 320 (1996). "Bodily injury" has been defined as "physical pain, illness or any impairment of physical condition." *Black's Law Dictionary* 786 (6th ed. 1990). One medical dictionary defines injury as "damage or wound or trauma." *Stedman's Medical Dictionary* 786 (25th ed. 1990). Another calls it "a disruption of the integrity or function of a tissue or organ by external means, which are usually mechanical but can also be chemical, electrical, thermal, or radiant." *International Dictionary of Medicine and Biology*, 1443, Vol. II. (1986).

The undisputed facts of this case show that Dugan received a 3-4 mm burn (the entry port) to his hand when the shock occurred. That burn is documented in the medical records, and by all accounts was caused by the electrical shock. Hence, it is clear that Dugan received an electrical shock in the course of his employment that produced a physical injury. He suffered a 3-4 mm burn on his hand where the electric current entered his body. Even

if the more elaborate diagnostic tests such as the MRI and the EKG produced no abnormal findings, it is inescapable that he suffered a wound to his hand.

Act 796 clearly shows that proof of a physical injury is now required before a psychological injury can be compensable in Arkansas. Here, we have a physical injury; namely, an observable wound to the external structure of the body. Other jurisdictions with similar statutory requirements have upheld benefits under similar facts. In Connecticut, inappropriate touching was held a sufficient basis for recovery for a mental disorder. *Crochiere* v. *Board of Educ.*, 227 Conn. 333, 630 A.2d 1027 (1993). Although a Florida decision held that mere touching does not suffice, a bite and scratch on the hand of a paramedic was sufficient to support an award of workers' compensation benefits for psychological injury. *City of Hollywood* v. *Karl*, 643 So.2d 34 (Fla. Ct. App. 1994).

■ It is true that Act 796 now requires us to construe the Workers' Compensation Law strictly. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). However, we find no substantial basis to uphold the denial of benefits to the appellant where the proof of his physical injury is present in the undisputed medical records.

We reverse and remand to the Commission with instructions to enter an award of benefits consistent with this decision.

Reversed and remanded.

ROBBINS and STROUD, JJ., agree.

[redacted]