Kimberly JENKINS *v.* STATE of Arkansas

CA CR 97-98 959 S.W.2d 57

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 22, 1997

Jeff Rosenzweig and *Woodson D. Walker*, for appellant.

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

JOHN B. ROBBINS, Chief Judge. Appellant Kimberly Jenkins was convicted by a jury of felony theft by receiving based upon her possession of three "slides" for a slide bracelet. She was thereafter sentenced to pay a fine of $4,275.00. Ms. Jenkins now appeals, raising four points for reversal.

Ms. Jenkins's first argument is that the evidence was insufficient to support her conviction. Next, she contends that, if we find sufficient evidence to support her conviction, the conviction should be reduced to a misdemeanor. Third, Ms. Jenkins asserts that the prosecuting attorney made improper arguments to the jury such that reversal is mandated. Finally, Ms. Jenkins argues that the trial court erred in refusing to grant a mistrial due to improper impeachment of Ms. Jenkins during the trial. We affirm.

When an appellant challenges the sufficiency of the evidence, we review the sufficiency argument prior to a review of any alleged trial errors. *Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach v. State, supra.* In determining the sufficiency of the evidence, we review the proof in the light most favorable to the appellee, considering only the evidence that tends to support the verdict. *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992).

At the trial in the instant case, Officer Chip Stokes testified on behalf of the State. Officer Stokes stated that he responded to a call from a jewelry store on December 12, 1995. He was informed by the jewelry store owner that Ms. Jenkins was present and was in possession of stolen jewelry. Upon his arrival, Officer Stokes asked Ms. Jenkins how she came into possession of stolen jewelry, and she told him that a friend had purchased it for her from a pawn shop in Dallas, Texas. Ms. Jenkins was then arrested, and according to Officer Stokes she was very cooperative and did not protest. Officer Stokes testified that Ms. Jenkins possessed

three "slides" that were stolen and that the slides were valued at $275, $275, and $425.

John David Hawks, part owner of JWC Jewelers, testified next. He stated that, on November 30, 1995, Ms. Jenkins came into his store and was interested in buying some jewelry. She then picked out a bracelet and one slide, and put them on layaway. A few days later, Ms. Jenkins entered the store with two "nice looking slides" and told Mr. Hawks to put those slides on the bracelet instead of the slide that she had originally selected. She explained that she received the two slides from her boyfriend in Texas. Mr. Hawks thought the slides looked familiar, and after checking his inventory he discovered that they had been stolen from the store. A few days later, Ms. Jenkins brought in five more slides and told Mr. Hawks to add them to her bracelet. He told her that he would do so, kept the slides, and called Dayer's Jewelry and found out that one of these slides had been stolen from that store. When Ms. Jenkins returned to pick up her slide bracelet, both jewelry store owners and the police were waiting for her. According to Mr. Hawks, the two slides that had been stolen from his store retailed for $275 and $270.

Danny Cook, also part owner of JWC Jewelers, testified that he recognized the jewelry on the bracelet as that which had been stolen from the store. He asked Ms. Jenkins whether she had been in Dayer's, and she replied that she had not. According to Mr. Cook, when they accused Ms. Jenkins of theft she sat down and stated, "What happens now," and acted as if a "bombshell dropped."

Tommy Dayer, owner of Dayer's Jewelry, testified that on or about November 30, 1995, Ms. Jenkins came into his store and wanted to look at some slides. One of these slides was eventually discovered missing, and Mr. Dayer testified that this was one of the slides that Ms. Jenkins had given to Mr. Hawks for attachment to her bracelet. The slide was admitted into evidence, and Mr. Dayer identified it as being the slide that was found to be stolen soon after Ms. Jenkins's visit to his store. He stated that the slide retailed for $400.

Ms. Jenkins testified on her own behalf and did not deny that the three slides at issue had been stolen. However, she denied stealing them or having any knowledge that they had been stolen. Rather, she indicated that the slides were a Christmas gift from a friend in Dallas, Texas. She acknowledged being at both JWC Jewelers and Dayer's Jewelers, but said she did not take any of the slides. Ms. Jenkins admitted that in October 1994 she pleaded guilty to misdemeanor shoplifting. Subsequent to that time, she acquired a teaching job in Conway and held that job through the date of her trial.

Ms. Jenkins's first point on appeal is a challenge to the sufficiency of the evidence. Arkansas Code Annotated section 5-36-106(a)(Repl. 1993) defines theft by receiving, and provides:

> A person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen.

Ms. Jenkins submits that, although she was admittedly in possession of stolen property, there was no substantial evidence that she knew or had good reason to know that the property was stolen. She points out that no one saw her take anything from either store, and also points to her testimony that the jewelry was received from her boyfriend as a Christmas present. Ms. Jenkins asserts that it would be totally illogical to buy a bracelet from a jewelry store and then steal slides from the same store and attempt to have them attach the stolen slides. Under these facts, she asserts her conviction was based on speculation and conjecture.

We find substantial evidence to support Ms. Jenkins's conviction. There was evidence presented to show that Ms. Jenkins viewed the stolen slides prior to the time that they were discovered missing. When confronted at JWC Jewelers, there was evidence that Ms. Jenkins denied ever being in Dayer's store, when in fact she had been and later so admitted. The jury was entitled to disbelieve her story that a boyfriend from Dallas gave her the slides as a Christmas gift, particularly since she received the slides in early December. Although Ms. Jenkins denied stealing the slides or having knowledge that they were stolen, the jury was

not required to believe this testimony, particularly since Ms. Jenkins was the person most interested in the outcome of the trial. *See Moore v. State*, 315 Ark. App. 131, 864 S.W.2d 863 (1993). From all the circumstances, there was ample evidence from which the jury could reasonably conclude that Ms. Jenkins was in possession of property that she knew to be stolen.

Ms. Jenkins next contends that her conviction should at least be reduced to a misdemeanor. She notes that the information charged her with possession of over $500 worth of stolen property, and that the jury was instructed to convict her of a felony if the stolen goods exceeded $200 in value. In 1995, our legislature increased the minimum threshold for felony theft from $200 to $500. *See* Ark. Code Ann. § 5-36-103(b)(2)(A) (1995 Supp.) However, the legislature did not change the minimum felony threshold for theft by receiving. Nevertheless, Ms. Jenkins submits that, although not explicitly stated by the 1995 amendments, the felony threshold for theft by receiving was also increased due to the language of Ark. Code Ann. § 5-36-102(a)(2) (Repl. 1993), which provides:

> A criminal charge of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

Ms. Jenkins argues that the jury should have been instructed that the offense was a misdemeanor if the value was $500 or less, and further submits that there was insufficient evidence to prove that the aggregate value of the three slides exceeded $500.

From the abstract presented, it is evident that there was no objection made to the jury instruction now at issue. It is well settled that an argument for reversal will not be considered in the absence of a timely objection. *Pharo v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989). Ms. Jenkins contends that no objection was necessary because this was a "structural error" going to the

heart of the offense. However, she gives no authority for this proposition. We will not consider assignments of error which are unsupported by convincing argument or citation to authority. *Womack v. State*, 36 Ark. App. 133, 819 S.W.2d 306 (1991). As a result of Ms. Jenkins's failure to object, her second point on appeal has not been preserved for our review.

Ms. Jenkins's next contention is that the prosecuting attorney engaged in improper argument that warrants reversal. Ms. Jenkins essentially contends that the prosecutor repeatedly indicated to the jury that Ms. Jenkins was not presumed to be innocent because she was unable to give an adequate explanation for being in possession of stolen property. Ms. Jenkins acknowledges that no objection was made during the prosecutor's argument, but asserts that none was necessary to preserve this point because the comments were so egregious that the trial court committed plain error in refusing to correct the statements or admonish the jury.

We need not address Ms. Jenkins's argument regarding various comments made during the prosecutor's closing argument. This court has held that there is no "plain error" rule, but instead has consistently held that the burden of obtaining a ruling is on the movant, and unresolved questions and objections are waived and may not be relied upon on appeal. *Aaron v. State*, 319 Ark. 320, 891 S.W.2d 364 (1995). Ms. Jenkins cites *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), for the proposition that it is incumbent upon the trial court to intervene, even without an objection, when a prosecutor makes improper comments to the jury. However, in dicta contained in that opinion, the supreme court merely suggested that the trial court may have a duty to correct such an error through an admonition to the jury or granting of a mistrial. The supreme court noted that such an exception to the contemporary objection rule "is a mere possibility, for it has not yet occurred in any case." *Wicks v. State*, 270 Ark. at 786, 606 S.W.2d at 369. We decline to extend this hypothetical exception to the general rule that an objection is necessary to preserve a point for review, and because no objection was made to the prosecutor's remarks in the instant case, we fail to reach the merits of Ms. Jenkins's third contention.

Ms. Jenkins's remaining assertion is that the trial court erred in refusing to grant a mistrial due to improper impeachment. On cross-examination, the prosecutor asked Ms. Jenkins whether she informed the Conway Public School System of her misdemeanor theft conviction when she applied for a job as a teacher. Ms. Jenkins replied that she did not disclose that information because her employer did not ask about it. After an objection by the defense, the prosecution stated that it was trying to attack Ms. Jenkins' credibility by showing that she misled her employer in order to get a job. Then, the defense moved for a mistrial and the trial court denied the motion. Ms. Jenkins now argues that the trial court's ruling was erroneous because the elicited testimony prejudiced the jury to the extent that she was denied a fair trial. Ms. Jenkins notes that the prosecution presented no proof that the Conway School District even asked about any misdemeanor convictions prior to hiring her.

We find no error in allowing the State to ask the question in dispute. On direct examination, Ms. Jenkins admitted that she had been convicted of misdemeanor shoplifting prior to gaining employment as a school teacher. The State then asked her on cross-examination whether she informed the school district about the conviction. This question was not objectionable because Ms. Jenkins "opened the door" to the question by discussing it on direct examination. *See Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994). While we do not know why Ms. Jenkins testified on direct examination about her earlier misdemeanor, it is conceivable that she wanted to display her candor before the court to bolster her credibility. The State could properly then cross-examine her about this testimony and inquire as to whether her candor extended to also telling her employer about the conviction when she was applying for her teaching job. Moreover, any possible prejudice was diminished by the fact that Ms. Jenkins replied that she did not inform the school district about her misdemeanor conviction because the question was not asked when she applied for employment.

A mistrial is an extreme remedy to be used only when it is determined that something has occurred that will undoubtedly deprive a party of a fair trial. *Foreman v. State*, 328 Ark. 583,

945 S.W.2d 926 (1997). A trial court has wide discretion when it comes to a motion for a mistrial. *Id.* In the instant case, we find that the trial court did not abuse its discretion in refusing to find that the contested line of questioning by the prosecution was improper or prejudiced Ms. Jenkins to such an extent that the granting of a mistrial was necessary.

Affirmed.

PITTMAN, JENNINGS, NEAL, and MEADS, JJ., agree.

JUDITH ROGERS, Judge, dissenting. As her fourth issue on appeal, appellant contends that the trial court erred in refusing to grant a mistrial based on an improper impeachment tactic employed by the deputy prosecutor. My disagreement with the majority view lies in its failure to acknowledge this clear and prejudicial error and in its attempt to excuse it on the basis of invited error.

On direct examination, appellant admitted that she had previously pled guilty to the misdemeanor offense of theft of property, or shoplifting. During the State's cross-examination of appellant, the following transpired:

> DEPUTY PROSECUTOR: And is it true — is it not true that you were convicted of the crime of theft of property in Pulaski County on October 18, 1994?
>
> APPELLANT: I already said yes when Mr. Davis brought it out.
>
> DEPUTY PROSECUTOR: Did you — did you provide this information to [the] Conway Public School System when you applied for your job?
>
> APPELLANT: No, I didn't. Everyone has skele-tons in a closet and things that they don't want to come out, and Conway Public Schools didn't ask me about it.
>
> DEPUTY PROSECUTOR: Conway Public Schools didn't ask you about it? Okay. So there wasn't anything on your application for employment here —
> DEFENSE COUNSEL: Your honor, that has nothing to do with this— that's irrelevant. We're talking about a misdemeanor.
>
> THE COURT: Where are you going counselor?

> DEPUTY PROSECUTOR: I'm questioning the credibility of this witness, your honor, that she would have filled out an application for employment and let mis—misled her employer as to her prior convictions for crime.
>
> DEFENSE COUNSEL: And that's garbage, your Honor. She's allowed to impeach with a prior conviction only to the tune of asking her. The fact it's a misdemeanor is not required on any application, and that's just trying to prejudice the jury with garbage, and I — I resent it, and I think it's improper. I am going to ask for a mistrial because of it. She knows it's improper.
>
> DEPUTY PROSECUTOR: State would object, your honor. There are no such grounds for a mistrial at this point.
>
> THE COURT: I wasn't even considering that. I was considering whether or not this is something that the jury could consider. I think you have asked the question, the witness has answered it, and I think you need to move on.
>
> DEPUTY PROSECUTOR: Okay. My last question was did she provide—I'm not sure what her answer was now. Did you provide this information to the Conway Public School System?
>
> DEFENSE COUNSEL: I'm objecting, your honor. That's not required to be asked. There's no requirement that that be listed on a misdemeanor, so it's an improper question.
>
> THE COURT: I think the witness has answered it. There was no requirement.

By the deputy prosecutor's own admission, this line of inquiry was pursued in an effort to impeach appellant's credibility by implying that she had misled her employer by failing to divulge her previous conviction on her application for employment. Questions asked a defendant about his or her previous misconduct for the purpose of attacking credibility are governed by Rule 608(b) of the Arkansas Rules of Evidence. It provides:

> 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 concerning his character for truthfulness or untruthfulness.

In *Gustafson v. State*, 267 Ark. 278, 590 S.W.2d 853 (1979), the supreme court observed that this rule marked a change in Arkansas law in that, before it was adopted, questioning was allowed concerning most any kind of misconduct. It was held that the rule was intended to restrict the use of such evidence, and recognizing the "highly prejudicial" nature of such information, the court set out the following three-part test governing its application: (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. The latter prong of the test has since been taken to mean a lack of veracity rather than dishonesty in general. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982); *Urquhart v. State*, 30 Ark. App. 63, 782 S.W.2d 591 (1990).

Applying the test here, while it can be said that the prosecution's question, implying deception, related to the issue of truthfulness, it can hardly be said that the first and second prongs of the test were satisfied. Good faith was utterly lacking since the record demonstrates that appellant was not asked to divulge this information. And, because she was not asked to disclose this conviction, her failure to do so does not reflect poorly on her capacity for truthfulness; therefore, the inquiry was wholly without probative value. The prosecutor's effort to impeach appellant's credibility by insinuating that she had deceived her employer was thus absolutely improper.

The prejudicial effect of this error cannot be minimized. The mere asking of this improper question elicited a prejudicial response from appellant about hiding "skeletons in a closet." The question should never have been asked, and appellant should not have been placed in the position of defending her actions in response to an improper question. And, it cannot be said with confidence that the jury was not left with the impression that appellant had purposely hidden this information from her prospective employer, a school district no less, or that the jury did not accept the prosecution's intimation that the conviction should have been disclosed and that the failure to do so was misleading and deceitful. Appellant's credibility was vital to her defense, and it is clear that her credibility suffered as a result of the prosecution's misguided efforts.

Nevertheless, the majority reasons that no harm resulted because of her response that she was not required to divulge this information. However, as indicated above, the prejudice to appellant was palpable. Moreover, our case law recognizes the prejudicial nature of this kind of inquiry and suggests that the prejudicial effect is not necessarily reduced by a negative answer. In *Gustafson, supra,* the court observed:

> We were also mistaken in *Cox* if we left the impression that a negative answer to an improper question results in no prejudicial error. There is no doubt that such a question harms a defendant's case. When it is proper, about a type of misconduct that is relevant, it is allowed only because it is relevant to the determination of the credibility of the defendant. But to say that a negative answer always removes the prejudice in every case goes too far.

Gustafson v. State, 267 Ark. at 291, 590 S.W.2d at 860. "The prejudicial effect of such questions is not remedied by the fact that they were answered in the negative. As was made clear in *Gustafson,* 'There is no doubt that such a question harms a defendant's case.'" *Cameron v. State,* 272 Ark. 282, 286, 613 S.W.2d 593, 595 (1981). "When answered negatively, no evidence of misconduct has been produced, but a prejudicial question may have been asked." *Spicer v. State,* 2 Ark. App. 325, 328, 621 S.W.2d 235, 237 (1981). "Since specific acts of misconduct may not be proved by extrinsic evidence, *Gustafson* teaches that a prosecutor hazards a reversal when he asks about prior misconduct and does not get an answer of probative value as to the witness's truthfulness or untruthfulness." *Summerlin v. State,* 7 Ark. App. 10, 14, 643 S.W.2d 582, 585 (1982). Given the inherent potential for prejudice flowing from this type of impeachment, the *Gustafson* court even issued a warning that prosecutors would be well advised to procure a ruling from the trial court prior to launching into this sort of inquiry before a jury. Based on the facts of this case and the foregoing authorities, I believe that the trial court abused its discretion in failing to grant appellant's motion for a mistrial.

Finally, I disagree with the majority's view that appellant somehow "opened the door" to the question by discussing the conviction on direct examination. True, it is generally recognized that otherwise inadmissible testimony may be offered when one

party has opened the door for another party to offer it. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994). This is referred to as "fighting fire with fire," and it is permitted when a defendant has been untruthful about a former crime or has brought otherwise inadmissible character evidence which the State may then rebut. *Id.* But this case does not involve such an act by appellant. Under the rules of evidence, appellant was not required to reveal a prior misdemeanor conviction for theft of property; nor could the State have brought it up on cross-examination. Ark. R. Evid. 608; Ark. R. Evid. 609. Her confession of it was thus a fortuitous occurrence for the State. But by admitting it, she said nothing untruthful and made no misrepresentation for the State to rebut. There was simply no fire to be extinguished by her admission, and it makes no sense to conclude that her admission of it provided the State with an opportunity to engage in improper impeachment. In fact, a similar conclusion was reached in *Larimore v. State, supra*, curiously enough the case cited by the majority to support its view.

I respectfully dissent.

UNIVERSITY OF ARKANSAS MEDICAL SCIENCES and Public Employee Claims Division *v.* Phyllis HART

CA 97-600 958 S.W.2d 546

Court of Appeals of Arkansas
Division II
Opinion delivered December 22, 1997

[redacted]

Nathan C. Culp, for appellants.

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

D. FRANKLIN AREY, III, Judge. This appeal challenges the Workers' Compensation Commission's determination that the appellee, Phyllis Hart, suffered a compensable injury. Appellants argue that the Commission's finding of a compensable injury is not supported by "objective findings" as required by Ark. Code Ann. § 11-9-102(5)(D) (Repl. 1996). They also argue that the Commission's finding that appellee suffered a compensable injury in the course and scope of her employment is not supported by substantial evidence. We affirm the Commission on both points.

Both issues presented by appellants question whether substantial evidence supports the Commission's finding.

> In reviewing appeals from the Workers' Compensation Commission, we view the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's decision and affirm that decision when it is supported by substantial evidence. Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. The Commission's decision will be affirmed unless fair-minded persons presented with the same facts could not have arrived at the conclusion reached by the Commission.

Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 384-85, 944 S.W.2d 524, 526 (1997)(citations omitted); *see City of Blytheville v.*

McCormick, 56 Ark. App. 149, 939 S.W.2d 855 (1997). "The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*." *City of Blytheville*, 56 Ark. App. at 152, 939 S.W.2d at 856.

In making our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995). The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.*

Appellee was employed as a nursing assistant at UAMS. Her duties included clerical work, answering phones, putting out linens, and making surgical packs. At the hearing before the Administrative Law Judge, she testified that on November 15, 1995, while lifting linens she sustained a back injury causing her to experience pain in her right shoulder, neck, and upper back. There were no witnesses to the injury. She was seen at the emergency room at UAMS on November 15, and she was diagnosed with a back strain. At the time of the injury she was five and one-half months pregnant; because of her pregnancy, extensive diagnostic testing could not be performed.

Appellee was seen by Dr. Teresa Maxwell in a follow-up on November 28. The medical record indicates:

> It was unclear the etiology of her pain [on November 15]. However, it appeared to be more trapezius and upper shoulder tightness.
>
> She comes in today for follow-up, without any improvements at all.
>
> On PE today, she is afebrile. Her VS are stable. She still walked and moved her head very slowly. Had problems sitting for any

> length of time on the exam table. Said that she did better in a regular chair without support.
>
> However, it was noted on exam that she seemed to have no problems nodding her head "yes" or "no" answering questions, than the effort put forth while trying to test her cranial nerves.
>
> She didn't seem to have any shoulder impingement. And had a lot of pain when the midline spine was palpated from C-3/4 all the way down to the coccyx on palpation.

The December 5, 1995 follow-up examination with Dr. Maxwell revealed the following:

> PE today is unchanged. She still complains of pain all the way down the midline spine to palpation as well as in the trapezes and the neck muscles. However, noted when walking in she can turn her head just fine and answer questions.

Dr. Maxwell diagnosed thoraco-lumbar strain.

Appellee was examined by Dr. Derek Lewis on December 22, 1995; she complained of pain in her right arm, shoulder, and back. Dr. Lewis reported that appellee suffered neck and back spasms. An earlier medical report dated December 6, 1995, also notes a diagnosis of positive spasms and lumbar strain.

On January 8, 1996, the appellee was examined by Dr. J.K. Smelz, an assistant professor with UAMS. Dr. Smelz noted in her physical examination that the appellee expressed symptoms of myofascial pain syndrome. Dr. Smelz was unable to determine whether the myofascial pain was secondary to an underlying problem. Due to the pregnancy, X-rays, CT scans, and MRIs could not be performed. However, Dr. Smelz did order a nerve conduction test to be performed, which was within normal limits. In a letter dated March 1, 1996, Dr. Smelz remarked that appellee did have some very mild muscle spasms in her shoulder girdle muscles at the January 8, 1996 examination; these were no longer present during a repeat examination on January 31, 1996.

In an April 22, 1996 letter, Dr. Lewis stated that the appellee presented to his office on December 22, 1995, with complaints of neck, back, shoulder, and arm pain. Dr. Lewis noted that "[u]nfortunately, this patient was pregnant at the time which pre-

vented us from doing any type of X-ray studies which also hampered us from establishing 'objective findings' other than the exam." Dr. Lewis again noted that his examination on that date did reveal back and neck spasms.

The Commission affirmed the decision of the Administrative Law Judge, and adopted her opinion as its own. The ALJ found that appellee sustained a compensable injury caused by a specific incident, "supported by objective findings (muscle spasm). . . ." The ALJ "noted that [the] general practitioner, Dr. Lewis, is the only physician who supports the claimant's position that this minor injury caused debilitating muscle spasm. . . . It is clear that Drs. Maxwell and Hunt felt the claimant's symptoms were out of proportion to her history of injury and clinical examination. . . ."

Appellants first argue that appellee's injury was not supported by objective findings. They contend that the muscle spasms were under her voluntary control, and point to Dr. Lewis's statement that the spasms were "50%" under patient control in support of this contention.

To be compensable, appellee's injury to her back had to be established by medical evidence, supported by "objective findings." Ark. Code Ann. § 11-9-102(5)(A)(i) provides in pertinent part:

> (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. . . .

Ark. Code Ann. § 11-9-102(5)(D) provides that a compensable injury must be established by medical evidence, supported by "objective findings" as defined in § 11-9-102(16). "Objective findings" are defined as findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i); *see Cox v. CFSI Temp. Employment*, 57 Ark. App. 310, 944 S.W.2d 856 (1997); *Daniel v. Firestone Bldg. Prods.*, 57 Ark. App. 123, 942 S.W.2d 277 (1997).

Dr. Lewis's examination of appellee revealed back and neck spasms. Appellee cites us to the following definition of "spasm":

> 1. An involuntary muscular contraction. . . . 2. Increased muscular tension and shortness which cannot be released voluntarily and which prevent lengthening of the muscles involved; [spasm] is due to pain stimuli to the lower motor neuron.

Stedman's Medical Dictionary 1304 (23d ed. 1976). Dr. Lewis agreed that muscle spasms are out of the voluntary control of the patient, although he did state that "50%" was "objective" and "50%" was under patient control.

Substantial evidence supports the determination that appellee's muscle spasms constitute "objective findings" in support of her claim of a compensable injury. Upon examination of appellee, Dr. Lewis observed back and neck spasms. This observation of "[a]n involuntary muscular contraction" or "[i]ncreased muscular tension and shortness which cannot be released voluntarily" constitutes an objective finding. *See Daniel*, 57 Ark. App. at 125, 942 S.W.2d at 278 (finding that a physician's direct observation of a fibrous mass, upon physical examination of the claimant, constitutes an objective finding pursuant to § 11-9-102(16)).

While there was medical evidence to the contrary of Dr. Lewis's observation and testimony, the resolution of this conflict was a question of fact for the Commission. Given the substantial nature of Dr. Lewis's testimony, we cannot reverse the Commission's decision to accept Dr. Lewis's testimony. *See City of Blytheville*, 56 Ark. App. at 155, 939 S.W.2d at 858.

Appellants also question whether appellee suffered a compensable injury in the course and scope of her employment. They note inconsistent statements, and that no one witnessed the appellee's accident. They suggest that appellee's testimony is not credible in light of perceived exaggerations and inconsistent statements.

The appellee testified that she had been physically healthy. She testified that she participated in races until she discovered she was pregnant in August of 1995. In September 1995, appellee brought a light duty release from her obstetrician, and her coworkers were told to assist her in lifting. The evidence indicates

that she had complained of leg problems in the past, but had not complained of back, neck, or shoulder pain until the injury in November 1995.

Following her injury, appellee attempted to return to work. She testified that she did not feel that her supervisor was cooperative in providing light duty. Appellee's supervisor, Nina Westbrook, testified that she tried to accommodate appellee in every way, not only for the work-related injury but also because of her pregnancy. Appellee returned to work on December 5, 1995, with a fifteen-pound lifting restriction that was later reduced to five pounds on December 11, 1995, and to two pounds on January 24, 1996. Ms. Westbrook testified that she literally weighed on a scale all of the objects that appellee might have to lift while at work to get an idea of what tasks appellee could perform.

Appellee was a member of the United States Army Reserve; her duties involved paper work associated with the soldiers' physicals and medical records. She testified that she injured her leg in 1991 when she fell down some stairs while stationed in Germany. She was diagnosed with tendonitis and stress fractures in her legs, but an EMG nerve conduction study proved normal. She further testified that after her November 15, 1995, injury she signed in for army duty but got permission to leave because of her injury.

Nicole Bogard testified that she was a captain in the army and was appellee's immediate supervisor. She testified that, to the best of her recollection, appellee was in attendance for the drill conducted on November 18 and 19, 1995. Captain Bogard could not recall exactly what tasks appellee performed that weekend; however, she stated that it was probably administrative work because she was prevented from lifting anything heavy due to her pregnancy. Appellee did not complain to her of any prior physical problems before sustaining the back injury in November 1995. Appellee missed the drill in December, which Captain Bogard assumed was related to her pregnancy. Captain Bogard noted that when she saw her again in January 1996, appellee mentioned her back injury.

The insurance adjuster, Davis Taylor, testified that her decision to deny the claim stemmed from a lack of objective findings

in the medical records, a conflicting statement from appellee that indicated her last Army drill was the weekend of October 27 through the 29, and the conflicting statement from a witness who did not recall that appellee was crying after the work-related injury.

Credibility of the witnesses is a matter exclusively within the province of the Commission. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996). Based upon the foregoing testimony, the ALJ determined that appellee suffered a compensable injury arising out of and in the course of her employment. The ALJ noted that "[t]here is no evidence the [appellee] sustained other upper back injuries in the Army." Because a reasonable person could accept this evidence as adequate to support the Commission's decision, we affirm.

Affirmed.

JENNINGS and STROUD, JJ., agree.

Craig W. WENZL *v.* DIRECTOR,
Employment Security Department

E 96-211 959 S.W.2d 63

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered December 22, 1997

Phyllis Edwards, for appellee.

SAM BIRD, Judge. Appellant Craig Wenzl appeals a decision of the Board of Review denying him unemployment compensation. We find that the decision of the Board of Review is supported by substantial evidence; therefore, we affirm.

Appellant worked for Anderson Merchandisers in a route-sales job as a "rack jobber," one who takes the product into the store and personally stocks and arranges the display of the product. His products were music, books, and videos, and his main customer was Wal-Mart. On June 30, 1995, appellant sustained severe injuries when a tractor-trailer truck rolled down a hill and over his company car. He was off work for four months. Appellant testified that when he returned to work in October he was still experiencing a lot of pain, and he found it hard to keep up with his job. He said the company had a trainee working his route

while he was off and helping him when he returned. Nevertheless, none of his merchandise had been ordered while he was out, and his route was in a "real mess." Appellant said he didn't have the energy or the strength to deal with trying to get the route ready for the holidays because it required working fast and carrying a lot of merchandise.

Appellant also testified that his take-home pay was reduced because the trainee was getting his commission. Appellant said he mentioned this to his sales manager without results. At the time of his injury, appellant said he was earning a salary of $1,300 a month, plus a $1,122.99 commission. When he returned to work after his injury, he received a salary of approximately $1,384 a month but no commission. Historically, he had received his highest commissions in November and December; his commission check alone for December 1994 was $1,702.08.

In January, appellant resigned. He testified that his main reason for resigning was his physical condition; he simply was unable to stand up to the physical requirements of the job. Appellant also testified that he suspected he was going to be fired. He said when his manager, Bill Lutrell, wanted to speak about his territory, Lutrell would talk to the trainee and ignore appellant.

Lutrell testified that there appeared to be some confusion about appellant's role when he came back with regard to the person appellant called a trainee. He said after appellant's accident, the man was assigned appellant's territory and was no longer considered a trainee. He explained that when appellant returned to work he was not assigned a territory because "he was not ready to accept the territory, and he said so even himself." Lutrell said:

> And the basic agreement was that when he was ready, and this was [what] we were planning after Christmas, sometime in January or February 1st, that he would be reassigned the territory, and since he was not assigned the territory, Todd [the man appellant called the trainee] was assigned the territory. Todd did receive all the commissions for that.

Lutrell said appellant never complained to him about not getting his commission, and that appellant did not give himself or the company an opportunity to see if he could work a territory alone.

Lutrell said it was his intention to assign appellant to a territory around February 1 and give him some help to see if his physical problems were temporary, and, if not, deal with it at that time. He said he never had any intention of firing appellant.

Arkansas Code Annotated section 11-10-513 (Repl. 1996) provides in pertinent part:

> (a)(1) If so found by the director, an individual shall be disqualified for benefits if he, voluntarily and without good cause connected with the work, left his last work.
>
> . . . .
>
> (b) No individual shall be disqualified under this section if, after making reasonable efforts to preserve his job rights, he left his last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification or, if, after making reasonable efforts to preserve job rights, he left his last work because of illness, injury, pregnancy, or other disability.

Good cause has been defined as a cause that would reasonably impel the average able-bodied, qualified worker to give up his or her employment. *Teel v. Daniels*, 270 Ark. 766, 606 S.W.2d 151 (Ark. App. 1980). What constitutes good cause for leaving employment is ordinarily a question of fact for the Board to determine from the particular circumstances of each case. *Ahrend v. Director*, 55 Ark. App. 71, 930 S.W.2d 392 (1996).

On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. Ark. Code Ann. 11-10-529(c)(1) (1987); *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Victor Indus. Corp. v. Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Feagin v. Everett, supra.* Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*; *Perdrix-Wang v. Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

Appellant's superior, Lutrell, said he intended to give appellant back a route around the first of February and see if appellant could handle it physically. However, appellant resigned before Lutrell had an opportunity to find appellant a new route or communicate his intentions to appellant. Lutrell testified, and appellant admitted, that appellant never inquired whether the company had any plans for returning him to a sales route of his own.

The dissenting opinion relies upon *Ladish v. Breashears*, 263 Ark. 48, 563 S.W.2d 419 (1978), to support its contention that this case should be reversed because appellant experienced a substantial cut in pay. But in *Ladish* the court recognized that the issue presented was a question of fact, and, of course, it is well settled that factual determinations of the Board of Review must be affirmed if supported by substantial evidence. *Victor Indus. Corp., supra.* The dissent's statement that when appellant returned to work he received only 57% of his former pay is misleading. The record reveals that appellant actually experienced a slight increase in his base salary (from a monthly average of $1,300 to $1,384) after his return to work. He did not, however, receive the commissions on sales because the commissions were being paid to the person who was assigned temporarily to take appellant's place while appellant was, admittedly, physically unable to do the job.

The Board of Review's finding that appellant left his last work without making reasonable efforts to preserve his job rights is supported by substantial evidence.

Affirmed.

AREY, JENNINGS, ROGERS, and GRIFFEN, JJ., agree.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse this case and remand for an award of benefits because I do not believe that the decision of the Board of Review is supported by substantial evidence and because our case law mandates an award of benefits where an employee leaves his job because of a reduction in pay. When Craig Wenzl returned to work on October 30, 1995, after an on-the-job injury, he received only 57% of his former pay, and a "trainee" whom he understood had been assigned to assist him was receiving his commissions. Wenzl worked two

months without any clue from his employer that he would be returned to his former status.

Although Wenzl's supervisor, District Manager Bill Luttrell, testified that he had actually assigned this trainee to Wenzl's territory shortly after Wenzl's accident, he never stated in the hearing that he had informed Wenzl of this, and Wenzl testified that he was never told this by Luttrell. Wenzl then worked for two months at approximately one-half of his former pay before resigning.

In *Ladish Co. v. Breashears*, 263 Ark. 48, 563 S.W.2d 419 (1978), the Board of Review found that Breashears left his job because of reduction in pay and a reclassification to a lower level. The Board of Review then concluded that this caused the work to become unsuitable and that Breashears left his last work for good cause. The Arkansas Supreme Court affirmed the action of the Board of Review in awarding unemployment benefits. *See also Jackson v. Daniels*, 269 Ark. 714, 600 S.W.2d 427 (Ark. App. 1980) (an act by the employer that does economic injury to the employee may be "good cause connected with the work"); *Carpenter v. Director*, 55 Ark. App. 39, 929 S.W.2d 177 (1996) (increased distance and risk of travel and costs of gasoline reducing appellant's take-home pay was good cause to quit); and *Morton v. Director of Labor*, 22 Ark. App. 281, 742 S.W.2d 118 (1987) (a change in duties calling for less competence and lower remuneration is cause for work to become unsuitable and good cause for voluntarily quitting).

Although Luttrell testified that he intended to give Wenzl back his route around the first of February and see if he could handle it physically, he did not communicate his intent to Wenzl during the two months he worked at half pay or even when Wenzl handed in his resignation. Wenzl stated that he left his work for two reasons: because his wages were cut a thousand dollars a month and because he was having trouble physically meeting the demands of the job. Under our case law, these reasons constitute good cause connected with the work. Moreover, in *Jackson v. Daniels*, *supra*, this court stated that because an employee who voluntarily leaves his employment for good cause connected with the

work is not required to preserve his job rights, "we attach no significance to . . . the abruptness of the claimant's departure."

The majority relies on *Teel v. Daniels*, 270 Ark. 766, 606 S.W.2d 151 (Ark. App. 1980), in which this court stated that good cause is cause that would reasonably impel the average able-bodied, qualified worker to give up his or her employment. This standard depends on the worker's perspective, at least impliedly, at the time that he decides to give up his job. An employer's future plans, if not communicated to the worker by the time he makes his decision, obviously do not and should not figure into the analysis of whether the situation would justify the worker's decision to quit. Yet the Board of Review and the majority rely on the employer's assertion that Wenzl was going to be assigned a territory, to find that he did not leave his employment for good cause.

The majority has in essence created a "secret good intentions" defense for employers to assert after they have driven an employee out of a job. Workers are left to the mercy of employers' good faith not to claim secret good intentions, a precarious position if it was the employer's bad faith that forced the employee to resign. For the foregoing reasons, I would reverse and remand to the Board of Review for an award of benefits.

Austin JENNINGS and Lyndell Burford Jennings *v.* Charles G. BURFORD and Mrs. Charles G. Burford

CA 97-316 958 S.W.2d 12

Court of Appeals of Arkansas
Division IV
Opinion delivered December 22, 1997

Dunn, Nutter, Morgan & Shaw, by: *R. David Freeze* and *Christie G. Adams*, for appellants.

Kinard, Crane & Butler, P.A., by: *David F. Butler*, for appellees.

JUDITH ROGERS, Judge. Appellants Austin Jennings and Lyndell Jennings, husband and wife, appeal the Columbia County Chancery Court's denial of their petition to quiet title to land lying between forty acres that they own and an adjoining forty-acre tract owned by the appellees, Mr. and Mrs. Charles Burford. In its order denying appellants' petition to quiet title, the chancery court determined that the boundary line between the two forty-acre tracts had been established by acquiescence and was marked by a meandering fence that appellee Charles Burford had used to contain cattle on his land for at least twenty years. Appellants assert six allegations of error. We affirm as modified.

The two forty-acre tracts at issue are located north-south relative to each other. Appellants own the northern tract and appellees own the southern. Appellant Austin Jennings and appellee Charles Burford each obtained his respective tract from a common grantor, W.W. Burford. W.W. Burford was the father-in-law of appellant Austin Jennings, the father of appellant Lyndell Jennings, and the father of appellee Charles Burford. Appellant Austin Jennings purchased his forty-acre tract from W.W. Burford in June 1957. Appellee Charles Burford purchased his forty-acre

tract from W.W. Burford, his father, in April 1961. Both tracts are comprised of farm land, pasture, and woodland. The dispute between the parties over the location of the boundary line between their land began in 1992 when appellee Charles Burford stopped the appellants from cutting timber on what he believed to be his land. The appellants filed their quiet title action in August of 1992. The appellees answered and asserted that there was a boundary between the tracts by acquiescence, which was marked by a fence. A hearing was held on the appellants' quiet title action in chancery court in May 1996.

First, appellants assert that the chancery court erred in finding that there was a boundary line by acquiescence between the two forty-acre tracts that followed a meandering fence that appellee Charles Burford had used for at least twenty years to contain cattle. Appellants contend that the chancery court erred in so finding because: (1) there was no evidence proving that the parties intended that the fence serve as a boundary line; (2) there was no evidence that a fence ran contiguously between the two forty-acre tracts; and (3) there was no evidence that there was a seven-year period during which the parties acquiesced in the fence as a boundary line.

The case-law principles that govern whether a boundary line has been established by acquiescence are well settled. Whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line and thus apparently consent to that line, it becomes the boundary by acquiescence. *Walker v. Walker*, 8 Ark. App. 297, 651 S.W.2d 116 (1983). A boundary line by acquiescence is inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line. *Warren v. Collier*, 262 Ark. 656, 559 S.W.2d 927 (1978); *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993). The period of acquiescence need not last for a specific length of time, but it must be for "many years" or "a long period of time" sufficient to sustain the inference that there has been an agreement concerning the location of the boundary line. *See Seidenstricker v. Holtzendorff*, 214 Ark. 644, 217 S.W.2d 836 (1949). This period varies with the facts of each case, just as all circumstantial evidence does,

unlike the seven years required to take land by adverse possession, which is a statute of limitations for commencement of an action to recover land adversely possessed. *See* Ark. Code Ann. 518-61-101(a) (1987). Moreover, establishment of a boundary line by acquiescence does not require adverse possession of the land by one party. *See Morton v. Hall*, 239 Ark. 1094, 396 S.W.2d 830 (1965). When the adjoining landowners occupy their respective premises up to the line they acquiesce in as the boundary for a long period of time, they and their grantees are precluded from claiming that the boundary thus acquiesced in is not the true boundary, although it may not be. *Rabjohn v. Ashcraft*, 252 Ark. 565, 480 S.W.2d 138 (1972). A boundary line may be established by acquiescence whether or not preceded by a dispute or uncertainty as to the boundary line. *Id.* Where a boundary line by acquiescence can be inferred from other facts presented in a particular case, a fence line, whatever its condition or location, is merely the visible means by which the acquiesced boundary line is located. *See Camp v. Liberatore*, 1 Ark. App. 300, 615 S.W.2d 401 (1981). The location of a boundary line is a question of fact, and we must affirm a chancery court's location of a boundary line unless its finding is clearly against a preponderance of the evidence. *Rabjohn v. Ashcraft*, 252 Ark. at 571; *Killian v. Hill*, 32 Ark. App. 25, 795 S.W.2d 369 (1990).

Steve Lee, appellee Charles Burford's son-in-law, testified on behalf of the appellees. Mr. Lee testified that he was familiar with the land at issue and that he lived on part of the appellees' land. He testified further that he helped maintain a barbed-wire fence between the appellants' property and the appellees' property. Mr. Lee testified further that the fence was enough to keep cows from going north onto the appellants' property. Mr. Lee testified further that this barbed-wire fence was strung from posts and trees and that the fence traversed the length of the appellees' forty-acre tract.

Appellee Charles Burford testified that his father sold the appellants their forty-acre tract in 1957 and that his father had sold an adjoining forty-acre tract to him in 1961. Mr. Burford testified that sometime in the 1960s he and appellant Austin Jennings had had a conversation about cutting timber near the fence line

between their forty-acre tracts. Mr. Burford characterized this conversation as follows: "When he decided to cut his timber he wanted to know, he asked me did I know where the boundary line was between me and him? I said as far as I'm concerned, it's the fence line. That's what my dad always said. I said you cut on the north side, I'll cut on the south side of the fence." Mr. Burford testified further that appellant Jennings did not cut any trees on the south side of the fence and that he (Burford) did not cut any trees on the north side of the fence. Mr. Burford testified further that since 1951, when he and his father purchased cattle, he had maintained the fence that he regarded as the boundary line and that the fence had always been able to hold cattle on his side of the fence. He testified that he had kept the fence in repair to hold cattle and that he had bushhogged a right of way approximately twenty feet wide. Mr. Burford testified further that, regardless of the results of the surveys that had been made to determine the boundaries of the two forty-acre tracts, it was his position that the dividing line between the two tracts was the fence that he had maintained since 1951 in order to keep cattle on the southern tract. This testimony by appellee Charles Burford and his son-in-law, Steve Lee, was contradicted by testimony given by the appellants.

The standards governing our review of a chancery court decision are well established. Although we try chancery cases *de novo* on the record, we do not reverse unless we determine that the chancery court's findings of fact were clearly erroneous. *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996). In reviewing a chancery court's findings of fact, we give due deference to the chancellor's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Holaday v. Fraker*, 323 Ark. at 525; *Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993). We conclude that the chancery court's finding that the meandering fence was a boundary line by acquiescence was not clearly erroneous.

Second, appellants argue that the chancery court erred in relying upon the testimony of the appellees' witness, Jimmy Askew, concerning the survey that he conducted on the disputed property in order to determine the true boundary line between

the parties' respective tracts. At the outset, we note that there is little, if any, connection between the accuracy of Mr. Askew's survey and the chancery court's finding of a boundary line by acquiescence. The court's finding was based on the testimony of appellee Charles Burford and that of his son-in-law, Steve Lee. Burford himself stated that, regardless of the results of the surveys, the boundary line between the two tracts was the fence he had maintained to keep cattle on the southern tract. However, in their brief, appellees explain the significance of Askew's survey to the chancery court's finding of a boundary line by acquiescence by noting that the court used the Askew survey as a reference point for concluding the fence line was the acquiesced boundary between the two tracts of land. Also, the chancery court's decree does note that the boundary line is the meandering fence "reflected by the Askew survey." Therefore, we will address the appellants' allegation of error concerning the Askew survey.

In essence, Mr. Askew testified that he had been a land surveyor for approximately twenty-five years, that he was qualified as a registered surveyor, and that he had conducted approximately 2,000 surveys. With regard to the survey that he had done for appellee Burford, Mr. Askew testified that, based upon previous surveys he had done in the area, he knew the locations of the southeast and southwest corners of the Southeast Quarter of Section Three. Mr. Askew testified further that he determined the boundary lines of only the Southeast Quarter of Section Three and testified further that his determination of these boundaries "checks extraordinarily well with the records." The location of a boundary line is a question of fact, and we affirm a chancery court's finding of the location of a boundary line unless the court's finding is clearly against a preponderance of the evidence. *Rabjohn v. Ashcraft*, 252 Ark. at 571. The credibility and weight of Askew's testimony was a matter for the chancery court to determine. *See Killian v. Hill*, 32 Ark. App. at 28. Given this testimony by Mr. Askew, we can not say that the chancery court erred in finding his testimony credible because, in cases where there are inconsistent theories as to the location of a boundary line, a survey establishing a boundary line may be based on artificial monuments and these monuments may be established by parol evidence. *See Garren v.*

Kelley, 249 Ark. 906, 462 S.W.2d 861 (1971); *Rice v. Whiting*, 248 Ark. 592, 452 S.W.2d 842 (1970).

Next, appellants argue that the chancery court erred in denying their hearsay objection that was made during the direct examination of appellee Charles Burford. Appellants' counsel objected on the basis of hearsay when Burford replied, "Yes, sir," after having been asked if he had any discussions with his father concerning the location of the marker that was to divide the forty-acre tracts. The chancery court did not err in denying this objection because appellee Burford's reply to the question was not hearsay. Hearsay is a statement made by an out-of-court declarant that is repeated in court by a witness and is offered into evidence to prove the truth of the matter asserted in the out-of-court statement. *See Gautney v. Rapley*, 2 Ark. App. 116, 617 S.W.2d 377 (1981); Ark. R. Evid. 801(c). Hearsay offered by an in-court witness is inadmissible except as provided by law or by the Rules of Evidence. *Easterling v. Weedman*, 54 Ark. App. 22, 922 S.W.2d 735 (1996); Ark. R. Evid. 802. Appellee Burford's reply of "Yes, sir," is not hearsay because it is not a repetition of a statement made out of court but, instead, is Burford's own statement that he had had a discussion with his father. A witness who states that he or she had conversations or discussions with others, but does not repeat what someone else said, has not violated the rule against hearsay. *See Shamlin v. Shuffield*, 302 Ark. 164, 787 S.W.2d 687 (1990).

Finally, appellants contend that the chancery court's decree is deficient in that it does not locate the boundary line between the two forty-acre tracts by specific description. Appellants correctly note that chancery court decrees that establish boundary lines must locate them by specific description. *See Harris v. Robertson*, 306 Ark. 258, 813 S.W.2d 252 (1991). The chancery court's decree describes the boundary line between the parties' land as the meandering fence "reflected by the Askew survey." In their brief, appellees seem to concede that this description of the boundary line is not sufficiently specific.

We agree that the description of the boundary line in the chancery court's decree was not sufficiently specific. How-

ever, this lack of specificity does not constitute reversible error but was, instead, a mere omission or oversight. Pursuant to Arkansas Rule of Civil Procedure 60(a), we grant leave to the chancery court to amend the decree by adding a more specific description of the boundary line between the parties' land.[1]

For the reasons set forth above, we affirm as modified the Columbia County Chancery Court's decree denying the appellants' petition to quiet title and establishing a boundary line by acquiescence between the parties' land.

Affirmed as modified.

BIRD and CRABTREE, JJ., agree.

Vivian A. KIMBLE *v.* DIRECTOR, Arkansas Employment Security Department, and Willis Shaw Express

E 97-50 959 S.W.2d 66

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 22, 1997

[1] In a recent supreme court decision, *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997), the court found that the decree, which did not identify the boundary lines of the disputed property but ordered a future survey to establish the boundary lines, lacked finality.. Thus, the supreme court dismissed the appeal. In our case, however, the decree described the boundary line between the parties' land as the meandering fence "reflected by the Askew survey." There is no unresolved issue that must be determined. We have only granted leave to the chancery court to amend the decree and provide the legal description of the fence line reflected by the Askew survey.

[redacted]

[redacted]

JUDITH ROGERS, Judge. This is an appeal from a decision of the Board of Review denying unemployment compensation benefits based on a finding that appellant, Vivian Kimble, was discharged for misconduct connected with the work. At issue in this case, which is submitted without supporting briefs, is whether the Board's finding of misconduct is supported by substantial evidence. We affirm the decision of the Board.

Appellant worked for Willis Shaw Express as a long distance truck driver from January 26, 1996, to October 18, 1996. It is undisputed that she was discharged after having had five accidents in a six-month period, the first occurring on April 4 and the last on October 14. There was testimony that the employer characterized each of the accidents as "preventable." In at least two of the accidents, appellant hit stationary objects. In the first, she made a turn too sharply and damaged the trailer she was hauling. In the second accident, she hit a parked vehicle. She next damaged some pavement while making a turn. In the fourth accident, she backed into a vehicle that was parked at a fuel pump. Last, appellant struck another vehicle while making a right-hand turn.

The employer had written policies governing the standards of conduct expected of its employees. One such policy warned that the failure to safely operate equipment entrusted to an employee's care could result in disciplinary action or the loss of one's job. After the fourth accident, appellant was placed on probation, and she was warned that another incident could result in the termination of her employment. In her testimony, appellant admitted that

each of the accidents was her fault, but she denied that she had "deliberately set out to have accidents."

"Misconduct," for purposes of unemployment compensation, involves: (1) disregard of the employer's interest; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has the right to expect; and (4) disregard of the employee's duties and obligations to her employer. *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). There is an element of intent associated with a determination of misconduct. *Fulgham v. Director*, 52 Ark. App. 197, 918 S.W.2d 186 (1996). Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, ordinary negligence, or good-faith errors in judgment or discretion are not considered misconduct for unemployment insurance purposes unless it is of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interest or of an employee's duties and obligations. *Willis Johnson Co. v. Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ark. App. 1980). *See also Shipley Baking Co. v. Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986); *Arlington Hotel v. Director*, 3 Ark. App. 281, 625 S.W.2d 551 (1981).

In the present case, the Board concluded that a preponderance of the evidence established a pattern of recurring negligence rising to the level of misconduct. The Board predicated its decision on the number of accidents that occurred in a short time span and appellant's own testimony that she was at fault.

The issue of misconduct is a question of fact for the Board of Review to determine. *Tenenbaum v. Director*, 32 Ark. App. 43, 796 S.W.2d 348 (1990). On appeal, the findings of fact made by the Board are conclusive if they are supported by substantial evidence. *George's Inc. v. Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995). Substantial evidence is defined as such evidence as a reasonable person might accept as adequately supporting a conclusion. *Calvin v. Director*, 31 Ark. App. 74, 787 S.W.2d 701 (1990). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's

findings. *Perdrix-Wang v. Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). Even where there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

It is generally recognized that unemployment benefits may be denied a discharged employee-driver based on a finding of misconduct where motor vehicle accidents are chargeable to negligence which has occurred periodically or with consistent regularity.[1] 76 AM. JUR. 2d, *Unemployment Compensation* § 84. But even numerous accidents will not support a finding of misconduct where evidence is lacking that the accidents were due to the employee's negligence. *Id.* The case of *B.J. McAdams v. Daniels*, 269 Ark. 693, 600 S.W.2d 418 (Ark. App. 1980), is illustrative of this latter point. There, the claimant had three accidents in an eleven-month period. We affirmed the Board's award of benefits based on the lack of evidence demonstrating recurring negligence from which misconduct could be inferred, when the last accident was attributable to weather conditions, and not the negligence of the claimant.

By contrast here, however, the appellant had five "preventable" accidents in a brief, six-month period for which she admitted fault. We also note that appellant performed her job without incident prior to the spate of accidents. On this record, we hold that, despite appellant's claim that she did not deliberately set out to have accidents, the number, frequency, and nature of the accidents satisfy the elements necessary to support a finding of misconduct. Quite apart from isolated instances of ordinary negligence, the evidence shows a recurring pattern of carelessness from which the Board was permitted to infer a manifest indifference that constitutes a substantial disregard of her employer's interests, as well as a substantial disregard of her duties and obligations to the employer. Therefore, we cannot say that there is no substantial evidence to support the denial of benefits.

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[1] *See, e.g.*, *Schappe v. Unemployment Compensation Board of Review*, 392 A.2d 353 (Pa. Commw. Ct. 1978).

Affirmed.

PITTMAN, JENNINGS, and MEADS, JJ., agree.

ROBBINS, C.J., and NEAL, JJ., dissent.

JOHN B. ROBBINS, Chief Judge, dissenting. I disagree with the prevailing opinion of this court, which today holds that Mrs. Vivian Kimble's accidents were tantamount to intentional misconduct and render her ineligible for unemployment compensation benefits.

Mrs. Kimble was employed by Willis Shaw Express as a long-distance truck driver. In the words of Allen Roller, vice president of Shaw's human resources and safety departments, "She delivered freight to all forty-eight states," in a "semi-tractor trailer." The record does not reflect the distance Mrs. Kimble drove her tractor-trailer rig during the nine months that she worked for Shaw, or the number of miles that the driver of an eighteen-wheeler could reasonably be expected to drive without experiencing an accident. We only know that Mrs. Kimble was involved in a total of five accidents over the course of her employment, with the last accident triggering her discharge.

There is a significant difference between the misconduct that disqualifies a worker from unemployment compensation and mere unsatisfactory job performance. I will not repeat here the definition of "misconduct" for purposes of unemployment compensation inasmuch as the prevailing opinion has quoted the definition we gave this term in *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). It must be noted, however, that misconduct involves an element of intent. *Fulgham v. Director*, 52 Ark. App. 197, 918 S.W.2d 186 (1996).

The prevailing opinion emphasizes that the accidents in which Mrs. Kimble was involved were "preventable" and that Mrs. Kimble admitted fault. Just because an accident is "preventable," i.e., in hindsight something could have been done differently and the accident would not have happened, does not alter the fact that the accident was only an accident. It was not disputed that Mrs. Kimble had the five accidents. Mrs. Kimble testified, however, that they were "just that, they were accidents. . . . They

were my fault accidents, but they were, there was nothing willful on my part." Mr. Roller also testified that Mrs. Kimble "wasn't intentionally trying to have the accidents," and that "Vivian's a real fine person, but we just had to make the decision because of the number of preventables."

Shaw Express may have acted prudently and reasonably in deciding to terminate Mrs. Kimble from employment as a long distance truck driver because she may be a poor driver. However, there is simply no substantial evidence to support a determination by the Board of Review that Mrs. Kimble's conduct was tantamount to an intentional disregard of her employer's interest so as to label her job performance "misconduct."

I would reverse and remand this case to the Board of Review with directions that Mrs. Kimble be awarded unemployment compensation benefits.

NEAL, J., joins in this opinion.

Walter Ray MACKINTRUSH *v.* STATE of Arkansas

CA CR 97-145 959 S.W.2d 404

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered December 22, 1997

McCullough Law Firm, by: *R.S. McCullough*, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

JOHN F. STROUD, JR., Judge. Ogretta MacKintrush, wife of Walter MacKintrush, died at home at approximately 3:00 a.m. on October 17, 1994. Mr. MacKintrush, who had called 911 to report that his wife was not breathing, was subsequently charged with first-degree murder. A trial was held in October 1995, but the jury deadlocked 11-1 and a mistrial was declared. A second trial was continued when a witness did not appear and was reset for July 30, 1996. At the trial which began on that date, Mr. MacKintrush was found guilty of murder in the second degree and he was sentenced to twenty years in the Arkansas Department of Correction.

Mr. MacKintrush appeals the conviction, raising five points of error. He contends that the trial court erred when it 1) denied him relief for alleged discovery violations by the State, 2) refused to grant a writ of mandamus to compel the sheriff to serve a subpoena, 3) allowed the medical examiner to testify outside his area of qualification, 4) permitted the State to use a peremptory challenge against a potential black juror, and 5) denied his mistrial motion based upon the racial make-up of the jury panel. Mr. MacKintrush filed a motion to transfer his appeal to the Arkansas Supreme Court. Although we determined that none of his

asserted reasons supported the request, we recommended certification under Ark. Sup. Ct. R. 1-2(a)(5) because the case involved a petition for mandamus directed to "state, county, or municipal officials." Certification was refused on June 9, 1997. We affirm the conviction, addressing the points as they were presented by appellant.

I. The trial court erred by not granting relief on the fact of the State's failure to provide witness information and in particular, exculpatory information.

Rule 19.2 of the Arkansas Rules of Criminal Procedure imposes upon a party a continuing duty to disclose, after compliance with the rules of discovery or a court order, if it discovers additional material or information comprehended by a previous request to disclose. Rule 17.1(d) requires a prosecutor to disclose promptly any material or information tending to negate the guilt of a defendant or tending to reduce his punishment. Under Rule 19.7, the trial court may order any of four sanctions against a party that fails to comply with a discovery rule or order: the discovery or inspection of materials not previously disclosed, a continuance, prohibition from introducing in evidence the undisclosed material, or such other order as the court deems proper.

In the instant case, appellant filed a motion for discovery before the first trial. The State responded with an open file policy, and the trial court ordered that discovery be supplied by June 12, 1995. Appellant complains on appeal, as he did during his trial, that the State violated its discovery obligations by failing to inform him of the existence of statements by Cynthia Marks and Jewel Williams.

Cynthia Marks's statement was that the victim had told her that appellant had filed for divorce previously, in the spring of 1994; that appellant thought the victim was having an affair; that he would kill her if he found it to be so, and no one would know how; and that appellant was "crazy." Ms. Williams's statement was that about two weeks before the murder the victim had said that appellant was going to divorce her, and that she had come to work a few days before her death with a cut inside her bottom lip

and with scratches and bruises on her neck resembling a hand print.

We address discovery of the two statements separately, beginning with that of Ms. Marks.

Statement of Cynthia Marks

When the State called Ms. Marks to testify, appellant objected on the basis that the State had not disclosed her as a witness. The prosecutor responded that she had been disclosed at the current trial and at the previous one, where she had been introduced but had not testified. The State was unable at that time to show that the defense had been notified, withdrew Ms. Marks as a witness, and stated that it would call her later. The trial court conducted hearings on the issue of disclosure, which we review below. Finding that the State had notified defense counsel of Ms. Marks's statement, the trial court ruled that she could testify after defense counsel visited with her. The State, however, later decided that it would not call Ms. Marks, and she never testified at trial.

At a hearing the day after his objection to Ms. Marks's testimony, defense counsel reiterated his position that her statement was a surprise. The prosecutor stated that her name had not been in the file originally supplied under the open file policy but had appeared on papers of "names provided" and that the prosecutor's policy was always to call about a new witness and leave a message. Defense counsel responded that the name had not been in the file and that no message had been left about Ms. Marks. The court told the prosecutor that until she could show "something that shows that you have had it in your file or that you notified him of it," the witness could not testify. The court noted that Ms. Marks appeared to be a major witness and announced that it would take a short recess to research the matter of allowing her to testify after defense counsel had a chance to visit with her.

When the proceedings continued, the prosecutor produced a photocopy of a June 19, 1995, fax that summarized Ms. Marks's testimony. The prosecutor explained that the assistant prosecutor had found it in his file, that the assistant's file contained only cop-

ies of her file, and that she had overlooked the photocopy. Defense counsel stated that he had never seen it before, nor had he seen the statement of Jewell Williams which was attached as another page. The prosecutor stated that the State did not plan to call Ms. Williams. When the court asked defense counsel when he had reviewed the State's file, defense counsel said that his investigator had reviewed it after June 19.

The trial court accepted into evidence Exhibit No. 2, which is a photocopy of pages 2 and 3 of a fax dated June 19, 1995. At the top of both pages a line of print reads, "LRPD DETECTIVE DIV FAX NO. 5013993448." One page summarizes Ms. Williams's statement and the other summarizes the statement of Cynthia Marks.

After taking a recess to examine the evidence, the rules of criminal procedure, and case law, the court issued the following ruling on allowing Ms. Marks to testify:

> According to the photocopies of the statements . . . dated June 18th, '95, 10:45, this states the existence of this witness, Marks, and a general statement of what she was to testify to. This would have been after a Court Order closing discovery some six days before. A fax mark on both of these two pages . . . shows June 19th of '95, although it doesn't directly say it's faxed to the prosecutor's office, that is the indication of it. So that means under 19.2 the State had a duty to disclose this. The State has an open file policy. And the Defense affirmatively states that after that date they did review or a member of their staff . . . reviewed that file, which means there was opportunity there . . . .
>
> Now, Rule 19.7 says that if there was a violation of this Order, which the Court is not finding, . . . the Court has about four different things that it can do . . . . I think that the proper order in this case would be to allow the defendant an opportunity to interview this witness before we go further. Therefore, I'm going to recess this jury until 9:15 in the morning to give counsel an opportunity to do that, and order the State to make this witness available to them in the interim.

The trial court has broad discretion in matters pertaining to discovery, which will not be second-guessed by the appel-

late court absent an abuse of discretion that is prejudicial to the appealing party. *Banks v. Jackson*, 312 Ark. 232, 848 S.W.2d 408 (1993). It is incumbent upon appellant to demonstrate actual prejudice resulting from an asserted discovery violation. *Johninson v. State*, 317 Ark. 431, 878 S.W.2d 727 (1994). Even where a discovery violation has occurred, we will not reverse if the error is harmless. *See Mosley v. State*, 323 Ark. 244, 914 S.W.2d 731.

Here, because Ms. Marks never testified, appellant was not prejudiced by any alleged discovery violations regarding her statement. Additionally, her statement was inculpatory because it referred to appellant's alleged threat to kill his wife. Thus, the State had no obligation to disclose it as an exculpatory statement under Arkansas Rule of Criminal Procedure 17.1. Even if we were to find that a discovery violation existed, which we do not, the error was clearly harmless. We find no error in the trial court's refusal to grant sanctions regarding this matter.

Statement of Jewell Williams

The trial court heard testimony by the prosecutor, Terry Raney-Ball, and defense counsel, R. S. McCullough, regarding discovery of the statement of Jewell Williams. Mr. McCullough asked the court to dismiss the charges, declare a mistrial, or grant a continuance because of the State's failure to inform him about her statement. He based his motion on Arkansas Rule of Criminal Procedure 17.1, contending that the statement was exculpatory and that the State was therefore obligated to inform him of its existence. He argued that the statement could implicate someone else because, several days before her death, appellant's wife had injuries and she did not attribute them to appellant. Ms. Ball asserted that the State had faxed Ms. Jewell's statement to defense counsel on March 5, 1996. She produced a fax cover sheet and the written statement, which was introduced into evidence as Exhibit No. 15. A heading on the cover sheet reads, "Prosecuting Attorney's Office," and the word "Faxed" appears upon the page. The sheet contains the signature of assistant prosecutor John Johnson, the date 3/5/96, and the following handwritten remarks:

R. S.

I'm faxing you the name and number of a witness that we may call. I believe you were given this name before, but I wanted to be sure. Call if you have any questions.

Jewell Williams
376-4694

The exhibit's second page, a summary of Jewel Williams's statement, is identical to that previously introduced in Exhibit No. 2 and discussed above.

Mr. McCullough noted that the cover sheet "doesn't show a machine fax sign or anything." The prosecutor again denied that the State had failed to provide the statement to defense counsel. She also said that the State did not plan to use the statement and that she had made that decision because Ms. Williams was living with appellant, the statement was too prejudicial, and there was "not enough link." The trial court found that defense counsel possessed the document before trial and denied appellant's motion for a mistrial, dismissal of charges, or a continuance.

A trial court's findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *Shibley v. State*, 324 Ark. 212, 920 S.W.2d 10 (1996). Here, the trial court conducted lengthy, thorough hearings on the alleged discovery violation before finding that defense counsel had received the document before trial. Furthermore, the key in determining if 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). We cannot say that the trial court clearly erred.

II. The trial court erred by not granting mandamus against the sheriff for failure to serve defense witness subpoena.

At appellant's request, the Pulaski County Circuit Clerk issued a subpoena for a witness whose address was 109 Chestnut in Hot Springs, which is in Garland County. The Pulaski County Sheriff refused to serve the subpoena because the residence was outside of Pulaski County. Appellant then petitioned the trial court to issue a writ of mandamus to compel the sheriff to serve the subpoena. The court refused to do so.

Appellant argues that Arkansas Code Annotated § 16-43-208 (Repl. 1994) imposes upon the sheriff a duty to serve subpoenas authorized by the statute. An examination of the statute shows it to be silent regarding service of subpoenas. The statute addresses only a) the duty of the clerk of the court to issue subpoenas, b) the number of witnesses subpoenaed at the expense of the county, c) a party's right to recall subpoenas, and d) the number of character witnesses to be subpoenaed at the expense of the county. Ark. Code Ann. § 16-43-208 (Repl. 1994).

The standard of review upon denial of a petition for a writ of mandamus is whether the trial court abused its discretion. *State v. Sheriff of Lafayette County*, 292 Ark. 523, 731 S.W.2d 207 (1987). Mandamus is not a writ of right but is within the discretion of the court, and the party applying for it must show a specific legal right and the absence of any other adequate remedy. *Hicks v. Gravett*, 312 Ark. 407, 849 S.W.2d 946 (1993). Here, appellant has failed in his effort to show his legal right to have the Pulaski County Sheriff serve a subpoena outside of the county. Additionally, another adequate remedy existed in that appellant could have requested service through the Garland County Sheriff or through a private process server. We find no abuse of discretion in the trial court's refusal to issue the writ of mandamus.

III. The trial court erred by allowing the medical examiner to testify outside his area of qualification.

The trial court accepted State's witness Dr. Charles Paul Kokes as an expert in forensic pathology. Appellant objected when Dr. Kokes, the medical examiner who performed the victim's autopsy, was asked to state his conclusion as to how the victim died. Out of the hearing of the jury, the State said that Dr. Kokes would testify that the victim died of strangulation. Appellant contended that such testimony was beyond the expertise of Dr. Kokes, who had been qualified as a forensic pathologist rather than a reconstructionist; therefore, he argued, Dr. Kokes could testify only that the manner of death was asphyxiation, and not that the asphyxiation resulted from strangulation. He also contended that the testimony should not be allowed because it reached the ultimate issue in the case.

The trial court allowed testimony within the bounds of a legal degree of certainty within the field of expertise, and it overruled appellant's objection as to reaching the ultimate issue. Dr. Kokes subsequently testified within those bounds that the cause of death was strangulation. He based his opinion upon his observation of petechial hemorrhages on the surfaces of the victim's eyes and eyelids, hemorrhage in her "cricoid thyroid muscle," and hemorrhage behind both horns of her thyroid. He stated that petechial hemorrhages on eyes and eyelids are common when force is applied to the neck, and that internal hemorrhages such as those he had found are caused by external pressure to the neck. Finally, he voiced his opinion, based upon the autopsy he had performed, that there was no other reasonable explanation for her cause of death.

It is well settled that the determination of the qualifications of an expert witness lie within the discretion of the trial court, and the trial court's decision will not be reversed unless that discretion has been abused. *Suggs v. State*, 322 Ark. 40, 907 S.W.2d 124 (1995). Arkansas Rule of Evidence 702 allows a witness qualified as an expert to testify, in the form of an opinion or otherwise, to scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue.

In the present case, an expert in forensic pathology based his opinion upon injuries he had observed while performing the autopsy on appellant's wife, and his opinion helped determine how she died. Thus, his testimony about the cause of death was proper under Rule 702 of our rules of evidence. We find no abuse of discretion by the trial court in permitting Dr. Kokes to express his opinion that the victim died by strangulation.

IV. The trial court erred by not granting appellant's Batson *motion regarding venireperson Orji.*

The State used its first two peremptory strikes against a black male and a white female, and its third strike against Stephen Orji, a black male. Appellant, who is an African-American, objected that the strike was a racial one in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

In *Batson* the United States Supreme Court held that the Equal Protection Clause of the United States Constitution forbids a prosecutor in a criminal case to use peremptory strikes to exclude jurors solely on the basis of race. *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 87 (1997). *Batson* was somewhat refined by *Purkett v. Elem*, 514 U.S. 765 (1995), which reads in part as follows:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. *Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.*" *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct., at 1866 (plurality opinion); *id.*, at 374 111 S.Ct. at 1874 (O'CONNOR, J., concurring in judgment).

514 U.S. at 767 (citations omitted) (emphasis added). The standard of review for reversal of a trial court's *Batson* ruling is whether the trial court's findings are clearly against the preponderance of the evidence. *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996).

Appellant focuses upon the second step, which requires the State to come forward with a race-neutral reason for the strike. At trial, the prosecutor listed the following reasons for the strike: in a group of six jurors, only Mr. Orji did not shake his head "yes" or "no" when questioned; he was not frank with her, and she thought his answers perhaps to be evasive; and the assistant prosecutor informed her that the State had struck Mr. Orji on a previous panel for inappropriate answers about sitting in judgment of someone or about the issue of self-defense. The trial court noted that two of the nine jurors already selected were of African descent, that the State had exercised one peremptory strike against a Caucasian and two against people of African descent, and that

there remained on the panel another African-American to be called as a possible juror. The court ruled the State's response to be racially neutral and denied the *Batson* motion.

Appellant contends that the reasons offered by the State were the type that *Batson* says are lukewarm, seemingly benign reasons that could always be used, if permitted, to discriminatorily use the peremptory strike. Our dissenting colleague agrees with appellant's position and, as he did in *Bosquet v. State*, faults the trial court for failing to make a sensitive inquiry into the State's explanation. *Bosquet v. State*, 59 Ark. App. 54, 64, 953 S.W.2d 894, 900 (1997), (Griffen, J., dissenting), *rev. denied*, (Ark. Sup. Ct., December 4, 1997). A review of decisions regarding the trial court's duty to make such an inquiry is therefore appropriate.

The Arkansas Supreme Court initially interpreted *Batson* as requiring, in every instance, a sensitive inquiry into the direct and circumstantial evidence available to decide if the State had made an adequate explanation. *See Mitchell v. State*, 295 Ark. 341, 750 S.W.2d 936 (1988); *Ward v. State*, 293 Ark. 88, 733 S.W. 2d 728 (1987). Later, however, that requirement was modified as follows:

> We now hold that upon a showing by a defendant of circumstances which raise an inference that the prosecutor exercised one or more of his peremptory challenges to exclude venire persons from the jury on account of race, the burden then shifts to the state to establish that the peremptory strike(s) were for racially neutral reasons. The trial court shall then determine from all relevant circumstances the sufficiency of the racially neutral explanation. *If the state's explanation appears insufficient, the trial court must then conduct a sensitive inquiry into the basis for each of the challenges by the state.*

Colbert v. State, 304 Ark. 250, 255, 801 S.W.2d 643, 646 (1990) (emphasis added).

In recent years, the Arkansas Supreme Court has consistently held that no sensitive inquiry is required when the neutral explanation given by the State is sufficient. One year after the *Purkett* decision, our supreme court stated, "Only if the defendant makes a prima facie case and the State fails to give a racially neutral

reason for the challenge is the court required to conduct a sensitive inquiry." *Wooten v. State*, 325 Ark. 510, 514, 931 S.W.2d 408, 410 (1996) (quoting *Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996), *cert. denied*, 117 S. Ct. 979 (1997)). In a very recent *Batson* decision, our supreme court reiterated, "*If the trial court is not satisfied with the State's explanation, it must conduct a sensitive inquiry*, and the defendant must explain how the state's racially neutral explanation is merely a pretext." *Roseby v. State*, 329 Ark. 554, 560, 953 S.W.2d 32, 35 (emphasis added) (1997). The duty of the trial judge is explained as follows:

> These procedures have been well established in our case law and are consistent with the principles set forth in *Batson* through *Purkett*. When the party having the burden of moving forward declines to proceed further, the trial court decides whether a prima facie case has been made. If a prima facie case has been made, the court must require an explanation and then determine . . . whether the neutral explanations given are genuine or pretextual.

Sonny v. Balch Motor Co., 328 Ark. 321, 328, 944 S.W.2d 87, 91 (1997).

Our own court recently applied the *Batson* doctrine in *Bosquet v. State*, 59 Ark. App. 54, 953 S.W.2d 894 (1997), *rev. denied*, (Ark. Sup. Ct., December 4, 1997), where we followed the cases discussed above and said:

> In *Purkett*, the Court restated the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
>
> *Our courts have adhered to the guidelines prescribed by the Supreme Court and have developed specific procedures to be followed when considering a Batson challenge. Sonny v. Balch Motor Co., supra.* As was reiterated by the court in *Wooten v. State*, 325 Ark. 510, 931 S.W.2d 408 (1996), *cert. denied* 117 S. Ct. 979 (1997):
>
>> First, the defendant must make a prima facie case that racial discrimination is the basis of a juror challenge. In the event that the defendant makes a prima facie case, the State has the burden of showing that the challenge was not based upon race. Only if the defendant makes a prima facie case and the

> State fails to give a racially neutral reason for the challenge is the court required to conduct a sensitive inquiry.
>
> *Id.* at 514, 931 S.W.2d at 410 (quoting *Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996)).

Bosquet at 58, 953 S.W.2d at 896-7 (emphasis added).

The appellate court affords great deference to the trial court's exercise of discretion in determining discriminatory intent relating to the use of a peremptory strike, and we reverse only if it is clearly against a preponderance of the evidence. *Sonny v. Balch Motor Co.*, 328 Ark. at 329, 944 S.W.2d at 92. We emphasize, with all due respect to the dissenting judge, that we will not deviate from this standard of review. Nor are we at liberty to ignore the cases of the United States Supreme Court and the Arkansas Supreme Court, which clearly state that a sensitive inquiry is not a requirement in every *Batson* case. Our careful review of case law shows that once the trial court determines that explanations offered by the striking party are racially neutral, there simply is no requirement of a sensitive inquiry.

Here, the trial court examined all relevant evidence and determined that the explanations offered by the State were racially neutral. *See Colbert*, 304 Ark. at 255, 801 S.W.2d at 646 (1990). There was no requirement, therefore, that the trial court undertake a sensitive inquiry. We find that the trial court's decision regarding racially-neutral explanations was not clearly against a preponderance of the evidence.

V. The trial court erred by not granting a mistrial in regard to the racially disproportionate jury panel.

During voir dire, appellant moved for a mistrial on the ground that the jury panel did not represent the racial make-up of Pulaski County, where the case was tried. He asserted that there were only five black persons in the panel of thirty-two. The trial court denied the motion, noting that the Arkansas Supreme Court has upheld the court's method of calling the jury panel at random from the voter registration.

The trial court was correct. *See Lee v. State*, 327 Ark. 692, 699, 942 S.W.2d 231, 234 (1997). Furthermore, we also

note that there is no requirement that the jury actually chosen mirror the community and reflect the distinctive groups in the population. *Danzie v. State*, 326 Ark. 34, 42, 930 S.W.2d 310, 314 (1995).

Affirmed.

BIRD and CRABTREE, JJ., agree.

AREY and ROAF, JJ., concur.

GRIFFEN, J., dissents.

D. FRANKLIN AREY, III, Judge, concurring. I join with the majority opinion in its result. To the extent that the majority relies on *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990), I believe that it is on track. However, I believe that Judge Roaf correctly identifies an inconsistency in our interpretation of *Batson*. At some point, our supreme court should address the divergent cases identified by Judge Roaf.

ANDREE LAYTON ROAF, Judge, concurring. I agree wholeheartedly with the views expressed by the dissenting judge. However, I concur with the majority in affirming this conviction because I believe that we are bound to follow the precedents of our supreme court, if for no other reason than they may review, and reverse, any opinion handed down by this court. However, what that precedent is, or should be in this instance, warrants further discussion.

In *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990), the supreme court held for the first time that trial courts would no longer be required to conduct a "sensitive inquiry" in every case where a *Batson* challenge is raised and a prima facie case made. The court said that a sensitive inquiry would be required only where the State's racially neutral explanations "appeared insufficient."

It may well be true that some race-neutral explanations will be so obviously nondiscriminatory as to require little inquiry by the trial court. It is equally true that other proffered explanations will be blatantly pretextual and will require little inquiry, sensitive or otherwise, to uncover the true discriminatory purposes behind

the strikes. However, in 1993, the supreme court further, and, I think inadvertently, undermined *Batson*, first in *Tucker v. State*, 313 Ark. 624, 855 S.W.2d 948 (1993), and later in *Franklin v. State*, 314 Ark. 329, 863 S.W.2d 268 (1993). The latter opinion contains the all-too-familiar and often-cited sentence, "Only if the defendant makes a *prima facie* case and the State *fails to give a racially neutral reason for the challenge* is the court required to conduct a sensitive inquiry." *Id.* at 338, 863 S.W.2d at 273 (emphasis added); *see, e.g.*, *Wooten v. State*, 325 Ark. 510, 931 S.W.2d 408 (1996); *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996); *Bell v. State*, 324 Ark. 258, 920 S.W.2d 821 (1996); *Cooper v. State*, 324 Ark. 135, 919 S.W.2d 205 (1996); *Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996); *Heard v. State*, 322 Ark. 553, 910 S.W.2d 663 (1995); *Reams v. State*, 322 Ark. 336, 909 S.W.2d 324 (1995); *Sims v. State*, 320 Ark. 528, 900 S.W.2d 508 (1995); *Rockett v. State*, 318 Ark. 831, 890 S.W.2d 235 (1994); *Gilland v. State*, 318 Ark. 72, 883 S.W.2d 474 (1994); *Bosquet v. State*, 59 Ark. App. 54, 953 S.W.2d 894 (1997); *Hollowell v. State*, 59 Ark. App. 39, 953 S.W.2d 588 (1997); *Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994). As the concurring justices in *Colbert* pointed out in 1990, "Surely any prosecutor can offer neutral reasons." *Colbert, supra*, (Newbern, Dudley, Glaze, JJ., concurring). The trial court's obligation to conduct a sensitive inquiry was, at least for a time, virtually eliminated in 1993.

Certainly this was not a proper interpretation of *Batson* as shown by the United States Supreme Court's subsequent decision in *Purkett v. Elem*, 514 U.S. 765 (1995), which provides that:

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). *If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.*

Id. at 767 (citations omitted) (emphasis added).

I am not unmindful that in recent cases, the supreme court has utilized only the pre-1993 language of *Colbert* in making the

Batson analysis. *See Lammers v. State*, 330 Ark. 324, 955 S.W.2d 489 (1997); *Jackson v. State*, 330 Ark. 126, 954 S.W.2d 894 (1997); *Roseby v. State*, 329 Ark. 554, 953 S.W.2d 32 (1997); *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 87 (1997). If there is a message in these cases, it has not reached this court, for we are yet citing the offending language from *Franklin*, in both published and unpublished opinions. Our confusion on this issue is only too apparent in the majority opinion, which employs both *Colbert* and the offending language from *Franklin* in its analysis.

Because of this conflict in our cases, and because we and our supreme court have in effect instructed trial courts to make the most crucial determination in the *Batson* analysis — whether racial discrimination occurred — without conducting *any* inquiry, as happened in the MacKintrush case, we have failed to follow either the spirit or the law of *Batson*.

WENDELL L. GRIFFEN, Judge, dissenting.

> *Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government, if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery.*

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180, 2 L.Ed. 60 (1803).

I would reverse appellant's conviction for second-degree murder and remand his case for retrial because the trial court failed to conduct the sensitive inquiry clearly mandated by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986). The Supreme Court has also pronounced, with equal clarity, that the sensitive inquiry mandated by *Batson* applies to the genuineness of racially neutral reasons offered by prosecutors whose peremptory challenges produce *prima facie* claims of race discrimination in violation of the Equal Protection Clause to the Fourteenth Amendment to the Constitution of the United States, and that the proper time for a trial court to undertake that inquiry is during the third step of the *Batson* analytical process when the trial court is deciding whether the *Batson* movant has proved purposeful discrimination. *Purkett v. Elem*, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). Therefore, I respectfully dissent.

Appellant raised a proper objection to the prosecutor's peremptory challenge to Stephen Orji, a black member of the venire. The prosecutor failed to obtain a ruling from the trial court on whether appellant made a *prima facie* case of race discrimination to satisfy the first step in the *Batson* decision process. Although the prosecution did not agree that appellant had made a *prima facie* case, it offered a race-neutral explanation on appellant's objection concerning the challenge to Orji as if a *prima facie* case had been established. Once a prosecutor has offered a race-neutral explanation for a peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a *prima facie* showing of discrimination becomes moot. *Hernandez v. New York*, 500 U.S. 352 (1991).

The trial court made no inquiry after ruling that the prosecution had produced a racially neutral explanation for excluding Orji. The majority, relying upon decisions by our supreme court beginning with *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990), has affirmed that ruling. *Colbert* and cases by our supreme court decided since it was issued, hold that no inquiry is necessary where a racially neutral explanation is advanced for excluding a protected person from jury service in the face of a *prima facie* claim of discrimination contrary to the Equal Protection Clause, as I acknowledged in my dissenting opinion in *Bousquet v. State*, 59 Ark. App. 54, 953 S.W.2d 894 (1997), *rev. denied*, (Ark. Sup. Ct., December 4, 1997).

Courts in Arkansas, including its appellate courts, have never been exempt from abiding by the United States Supreme Court decisions concerning rights and remedies under the United States Constitution. This holds true for questions about claims of race discrimination in the exercise of peremptory challenges under the Fourteenth Amendment. The United States Supreme Court has not declared Arkansas a *Batson*-free state where *prima facie* claims of discrimination in jury selection can be dismissed out-of-hand with a finding that the party who exercises the questioned peremptory challenge has advanced a facially neutral explanation. It is equally obvious that the Supreme Court has never retreated from or otherwise repudiated its declaration in *Batson* that trial courts must

undertake a sensitive inquiry into available direct and circumstantial evidence of discriminatory intent in deciding if a discrimination claimant has carried his burden of persuasion.

There is an obvious contradiction between the principle and procedure pronounced by the United States Supreme Court in *Batson* and *Purkett* and the result reached in this case. The majority opinion cites no decision by the Supreme Court that has limited the sensitive inquiry requirement to those cases where a facially neutral explanation has been deemed "insufficient," and one can readily understand why none exist. Under the *Purkett* holding, if discriminatory intent is not inherent in an explanation for peremptorily excluding a prospective juror, then the explanation will be deemed facially neutral. *Id.*, 131 L.Ed.2d at 839. It necessarily follows, therefore, that all facially neutral explanations for peremptorily excluding prospective jurors protected under the Equal Protection Clause must undergo the sensitive inquiry required by *Batson*. Any other requirement would be illogical because it would be absurd to require trial courts to undertake a sensitive inquiry concerning discriminatory intent when that intent is inherent. But when discriminatory intent is not inherent in a prosecutor's explanation for peremptorily excluding a venireperson, the sensitive-inquiry requirement is essential if the trial court is to reach an intelligent decision about whether the discrimination claimant has proved that intent by a preponderance of the evidence as required by *Batson*.

The State's reliance upon *Hernandez v. New York*, *supra*, is misplaced. *Hernandez* shows that trial court assessments of the plausibility of racially neutral explanations are crucial, and are accorded deference on appellate review, as the Supreme Court explained when it said:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding "largely will turn on evaluation of credibility." 476 U.S., at 98, n.21. *In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.*

Id. at 365, emphasis added. The *Purkett* holding shows that explanations, despite their plausibility or implausibility, will be racially neutral under *Hernandez* if discriminatory intent is not inherent, and that the proper time for scrutinizing the credibility of those explanations is during the third stage of the *Batson* process. The State's argument would subvert the holdings in *Hernandez* and *Purkett* to mean that racially neutral explanations for exercising peremptory challenges can never undergo the sensitive inquiry that *Batson* compels. The United States Supreme Court has never held that race-neutral explanations must always be believed or never questioned. Such a rule would destroy the sensitive-inquiry requirement in *Batson* altogether.

We do not disrespect our supreme court by following the controlling rulings by the United States Supreme Court in *Batson* and *Purkett*, and reversing trial court rulings that fail to undertake the sensitive inquiry required by *Batson*. We are bound to follow *Batson* and *Purkett* because the United States Supreme Court is the foremost and final authority concerning what the Equal Protection Clause of the Fourteenth Amendment means and requires. This is a recognized and fundamental principle of American constitutional law that has even been affirmed by the Arkansas Supreme Court in the area of race discrimination and jury selection.

> There can be no question that this court, as well as the trial courts of this state, is bound by the decisions of the United States Supreme Court concerning rights and prohibitions under the provisions of the United States Constitution and, there is no question that the United States Supreme Court has spoken clearly, and more than once, on the question of racial discrimination in the selection of juries in criminal cases.

Williams v. State, 254 Ark. 799, 496 S.W.2d 395 (1973). If the Arkansas Supreme Court is bound by decisions of the United States Supreme Court regarding the United States Constitution, the Arkansas Court of Appeals certainly has no excuse for thinking otherwise.

Given that Arkansas judges are sworn to support the Constitution of the United States, including the Equal Protection Clause

of the Fourteenth Amendment, the question raised by Chief Justice John Marshall in *Marbury v. Madison*, that was quoted at the introduction to this opinion, cannot be evaded. As the great Chief Justice observed almost 200 years ago, for judges sworn to support the Constitution of the United States to act as if that Constitution holds no power for their government "is worse than solemn mockery."

I respectfully dissent.

LAWHON FARM SERVICES, et al. *v.* James R. BROWN

CA 97-289 958 S.W.2d 538

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered December 22, 1997

Friday, Eldredge & Clark, by: *Betty J. Demory*, for appellants.

Teresa A. French, for appellee.

MARGARET MEADS, Judge. This is an appeal from a decision of the Workers' Compensation Commission that awarded dependency benefits. Appellant contends the Commission erroneously interpreted Ark. Code Ann. § 11-9-527 (Repl. 1996), and there is no substantial evidence to support the Commission's finding that the decedent's children are entitled to benefits. We affirm.

James R. Brown was killed in an automobile accident on June 7, 1994, while within the scope of his employment. Mrs. Lucinda Penick, his former wife, brought a claim for dependent

workers' compensation benefits on behalf of their three children, Jamie Lee, born January 28, 1977, Melva Sue ("Susie"), born June 19, 1979, and Angela Marie, born February 23, 1981. Appellant denied the claim on the basis that the children were not dependent on the decedent and not entitled to benefits under a strict construction of Ark. Code Ann. § 11-9-527(c).

At the hearing on the claim, Mrs. Penick testified that she and Mr. Brown were divorced in January 1993; that she was awarded custody of Jamie; and that Mr. Brown was awarded custody of Susie and Angela. No child support was ordered from either party. Mr. Brown supported Susie and Angela, and he bought clothing and school supplies for Jamie, and occasionally gave Jamie money.

In the summer of 1993, Mr. Brown asked Mrs. Penick to send Susie and Angela to school in McGehee; the girls came to live with Mrs. Penick; and Mr. Brown moved to McCrory. Mr. Brown bought school clothing and supplies for all the girls. Although Mr. Brown refused to give Mrs. Penick money or to pay child support until ordered to do so, he gave the girls money, brought groceries to the house, provided money for gas, and gave them furniture he no longer needed. In August 1993, Mrs. Penick began having problems with Susie, and Susie went to live with Mr. Brown.

Mrs. Penick testified that she tried to obtain child support through the Child Support Enforcement Unit because Mr. Brown refused to give her any money, and she was unable to provide what the girls needed. He gave the children money, but they would "just blow it" and not buy the things that they needed.

In January 1994, Susie returned to live with Mrs. Penick. Subsequently, Mrs. Penick went to Juvenile Court in an attempt to obtain child support, but Mr. Brown never appeared in court. Sometime after April 1994, Mrs. Penick contacted an attorney to obtain child support from Mr. Brown, but she had not yet initiated a chancery court proceeding when Mr. Brown died. She said that she needed assistance in supporting the children, and she expected to get it from Mr. Brown.

Mr. Brown did not see the children from January 1994 until he died in June. Mrs. Penick told him that they wanted to see him, but he said he did not have time, that he went to work early and got off late, and that he had to work. Mrs. Penick asked him for money; he said he would send a money order, but he never did. She testified that he was angry at her because she wanted child support and that he had cut off contact with her because she had attempted to obtain child support.

Debra Wiggins, Mr. Brown's daughter with whom he lived after January 1994, testified that he provided no support for the girls after that time. She also testified that although he did not see the girls after January, he really could not go anywhere because of the hours he was working.

The administrative law judge held that the children were entitled to an award of dependency benefits pursuant to Ark. Code Ann. § 11-9-527(c)(3). The full Commission affirmed the law judge and held that the children were "wholly" and "actually" dependent upon the decedent. The Commission was not persuaded that previous judicial interpretations of "wholly and actually dependent" conflicted with Act 796, and it refused to depart from them. It stated:

> We accept Mrs. Penick's testimony as credible, and specifically find therefrom that decedent has, in fact, provided varying degrees of support to his minor children both as a custodial and non-custodial parent. From that same evidence, we also specifically find that Mrs. Penick, after she had assumed the primary custodial role, made efforts to pursue some form of official child support remedy prior to decedent's death. Also, given the maintenance needs of school-aged children in a modernized society, and taking into account that decedent's minor children have, in fact, needed school supplies, clothes, and other items which he provided (at least in part) while alive, we specifically find that the necessary expenses of decedent's minor children will naturally increase as they grow older. In light of the above, we are persuaded to specifically find that decedent's minor children had a "reasonable expectation of future support" from him, and were accordingly "actually," as well as "wholly," dependent upon him at the time of his death in a work-related accident.

Appellant first argues that the Commission erred in its interpretation of Act 796 of 1993 and Ark. Code Ann. § 11-9-527(c), which provides that "compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon the deceased employee." According to appellant, Act 796's mandate of strict statutory construction repeals prior case law and prohibits dependency benefits in this case. Appellant urges us to adopt the dictionary meaning of the words "wholly" and "actually" and to hold that in order for a person to be entitled to dependency benefits a person must prove that, at the time of the compensable injury which caused death, they were "entirely or completely and in fact or reality" dependent upon the decedent for support. Appellant says the statute mentions nothing about reasonable expectation or a moral obligation of a parent to support his child.

Under the legislative declaration of Act 796, "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" are nullified (Ark. Code Ann. § 11-9-1001 (Repl. 1996)). Also, "administrative law judges, the Commission, and any reviewing courts shall construe the provisions of [the Arkansas Workers' Compensation Law] strictly." (Ark. Code Ann. §§ 11-9-704(c)(3) (Repl. 1996)). Prior to Act 796, workers' compensation provisions were construed "liberally." (Ark. Code Ann. § 11-9-704(c)(3) (Supp. 1991)).

In *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997), the rules of statutory construction were set forth:

> In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. The basic rule of statutory construction to which all other interpretive guides defer is to give effect to the intent of the legislature. As a guide in ascertaining legislative intent, this court often examines the history of the statutes involved, as well as the contemporaneous conditions at the time of their enactment, the consequences of interpretation, and all other matters of common knowledge within the court's juris-

> diction. Furthermore, in construing any statute, this court will place it beside other statutes relevant to the subject matter in question, giving it meaning and effect derived from the combined whole.

327 Ark. at 415, 939 S.W.2d at 284-85 (citations omitted). Moreover, the Workers' Compensation Commission is an administrative agency, and as a general rule administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than are courts to determine and analyze legal issues affecting their agencies; therefore, while not conclusive, the interpretation of a statute by an administrative agency is highly persuasive. *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1997). An administrative agency's interpretation of a statute or its own rules will not be overturned unless it is clearly wrong. *Arkansas Dep't. of Human Servs. v. Hillsboro Manor Nursing*, 304 Ark. 476, 803 S.W.2d 891 (1991).

Dependency benefits were originally payable to persons who were "wholly dependent" upon a deceased employee. The courts interpreted the term "wholly dependent" in the statute (then Ark. Stat. Ann. § 81-1315(c) (Supp. 1951)) as applying to those ordinarily recognized in law as dependents, including children. *Chicago Mill & Lumber Co. v. Smith*, 228 Ark. 876, 310 S.W.2d 803 (1958).

In 1976 the Legislature amended § 81-1315(c) to provide that dependency benefits are payable to persons who were "wholly and actually dependent" upon the deceased employee. "Actually dependent" was then interpreted to require some showing of actual dependency; dependency is a question of fact to be determined in light of prior events; it is not controlled by an unusual temporary situation. *Roach Mfg. Co. v. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979). "Actually dependent" does not require total dependency; it requires a showing of actual support or a reasonable expectation of support. *Porter Seed Cleaning, Inc. v. Skinner*, 1 Ark. App. 230, 615 S.W.2d 380 (1981).

In 1993, the Legislature again amended the Workers' Compensation Law. However, no changes were made to survivor benefits except to increase the funeral expense benefit from $3,000 to

$6,000 and to modify the effective date. Thus the new provisions regarding survivor benefits are virtually the same as the old.

It can hardly be said that the Legislature in making the sweeping changes to our workers' compensation law in 1993 was unaware of our interpretation of the words "wholly and actually dependent." *Roach, supra. See also, Williams v. Edmondson*, 257 Ark. 837, 520 S.W.2d 837 (1995); *Tune v. Cate*, 301 Ark. 66, 781 S.W.2d 482 (1989); *Smith, Admr. v. Ridgeview Baptist Church*, 257 Ark. 139, 514 S.W.2d 717 (1974). Yet, case law interpreting these words was not expressly overridden (*see* Ark. Code Ann. §§ 11-9-107(e), 713(e) (Repl. 1996)), and the dependency benefit provisions of prior law were not substantively changed. Moreover, the declaration of legislative intent regarding the new Act, found in Ark. Code Ann. § 11-9-1001 (Repl. 1996), provides:

> 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. . . . 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 . . . courts of this state contrary to or in conflict with any provision in this act.

The legislative intent as expressed in this section contains nothing to support the view that prior case law in regard to dependency benefits was repealed.

As to appellant's argument that a person must prove that they were entirely and "in fact" dependent upon the decedent for support, we note that although the 1976 amendment to Ark. Stat. Ann. § 81-1315(c) imposed the additional requirement that the decedent's spouse establish "in fact" some dependency upon the deceased employee before being entitled to death benefits, no such requirement was imposed for child beneficiaries. Indeed, in *Roach, supra*, our supreme court held that a ten-year-old child who was being supported by her mother at the time of her father's death was actually dependent upon her father. Although her

mother had taken no legal action to obtain support for the child, our supreme court held that with respect to the child, the lapse of eleven months without legal action on the mother's part did not demonstrate that there was no longer any reasonable expectation of support from the father. Because the child's necessary expenses would naturally increase as she grew older, her mother might not be able to maintain her in her accustomed mode of living, and the child could not act for herself, our supreme court found a reasonable expectation of future support and held that the child was entitled to dependency benefits.

Appellant asks that we adopt the dictionary definition of the words "wholly" and "actually." However, we are not limited to the dictionary definition of a term. *Bill Fitts Auto Sales, Inc. v. Daniels*, 325 Ark. 51, 922 S.W.2d 718 (1996). Indeed, it has been held error to take the definition of a word from the dictionary rather than from the Workers' Compensation Act and the appellate cases which have construed and interpreted it. *Williams v. Cypress Creek Drainage*, 5 Ark. App. 256, 635 S.W.2d 282 (1982).

Moreover, the adoption of appellant's definition of "wholly and actually dependent," which would require proof that at the time of the decedent's death the children were "entirely or completely and in fact or reality" dependent upon him for support, would lead to some untoward results. Under such an interpretation, where a custodial parent has even a small amount of income available for support of a child, that child could never be considered "wholly and actually dependent" upon a deceased non-custodial parent; nor could a child with a part-time job; nor a child of two working parents. We do not believe the legislature intended such untoward results to occur.

In regard to appellant's contention that the statute mentions nothing about a moral obligation to support one's minor child, suffice it to say that a parent has a legal duty to support a minor child. *Pender v. McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979); *Yell v. Yell*, 56 Ark. App. 176, 939 S.W.2d 860 (1997).

Because the Seventy-Ninth General Assembly made no substantive changes to § 11-9-527 and did not specifically annul

prior case law construing it, we cannot say that prior case law interpreting "wholly and actually dependent" is contrary to or in conflict with the legislative intent, that prior case law must be set aside, or that the Commission's interpretation of the statute was clearly wrong.

Appellant next argues there is no substantial evidence to support the Commission's finding that the children had a reasonable expectation of support and are entitled to dependency benefits. Appellant contends that at the time of his death and for at least five months prior to his death, Mr. Brown was not wholly and actually supporting the children, there was no order of child support, and the children were not even partially dependent upon Mr. Brown at the time of his death.

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 Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979). 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. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

In *Chicago Mill & Lumber, supra*, our supreme court held that persons who are ordinarily recognized in law as dependents, including a wife and children, and to whom the employee owed a duty of support are "wholly dependent." When the widow and children are not living with the employee at the time of his death, there must be some showing of actual dependency. *Roach, supra.* "Actually dependent" does not require total dependency but rather a showing of actual support or a reasonable expectation of support. *Porter Seed Cleaning, Inc., supra.* Dependency is an issue of fact rather than a question of law, and the issue is to be resolved based upon the facts present at the time of the compensable event; it may be based upon proof of either actual support from the decedent or a showing of a reasonable expecta-

tion of support. *Hoskins v. Rogers Cold Storage*, 52 Ark. App 219, 916 S.W.2d 136 (1996). The support being furnished at the time of the worker's injury is important, but conditions prior to the injury should be considered; a reasonable period of time should be used. *Williams, supra.* The fact of dependency is to be determined in the light of prior events and is not to be controlled by an unusual temporary situation. *Roach, supra.*

Here, the Commission found testimony regarding the children's dependency to be credible and specifically found that the decedent had provided varying degrees of support to the children. It considered the children's increasing needs as they grow older and found that the children were wholly and actually dependent upon the decedent at the time of his death. Viewing the evidence in the light most favorable to the findings of the Commission, we find there is substantial evidence to support the Commission's award of benefits.

Affirmed.

GRIFFEN, J., agrees; AREY, J., agrees, writing separately.

PITTMAN, JENNINGS, and STROUD, JJ., dissent.

D. FRANKLIN AREY, III, Judge, agreeing and writing separately. I wholeheartedly join in the majority opinion. Nothing in this concurrence should be taken as a disagreement with its analysis. Instead, my purpose in writing is to note what I perceive to be a gap in the dissent's analysis.

Both this court and our supreme court have had several opportunities over the years to construe Ark. Code Ann. § 11-9-527(c) and its predecessors. A good summary of these cases is contained in *Porter Seed Cleaning, Inc. v. Skinner*, 1 Ark. App. 230, 615 S.W.2d 380 (1981). Since the majority opinion and the dissent trace the development of the construction given to § 11-9-527(c), that development will not be recounted here.

These appellate decisions construing § 11-9-527(c) are treated as a part of the statute itself.

> When a statute has been construed, and that construction has been consistently followed for many years, such construction

> ought not be changed. As time passes, the interpretation given a statute becomes a part of the statute itself.

Morris v. McLemore, 313 Ark. 53, 55, 852 S.W.2d 135, 136 (1993)(citations omitted). Thus, those cases cited in *Porter Seed* collectively give an interpretation of the section that has become a part of the statute itself.

We must assume that the General Assembly is familiar with our interpretation of § 11-9-527(c), and that it knows how to change that interpretation.

> The legislature is presumed to be familiar with this court's interpretation of its statutes, and if it disagrees with those interpretations, it can amend the statutes. Without such amendments, however, this court's interpretation of the statute remains the law.

Sawyer v. State, 327 Ark. 421, 424, 938 S.W.2d 843, 845 (1997)(citations omitted). We are bound to follow this rule: those appellate decisions interpreting § 11-9-527(c) remain the law until the legislature amends the statute.[1]

The General Assembly is not oblivious to our opinions. *See* Chuck Smith, *The Influence of the Arkansas Supreme Court's Opinions on Policy Made by the General Assembly: A Case Study*, 18 U. ARK. LITTLE ROCK L.J. 441, 457 (1996). Further, it knows how to correct statutory interpretation with which it disagrees.

> When legislators think the court has misread legislative intent in its interpretation of a statute, a new statute will be enacted, and it will be noted in the legislative finding, in the emergency clause appended to the act, that the legislation is intended to correct the court's interpretation of the statute it amends.

Id. at 458 (footnote omitted). The General Assembly's understanding is consistent with *Sawyer*: it knows that if it does not agree with our interpretation of the statute, it must amend the

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[1] As noted in the majority opinion, Act 796 of 1993 did *not* amend § 11-9-527(c). Therefore, language in § 11-9-1001 noting the General Assembly's intent "to repeal, annul, and hold for naught" prior decisions contrary to "any provision in this act" does not apply to § 11-9-527(c)'s prior interpretation. No substantive provision "in this act" is contrary to § 11-9-527(c).

statute.[2] For examples of the General Assembly acting consistently with this rule in the context of workers' compensation law, see Ark. Code Ann. §§ 11-9-107(e) and 11-9-713(e).

The dissent ignores the supreme court rule articulated in *Sawyer*. The dissent relies solely on § 11-9-704(c)(3); this is a rule of construction. The dissent cites no authority for the proposition that a rule of construction enacted by the legislature should be allowed to "annul" prior case law.

In light of *Sawyer*, I believe our supreme court would require an amendment to § 11-9-527(c) in order to alter that statute's interpretation. Further, it is clear that the General Assembly believes it must enact legislation in order to "annul" prior decisions construing a statute. If the supreme court would require an amendment to change a statute's interpretation, and the General Assembly knows this and acts accordingly, then a rule of construction will not suffice to produce the dissent's result.

JOHN MAUZY PITTMAN, Judge, dissenting. In 1993, the Arkansas General Assembly made sweeping changes to the Workers' Compensation Law. In doing so, it declared that these changes were necessary because the Commission and the courts had frustrated the legislative purpose by continually broadening the scope of the workers' compensation statutes of this state. In keeping with this declaration, the legislature repealed and held for naught all prior opinions or decisions conflicting with any provision of the new Act and, in unmistakable terms, reserved exclusively to itself the power to liberalize or broaden the scope of the workers' compensation statutes. To prevent further unwanted interference with the legislative purpose, the General Assembly diminished our role in the interpretation of the Workers' Compensation Law. Whereas we had formerly and traditionally been entrusted with construing the provisions of the Workers' Compensation Law liberally in accordance with its remedial purpose, in

[2] Section 11-9-1001 is consistent with *Sawyer*. In that section, the legislature "acknowledges its responsibility" to change the workers' compensation statutes, and reserves for itself the task of acting if these statutes "need to be liberalized, broadened, or narrowed. . . ." Arguably, the dissent's proposal to narrow § 11-9-527(c) is contrary to § 11-9-1001's legislative declaration.

1993 this trust was withdrawn: we are now required to review the provisions of the Workers' Compensation Law strictly. Despite all of this, the prevailing opinion, employing a strained analysis based on the repealed doctrine of liberal construction, holds that children living with and supported by their mother were "*wholly and actually dependent*" on an absentee father who only occasionally provided them with incidentals, who had not been ordered to pay child support, and, in any event, who flatly refused to pay child support. I dissent.

The legislature announced its clear intent to overturn prior law in Act 796 of 1993, § 35, which declares that:

> 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. 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 statute of limitations, the standard of review by the Workers' Compensation Commission or courts, 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.

Ark. Code Ann. § 11-9-1001 (Repl. 1996) (emphasis added). One "provision in this act" expressly repealed the doctrine of liberal construction formerly applicable to workers' compensation statutes and decreed that the entire Arkansas Workers' Compensation Law was instead to be strictly construed:

> Administrative law judges, the commission, and any reviewing courts shall construe the provisions of this chapter strictly.

Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996).

The statutory provision at issue in the case at bar is Ark. Code Ann. § 11-9-527(c) (Repl. 1996), which provides for death benefits to persons who were "wholly and actually" dependent upon the deceased employee. The interpretation of this language is the precise question before us in this appeal, and we are required by Ark. Code Ann. § 11-9-704(c)(3) to construe this provision strictly. The prevailing opinion does not do so, but instead adopts an analysis squarely grounded on prior opinions employing liberal construction; *i.e.*, opinions employing a standard of construction "contrary to" that enunciated in § 11-9-704(c)(3), and consequently "repealed, annulled, and held for naught" by the unmistakable terms of Ark. Code Ann. § 11-9-1001.

The history of § 11-9-527(c) and its antecedents, and of their interpretation by the courts, provide an excellent example of the steady erosion of the legislative purpose that prompted the General Assembly to minimize the latitude allowed us in construing the workers' compensation statutes. Originally the legislature thought it sufficient to merely state that death benefits were limited to those who were "wholly dependent" on the deceased employee. One of the cases upon which the prevailing opinion is founded defined that term as follows:

> The employer contends that Ark. Stat. 81-1315(c) limits the payment of compensation to those who were *wholly dependent* on the employee at the time of his death. The statute provides: "Subject to the limitations as set out in section 10 (81-1310) of this act, compensation for the death of an employee shall be paid to those persons who are wholly dependent upon him in the following percentage of the average weekly wage of the employee, and in the following order of preference. * * * *"

> *It would be possible to construe this provision of the Act as depriving a widow or child of any compensation when, as here, the husband and father was completely void of any sense of his family obligation. But it is a rule that remedial legislation shall be liberally construed.* We believe the Legislature used the term "wholly dependent" in the sense of applying to those ordinarily recognized in law as dependents, and this would certainly include wife and children.

Chicago Mill & Lumber Co. v. Smith, 228 Ark. 876, 878, 310 S.W.2d 803, 805 (1958) (emphasis added). Thus, through liberal construction, the *Chicago Mill* court held that the deceased worker's widow and children were "wholly dependent" upon him for the purpose of receiving death benefits even though the worker had not been contributing to the support of his wife and children prior to his death. Dependency was conclusively presumed. "Wholly" was rendered meaningless.

Following this peculiar interpretation of "wholly dependent," the legislature amended the statute to allow death benefits only to those who were "wholly and actually dependent" upon the deceased employee. The doctrine of liberal construction was firmly in place, and was again referenced, when the supreme court was called upon to decide whether the addition of the word "actually" had imparted any meaning to the requirement that a beneficiary was "wholly" dependent. The court's reluctance to do so is palpable:

> We assume — under our settled law we must assume — that the legislature, in deciding to amend the statute, knew the meaning that we had attributed to "wholly dependent." *Williams v. Edmondson*, 257 Ark. 837, 250 S.W.2d 260 (1975). It unavoidably follows that the addition of the word "actually" was intended to change what amounted to a conclusive presumption of dependency under our prior cases. It follows at least that when, as here, the widow and child were not living with the employee at the time of his death, there must be some showing of actual dependency.

Roach Manufacturing Co. v. Cole, 265 Ark. 908, 912, 582 S.W.2d 268, 270 (1979). By construing the statutory language liberally, the *Roach* court concluded that persons having a "reasonable expectation of future support" were "wholly and actually depen-

dent" upon the decedent. "Wholly and actually" meant "perhaps partially."

The legislature amended the workers' compensation law once again in 1993. The changes were extensive and revolutionary. The doctrine of liberal construction was repealed and replaced with strict construction, which is construction of a statute according to its letter, which recognizes nothing that is not expressed, takes the language used in its exact and technical meaning, admits no equitable considerations or implications, and resolves all reasonable doubts against the applicability of the statute to a particular case. BLACK'S LAW DICTIONARY 283, 1275 (5th ed. 1979). But despite the fundamental changes in workers' compensation law and the rigorous standard that we are now duty-bound to apply when construing those statutes, the prevailing opinion adheres to the liberally construed definition enunciated in *Roach*; despite the legislature's manifest declaration that we must give its words a literal and reasonable meaning, the prevailing judges still hold that "wholly and actually" means "perhaps partially."[1]

Finally, I should note that this should not be viewed as an isolated case: this is the first time we have been called upon to decide the validity of a statutory interpretation in an opinion that, although not expressly overturned in Act 796 of 1993, is untenable in light of the changes made therein. This case should be seen as an indication of the approach that will be taken in the hundreds of similar cases that have yet to be decided. Because I firmly believe that the prevailing judges' approach is repugnant to the legislature's intent, I must respectfully dissent.

JENNINGS and STROUD, JJ., join in this dissent.

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[1] The prevailing opinion expresses concern that a strict construction of "wholly and actually dependent" would lead to complete denial of relief in some cases. It should be noted in this context that persons only partially dependent on the deceased employee are entitled to benefits under Ark. Code Ann. § 11-9-527(i) (Repl. 1996).

LITTLE ROCK CONVENTION AND VISITORS BUREAU *v.* David PACK

CA 97-698 959 S.W.2d 415

Court of Appeals of Arkansas
Division III
Opinion delivered December 22, 1997

Dover & Dixon, P.A., by: *Joseph H. Purvis*, for appellant.

Dabbs, Graham & Pomtree, by: *Jeffrey M. Graham*, for appellee.

ANDREE LAYTON ROAF, Judge. The Little Rock Convention and Visitors Bureau (employer) appeals from a Workers' Compensation Commission decision finding that the appellee, David Pack, suffered a compensable unexplained fall. Pack, who suffered brain damage as a result of the fall and is permanently and totally disabled, cross-appeals from the denial of benefits for nursing services provided by his mother. On appeal, the employer contends that the Commission erred in finding that Pack proved that his condition resulted from an injury that arose out of and in the course of his employment. Pack contends on cross-appeal that the denial of benefits for nursing services is not supported by substantial evidence. We affirm on both the appeal and the cross-appeal.

David Pack, aged thirty-eight, was employed by the appellant as a maintenance worker. On April 16, 1991, he was working

alone, applying caulk to a concrete walkway outside Robinson Auditorium. A co-worker, Tim Gosser, testified that he observed Pack bent over, squatting or on his hands and knees while he was caulking, and that he spoke to Pack and he seemed fine. However, when Gosser returned to where Pack was working about twenty minutes later, he found Pack lying on the ground on his stomach, with his head turned to the right. Pack was barely breathing and was beginning to turn blue. Gosser called Pack's supervisor, who turned Pack over onto his back and called for an ambulance.

Paramedics arrived and performed a "jaw thrust" to open up Pack's airway. The paramedic stated that Pack was attempting to breathe, but was not moving any air. A small abrasion to Pack's forehead was the only sign of trauma noted. The paramedic testified that he did not observe evidence of seizures at the scene of the accident or on the way to the hospital. He testified that although he noted copious saliva, which can be present with seizures, he did not feel that Pack had suffered a seizure because there was no evidence of incontinence, blood in Pack's saliva, or abrasions on his head and hands from thrashing about. While in route to the hospital, Pack was administered oxygen and began to regain color and his blood pressure returned to a more normal rate. After Pack reached the UAMS Emergency Room, he experienced several grand mal seizures. He remained at UAMS for six days and was then transferred to Baptist Memorial Hospital where he remained for nearly one month. After his release from the hospital, Pack underwent a month of rehabilitation at Baptist Rehabilitation Institute. His mother cared for him at home until he was enrolled in the Timber Ridge Neurorehabilitation Program for one month in 1993. His mother then resumed his care and continues to care for him. The parties stipulated that Pack suffered brain damage and that he is permanently and totally disabled.

At the hearing, Gosser, Pack's co-worker, testified that he was not aware that Pack had any health problems or problems with drugs or alcohol. Gosser also stated that he did not see any foreign objects near Pack which he might have choked on. Bill Patten, Pack's supervisor, testified that Pack did not have any alcohol or health problems that he knew of, although he thought he had

smelled alcohol on him before the date of the accident. Patten also noted that Pack had missed several days of work due to illness just prior to the accident.

Ruth Siratt, Pack's mother, testified that Pack was divorced and had lived with her for several years prior to his accident. She testified that he had no health problems other than seasonal allergies. Siratt denied that Pack had a drinking problem and testified that she did not know how a reference to an alcohol problem got into Pack's medical records. Siratt testified about Pack's care and transfer among the hospitals and to the rehabilitation institutes. She testified that she had to toilet train Pack after the injury and that it took about four to six months. She testified that she still washes Pack's hair and that she has to help him shave. She stated that he can be left alone for periods of time, but that doctors have indicated that if he is in a cold room, he will not turn on the heat, or that if the room becomes hot, he will not turn on the air conditioning. She testified that she has to give Pack verbal cues to attend to his personal hygiene because he lacks the initiative to do it himself.

Dr. Edward Barron, who first examined Pack on July 30, 1992, testified as to the most probable sequence of events leading to Pack's injury. Based on his review of the medical records, Dr. Barron theorized that when Pack stood up after kneeling or bending over for a period of time, he had a "vaso-vagal syncope" (fainted), fell to the ground, struck his forehead, and was knocked unconscious. Dr. Barron stated that Pack's airway was obstructed because of the positioning of his head, and that Pack developed hypoxic encephalopathy (lack of oxygen to the brain), resulting in permanent brain damage. He stated that the seizure activity observed after Pack reached the hospital was secondary to the hypoxic encephalopathy.

Pack's mother, now his legal guardian, filed a claim for workers' compensation benefits. She also sought an award for nursing services for his continuing care. The Commission found that Pack suffered an "unexplained fall," and that he was, therefore, entitled to benefits. The Commission, however, denied the claim for "nursing services."

1. *Unexplained Fall*

The employer argues that there was insufficient evidence to prove that Pack's injuries "arose out of and in the course of his employment," and that Pack suffered a noncompensable "idiopathic" fall, rather than a compensable "unexplained" fall. In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). 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 question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988). In making our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995). The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Id.*

The Commission noted that, in order to be compensable, an injury must be found to arise out of and in the course of a claimant's employment. However, Arkansas courts have said that where a claimant suffers an "unexplained injury" at work, it is compensable. In contrast, when a claimant suffers an "idiopathic injury," it is not compensable because such an injury is considered personal in origin and would not, therefore, arise out of and in the course of the employment. This court explained the distinction in *Moore v. Darling Store Fixtures*, 22 Ark. App. 21, 732 S.W.2d 496 (1987):

> When one suffers an injury at work, the cause is, obviously, either known or unknown. Larson's treatise on workers' com-

> pensation law states that the most common example of a situation in which the cause of the harm is unknown is the unexplained fall in the course of employment and that most courts confronted with that situation have seen fit to award compensation. However, injuries from idiopathic falls do not arise out of the employment unless the employment contributes to the risk or aggravates the injury by, for example, placing the employee in a position which increases the dangerous effect of the fall, such as on a height, near machinery or sharp corners, or in a moving vehicle.
>
> The word "idiopathic" is defined in Webster's Third New International Dictionary, Unabridged (1976), as (1) peculiar to the individual, (2) arising spontaneously or from an obscure or unknown cause. Although the two concepts are frequently confused, Larson says "unexplained fall cases begin with a completely neutral origin of the mishap, while idiopathic fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie showing of personal origin." (Citations omitted.)

Moore, 22 Ark. App. at 25, 732 S.W.2d at 498.

The court further noted that a workers' compensation claimant bears the burden of proving that his injury was the result of an accident that arose in the course of his employment, and that it grew out of, or resulted from the employment. *Id.* at 27, 732 S.W.2d at 499. "Arising out of the employment" refers to the origin or cause of the accident, while "in the course of the employment" refers to the time, place and circumstances under which the injury occurred. *Id.* (citing *Owens v. National Health Lab., Inc.*, 8 Ark. App. 92, 97 S.W.2d 829 (1983)). When a truly unexplained fall occurs while the employee is on the job and performing the duties of his employment, the injury resulting therefrom is compensable. *Id.*

In the present case, the Commission found that Pack suffered an "unexplained fall" based on the following facts: (1) the coworker who last saw Pack conscious testified there was nothing abnormal about Pack's condition, and about twenty minutes passed between the time he last saw Pack and when he found him unconscious; (2) the paramedic testified that he did not see a foreign object at the scene (something Pack might have choked on) and about the lack of evidence that Pack had suffered a seizure

when he fell; (3) Pack's post-injury alcohol and drug screens were negative and there was no record of prior seizures or abnormalities; (4) Pack's discharge summary stated that the cause of his injury was unknown, and the doctors who treated Pack after his injury only theorized that Pack could have had a seizure which caused his airway to be blocked or that his subsequent seizures in the emergency room could have been caused by having his airway blocked; and (5) medical testimony revealed that, had Pack's injury been alcohol-related, there would have been alcohol in his system. There was also no evidence that chronic alcohol abuse would increase the risk of seizures.

The employer argues that there was evidence that Pack drank a six-pack of beer daily prior to his injury, and suggests that alcohol abuse could have led to his injury. The employer also argues that, even if the Commission accepted Dr. Barron's scenario as to how Pack's injury occurred, it should still be found to be an "idiopathic injury" because it may have happened due to Pack's weakened condition because of illness. The employer further argues that because what Pack was doing, applying caulk, was "hardly a risky task," his idiopathic injury is not compensable. However, these arguments are based merely upon speculation as to how Pack's injury might have occurred. The Commission, in its summary of the facts, medical records, and testimony, concluded that there was no evidence that a condition personal to Pack caused his injury. Upon our review of the record, we cannot say that there is not substantial evidence to support the Commission's finding that Pack suffered a compensable unexplained fall.

2. *Nursing Services*

On cross-appeal, Pack argues that the decision to deny benefits for nursing services is not supported by substantial evidence. He argues that he needs twenty-four hour supervision, cannot care for himself, and cannot participate in out-of-home programs, such as Easter Seals, because he is too old and because his mother's 5:00 a.m. to 1:00 p.m. work schedule does not allow her to be present to prepare him to be picked up in the mornings. Pack contends that even though his physical limitations are minimal, his

mental limitations are great, and he would need to be in a nursing home if his mother did not care for him.

While it is true that doctors have indicated that Pack is incapable of living alone and taking care of himself, his mother described the tasks she must perform for him as primarily giving him "verbal cues." Although Pack can bathe himself, dress himself, and perform other personal tasks, his mother testified that he is not likely to initiate those tasks without being told to do so. Pack's mother testified that while she sometimes has to help him finish shaving and tell him what clothes to put on, he can do those things himself. There was no evidence that Pack needs constant supervision or that he cannot be left alone. In fact, Pack's mother works at a nursing home in the mornings and Pack is left alone until 1:00 p.m. The Commission also noted that Pack was enrolled in a computer training class during the time his mother claimed he was incontinent.

The supreme court has said that the services contemplated under "nursing services" are those rendered in tending or ministering to another in sickness or infirmity. *Pickens-Bond Constr. Co. v. Case*, 266 Ark. 323, 584 S.W.2d 21 (1979). Nursing services do not include assistance with household and personal tasks which the claimant is unable to perform. *Pine Bluff Parks & Recreation v. Porter*, 6 Ark. App. 154, 639 S.W.2d 363 (1982); *Pickens-Bond Constr. Co., supra.* Benefits for nursing services have been allowed where the services consisted of medical care, including changing bandages and cleaning a wound, (*Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1983)), giving injections, enemas and hot baths, (*Dresser Minerals v. Hunt*, 262 Ark. 280, 556 S.W.2d 138 (1977)), physical therapy, (*Wasson v. Losey*, 11 Ark. App. 302, 669 S.W.2d 516 (1984)), and where the claimant was mentally and physically helpless with no control over his bodily functions and needed twenty-four hour per day care (*Sisk v. Philpot*, 244 Ark. 79, 423 S.W.2d 871 (1968)). However, nursing services were not allowed where the claimant needed supervision because he was depressed and suicidal. *J.P. Price Lumber Co. v. Adams*, 258 Ark. 631, 527 S.W.2d 932 (1975).

In Pack's case, his doctors noted that he needed encouragement to do such personal things as caring for himself. Moreover, according to Pack's mother, she only assists him in his daily tasks and housekeeping, and does not provide any medical care to Pack. Based on the relevant case law and on Pack's mother's testimony regarding the type of care she provided to her son, we cannot say that there is not substantial evidence to support the denial of benefits for nursing services.

Affirmed.

ROBBINS, C.J., and MEADS, J., agree.

Christopher WARD *v.* Linda Mae Ward McCORD

CA 97-1122 957 S.W.2d 190

Court of Appeals of Arkansas
Opinion delivered December 22, 1997

James Howard Smith, for appellant.

Helen Rice Grinder, for appellee.

PER CURIAM. Appellant Christopher Ward's motion to reconsider our denial of his motion to consolidate the record is denied because it was unnecessary for him to seek permission from this court to consider the entire record in his appeal.

This case involves a motion by Appellee Linda Mae Ward McCord to set aside the property settlement incorporated in the parties' 1986 divorce decree. This court had on March 8, 1995, dismissed Ward's prior appeal of the trial court's denial of his motion for summary judgment, CA94-1362. In his motion related to his current appeal, CA97-1122, Ward has moved to consolidate the record because the chancellor referred to the proceedings contained within the record lodged with this court for CA94-1362.

Arkansas Supreme Court and Court of Appeals Rule 4-2(a)(5) expressly states in pertinent part: "On a second or subsequent appeal, the abstract shall include a condensation of all pertinent portions of the record filed on any prior appeal." Accordingly, the appellant need not have moved for leave of this court to include in his current abstract those portions of the record filed for CA94-1362. *See Marshall v. State*, 264 Ark. 34-D, 603 S.W.2d 393 (1979) (Per Curiam Order decided under prior rule).

It is so ordered.

Tyrone H. TERRELL *v.* ARKANSAS TRUCKING SERVICE, INC.

CA 97-649 959 S.W.2d 70

Court of Appeals of Arkansas
Division I
Opinion delivered January 7, 1998
[Petition for rehearing denied February 4, 1998.]

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

Roberts Law Firm, P.A., by: *Bud Roberts*, for appellee.

SAM BIRD, Judge. Tyrone H. Terrell appeals a decision of the Workers' Compensation Commission that denied him a psychological evaluation and temporary total disability benefits during any necessary treatment. He argues that the decision is not supported by substantial evidence. We agree that appellant should have been granted a psychological evaluation and reverse and remand to the Commission for that purpose.

Appellant, a truck driver, was injured in a compensable vehicle accident on August 10, 1995, and sustained injuries to his neck, right shoulder, right leg, and lower back. It was stipulated that the injuries were compensable and that medical benefits and temporary total disability benefits had been paid through January 28, 1996. Appellant sought additional medical treatment in the form of a psychiatric evaluation and treatment for depression.

Appellant testified that he was nearing a bridge in Meridian, Mississippi, on a two-lane road when another truck pulling a large, oversized fabricated home tried to pass him and collided with his truck. Appellant's truck was forced into a wall on the bridge, the other truck jackknifed in front of him, and the trucks became tangled and went down an embankment. Appellant was treated for cervical, thoracic, and lumbar strain with physical therapy and work hardening and was certified as having reached maximum physical improvement on January 19, 1996.

After the accident, appellant began having recurring dreams in which a truck he was driving would go off of a bridge, explode, or catch on fire with him inside, apparently unable to get out. He said he also began to have frequent headaches and debilitating pain and was afraid to drive a truck again. Following a recommendation by Joyce Kay Hamilton, M.L.A., a psychotherapist who interviewed appellant in connection with the work-hardening program, appellant's treating physician referred him to Dr. Louis

E. Deere, D.O., a psychiatrist. However, appellant said Dr. Deere visited with him for only about fifteen minutes and scheduled him for a return appointment for evaluation. Appellee refused to authorize payment, and appellant did not go back. Appellant testified that he felt like he needed continued medical treatment because he suffers from sleep deprivation, chronic pain, and nightmares about the accident.

The administrative law judge held that appellant had failed to prove by a preponderance of the credible evidence that a psychological evaluation or treatment was reasonable or medically necessary to treat the injuries he sustained in the August 1995 accident. The Commission affirmed and adopted the opinion of the law judge.

When we review 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 Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979); *Crossett Sch. Dist. v. Gourley*, 50 Ark. App. 1, 899 S.W.2d 482 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996); *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 941 S.W.2d 434 (1997); *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992).

On appeal, appellant argues that the Commission's decision that he had failed to prove that a psychological evaluation or treatment was reasonable and necessary for treatment of his compensable injury is not supported by substantial evidence. He contends that he is totally disabled by his mental distress and that his primary physician recommends that he not return to work until he has had a psychological evaluation and any necessary treatment. Arkansas Code Annotated section 11-9-113(a)(2) (Repl. 1996) requires that

a mental injury or illness be diagnosed by a licensed psychiatrist or psychologist and meet the criteria established by the Diagnostic and Statistical Manual of Mental Disorders to be compensable. Appellant contends he cannot meet those requirements if a psychiatric evaluation is not authorized. We agree.

Arkansas Code Annotated section 11-9-113 (Repl. 1996) provides in pertinent part:

> (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.
>
> (2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

There is no question that appellant sustained physical injuries in the compensable accident. Whether the physical injuries have caused appellant's mental distress must be answered by a psychological evaluation by a licensed psychiatrist or psychologist. The results of the evaluation should make it clear whether appellant's distress is the result of his physical injuries or the accident itself. For appellant's mental injury to be compensable it must have a causal connection to his physical injuries. As the statute is written, mental injury or illness under this section is not compensable unless it is caused by the physical injuries.

We recently expressed this holding in *Amlease, Inc. v. Kuligowski*, 59 Ark. App. 261, 957 S.W.2d 715 (1997). In that case, appellee Ronald Kuligowski had been involved in an accident when his truck skidded into oncoming traffic and was hit broadside by a van. The driver of the van was killed, and a passenger was seriously injured. Kuligowski was injured physically and was suffering from post-traumatic stress disorder. There was no dispute that Kuligowski's mental anguish was not the result of his physical injuries, but rather, was the result of the death of the man

driving the van. There was conclusive medical evidence in the record supporting that conclusion, and Kuligowski admitted it during his testimony. We were constrained to reverse the decision of the Commission, which had awarded appellee benefits for his post-traumatic stress disorder.

In the case at bar, the claimant has been only superficially evaluated by a psychotherapist, who interviewed appellant in connection with a work-hardening program, and by a psychiatrist who talked to him briefly. We emphasize that our decision affords appellant only a psychological evaluation by a licensed psychiatrist or psychologist to determine if his mental problems are the result of the injuries he sustained in the accident.

We reverse and remand for the Commission to order appellee to provide appellant with a psychological evaluation by a licensed psychiatrist or psychologist, and based upon those results, determine if the psychological injury is compensable.

Reversed and remanded.

ROGERS and CRABTREE, JJ., agree.

Jerrard Lamont PALMER *v.* STATE of Arkansas

CA CR 97-315 959 S.W.2d 420

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered January 7, 1998

Jo Ellen Carson, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

TERRY CRABTREE, Judge. On February 23, 1994, appellant Jerrard Lamont Palmer pled *nolo contendere* to committing a terrorisitic act — firing three shots at a residence during an alterca-

tion — in violation of Ark. Code Ann. § 5-13-310 (1993), for which he received a suspended sentence. In July 1994, the State petitioned the court to revoke his suspended sentence based on pending drug and weapons charges. The State amended its petition to revoke in September 1994 to include a charge of battery in the second degree and failure to pay costs and fines. On September 28, 1994, appellant pled *nolo contendere* to the charges of felon in possession of a firearm, possession of cocaine with intent to deliver, possession of marijuana with intent to deliver, and battery in the second degree. The trial court again saw fit to suspend much of the imposed sentences, contingent on standard conditions. On July 11, 1996, appellant was again charged with possession of cocaine with intent to deliver, and the State again petitioned to revoke his suspended sentences based on the new drug charge and failure to pay costs and fines. From that revocation proceeding comes this single-issue appeal. Appellant argues that the trial court's decision is not supported by sufficient evidence.

To revoke probation (or a suspended sentence), the burden is on the State to prove a violation of a condition by a preponderance of the evidence, and on appellate review the trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992). We hold that the trial court's findings are not clearly against the preponderance of the evidence, and therefore we must affirm.

The facts in the present case were developed at the revocation hearing through the testimony of two police officers, one of whom noticed a car parked for several minutes at the Ragon Courts apartment complex in Fort Smith at 4:25 a.m. on July 11, 1996. On cross-examination, the officer explained that he was patrolling the apartments because of recent reports of vehicle thefts in the area. Officer Hays observed three persons "ducked down" in the car for several minutes. He then approached the car to ask the occupants what they were doing. The officer observed an empty bottle of gin in the back seat and arrested appellant for contributing to the delinquency of a minor. The officer also arrested the other two occupants of the car, charging each with

minor in possession of alcohol. While interrogating the suspects individually, each gave conflicting accounts of why they were present in the parking lot.

Officer Perceful arrived on the scene to assist Officer Hays in the arrest. Officer Perceful then conducted an inventory search of the vehicle finding, in plain view, a plastic pill bottle on the front floorboard near the door on the driver's side (appellant was seated in the front passenger-side seat). The bottle contained .782 grams of cocaine.

A ledger sheet that reflected appellant's nonpayment of costs and fines was introduced at the revocation hearing, without comment or objection.

The first piece of evidence introduced, without objection, at the revocation hearing was a "Criminal Judgment and Payment Inquiry." The ledger dated August 9, 1996, reflects the fines and court costs imposed after appellant's first criminal plea to committing a terroristic act. Payments were scheduled at $50 per month and were to begin on March 15, 1994. The ledger reflects that for two-and-a-half years, no money had been paid toward the total $895.75 balance due. No testimony regarding the nonpayment of fines was introduced by either side, and the extent to which the trial judge relied on the nonpayment of fines for the revocation decision is unclear in his ruling. Further, appellant's argument regarding the nonpayment of fines as a proper basis for revocation is limited to the final two sentences of his brief, which characterizes imposing a twelve-year prison term based on nonpayment of fines as "cruel and unusual punishment," without reference to any authority.

We acknowledge the Supreme Court's holding on this issue in *Bearden v. Georgia*, 461 U.S. 660 (1983), and our own supreme court's holding in *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984), both of which seek to avoid invidious discrimination against indigent defendants. However, we find the holdings in *Baldridge v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990), and *Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988), controlling under the present facts.

Here the State introduced, without objection, documentary evidence showing a violation of the terms and conditions related to payment of fines and costs. Once such evidence is introduced, the defendant then bears the burden of going forward with some reasonable excuse for his failure to pay. *Id.* Here the defendant offered no reasonable excuse to the trial court and only referenced the issue in his appeal as a closing afterthought, with no supporting authority. Accordingly, we hold the trial court's finding of nonpayment of fines and costs supports the revocation and is not clearly against the preponderance of the evidence.

Appellant argues on appeal that the facts relating to his possession of cocaine, under the doctrine of joint possession, are insufficient evidence upon which to revoke his suspended sentence. While his argument might be more persuasive if this were an appeal of a criminal trial, it is not. As our supreme court recently explained in a different context, "in a probation revocation hearing, a trial has already been held, and the defendant convicted." *Dority v. State*, 329 Ark. 631, 634, 951 S.W.2d 559, 561 (1997) (holding that a revocation hearing is not a stage of a criminal prosecution for purposes of Sixth Amendment speedy-trial guarantees). Likewise, a hearing on the revocation of appellant's suspended imposition of sentence is not a criminal prosecution, and the legislature has seen fit to require only the lowest showing of proof available — a preponderance of the evidence. *See* Ark. Code Ann. § 5-4-309(d) (1993).

The burden of proof on the State in a revocation hearing is to prove the violation of a condition of probation by a preponderance of the evidence. *Tipton v. State*, 47 Ark. App. 187, 188, 887 S.W.2d 540, 542 (1994). The appellate court defers to the trial court's superior position on determinations of credibility. *Lemons, supra.* Further, the trial court, sitting as a finder of fact, is entitled to the same deference as a jury.

> It is important to remember that jurors do not and need not view each fact in isolation, but rather may consider the evidence as a whole. The jury is entitled to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. [Citation omitted.] A jury may accept or reject any part of a witness's testimony, and its conclusion on credibility

> is binding on the appellate court. *Winters v. State*, 41 Ark. App. 104, 848 S.W.2d 441 (1993).

White v. State, 47 Ark. App. 127, 131, 886 S.W.2d 876, 879 (1994).

Further, the complete constructive-possession analysis does not apply to revocation proceedings. For example, *Billings v. State*, 53 Ark. App. 219, 921 S.W.2d 607 (1996), held that a revocation appellant's possession of a key to a car containing contraband was sufficient evidence to support the revocation. In another case a jury acquitted the appellant of battery, but a trial court revoked the appellant's suspended sentence based on the same evidence. In affirming the revocation, the supreme court explained:

> The evidence presented was circumstantial and, perhaps, inadequate for a conviction, but that quantum of evidence is not required in a revocation hearing. *Gordon v. State*, 269 Ark. 946, 601 S.W.2d 598 (1980). Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation revocation. *Lemons, supra.* On our review of the evidence, we cannot say that this finding is clearly against the preponderance of the evidence. A determination of preponderance of the evidence turns heavily on questions of credibility and weight to be given the testimony, and, in that respect, we defer to the superior position of the trial court to make that determination. *Id.*

Kirby v. State, 52 Ark. App. 161, 164, 915 S.W.2d 736, 738-39 (1996).

Ellerson v. State, 261 Ark. 525, 549 S.W.2d 495 (1977), further illustrates the appropriate quantum of proof required to uphold a revocation. In *Ellerson*, the supreme court affirmed a revocation based on the uncorroborated testimony of an accomplice, noting that such a lack of corroboration would be fatal to the State's case in a criminal trial, but the same quality or degree of proof is not required for the exercise of the court's discretion to revoke a suspended sentence. *Id.* at 531, 549 S.W.2d 498.

The dissent discusses at great length the twin theories of joint occupancy and constructive possession. Both are valuable and well-developed legal theories used to guarantee the reliability

of criminal convictions based solely on circumstantial evidence. However, we are not convinced from a reading of our prior case law that such safeguards are necessary in a revocation inquiry. Joint occupancy and constructive possession allow circumstantial evidence, when it sufficiently excludes all other reasonable hypotheses, to pass beyond the hurdle of "reasonable doubt" to support a criminal conviction. As we have attempted to explain at length here, "reasonable doubt" has no application in revocation proceedings, which are governed by a preponderance-of-the-evidence standard.

Based on the supreme court's holding in *Dority*, *supra*, that revocation is not a stage in a criminal prosecution for Sixth Amendment purposes, the legislature's choice to require the lowest quantum of proof to support a revocation, our own limited standard of review, which gives significant deference to the trial court's determination of credibility, and the many cases that hold that evidence insufficient to convict may be sufficient to revoke (*Lemons*, *Ellerson*, and *Kirby*, *supra*), we find the following facts relevant to support our holding that the trial court's revocation based on the cocaine charge was not clearly against the preponderance of the evidence.

First, appellant's suspicious behavior is relevant to our inquiry. Several reasonable inferences can be drawn from circumstantial evidence that officers observed at the scene. Appellant was encountered at approximately 4:25 a.m. The time of day of an arrest is relevant to the inquiry because a parked car with three occupants who are observed for several minutes could reasonably amount to suspicious circumstances at that time of day. *See Bailey v. State*, 307 Ark. 448, 821 S.W.2d 28 (1991). Also, the fact that the officer observed appellant and the other occupants of the vehicle "ducked down" is a furtive or suspicious action that amounts to relevant circumstantial evidence. *See Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988). Additionally, the inconsistent accounts of the three suspects to the police during the encounter create an inference of suspicious behavior. *See Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994) (discussing at length the improbable nature of appellants' claim that they were going to Branson to see the shows when none of them were carrying ade-

quate clothing for a week-long visit). Further, the fact that the arrest took place in a high-crime area is relevant to the revocation determination. *Greene v. State*, 324 Ark. 465, 467, 921 S.W.2d 951, 952 (1996).

Secondly, the presence of the contraband in close proximity to appellant is relevant circumstantial evidence supporting the trial court's revocation decision. *See Kilpatrick v. State*, 322 Ark. 728, 733, 912 S.W.2d 917, 920 (1995); *Bond v. State*, 45 Ark. App. 177, 180-82, 873 S.W.2d 569, 571-72 (1994).

Finally, the fact that appellant had a prior conviction for a similar offense is relevant in a revocation decision. While appellant's prior offenses might have been excluded in a traditional criminal trial, such evidence may be admissible at a revocation hearing. *Fitzpatrick v. State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983) (holding that relevant evidence inadmissible at a criminal trial may be admissible at a revocation hearing).

Based on these three factors, the holding in *Dority*, statutory guidance for revocation proceedings, and the implications of our own standard of review, we hold that the trial court's decision to revoke appellant's suspended sentence based on the cocaine charge is not clearly against the preponderance of the evidence, and therefore must be affirmed.

Affirmed.

AREY and ROGERS, JJ., agree.

ROBBINS, C.J., NEAL, and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I agree with the prevailing judges that Jerrard Palmer is certainly no Boy Scout. However, I do not agree that the State met its burden of proving, by a preponderance of the evidence, that Palmer was in constructive possession of the cocaine found in the automobile in which he was a passenger with two others. Because this was the sole basis stated by the trial court for revoking Palmer's suspended sentence, I would reverse.

Although the State also alleged in its petition to revoke that Palmer failed to pay costs and fines, the prosecutor merely intro-

duced, without comment, a "ledger" reflecting that Palmer had failed to pay the fines and costs. The record reflects that the State uttered not a single word about this ledger or about Palmer's failure to pay costs, either as testimony or in argument, and that the trial court never mentioned the failure to pay in pronouncing the following ruling:

> The Court finds by a preponderance of the evidence that the defendant possessed Cocaine With Intent to Deliver on July the eleventh, 1996. He was in the vehicle and the cocaine was found in the vehicle. . . . And there are grounds to revoke the suspended portion of [Palmer's] sentences.

Thus, even the record is devoid of any basis on which this court can affirm for failure to pay costs. The State, to its credit, does not even suggest such a disposition in its brief, undoubtedly because the record is clear — the trial court made no finding of nonpayment of fines and costs. Indeed, not one word about failure to pay was spoken by anyone at Palmer's hearing, and we do not conduct a *de novo* review of revocation proceedings.

As to the finding that Palmer was in possession of cocaine, I cannot agree that this is supported by any evidence, much less a preponderance of the evidence. For, although the State's burden in a revocation proceeding is less than for a criminal conviction, the State must still put forth *some* evidence of the offense, and we must still look to our established precedents to determine what that evidence should consist of. In a joint-occupancy situation, additional linking factors must be present before a defendant's probation may be revoked. *Billings v. State*, 53 Ark. App. 219, 921 S.W.2d 607 (1996) (appellant possessed a key to an automobile in which police found cocaine, and was the only person present when the search warrant was executed).

The factors outlined in the prevailing opinion — three men "ducked down" in a vehicle parked at an apartment complex in the early morning hours — may have justified an investigatory stop. The "inconsistent" statements allegedly given by the three young men — all said they were just visiting the complex, two said they had just arrived, and one stated they were about to leave — may have justified further inquiry. Discovery of an empty bot-

tle of gin in the back seat of the car in which Palmer was sitting with a minor and another adult may have justified Palmer's arrest for contributing to the delinquency of a minor, even though it is just as likely that the empty bottle could have been intended for use with the bottle rockets that were also discovered in the car. However, none of these factors serve to link Palmer to a small plastic pill bottle, found next to the driver's side door of the car after the driver, who was the last of the three to be taken from the car, had exited. No evidence was presented that Palmer was anything other than a passenger in the car. There was no testimony that he made any suspicious moves before leaving the car, that he owned the car, had keys to the car, or proof of any other factor suggesting that he "exercised care, control, and management over the contraband," as required in a joint-occupancy case. *See Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995); *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988).

There is certainly no lack of guidance for this court or for the State to determine what constitutes the requisite linking factors. In *Plotts*, *supra*, the supreme court first set out the linking factors to be considered in cases involving vehicles occupied by more than one person: (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the driver of the automobile, or exercised dominion and control over it; and (5) whether the accused acted suspiciously before or during arrest. In affirming Plotts's conviction for possession of marijuana with intent to deliver, the court found sufficient linking factors where Plotts owned the car, a fully stuffed clothes bag with a plastic bag containing green vegetable material protruding out of it was in plain view in the back seat, and Plotts made a suspicious statement concerning drugs when he was asked to consent to a search of the car.

A review of the numerous post-*Plotts* cases involving the joint occupancy of a vehicle in which contraband has been found yields no case in which a conviction *or revocation* has been upheld with linking factors so insubstantial as in the case before us. *See Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995) (appellant was

the only person to drive the car on the day of the arrest, testified that he had thoroughly cleaned the car before using it, and contraband was found in plain view between the driver and passenger seats); *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994) (numerous additional factors cited linking three appellants to 11.7 pounds of cocaine found hidden in a motor home leased by two of them and driven by the third); *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993) (numerous containers of cocaine found in the vehicle appellant was driving, his fingerprints were found on an envelope containing baggies with cocaine residue, drug paraphernalia was found in a console next to appellant); *Kastl v. State*, 303 Ark. 358, 796 S.W.2d 848 (1990) (conviction for minor in possession of alcohol *reversed* where appellant was a passenger in a car with four others, a six-pack of beer was found lying in hatch area of vehicle behind her and accessible to her, appellant had smell of intoxicating alcohol about her person, and beer cans were found lying beside the vehicle); *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994) (both appellants linked to contraband where pipe was found in plain view in immediate proximity to both, marijuana was found in back seat behind driver and accessible to both driver and passenger, a noticeable odor of marijuana was in the car, and both driver and passenger appeared glassy-eyed); *Haygood v. State*, 34 Ark. App. 161, 807 S.W.2d 470 (1991) (both driver and passenger linked to cocaine found in vehicle where cocaine was in gym bag in back seat right beside passenger and also in the driver's immediate access, and driver of vehicle also had cocaine in a medallion around his neck); *Johnson v. State*, 35 Ark. App. 143, 814 S.W.2d 915 (1991) (appellant was driver of car from which a bag of cocaine was dropped and exhibited suspicious behavior by speeding away after being stopped); *Nowden v. State*, 31 Ark. App. 266, 792 S.W.2d 621 (1990) (appellant was driver of a vehicle in which an open sack of marijuana was found in plain view on the passenger side of the floorboard with no console or barrier between the seats, and appellant appeared to be nervous); *Booth v. State*, 10 Ark. App. 216, 662 S.W.2d 213 (1984) (conviction *reversed* where appellant was a passenger in a car in which marijuana was discovered locked in the trunk and there was no evidence that he had keys to the car, and no proof of his relationship with the driver or length of time they had been

together). In fact, the linking factors in the instant case are similar, but far less compelling than in *Cerda v. State*, 303 Ark. 241, 795 S.W.2d 358 (1990), in which the supreme court reversed a criminal conviction where the contraband was not in plain view, on appellant's person, or in his immediate proximity, and appellant was not the owner of the vehicle or in control of it, even though appellant was extremely nervous and he and the joint occupant told conflicting stories.

Although the prevailing opinion seeks to distinguish these authorities because they involve appeals from criminal convictions rather than revocation proceedings, *Billings, supra,* which did involve a revocation proceeding, cannot be so easily ignored. In *Billings*, the affirmance was clearly based upon the appellant's possession of a key to the automobile parked outside his motel room, and in which cocaine was found — strong evidence that the appellant "exercised dominion and control" over the vehicle.

Here, the preponderance of the evidence — the greater weight of the evidence — the size of the bottle, location where it was found, the "hump" described by officers as separating the front floor board, the failure to connect Palmer to the vehicle in any way, and the fact that the driver exited last, suggests that the driver, not Palmer, possessed the easily concealed pill bottle. However, as the trial court said in finding that Palmer possessed cocaine with intent to deliver, "[h]e was in the vehicle and the cocaine was found in the vehicle." This was sufficient for the trial court and, sad to say, is also sufficient for the majority to send this man to prison for twelve years. Perhaps the State would have prevailed had it presented evidence on Palmer's failure to pay his costs or had it pursued the charge of contributing to the delinquency of minors. However, on appellate review, we must decide the case based on the record before us, not what the State might have or should have done. Here, the State simply failed to meet its burden of linking Palmer to the contraband, and failed to go forward with its case on the failure to pay costs. Even though the State has a lesser burden of proof in parole revocation hearings, I am aware of no authority that excuses the State from the most fundamental precept in our adversary system of justice: that you must make your case in order to prevail. I would reverse.

ROBBINS, C.J., and NEAL, J., join.

DEPARTMENT OF PARKS & TOURISM *v.*
Belinda Gail HELMS

CA 97-653 959 S.W.2d 749

Court of Appeals of Arkansas
Division II
Opinion delivered January 14, 1998

Nathan C. Culp, for appellants.

Everett O. Martindale, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Department of Parks and Tourism appeals the decision of the Workers' Compensation Commission that found that appellee Belinda Gail Helms was properly referred to a chiropractor and then to a general practitioner by her treating physician. It argues that this was not supported by substantial evidence. Appellant also argues that the impairment rating to the body as a whole was not based on objective and measurable findings, taking issue with appellee's range-of-motion tests. Though we find no merit to the Department's

arguments regarding the referrals, we do find merit in its disagreement with the award of a permanent partial disability.

Appellee was injured on April 23, 1995, when she slipped and fell while performing duties as a waitress at DeGray Lodge. Appellant admitted compensability. She was initially treated at an Arkadelphia hospital for shoulder, lower back, and head pain. She was followed up two days later by Dr. Jensen, a general practitioner, with her only complaint being shoulder pain. She was seen again on May 9th when Dr. Jensen referred appellee to an orthopedist, Dr. McLeod. He pursued conservative treatment of appellee's injury. Upon suggestion of Dr. McLeod, appellee underwent six sessions of physical therapy between May and June 1995. On June 7th, appellee cancelled her remaining physical therapy sessions and sought chiropractic treatment. She underwent those treatments for several months.

She returned to see the orthopedist in September 1995 complaining of headaches. Because he did not treat headaches, she was referred to Dr. Taylor, a general practitioner. She returned to the orthopedist on March 8, 1996, for a permanent impairment evaluation, and was assessed a four-percent impairment rating based on the results of active range-of-motion tests. The Department denied the compensability of the chiropractic and general practitioner treatment as well as the four-percent rating. The administrative law judge determined that the referrals and treatments were reasonable and necessary and that the rating was appropriate. The Full Commission affirmed the decision of the administrative law judge. This appeal resulted.

The first argument centers primarily on whether appellee consulted the chiropractor on her own or whether she was referred to him by her orthopedist. In his deposition her orthopedist explained that, in his estimation, appellee could have understood his discussions with her to mean that he was referring her to a chiropractor. They had discussed the topic of chiropractic treatment in her May 1995 visit, before physical therapy had begun. His practice was to advise patients of alternative treatments, which include chiropractic treatment. Dr. McLeod had been to Dr. Clary's and Dr. Schuck's offices, both local chiropractors, and

mentioned their names to appellee. Dr. McLeod stated that there are business cards of Dr. Clary's in Dr. McLeod's office.

Appellee testified that she returned to Dr. McLeod's office because physical therapy was not providing her any relief. At the front desk, she mentioned to the receptionist that she was interested in seeking chiropractic treatment like Dr. McLeod had mentioned. The receptionist went to the back, and later returned and wrote Dr. Clary's name and address on a piece of paper for her. The receptionist mentioned to appellee that Dr. Clary was new in town and had unique methods of treatment. Though the receptionist testified that she did not receive instructions from Dr. McLeod to send appellee to the chiropractor, appellee was left with the impression that he did. Dr. McLeod stated that her subjective understanding could have been that she was referred to a chiropractor, because of the circumstances under which appellee was given the name of Dr. Clary. Dr. Clary even corresponded back to Dr. McLeod thanking him for the "referral" of appellee.

Whether treatment is a result of a "referral" rather than a "change of physician" is a factual determination to be made by the Commission. *Pennington v. Gene Cosby Floor & Carpet*, 51 Ark. App. 128, 911 S.W.2d 600 (1995); *TEC v. Underwood*, 33 Ark. App. 116, 802 S.W.2d 481 (1991). When that determination is challenged on appeal, we affirm if it is supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* Unless we are convinced that fair-minded persons with the same facts could not arrive at the conclusion reached by the Commission, we will affirm. *Id.*; *Tuberville v. International Paper Co.*, 28 Ark. App. 196, 771 S.W.2d 805 (1989). Here, the Commission could reasonably find that appellee was not physician-shopping but was seeking assistance in following through with an option discussed by Dr. McLeod.

Further evidence was presented to this effect. In the patient information sheet that she filled out at Dr. Clary's office, she responded to a question, "How did you hear about us?" with the answer, "Recommended by Dr. McLeod." In response to the question, "If referred, by who?" she answered Dr. McLeod. The

Commission was persuaded by appellee's credible testimony, coupled with Dr. McLeod's explanation of the situation. We cannot say that there was no substantial evidence to support the Commission's decision.

The second physician whose services appellant takes issue with is Dr. Taylor. Appellee sought the care of Dr. Taylor after a consultation with Dr. McLeod in September 1995. On that visit, she complained to Dr. McLeod of headaches. Dr. McLeod stated in his deposition that he was not qualified to render opinions and treatment for headaches. At Dr. McLeod's suggestion she saw Dr. Taylor, a family physician. Dr. McLeod testified that "[S]he told me about she'd been having some headaches. And I don't treat headaches, and I wanted her to have that looked at, and asked her about a family physician." He went on to state that she had seen Dr. Jensen and that a couple of her family members had seen Dr. Taylor. She expressed confidence in Dr. Taylor to Dr. McLeod, "so we made a referral for her to see Dr. Taylor for evaluation of these headaches." A patient's mere request for treatment by a particular physician is not in itself sufficient to invalidate an otherwise valid referral. *Electro-Air v. Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985); *see also*, *Patrick v. Arkansas Oak Flooring Co.*, 39 Ark. App. 34, 833 S.W.2d 869 (1992). In his office notes, Dr. McLeod mentioned that appellee did not want to see any doctor other than Dr. Taylor for the headaches. The doctor explained that in their discussions, appellee or her husband brought up Dr. Taylor. Nothing negative was stated about Dr. Jensen; they just appeared comfortable with Dr. Taylor as a physician. The Commission was well within the substantial-evidence requirement in finding that this was a valid referral and not a demand by appellee for a change of physician.

Lastly, appellant argues that the four-percent impairment rating assessed by Dr. McLeod on March 8, 1996, is invalid because Dr. McLeod used active range-of-motion tests that do not qualify as "objective and measurable" under the Workers' Compensation Act. Appellant asserts that any impairment rating attributable to appellee's right shoulder injury cannot be predicated on active range-of-motion tests. Dr. McLeod gave appellee a seven-percent shoulder impairment pursuant to the American

Medical Association Guidelines, which correlates to a four-percent impairment to the body as a whole. Arkansas Code Annotated § 11-9-102(16)(A)(ii) (Repl. 1996) states:

> 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.

This was not an evaluation of spine impairment. However, appellee did bear the burden to prove physical or anatomical impairment by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(C)(1)(B) (Repl. 1996). "Objective findings" are those findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i) (Repl. 1996). Dr. McLeod stated that he based the impairment rating on active range-of-motion tests. The legislature has eliminated range-of-motion tests as a basis for physical or anatomical impairment ratings to the spine *by definition.* It was incumbent upon appellee to present evidence that active range-of-motion tests are objective tests. In other words, it was incumbent upon her to present proof that those tests do not come under the voluntary control of the patient. She did not do so. In fact, there is authority to suggest that active range-of-motion tests are based almost entirely on the patient's cooperation and effort. *See* American Medical Association, *Guidelines to the Evaluation of Permanent Impairment*, (3d ed. 1988). "The full range possible of active motion should be carried out by the subject and measured by the examiner. If a joint cannot be moved actively by the subject or passively by the examiner, the position of ankylosis should be recorded." *Id.* at 14. Because appellee did not present any objective physical findings to support the percentage of impairment to the body as a whole, we cannot uphold the Commission's decision on this point since it does not provide a substantial basis for its award.

Affirmed in part; reversed in part.

BIRD and GRIFFEN, JJ., agree.

Richard BRANSCUM *v.* RNR CONSTRUCTION COMPANY

CA 97-217 959 S.W.2d 429

Court of Appeals of Arkansas
Division I
Opinion delivered January 14, 1998

[redacted]

McDaniel & Wells, P.A., by: *Phillip Wells*, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jim Tilley* and *Julia Busfield*, for appellee.

JOHN E. JENNINGS, Judge. The appellant, Richard Branscum, was a general contractor and manager of RNR Construction Company, a heating and air conditioning business. At the time of the hearing below he was thirty-one years old. On May 9, 1994, he was working in Blytheville, Arkansas, when he fell approximately thirty-five feet from a "bucket truck." He sustained back and internal injuries. A bone scan of Mr. Branscum's back was normal. Dr. Ed Pratt, an orthopaedic surgeon, diagnosed his condition as chronic low-back pain and leg pain and concluded that the condition was "non-operative." Dr. Moacir Schnapp concluded in November 1994 that Mr. Branscum had reached maximum medical improvement and rated his anatomical impairment at twenty percent to the body as a whole.

At a hearing before the administrative law judge, Mr. Branscum contended that as a result of his compensable injury he suffered from psychological problems, including depression and post-traumatic stress disorder, for which he was entitled to appropriate benefits. He also contended that he was permanently and totally disabled as a result of the injury. The administrative law judge awarded Branscum a thirty percent wage-loss disability.

The employer appealed to the full Commission arguing that the award of wage-loss disability was error. Mr. Branscum cross-appealed, arguing that the award was inadequate. The Commission held that Branscum was not entitled to an award of wage-loss disability. Specifically, the Commission held: (1) that Branscum's psychological injury was not compensable because it was not shown, pursuant to Ark. Code Ann. § 11-9-113(a)(2) (Repl. 1996), that the diagnosis of the condition meets the criteria established in the most current issue of the *Diagnostic and Statistical Manual of Mental Disorders*, ("DSM"); and (2) that even if the claimant's psychological condition was compensable, he would not be entitled to wage-loss disability because of the limitation of benefits in section 11-9-113(b)(1) (Repl. 1996).

On appeal to this court, Branscum contends that both holdings of the Commission were error and that, when the effects of his psychological problems are considered, it was error for the Commission not to award wage-loss disability. Because we hold that the Commission's finding that Branscum's psychological condition was not compensable is supported by substantial evidence, we affirm.

Arkansas Code Annotated section 11-9-113(a)(2) (Repl. 1996) provides:

> No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the *Diagnostic and Statistical Manual of Mental Disorders*.

The most current issue of that publication is the fourth edition, copywritten in 1994 by the American Psychiatric Association. As an example, the diagnostic criteria for post-traumatic stress disorder are listed at page 428 of the manual:

> A. The person has been exposed to a traumatic event in which both of the following were present:
>
> (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others

(2) the person's response involved intense fear, helplessness, or horror. *Note*: In children, this may be expressed instead by disorganized or agitated behavior

B. The traumatic event is persistently reexperienced in at least one of the following ways:

(1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. *Note*: In young children, repetitive play in which themes or aspects of the trauma are expressed

(2) recurrent distressing dreams of the event. *Note*: In children, there may be frightening dreams without recognizable content.

(3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). *Note*: In young children, trauma-specific reenactment may occur.

(4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

(5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

(1) efforts to avoid thoughts, feelings, or conversations associated with the trauma

(2) efforts to avoid activities, places, or people that arouse recollections of the trauma

(3) inability to recall an important aspect of the trauma

(4) markedly diminished interest or participation in significant activities

(5) feeling of detachment or estrangement from others

(6) restricted range of affect, (e.g., unable to have loving feelings)

(7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by at least two (or more) of the following:

(1) difficulty falling or staying asleep
(2) irritability or outbursts of anger
(3) difficulty concentrating
(4) hypervigilance
(5) exaggerated startle response

E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than one month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:
Acute: if duration of symptoms is less than 3 months
Chronic: if duration of symptoms is 3 months or more
Specify if:
With delayed onset: if onset of symptoms is at least 6 months after the stressor.

The question whether the diagnosis of the condition meets the criteria established in the DSM must ordinarily be one of fact. The claimant has the burden of proof on this issue by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(5)(e)(i) (Supp. 1997). In reviewing the Commission's decision on a question of fact, we will affirm the Commission if its decision is supported by substantial evidence. *McMillan v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997). 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).

In the case at bar Dr. Paul Neal, a clinical psychologist, reported that "the suggested diagnoses" for Mr. Branscum were post-traumatic stress disorder, major depression with melancholy and generalized anxiety disorder, and mixed personalities disorder with borderline and avoidant features. A report from Dr. John Harris, a psychiatrist, stated that appellant's thought content included "symptoms suggesting the presence of a post-traumatic stress disorder. . . ." It was his impression that Mr. Branscum had major depression, single episode, and post-traumatic stress disorder, "by history." In a later report Dr. Harris concluded that there was no basis to conclude that Mr. Branscum suffered from the effects of significant psychiatrical impairment.

Neither Dr. Neal's nor Dr. Harris's reports refers to the DSM nor to the criteria for the various disorders discussed. It is true that Dr. Harris's first report refers to five axes which correspond to the system of "multi-axial assessment" set out by the DSM, but this cannot be said to conclusively establish that the DSM criteria were met. Where a claim is denied, the substantial evidence standard of review requires us to affirm the Commission if its opinion displays a substantial basis for the denial of the relief sought. *Linthicum v. Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987). Here the Commission's opinion adequately explains why it was not persuaded that the diagnosis of the appellant met the criteria established by the DSM.

The Commission went on to hold that, even if it were to find that Mr. Branscum sustained a compensable mental injury, that injury would not support an award of wage-loss disability because Ark. Code Ann. § 11-9-113(b) (Repl. 1996) limits recovery for a compensable mental injury to twenty-six weeks of disability benefits. Although Branscum contends that this holding was error, we need not reach the issue because we have upheld the Commission's determination here that the mental injury was not compensable.

Finally, appellant contends that the Commission erred in declining to award wage-loss disability over and above his physical impairment rating. On this issue the Commission said:

> Consequently, even if we were to find that the claimant sustained a compensable, mental injury, which we do not find, we cannot use it as the basis for awarding wage loss disability.
>
> When we take into consideration the claimant's age, education, work experience, medical evidence, post-injury income, credibility, demeanor, and interest in returning to work, we find that the claimant has not sustained any disability over and above his physical impairment rating. . . . The functional capacity evaluation revealed that the claimant was capable returning to the workforce. The limitations placed upon the claimant by the evaluation were far from rigorous, and the claimant was not unduly restricted. The medical evidence clearly reveals that the claimant may and should return to the workforce.
>
> Despite the medical clearance to return to work, the claimant never attempted to return to work or to work rehabilitation,

> yet he has begun flying lessons. At the time of the hearing, the claimant was only 31 years of age. He is a high school graduate and he attended one year of college in addition to several vocational courses. The claimant has experience supervising employees and he has owned his own business. These factors coupled with the recommendations from his physicians that he return to work as well as Dr. Harris' evaluation which states there are ". . .no contradictions for Mr. Branscum to resume active participation in his previous vocation. . ." clearly show that the claimant has failed to prove by a preponderance of the evidence any wage loss disability.

We cannot say that the Commission's decision in this regard was not supported by substantial evidence.

For the reasons stated the Commission's decision is affirmed.

Affirmed.

AREY and GRIFFEN, JJ., agree.

Markland JENKINS *v.* STATE of Arkansas

CA CR 97-711 959 S.W.2d 427

Court of Appeals of Arkansas
Division II
Opinion delivered January 14, 1998

William R. Simpson, Jr., Public Defender, by: *Deborah R. Sallings*, for appellant.

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

JOHN F. STROUD, JR., Judge. Markland Jenkins was charged with second-degree battery; in addition, the State filed a petition for revocation of his probation for a previous conviction. He waived trial by a jury. Evidence on the underlying offense and the revocation was presented in the same proceeding. Mr. Jenkins moved for a directed verdict at the end of the State's case and again at the close of the evidence put on by the defense. The trial

court denied his motions, found him guilty of second-degree battery, and found him in willful violation of his probation. He was sentenced to thirty-six months in the Arkansas Department of Correction with thirty months suspended on the battery charge, and to thirty-six months with twenty-four months suspended on the revocation, the sentences to be served consecutively. On appeal he challenges the sufficiency of the evidence to support the conviction and the revocation. We find the evidence sufficient and affirm.

A motion for directed verdict is a challenge to the sufficiency of the evidence. *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, which is evidence of such certainty and precision to compel a conclusion one way or another. *Id.* We review the evidence in the light most favorable to the appellee, considering only the testimony which tends to support the verdict. *Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1990).

It is not disputed that appellant's girlfriend jumped through a second-story window after the couple argued over whether she was seeing someone else, and that she fractured elbow, pelvis, ankle, and facial bones when she landed on the concrete below. Appellant argues, however, that his conviction for second-degree battery cannot stand because he did not cause her injuries.

A person commits battery in the second degree if with the purpose of causing physical injury to another person, he causes serious physical injury to any person. Ark. Code Ann. § 5-13-202(a)(1) (Repl. 1995). Causation is addressed as follows:

> Causation may be found where the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause unless the concurrent cause was clearly insufficient to produce the result and the conduct of the defendant clearly insufficient.

Ark. Code Ann. § 5-2-205 (Supp. 1993).

Appellant's girlfriend testified that appellant choked her steadily, choking her so hard that she urinated on herself. She

stated that he pushed her or otherwise stopped her each time she tried to reach the door. She said that he threatened to kill her and that he held her down on the bed while he made a phone call, asking someone, "Man, what did you do with my gun?" She testified that after reaching into a dresser drawer and behind the bed, he held something that she thought might have been a gun or a clip. She also testified that she knew he kept a gun in the house. Regarding her own actions, she stated the following:

> [He said], "Tell me the truth, or, you know, I'm going to kill you." My cousin had just got shot in the head like some months before by her boyfriend, and I kept on thinking about that. And I was like I'll take my chances. I'd rather jump out this window and take my chances of being crumbled up than him putting a gun to my head, and I'm dead for life, leaving my two kids behind. And so when he . . . grabbed me like he was going to shoot me or something, I just lost it. I just got up and jumped out the window.

Appellant testified that he never choked his girlfriend and that he did not prevent her from going downstairs.

The circumstances here are akin to those in *Holmes v. State*, 288 Ark. 72, 702 S.W.2d 18 (1986), where a homeowner fought back after being hit twice by an intruder and broke his own kneecap while making a tackle. The supreme court viewed the blows to the homeowner and the breaking of the kneecap as one continuous occurrence, finding evidence to indicate that "the prerequisite intent was still present."

Appellant's sufficiency argument focuses upon the testimony and the element of causation. He contends that the physical injuries arose from an event separate and distinct from the altercation. He insists that the physical fight had ceased before his girlfriend jumped and that he was then, at the most, threatening her. He points to the victim's testimony that she "lost it" and decided to jump. He also notes that she testified that he had threatened to kill her but told police only that he had threatened to shoot her in the leg.

The credibility of witnesses and the weight to be accorded their testimony are for the trier of fact; such determina-

tions will not be disturbed on appeal when there is substantial evidence to support the factfinder's conclusion. *Atkins v. State*, 310 Ark. 295, 836 S.W.2d 367 (1992). Here, the trier of fact accepted the victim's story that appellant choked her and said he would kill her, and that she jumped through the window rather than be shot and killed. Viewing the evidence in the light most favorable to the State, we find that the victim's jumping through the window and appellant's choking her comprised one continuous occurrence. We also find the victim's testimony sufficient to show that appellant's intent to harm her existed at the time she jumped. *See Holmes v. State*, 288 Ark. 72, 702 S.W.2d 18 (1986). We find that there was substantial evidence to support appellant's conviction for second-degree battery.

On the issue of the revocation, the standard of review is slightly different. In such cases, the trial court must find by a preponderance of the evidence that the defendant has failed to comply with the conditions of his probation before it may be revoked. Ark. Code Ann. § 5-4-309(d) (Repl. 1997). On appeal, we do not reverse the trial court's decision unless it is clearly against the preponderance of the evidence. *Alford v. State*, 33 Ark. App. 179, 804 S.W.2d 370 (1991). In light of the evidence outlined above, we cannot conclude that the trial court erred in revoking appellant's probation.

Affirmed.

AREY and JENNINGS, JJ., agree.

Henry Silas KILLIAN *v.* STATE of Arkansas

CA CR 97-449 959 S.W.2d 432

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered January 21, 1998

Hough, Hough, & Hughes, P.A., by: *Stephen G. Hough*, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Henry Silas Killian was convicted by a jury of being a felon in possession of a firearm. He was sentenced as an habitual offender to fifteen years in the Arkansas Department of Correction and fined $10,000.00. Mr. Killian now appeals, arguing only that the trial court erred in denying his motions for directed verdict. We affirm.

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). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992). In determining the sufficiency of the evidence, we review the proof in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992).

Officer David Slaughter of the Fort Smith Police Department testified on behalf of the State. He stated that he was involved in the search of a house on March 26, 1996. Officer Slaughter believed that Mr. Killian and his wife lived in the house. During the search, Detective Frank Grill recovered a firearm that he had found beneath a stereo speaker. Mr. Killian was present when the search began, and Dana Marr (his girlfriend) arrived moments later. Nobody else was in the house during the search. When the gun was found, Mr. Killian told Officer Slaughter "that it needed to be hidden better or it wasn't hidden good enough or something

to that effect." On cross-examination, Officer Slaughter acknowledged that no fingerprint testing was conducted on the firearm.

Detective Grill testified that, during the search, he found a small caliber semi-automatic handgun under a stereo speaker. The speaker was located in a bedroom that had been converted into an entertainment room with a stereo, television set, and recliners. Detective Grill indicated that Mr. Killian was the only person present when the search commenced, but did not indicate in which part of the house Mr. Killian was situated.

Dana Marr testified on behalf of Mr. Killian, and she stated that Mr. Killian is her live-in boyfriend and the father of her infant child. Ms. Marr testified that the gun recovered by the police belonged to her, and that she purchased it from Carol Ann Ball for $40.00 in November 1995. Ms. Marr explained that, at the time she bought the gun, she had kicked Mr. Killian out of the house and needed protection from prowlers. She stated that she put the gun under the speaker immediately after buying it, and that it had been there until the day of the search. Ms. Marr indicated that she owned the house that was searched, and she denied hearing Mr. Killian tell the police that he should have hidden the gun better after it was seized.

Ms. Ball testified that she is a friend of Ms. Marr. She stated that she sold a gun to Ms. Marr for $40.00 in November 1995. She identified the gun that was admitted into evidence as the same gun that she had sold to Ms. Marr.

For reversal, Mr. Killian challenges the sufficiency of the evidence. Specifically, he contends that there was not substantial evidence to support the jury's finding that he was in possession of the gun at issue. Mr. Killian cites *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986). In that case, the appellant had been convicted of being a felon in possession of a firearm after a gun was found in a house that was jointly occupied. We held that, when there is joint occupancy of a residence, additional factors must be proven linking the accused to the gun. *See Harper v. State*, *supra*. In the instant case, Mr. Killian lived in a house along with Ms. Marr, and he submits that there were no factors that linked him to possession of the seized pistol. He notes that the house

belonged to Ms. Marr, and he asserts that the only evidence as to ownership of the gun was Ms. Marr's testimony that she had bought it and hidden it under the speaker. Mr. Killian argues that the jury's verdict was based on speculation and conjecture.

We find that there was an additional factor that sufficiently linked Mr. Killian to possession of the gun. The testimony of Officer Slaughter, which the jury was entitled to believe, indicated that Mr. Killian told him that the gun should have been hidden better after it had been found by the police. True, this statement could have merely been a flippant remark or only an acknowledgment that Mr. Killian simply knew the gun was there. But the jury could also reasonably interpret the remark, as it did, and infer that Mr. Killian was admitting that the gun was under his control. Our courts have repeatedly said that the drawing of inferences is for the trier of fact. *Williams v. State*, 54 Ark. App. 271, 278 927 S.W.2d 812, 816 (1996). Although Ms. Marr testified at trial that the gun belonged to her, there was no evidence that she told this to the police on the day that Mr. Killian was arrested. Ms. Marr was clearly an interested witness in this case, and the jury was not obligated to give credence to her testimony. It is well settled that it is the jury's duty to assess the credibility of the witnesses, and this court is bound by the jury's conclusion as to a witness's credibility. *Winters v. State*, 41 Ark. App. 104, 848 S.W.2d 441 (1993). Mr. Killian linked himself with the gun when he told the police that it should have been hidden better. Therefore, we affirm his conviction for felon in possession of a firearm.

Affirmed.

BIRD, ROGERS, CRABTREE, and MEADS, JJ., agree.

ROAF, J., dissents.

ANDREE LAYTON ROAF, Judge, dissenting. I do not agree that this conviction should be affirmed. In order to convict Killian of being a felon in possession of a firearm, the State need not prove actual possession or ownership; constructive possession, which is the control or the right to control the contraband, is sufficient. *Knight v. State*, 51 Ark. App. 60, 908 S.W.2d 644

(1995). Constructive possession can be implied where the contraband was found immediately and exclusively accessible to the accused and subject to his control, *id.* However, where the conviction is based on joint occupancy of the premises where contraband is found, there must be some additional factor present linking the accused to the contraband. *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995). In joint-occupancy cases, the State must prove two elements: (1) that the accused exercised care, control, and management over the contraband; and (2) the accused knew that the matter possessed was contraband. *Id.*, (citing *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988)).

In the instant case, the only additional factor present is Killian's statement. For it to constitute substantial evidence, the jury would have to infer from the statement that Killian exercised control over the gun, not simply that he knew where it was hidden.

This is a stretch that I cannot make. The officer who allegedly heard the statement testified that he did not recall the exact words, and did not put the statement in his report, but recalled that Killian said that "it needed to be hidden better or wasn't hidden good enough or something to that effect."

The statement could have merely been a flippant remark or could have been an acknowledgment of sorts that Killian knew the gun was there. However, in a joint-occupancy case involving a firearm, knowledge that a gun is present does not carry the same import as knowledge that illegal drugs or other such contraband are present. Furthermore, people hide guns in their homes for good reasons, especially where children are present.

Of course, felons may not possess firearms. However, family members of felons may do so. By today's ruling, the majority, in effect, has narrowed the options for family members willing to take in a felon who has paid his debt to society, and for the convicted felon as well — give up the gun or expose the returning family member to the risk of further incarceration for simply knowing that there is a gun in the family home.

O.C. WILLINGHAM *v.* STATE of Arkansas

CA CR 96-1222 959 S.W.2d 74

Court of Appeals of Arkansas
Division IV
Opinion delivered January 21, 1998

Honey & Honey, P.A., for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was charged with delivery of cocaine. After a jury trial, he was convicted of that offense and sentenced to ten years in the Arkansas Department of Correction. From that conviction, comes this appeal.

For reversal, appellant contends that there is insufficient evidence to support his conviction for delivery of cocaine. He argues that an audiotape played for the jury and a witness's testimony based on that audiotape should not have been admitted into evidence, and asks us to disregard those items of evidence and hold that the remaining evidence is insufficient to sustain his conviction.

Appellant's argument misconstrues our review of the sufficiency of the evidence. We consider sufficiency questions before we consider any alleged trial errors. In determining whether a finding of guilt is supported by substantial evidence, we review the evidence, *including* any that may have been erroneously admitted, in the light most favorable to the verdict. *Davis v. State*, 318 Ark. 212, 885 S.W.2d 292 (1994); *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). Here the evidence, including that alleged to have been erroneously admitted, shows that a confidential informant arrived at appellant's home on the day in question, told appellant that he wanted a "five-oh," gave appellant $50.00,

and received two rocks of crack cocaine. This evidence is sufficient to support the jury's finding of appellant's guilt.

Nor do we think that the evidence in question was improperly admitted.[1] Appellant contends that the audiotaped conversation of the transaction between himself and the informant should not have been considered by the jury because it was inaudible and, therefore, was untrustworthy. However, such recordings are admissible unless the inaudible portions are so substantial as to render the recording as a whole untrustworthy. *Loy v. State*, 310 Ark. 33, 832 S.W.2d 499 (1992). This is a matter within the trial court's discretion, and we will not reverse absent an abuse of that discretion. *Id.* According to the appellant's abstract in the case at bar, approximately half of the audiotape that was played for the jury was audible, including the question "what do you need now" and the response "I need a five-oh." The circuit court did not believe that the tape was so deficient as to be of no assistance to the jury, and we cannot say that the circuit court abused its discretion on this point.

Appellant also argues that the trial court erred in allowing Agent Richard Wiggins to "interpret" the audiotape. We do not agree. Although Agent Wiggins testified concerning what was said on the tape, this was in response to a question regarding what he had heard while auditing the conversation as it took place. Furthermore, Agent Wiggins's testimony was limited to those parts of the conversation that were audible on the audiotape. Finally, while Agent Wiggins was allowed to testify that "five-oh" was a term meaning fifty dollars worth of illegal drugs, this testimony was based on his specialized training and experience as a police officer engaged in drug task force assignments. Because Agent Wiggins could have qualified as an expert in this area under

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[1] Appellant asserts on appeal that the audiotape was never formally introduced into evidence, although the tape was played for the jury and the jury was permitted, without objection, to take the tape to the jury room during deliberation. Although appellant, after the close of all the evidence, raised questions concerning the formalities of the audiotape's introduction, no objection was made, no relief was requested, and no ruling was obtained. Under these circumstances, no issue relating to the formalities of the audiotape's introduction is before us. *See Burton v. State*, 327 Ark. 65, 937 S.W.2d 634 (1997); *Jones v. State*, 326 Ark. 61, 931 S.W.2d 83 (1996).

Ark. R. Evid. 702, his testimony was not improperly admitted. *See Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997).

Affirmed.

AREY and ROAF, JJ., agree.

Bilgay LOBANIA *v.* STATE of Arkansas

CA CR 97-592 959 S.W.2d 72

Court of Appeals of Arkansas
Division I
Opinion delivered January 21, 1998

Robert C. Marquette, for appellant.

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

JUDITH ROGERS, Judge. In a jury trial, the appellant, Bilgay Lobania, was convicted of rape and sentenced to a term of ten years in prison. As his only issue on appeal, appellant contends that the trial court erred in denying his motion to suppress evidence seized in a search of his residence. We reverse, because we agree that the record fails to demonstrate that appellant voluntarily consented to the search.

The testimony adduced at the suppression hearing was as follows. On July 1, 1996, Sergeant Kevin Johnson of the Van Buren Police Department received a report from the victim that she had been raped and kidnapped by the appellant. While en route to appellant's residence, the purported scene of the attack, the victim observed the appellant riding in a vehicle. Officer Johnson initiated a stop, placed appellant under arrest, and transported him to the police department. Appellant is Hispanic, and Johnson perceived that there was a language barrier, so he called in Jose Vasquez, a Spanish-speaking city employee, to act as an interpreter. Officer Johnson testified that he asked Vasquez to advise appellant of the charges against him and to ask appellant if his residence could be searched with reference to a gun that the victim claimed to have been used in committing the offenses. Johnson said that appellant accompanied him, Vasquez, and Officer Brent Grill to

the residence and was present during the search when the gun was found.

Jose Vasquez testified on behalf of the State. He said that he had lived in Mexico for fourteen years and was raised by his grandparents, who spoke Spanish. He then spent nine years in Corpus Christi, Texas, where Spanish was the primary language spoken. Vasquez testified that he moved to Arkansas fourteen years ago when he was age thirty or thirty-two and that he had learned to speak English at that time. He said that he now speaks mostly English, only conversing with his friends in Spanish on an infrequent basis. He testified that he could carry on a conversation in Spanish but that he did not "speak too much of it." Vasquez stated that he had acted as an interpreter in municipal court but that he was not a certified interpreter. He testified that, while he speaks Spanish, "sometimes I need to think a lot, of some of the terms in English. I have to think of the word."

Vasquez further testified that Officer Johnson asked him to tell the appellant why he had been arrested and to advise appellant of his rights. Vasquez said that appellant indicated that he understood by saying that he did not rape the victim. Vasquez stated that Johnson told him to ask appellant for permission to search his residence and that he told the appellant that "Kevin Johnson got a permit to go search his apartment where he lives." He testified that, when he asked appellant for permission to search, appellant responded by saying "okay," or "go ahead." On cross-examination, Vasquez said that "when I told him, you know, you get permission to search his room, and he said, 'okay.'"

All searches without a valid warrant are unreasonable, unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. *Johnson v. State*, 27 Ark. App. 54, 766 S.W.2d 25 (1989). Consent is a justification for a warrantless search. *Id.* When the State claims that a search is justified by consent, it has the burden of proving that the consent was freely and voluntarily given and that there was no actual or implied duress or coercion. *Saul v. State*, 33 Ark. App. 160, 803 S.W.2d 941 (1991). In reviewing the denial of a motion to suppress evidence, the appellate court makes an independent determi-

nation based on the totality of the circumstances, and we reverse the decision only if it is clearly erroneous or clearly against the preponderance of the evidence. *Mounts v. State*, 48 Ark. App. 1, 888 S.W.2d 321 (1994).

From our review of the totality of the circumstances, we hold that appellant did not freely and voluntarily consent to the search of his residence. The interpreter admittedly did not have a strong command of the English language, and we are convinced that he did not effectively communicate the officer's request for permission to search the residence. Vasquez's statements to appellant that the officer "got a permit" and that "you get permission to search" indicate that he told appellant that a search was allowed and forthcoming, rather than asked appellant for his consent to a search. Although perhaps innocently, Vasquez's translation was misleading. The trial court's decision upholding the search is clearly erroneous, and we reverse and remand for a new trial.

STROUD and NEAL, JJ., agree.

Everett J. BROWN *v.* ALABAMA ELECTRIC COMPANY
and Wausau Insurance Companies

CA 97-469 959 S.W.2d 753

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered January 21, 1998

The Cortinez Law Firm, P.L.L.C., by: *Bob Cortinez*, for appellant.

Anderson & Kilpatrick, L.L.P., by: *A. Gene Williams*, for appellees.

JOHN F. STROUD, JR., Judge. Everette J. Brown, an electrician for Alabama Electric Company, arrived at the Potlatch job site in Cypress Bend the morning of July 12, 1994. His foreman asked him to drive to McGehee to get cutting oil. On the way to McGehee at about 8:35 a.m., his company truck left the highway and hit a tree. Mr. Brown was taken to the emergency room of Desha County Hospital and then transferred to Jefferson Regional Medical Center for treatment of a fractured right femur. A urine specimen collected shortly after he arrived at Jefferson Regional was sent to a laboratory for testing. The laboratory analysis, performed by gas chromatography mass spectrometry testing, revealed the presence of marijuana metabolites in the urine.

Alabama Electric and its carrier controverted the claim for workers' compensation benefits, contending that Mr. Brown's injuries were not compensable under the law. Appellees argue that the presence of marijuana in his body at the time of or immediately after the accident raised the statutory presumption that the injury was substantially occasioned by the illegal substance. The administrative law judge awarded benefits after finding that Mr.

Brown sustained his burden of proof by a preponderance of the credible evidence that he had sustained the injury arising out of and in the course of his employment. The Workers' Compensation Commission reversed in a two to one decision, finding that Mr. Brown had not rebutted the statutory presumption that the accident was substantially occasioned by the use of marijuana. Mr. Brown now appeals, contending that 1) there was no substantial evidence to invoke the presumption, and the Commission abused its discretion by invoking the presumption; and 2) the Commission had no substantial basis to deny relief to appellant, and it abused its discretion by disbelieving his testimony and ignoring other evidence of record. We address the issues as appellant presents them.

I. There was an absence of substantial evidence to invoke the presumption of Ark. Code Ann. § 11-9-103(b)(iv), and the Commission abused its discretion by invoking the presumption.

A prima facie presumption existed under our prior workers' compensation law that an injury did not result from intoxication of the injured employee while on duty. Ark. Code Ann. § 11-9-707(4) (1987). Act 796 of 1993 changed that presumption: Arkansas Code Annotated § 11-9-102(5)(B)(iv) (Repl. 1996) now reads in pertinent part:

> (B) "Compensable injury" does not include:
>
> . . . .
>
> (iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.
>
> (b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.
>
> (c) Every employee is deemed by his performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.
>
> (d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the

> alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

Ark. Code Ann. § 11-9-102(5)(B)(iv) (Repl. 1996).

In its decision, the Commission referred to the statute above and wrote, "In the present claim, the evidence shows that marijuana was present in the Claimant at the time of the injury. Therefore, we begin with the assumption that the Claimant's injury was substantially occasion [sic] by the drug." Appellant presents the threshold issue of whether there was substantial evidence upon which the Commission could base the presumption that the injury was substantially occasioned by marijuana.

Evidence presented at the hearing included a drug-testing report by Dr. H. H. Miller, Ph.D., a pharmacologist and director of toxicology at Corning Clinical Laboratories; deposition testimony of Dr. Henry F. Simmons, Jr., a toxicologist and medical doctor who reviewed Dr. Miller's report; and testimony of appellant.

Appellant testified that he had smoked marijuana about three weeks before the accident but had not done so since, keeping a vow made to his wife on their wedding day, July 1. He denied smoking marijuana the morning of the accident. He stated that he had lost control of the truck when it hydroplaned in a rainstorm.

Dr. Miller's report stated that the level of marijuana metabolites detected in the laboratory analysis was consistent with drug ingestion. His report went on to say, however:

> I cannot determine when, in what manner, in what quantity, or whether legal or illegal drug use occurred. Neither can I draw any conclusions about whether the individual was impaired or intoxicated at the time the specimen was collected. Impairment is a function of the level of the active parent drug which is presented to the central nervous system via the arterial blood supply and bears no relationship to the metabolic level found in the urine.

Dr. Henry Simmons, who reviewed Dr. Miller's report for appellant, testified by deposition as follows:

> The urine tests in and of themselves, at least through the [Department of Transportation] programs, are not used to determine the dose, to determine the dosing time, or determine the point of impairment.
>
> . . . .
>
> There are tests that can be conducted on blood, the results of which would more likely be connected to acute use and impairment than the tests that are conducted on urine.
>
> . . . .
>
> [A blood test] would dramatically narrow the framework. For example, an individual who had a significant quantity of the primary psychoactive ingredient of marijuana that was actually measurable in his blood, namely THC, is an individual who has used the drug within a very short time frame, say minutes to a few hours; as opposed to the presence of metabolites or breakdown products of THC in the urine which could be present under some circumstances for literally weeks after last use.

Under cross-examination, this exchange took place:

> Q. And the level as shown on the July 12, 1994, report is consistent with Mr. Brown having been impaired on that date; is that right, sir?
> A. A better way to state it would be that the presence of the metabolites— in his urine given on July the 12th of '94 [is] consistent with impairment on that day. But by no means specific for impairment.

When questioned about his familiarity with effects of marijuana metabolites on the central nervous system, Dr. Simmons answered, "[M]ore appropriately, not metabolites in general, but the THC itself. Certainly, not all of the metabolites are psychoactive." He stated that THC is the primary component affecting the central nervous system and can, in sufficient dosage, cause problems with perception, balance or coordination, reaction and response time, dizziness and light-headedness, loss of judgment, and possibly involvement in a motor-vehicle accident. He stated that his opinions in this case were based upon his believing appellant's testimony.

On redirect examination, Dr. Simmons said:

> There is nothing about the test that can be conclusively linked by itself to impairment at any particular time. The test alone could just as easily be consistent with not being impaired at all. [One can] not tell from this test whether or not the person was impaired. Absolutely not. You cannot tell from this test whether he was impaired. It would be fair to state that this test is inconclusive as far as whether or not a person was impaired on the date of the accident.

Appellant notes statements by Dr. Miller and Dr. Simmons that urine tests cannot show intoxication or impairment at the time the specimen was taken, and that the tests cannot determine the time or manner of use, the quantity used, or whether usage was legal or illegal. Appellant contends that the report thus did not meet the statutory requirements for "reasonable and responsible testing" by "properly trained medical or law enforcement personnel" of Arkansas Code Annotated § 11-9-102(5)(B)(iv)(c); and that it was not properly certified. Appellant contends that the presence of marijuana metabolites in his urine was not evidence of the presence of marijuana and that, therefore, the presumption that the injury or accident was substantially occasioned by the use of illegal drugs did not arise. *See* Ark. Code Ann. § 11-9-102(5)(B)(iv)(b).

Arkansas Code Annotated section 11-9-102 does not require that the Commission promulgate drug-testing procedures or specify particular types of tests to be used as a precondition to the intoxication presumption. The Arkansas General Assembly could have required testing that would show a certain level of illegal drugs, as it has required to invoke the presumption in D.W.I. cases, but it has not made such a requirement. The Commission has broad discretion with reference to admission of evidence, and its decision will not be reversed absent a showing of abuse of its discretion. We find no abuse of discretion in the Commission's considering the report on urine testing as evidence of the presence of drugs under Arkansas Code Annotated section 11-9-102(5)(B)(iv) (Repl. 1996). Neither do we find that there was an absence of substantial evidence for the Commission to invoke the presumption that appellant's accident was substantially occasioned by the use of marijuana.

II. The Commission had no substantial basis to deny relief to appellant, and the Commission abused its discretion when it disbelieved his testimony and ignored other evidence of record.

When a claim is denied because a claimant fails to show entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires that we affirm if a substantial basis for the denial of relief is displayed by the Commission's opinion. *Linthicum v. Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987). It is well established that the credibility of witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. *Wade v. Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989).

Appellant points to statements in the Commission's opinion that the only evidence pertaining to the cause of the accident was appellant's own testimony and that there is no corroborative testimony of how the accident occurred. He contends that the Commission ignored the investigating officer's decision not to mark alcohol and drugs as contributing factors, medical records reporting that he was awake and alert after the accident, and the absence of any notations by medical personnel that would indicate impairment or intoxication.

The Commission addressed in its opinion the question of whether appellant's denial of having used marijuana on the date of the accident was sufficient to constitute a preponderance of the credible evidence and rebut the presumption that the accident was substantially occasioned by the use of marijuana. It is clear that the Commission did not believe appellant's testimony that he had not smoked marijuana in three weeks. Furthermore, the Commission stated, "An admission of prior drug use, a positive drug test on the day of the accident, and two expert toxicologist's testimony that the test results could not pinpoint the time of use does not add up to a preponderance of the evidence that the accident was not substantially [occasioned] by drug use."

We cannot conclude that the Commission's decision failed to display a substantial basis for the denial of the claim. Furthermore, the Commission based its decision on the evidence to which it assigned the greater weight.

Affirmed.

BIRD, J, agrees.

AREY, CRABTREE, and ROAF, JJ., concur.

GRIFFEN, J., dissents.

TERRY CRABTREE, Judge, concurring. I concur for the reason stated in my concurrence to *Roberson v. Waste Management*, 58 Ark. App. 11, 15-16, 944 S.W.2d 858, 861-62 (1997).

ANDREE LAYTON ROAF, Judge, concurring. I concur for the reasons stated in my concurring opinion in *Graham v. Turnage Employment Ins. Cos.*, 60 Ark. App. 150, 960 S.W.2d 453 (1998).

AREY, J., joins.

WENDELL L. GRIFFEN, Judge, dissenting.

> *Drug (n.) 1. A substance used in medicine. 2. A substance that acts on the nervous system, such as a narcotic or stimulant, especially one causing addiction.*
> *Illegal (adj.) Against the law.*
> *Presence (n.) 1. Being present in a place.*
> *Present (adj.) 1. Being in the place in question. 2. Being dealt with or discussed. 3. Existing or occurring now.*
> OXFORD AMERICAN DICTIONARY 197, 325, 527 (1980).

How can a statute be strictly construed to excuse a party from meeting its burden of proof regarding a defense to a workers' compensation claim? How can a statute that requires proof of the "presence of . . . illegal drugs" in order to create a rebuttable presumption that an injury or accident was substantially occasioned by the use of "illegal drugs" be strictly construed to create the presumption without proof that a drug is present, not to mention an illegal drug? How can expert testimony that the results of urine testing are inconclusive regarding when illegal drugs were used, what drugs were used, what quantity of illegal drugs were used, and even whether illegal drug use occurred, be deemed proof that marijuana was present so as to create the rebuttable presumption? How can a finding by the Workers' Compensation

Commission that marijuana was present be supported by substantial evidence without proof that marijuana was present?

The urine testing that appellant underwent following his July 12, 1994, single-vehicle accident while performing a work-related errand in a company truck produced positive results for marijuana metabolites. Appellees relied upon those test results to deny appellant's claim for compensation benefits, contending that the positive test results established the presence of illegal drugs. Appellees introduced no other proof to establish the presence of illegal drugs. Appellant argues that the Commission's decision is not supported by substantial evidence, and he challenges the conclusion that marijuana metabolites constitute an illegal drug so as to trigger the rebuttable presumption relied upon by appellees. I would hold that there is no substantial evidence to support the Commission's decision because there is no evidence that marijuana or any other illegal drug was present. Therefore, I would reverse the Commission's decision and remand the case so that benefits could be awarded. The Commission's decision, and the position stated in the prevailing opinion that now affirms it, flies in the face of our obligation to strictly construe the workers' compensation statutes and violates our duty to leave narrowing or broadening the workers' compensation laws to the Arkansas General Assembly.

Arkansas Code Annotated Section 11-9-102(5)(B)(iv)(a) (Repl. 1996), provides that a compensable injury does not include an injury where the accident was substantially occasioned by the use of illegal drugs. Subsection (b) provides that "the presence of . . . illegal drugs" shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of illegal drugs. Subsection (d) states that an employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the illegal drugs did not substantially occasion an injury or accident.

Arkansas Code Annotated Section 11-9-704(c)(2) (Repl. 1996) provides that when deciding any issue, administrative law judges and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence.

Subsection (c)(3) states that administrative law judges, the Commission, and any reviewing courts shall construe the provisions of the workers' compensation law strictly, while subsection (c)(4) provides that in determining whether a party has met the burden of proof on an issue, administrative law judges and the Commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party.

Given this legislative framework concerning the burden of proof, strict construction, and impartial weighing of the evidence, and recognizing that the legislature has plainly declared that if the scope of the workers' compensation statutes is to be liberalized, broadened, or narrowed, then that concern is to be addressed by the General Assembly and not done by administrative law judges, the Commission, or the courts (*see* Ark. Code Ann. § 11-9-1001), the result now being affirmed is amazing. The appellees accepted the burden of proving the presence of "illegal drugs" when they defended appellant's compensation claim. They produced no proof that "illegal drugs" or any other drugs were present in the urine specimen obtained from appellant shortly after his accident occurred.

None of the expert opinion evidence introduced by appellees established that illegal drugs were present in the urine specimen. Instead, the report prepared by Dr. Harold Miller, a medical toxicologist and pharmacologist consulted by appellees, stated that repeat tests of appellant's urine sample were reported as confirmed positive for marijuana metabolites. Based on that testing, Dr. Miller concluded as follows:

> I cannot determine when, and what manner, and what quantity, or whether legal or illegal drug use occurred. Neither can I draw any conclusions about whether the individual was impaired or intoxicated at the time the specimen was collected. Impairment is a function of the level of activity parent drug which is presented to the central nervous system via the arterial blood supply and bears no relationship to the metabolite level found in the urine.

Appellees also deposed Dr. Henry S. Simmons, a medical doctor who is board certified in emergency medicine and medical toxicology. Dr. Simmons concurred with Dr. Miller that the

results of appellant's urine specimen collected on the date of his accident revealed the presence of marijuana metabolites. However, neither Dr. Miller nor Dr. Simmons stated that the marijuana metabolites were marijuana. Dr. Simmons explicitly stated that there was no proof in appellant's urine test results that tetrahydrocannabinol (THC), the principal psychoactive ingredient in marijuana, was present.

It is beyond dispute that marijuana is an illegal drug; however, appellees produced no proof that marijuana metabolites constitute drugs, not to mention "illegal drugs," anywhere, let alone in Arkansas. The statute upon which they based their defense to appellant's claim plainly requires proof of the presence of "illegal drugs," not metabolites. According to *The Sloane-Dorland Annotated Medical-Legal Dictionary*, a metabolite is any substance produced by metabolism or by a metabolic process. *Id.* at 353 (Supp. 1992). Hence, a marijuana metabolite is a substance produced through the metabolism of marijuana. It makes no more sense to call a marijuana metabolite marijuana than to call carbon monoxide gasoline.

Appellant's argument — that the mere presence of marijuana metabolites in his urine on the day of his accident was not sufficient to trigger the rebuttable presumption — was a direct challenge to the defense based upon the urine testing. If the expert opinions from Dr. Miller and Dr. Simmons prove anything, they show that appellees failed to prove that marijuana was present in appellant when the urine specimen was collected following his accident. That means that there is no substantial evidence to support the Commission's finding that marijuana was present so as to create the rebuttable presumption that appellant's injury was substantially occasioned by illegal drug use.

The Commission erred when it held that appellant was obligated to present proof to overcome the rebuttable presumption. There is no scientific, medical, judicial, statutory, or other basis in the record to justify declaring that marijuana metabolites are marijuana, or that they otherwise are "illegal drugs." Therefore, I respectfully dissent.

Billy Leon GRAHAM *v.* TURNAGE EMPLOYMENT GROUP and Wausau Insurance Companies

CA 97-456 960 S.W.2d 453

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered January 21, 1998

The Cortinez Law Firm, P.L.L.C., by: *Robert Cortinez*, for appellant.

Anderson & Kilpatrick, by: *Randy Murphy*, for appellees.

JOHN F. STROUD, JR., Judge. Billy Leon Graham was employed by Turnage Employment Group, a temporary employment agency, and reported to a job site for a roofing job on June

13, 1995, at approximately 5:00 a.m. At 9:45 a.m., when the accident occurred, he was unrolling insulation and moving backwards on top of a building. He fell through an open part of the roof and landed on a concrete floor thirty feet below, breaking his wrist and injuring his back, spleen, and liver. At the hospital emergency room, a urine specimen was taken for drug testing. Laboratory reports revealed the presence of marijuana metabolites.

The administrative law judge awarded benefits to Mr. Graham after finding that he had overcome the presumption of Arkansas Code Annotated section 11-9-102(5)(B)(iv) (Repl. 1996) that his accident was substantially occasioned by the presence of illegal drugs. The Workers' Compensation Commission reversed the award of benefits in a split decision. Mr. Graham now appeals, contending that 1) there was no substantial evidence to invoke the presumption, and the Commission abused its discretion by invoking the presumption; and 2) the Commission had no substantial basis to deny relief to appellant, and it abused its discretion by disbelieving his testimony and ignoring other evidence of record. The issues are identical to those raised in *Brown v. Alabama Electric Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998), which we also decide today. We affirm, addressing the issues as appellant presents them.

I. There was an absence of substantial evidence to invoke the presumption of Ark. Code Ann. § 11-9-103(b)(iv), and the Commission abused its discretion by invoking the presumption.

A prima facie presumption existed under our prior workers' compensation law that an injury did not result from intoxication of the injured employee. Ark. Code Ann. § 11-9-707(4) (1987). Act 796 of 1993 changed that presumption: Arkansas Code Annotated § 11-9-102(5)(B)(iv) (Repl. 1996) now reads in pertinent part:

> (B) "Compensable injury" does not include:
>
> * * * *
>
> (iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

> (b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.
>
> (c) Every employee is deemed by his performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.
>
> (d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

Ark. Code Ann. § 11-9-102(5)(B)(iv) (Repl. 1996).

The Commission referred to the statute above and wrote in its decision, "In the present claim, the evidence shows that marijuana was present in the Claimant at the time of the injury. Therefore, we begin with the assumption that the Claimant's injury was substantially occasion [sic] by the drug." Appellant presents the threshold issue of whether there was substantial evidence upon which the Commission could base the presumption that the injury was substantially occasioned by marijuana.

Evidence presented at the hearing included testimony of appellant and of Dr. Henry F. Simmons, Jr., a toxicologist and medical doctor who reviewed the laboratory testing report and testified by deposition. Appellant testified that he had smoked marijuana as a teenager and on an occasion seventeen days before the accident, but had not smoked between then and his accident. In cross-examination, he was questioned about statements in his deposition testimony, which had been recorded a month before the hearing; he acknowledged that he had responded both that he did not use illegal drugs and that he had smoked marijuana on May 27. He explained that his affirmative answers about "occasional use" were meant to refer to use of alcohol, not marijuana, and that he had been on pain killers when an insurance representative came to his home ten days after the accident to record his statement.

Dr. Henry Simmons testified that marijuana metabolites are the breakdown products that arise from the use of THC, tetrahydro-cannabinol, which is the principal psychoactive ingredient in marijuana. He stated that the presence of marijuana metabolites in appellant's urine was consistent with appellant's either being impaired or not being impaired on the date the specimen was taken. Dr. Simmons stated his opinion, based upon laboratory testing and appellant's statement that he had not used marijuana since seventeen days before his accident, that appellant would not have been acutely impaired by marijuana on the date of the accident.

Appellant contends that the urine testing did not meet the statutory requirements for "reasonable and responsible testing" by "properly trained medical or law enforcement personnel" as provided in Arkansas Code Annotated § 11-9-102(5)(B)(iv)(c). Appellant also contends that the presence of marijuana metabolites in his urine was not evidence of impairment due to the presence of marijuana and that, therefore, the presumption that the injury or accident was substantially occasioned by the use of illegal drugs did not arise. *See* Ark. Code Ann. § 11-9-102(5)(B)(iv)(b).

As we said today in *Brown v. Alabama Electric Co.*, Arkansas Code Annotated section 11-9-102(5)(B)(iv)(b) (Repl. 1996) does not require that the Commission promulgate drug-testing procedures or specify particular types of tests to be used as a precondition to the intoxication presumption. The Arkansas General Assembly could have required testing that would show a certain level of illegal drugs, as they have required to invoke the presumption in D.W.I. cases, but they have not made such a requirement. The Commission has broad discretion with reference to admission of evidence, and its decision will not be reversed absent a showing of abuse of its discretion. We find no abuse of discretion in the Commission's considering the report on urine testing as evidence of the presence of drugs under Arkansas Code Annotated section 11-9-102(5)(B)(iv) (Repl. 1996). Neither do we find that there was an absence of substantial evidence for the Commission to invoke the presumption that appellant's accident was substantially occasioned by the use of marijuana.

II. The Commission had no substantial basis to deny relief to appellant, and the Commission abused its discretion when it disbelieved his testimony and ignored other evidence of record.

When a claim is denied because a claimant fails to show entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires that we affirm if a substantial basis for the denial of relief is displayed by the Commission's opinion. *Linthicum v. Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987). It is well established that the credibility of witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. *Wade v. Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989). Furthermore, the Commission may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995).

In denying appellant's claim, the Commission wrote as follows:

> The claimant offered no credible evidence to refute the presumption and he gave contradictory and inconsistent testimony regarding his marijuana use. Therefore, after giving the claimant's testimony the weight that it is entitled to receive, and based upon the testimony of Dr. Simmons, we find that the claimant has failed to rebut by a preponderance of the evidence the presumption that his injury was substantially occasioned by the use of illegal drugs.

Appellant takes issue with the Commission's statement that he offered no credible evidence to refute the presumption that his accident was substantially occasioned by the use of marijuana.

Appellant complains that the Commission's treatment of testimony by his expert, Dr. Simmons, was highly selective and unfair. He notes that the Commission quoted the testimony about results of the drug test and mechanics of the accident being consistent with impairment, but that it did not mention the testimony about results also being consistent with no impairment and about the inability of any urine test to reveal when marijuana had been used or whether it had affected a person's capacity to func-

tion. Appellant also complains that the Commission ignored the fact that his medical records never mentioned intoxication or the presence of THC. Finally, he complains that the Commission greatly exaggerated by characterizing his testimony as "replete with contradictions and inconsistencies," when he testified that any contradictions were due to his pain medication and his confusion about the questioning. He points out that the Commission reversed the decision of the administrative law judge, who gave credence to his testimony.

We reiterate, as we have many times before, that 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 uphold those findings if they are supported by substantial evidence. *Roberson v. Waste Management*, 58 Ark. App. 11, 944 S.W.2d 858 (1997). The issue is not whether this court 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 result in the Commission's decision, we must affirm. *Id.* Moreover, this court reviews only the findings of the Commission and ignores those of the administrative law judge. *Crawford v. Pace*, 55 Ark. App. 60, 929 S.W.2d 727 (1996).

Here, the Commission based its decision on the evidence it found credible and of greater weight. We cannot conclude that the Commission's decision failed to display a substantial basis for the denial of the claim.

Affirmed.

BIRD, J., agrees.

AREY, CRABTREE, and ROAF, JJ., concur.

GRIFFEN, J., dissents.

TERRY CRABTREE, Judge, concurring. I concur for the reason stated in my concurrence to *Roberson v. Waste Management*, 58 Ark. App. 11, 15-16, 944 S.W.2d 858, 861-62 (1997).

ANDREE LAYTON ROAF, Judge, concurring. I concur in affirming this case. I do so because the appellant has failed to raise the issue that would allow us to reverse — whether a test that shows only the presence of non-psychoactive metabolites of marijuana sufficiently demonstrates the "presence . . . of illegal drugs" required to invoke the rebuttable presumption provided for in Arkansas Code Annotated § 11-9-102(5)(B)(iv)(b) (Repl. 1996).

This court is mandated to strictly construe workers' compensation statutes. Arkansas Code Annotated § 11-9-709(c)(3) (Repl. 1996). *Stephens v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997). Surely this mandate would not permit us to equate the presence of a by-product from the breakdown of a drug with the drug itself. The statute is unambiguous — it requires the presence of the drug. It seems hardly necessary to say that "presence" means "current existence" or "immediate proximity in time or place." AMERICAN HERITAGE COLLEGE DICTIONARY 1082 (3d ed. 1993).

It is true that the appellant argued that the presumption that his accident was substantially occasioned by the use of an illegal drug should not be invoked because the test employed was not "reasonable and responsible" as required by Ark. Code Ann. § 11-9-103(5)(b)(iv)(c) (Repl. 1996). His three-prong challenge to the test, however, misses the mark. First, he contends that the test reports are not properly certified, and second, that they do not indicate that the test was done by properly trained personnel. With regard to his third, challenge which goes to the substance of the test, he contends only that urine tests cannot show "impairment" or "intoxication." However, the statute in question does not require a showing of impairment, and this argument is thus beside the point.

Because Graham does not argue that there is no evidence of the presence of the illegal drug, I must concur in an affirmance. Given the fact that the presumption had been invoked, I cannot say that there was not substantial evidence to support the finding that Graham failed to rebut this presumption.

AREY, J., joins.

WENDELL L. GRIFFEN, Judge, dissenting. I dissent from the result announced and the reasoning employed in the majority opinion because it is clear that the appellees did not carry their burden of proving the presence of "illegal drugs" so as to establish the rebuttable presumption created by Ark. Code Ann. § 11-9-102(5)(B)(iv)(b) (Repl. 1997). As I mentioned in my dissenting opinion in *Brown v. Alabama Electric Co.*, 60 Ark. App. 138, 959 S.W.2d 753, (1998), also decided today, there is no evidence in the record showing that marijuana or any other illegal drug was present. There was, therefore, no basis whatsoever for the Commission to hold that appellees had established an evidentiary basis for the rebuttable presumption that appellant's June 13, 1995, injury was substantially occasioned by the use of illegal drugs, and no basis for requiring appellant to rebut the presumption.

The employer and its workers' compensation insurer plainly had the burden of proving the presence of illegal drugs in order to take advantage of the presumption, and the workers' compensation law is unmistakably clear that a party having the burden of proof on an issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1997). Subsection (c)(3) states that administrative law judges, the Commission, and any reviewing courts shall construe the provisions of the workers' compensation law strictly. Subsection (c)(4) provides that in determining whether a party has met the burden of proof on an issue, administrative law judges and the Commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party. Thus, it is remarkable, to say the least, that the majority now affirms the Commission's decision that marijuana was present in appellant's body at the time of his June 13, 1995, injury. The rules of strict construction and burden of proof should be applied to employers and insurance carriers the same way that they are applied to injured workers.

The evidentiary and scientific truth is that no marijuana was proved to be present in appellant's body or at any other relevant site related to his injury and workplace. The only thing that the urine specimen taken from appellant after his injury showed was that marijuana metabolites were present. There is no proof that

marijuana metabolites *are* marijuana, or that marijuana metabolites are even a drug, let alone an "illegal drug." Instead, the only expert opinion evidence came from Dr. Henry Simmons, whose testimony established that marijuana metabolites are by-products produced when the body has metabolized marijuana.

There is a fundamental difference between illegal drugs and other drugs. Illegal drugs are specifically proscribed as such. They are not legal drugs, and they are not non-drugs. Marijuana is an illegal drug in Arkansas and is listed among the controlled substances prohibited by the Arkansas Controlled Substances Act (Ark. Code Ann. § 5-64-101 et seq. (Repl. 1997)). Section 5-64-101(n) defines marijuana as follows:

> "Marijuana" means all parts and any variety and/or species of the plant Cannabis that contains THC (Tetrahydrocannibaninol) whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

Nothing in that definition fits the proof in this case. There is no proof that any part, variety, or species of the plant Cannabis that contained THC was present in appellant's body. In fact, Dr. Simmons unequivocally testified that the drug testing simply established that at some past time appellant had been exposed to THC, had absorbed the material, had metabolized it, and was excreting marijuana metabolites that were found in the urine specimen taken from him after his injury. There is no proof that the marijuana metabolites found in appellant's urine specimen contained THC, the principal psychoactive agent in marijuana according to Dr. Simmons' testimony. There is no proof that marijuana metabolites are illegal in Arkansas, or elsewhere, or that they have ever been illegal.

Equally remarkable is that the majority today affirms the Commission's finding that appellees met their burden of proving

the presence of an "illegal drug." Arkansas Code Annotated § 5-64-101(k) (Repl. 1997) contains the following definition of "drug."

> "Drug" means (1) Substances recognized as drugs in the official United States Pharmacopeia, official Homeopathic Pharmacopeia of the United States, or official National Formulary, or any supplement to any of them; (2) Substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals; (3) Substances (other than food) intended to affect the structure or any function of the body of man or animals; and (4) Substances intended for use as a component of any article specified in clause (1), (2), or (3) of this subsection. It does not include devices or their components, parts, or accessories.

Appellees presented no proof that the marijuana metabolites found in appellant's urine specimen matched any part of this definition, or that marijuana metabolites fit any other definition of "drugs." One would think that adherence to the requirements that the workers' compensation statute be strictly construed and that a party having the burden of proof on any issue be required to meet that burden by a preponderance of the evidence would require, at minimum, some proof showing that marijuana metabolites are drugs, or at least some explanation why no such proof is necessary.

When the Arkansas General Assembly enacted Act 792 of 1993 and included the rebuttable presumption relied upon by appellees, it knew the difference between marijuana and marijuana metabolites. The General Assembly knew the difference between a drug and a by-product produced after a drug has been metabolized. The General Assembly made the rebuttable presumption dependent upon proof by a preponderance of the evidence that an illegal drug, and nothing less, was present in connection with an injury for which workers' compensation benefits are sought. If the General Assembly had intended for the presumption to be triggered by mere proof of substances that are not drugs, such as metabolites, it could have included those substances in § 11-9-102(5)(B)(iv)(b). It did not do so. Instead, it declared that the Commission and reviewing courts are not to lib-

eralize, broaden, or narrow the scope of the workers' compensation statutes. *See* Ark. Code Ann. § 11-9-1001 (Repl. 1997).

I cannot imagine a more flagrant violation of that legislative declaration than the decisions reached in these cases, whereby substances neither proven illegal nor drugs are judicially deemed "illegal drugs" by the Commission and the court of appeals, in the face of plain statutory language requiring that the workers' compensation statutes be strictly construed without giving the benefit of the doubt to any party. If an injury must be substantially occasioned "by the use of illegal drugs" in order to disqualify a worker from receiving workers' compensation benefits, it makes no sense to deny benefits based on that defense when the parties who assert the defense are unable to prove that "illegal drugs" are present, let alone that they substantially occasioned the injury. Therefore, I respectfully dissent.

Ivory McKENZIE *v.* STATE of Arkansas

CA CR 97-685 961 S.W.2d 775

Court of Appeals of Arkansas
Division II
Opinion delivered January 28, 1998

Maxie G. Kizer, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly S. Terry*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Ivory McKenzie was placed on probation for possession of a controlled substance and for possession with intent to deliver. The illegal substance was cocaine, and the offenses were committed in October and November of 1994. Among the conditions of probation was that he not engage in illegal drug use. The State moved to revoke alleging that appellant tested positive for illegal drugs on three separate occasions during his probationary period. A hearing on the matter was held on February 3, 1997, and the circuit court of Lincoln County found that appellant had violated the terms of his probation, resulting in revocation. He was given two concurrent ten-year sentences. He now appeals the revocation of his probation arguing that there is insufficient evidence upon which to base the revocation. We affirm.

Probation may be revoked upon a finding by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of the probation. Ark. Code Ann. § 5-4-309(d) (Repl. 1993). Therefore, evidence that is insufficient to convict a person of the offense may be sufficient to revoke

probation. *Billings v. State*, 53 Ark. App. 219, 921 S.W.2d 607 (1996). On appeal of a revocation, the revocation will not be overturned unless the decision is clearly against the preponderance of the evidence. *Id.* We must give due regard to the trial court's superior position in determining the credibility of witnesses and the weight to be given their testimony. *Id.* Given these standards of review, the trial court's decision to revoke appellant's probation is not clearly against the preponderance of the evidence.

The evidence revealed that appellant tested positive for cocaine on June 5, 1996, and positive for marijuana on June 5, July 12, and October 2, 1996. He refused to submit to a later drug screen. Appellant's contention is not that he did not use illegal drugs, but that he had an excusable reason for using them. He testified that he suffers from keloid scarring and uses marijuana to gain relief from the pain caused by that condition. He admitted that no doctor has prescribed or recommended using marijuana or cocaine. Appellant also testified that he suffers from a split personality such that he could not swear he did not take the illegal drugs for which he tested positive. He presented no documentation to support his allegation of split personality disorder.

While we might have sympathy for appellant's medical condition, it does not excuse his illicit drug use. Medical treatments to prevent infection and to dissipate pain were available by prescription under a physician's care and control, as his physician testified. His physician recommended to appellant that he attend a pain clinic for ongoing problems with his condition, but he never recommended illicit drug use. The doctor's testimony included the following statements: "[I]n no way am I advocating the use of illegal drugs, because they are illegal. . . . I don't advocate the use of marijuana."

Appellant admitted to using, at some point in his life, every drug "from heroin to cocaine." Ironically, he denied illicit drug use during the time he tested positive. Given his belief that he suffered from a split personality disorder, appellant could not assure the trial court that he did not use drugs in the past nor could he assure the trial court that he would not take drugs in the future.

During his probation, the State attempted to assist appellant in getting help for his illicit drug use. Appellant stated that he could not complete such a program for various reasons. For example, he stated that he could not dedicate himself to the program because he would resort to drugs to relieve the pain. None of his reasons justify violation of probation conditions, and he presents us no compelling authority to alter the outcome of this revocation hearing. With this evidence, the trial court was not clearly erroneous when it revoked appellant's probation.

Affirmed.

BIRD and GRIFFEN, JJ., agree.

Sandra Kay BISHOP *v.* James R. BISHOP

CA 97-23 961 S.W.2d 770

Court of Appeals of Arkansas
Division II
Opinion delivered January 28, 1998

Anne Orsi Smith, for appellant.

Ramsay, Bridgforth, Harrelson & Starling, by: *Rosalind M. Mouser*, for appellee.

D. FRANKLIN AREY, III, Judge. This is a divorce case. Sandra Bishop appeals from the Jefferson County Chancery Court's decree finding that a certificate of deposit account amounting to approximately $37,000 did not belong to the parties because it had been given to their son, and from the denial of her motion to set aside the parties' property settlement agreement. We find no error and affirm.

After almost thirty years of marriage, the parties separated in January 1995. Later that year the appellee, James Bishop, filed for divorce. The parties' only child, J.R. "Ricky" Bishop, Jr., was an adult at the time of the divorce. Appellee worked for International Paper Company for the entire length of the marriage and acquired rights to a retirement pension there. Appellant did not work during the marriage. The parties owned, among other assets, a home on which there was no debt and several bank accounts.

One of these accounts was a certificate of deposit account held in the names of Ricky Bishop and appellee, under Ricky's social security number. This account was set up when Ricky was fourteen and was funded by the parties. Even though Ricky paid taxes on the earnings from this account, it is undisputed that the parties reimbursed him. The sole withdrawal from the CD account occurred in 1987 when the parties purchased a van. Appellee was the only person who monitored the activity in this account. The bank statements from this account came to the parties' residence until appellee changed the address to a post office box at a time when the parties were having marital difficulties. Appellee later changed the address back to that of the parties' residence, but changed it to Ricky's address when it became apparent to appellee that divorce was imminent.

At trial, appellant contended that the certificate of deposit account belonged to the parties and that she was entitled to have her half of this account charged off against appellee's portion of the marital assets. Appellant testified that the parties had simply placed the money into an account in their son's name to lessen

their tax burden, and that appellee kept control of this account throughout their marriage. She contended that appellee decided to give this money to Ricky because the parties were separated and because appellee, who was living with Ricky at the time, wanted to conceal this asset from her.

Appellee responded that these funds were no longer marital property because a valid *inter vivos* gift had been completed to Ricky. Appellee testified that on January 5, 1995, Ricky cashed in the CD account in his presence and deposited the money into a new account at Simmons Bank in Ricky's name. He stated that his (appellee's) name is on the account only as the designated beneficiary in the event of Ricky's death. Ricky admitted at trial that he had never accessed the CD account until January 1995. He also testified that, although appellee is listed as a beneficiary, he is not an owner of the new account.

At trial, the parties agreed upon every issue except the ownership of the CD account and entered into a stipulated property settlement agreement, which was read into the record. At the conclusion of the reading of the stipulation, appellant's attorney asked appellant if there was anything that they had not covered. Appellant affirmed that she had no further questions, agreed to the stipulation, and wanted the court to approve it. Appellee likewise stated that he understood the stipulation and agreed to it.

Before the divorce decree was entered, appellant filed a motion to set aside the property settlement agreement on the ground that she had been misinformed as to the retirement benefits to which she was entitled. At the hearing on the motion to set aside the agreement, appellant testified that her attorney had erroneously informed her that, if appellee did not survive, appellant would not receive anything from his pension plan. Appellant contended that she had opted to accept the house instead of any interest in appellee's retirement plan in reliance upon her attorney's incorrect advice. Appellant's father corroborated appellant's testimony.

Appellant's former attorney testified that, as a package deal, appellant had agreed to give up any interest in appellee's retirement account in order to receive the marital residence. He stated

that he had informed appellant that her interest in appellee's retirement account would terminate if Mr. Bishop died first and a joint and survivor benefit had not been designated. He stated that he told her that if a joint and survivor election was made, there would be a reduction in the monthly benefit, but he was not sure how appellee's death would affect it. He stated that they had gone over this subject for quite some time and in more than one discussion, and that Mrs. Bishop had made her decision in consultation with several members of her family. He stated that he had been uncertain about the effect appellee's death would have on appellant's benefits, and that this was taken into consideration when she decided to keep the house in lieu of an interest in appellee's retirement plan.

At the conclusion of the hearing, the chancellor stated that appellant had offered no credible proof that she received any inaccurate information from her former attorney. He found that the agreement was fair and equitable and held that he would enforce it. The chancellor then entered the divorce decree in which he found that the CD account did not belong to the parties and entered an order denying appellant's motion to set aside the property settlement agreement.

In her first point on appeal, appellant argues that the evidence does not support the chancellor's finding that appellee made an *inter vivos* gift of the CD account to Ricky. The requirements for an effective *inter vivos* gift are: an actual delivery of the subject matter of the gift to the donee with a clear intent to make an immediate, unconditional, and final gift beyond recall, accompanied by an unconditional release by the donor of all future dominion and control over the property so delivered. *Chalmers v. Chalmers*, 327 Ark. 141, 937 S.W.2d 171 (1997). These elements must be established by clear and convincing proof in order for an *inter vivos* gift to be sustained. *Jamison v. Estate of Goodlett*, 56 Ark. App. 71, 938 S.W.2d 865 (1997). Clear and convincing evidence is evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the fact-finder to come to a clear conviction, without hesitance, of the truth of the facts related. *First Nat'l*

Bank v. Rush, 30 Ark. App. 272, 785 S.W.2d 474 (1990). This court's test on review is not whether it is convinced that there was clear and convincing evidence to support the trial judge's finding but whether it can say that the finding is clearly erroneous. *Id.* A requirement that the evidence be clear and convincing does not mean that the evidence must be uncontradicted. *O'Flarity v. O'Flarity*, 42 Ark. App. 5, 852 S.W.2d 150 (1993). Even where the burden of proof is by clear and convincing evidence, this court defers to the superior position of the chancellor to evaluate the evidence. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996).

[redacted] The gravamen of delivery is a showing of an act or acts on the part of the putative donor displaying an intention or purpose to part with dominion over the object of the gift and to confer it on some other person. *Chalmers v. Chalmers, supra.* Intention to give, by itself, is not sufficient; there must be a delivery to consummate the gift and to pass title. *Id.* The decisive factor is whether the putative donor has the power to reclaim the property. *Id. Accord Swaffar v. Swaffar*, 327 Ark. 235, 938 S.W.2d 552 (1997); *Gibson v. Boling*, 274 Ark. 53, 622 S.W.2d 180 (1981); *Hudson v. Bradley*, 176 Ark. 853, 4 S.W.2d 534 (1928). Although the rule with respect to delivery of gifts is less strictly applied to transactions between members of a family, delivery must occur for a gift to be effective. *Chalmers v. Chalmers, supra.*

> There can be no doubt that a certificate of deposit may be the subject of a gift *inter vivos*. We have stated that a promissory note, or any chose in action or other evidence of debt, may be the subject of a gift *inter vivos* and that a certificate of deposit falls into this category. *Boling v. Gibson*, 266 Ark. 310, 584 S.W.2d 14 (1979). Likewise, there can be no doubt that the requirements of intent and delivery apply to an *inter vivos* gift of a certificate of deposit. We have also stated that in order to constitute a valid gift of a certificate of deposit, there must be an intent by the donor that title pass immediately, and a delivery of the certificate. *Id.*

Irvin v. Jones, 310 Ark. 114, 118, 832 S.W.2d 827, 828-29 (1992).

We cannot say that the chancellor's finding that the parties made a gift of the CD account to Ricky is clearly erroneous. The account was established in Ricky's name, using his social security number. Ricky paid taxes on the account's earnings, which further indicates his parents' intent to give the funds to him. There is evidence that the delivery of this account was completed in January 1995 when Ricky cashed it. We cannot say that the chancellor erred in refusing to charge off an amount equal to half of this account against appellee's property.

In her second point on appeal, appellant argues that the chancellor erred in refusing to set aside the property settlement agreement due to her unilateral mistake. Citing *Mountain Home School District No. 9 v. T.M.J. Builders, Inc.*, 313 Ark. 661, 858 S.W.2d 74 (1993), appellant claims that she is entitled to rescission or reformation of the agreement due to her unilateral mistake. The conditions essential for obtaining rescission due to a unilateral mistake were set forth in that case as follows: (1) the mistake must be of so great a consequence that to enforce the contract as actually made would be unconscionable; (2) the matter as to which the mistake was made must relate to a material feature of the contract; (3) the mistake must have occurred notwithstanding the exercise of reasonable care by the party making the mistake; and (4) the party seeking it must be able to get relief by way of rescission without serious prejudice to the other party, except for the loss of his bargain.

The rule applied in *T.M.J. Builders* originates from *State ex rel. Arkansas State Highway Commission v. Ottinger*, 232 Ark. 35, 334 S.W.2d 694 (1960). In both cases a contractor discovered a mistake in its bid prior to formal acceptance of the bid. In *Ottinger*, our supreme court stressed the contractor's attempt to withdraw its bid "before any award of the contract and within a matter of hours after the bids were opened. . . ." *Ottinger*, 232 Ark. at 37, 334 S.W.2d at 695. No other bids had been rejected. *Id.* In both cases, the other party did not recognize the withdrawal, and formally accepted the bid. In *Ottinger*, the chancellor found that the contractor had proven his entitlement to rescission, and the supreme court affirmed; in *T.M.J. Builders*, the chancellor found

that the contractor had not proven entitlement to rescission, and the supreme court affirmed.

The case before us differs from *Ottinger* and *T.M.J. Builders*. It does not involve an attempt to withdraw a bid prior to its acceptance. Instead, appellant's attempt to set aside the settlement agreement arose *after* appellant and appellee entered into a binding contract. "[W]hen a stipulation dictated into open court covers all the rights and liabilities of the parties in a total and complete agreement, it will have the full force and effect of a binding agreement, and it will not be modifiable." *Kunz v. Jarnigan*, 25 Ark. App. 221, 224, 756 S.W.2d 913, 915 (1988) (citing *Linehan v. Linehan*, 8 Ark. App. 177, 649 S.W.2d 837 (1983)). Thus, we find *Ottinger* and *T.M.J. Builders* distinguishable, and not applicable to the facts at hand.

A contractual stipulation can only be withdrawn on grounds for nullifying a contract, *i.e.*, fraud or misrepresentation. *See Linehan, supra.* The generally accepted rule is that rescission cannot be enforced or ordered on account of unilateral mistake unless some special ground for the interference of a court of equity is shown. There can be no rescission on account of the mistake of one party only, where the other party was not guilty of any fraud, concealment, undue influence, or bad faith, and did not induce or encourage the mistake, and will not derive any unconscionable advantage from the enforcement of the contract. *Lowell Perkins Agency, Inc. v. Jacobs*, 250 Ark. 952, 469 S.W.2d 89 (1971). The fact that appellant entered into an agreement which later appeared improvident to her is no ground for relief. *Helms v. Helms*, 317 Ark. 143, 875 S.W.2d 849 (1994).

Chancery cases are reviewed *de novo* on appeal, and the appellate court will not disturb the chancellor's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993). Because the question of the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court will defer to the chancellor's superior opportunity to assess credibility. *Id.*

The chancellor heard the testimony and found appellant's former attorney to be more credible than appellant and her father. The chancellor's findings are not clearly erroneous in light of the testimony and proof summarized above. We therefore cannot say that the chancellor erred in refusing to set aside the settlement agreement due to appellant's unilateral mistake.

Affirmed.

JENNINGS and STROUD, JJ., agree.

Brenda Ann RUDICK *v.* UNIFIRST CORPORATION

CA 97-611 962 S.W.2d 819

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered January 28, 1998

Tom Thompson, for appellant.

Womack, Landis, Phelps, McNeill & McDaniel, by: *Richard Lusby*, for appellee.

D. FRANKLIN AREY, III, Judge. This appeal arises from the Workers' Compensation Commission's denial of benefits to the appellant, Brenda Ann Rudick. The Commission affirmed and adopted the administrative law judge's opinion; the ALJ found that a rocking motion made by appellant six times per minute to perform her job was not sufficiently rapid to constitute a "rapid repetitive motion" under Ark. Code Ann. § 11-9-102(5)(A)(ii)(a) (Supp. 1997). Appellant contends that the Commission's decision is not supported by substantial evidence, and that it is erroneous as a matter of law. We reverse and remand.

The appellee, Unifirst Corporation, manufactures uniform shirts. Appellant was employed by appellee; she worked with a pocket setting machine that required her to stand and use her right foot to depress a pedal that operated the machine. A video tape of her work revealed that her left leg was extended and flexed as she stepped forward with her right foot to press the pedal and then stepped back. The parties stipulated at the hearing before the ALJ that appellant would stand and push on this pedal between 2,400 and 2,500 times a day.

Appellant developed problems with her left knee in February and March of 1995. She testified that she had no prior problems with her left knee. Her treating physician gave a diagnosis of moderate chondromalacia in her left knee, and indicated that the

chondromalacia was causally related to the rocking back and forth motion appellant used to operate her machine at work.[1]

In his opinion filed July 8, 1996, the ALJ concluded that appellant's work activities did not involve a rapid motion. The ALJ noted that appellant was required to prove by a preponderance of the evidence that a gradual-onset injury such as hers was caused by rapid repetitive motion and was the cause of more than 50% of her disability or need for treatment. *See* Ark. Code Ann. § 11-9-102(5). The ALJ applied a test for rapid repetitive motion adopted by the Commission in one of its opinions.

> In *Throckmorton v. J & J Metals*, . . . the Commission held that the requirement of rapid repetitive motion is satisfied where the employment duties involve, at least in part, a notably high rate of activity involving the exact, or almost the exact, same movement again and again over extended periods. . . .
>
> The video tape of [appellant's] work activities leaves no doubt that her job involved repetitive motion. However, although the motion was steady, it was not "a notably high rate of activity" that would be sufficient for it to be considered rapid. [Appellant's] estimates of her job activity indicate that she rocked back and forth, at most, no more than six times per minute. This is not sufficiently rapid to satisfy the statutory requirement.

The ALJ denied and dismissed appellant's request for benefits. In an opinion filed February 21, 1997, the full Commission affirmed and adopted the ALJ's decision.

Appellant argues that the Commission's interpretation of the term rapid is erroneous. In essence, appellant claims that the Commission applied the wrong legal standard to determine whether her work activity was rapid. Appellant cites to our decision in *Baysinger v. Air Systems, Inc.*, 55 Ark. App. 174, 934 S.W.2d 230 (1996); appellee counters that *Baysinger* addresses

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[1] Appellee argues that appellant did not demonstrate that the major cause of her condition was her employment activity. We do not reach this argument, because it was not ruled on by the Commission. *See W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 921 S.W.2d 954 (1996). We express no judgment in this opinion on any question other than the Commission's interpretation of the term "rapid" in the phrase "rapid repetitive motion."

repetitive activity, not *rapid* activity. Appellee's point is well taken. Nonetheless, appellant does call into question the Commission's *Throckmorton* test for rapid motion.

Two of our recent decisions are instructive. *See Kildow v. Baldwin Piano & Organ*, 28 Ark. App. 194, 948 S.W.2d 100 (1997), *review granted*, No. 97-828 (Ark. Sept. 11, 1997); *Lay v. United Parcel Serv.*, 58 Ark. App. 35, 944 S.W.2d 867 (1997). In *Lay*, one of the claimant's alternative arguments was that his injury was compensable as a "rapid repetitive motion" injury. The claimant asserted that his motions were rapid, because he made nearly eighty deliveries per day in a ten-to-eleven-hour shift, an average of one every eight minutes. He did not claim that driving his delivery truck or actually making the deliveries constituted a part of his rapid repetitive tasks. Instead, he claimed that loading and unloading packages, and lifting and replacing an electronic clipboard, constituted rapid activity.

We affirmed the Commission's denial of benefits. *See Lay, supra*. We did not think *Baysinger* was dispositive: *Baysinger* addressed the repetitive element of "rapid repetitive motion," but the Commission decided that the claimant did not prove that his job was *either* rapid or repetitive. *See Lay*, 58 Ark. App. at 37, 944 S.W.2d at 870. We agreed with the Commission.

> Although we do not provide a comprehensive definition of what constitutes "rapid repetitive motion," we conclude that the motions as described by Lay, separated by periods of several minutes or more, do not constitute rapid repetitive motion under the meaning of § 11-9-102-(5)(A)(ii)(a).

Lay, 58 Ark. App. at 41, 944 S.W.2d at 870.

In *Kildow*, the Commission denied benefits to the claimant, because she failed to prove that her activities were rapid. The Commission applied the same *Throckmorton* standard that is applied against appellant in the instant case. That is, the Commission required proof of "a notably high rate of activity." *See Kildow*, 58 Ark. App. at 199, 948 S.W.2d at 103. We noted our holding in *Baysinger* which rejected the Commission's *Throckmorton* standard to determine if an activity was repetitive. We observed that "[i]n its ordinary usage, rapid means swift or

quick." *Kildow*, 58 Ark. App. at 200, 948 S.W.2d at 103 (citing *Concise Oxford Dictionary* 1137 (9th ed. 1995)). We determined that the Commission's decision was not supported by substantial evidence, and we reversed and remanded the matter to the Commission for an award of benefits. *See id.* at 203, 948 S.W.2d at 103-104.

We did not adopt the Commission's *Throckmorton* test for rapidity in either *Lay* or *Kildow*. We have not required a showing of "a notably high rate of activity." *See Kildow*, 58 Ark. App. at 203, 948 S.W.2d at 103-104. Both *Lay* and *Kildow* were handed down after the Commission filed its opinion in the case now before us. Nonetheless, the Commission should review appellant's case in light of these decisions. "Where legislative interpretation is concerned,. . . legal reasoning does attempt to fix the meaning of the word. When this is done, subsequent cases must be decided upon the basis that the prior meaning remains. . . . Its meaning is made clear as examples are seen, but the reference is fixed." Edward H. Levi, *An Introduction to Legal Reasoning* 33 (1949).

Because the Commission should apply our decisions to test for rapid motion, this case is reversed and remanded for its further consideration. *Baysinger* is sufficiently analogous to lend support for this disposition. There, we decided that the Commission's interpretation of section 11-9-102(5)(A)(ii)(a) was "too restrictive." *Baysinger*, 55 Ark. App. at 176, 934 S.W.2d at 230. We reversed and remanded to the Commission "for a new determination on the issue of appellant's meeting his burden of proof." *Id.* Likewise, in this instance it would be appropriate for the Commission to apply *Lay* and *Kildow* to the record before it, and to make findings of fact and rule accordingly. *See* Ark. Code Ann. § 11-9-704(b).

Finally, it is appropriate to repeat an observation previously made by Judge Cooper: "We think it apparent that the Commission is making every effort to comply with the legislative mandate, a difficult task that requires that a fine balance be struck between the legislature's prohibition against broadening the scope of the workers' compensation statutes and the legislature's express state-

ment that the controlling purpose of workers' compensation is to pay benefits to all legitimately injured workers." *Daniel v. Firestone Bldg. Products*, 57 Ark. App. 123, 124, 942 S.W.2d 277, 278 (1997). Notwithstanding our disagreement in this instance, we continue to acknowledge the Commission's efforts.

Reversed and remanded.

ROBBINS, C.J., and MEADS and ROAF, JJ., agree.

JENNINGS and STROUD, JJ., dissent.

JOHN E. JENNINGS, dissenting. As I understand it, we are reversing this case and remanding it to the Commission because it used an improper standard in determining whether appellant's actions at work were "rapid" within the meaning of Ark. Code Ann. § 11-9-102(5). I cannot agree that the Commission used an inappropriate standard.

One of the definitions of a "compensable injury" is an injury "caused by rapid repetitive motion." Ark. Code Ann. § 11-9-102(5). In *Baysinger v. Air Systems, Inc.*, 55 Ark. App. 174, 934 S.W.2d 230 (1996), the Commission had held that in order to be "repetitive" under the statute the activity must involve the exact, or almost exact, same movement again and again over extended periods of time. We held in *Baysinger* that this formulation was too restrictive in that it precluded multiple tasks from being considered together to satisfy the requirements of the statute. *Baysinger* did not address the statutory requirement that the motion be "rapid" and has no real application to the case at bar.

In *Kildow v. Baldwin Piano & Organ*, 58 Ark. App. 194, 948 S.W.2d 100 (1997), we said that "rapid" means "swift or quick." While I have no problem with that definition, I cannot agree that it is materially different from the test used by the Commission, i.e., that "rapid" means "a notably high rate of activity."

The majority also relies on *Lay v. United Parcel Serv.*, 58 Ark. App. 35, 944 S.W.2d 867 (1997), but that case offers no support either. Indeed, we affirmed the Commission's decision in *Lay* that the claimant's activity was not sufficiently "rapid," despite the

fact that the Commission evidently used its "notably high rate of activity" standard. *See Lay*, 58 Ark. App. at 40-41.

In short, I can see no meaningful difference between the language used by the Legislature, "rapid"; the language we used in *Kildow*, "swift or quick"; and the language used by the Commission, "a notably high rate of activity." No useful purpose can be served by remanding this case to the Commission; I would decide the issue on the merits.

I am authorized to state that Judge Stroud joins in this dissent.

Fred DAVIS *v.* STATE of Arkansas

CA CR 97-404 962 S.W.2d 815

Court of Appeals of Arkansas
Division II
Opinion delivered January 28, 1998
[Petition for rehearing denied March 18, 1998.]

Richard A. Hutto, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Fred Davis was found guilty of delivery of a controlled substance (cocaine) and sentenced to thirty years in the Arkansas Department of Correction. He argues three points on appeal: (1) that the trial court committed prejudicial error by not granting his challenge for cause, thereby forcing him to use a peremptory challenge against that juror and forcing him to accept a juror he did not want; (2) that the trial court committed prejudicial error by refusing to grant a mistrial after the State's witness referred to appellant as a "bigger dealer"; and (3) that the trial court committed prejudicial error by allowing the State to present, over defense's objection, evidence of prior uncharged misconduct by the appellant. We disagree and affirm.

Appellant first argues that the trial court erred in refusing to strike prospective juror Pat Compton for cause. During voir dire, Ms. Compton stated that she was currently employed as a law clerk for a United States Magistrate but before that she was Chief Deputy Prosecutor for Union County. In that capacity she had prosecuted some drug cases and had sat as "second chair" on occasional cases with the prosecutor in this case. She had worked with Officer Linda Law, a witness in this case. She acknowledged that she had a fairly long association with the El Dorado Police Department and the Union County Sheriff's Office, and had a close association with officers in both places. Defense counsel's motion that she be removed for cause was denied by the trial court. Ms. Compton then stated that she considered the defendant not guilty unless the State met the burden of proving otherwise, and that her friendship with police officers did not make her more likely to believe their testimony. Defense counsel then used the seventh of his eight peremptory strikes against Ms. Compton. After defense counsel used his eighth and last peremptory strike, he subsequently attempted to excuse another juror, Donald

Moon, but was not allowed to do so. He did not challenge juror Moon for cause.

Appellant argues that since he objected to the trial court's refusal to strike Ms. Compton for cause and exhausted all of his peremptory challenges, it follows that prejudicial error was committed. We disagree.

The Arkansas Supreme Court has stated unequivocally that in deciding whether a defendant's right to an impartial jury has been violated, the focus should not be on a juror who was peremptorily challenged, but on the persons who actually sat on the jury. *Pickens v. State*, 301 Ark. 244, 783 S.W.2d 341 (1990) (citing *Ross v. Oklahoma*, 487 U.S. 81 (1988)). In that case, as in the case at bar, appellant did not contend that any person who actually sat on the jury should have been excluded for cause; rather, the only complaint was the loss of peremptory challenges, which is not reversible error. *Id.* Furthermore, our supreme court has held that the loss of peremptory challenges cannot be reviewed on appeal. *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996). To preserve for appeal an argument that the trial court erred in not excusing certain jurors for cause, the appellant must have exhausted his peremptory challenges and must show that he was later forced to accept a juror who should have been excused for cause. *Scherrer v. State*, 294 Ark. 227, 742 S.W.2d 877 (1988); *see also Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988); *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284 (1982).

Appellant argues, in reliance upon *Glover v. State*, 248 Ark. 1260, 455 S.W.2d 670 (1970), that our focus on appeal should not be on whether Juror Moon should have been excused for cause, but whether Ms. Compton should have been excused for cause. He argues that the standard enunciated in *Scherrer* does not address the real issue and is not in accordance with earlier Arkansas case law. He urges us to reaffirm the procedure followed in *Glover* and hold that "an appellant preserves a denial of a challenge for cause for appeal when he peremptorily challenges the juror who was not excused for cause, uses all his peremptory challenges, and states on the record that he would have challenged another juror if he had not been required to use his peremptory

challenge against the juror who should have been excused for cause." Such a holding would require us to disregard considerable recent precedent to the contrary. Furthermore, to the extent that this court's opinion in *Givens v. State*, 42 Ark. App. 173, 856 S.W.2d 33 (1993), could be read as contrary to the decisions of the supreme court, it is overruled.

For his second point on appeal, appellant argues that the trial court erred in refusing to grant a mistrial. Mistrial is a drastic remedy which should be resorted to only when there has been error so prejudicial that justice cannot be served by continuing the trial. *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996). A trial judge's denial of a mistrial will be not disturbed on appeal absent an abuse of discretion. *Id.*

Evidence revealed that police officer Linda Law was in charge of this case. Delbert Mathis, an informant, was working with undercover officer David Fields in order to purchase drugs. They drove to an area of El Dorado known as Memphis Heights. Anthony Hicks approached the car. The informant told Hicks he wanted a "forty," meaning two rocks of crack cocaine. Hicks went to the back of a nearby residence where appellant was sitting on the porch. Appellant gave the crack to Hicks, who returned to the car and handed it to the informant in exchange for forty dollars. Hicks then returned to the porch and gave the money to appellant. On direct examination, Linda Law testified about how these undercover operations are structured, and about the necessity of using informants as intermediaries because "the larger players will not sell dope to a complete stranger." In describing how informants are paid, she testified that in this case "Mathis might have gotten paid a little more" because "we had been wanting to get this defendant." She testified that an informant is interviewed to determine who he knows and what he can do in order to "start off with the biggest player he can help us get." She testified that informant Mathis had mentioned appellant in the interview. On cross-examination, she testified that appellant had been "targeted" after being brought up in the informant's interview. When asked whether the informant "might have gotten paid more because he managed to get something on [appellant]," officer Law replied, "Not just on [appellant], but [appellant's] a bigger player than

the street dealer." Defense counsel objected, moved to strike, and moved for a mistrial, arguing that the witness's response made improper reference to character or reputation. The prosecutor responded that the reference to "bigger player" meant that, compared to Hicks, who had actually approached the car, appellant was the "bigger player." The trial court denied the motion for mistrial, and instead, at defense counsel's request, admonished the jury that appellant was only being tried for the one offense.

Appellant argues that allowing the witness to describe him as a "bigger player" is essentially the same as telling the jury that appellant had been involved in other instances of drug dealing. He argues that the statement was so prejudicial that it could not be corrected by the admonition. We disagree. Defense counsel elicited a response that, even if categorized as a reference to previous illegal conduct, was one that could be cured by a proper admonishment from the trial court. *See e.g., Hall v. State*, 314 Ark. 402, 862 S.W.2d 268 (1993). We find no abuse of discretion by the trial court.

For his last point, appellant argues that the trial court erred in allowing the State to present evidence during sentencing of prior uncharged misconduct by appellant. During the sentencing phase of the trial, appellant sought to exclude testimony offered by the State regarding prior drug sales. The State argued that the evidence should be admitted pursuant to Ark. Code Ann. § 16-97-103 (Supp. 1995), as either aggravating circumstances or as relevant character evidence. The trial court allowed the evidence, which consisted of testimony from Donald Dismuke that he had bought $100.00 worth of crack from appellant and that he had seen appellant sell crack on other occasions. Mike Wilson testified that, while working with the prosecutor's office, he had driven into El Dorado and Dismuke had approached his car. When asked if he had any drugs, Dismuke went over to appellant, obtained drugs, and brought them back to the car and exchanged them for money. Appellant argues that this evidence was improper and that its admission was prejudicial error.

Arkansas Code Annotated section 16-97-103 allows for the introduction of evidence relevant to sentencing, including evi-

dence of aggravating circumstances. The supreme court has addressed the meaning of "aggravation" in the context of this statute in *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994). There, after the defendant pled guilty to robbery, the State was allowed to introduce testimony during sentencing regarding the defendant's prior attempt to rob the same victim. The court held that such testimony clearly met the definition of "aggravation," meaning "any circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime . . . itself."

The same can be said for the evidence presented by the State in the case at bar. While appellant's conviction for delivery of a controlled substance involved a relatively small amount of the drug, the State's evidence showed that the transaction was not an isolated incident; rather, it showed that appellant engaged in similar transactions with different intermediaries and buyers. Like the court in *Hill*, the trial court could consider these "circumstances attending the commission of a crime" to be the type that "increases its guilt or enormity or adds to its injurious consequences." The trial court has wide discretion in admitting evidence of other crimes or wrongs, and its decision will be not reversed absent an abuse of discretion. *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994).

Because we find no error, the judgment is affirmed.

Affirmed.

AREY and STROUD, JJ., agree.

Marilyn Ladell FIELDS *v.* William Carroll GRIFFEN

CA 97-82 959 S.W.2d 759

Court of Appeals of Arkansas
Division II
Opinion delivered January 28, 1998

[redacted]

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

David L. Eddy, for appellee.

JOHN E. JENNINGS, Judge. This case involves a boundary-line dispute. Marilyn Ladell Fields appeals from an order of the Pope County Chancery Court which found a boundary line by agreement between her property and that of appellee William Carroll Griffen, the adjoining landowner to the south. She argues that the trial court erred in finding a boundary-line agreement. We agree.

Although the facts of this case are rather complicated, the issue essentially involves adjoining landowners who were unaware that their respective warranty deeds contained legal descriptions that overlapped as to a strip roughly eighty feet wide along the boundary. Appellee acquired the south tract in 1987. He purchased the land from Thompson Industries. He testified that at the time of purchase he walked the property with Harry Scott, who runs Thompson Industries, and was shown a steel stake near the Highway 7 frontage. A fence ran from there across the property to a round pipe, and appellee was told that the fence and the pipe and stake marked the boundary. The land was hilly and had big oak trees. The lower, southernmost part of his tract had undergone excavation. Appellee began more excavation in April 1987. Appellee had trees logged off the uphill, northern part of his tract, instructing the loggers to "cut trees to the north line, and by that I mean where the fence row was and in between the stake on the front and the back."

In 1989, appellant and her husband, Buddy Fields, now deceased, acquired the adjoining north tract. Appellee and Buddy Fields were friends, and appellee had suggested to Buddy that he purchase the north tract. Appellee and Buddy discussed their wishes to develop their respective tracts from time to time. In December 1992 Buddy Fields contacted his friend, appellee, to tell him that he had made arrangements to excavate and sell dirt from the north tract and to see if appellee wished to do the same

on the south. The two men met on the property along with the excavators. Buddy Fields handled the transaction, and indicated where the property line was to the excavators. There were remnants of an old fence. A line was strung from an existing pipe in the ground across the property to a stake, and the excavators used this line as a reference for the removal of dirt from both tracts. Appellee testified that there was no confusion or dispute regarding the boundary line until after Buddy's death in January 1995, when appellant had a survey done and the overlapping eighty-foot strip along the boundary was discovered. Appellant erected a fence on the southern edge of the overlap, and appellee filed suit to quiet title to the disputed strip. The chancellor found that "there was an agreed boundary between Buddy Fields and [appellee]."

In order for there to be a valid boundary-line agreement, certain factors must be present: (1) there must be an uncertainty or dispute about the boundary line; (2) the agreement must be between the adjoining landowners; (3) the line fixed by the agreement must be definite and certain; and (4) there must be possession following the agreement. *Jones v. Seward*, 265 Ark. 225, 578 S.W.2d 16 (1979); *Bryson v. Dillon*, 244 Ark. 726, 427 S.W.2d 3 (1968). With regard to the first element, all the evidence in the case at bar indicates that there was no dispute between the parties as to the boundary line until after the death of Buddy Fields. While the overlapping deeds might have created uncertainty, the parties were not aware of any uncertainty nor was there any dispute at the time of the purported agreement between Buddy Fields and appellee. It has been held that only where the true line is unknown, or is difficult of ascertainment, and the parties establish the line to settle a disputed and vexatious question as to the boundary line between them, is the agreement binding. *Randleman v. Taylor*, 94 Ark. 511, 127 S.W. 723 (1910). When numerous conflicting surveys gave rise to uncertainty as to the division line and created dispute and controversy, it was held that adjoining landowners could orally agree upon a division line. *Furqueron v. Jones*, 186 Ark. 155, 52 S.W.2d 962 (1932). In the case at bar the purported agreement between Buddy Fields and appellee was not made to settle any dispute or uncertainty; the uncer-

tainty created by the overlapping legal descriptions in their respective deeds had not been discovered.

Appellant also argues that the trial court erred in not quieting title in her favor to the disputed strip. When the chancellor found that a boundary line was established by agreement, he declined to address the other issues presented by both parties at trial, including adverse possession and acquiescence. Because we reverse on the finding that there was an agreed boundary, we remand for the chancellor to address the parties' other issues.

Reversed and remanded.

AREY and STROUD, JJ., agree.

Eva Gail HALTER *v.* Dennis P. HALTER

CA 97-120 959 S.W.2d 761

Court of Appeals of Arkansas
Division IV
Opinion delivered January 28, 1998

Winonia R. Griffin, for appellant.

Dowd, Harrelson, Moore & Giles, by: *Marshall H. Moore*, for appellee.

JUDITH ROGERS, Judge. In this appeal, appellant contests two adverse rulings with respect to claims concerning child support. She first contends that the chancellor abused his discretion in failing to award a percentage of an inheritance that appellee received from his parents' estates. As her second issue, she argues that the chancellor erred in failing to hold appellee responsible for an arrearage in child support. We find no error and affirm.

Appellant, Eva Gail Halter, and appellee, Dennis P. Halter, were divorced in March of 1988. In the decree, appellee was ordered to pay $60 a week in child support on behalf of their two children. The decree further provided that "[a]t such time as [appellee] obtains employment, child support will be adjusted in accordance with [appellee's] income." After the decree, appellant filed several motions seeking an increase in support but did not pursue them to completion. As a result, appellee's obligation remained at $60 a week. The petition that led to this appeal was filed in October of 1995. In it, she requested an increase in child support and a percentage of a $66,000 inheritance appellee had received in 1994 upon the death of his parents. She also asked that appellee be held in contempt for his failure to increase the payment of child support commensurate with his increased income as provided in the decree. In this regard, she further contended that appellee's support obligation should be increased retroactively and that she was entitled to judgment for the arrearage that had accrued.

A hearing was held on May 28, 1996. Afterwards, the chancellor ordered an immediate increase in child support to $600 a month, but he denied appellant's request for the claimed arrearage. The chancellor took the question of appellee's inheritance under advisement, asking the parties to brief the issue. A final order was entered on October 11, 1996, wherein the court denied appellant's request for a lump-sum percentage of appellee's inheritance. This appeal followed.

Appellant's first assignment of error concerns the denial of her claim for a lump-sum payment of twenty-two percent of appellee's inheritance. It is well settled that the amount of child support lies within the discretion of the chancellor, and his findings will not be disturbed on appeal absent an abuse of discretion. *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996). Thus the question before us is whether the chancellor's ruling constitutes an abuse of discretion.

Appellant's argument is based on the *per curiam* in effect, *In Re: Guidelines for Child Support*, 314 Ark. 644, 863 S.W.2d 291 (1993), wherein it is stated that, when the payor's

income exceeds the amount shown on the extended support chart, the court should use a figure of 22% of the payor's monthly or weekly income, "as defined hereinafter," when there are two dependents. Appellant's argument presupposes that an inheritance is considered as income for purposes of applying the percentage. However, "income" in the family-support chart refers to the definition of income in the federal income tax laws. Under federal tax law, income does not include the value of property acquired by gift, bequest, devise, or inheritance. 26 U.S.C. § 102(a) (1997). Because the percentage relied upon by appellant applies to weekly or monthly income that exceeds the amounts shown on the extended chart, and because an inheritance does not fall within those parameters, we can find no abuse of discretion in the chancellor's refusal to award a lump-sum percentage of the inheritance as child support based on that provision of the *per curiam*.

Although we can find no abuse of discretion, we do not mean to imply that the inheritance was entirely irrelevant to the issue of child support. For example, in *Munn v. Munn*, 315 Ark. 494, 868 S.W.2d 478 (1994), the appellant claimed entitlement to a percentage of the appellee's workers' compensation settlement.[1] Instead, the chancellor applied a hypothetical investment yield to project an increase in the appellee's monthly income. He then applied that amount to the support chart in setting appellee's monthly support obligation. The supreme court affirmed, finding no abuse of discretion. By analogy here, any earnings that might have been generated from appellee's inheritance could have been considered by the chancellor in determining the amount of support, since such earnings are considered income under the tax code. 26 U.S.C. § 102(b) (1997). Yet, appellant limited her claim to a flat percentage of the inheritance. It was appellant's duty to present sufficient evidence, argument, and citation of authority to prove her assertion that she was entitled to twenty-two percent of the inheritance. *Munn v. Munn, id.* This she has failed to do.

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[1] The family-support chart provides that for workers' compensation disability recipients, support is to be calculated based on those benefits. *In Re: Guidelines for Child Support, supra.*

Appellant's next argument is that the language of the original decree providing that "[a]t such time as [appellee] obtains employment, child support will be adjusted in accordance with [appellee's] income," placed an affirmative obligation on appellee to increase the payment of child support. She argues that the chancellor erred by not enforcing this provision to retroactively increase appellee's child-support payments as his income increased during the intervening years. We cannot agree. One seeking the reversal of a chancellor's order has the burden of demonstrating error in the chancellor's findings, and we will not reverse such findings unless they are clearly against the preponderance of the evidence. In light of the wording of the decree, we cannot say that the chancellor's interpretation, that it did not place any burden on appellee to voluntarily seek modification, is clearly erroneous.

Affirmed.

BIRD and CRABTREE, JJ., agree.

OFFICE OF CHILD SUPPORT ENFORCEMENT *v.* John R. COOK

CA 97-444 959 S.W.2d 763

Court of Appeals of Arkansas
Division I
Opinion delivered January 28, 1998

Grider Law Firm, PLC, by: *Murrey L. Grider*, for appellant.

Robert H. Crank, for appellee.

OLLY NEAL, Judge. The Office of Child Support Enforcement has brought this appeal from an order of the Lawrence County Chancery Court that registered and modified a Florida child-support order. For reversal of the chancellor's order, appellant contends that the chancellor committed error in modifying the Florida order of support, and in failing to grant its motion for a new trial. We agree with appellant that, under the Uniform Interstate Family Support Act (UIFSA), Ark. Code Ann. §§ 9-17-101 through 9-17-905 (Repl. 1993), the chancellor erred in modifying the Florida support order, and reverse and remand this matter to the trial court.

Linda Cook obtained a divorce by default from appellee John Cook on April 3, 1996, in Florida's Seminole County Circuit Court. She received custody of the couple's two minor children. The divorce decree obligated appellee to pay $203.25 per week in child support to Ms. Cook. On August 22, 1996, appellant filed

an action under UIFSA to register the Florida order in Lawrence County Chancery Court and to obtain judgment against appellee for child-support arrearages. In his response, appellee alleged that he had not been properly served with notice of the Florida divorce proceedings and asserted that the child-support obligation of $203.25 per week for two minor children was "not remotely based upon [appellee's] ability to pay support and amounts to a grossly unrealistic support order. . . ." He requested that the child-support arrearage be held unenforceable, and asked that the Lawrence County chancellor reduce his child-support obligation in accordance with his take-home pay.

At the hearing, appellant presented evidence that, based upon the Florida support order, appellee owed Ms. Cook $3,252 in child support. Appellee testified that, although he had signed some papers at the sheriff's office in December 1995, the only document he had received was a summons and that he had not received copies of the divorce complaint or the decree. Appellee stated that he had not been able to afford an attorney to represent him in the Florida divorce and admitted that he had known that a lawsuit had been filed against him. Appellee also introduced into evidence his income tax return for 1995 that listed his adjusted gross income as $2,898. He testified that, at present, his take-home pay is $250 per week.

At the conclusion of the hearing, counsel for appellant argued that the chancellor should not modify the Florida decree. The chancellor responded in the following manner:

> Well, let me put it this way. I've heard the testimony, and I've looked at the tax return, and I've looked at the judgment that was entered in the divorce decree, and regardless of whether Florida wants to accept the modification or not, if they want it collected in the State of Arkansas, they will have to accept the modification. . . .

The chancellor also stated that, based upon appellee's present take-home pay, appellee should be required to pay $68 a week in child support and indicated that he would grant judgment for the arrearage based only upon this amount.

In the order registering the Florida decree, the chancellor made the following findings and conclusions:

> 2. The Court finds that the foreign judgment, Linda Weir Cook vs. John Raymond Cook, in the Circuit Court of Seminole County, State of Florida, No. 95-3316-DR 01 A, entered April 3, 1996, is hereby registered with this Court for enforcement purposes pursuant to UIFSA, and is hereby given "full-faith-and-credit" pursuant to the Constitution of the United States and the State of Arkansas. That the aforementioned foreign judgment is enforceable as if it were issued by this Court.
>
> 3. That the [appellee] has accrued child support arrearage in the amount of $2,400.00 as of OCTOBER 11, 1996, for which Plaintiff is hereby granted Judgment. . . .
>
> 4. That the [appellee's] current child support obligation shall be $68.00 per week, with an additional 10% of [appellee's] net income per week going toward accrued arrearage, to begin at the [appellee's] next regularly scheduled child support payment due date following this hearing. Deviation from the chart is supported by evidence presented to the Court and so noted on the record pursuant to Ark. Code Ann. § 9-12-312.

We agree with appellant that the chancellor erred in modifying the Florida support order. In 1993, the legislature enacted Act 468 of 1993, which repealed the Revised Uniform Reciprocal Enforcement of Support Act (RURESA) and adopted UIFSA in its place. *See Jefferson Co. Child Support Enforcement Unit v. Hollands*, 327 Ark. 456, 939 S.W.2d 302 (1997); *Office of Child Support Enforcement v. Troxel*, 326 Ark. 524, 931 S.W.2d 784 (1996). Arkansas Code Annotated § 9-17-603(c) (Repl. 1993) provides:

"Except as otherwise provided in Article 6, a tribunal of this state shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction."

The following limitations are placed upon modification of child-support orders issued in other states:

> (a) After a child support order issued in another state has been registered in this state, the responding tribunal of this state may modify that order only if, after notice and hearing, it finds that:

(1) the following requirements are met:

(i) the child, the individual obligee, and the obligor do not reside in the issuing state;

(ii) a petitioner who is a nonresident of this state seeks modification; and

(iii) the respondent is subject to the personal jurisdiction of the tribunal of this state; or

(2) an individual party or the child is subject to the personal jurisdiction of the tribunal and all of the individual parties have filed a written consent in the issuing tribunal providing that a tribunal of this state may modify the support order and assume continuing, exclusive jurisdiction over the order.

(b) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state and the order may be enforced and satisfied in the same manner.

(c) A tribunal of this state may not modify any aspect of a child support order that may not be modified under the law of the issuing state.

Ark. Code Ann. § 9-17-611 (Repl. 1993).

Clearly, appellee satisfied none of the requirements with respect to the limitations placed upon the modification of child-support orders issued in other states. The mother and child remain Florida residents, and they have not consented to the jurisdiction of the Lawrence County Chancery Court.

Appellee contends that, as provided in Ark. Code Ann. § 9-17-607(a)(5), he had a defense under the law of this state to the remedy sought because the Florida order required him to pay "more child support per week than he had income per week. . . ." Appellee has, however, provided us with no authority holding that, even though he failed to appeal from the Florida order, he can now assert that his child-support obligation was more than he could pay per week. We note the lack of correlation between appellee's weekly income and his weekly child-support obligation. Nevertheless, the reduction of appellee's weekly child-support obligation requires application to the issuing tribunal — Florida's Seminole County Circuit Court. In the Lawrence County order,

the chancellor held that the Florida divorce decree was entitled to full faith and credit, and appellee has not filed a cross-appeal from this finding. Therefore, there is no real question presented on appeal as to whether the Florida court had personal jurisdiction over appellee.

We are, therefore, compelled to hold that the chancellor erred in modifying the Florida support order. Appellee did not establish a basis for contesting the registration and enforcement of the Florida decree and did not prove that either of the circumstances permitting modification were present. Accordingly, the order of the chancellor modifying the Florida decree is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

ROGERS and STROUD, JJ., agree.

Marcus Antonio FRANKLIN *v.* STATE of Arkansas

CA CR 97-486 962 S.W.2d 370

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered January 28, 1998

Bill Luppen, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Asst. Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Appellant, Marcus Antonio Franklin, was convicted in a bench trial of possession of a controlled substance with intent to deliver and maintaining a drug premises. His sole point on appeal is that there is insufficient evidence to sustain the convictions because there is no evidence linking him to drugs found in a house in which he was a joint occupant. We agree and reverse both convictions.

Franklin was charged with possession of a controlled substance with intent to deliver and maintaining a drug premises. Two Little Rock detectives testified at his bench trial on the charges. Detective David Green testified that he assisted in executing a search and seizure warrant at a residence in College Station and that there were two people present at this house, Franklin and his co-defendant, Tyrone Johnson. Detective Green further testified that he found cocaine hidden under a dog house in the back yard, and that there were three dogs chained in the yard.

Detective Kevin Tindle testified that on a prior, unspecified date, he had made a controlled narcotics purchase from the residence, but that he could not see the people during the sale and could not say that Franklin was involved. Detective Tindle stated that he also participated in the search and seizure, and located an off-white, rock-like substance in the house hidden under a piece of carpet in the southeast bedroom. He testified that no one was found in that room and that Franklin was found asleep in the northeast bedroom. He further testified that he found no drugs in Franklin's room, on his person, or in his possession. The police did not find drugs or paraphernalia in either of the two cars that were parked outside, and found no paperwork having either the occupant's or the owner's name.

Franklin's father, Lewis Franklin, testified that he owned the house and that he was aware that dogs were on the premises. He said that the dogs were not Franklin's and that Franklin was afraid of dogs and did not like them. He also stated that Johnson and Franklin were living in the house and that they sometimes paid rent. At the conclusion of the trial, Franklin was convicted of both charges and was sentenced to serve forty months in the Arkansas Department of Correction. He appeals from both convictions.

On appeal, Franklin argues that the trial court erred in failing to grant his motion for directed verdict based upon the insufficiency of the evidence. Although Franklin's motion for directed verdict challenged the sufficiency of the evidence only for the charge of possession, a motion for directed verdict is not required in a bench trial to preserve for appeal the issue of sufficiency of the evidence. *Mackey v. State*, 56 Ark. App. 164, 939 S.W.2d 851 (1997). Consequently, we may consider the merits of his appeal of both convictions.

Franklin argues that because joint occupancy was established, the State must prove some additional link between him and the cocaine that was found hidden in the bedroom or under the dog house. He contends that the State failed to do so because there was no evidence that he had control over the narcotics or even knew that drugs were present. He argues that he was not found in the bedroom where the cocaine was discovered and that he did not own the dogs. He also argues that there was no evidence that he acted suspiciously, had made any previous sales of illegal drugs, or made any incriminating statements which would indicate that he had knowledge of the cocaine, and adds that cocaine was not found in common areas throughout the house or in plain view.

The State counters that the large quantity of narcotics found in the house and under the dog house, 10.502 grams, Franklin's father's ownership of the house, and the fact that a drug sale had previously occurred at the residence, constitute substantial evidence linking Franklin to the contraband. We do not agree.

In order to sustain a conviction for possession of a controlled substance, the State need not prove that the accused

had actual physical possession of the controlled substance. *White v. State*, 47 Ark. App. 127, 886 S.W.2d 876 (1994). Constructive possession, which is control or right to control the contraband, is sufficient. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982). 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. *Id.*

Constructive possession can also be inferred when the controlled substance is in the joint control of the accused and another. *White, supra.* However, joint occupancy alone is not sufficient to establish possession or joint possession; there must be some additional factor linking the accused to the contraband. *White, supra.* In such cases, the State must prove two additional elements: (1) that the accused exercised care, control, and management over the contraband and (2) that the accused knew the matter possessed was contraband. *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995) (quoting *Plotts v. State*, 297 Ark. 66, 69, 759 S.W.2d 793, 794 (1988)).

Although the State cites a number of joint-occupancy cases in support of its contention that there are sufficient factors linking Franklin to the contraband to support both convictions, it is clear that these authorities may be distinguished from the facts in this case. In *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991), the supreme court stated that there was substantial evidence of constructive possession when at the time of the raid Nichols was found seated at the kitchen table of his residence with drugs in plain view on the table in front of him. In *Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990), the court held that there was evidence from which the jury could conclude that the appellant exercised control over marijuana and paraphernalia found in a closet of a home formerly occupied by him and his ex-wife and owned by his father, where his ex-wife testified that he received shipments of marijuana during their marriage and identified drug paraphernalia and other items found with the drugs as belonging to him. Also, a neighbor testified that appellant was quite often at the house after his ex-wife had moved out. In *Gary v. State*, 259 Ark. 510, S.W.2d 230 (1976), there was sufficient evidence that appellant had joint possession of drugs even though he was not

present when his apartment was raided. The appellant admitted that he lived there, the drugs were found in a bedroom closet in which a glove bearing his name was also found, and his personal papers were found in the apartment. Although a joint occupant of the apartment testified that the drugs were his, he also testified that appellant had used heroin from the supply, collected money from a sale of the drugs, and inquired about the drugs after he learned of the search.

In *Ramey v. State*, 42 Ark. App. 242, 857 S.W.2d (1993), the appellant's conviction for maintaining a drug premises was upheld where police found marijuana on a person sitting on appellant's front porch but found no other drugs in the search of appellant's home. However, in response to complaints about drug dealing, the police had conducted a surveillance of the house and had observed drug trafficking there for several months. They found scales and five or six hundred plastic baggies in the house. In addition, several people who had come to the house seeking to buy drugs during the police search testified at appellant's trial that they had bought drugs at the house in the past. In *Sweat v. State*, 25 Ark. App 60, 752 S.W.2d 49 (1988), the court found sufficient linking factors to support a finding that appellant was in constructive possession of marijuana found in his mother's home. The appellant also lived there, was present when the search was conducted, and marijuana was found in common areas of the house, in the refrigerator and on top of the freezer. Also, drug paraphernalia was found on the kitchen table. In addition, an officer testified that he called the house prior to the search, asked for appellant, and when a man came to the phone and was asked about buying some marijuana, "he said he didn't know me."

Clearly, the three factors relied upon by the State, even taken together, fall far short of demonstrating the degree of connection to the contraband or knowledge of its presence found in any of these cases. Consequently, we hold that there is insufficient evidence to support a finding that Franklin was in constructive possession of the drugs, and the conviction for possession of a controlled substance with intent to deliver must be reversed.

Franklin's conviction for maintaining a drug premises must also be reversed. Arkansas Code Annotated section 5-64-402(a)(3) (Repl. 1993) states:

> It is unlawful for any person to . . . *knowingly* keep or maintain any store, shop, warehouse, or other structure or place or premise, which is resorted to by persons for the purpose of *using* or *obtaining these substances* or which is used *for keeping them* in violation of subchapter 1-6 of this chapter.

(Emphasis added.) Franklin contends that there was no evidence presented that he knew that drugs were present, and we agree.

Although the State argues in response that there was substantial evidence that Franklin had both knowledge and control of the cocaine found in the house and under the dog house, it relies upon the same authorities advanced in support of the conviction for possession. However, knowledge is an element of the offense of maintaining a drug premises. As pointed out by Franklin, there were no drugs found in plain view, in the common areas of the house, or in the bedroom occupied by Franklin. There were no statements by Franklin or by anyone else suggesting that Franklin knew that drugs were kept in the house, used there, or sold there. In the only case relied upon by the State involving a conviction for maintaining a drug premises, *Ramey, supra,* there was overwhelming evidence and testimony that the appellant's home was used extensively in drug trafficking, including the testimony of several persons who had bought drugs there. Here, there was testimony about only one prior drug sale, with no specific date or even a time frame given for the sale. Thus, there was no evidence that Franklin had knowledge that the drugs were kept, used, or sold at the home.

Reversed and dismissed.

ROBBINS, C.J., NEAL and ROGERS, JJ., agree.

AREY and CRABTREE, JJ., dissent.

D. FRANKLIN AREY, III, Judge, dissenting. I agree that we should reverse appellant's conviction for possession of a controlled

substance. We should affirm the conviction for maintaining a drug premises, because appellant did not argue this point on appeal. Appellant's fleeting references to the conviction cannot be translated into an argument for reversal. We consider only those arguments raised by the parties; we do not reverse a trial court for unargued reasons. *Bousquet v. State*, 59 Ark. App. 54, 953 S.W.2d 894 (1997). Therefore, I dissent from the reversal of appellant's conviction for maintaining a drug premises.

CRABTREE, J., joins.

Allen W. LAMMEY and Melodia L. Lammey, Husband and Wife *v.* Elmer H. ECKEL and Elsie E. Eckel, Husband and Wife, and Gary Eckel

CA 97-1400 958 S.W.2d 304

Court of Appeals of Arkansas
En Banc
Opinion delivered January 28, 1998

Craig Alan Campbell, for appellants.

Sean T. Keith, for appellees.

PER CURIAM. Appellants filed their motion on January 8, 1998, seeking leave to file a belated brief. They caused the record to be lodged with the court on November 21, 1997, but contend

that, because they did not receive a copy of a "scheduling order" from the court, they did not know that their brief was due December 31, 1997. Appellants request thirty additional days within which to file their brief.

■ ■ Appellants' motion is granted, and their brief should be filed not later than January 30, 1998. However, counsel for appellants are referred to Rule 4-4 of the Arkansas Rules of the Supreme Court that very clearly requires an appellant to file an appellant's brief within forty days of the date the record is lodged. We assume appellants' reference to "scheduling order" is to the notice that our clerk sends out as a matter of courtesy that sets out the calendar date on which the fortieth day falls. It is the appellants' responsibility, not our clerk's, to keep up with the date on which the brief is due to be filed.

David RAMSEY III *v.* STATE of Arkansas

CA CR 96-1227 959 S.W.2d 765

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered February 4, 1998

Jo Ellen Carson, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

SAM BIRD, Judge. On June 5, 1995, David Ramsey, the appellant, entered a plea of nolo contendere to the charge of robbery and was given a suspended imposition of sentence for five years, conditioned upon appellant's making a good-faith effort to complete his high-school education or earn a GED and not possessing any controlled substances. Due to his incarceration on unrelated charges, appellant did not enroll in school until the spring semester of 1996. On January 25, 1996, after being involved in what appeared to be a gang-related incident at school, appellant was suspended from school. Two days later, the car in

which appellant was riding with two minors was pulled over at 2 a.m. for violation of curfew. The officers conducted a search of the car, finding marijuana. On January 31, 1996, the State filed a petition to revoke appellant's suspended sentence, alleging that he was suspended from school as a result of improper activity. The petition was later amended to include charges that appellant had committed the offenses of possession of marijuana and contributing to the delinquency of a minor.

A revocation hearing was held, and the judge revoked appellant's suspended sentence. Afterward, the State declined to prosecute the charges of contributing to the delinquency of a minor and possession of marijuana for lack of evidence. Appellant then filed a motion requesting the court to reconsider its revocation because the State had failed to prosecute the marijuana and contributing charges. Following another hearing, the court denied the motion and affirmed the earlier ruling revoking appellant's suspended sentence. Appellant brings this appeal contending that his improper activity, which resulted in his suspension from school, was not sufficient evidence to prove that he failed to make a good-faith effort to obtain his high-school diploma or GED.

■ ■ When appealing a revocation, the appellant has the burden of showing that the trial court's findings are against the preponderance of the evidence. Ark. Code Ann. § 5-4-309(d) (Repl. 1993); *Tipton v. State*, 47 Ark. App. 187, 887 S.W.2d 540 (1994). On appellate review, the trial court's findings are upheld unless they are clearly against a preponderance of the evidence. *Tipton v. State, supra*; *Russell v. State*, 25 Ark. App. 181, 753 S.W.2d 298 (1988). Evidence that is insufficient to support a criminal conviction may be sufficient to support a revocation. *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992).

From a reading of the briefs, it appears that the conditions of the suspended sentence that the State alleges were violated are that the appellant did not make a good-faith effort to obtain his high-school diploma or GED, that he possessed controlled substances, and that he contributed to the delinquency of a minor.

First, the appellant argues that he did not violate the conditions of his suspended sentence by failing to make a good-faith

effort to obtain his high-school diploma or his GED. He argues that he was suspended from school for only ten days for a gang-related incident and that he was eligible to return to school after the suspension. He argues further that he did not return to the school after the ten-day suspension because he had enrolled in the Adult Education Center in an effort to get his GED. A good-faith effort is defined in Ark. Code Ann. § 5-4-323 (Supp. 1995) as meaning "the person has been enrolled in a program of instruction and is attending school or adult education." The State argues that the suspension, coupled with evidence that the appellant had been truant once and tardy twice during only a one-month period of enrollment, is enough to show that the appellant was not making a good-faith effort to obtain his high-school education.

Second, the appellant contends that his sentence should not be revoked because the State failed to prove that he was in possession of marijuana and the State did not prosecute the marijuana and contributing charges due to lack of evidence. The appellant argues that the State did not prove, nor is there any evidence to establish, that he knew the marijuana was in the car. The State argues that evidence that specifically links defendant to the controlled substance is not needed in a revocation hearing.

However, even without the consideration of the charges of contributing to the delinquency of a minor and possession of marijuana, the court did not err in revoking the appellant's suspended sentence. In order for appellant's suspended sentence to be revoked, the State need only prove that the appellant committed one violation of the conditions. *Ross v. State*, 22 Ark. App. 232, 738 S.W.2d 112 (1987). The fact that the appellant had been truant once, tardy twice and suspended for ten days from school, all within a period of less than a month, are sufficient proof of his lack of a good-faith effort to obtain his high-school diploma or GED.

The dissenting opinion implies that appellant is merely a school child who is being imprisoned for being tardy, cutting classes, and being suspended from school, just like "thousands, if not tens of thousands," of other citizens. The dissent has apparently overlooked the fact that appellant is an eighteen-year-old

convicted felon serving a suspended sentence for robbery, subject to revocation if, among other conditions, he fails to make a good-faith effort to obtain his high-school diploma or GED. Notwithstanding the tenuous position this condition of his suspended sentence put him in at school, within a period of less than one month appellant was tardy to school twice, absent without excuse once, and suspended from school for ten days. As a result of the accumulation of these offenses, the trial court made a factual determination that appellant had violated the "good-faith effort" condition of his suspension, and sentenced appellant to serve the five-year term of imprisonment that had been earlier suspended following his conviction for robbery. Nothing in the record suggests that appellant was sentenced to serve a term in prison for being tardy, truant, and suspended from school. Plainly put, this is not a case about a school child who is being too harshly punished for violating a school rule. This case is about a convicted robber serving a five-year suspended sentence who lacked the discipline to obey the simple condition of his suspension that he attend and behave at school.

The dissenting opinion also suggests that before the trial court may revoke the appellant's suspended sentence, the State must present proof that appellant was tardy or absent a sufficient number of times to subject himself to expulsion from school, the failure to be promoted, or failure to graduate. Of course, no authority is cited in support of this suggestion because none exists.

The dissent suggests that the purpose of Ark. Code Ann. § 5-4-323(c) may be thwarted if people are sent to prison when they violate the "good-faith effort" condition of their suspended sentences, because in prison they cannot be compelled to go to school. And it is suggested that, by enforcing strict compliance with this condition of appellant's suspended sentence, the court is increasing the prison population at the expense of encouraging education. This distorted reasoning is contrary to the language of section 5-4-323(b), which requires that the court "*shall revoke* a suspension of sentence or probation if the person fails to make a good-faith effort to achieve the degree or certificate." (Emphasis added.) Whether a good-faith effort has been made is a question of fact to be determined by the trial judge that we will

not reverse unless clearly against the preponderance of the evidence. We do not find that the trial court's decision is clearly against the preponderance of the evidence.

Affirmed.

AREY and STROUD, JJ., agree.

CRABTREE, J., concurs.

GRIFFEN and ROAF, JJ., dissent.

TERRY CRABTREE, Judge, concurring. I wholeheartedly agree with the conclusion stated in the majority opinion. I write separately to emphasize our very limited standard of review of revocation hearings, and to clarify the inappropriate characterization of appellant's circumstances by the dissent.

The State has the burden of proof to establish that the appellant violated the terms of his suspended sentence or probation by a preponderance of the evidence. *Deere v. State*, 59 Ark. App. 174, 954 S.W.2d 943 (1997). A preponderance of the evidence is the greater evidence when compared to that opposed to it. *Missouri Pac. R.R. Co. v. Hancock*, 195 Ark. 414, 113 S.W. 2d 489 (1938). On appeal, we reverse the trial court only if we determine that the evidence is clearly against the preponderance of the evidence, *Pearson v. State*, 262 Ark. 513, 558 S.W. 2d 149 (1977), and we need not review the evidence in the light most favorable to the State to make that determination. *See contra Billings v. State*, 53 Ark. App. 219, 921 S.W.2d 607 (1996). When considering the preponderance of the evidence, it does not matter to what degree the evidence in favor of the trial court's judgment outweighs that opposed to it, only that the evidence is sufficient to support the trial court's finding, even if that evidence only minutely outweighs that opposed to it. Because we review a cold record, we must give considerable deference to the trial court's findings on credibility issues. *Hyde v. State*, 59 Ark. App. 131, 953 S.W. 2d 911 (1997). In a revocation proceeding, it is equally important for this Court to give deference to the trial court in its superior position to consider the demeanor of the parties — things that a record cannot reflect, such as facial expression, speech intonation, and the sincerity of the defendant. Although we may question the

ultimate disposition of the case, we must affirm if the revocation was not *clearly* against the preponderance of the evidence and within the range of punishment allowed by law.

In this case, two weeks after the court suspended the appellant's sentence for robbery, the appellant served four months in the Department of Correction for committing another felony offense. Shortly after his release from the Department of Correction, the appellant enrolled in public school. Within a month, he was suspended for ten days for disrupting school by allegedly engaging in gang activity. Not long after his suspension from school, the appellant was arrested at 2 a.m. for contributing to the delinquency of a minor and possession of marijuana.[1] Since the rules of evidence do not apply in revocation matters, it is appropriate for the trial court to consider appellant's criminal history. *See Palmer v. State*, 60 Ark. App. 97, 105, 959 S.W.2d 420, 424 (1998). Under the facts of this case, I cannot say that the trial court's revocation of appellant's suspended sentence is clearly against the preponderance of the evidence. To the contrary, the findings of the trial court indicate that the trial judge was sympathetic to the age and circumstances of the appellant.

The dissenting opinion strongly argues that the appellant did not violate the "good faith" requirement that he obtain a high school diploma or G.E.D. certificate because he enrolled in the G.E.D. program but never attended because he was arrested for the violations. I would point out that the appellant's mother was the one who convinced the appellant to enroll in the G.E.D. program. There is nothing in the record to indicate that appellant himself initiated that particular conduct.

The dissenting opinion also suggests that the appellant should not have his suspended sentence revoked because of a few tardies, missing school once, and being suspended. I disagree with this characterization of the appellant's incarceration. Lest we forget, the appellant committed a felony offense punishable by up to twenty years in the state penitentiary. He was not sentenced to

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[1] This activity, if proven, would constitute two more good causes to revoke appellant's suspended sentence.

the DOC for being suspended from school or because he was tardy from school. Only after the trial court bent over backwards to keep him out of prison was he finally sentenced for the underlying felony offense to which he pled guilty. While we would all prefer that our nation's youth choose the path of education over that of criminal conduct, that decision is the offender's and not ours.

For the reasons stated herein, I concur in the majority opinion.

WENDELL L. GRIFFEN, Judge, dissenting. I would reverse the trial court's decision to revoke appellant's suspended sentence because it is clearly erroneous. Although the State and the majority maintain that appellant was suspended from high school for ten days because of involvement in what they term "a gang-related incident at school," the State filed a petition to revoke the suspended sentence based on appellant's ten-day suspension from high school for merely saying,"What's up?" during a confrontation involving several youths in a school hallway.

Before the suspension ended, appellant attempted to enroll in adult education classes because his parents and a cooperative education teacher had counseled him not to return to Fort Smith Northside High School. It is self-evident that appellant could not make a good-faith effort to obtain a general education development certificate without enrolling in such a program; hence, it is preposterous to conclude that he failed to put forth a good-faith effort to obtain a high school diploma or a general education development certificate when all of the proof shows that he was attempting to enroll in a GED program when the revocation proceeding was commenced.

It is also perverse reasoning to hold that appellant's suspension, two incidents of tardiness, and one incident of truancy during the month that he attended Northside High School proved a failure to make a good-faith effort toward completion of a high-school diploma or GED certificate. No doubt Arkansas has thousands, if not tens of thousands, of residents who completed high-school or obtained their GED certificates but who were tardy or cut classes. There is no proof in the record about how

many absences or tardy episodes were necessary in order to put a student in the Fort Smith School District at risk for expulsion or failing a grade. The very idea that a school district could expel or flunk a student for being tardy twice and having a single unexcused absence is absurd. If the school district legally charged with educating appellant and presumably knowledgeable about its own attendance and conduct criteria for good-faith effort did not expel appellant or flunk him because of his truancy, tardiness, and the suspension, it is astounding that courts would find that appellant had failed to make a good-faith effort to obtain an education, especially when the only other evidence before us is that appellant was trying to enroll in a GED program.

Finally, the result affirmed today should be understood in light of its practical consequences for appellant and our criminal justice system. The underlying premise of Ark. Code Ann. § 5-4-323(c) (Supp. 1995) is that there is a positive relationship between having a high school education and reducing or preventing crime. The basis for that premise is obvious given the mountain of data showing that the overwhelming majority of persons in our prison system lack a high-school diploma or general education development certificate. Thus, it is possible for prison inmates to enroll in GED programs and obtain the equivalent of a high-school education while in prison, but no one has introduced any proof about what degree of absenteeism or tardiness will disqualify the inmates from participating in adult education. So it is ironic, to put it mildly, that the people of Arkansas are now forced to house, feed, clothe, and possibly educate appellant — at government expense for five years — because he was tardy twice, had a single incident of truancy, and had been suspended from high-school for ten days while serving a suspended sentence. Of course, no one can force appellant to obtain an education in prison, so the very incentive that the General Assembly hoped to offer when it enacted § 5-4-323 may be lost to appellant and to society.

Subsection (c) exists to promote education, not increase the prison population. That we have overlooked this aim upon no proof shows what happens when the legal process strains at gnats and swallows camels. Therefore, I respectfully dissent.

ROAF, J., joins in this dissent.

Betty J. MORSE *v.* Jerry B. MORSE

CA 97-648 961 S.W.2d 777

Court of Appeals of Arkansas
Division I
Opinion delivered February 4, 1998

Rush, Rush & Cook, by: *David L. Rush* and *Coy J. Rush, Jr.*, for appellant.

Kirkman T. Dougherty, *Jeanne Ann Whitmire*, and *Michael J. Medlock*, for appellee.

JUDITH ROGERS, Judge. Appellant Betty Morse appeals from a chancery court decree awarding her ex-husband, appellee Jerry Morse, $46,834 in insurance proceeds. She also appeals from the dismissal of her counterclaim for abuse of process. We find no error and affirm.

Appellant and appellee were divorced on August 23, 1995. At the time of their divorce, they owned two parcels of real property in Crawford County. Under the terms of a property settle-

ment agreement, appellant deeded one of the parcels, a seventy-two-acre tract, to appellee. The agreement also provided, under the section entitled "PERSONAL PROPERTY," as follows:

> 3. To equalize the division of property, Husband shall pay to the Wife to [sic] total sum and amount of $20,000.00. He shall have five (5) years from the date of this agreement to satisfy this debt. Any portion of the $20,000.00 not paid prior to June 28, 2000, shall be immediately due and payable on that date.

Appellant and appellee's marital residence was situated on the seventy-two acres deeded to appellee. Several weeks before appellant and appellee separated, they had procured a homeowner's insurance policy covering the residence and its contents. The policy, issued by Farm Bureau Mutual Insurance Company, listed appellant and appellee as named insureds and was effective for a period beginning June 1, 1995, and ending June 1, 1996. After the divorce, appellee lived in the home and was still living there when, on March 28, 1996, the home was destroyed by fire. Farm Bureau tendered a check in the amount of $46,834 made out to appellant and appellee. However, appellant refused to endorse the check. As a result, appellee filed a petition in Crawford County Chancery Court asking that Farm Bureau be required to interplead the $46,834 into the court registry; that he be declared the owner of the insurance proceeds; and that appellant be held in contempt for her "refusal to comply with the terms of the Property Settlement Agreement and Decree of this Court, as entered of record last year." Appellant answered and filed a counterclaim for abuse of process. Further, she asked that a constructive trust be placed on the insurance proceeds to the extent of the $20,000 owed her under the property settlement agreement. Later, by amended counterclaim, she alleged that she was entitled to half of the insurance proceeds and to immediate payment of the $20,000.

On September 18, 1996, Farm Bureau placed $46,834 into the court registry. Thereafter, a hearing was held, and the chancellor found that the insurance money belonged to appellee since the proceeds were for damage caused to property that appellant had quitclaimed to appellee. The chancellor directed the court clerk to disburse $26,834 to appellee, leaving $20,000 in the court registry. The $20,000 would be disbursed upon a showing that

appellee was using the money to rebuild his residence. The chancellor also granted appellant a lien on the seventy-two acres that would remain in effect until the $20,000 debt was satisfied.[1] Additionally, during the course of the hearing, the chancellor dismissed appellant's abuse of process counterclaim.

Appellant's first argument on appeal is that the chancellor erred in not awarding her half of the insurance proceeds. In deciding appeals from chancery courts, we review the evidence *de novo* and reverse only if the chancellor's findings are clearly erroneous. *Roberts v. Feltman*, 55 Ark. App. 142, 932 S.W.2d 781 (1996).

Appellant bases her argument upon the contention that a contract of insurance is a personal contract and not a contract running with the property. *See National Bedding and Furniture Indus., Inc. v. Clark*, 252 Ark. 780, 481 S.W.2d 690 (1972); *Whitley v. Irwin*, 250 Ark. 543, 465 S.W.2d 906 (1971). Her statement of the law is correct. However, insurance proceeds are payable to the person insured only if that person has an insurable interest both at the time of making the contract and at the time of the loss. *National Bedding and Furniture Indus., Inc. v. Clark, supra.* Arkansas Code Annotated § 23-79-104(a) (Repl. 1992) provides that a contract of insurance on property is only enforceable for the benefit of one who has an insurable interest in the things insured "at the time of the effectuation of the insurance and at the time of the loss." The statute goes on to define insurable interest as "any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment." Ark. Code Ann. § 23-79-104(b) (Repl. 1992).

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[1] The chancellor actually placed appellant in a better position than she had been in under the original property settlement agreement. We are aware of the rule that, once the parties' agreement is incorporated into the divorce decree, it is not generally subject to modification. *Kennedy v. Kennedy*, 53 Ark. App. 22, 918 S.W.2d 197 (1996). However, since appellee filed no cross-appeal on this issue, we need not discuss it further. Appellate courts are precluded from awarding affirmative relief to the appellee in the absence of a cross-appeal. *Barnhart v. City of Fayetteville*, 321 Ark. 197, 900 S.W.2d 539 (1995).

There is no doubt that appellant had an insurable interest in the property at the time the insurance went into effect. At that point, she and her husband owned the house and were living in it. The question is whether she had an insurable interest in the house on March 28, 1996, when it burned. Under the statute, it is imperative that appellant show an insurable interest not only at the time the insurance went into effect, but at the time the loss occurred. Appellant argues that she had an insurable interest at the time the loss occurred because the destruction of the house diminished her ability to collect the $20,000 appellee owed her under the property settlement agreement. However, the property settlement agreement reveals no connection between the seventy-two acres deeded to appellee and the $20,000 owed to appellant. The agreement does not recite that the real property is security for the $20,000 debt. Further, appellant admitted in her testimony that she had no security for the $20,000 debt. As a result, she is in the position of an ordinary contract creditor. It is generally recognized that a simple contract creditor has no insurable interest in the property of his debtor. 3 COUCH ON INSURANCE 3D § 42:23 at 42-31 (1996); 4 APPLEMAN, INSURANCE LAW AND PRACTICE § 2138 at 57 (1969). Additionally, the term "insurable interest" means an "actual, lawful, and substantial" economic interest in the property. Ark. Code Ann. § 23-79-104(b) (Repl. 1992). The possibility that appellee might have used the home to pay the $20,000 debt is too speculative to give appellant an insurable interest in the house at the time of its destruction.

This case is similar to the situation we recently addressed in *Marion v. Town and Country Mutual Insurance Co.*, 59 Ark. App. 120, 952 S.W.2d 681 (1997). In *Marion*, appellant's property was purchased at a foreclosure sale. Appellant filed an appeal from the foreclosure proceedings and obtained an order staying the judgment pending appeal. Shortly thereafter, her property was destroyed by fire. We affirmed the trial court's ruling that appellant had no insurable interest in the property at the time of the fire, saying that, even though appellant still had a possessory interest in the property, the delivery of the commissioner's deed to a buyer had the effect of terminating her insurable interest in the property. Likewise, in this case, appellant deeded the prop-

erty to appellee and, under the terms of the property settlement agreement, "relinquished any and all right, claim or interest she might have in and to said property. . . ." Further, the property was not pledged as security for any debt, nor did appellant have a possessory interest in the property. Under these circumstances, appellant had no insurable interest in her former home at the time it was destroyed.

Appellant's second argument is that the chancellor erred in failing to require appellee to pay the $20,000 owed under the property settlement agreement from the proceeds of the insurance policy. Appellant cites no authority for her argument on this issue. Failure to cite convincing legal authority for a point on appeal will result in affirmance of that point. *Pender v. Pender*, 57 Ark. App. 305, 945 S.W.2d 395 (1997). In any event, the agreement recites that appellee has until June 28, 2000, to pay the debt. Any action to recover the $20,000 before that time would be prematurely brought. *See Pearce v. Hollis Constr. Co.*, 212 Ark. 434, 206 S.W.2d 15 (1947); *Winn v. Collins*, 207 Ark. 946, 183 S.W.2d 593 (1944).

Finally, appellant argues that the chancellor erred in dismissing her abuse of process claim. In her second amended counterclaim, appellant attempted to set forth a cause of action for abuse of process in the following manner:

> That the Defendant has fully complied with all orders of this Court, wheresoever and whatsoever, including Quitclaiming the appropriate property to the Plaintiff. Thus, the action by the Plaintiff in suing the Defendant is an abuse of process, and the Defendant is entitled to damages in the sum of FIFTY THOUSAND AND 00/100 DOLLARS ($50,000.00), attorney's fees, and costs.

The elements of a claim for abuse of process are: (1) a legal procedure set in motion in proper form, even with probable cause, and even with ultimate success, but, (2) perverted to accomplish an ulterior purpose for which it was not designed, and (3) a willful act in the use of process not proper in the regular conduct of the proceeding. *Cordes v. Outdoor Living Center, Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). Showing that a vexatious

lawsuit was filed is not enough by itself. There must be a specific abusive use of "process." *McNair v. McNair*, 316 Ark. 299, 870 S.W.2d 756 (1994); *Union Nat'l Bank v. Kutait*, 312 Ark. 14, 846 S.W.2d 652 (1993). Arkansas requires that a pleading that sets forth a claim for relief contain a statement in ordinary and concise language of facts showing that the pleader is entitled to relief. Ark. R. Civ. P. 8(a)(1). Failure to state facts giving rise to the essential elements of a claim should result in dismissal. *Perrodin v. Rooker*, 322 Ark. 117, 908 S.W.2d 85 (1995). Appellant's counterclaim did not recite facts sufficient to sustain her claim. In particular, she did not recite facts which related to the elements necessary to prove abuse of process. Even though it is unclear whether the chancellor based his dismissal on this line of reasoning, a chancellor's decision will be affirmed if correct for any reason. *Synergy Gas Corp. v. H.M. Orsburn & Son, Inc.*, 15 Ark. App. 128, 689 S.W.2d 594 (1985).

Affirmed.

STROUD and NEAL, JJ., agree.

Tom ANDERSON *v.* Paula ANDERSON

CA 97-498 963 S.W.2d 604

Court of Appeals of Arkansas
Division II
Opinion delivered February 11, 1998

Pryor, Barry, Smith, Karber & Alford, PLC, by: *Gregory T. Karber*, for appellant.

Eddie N. Christian, Jr., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Tom Anderson appeals the Sebastian County Chancery Court's order directing that he pay alimony and child support to his ex-wife, appellee

Paula Anderson. Appellant Anderson also appeals those parts of the chancery court's order directing him to pay certain marital debts and to pay appellee Anderson's counsel a fee of $4,000. We conclude that the chancery court did not err in ordering appellant Anderson to pay alimony and in determining the amount of child support that it ordered appellant to pay to appellee Paula Anderson. We further conclude that the chancery court did not err in ordering appellant Anderson to pay certain marital debts and to pay Paula Anderson's attorney's fees. Because the chancery court did not err, we affirm.

The chancery court entered the order at issue on January 14, 1997, as a supplement to a divorce decree that it had previously entered on April 17, 1996. In the 1996 decree the chancery court awarded appellant Anderson a divorce from Paula Anderson and awarded custody of the Andersons' two minor daughters to her. In this decree the chancery court noted "that issues concerning the property settlement, permanent child support and alimony will be deferred until further order." Until such time as this further order was entered, the chancery court ordered appellant Anderson to pay $1,267 in alimony and child support every month and to make the monthly mortgage payments on the family home. The chancery court entered this order after having heard testimony from appellant Anderson and his father, Frank Anderson, at a hearing held on April 11, 1996. In order to decide the issues preserved in the 1996 divorce decree, the chancery court held an additional hearing on November 18, 1996. Appellant Anderson and his father also testified at this hearing. In addition, William Beall, the accountant for the Anderson family business, testified on behalf of appellant Anderson. Paula Anderson testified as well. After hearing the testimony of these witnesses and after considering arguments made by counsel in post-hearing briefs, the chancery court entered the order, noted above, from which appellant Anderson appeals.

Appellant Anderson makes five allegations of error. He asserts that, in determining his income for the purpose of calculating the alimony and child support he should pay each month, the chancery court erred by refusing to deduct the income taxes that he paid on a portion of his 24% share of earnings that was retained

by the family business, a closely held corporation, Anderson-Martin Machine Company (hereinafter AMCO). This error resulted in the chancery court ordering him to pay child support of $2,133 per month. He also contends that, under the circumstances of this case, the court abused its discretion in ordering him to pay alimony of $500 per month for a period of time that extended to five years after the parties' youngest child attains the age of eighteen or graduates from high school. Anderson also asserts that the chancery court erred in ordering him to pay up to $5,000 of credit card debts that the parties incurred during their marriage. He further asserts that the chancery court erred in refusing to order appellee Paula Anderson to pay part of a $150,000 debt that he owes in connection with a failed business venture. Finally, appellant Anderson asserts that the chancery court erred in directing him to pay a fee of $4,000 to Paula Anderson's counsel. For the reasons we will set forth, we conclude that none of these allegations of error has merit.

Appellant Anderson's first allegation of error presents a question of first impression concerning the interpretation of the Arkansas Family Support Chart set forth in *In re: Guidelines for Child Support*, 314 Ark. 644, 863 S.W.2d 291 (1993).[1] This issue is of substantial public interest to individuals, such as appellant Anderson, who have child-support obligations and who also receive income based on their pro rata ownership of a closely held business corporation that pays no federal income tax pursuant to subchapter S of the Internal Revenue Code, 26 U.S.C.S. §§ 1361-79 (1996), and no state income tax pursuant to Ark. Code Ann. § 26-51-409 (Supp. 1995/Repl. 1997), pursuant to which subchapter S of the Internal Revenue Code is adopted to determine the state income tax owed by certain closely held business corporations. According to appellant Anderson, the chancery court erred in concluding that it should not deduct from the income that Anderson had available to pay child support in 1995 the income taxes that he paid for that year on his pro rata share of

[1] The family support chart involved in this case was issued in 1993. The Arkansas Family Support Chart has recently been revised by the Arkansas Supreme Court. The newly revised family-support chart was handed down by the Court on September 25, 1997, and is published in the appendix to 329 Arkansas Reports at page 668.

the profits earned by his family business, AMCO, which is a subchapter S corporation. Pursuant to the family-support chart, a child-support payor may deduct from his income available to pay child support the amount of federal and state income taxes that he paid for that year. *Guidelines*, 314 Ark. at 646. Appellant Anderson asserts that this provision of the family-support chart permits him to deduct from the income he had available in 1995 to pay child support the income taxes that he paid for that year on his pro rata share of AMCO's earnings that the corporation retained and did not distribute to him, as a shareholder.

This issue arose because appellant Anderson owns 24% of AMCO, and its income taxes are accounted for pursuant to subchapter S of the Internal Revenue Code. A subchapter S corporation is defined as follows:

> A small business corporation with a statutorily limited number of shareholders, which, under certain conditions, has elected to have its taxable income taxed to its shareholders at regular income tax rates. . . . Its major significance is the fact that S corporation status usually avoids the corporate income tax, and corporate losses can be claimed by the shareholders.

Black's Law Dictionary 342 (6th ed. 1990). Pursuant to subchapter S, a small business corporation can have its profit taxed in the same way that the profit of a partnership is taxed:

> Corporations which elect to be treated as small business corporations under the provisions of Subchapter S receive tax treatment that is similar to that of partnerships. Shareholders of a Subchapter S corporation are required to include their respective pro rata shares of the undistributed taxable income of the corporation as part of their gross income on their individual tax returns. . . . In addition, shareholders in a Subchapter S corporation can deduct their pro rata share of any net operating loss of the corporation on their individual tax returns.

Hudspeth v. C.I.R., 914 F.2d 1207, 1211 (9th Cir. 1990).

Before the chancery court, appellant Anderson argued that his shareholder income for 1995 that was retained by AMCO should not be counted as income available to pay child support. For simplicity, appellant has used hypothetical figures in his argu-

ment. We will do likewise. If the net earnings of AMCO in 1995 equal $1,000,000, then appellant's 24% distributable share that is reported to the IRS on Schedule K-1 is $240,000. Appellant must pay $90,000 of state and federal income taxes on this sum, even if AMCO holds back $80,000 and only distributes $160,000 of its income to appellant. While this retention of part of appellant's share of profits may impact appellant's ability to pay his taxes, it does not reduce his tax liability. The chancery court agreed with appellant's contention and excluded from its computation of his income for child-support purposes the portion of his shareholder income that was retained by AMCO in 1995, which was $80,000 in the above hypothetical.[2]

Appellant Anderson also asserted that, in its computation of his income for child-support purposes in this hypothetical, the court should deduct the total income taxes of $90,000 that he paid on his $240,000 share of AMCO's distributed earnings. The chancery court rejected this argument. It deducted from appellant's income only $60,000, which is the proportion of his income taxes that is attributable to the $160,000 of AMCO earnings actually distributed to him. The $30,000 of income taxes attributed to the $80,000 of appellant's earnings retained by AMCO was not deducted. In its January 14, 1997, order, the chancery court explained its decision as follows:

> The court has determined that child support should be based on plaintiff's net income for 1995 exclusive of his company's retained earnings and after giving him credit for income taxes paid on his distributed income, but not for income taxes paid on retained earnings.
>
> . . . .
>
> In reaching its decision on the amount of child support to award the defendant the court has carefully considered the arguments of counsel for both parties. It is convinced that plaintiff's share of retained earnings he receives each year from his company, of which he is a 24% shareholder, is income for child support calculation purposes, according to the definition of income in the

[2] Appellee has not appealed the chancellor's decision to exclude Anderson's share of AMCO's retained/undistributed earnings from Anderson's income in computing his support liability. Consequently, we do not express any opinion on its propriety.

> Supreme Court's per curiam opinion and under A.C.A. Section 9-14-107(b). It is further convinced, however, that plaintiff has rebutted the presumption that the amount reflected by the child support chart after including income from retained earnings is the just amount of child support to order in this particular case, and that accordingly plaintiff's share of his company's undistributed share of retained earnings should not be used in calculating income or child support in this particular case. It is further convinced, however, that if the court is not going to include plaintiff's undistributed share of retained earnings in calculating his child support it would be inequitable to give plaintiff credit for income taxes paid on those retained earnings even though the taxes are deducted from plaintiff's paycheck. Notwithstanding the fact that plaintiff may not immediately receive his share of retained earnings, he, nevertheless does benefit from them (his stockholder's equity is increased) and it would be inequitable for him to receive this substantial benefit in which the defendant does not share and then deprive the defendant further by allowing plaintiff to reduce that portion of his income for child support calculation purposes by deducting the taxes on the retained earnings.

As noted above, this issue requires interpretation of the family-support chart. The family-support chart is, in essence, a rule promulgated by the Arkansas Supreme Court .[3] We construe court rules using the same means, including canons of construction, that are used to interpret statutes. *See Gannett River States Pub. Co. v. Arkansas Judicial Discipline and Disability Comm'n*, 304 Ark. 244, 247, 801 S.W.2d 292 (1990). The basic rule of statutory interpretation to which all other interpretative guides must yield is the necessity to give effect to the intent of the drafter of the statute. *See Rogers v. Tudor Ins. Co.*, 325 Ark. 226, 234, 925 S.W.2d 395 (1996). The cardinal principle for construing remedial legislation is for courts to give appropriate regard to the spirit which promoted the enactment of the remedial legislation, the

[3] Because this case involves an issue of first impression, is of substantial public interest, and requires interpretation of a rule of the supreme court, we certified this case to the Arkansas Supreme Court pursuant to Ark. Sup. Ct. R. 1-2(a)(17)(i); (iv); (v) (1996). However, the supreme court declined to accept the case and remanded it back to this court for decision. Jurisdiction to determine the issues presented in this appeal is therefore in the court of appeals.

mischief sought to be abolished, and the remedy proposed. *Arkansas Dep't of Human Servs. v. Walters*, 315 Ark. 204, 209, 866 S.W.2d 823 (1993). The purpose of a statute must be considered when construing it. *Stover v. Stover*, 287 Ark. 116, 119, 696 S.W.2d 750 (1985). Moreover, in interpreting statutes, a court should take a common-sense approach. *Bryant v. Mars*, 309 Ark. 480, 485, 830 S.W.2d 869 (1992).

When we apply these principles of statutory interpretation to the chancery court's interpretation of the pertinent provisions of the family-support chart, we conclude that the court did not err in rejecting appellant Anderson's contention that, pursuant to the chart, he was entitled to have deducted from his income available to pay child support the income taxes that he paid on his 1995 shareholder earnings that were retained by AMCO. We agree with the chancery court's interpretation of the pertinent provisions of the family-support chart and reject Anderson's interpretation because it is contrary to the purpose for which the family-support chart was promulgated. The family-support chart was established "to ensure the proper enforcement of child-support awards in this state." *Guidelines*, 314 Ark. at 650.

Appellant Anderson's interpretation of the provisions of the chart that permit deduction of income-tax payments from the income that a child-support payor has available to pay child support is contrary to the purpose of the family-support chart. His interpretation would encourage child-support payors, who are also shareholders in subchapter S corporations, to favor their own long-term financial interests in their corporations over their children's need for support until such time as the children are no longer minors. A subchapter S corporation shareholder, such as appellant, would have an incentive to keep most or all of his shareholder income as retained earnings by the corporation. The greater the percentage of his income that the shareholder has retained by the corporation, rather than distributed to him, the lesser will be his income available to pay child support. This is so because not only would the child-support payor/subchapter S corporation shareholder, pursuant to the chancery court's decision in this case, be able to deduct from his child-support income the amount of his shareholder earnings retained by the corporation,

but he would also be able to reduce his child-support income by the entire amount of income taxes that he pays on his corporate earnings, whether distributed to him or retained by the corporation. It is wholly inconsistent with the purpose of the family-support chart to interpret it in such a way as to encourage child-support payors to minimize their child-support income. Appellant Anderson's interpretation does so and the chancery court did not err in rejecting it.

Appellant Anderson also asserts that the chancery court erred in declining to order appellee Paula Anderson to pay some of the $150,000 debt that he owes to a bank in connection with a failed business venture. In 1992 appellant Anderson and a partner started a company, Technology Direct, to build and sell inexpensive computers. The business failed in October of 1995, and appellant Anderson and his partner were jointly liable for a $150,000 debt to a bank that had provided financing for Technology Direct. In April of 1996, when the first hearing was held in this case, appellant Anderson was personally liable for one-half of this debt and was responsible for the entire debt if his partner failed to pay his half. At this hearing, appellant Anderson volunteered to "just keep paying" his debt to the bank. When asked on direct examination if he intended to ask Paula Anderson to pay part of this debt, appellant Anderson replied, "I don't foresee her being able to pay it and we'll just do the best we can on that one." At the second hearing that was held in this case, in November 1996, appellant Anderson testified that his partner in Technology Direct had failed to pay his half of the debt to the bank and, therefore, he was liable to the bank for approximately $150,000. On cross-examination, appellant Anderson was asked if anything had changed with regard to Paula's financial situation such that she could pay some of the Technology Direct debt. He replied, "She hasn't received any kind of high paying job at this point." Given appellant Anderson's testimony at the two hearings that he did not foresee that Paula would have the financial ability to pay any of the Technology Direct debt, he will not be heard on appeal to complain that the chancery court erred by agreeing with his conclusion that Paula lacked the financial resources to pay part of the Technology Direct debt. An appellant may not complain on

appeal that the chancellor erred if the appellant has induced, consented to, or acquiesced in the chancellor's decision. *Dodson v. Dodson*, 37 Ark. App. 86, 89, 825 S.W.2d 608 (1992).

Appellant Anderson also asserts that the chancery court erred in ordering him to pay child support of $2,133 per month. Moreover, he contends that the chancery court erred in ordering him to pay Paula alimony of $500 per month until five years after the graduation of their youngest child or until she remarries. The chancery court made the $2,133 per month child-support award after determining that appellant Anderson's net income for child-support purposes in 1995 was $116,357 ($9,696 per month) and by then applying to this figure the appropriate directive set forth in the Arkansas Family Support Chart. The support chart that was then in effect stated, in essence, that when the payor's income exceeds $5,000 per month the appropriate level of child support for two dependents is 22% of the payor's monthly income. *In re: Guidelines for Child Support*, 314 Ark. 644, 646, 863 S.W.2d 291 (1993). With regard to its award to Paula of $500 alimony per month, in its order the chancery court noted:

> In addressing the subject of alimony, the court is convinced the plaintiff has the ability to pay alimony and that the defendant is in need of it. The court further believes that the defendant's desire to obtain employment which will allow her to be at home with the children when they are out of school is not unreasonable considering that defendant has always been at home with the children during this marriage of substantial duration. Obtaining employment which will coincide with the children's school schedule will, of course, limit the job opportunities available to defendant and the amount of compensation. Considering the length of the marriage, the wife's prospects for employment, and the husband's ability to pay, the court finds plaintiff should pay alimony until five years after the youngest child is presently scheduled to graduate from high school or until defendant remarries or cohabits with a man to whom she is not related.

Moreover, in its order the chancery court noted that the total of appellant Anderson's monthly child-support payment ($2,133) and of his monthly alimony payment ($500) was $2,633 per month. The chancery court noted further that, after subtracting

these amounts from appellant Anderson's 1995 income of $9,696 per month and after further subtraction of monthly payments on the Technology Direct debt and payments for additional income taxes on his undistributed earnings portion of his 1995 income, appellant Anderson will still have $2,364 per month to support himself and will still have 24% ownership of AMCO. The chancery court noted further that the $2,364 per month that appellant Anderson will have to live on "is only $269 less than the amount provided by the court for defendant [Paula] and [the] two children."

Certain case-law principles govern our review of a chancery court's award of spousal and child support. The amount of child support a chancery court awards lies within the court's sound discretion, and we will not disturb the chancellor's child-support award absent an abuse of discretion. *Mearns v. Mearns*, 58 Ark. App. 42, 48, 946 S.W.2d 188 (1997); *Jones v. Jones*, 43 Ark. App. 7, 12, 858 S.W.2d 130 (1993). Reference to the family-support chart is mandatory, and the chart itself establishes a rebuttable presumption of the appropriate amount of child support that can only be disregarded if the chancery court makes express findings of fact stating why the amount of child support set forth in the support chart is unjust or inappropriate. *See Black v. Black*, 306 Ark. 209, 214, 812 S.W.2d 480 (1991); *McJunkins v. Lemons*, 52 Ark. App. 1, 5, 913 S.W.2d 306 (1996). With regard to a chancery court's decision to award spousal support (alimony), the chancery court's decision to do so is a matter that also lies within the court's sound discretion. *Wilson v. Wilson*, 294 Ark. 194, 199, 741 S.W.2d 640 (1987). A chancery court's decision to award alimony will not be reversed on appeal absent an abuse of discretion. *Id.*; *Tortorich v. Tortorich*, 50 Ark. App. 114, 121, 902 S.W.2d 247 (1995). The purpose of alimony is to rectify economic imbalance in the earning power and the standard of living of the parties to a divorce in light of the particular facts of each case. *Harvey v. Harvey*, 295 Ark. 102, 105, 747 S.W.2d 89 (1988). The primary factors that a chancery court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.*; *Mearns v. Mearns*, 58 Ark. App. at 49. To balance these primary factors, a chancery court

should consider certain secondary factors. *See Mearns v. Mearns*, 58 Ark. App. at 49-50. Among these secondary factors are: (1) the financial circumstances of both parties; (2) the amount and nature of the income, both current and anticipated, of both parties; (3) the extent and nature of the resources and assets of each of the parties; and (4) the earning ability and capacity of both parties. *Id.*

Testimony pertaining to the nature and amount of appellant Anderson's income, pertaining to the extent and nature of his resources and assets and pertaining to his earning ability and capacity have been noted, above, in connection with his contention that the chancery court erred in not reducing his income available to pay child support by the amount of income taxes he paid in 1995 on his pro rata share of earnings retained by AMCO. At the hearing that was held on November 18, 1996, Paula testified concerning the nature and amount of her income, both current and anticipated, testified about the nature and extent of her financial resources and assets, and also testified about her earning ability and capacity. She testified that she had married appellant Anderson in 1973. She noted that prior to her marriage she had worked as an administrative secretary for a county health department and that she had graduated from high school and had attended the University of Arkansas for one year. She testified further that she and appellant had had three daughters and that the two youngest were twelve and fourteen years of age. She stated that she and appellant Anderson had agreed in 1977 that she would not work after their first child was born but that she would stay home and raise the children. She acknowledged that since September 1995 she had worked as a substitute secretary and a substitute media specialist for the Fort Smith Public Schools and that she intended to apply for a permanent job as a secretary with the school system. She noted that, if she were hired, she would earn $10,000 to $18,000 for a nine-month contract. She explained that she was applying for a permanent job only with the school system so that she could be at home with her daughters during the summer months when school was not in session. With regard to the extent and nature of her financial resources and assets, Paula said: "I'm forty-three (43) years old. I have very little

education. I do not have anything. I don't have any CDs. I don't have any stocks. I don't have any retirement. . . . It's going to take a long time for me to get back on my feet . . . . And I also don't own 24 percent in stock in a company like Mr. Anderson does. I don't have anything to fall back on."

Given the testimony, noted above, that was before the chancery court, we cannot say that the court abused its discretion in ordering appellant Anderson to pay $2,133 per month in child support for two children and to pay $500 per month in spousal support. The chancery court's child-support award was nothing more than a straightforward application of the family-support chart to the $9,696 monthly income that appellant Anderson had available to pay child support. The chancery court's spousal-support award was based on testimony from which the court could conclude that Paula needed $500 per month in support and that appellant Anderson had the financial ability to provide this support.

Appellant Anderson also asserts that the chancery court erred in ordering him to pay up to $5,000 of credit card debts that he and Paula had incurred. In its order, the chancery court ordered appellant Anderson to pay this debt because Paula "has no ability to pay . . . the credit cards debts." A chancery court has authority to consider the allocation of debt in a divorce case. *See Box v. Box*, 312 Ark. 550, 557, 851 S.W.2d 437 (1993). A chancery court's decision to allocate debt to a particular party in a divorce case is a question of fact and will not be reversed on appeal unless clearly erroneous. *See Grace v. Grace*, 326 Ark. 312, 317, 930 S.W.2d 362 (1996). A chancery court's determination that debt should be allocated between the parties in a divorce case on the basis of their relative ability to pay is not a decision that is clearly erroneous. *See Richardson v. Richardson*, 280 Ark. 498, 503, 659 S.W.2d 510 (1983). As noted above, there was ample testimony before the chancellor from which he could conclude that appellant Anderson's financial position was decidedly superior to Paula's. Therefore, the court's allocation of the parties' credit-card debt was not clearly erroneous.

Finally, appellant Anderson asserts that the chancellor erred in ordering him to pay Paula's counsel a fee of $4,000. Pursuant to statute, such fee awards are permissible in divorce cases. Ark. Code Ann. § 9-12-309(a) (Repl. 1993). A chancellor has considerable discretion to award attorney's fees in a divorce case. *Gavin v. Gavin*, 319 Ark. 270, 272, 890 S.W.2d 592 (1995); *Stepp v. Gray*, 58 Ark. App. 229, 240-41, 947 S.W.2d 798 (1997). Moreover, the chancellor is in a better position to evaluate counsel's services than an appellate court, and, in the absence of clear abuse, the chancellor's award of an attorney's fee will not be disturbed on appeal. *Wilson v. Wilson*, 294 Ark. 194, 198, 741 S.W.2d 640 (1987). In determining whether to award attorney's fees, the chancellor must consider the relative financial abilities of the parties. *Paulson v. Paulson*, 8 Ark. App. 306, 310-11, 652 S.W.2d 46 (1983); *see also Lee v. Lee*, 12 Ark. App. 226, 674 S.W.2d 505 (1984). As we have previously noted, from the testimony given by appellant Anderson and his witnesses, the chancellor could have concluded that he was, relative to Paula, in a much better financial position. Review of the record shows that in the course of representing Paula her counsel conducted a deposition, responded to two sets of interrogatories, and carefully studied many complex financial and tax records of appellant Anderson and AMCO. Given the chancellor's superior position to evaluate the services Paula's counsel rendered, we cannot say that the chancery court clearly abused its discretion in ordering appellant Anderson to pay attorney's fees.

For the reasons set forth above, we affirm the Sebastian County Chancery Court's order of January 14, 1997.

Affirmed.

BIRD and GRIFFEN, JJ., agree.

SECOND INJURY FUND *v.* Ronnie FURMAN

CA 97-906 961 S.W.2d 787

Court of Appeals of Arkansas
Division II
Opinion delivered February 11, 1998

David L. Pake, for appellant.

Hardin, Jesson, Dawson & Terry, by: *J. Rodney Mills* and *Robert T. Dawson*, for appellee Simmons Industries.

JOHN B. ROBBINS, Chief Judge. Appellee Ronnie Furman sustained a work-related injury to his back while working for Rymer Foods in July 1992. As a result of this injury, Mr. Furman underwent surgery and Rymer paid benefits in accordance with a 10% anatomical impairment rating. Mr. Furman returned to work in the same position that he held prior to the injury, and continued to do so after Rymer was bought by Simmons Industries on January 1, 1994. On May 18, 1994, Mr. Furman was working for Simmons and sustained a second back injury. After again undergoing surgery, Mr. Furman returned to work on a part-time basis for about a month, but has not worked since January 1995. As a result of the second back injury, Mr. Furman was assigned an additional 2% anatomical rating, for which Simmons has compensated him.

Mr. Furman filed a claim with the Workers' Compensation Commission, contending that his injuries had rendered him permanently and totally disabled. A hearing was held to determine, among other things, the extent of any responsibility of appellant Second Injury Fund. After the hearing, the Commission found that the original back injury resulted in a 5% wage loss. The Commission also found that, after the second injury, Mr. Furman was not totally disabled but rather suffered an additional wage loss of 18%. The Commission then ordered the Second Injury Fund to compensate Mr. Furman for 18% wage loss. Second Injury Fund now appeals this award.

For reversal, the appellant raises seven arguments. It first contends that the Commission erred in characterizing Mr. Furman's first back injury as an "impairment" rather than a "disability." Next, Second Injury Fund argues that the Commission erred in concluding that Mr. Furman's first injury resulted in a 5% wage loss. The appellant's third and fourth arguments are that Mr. Furman failed to establish that the two injuries combined to produce the resulting disability and that substantial evidence does not support the finding that the second injury would not have caused

the entire disability alone and of itself. The appellant also argues that the Commission erred in finding that Mr. Furman did not waive vocational rehabilitation and further asserts that the Commission misquoted Ark. Code Ann. § 11-9-505(b)(3) (Repl. 1996) with regard to an employee's waiver of vocational rehabilitation. Finally, Second Injury Fund contends that the Commission erred as a matter of law in finding that the Fund could pay for vocational rehabilitation 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).

At the hearing before the Commission, Mr. Furman testified on his own behalf. He stated that, between 1990 and the date of his second injury, he had been employed as a production manager. His duties included supervising and training employees as well as helping on the production line when needed. Mr. Furman indicated that on some occasions he was required to lift as much as seventy pounds.

In July 1992, Mr. Furman suffered a back injury that resulted in surgery performed by Dr. Michael Standefer in January 1993. Mr. Furman returned to his supervisory position in March 1993 and was able to earn the same or more money than he had been making prior to the injury. However, he testified that as a result of the first injury, bending over became more strenuous and he was no longer able to lift seventy pounds.

On May 18, 1994, Mr. Furman "was carrying a tray of chicken and stumbled over a tub stand and twisted and hurt [his]

back again." This injury resulted in a subsequent surgery, and according to Mr. Furman, he has been unable to return to full duty since that time. He testified that he now has almost constant pain in his back and that he can no longer perform his job because of the standing and walking requirements. He admitted that he might be able to perform a job involving minimal physical demands, but stated that he has applied for these types of jobs with no success. Mr. Furman testified that he checked with Arkansas Rehabilitation Services about vocational training, but that "I did not get a follow up on my inquiry."

The pertinent medical evidence in this case was provided in large part by the medical reports of Dr. Standefer. After the initial surgery, Dr. Standefer released Mr. Furman to work with the requirements that he lift no more than twenty-five pounds and avoid repeated bending. After the second injury, Dr. Standefer performed a myelogram and CT scan that provided findings consistent with a herniated disc, and he determined that another surgery would be necessary. Several months later, Dr. Standefer assigned an additional 2% impairment rating that was attributed to the second injury, and he gave the following opinion with regard to Mr. Furman's employment possibilities:

> In the future it will be important for him to avoid heavy lifting and repeated bending as in the past. I am inclined to think that resumption of his previous occupation will not be feasible. He should investigate alternative employment opportunities or vocational/technological school or resumption of higher education in the form of college.

Second Injury Fund's first assignment of error is that the Commission erred in finding that Mr. Furman's first injury was an "impairment" rather than a "disability." It points out that, under Act 796 of 1993, the legislature has mandated strict construction of our workers' compensation laws. The Fund then submits that, under the new Act, an injury occurring on the job cannot result in an "impairment," but rather must be categorized as a "disability" that results in wage loss. Hence, argues the Fund, Mr. Furman did not suffer an impairment when he sustained a compensable back injury while working in July 1992.

The appellant's first argument is without merit. The new Workers' Compensation Act did not change the following guidelines for Second Injury Fund liability, which are now codified at Ark. Code Ann. § 11-9-525(3) and (4) (Repl. 1996):

> (3) If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, then the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment which would have resulted from the last injury had there been no preexisting disability or impairment.
>
> (4) After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than the actual anatomical impairment resulting from the last injury, has been determined by an administrative law judge or the Workers' Compensation Commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by the administrative law judge or the commission, and the degree or percentage of disability or impairment which existed prior to the last injury plus the disability or impairment resulting from the combined disability shall be determined, and compensation for that balance, if any, shall be paid out of the fund provided for in § 11-9-301.

Pursuant to the above provisions, the Second Injury Fund may be subjected to liability if a claimant suffers from a permanent impairment, whether or not the impairment is the result of a compensable injury. In *Second Injury Trust Fund v. POM, Inc.*, 316 Ark. 796, 875 S.W.2d 832 (1994), a case decided under prior law, our supreme court held that a preexisting impairment can either be work related or non-work related, and need not include wage loss. In that case, Second Injury Fund argued, as it does here, that in order to invoke fund liability, it is necessary to show that the employee suffered a loss in wage-earning capacity where the initial

injury was work related, because "impairment" is necessarily non-work related. However, this argument was rejected.

In the instant case the appellant contends that, as a result of the new legislation, the result in *Second Injury Trust Fund v. POM, Inc., supra,* is no longer controlling. We disagree. Although the new Act is to be construed strictly, none of its provisions give rise to a different result in the disposition of this issue. Mr. Furman suffered a 10% anatomical impairment as a result of his first injury, and his employer compensated him for this impairment. It is immaterial whether or not the impairment resulted in any wage-loss disability. In either case, the Commission was correct in concluding that the impairment gave rise to potential Second Injury Fund liability. This would have been the proper ruling under prior law, and it continues to be the proper ruling under the new Act.

The appellant next contends that, because Mr. Furman did not suffer an impairment as the result of his first injury, any liability on its part would have to be based on a finding that the first injury caused a disability. It argues further that the Commission erred in concluding that Mr. Furman suffered a 5% wage-loss disability because he returned to work at the same or greater wages than he had been earning prior to the first injury. The Fund argues that because Mr. Furman suffered no initial impairment or disability, it could not be held liable under the relevant provisions of Ark. Code Ann. § 11-9-525 (Repl. 1996).

We agree with appellant that the Commission erred in assigning a 5% wage-loss disability to the first injury. Mr. Furman had returned to work at the same or greater wage level than he had been earning prior to the injury. However, such error is harmless because of our holding that it is immaterial whether the first injury was a work-related impairment or involved a wage-loss disability. The permanent impairment caused by the first injury was sufficient to trigger Second Injury Fund liability after the second injury suffered by Mr. Furman.

The appellant's third and fourth arguments are interrelated. It asserts that the Commission erred in finding that the two injuries combined to cause Mr. Furman's disability, and that the evi-

dence showed that his disability was no greater than that which would have been caused by the second injury alone. The Fund points out that, after the first injury, Mr. Furman returned to the same job and was able to work full time. He was also able to continue his hobbies, including golf and bowling. It was not until after the second injury that he was forced to quit his employment and discontinue his hobbies. Based on this evidence, Second Injury Fund submits that we can only reasonably conclude that the second injury was by itself responsible for Mr. Furman's resulting disability.

We find substantial evidence to support the Commission's finding that the two injuries combined to produce Mr. Furman's disability. An MRI conducted after the initial injury revealed disk bulges along with a herniated disk, and these conditions required surgery. After returning to work, Mr. Furman worked at the same or greater wages but was given restrictions on his lifting and bending. The second injury occurred in precisely the same L5-S1, left location, and he again underwent surgery. After the second surgery, Dr. Standefer assigned a 12% anatomical impairment rating, which was based on Mr. Furman's "two previous operations." This represents only a 2% increase from the 10% anatomical rating that had been assigned as a result of the first injury alone. We find that there is substantial evidence to support the Commission's determination that the two injuries combined to cause Mr. Furman's disability, and that his disability was greater than that which would have been caused by the second injury alone.

Second Injury Fund next contends that the Commission erred in finding that Mr. Furman did not waive vocational rehabilitation, and that it misquoted Ark. Code Ann. § 11-9-505(b)(3) (Repl. 1996), which provides:

> (3) The employee shall not be required to enter any program of vocational rehabilitation against his consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of

> permanent physical impairment established by objective physical findings.

The appellant essentially contends that Mr. Furman had a duty to pursue rehabilitation, and that he failed to do so. It asserts that, at the time of the hearing, Mr. Furman was not working and had no plans to seek employment in the future. Nor did he file with the Commission any plan for rehabilitation. The appellant submits that this constituted a waiver of any right to rehabilitation and thus relieves it of any liability pursuant to the above statutory provision. The Fund notes that, in its opinion, the Commission misquoted the above provision when it stated "no employee who waives *an offer of* rehabilitation" shall be entitled to disability benefits in excess of his permanent impairment (emphasis added). The appellant argues that the Commission erroneously concluded that it was the responsibility of the Fund to offer rehabilitation, rather than the responsibility of Mr. Furman to seek it.

Notwithstanding the Commission's failure to accurately quote the pertinent statute, we find no error in its decision that Mr. Furman has not waived rehabilitation and is entitled to disability benefits. We acknowledge that Ark. Code Ann. § 11-9-505(b)(4) (Repl. 1996) provides that, if a claimant elects to apply for rehabilitation at the expense of his employer, he must file such election with the Commission prior to a determination of disability benefits. However, this provision does not stand for the proposition that every claimant must formally file for rehabilitation with the Commission or waive entitlement to disability benefits. In the instant case, there was no evidence that either the appellant or Mr. Furman's employer at any time suggested a plan of rehabilitation. However, in answering his interrogatories, Mr. Furman affirmatively indicated that he wanted to pursue rehabilitation and did not waive his right to the same. Then, at the hearing, he presented a plan for attending Westark Community College to pursue a degree in hotel and restaurant management, and he provided a list of the expected finances to fund such a program. On these facts, we find no error in the Commission's refusal to deny disability benefits based on the appellant's contention that Mr. Furman waived rehabilitation. In *Second Injury Fund v. Robison*, 22 Ark. App. 157, 737 S.W.2d 162 (1987), we held that the Com-

mission is not required to consider a claimant's failure to request rehabilitation in determining the degree of his disability.

The appellant's remaining argument is that the Commission erred in finding that the fund could pay for vocational rehabilitation benefits. It cites *Second Injury Fund v. Robison, supra.* In that case, we indicated that if an employee's request for a rehabilitation program is granted, the employer is responsible for providing the vocational rehabilitation. The appellant submits that this fact has not been changed by any provision in the new Act.

We find the appellant's final point to be moot, because the Fund was not ordered to pay for any rehabilitation program. Its liability was limited to a wage-loss disability award. Therefore, the Commission's mention of potential Fund liability as to a hypothetical rehabilitation program was of no consequence.

Affirmed.

BIRD and GRIFFEN, JJ., agree.

James David McGILL *v.* STATE of Arkansas

CA 97-186 962 S.W.2d 382

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered February 11, 1998

Virginia Y. Middleton, for appellant.

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

D. FRANKLIN AREY, III, Judge. After a bench trial in the Juvenile Division of the Washington County Chancery Court, the

appellant, James David McGill, was found to be delinquent for committing criminal mischief in the first degree. He was sentenced to thirty days in the juvenile detention center with twenty-eight days suspended; he was also placed on supervised probation for twelve months, required to make restitution, and ordered to perform 100 hours of public service, among other terms and conditions. On appeal, appellant argues that the trial court erred by denying his motion for directed verdict because the evidence was not sufficient to prove he purposely destroyed or damaged any property. We affirm as modified and remand the case.

Appellant asked his high school classmate, Malanda Jo Gardner, if he could sit in her car to smoke a cigarette and listen to the radio. She gave him her keys. He did not ask Gardner if he could drive the car; likewise, she did not tell him he could drive the car.

Another classmate, Carl Shoffitt, was present when Gardner gave appellant her keys. Shoffitt saw appellant walk to the passenger side of the car and throw the keys over the top of the car to another student named Gene Duggin. Duggin got in the car, put the keys in the ignition, and turned the key over so he could use the cigarette lighter; appellant got in the passenger seat. Shoffitt testified that as he was about to go inside, he heard the vehicle start and turned around to look. He saw Duggin driving Gardner's car, with appellant in the passenger seat. He next saw the car thirty minutes later on the parking lot, after it had been wrecked.

Gardner testified that her car was in excellent condition before appellant borrowed the keys. The car was returned to her in a wrecked condition. Gardner's mother testified that the car had been "totaled," and that the frame was bent or warped. Gardner's mother further testified that Gardner's father "had $2,500 in the car."

Duggin and appellant gave conflicting statements. Duggin claimed that appellant drove the car and was "fishtailing" it around corners. Duggin stated that as appellant fishtailed around one corner, the back end of the car went to the right and swung up against a fence. The bumper was damaged, and the two students tried to put it back on. They brought the car back to the school after the accident.

Appellant gave two statements. In his first statement, appellant said nothing about leaving the school in the car. In his second statement, he admitted that he and Duggin took the car out of the parking lot, with Duggin driving. He claimed that Duggin lost control of the car, slid to the right, and hit a fence post. They tried to fix the damaged bumper and returned the car to the parking lot.

The State originally sought appellant's adjudication of delinquency based upon acts of criminal mischief in the first degree and theft of property. At trial, the court granted appellant's motion for directed verdict on the theft of property charge. The court denied the motion as to the remaining charge, and found appellant guilty of juvenile delinquency by reason of criminal mischief in the first degree.

Appellant contests the trial court's denial of his motion for directed verdict. He argues that the proof is not sufficient to establish that he purposely destroyed or damaged Gardner's car.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *D.D. v. State*, 40 Ark. App. 75, 842 S.W.2d 62 (1992). In reviewing the sufficiency of the evidence in a delinquency case, we apply the same standard of review as in criminal cases. *C.H. v. State*, 51 Ark. App. 153, 912 S.W.2d 942 (1995). When the sufficiency of the evidence is challenged on appeal from a criminal conviction, we consider only the proof that tends to support the finding of guilt, and we view the evidence in the light most favorable to the State. *Id.*; *D.D.*, 40 Ark. App. at 76, 842 S.W.2d at 63. We will affirm if the conviction is supported by substantial evidence. *C.H.*, 51 Ark. App. at 154, 912 S.W.2d at 943. Substantial evidence is that which is of sufficient force and character to compel a conclusion one way or the other without resorting to speculation or conjecture. *Id.*

A person commits the offense of criminal mischief in the first degree if he purposely and without legal justification destroys or causes damage to any property of another. Ark. Code Ann. § 5-38-203(a)(1) (Repl. 1997). A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such

a result. Ark. Code Ann. § 5-2-202(1). "It is not enough to show merely that the property was damaged or destroyed, for one essential element of this crime is that the damage was willfully caused and not accidental." *Bray v. State*, 12 Ark. App. 53, 670 S.W.2d 822, 823 (1984).

Appellant's delinquency adjudication based upon criminal mischief in the first degree is not supported by substantial evidence. Viewed in the light most favorable to the State, we cannot say that the evidence indicates that appellant purposely damaged the car. Although Duggin's statement that appellant fishtailed the car indicates appellant's intent to surrender some degree of control over the car, this evidence is not sufficient to show that appellant willfully intended to have a wreck and damage the car.

The State argues, in the alternative, that we should modify the delinquency adjudication by finding that it is based on an act that would constitute criminal mischief in the second degree. In his reply brief, appellant responds that he did not recklessly destroy or damage the car; rather, he simply borrowed Gardner's keys.

A person commits criminal mischief in the second degree if he recklessly destroys or damages any property of another. Ark. Code Ann. § 5-38-204(a)(1). A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or that the result will occur. The risk must be of the nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. Ark. Code Ann. § 5-2-202(3).

We agree that the evidence supports the conclusion that appellant acted recklessly. Duggin's statement indicates that appellant fishtailed the car as he drove around a corner, so that he lost control of the car and struck a fence. By driving in this fashion, appellant consciously disregarded the risk that he could lose control of the car and have a wreck, resulting in the destruction of or damage to someone else's car. Thus, appellant's conscious disregard of the risk of a wreck would support a finding of delinquency for committing criminal mischief in the second degree.

Appellant argues that he never admitted to driving the car, and that his statements are corroborated by the testimony of Shoffitt. But, under our standard of review, we consider only the proof that tends to support the finding of appellant's guilt, and we view the evidence in the light most favorable to the State. *See C.H., supra.* Gardner gave appellant the keys to the car, Duggin stated that appellant drove the car, and appellant gave two inconsistent statements when confronted about the matter. There is substantial evidence to support the trial court's finding of appellant's delinquency.[1]

Therefore, we modify the basis for the trial court's finding of delinquency to criminal mischief in the second degree. *See* Ark. Code Ann. § 16-67-325(a) (1987).

> Where the evidence presented is insufficient to sustain a conviction for a certain crime, but where there is sufficient evidence to sustain a conviction for a lesser included offense of that crime, this court may "reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it. . . at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial either absolutely or conditionally."

Tigue v. State, 319 Ark. 147, 152-53, 889 S.W.2d 760, 762 (1994)(citing *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986)). Criminal mischief in the second degree is a lesser included offense of criminal mischief in the first degree. *Cf. McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997)(articulating the factors to consider in finding a lesser-included offense). Second-degree criminal mischief is established by proof of the same elements as first-degree criminal mischief; the crimes are of the same generic class; and the distinction between the two offenses is based upon grades of intent or degrees of culpability. *Compare* § 5-38-203(a)(1) *with* § 5-38-204(a)(1).

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[1] We disagree with Judge Neal; even without Duggin's statement, the evidence tends to connect appellant with the commission of the crime. Gardner testified that she gave her keys *to appellant*, not to appellant and Duggin jointly. Further, appellant gave inconsistent statements to the police. False statements made to the police by an accused may constitute corroborating evidence. *See Henderson v. State*, 279 Ark. 435, 652 S.W.2d 16 (1983).

While we modify the underlying basis for finding appellant delinquent to criminal mischief in the second degree, we note that the trial court's punishment options did not depend upon the degree or classification of the underlying charge. *See* Ark. Code Ann. § 9-27-330 (Repl. 1993). Thus, unlike the situation typified by *Tigue*, modifying the basis for the delinquency charge to criminal mischief in the second degree leaves us with little or no guidance for fixing appellant's punishment. For this reason, we remand this case to the trial court for assessment of the penalty. *See* Ark. Code Ann. § 16-67-325(a); *Tigue, supra.* We announce no opinion on the suitability of appellant's current punishment.

Affirmed as modified and remanded for further proceedings not inconsistent with this opinion.

ROBBINS, C.J., and ROGERS and CRABTREE, JJ., agree.

NEAL and ROAF, JJ., dissent.

OLLY NEAL, Judge, dissenting. Although I join in Judge Roaf's dissenting opinion, I must write separately to illuminate a point we all have apparently overlooked. The appellant here, Christopher McGill, a juvenile, was found guilty of a felony offense, and the majority can point only to the uncorroborated out-of-court statement of an accomplice as substantial evidence to support the conviction.

Arkansas Code Annotated § 16-89-111(e)(1) (1987) provides that a felony conviction *may not be had* upon the testimony of an accomplice *unless corroborated* by other evidence tending to connect the accused to the commission of the offense. Felony convictions supported only by uncorroborated accomplice testimony should be dismissed on appeal to avoid running afoul of the double jeopardy clause. *See Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997).

The test for determining whether accomplice testimony is sufficiently corroborated to render it sufficiently reliable is whether, when the accomplice's testimony is totally stricken, the *remaining* evidence independently establishes the crime *and* tends to connect the accused to its commission. *Peeler v. State*, 326 Ark.

423, 932 S.W.2d 312 (1996). Here, without the accomplice's testimony, the other evidence establishes that 1) the victim left her car keys with appellant and the accomplice; 2) a disinterested witness saw *the accomplice* driving the car; and 3) when the victim later returned to the school parking lot her car was "totalled." Because there was uncontradicted testimony that the victim left her car keys with both appellant *and* the alleged accomplice, neither factor nor any combination thereof is sufficient to independently connect appellant to the commission of the crime. Because the testimony of Duggin, the alleged accomplice, was not corroborated, we should reverse and dismiss this appeal, consistently with our established practice when we find the evidence insufficient to sustain a conviction.

ANDREE LAYTON ROAF, Judge, dissenting. It is well settled that, because of double jeopardy considerations, this court must reverse and dismiss a criminal conviction where the evidence is insufficient to support the conviction. This has been the law of the land since 1978. *See Pollard v. State*, 264 Ark. 753, 574 S.W.2d 656 (1978) (citing *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978)). It is also axiomatic that this court may reduce the conviction to a lesser-included offense where the trial court erred by refusing to give a requested instruction on the lesser-included offense. *See Hamilton v. State*, 262 Ark. 366, 556 S.W.2d 884 (1977).

However, the disposition of this case presents an example of a third and apparently equally well-established tenet of appellate review in Arkansas — that we may, in the absence of other trial error, reduce a conviction gained upon insufficient evidence to a lesser-included offense not charged, requested, or even mentioned at trial, in lieu of reversing the conviction outright. *Tigue v. State*, 319 Ark, 147, 889 S.W.2d 760 (1994). This is to be distinguished from the power of our reviewing courts to modify a sentence or punishment deemed excessive or illegal. *Hudgens v. State*, 324 Ark. 169,919 S.W.2d 939 (1996).

Much could be said about the origins and evolution of this authority; I will not attempt to do so, in the interest of holding the reader's attention. Suffice it to say that the distinction

between reducing a sentence and reducing the degree of the offense has been somewhat blurred in the past. The supreme court has done one or the other, or a combination of the two, commencing in the nineteenth century, *see Brown v. State*, 34 Ark. 232, (1879), *Simpson v. State*, 56 Ark. 8, 19 S.W. 99 (1892), and continuing on into the decades that followed. *Noble v. State*, 75 Ark. 246, 87 S.W. 120 (1905); *King v. State*, 117 Ark. 82, 173 S.W. 852 (1915); *Brooks v. State*, 141 Ark. 57, 216 S.W. 705 (1919). We have persisted in reducing convictions, such as McGill's, during the years where we had the option of remanding such cases for new trial, *see Dixon v. State*, 260 Ark. 857, 545 S.W.2d 606 (1977); *Bailey v. State*, 206 Ark. 121, 173 S.W.2d 1010 (1943); and after 1978, when we did not. *See Tigue v. State*, *supra*; *Bishop v. State*, 294 Ark. 303, 742 S.W.2d 911 (1988); *Mills v. State*, 270 Ark. 141, 603 S.W.2d 416 (1980).

The majority relies upon *Tigue*, *supra*, for the authority to reduce McGill's conviction in this case. *Tigue* in turn relied upon *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1994). Unfortunately, both *Tigue* and *Trotter* quote from *Dixon v. State*, *supra*, a 1977 pre-*Pollard* decision which stated that where the evidence is insufficient to sustain a conviction for a particular crime, the court may

> reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it. . . at some intermediate point, remand the case to the trial court for the assessment of the penalty *or grant a new trial either absolutely or conditionally*.

Dixon, 260 Ark. at 862, 545 S.W.2d at 609 (emphasis added). Of course, after 1978, this is no longer an accurate statement of the law.

Nevertheless, as it stands today, we are authorized by our supreme court to reduce a conviction when faced with the situation now confronting us and confronting young Mr. McGill. When we may do so is presumably solely within our discretion. In McGill's case, we are prodded to employ this discretion by the State, most likely because it sees the handwriting on the wall for its conviction based upon first-degree criminal mischief. The

State now recommends to us an alternative it did not present to McGill or to the trial court — *we* may find McGill guilty of second-degree criminal mischief.

Although both offenses are felonies because of the alleged value of the automobile that was totaled, McGill was adjudicated a delinquent because of his age and faces only two days' incarceration in a juvenile detention center. However, our appellate courts have most often exercised the prerogative to reduce rather than dismiss a conviction when reversing felony convictions from both jury and bench trials.

It may well be that our courts have, since 1978, reversed and dismissed some criminal convictions based on insufficiency of the evidence because the State did not suggest in its appellee brief a lesser-included offense, and we did not ferret one out on our own. For criminal appellants as a whole, the glass may be half full rather than half empty. However, each case stands on its own, and each defendant is entitled to fair and equal treatment in light of our avowed dedication to the uniform administration of justice. *See, e.g.*, *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997).

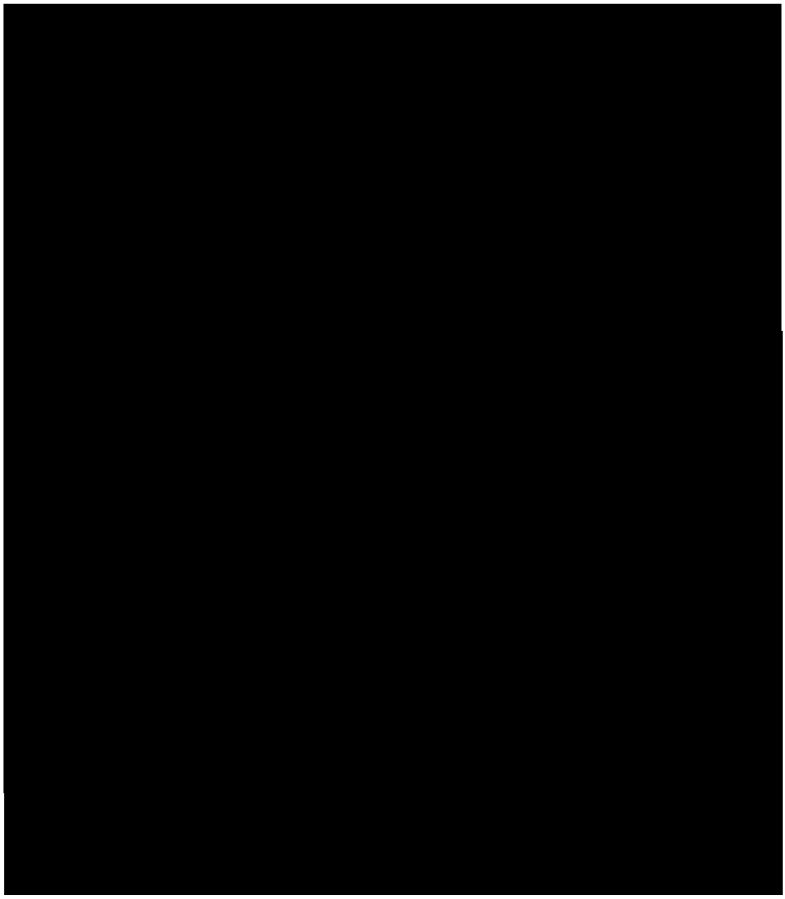
In the case before us, the prosecutor has already exercised his considerable discretion in the proceedings below. I choose to exercise my much more limited discretion by casting my vote to reverse and dismiss this conviction.

NEAL, J., joins this dissent.

Floyd H. FULKERSON *v.* Sylvester VAN BUREN, et al.

CA 97-176 961 S.W.2d 780

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered February 11, 1998
[Petition for rehearing denied March 18, 1998.*]



* STROUD and MEADS, JJ., would grant.

Hankins, Hicks, Madden & Blackwood, by: *Stuart W. Hankins*, for appellant.

Montgomery, Adams & Wyatt, PLC, by: *James W. Wyatt*, for appellees.

JOHN E. JENNINGS, Judge. Appellant Floyd H. Fulkerson appeals the Pulaski County Circuit Court's judgment awarding title to a 4.5-acre parcel of real estate to appellee the Progressive Church, Inc. The church claimed title to the land by adverse possession. We reverse and remand.

The 4.5 acres at issue are situated in Pulaski County, near the town of Scott. The parcel is irregularly configured and has eleven sides. The northernmost part of the parcel abuts Old Highway 30 for approximately 115 feet. A single-story church building is situated near the highway. This building is the meeting place for appellee, the Progressive Church, Inc. When the litigation between the parties began, appellant Fulkerson had held legal title

to the parcel since December 1949. Sometime in 1985, the congregation of the Progressive Church, without obtaining permission from Fulkerson, began using the church building on the property as their place of worship. Over the next several years, the congregation greatly improved the church building itself and the surrounding land. Sometime in 1990, appellant Fulkerson began to negotiate with appellee Sylvester Van Buren, the pastor of the church, to reach an agreement whereby the church would lease the parcel from Fulkerson. Fulkerson and Reverend Van Buren were unable to negotiate a lease.

In November 1994, Fulkerson sent to Reverend Van Buren a letter demanding that he and the church congregation immediately vacate the church building located on the parcel. The church did not vacate the premises. In May 1995, Fulkerson filed in Pulaski County Circuit Court a complaint in which he requested that the court eject the congregation from the church building and from the rest of the parcel at issue. Subsequently, appellant Fulkerson filed an amended complaint, naming as a defendant not only Reverend Van Buren but also the Progressive Church, Inc., in which he repeated his request for ejectment of the Progressive Church congregation from the parcel at issue. Reverend Van Buren and the church filed a response to Fulkerson's amended complaint in which they requested that Fulkerson's complaint be dismissed. Filed with this response was a counterclaim brought by the Progressive Church, Inc. In this counterclaim, the church asserted that it owned the parcel of land at issue by adverse possession and requested that the matter be transferred to chancery court to quiet title to the land after recognition of its ownership of the parcel. In October 1996, trial was held in Pulaski County Circuit Court in connection with Fulkerson's complaint and the church's counterclaim. After hearing testimony from witnesses presented by both parties, the circuit court subsequently caused to be entered a judgment in which the court determined that the Progressive Church owned the parcel of land by adverse possession.

[redacted] The legal principles governing establishment of title to land by adverse possession are well established. We recently set forth these principles as follows:

> It is well settled that, in order to establish title by adverse possession, appellee had the burden of proving that she had been in possession of the property continuously for more than seven years and that her possession was visible, notorious, distinct, exclusive, hostile, and with intent to hold against the true owner. The proof required as to the extent of possession and dominion may vary according to the location and character of the land. It is ordinarily sufficient that the acts of ownership are of such a nature as one would exercise over her own property and would not exercise over that of another, and that the acts amount to such dominion over the land as to which it is reasonably adapted. Whether possession is adverse to the true owner is a question of fact. *See Walker v. Hubbard*, 31 Ark. App. 43, 787 S.W.2d 251 (1990); *Hicks v. Flanagan*, 30 Ark. App. 53, 782 S.W.2d 587 (1990).

Moses v. Dautartas, 53 Ark. App. 242, 244, 922 S.W.2d 345 (1996). Moreover, for a trespasser to establish title to land by adverse possession, the quantum of proof necessary is greater if the trespasser has no color of title. *DeClerk v. Johnson*, 268 Ark. 868, 870, 596 S.W.2d 359 (1980). A trespasser who claims ownership of land without color of title must show actual possession to the extent of the claimed boundaries for the required seven years. *Id.* However, it was not necessary for the church to have color of title in order to adversely possess the parcel of land at issue. *See Barclay v. Tussey*, 259 Ark. 238, 241, 532 S.W.2d 193 (1976) .[1] For possession to be adverse, it is only necessary that it be hostile in the sense that it is under a claim of right, title, or ownership as distinguished from possession in conformity with, recognition of, or subservience to the superior right of the holder of title to the land. *Id.* Possession of land will not ordinarily be presumed to be adverse, but rather subservient to the true owner of the land. *See Dillaha v. Temple*, 267 Ark. 793, 797, 590 S.W.2d 331 (1979). Therefore, mere possession of land is not enough to adversely possess the land, and there is every presumption that possession of land is in subordination to the holder of the legal title to the land.

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[1] This rule was changed by Act 776 of 1995, which included as additional requirements for establishing adverse possession that the person claiming must have held color of title to the property or to contiguous real property for at least seven years. *See* Ark. Code Ann. § 18-11-106 (Supp. 1997).

Id. The intention to hold adversely must be clear, distinct, and unequivocal. *Id.* Moreover, it is well settled that the trustees of a religious society may acquire title to real property by adverse possession. *See Young v. Knox*, 165 Ark. 129, 134, 263 S.W. 52 (1924). The standard of review requires that we affirm the trial court's decision on a question of fact unless it is clearly against a preponderance of the evidence. Ark. R. Civ. P. 52(a); *Superior Improvement Co. v. Mastic Corp.*, 270 Ark. 471, 604 S.W.2d 950 (1980).

The core of the church's proof of adverse possession of the 4.5 acres at issue was provided by appellee, Reverend Sylvester Van Buren. As noted above, the intent required for adverse possession is the intention to claim the land at issue under right, title, or ownership as distinguished from possession in conformity with, recognition of, or subservience to the superior right of the true owner of the land. *Barclay v. Tussey*, 259 Ark. at 241. We conclude that Reverend Van Buren's testimony shows that, from the time the congregation occupied the church building on the parcel until November 1994, the church congregation was unsure of the precise nature of its interest in the land and, moreover, recognized that Fulkerson owned the land.

On cross-examination, Reverend Van Buren testified that in 1990 or 1991 he first realized that the church did not have a deed to the land at issue. He testified further that, prior to this time, he made no assumptions about whether the church was on the land with permission or whether the church had purchased the land. Reverend Van Buren specifically stated in this regard, "I didn't know how or what kind of possession they had." In order to clarify the matter of the church's right to occupy the land, Reverend Van Buren contacted appellant Fulkerson. He asked Fulkerson to give a quitclaim deed to the church, which Fulkerson refused to do. Reverend Van Buren testified further that, after Fulkerson told him that he (Fulkerson) held legal title to the land, he (Van Buren) "accepted that as a fact." In this regard, Reverend Van Buren testified:

> I had no way of knowing. I did some research on the layout of the land and saw where he had acquired the land from a relative somewhere's . . . between 1940 and '59 or somewhere like that.

> So I saw he acquired the land. And I saw no other records. During this time the courthouse was taken down and they had moved to another temporary location and everything they had was on microfilm and a lot of things wasn't clear. But as far as I knew he clearly had possession. And this is after we had talked and all. And even some weeks before we went to court. That this took place which is just a couple of years ago. Last year rather.

With regard to the time at which the church congregation decided to claim the land at issue, Reverend Van Buren testified:

> Once the term adverse had been positioned and he [Fulkerson] had caused us to be evicted or had asked us out of the church and we had no other alternatives. I just wondered what we should do. It wasn't a decision that was made impulsively at that time. We made the decision that we wanted the land once we found out it wasn't ours. And as far as adverse, adverse only came into play when no other avenue worked.

When asked whether this decision would have been reached in 1994 to 1995, Reverend Van Buren replied, "If you say so, that's close."

Given this testimony by Reverend Van Buren, given that a possessor of land does not possess adversely if, while in possession, he recognizes the ownership right of the titleholder to the land, and given that proof of the possessor's intention to hold adversely must be clear, distinct, and unequivocal and must have lasted seven years, we conclude that the circuit court's finding of fact that the congregation of the Progressive Church possessed for seven years the requisite intent to possess the land at issue adversely to appellant Fulkerson is clearly against the preponderance of the evidence. Because the church congregation did not possess the land with the requisite intent for seven years, the church congregation did not adversely possess the land.

For the reasons set forth above, we reverse the Pulaski County Circuit Court's judgment in favor of appellee the Progressive Church, Inc., on its counterclaim for adverse possession, and remand to the circuit court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

PITTMAN, BIRD, and CRABTREE, JJ., agree.

MEADS and STROUD, JJ., dissent.

MARGARET MEADS, Judge, dissenting. The trial court determined that appellees established their claim for adverse possession of the tract of land they had occupied since 1985. Because I do not believe the trial court's findings of fact are clearly erroneous or clearly against the preponderance of the evidence, I would affirm.

Reverend Van Buren testified that he became pastor of The Progressive Church in 1985 and that he and other church members immediately began cleaning up the premises, which he described as a "wilderness" and "dumping site." The land was overgrown with vines and littered with storm debris, and the church building was infested with snakes. They cut down trees, cleared out debris, and cleaned up the highway frontage so that the building became visible from the road. They repaired the building by installing central heat and air, and by replacing the roof, siding, windows, and floor. They added a 40-foot building and office. After two years, the property was in "immaculate" condition, and the congregation received compliments for their efforts from the local community. When asked whether he had treated the property as his own, Reverend Van Buren asserted: "There's no way that I would have gone to this property and cleared it by hand . . . if I had assumed we didn't have business being there, the right to be there, or if the church didn't have the needed possession."

Reverend Van Buren further testified that he had no dealings whatsoever with appellant until sometime in the early nineties, when appellant stopped by the church, asked to speak to the preacher, complimented him on the church's efforts to improve the appearance of the church and grounds, but was silent as to his ownership of the site. It was not until 1992 that appellant, through his attorney, notified appellee that he (appellant) owned the land and was willing to negotiate a lease with the church. Subsequently, appellant personally spoke to Reverend Van Buren about a lease. Ultimately, appellant's attorney sent appellees a demand to vacate dated November 4, 1994, and filed the eject-

ment action in May 1995. All during this time, The Progressive Church steadfastly refused to negotiate with appellant, asserted its intent to remain in possession, and defied eviction efforts. Reverend Van Buren repeatedly asked appellant for a quitclaim deed to the premises. He contended there were never any "negotiations" with appellant for a lease, and "the only reason lease was mentioned is because Mr. Fulkerson dominated the conversation. You only talk about what Mr. Fulkerson wants to talk about. It doesn't matter what you say."

To establish adverse possession which ripens into ownership, the claimant must prove possession for seven years that has been actual, open, notorious, continuous, hostile, and exclusive, accompanied with an intent to hold against the true owner. *Utley v. Raff*, 255 Ark. 824, 827, 502 S.W.2d 629, 632 (1973). The majority believes appellee failed to establish the requisite intent to hold against the true owner, because once appellant asserted his ownership and the church "recognized" appellant's ownership right, the church's occupancy ceased to be adverse, thus interrupting the seven-year statutory period. I disagree.

First, I do not believe the church recognized appellant's ownership. Church members began to occupy the premises in 1985, using the building regularly, without interruption, and without notice of appellant's ownership until 1992. After being notified of appellant's title and after receiving a demand to vacate and later an eviction notice, they continued to occupy the premises, using the building regularly and without interruption. By their actions, the congregation continued to repudiate appellant's ownership even through the date of trial and beyond. To date, they have been in continuous possession for almost thirteen years.

Second, I believe the church clearly demonstrated a hostile intent within the meaning of the law. As this court stated in *Walker v. Hubbard*, 31 Ark. App. 43, 787 S.W.2d 251 (1990):

> The word hostile, as used in the law of adverse possession, must not be read too literally. For adverse possession to be hostile, it is not necessary that the possessor have a conscious feeling of ill will or enmity toward his neighbor. Claim of ownership, even under a mistaken belief, is nevertheless adverse. (Citation omitted.)

Id. at 46-47. Additionally, for possession to be adverse, it is only necessary that it be hostile in the sense that it is under a claim of right, title, or ownership as distinguished from possession in conformity with, recognition of, or subservience to, the superior right of the owner. *Barclay v. Tussey*, 259 Ark. 238, 241, 532 S.W.2d 193, 195 (1976). For the reasons stated in the previous paragraph, I cannot say that appellee's possession was "in conformity with, recognition of, or subservience to" appellant's rights.

Third, it appears to me that appellee established seven years of possession with all the qualifying factors before appellant ever asserted his ownership.

I would affirm.

Stroud, J. joins in this dissent.

Perry HARNESS, et al. *v.* ARKANSAS PUBLIC SERVICE COMMISSION and Carroll Electric Cooperative Corporation

CA 96-1218 962 S.W.2d 374

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered February 11, 1998

Shults, Ray & Kurrus, by: *H. Baker Kurrus* and *Deborah Truby Riordan*, for appellants.

Valerie F. Boyce, for appellee Arkansas Public Service Commission.

Everett & Mars, by: *William B. Putman*, for appellee Carroll Electric Cooperative Corporation.

OLLY NEAL, Judge. Carroll Electric Cooperative Corporation (Carroll) filed an application with the Arkansas Public Service Commission (Commission) for a certificate of public convenience and necessity (certificate) to construct, operate, and maintain an electric transmission line and facilities in Arkansas. The Commission found that Carroll's proposed transmission line and facilities were needed to assure an adequate and more reliable supply of electric energy and that Carroll's proposed route for its transmission line was reasonable and appropriate and granted Carroll's application. Appellants, property owners in Boone and Newton Counties, opposed Carroll's proposed location for the transmission line, although they did not controvert the need for improved transmission facilities. On appeal, they contend that the Commission failed to pursue its regular authority as required by Ark. Code Ann. § 23-2-423 (Supp. 1995), in finding that appellants were provided adequate notice of the Commission proceedings and that the Commission acted arbitrarily and capriciously in approving the route proposed by Carroll for its transmission line and facilities.

This court's review of the Commission's orders is limited and governed by Ark. Code Ann. § 23-2-423(c), which provides that the finding of the Commission as to facts, if supported by substantial evidence, shall be conclusive and that the court's review shall not be extended further than to determine whether the Commission's findings are supported by substantial evidence and whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violated any rights under the laws or Constitution of the United States or of the State of Arkansas. *See Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997). 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 disregard of the facts or circumstances of the case. *AT&T Communications of the S.W., Inc. v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 126, 843 S.W.2d 855 (1992). In order to establish an absence of substantial evidence, the aggrieved party must show that the proof before the Commission was so nearly undisputed that fair-minded persons could not reach the same conclusion. *Id.* If an order of the Commission is supported by substantial evidence and it is neither unjust, arbitrary, unreasonable, unlawful, nor discriminatory, then this court must affirm. *Id.*

On October 11, 1995, Carroll filed an application with the Commission, requesting a certificate of public convenience and necessity pursuant to Ark. Code Ann. § 23-3-201 (1987), to construct, operate, and maintain a 69-kilovolt high-capacity transmission line from a substation to be constructed in the southwest portion of Harrison, Arkansas, to its existing substation in Dogpatch, Arkansas, and into Jasper, Arkansas. A hearing on Carroll's application was scheduled for February 20, 1996. On or about January 18, 1996, Carroll sent notice of the filing of its application to the affected landowners. Appellants, some of the affected landowners, filed a petition to intervene on February 12, 1996, and moved for a continuance of the hearing. The administrative law judge (ALJ) granted appellants' intervention petition but denied their motion for a continuance.

Order No. 4, entered by the ALJ following the conclusion of the February 20th hearing, granted Carroll's request for the certificate. The ALJ found that Carroll's proposed transmission line and facilities were needed to assure an adequate and more reliable supply of electric energy and that Carroll's proposed route for the transmission line was just and reasonable. The ALJ also found that the testimony and other evidence at the February 20, 1996, hearing indicated that Carroll Electric complied with the property owner notification requirements of the Commission Rules of Practice and Procedure. In Order No. 5, the Commission affirmed Order No. 4 without modification, and in No. Order 6, the Commission denied appellants' petition for rehearing and

injunction without comment. On October 10, 1996, appellants filed their notice of appeal of Orders No. 4, 5, and 6.

The first issue appellants raise concerns the timeliness of the notice that Carroll gave them of the filing of its original application for a certificate of public convenience and necessity. Carroll filed its application, seeking approval of its proposed transmission line and facilities, on October 11, 1995. Carroll then waited until January 18, 1996, approximately thirty days before the scheduled February 20th hearing date, to notify the affected landowners of its application. Appellants argue that they were denied due process because they were not afforded sufficient time to prepare for the hearing. A fundamental requirement of due process in matters of public utility regulation is a full and fair hearing, including the right to submit evidence and testimony, to examine witnesses, and an opportunity to present evidence or testimony in rebuttal to adverse positions. *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47, 813 S.W.2d 263 (1991).

Arkansas Code Annotated § 23-3-201(a) requires a utility to obtain a certificate of public convenience and necessity before any new construction or operation of any equipment or facilities for supplying a public service, or extension thereof, is undertaken. The Commission, in issuing or denying certificates of public convenience, acts legislatively and effectuates the legislative intent through the promulgation of rules and regulations. *See Department of Pub. Util. v. McConnell*, 198 Ark. 502, 130 S.W.2d 9 (1939). In enforcing such rules and regulations, the Commission acts in an administrative capacity. *Id.* Rule 7.04 of the Commission Rules of Practice and Procedure addresses certificates for electric utilities. Rule 3.03(a) and (b) provide for the notice that must be given when applying for a certificate:

> (a) The Commission shall fix the time and place of all hearings and notice of the place, day and hour of a hearing shall be served on all parties to the proceeding at least thirty (30) calendar days before the time set therefor, unless the Commission shall find that public necessity requires the hearing to be held at an earlier date. (See also Rule 1.04(b).)

(b) Notice of the filing of a formal application by a public utility shall be given by a public utility in the following manner, unless otherwise provided by the Commission.

. . . .

(2) Application for Certificates of Public Convenience and Necessity.
The applicant for a Certificate of Public Convenience and Necessity shall notify each owner of record (or the person or firm to whom property tax statements have been mailed in the most recent year) of lands which the applicant proposes in its application to traverse. Such notice shall be given by first-class mail, properly addressed with charges prepaid and shall include the following information:

(A) The date the application was filed, the docket number assigned thereto; and, if known, the place, day, and hour of the hearing on such application; if hearing date is unknown at the time of filing for a Certificate of Public Convenience and Necessity, the name and address of the Commission's Secretary where such information may be obtained in the future;

(B) A brief description of the facilities to be constructed and a description of the owner's lands to be traversed.

It is undisputed that the first notice of Carroll's application appellants received was the January 18th notice sent by Carroll that advised them of the time and place of the hearing set on its application. The Commission and Carroll argue that Rule 3.03(b)(2) does not specify when the notice must be given and therefore the January 18th notice that Carroll sent to appellants complied with the Commission rules. Appellants contend that Carroll's failure to give them the notice required by Rule 3.03(b)(2) at the time its application was filed deprived them of adequate due process and that the Commission erred in holding that Carroll complied with the property owner notification requirements of the Commission Rules of Practice and Procedure.

[redacted] An agency's interpretation of its own rules is not binding on the courts if the interpretation is plainly erroneous or

inconsistent. *See General Tel. Co. of the Southwest v. Arkansas Pub. Serv. Comm'n*, 23 Ark. App. 73, 744 S.W.2d 392 (1988). *See also Boone County v. Apex of Ark.*, 288 Ark. 152, 702 S.W.2d 795 (1986). Here, the Commission attempts to persuade this court that Rule 3.03(b)(2) allows the petitioner to wait to send notice until after the hearing date is set as long as the notice is given within a "reasonable time." We find this construction inconsistent with Rule 3.03(a) and the intent of the notice requirements. Although the wording of Rule 3.03(b)(2)(A) is somewhat unclear, the most reasonable construction is that this rule requires the petitioner to give notice when the petition is filed and, if a hearing date is not set at that time, the petitioner must include in the notice "the name and address of the Commission's Secretary where such information may be obtained in the future. . . ." Rule 3.03(a) specifically requires the Commission to give the parties notice of the hearing. To have become parties, the affected landowners would have to have received notice of the filing of the application. It is nonsensical to interpret the rule to allow the petitioner to wait to give notice until after the hearing is set, especially under the facts of this case where the hearing was not set until more than three months after the application was filed. Even if we agreed that Rule 3.03(b)(2) allows notice within a reasonable time, Carroll waited an additional nine days after the hearing was scheduled before it notified the landowners. We cannot agree that waiting almost 100 days to give notice when the hearing is set for thirty days later is a "reasonable time."

■ ■ Nevertheless, we are precluded from reversing on this issue because of the doctrine of invited error. This doctrine provides that an appellant may not complain of an alleged erroneous action of the trial court if he has consented to or acquiesced in that action. *See Briscoe v. Shoppers News, Inc.*, 10 Ark. App. 395, 664 S.W.2d 886 (1984). *See also Peek v. Arkansas Dept. of Human Servs.*, 304 Ark. 172, 800 S.W.2d 428 (1990). In Order No. 3, which denied appellants' motion for continuance, the ALJ stated:

> If, at the conclusion of the hearing, the record has not been fully and adequately developed for the [appellants'] purposes, and this appears to be a result of a lack of timely notice afforded to one or more of the [appellants], then those [appellants] may renew

> their motion for a continuance, and the advisability and necessity of a second hearing for the purpose of receiving additional evidence will be considered.

Appellants did not renew their motion for continuance at the February 20 hearing. Instead, they made a proposal to the ALJ at the conclusion of the hearing, requesting that they be allowed ten days to decide whether they wanted to submit testimony of an expert witness and, if so, to depose the witness within twenty days thereafter. The ALJ granted appellants' proposal over the objection of Carroll. The ALJ also stated that he would treat the record as closed if appellants chose not to submit expert testimony at the end of the ten-day period. No objection was made by appellants at that time. Although the ALJ was later notified by appellants' attorney that appellants would not present expert testimony and to note appellants' objections to his denial of the continuance for the record, his objections were not made until after appellants' proposal was granted. Appellants may not now complain that they were denied a continuance when they did not renew their motion at the hearing but instead requested that their proposal be granted. *See Security Pac. Hous. Servs. v. Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993).

The remainder of appellants' arguments on appeal concern their contention that the Commission acted arbitrarily and capriciously in granting Carroll a certificate to locate a transmission line and facilities along its proposed route. Specifically, appellants contend that, because the Commission was not presented with any cost studies substantiating the reasonableness of the proposed right-of-way; no meaningful analysis of alternative right-of-ways was performed; environmental considerations were not taken into account; and a meaningful analysis of the use of the existing right-of-way was not considered, it had insufficient evidence before it to determine whether Carroll's proposed right-of-way was appropriate and reasonable. Appellants point out that statutes which relate to the power of eminent domain should be strictly construed in favor of the landowner, *see Columbia County Rural Dev. Auth. v. Hudgens*, 283 Ark. 415, 678 S.W.2d 324 (1984); *Loyd v. Southwest Ark. Util. Corp.*, 264 Ark. 818, 580 S.W.2d 935 (1979), and no more property of a private individual,

and no greater interest therein, can be condemned and set apart for public use than is absolutely necessary. *See Selle v. City of Fayetteville*, 207 Ark. 966, 184 S.W.2d 58 (1944).

Arkansas Code Annotated § 18-15-503(a)(1) (1987) provides:

> Any corporation organized under the laws of this state for the purpose of generating, transmitting, and supplying electricity for public use may construct, operate, and maintain such lines of wire, cables, poles, etc., necessary for the transmission of electricity along and over the public highways, and the streets of the cities and towns of this state or across or under the waters, and over any lands or public works belonging to the state, and on and over the lands of private individuals. . . .

Broad discretion is vested in those to whom the power of eminent domain is delegated. *State Highway Comm'n v. Saline County*, 205 Ark. 860, 171 S.W.2d 60 (1943). The question of whether the condemnation of a right-of-way for a transmission line is necessary must be left largely to the discretion of the condemnor, and the exercise of that discretion will not be disturbed unless it clearly appears that the discretion has been abused and the action is arbitrary and causing unnecessary damage to the property owners. *Patterson Orchard Co. v. Southwest Ark. Util. Corp.*, 179 Ark. 1029, 18 S.W.2d 1028 (1929). In *Gray v. Ouachita Creek Watershed Dist.*, 234 Ark. 181, 351 S.W.2d 142 (1961), the supreme court explained:

> The State, by conferring on the District the power of eminent domain, necessarily left largely to the discretion of the District the location and area of the land to be taken. And one seeking to show that the taking has been arbitrary or excessive shoulders a heavy burden of proof in the attempt to persuade the Court to overrule the District's judgment. *Burford v. Upton*, 232 Ark. 456, 338 S.W.2d 929; *Woolard v. State Hwy. Comm.*, 220 Ark. 731, 249 S.W.2d 564; *State Game & Fish Comm. v. Hornaday*, 219 Ark. 184, 242 S.W.2d 342; *State Hwy. Comm. v. Saline County*, 205 Ark. 860, 171 S.W.2d 60; and *Patterson Orchard Co. v. S.W. Ark. Util. Corp.*, 179 Ark. 1029, 18 S.W.2d 1028.
>
> In *State Highway Comm. v. Saline County, supra*, the State Highway Commission was condemning a right-of-way through certain lands, and we said of the Highway Commission:

> Since it had this power it also had discretion to determine the route and the location of the right-of-way. "A broad discretion is necessarily vested in those to whom the power of eminent domain is delegated, in determining what property is necessary for the public purpose, with respect to the particular route, line, or location of the proposed work or improvement; and the general rule is that the courts will not disturb their action in the absence of fraud, bad faith, or gross abuse of discretion. The landowner may not object merely because some other location might have been made or some other property obtained which would have been suitable for the purpose." 18 Am.Jur. 735. In 29 Corpus Juris Secundum (Eminent Domain § 91), page 886, it is said: "Under a delegation of the power of eminent domain the grantee of the power, in the absence of legislative restriction, may determine the location and route of the improvement and of the land to be taken for it, and such determination will not be interfered with by the courts if it is made in good faith and is not capricious or wantonly injurious, or in some respects beyond the privilege conferred by the charter or statute." Justice Butler, speaking for the court in the case of *Patterson Orchard Co. v. Southwest Arkansas Utilities Corporation*, 179 Ark. 1029, 18 S.W.2d 1028, 65 A.L.R. 1446, said: "While the Legislature has said that a right of way must be necessary for the exercise of the rights of the corporation taking it, the question of whether or not there was a necessity must necessarily be left largely to the discretion of the corporation itself, and, unless it clearly appears that such discretion has been abused and its action arbitrary and to the unnecessary damage of property owners, the exercise of that discretion will not be disturbed."

Gray v. Ouachita Creek Watershed Dist., 234 Ark. at 183-85, 351 S.W.2d at 144.

Although Arkansas courts have not had occasion to discuss the appropriate scope of inquiry that the Commission should consider in granting a certificate of public convenience for the construction of an electrical transmission line and facilities, the issue has been addressed by the Commission. In *In re Arkansas Power and Light Co.*, 118 P.U.R. 4th 156 (1990), the Commission held that the basic test or guiding principle that should govern the selection of a route in a transmission-line case is whether the route proposed will best serve the public interest and result in the least

amount of private harm. The Commission explained that, if the route proposed by the utility is not unreasonable and appears to have been selected after consideration of certain factors, the governmental regulatory agency should confine itself only to ordering minor deviations in the route. The Commission then listed the following factors that should be considered in determining whether a proposed route is reasonable: cost of the facility, health and safety, engineering and technical concerns, ecological/environmental disruptions, disruption to or interference with existing manmade property uses, disruption to or interference with planned manmade property uses, and aesthetic displeasure. These same factors were restated by the Commission in *In re Southwestern Electric Power Co.*, Docket No. 94-003-U, 155 P.U.R.4th 316 (1994):

> It is not the function of a public utility regulatory agency to substitute or superimpose its judgment for that of a utility as to the location of proposed new transmission facilities. If the route selected by the utility is not unreasonable and appears to have been chosen after consideration of the seven factors previously enumerated, and any other factors which may be relevant in that specific case, then in the absence of special or very unusual circumstances the governmental regulatory body reviewing the application for a certificate of public convenience and necessity should confine itself to only ordering minor deviations in the route.

Id.

In support of its application, Carroll introduced the testimony of Emmett Green, the engineer principally in charge of designing Carroll's proposed route and facilities. Green explained that Carroll's present power source is served by a 33-kilovolt substation in Bellefonte, Arkansas, which was built by Arkansas Power & Light (AP&L) many years ago. He stated that, as the loads have grown in the Harrison area, AP&L has discontinued the use of 33 kilovolt, changing to 161 kilovolt and others, and stated that Carroll's load in Jasper and Dogpatch areas has grown to the point where the transformer that AP&L was permitting them to use is fully loaded. He also stated that Carroll's present line that runs to Jasper was built in the 1940s and has become overloaded; the facil-

ities have deteriorated; and the line is inadequate for the loads that have developed in Jasper. Green testified that Carroll must obtain another power source with more capacity to serve the Newton County area; that it began looking in the Harrison area for a place to install a new 161- to 69-kilovolt substation; and that AP&L had a location that permitted Carroll to have a short line from Jasper to Harrison. Green testified that, because the government would not negotiate an alternative route, Carroll would continue to use its existing easement through the Buffalo National Forest and Park as part of its proposed route and overbuild its lines through the area. This easement will consist of a sixty-foot right-of-way through the national park and river and an eighty-nine to ninety-foot right-of-way through the forest. He explained that a 100-foot right-of-way was being proposed for the remainder of the line, because it provides a little more margin for safety and takes into account the height of the trees that might be on the outside of the clearance and whether they would strike a conductor if they fell.

Evidence was also presented that Carroll did consider other alternate routes for its proposed line. Green testified that three of the alternate routes Carroll considered were not acceptable because they would have required a new right-of-way through the Buffalo National Park and Forest, which the government was unwilling to negotiate. In explaining Carroll's decision not to build along its existing route, Green testified that Carroll would have to build a 161- to 69-kilovolt substation near its metering point to be able to overbuild its existing line; that there would be difficulty in finding a location in that area because the area is congested around Harrison and along Highway 62; that it is a hazardous and very slow process to overbuild or build next to an existing line that is operating at 33,000 volts; and that it is more expensive to keep an existing line in operation and work around it. Carroll estimated its costs for the project to be $2,510,000. Green testified that the cost to overbuild or build along an energized line would be higher and that the labor cost alone will be at least 50% more to overbuild. He also explained that the number of corners in the existing line are very expensive additions to lines, ranging

from $10,000 to 25,000 each, and would significantly increase the cost of using the existing route.

Paul Mixon, an engineer with Staff's electric section, testified that the purpose of his testimony was to make his recommendations regarding Carroll's application and that his evaluation considered the appropriateness of the routing of the transmission line and facilities, the reasonableness of the associated costs, and the necessity of the proposed line and facilities. He testified that Carroll has experienced substantial load growth in the Jasper area over the past several years, that service reliability is becoming more of a problem, and that the existing 33-kilovolt facilities are very old and do not lend themselves to economical replacement. He testified that there was a need for the proposed transmission line and facilities and that the $2,510,000 estimated cost is reasonable in Staff's opinion. He also testified that he traveled along Carroll's proposed transmission line route as closely as possible and toured the surrounding areas to consider alternative routing for the proposed line and facilities. In doing so, he stated that he considered the impact on landowners in the area, the location of the facilities with respect to existing residential developments, existing public facilities, existing utility facilities, and the current use of the land involved and found that the proposed route takes into consideration property lines and existing roadways and was finalized with the objective of minimizing both the cost of construction and disturbance to the area. He summarized that, in Staff's analysis, the proposed transmission line and facilities represent a reasonable, efficient solution to the power supply problems which exist in the area, that there is a need for the proposed facilities, and that the proposed facilities are in the public interest.

Appellants point out that neither Carroll nor Staff presented any evidence that they took environmental considerations into account. Green testified in response to questioning about Crooked Creek that he was not aware of any special consideration given to it any more than other creeks or waterways through the area and that Carroll takes aesthetics into consideration and tries to accommodate the landowner when it sites a right-of-way. Mixon testified that he did consider the aesthetic displeasure that most people associated with a 69-kilovolt line when he considered the

proposed route and whether the route chosen was an appropriate route for the particular line and facilities. He stated that he also factored ecological and environmental disruption into his analysis and he considered the health and safety of the general public.

From the evidence presented, we cannot say that the Commission's finding that Carroll's proposed route for the transmission line and facilities was reasonable is not supported by substantial evidence or that the Commission failed to regularly pursue its authority in granting Carroll a certificate of necessity and convenience over its proposed route. Although appellants argue that the Commission was not presented with any meaningful analysis of alternative rights of way, the testimony of Carroll witness Green clearly rebuts this argument. Green not only testified in support of Carroll's proposed route, but he also explained why the other routes were not feasible and presented extensive testimony concerning Carroll's existing route. His testimony was corroborated by Staff witness Mixon. Appellants also argue that neither witness Green nor Mixon took environmental considerations into account; however, Staff witness Mixon testified that he traversed the entire route and factored ecological and environmental disruption into his analysis. Obviously, we agree that the placement of any transmission line in a natural area will to some extent adversely affect the area. Nevertheless, after reviewing the evidence before the Commission, we cannot say that the Commission's decision is not supported by substantial evidence or that it has failed to regularly pursue its authority. Accordingly, we must affirm.

Affirmed.

PITTMAN, AREY, JENNINGS, and STROUD, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I respectfully dissent from the decision announced in the majority opinion because I believe that when the Arkansas Public Service Commission failed to provide appellants with notice of the application for Certificate of Public Necessity in a reasonable and timely manner, appellants were deprived of due process in this case. I also believe

that the majority's reliance on the "invited error" doctrine to find the Commission's error harmless is misplaced.

The facts reveal that Carroll Electric filed its application for Certificate of Public Convenience and Necessity on October 11, 1995. The hearing was set for February 20, 1996; however, appellants were not notified of the application until January 18, 1996, ninety days after the filing date. However, this was but thirty-three days before the hearing. The majority concedes that Carroll did not act reasonably in waiting ninety days before giving notice to appellants for a hearing set to begin only thirty days later, but nevertheless reasons that no due process violation occurred.

As the supreme court stated in *Davis v. Schimmel*, 252 Ark. 1201, 482 S.W.2d 785 (1972), the Due Process Clause of the Fourteenth Amendment is satisfied if:

> the property owner has reasonable notice and a reasonable opportunity to be heard and to present his claim or defense, or to protect and enforce his rights, before a tribunal having power to hear and rule his cause, due regard being had to the nature of the proceeding.

Id. at 1207-08, 482 S.W.2d at 789 (1972) (citing *Dohany v. Rogers*, 281 U.S. 362 (1930)). Where appellants did not receive reasonable notice of the application affecting their property and the hearing on that application, they were not afforded a meaningful opportunity to prepare and present a defense and were deprived of due process protection. The procedure followed in this case was not fair by any means when one considers that Carroll Electric and the PSC staff separately pre-filed testimony supporting the application before appellants even *knew* that an application had been lodged.

The majority excuses this glaring constitutional violation by concluding that appellants committed "invited error." The doctrine of invited error prevents an appellant from requesting a ruling by the trial court and then complaining of that ruling on appeal. *Security Pac. Hous. Serv. v. Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993). The majority has concluded that appellants committed invited error by consenting to or acquiescing in the

Commission hearing. To the contrary, when appellants received notice of the hearing, they promptly filed a motion to intervene and also filed a motion for continuance in order to prepare a proper defense. The ALJ granted the motion to intervene, but denied appellants' motion for continuance. Appellants were, therefore, compelled to appear on February 20, 1996, to present some proof supporting their position that the certificate should not be granted to Carroll. Had they not appeared their absence would have prevented any challenge whatsoever.

In the order denying appellant's motion for continuance, the ALJ ruled that appellants could renew their motion for continuance after the hearing. Appellants preserved their objection regarding the continuance issue by insisting that the ALJ note their objection to his denial of their motion at the same time that they informed the ALJ that they would not present any expert testimony. The ALJ gave them ten days following the hearing in which to decide whether to present expert testimony.

Appellants did not invite error in this case by requesting ten days following the hearing to submit additional testimony. Appellants simply attempted to do what any litigant would do — attempt to salvage a case that had suffered a fatal blow. Furthermore, the grant of additional time in no way remedied the due process violation that occurred when the Commission denied appellants' continuance motion after permitting Carroll Electric and the PSC staff to submit pre-filed testimony before the appellants had notice of the hearing.

This unjust result arises from the very conduct that the Due Process Clause was intended to protect citizens from suffering. It is regrettable that we will not discourage other litigants from employing such underhanded tactics in order to deprive property owners of a fair opportunity to protect their interests. I dissent from the result and reasoning stated in the majority opinion.

Helen SULLIVAN *v.* PARIS RETIREMENT INN

CA 97-703 961 S.W.2d 785

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered February 11, 1998

Walters, Hamby & Verkamp, by: *Michael Hamby*, for appellant.

Ledbetter, Hornberger, Cogbill, Arnold & Harrison, by: *James A. Arnold, II* and *Rebecca D. Hattabaugh*, for appellee.

OLLY NEAL, Judge. Helen Sullivan appeals from the portion of the order of the Workers' Compensation Commission that denied the compensability of her claim for permanent partial disability benefits. For reversal of the Commission's order, appellant

argues that the Commission's decision that she failed to prove, by a preponderance of the evidence, entitlement to permanent partial disability benefits is not supported by substantial evidence. We affirm.

Appellant was employed by appellee as a nurse's assistant whose job duties included lifting patients out of bed to dress and bathe them. On October 10, 1994, appellant suffered an injury to her right shoulder, for which appellee accepted compensability and paid benefits. Appellant suffered a second injury to her right shoulder and neck on June 12, 1995. Following her compensable injury, appellant underwent a cervical fusion that was performed by Dr. Luis Cesar. Subsequent to that time, appellant developed a number of complaints involving pain in her left heel, left arm, left shoulder and right forearm. Appellant then filed a claim for workers' compensation disability benefits and contended that she sustained injuries to those parts of her body as a result of repetitive trauma while employed by appellee. The administrative law judge awarded appellant benefits for her admittedly compensable injuries through June 9, 1996. The ALJ also found that appellant had failed to prove by a preponderance of the evidence that she is entitled to any permanent partial disability benefits as the result of her compensable injuries. In addition, the ALJ found that appellant failed to prove that she suffered a compensable injury to her left heel, left arm, left shoulder, or right forearm while employed by appellee. The appellant then appealed to the Commission, which affirmed and adopted the ALJ's decision as its own.

■ When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonably 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. *Atkins Nursing Home v. Gray*, 54 Ark. App. 125, 923 S.W.2d 897 (1996). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Smith v. Gerber Products*, 54 Ark. App. 57, 922 S.W.2d 365 (1996).

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 pre-existing 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)(A) (Repl. 1996) defines "major cause" as "more than fifty percent (50%) of the cause."

At trial, the deposed testimony of Dr. Cesar was admitted into evidence. According to Dr. Cesar, he performed a cervical fusion on appellant at the C5-6 level to correct a disc herniation. While conducting the surgery, Dr. Cesar also removed bone spurs that he opined were the result of cervical spondylosis. Dr. Cesar noted that when performing surgery to address an injury to the neck there generally is a combination of the bone spur and disc herniation. Dr. Cesar assigned appellant a permanent impairment rating of 7% to the body as a whole based upon *AMA Guidelines*. When questioned, Dr. Cesar could not state whether the 7% rating was due mostly to cervical spondylosis or mostly to the disc herniation, because the impairment rating refers to the type of procedure a patient has had and the result.

According to appellant, Dr. Cesar's testimony should be construed to mean that the ratings do not provide sufficient information or guidance to allow him to award a rating based upon causation, but merely refer to the fact that it was a single level operation to the neck and the results of the surgery. When asked what cervical spondylosis is, Dr. Cesar responded:

> Cervical spondylosis is a general term that refers to changes that you see in the spine due to chronic progressive wear and tear alterations that you see as people grow old, and are generally characterized by the drying up of discs, narrowing of the vertebral space, spurs, and many times disc herniations.

Dr. Cesar also stated that the single event in this case would not have caused spondylosis, although it may have cause the disc herniation. Dr. Cesar was unable to state that the compensable

injury was the major cause of appellant's permanent disability. Dr. Cesar also opined that appellant's neck and shoulder injury were not causally related to her other complaints.

As stated earlier, on appeal we view the evidence in the light most favorable to the Commission's findings. Here, appellant has failed to produce evidence that the compensable injury is the major cause of her disability.

We hold that there is substantial evidence to support the Commission's decision.

Affirmed.

ROBBINS, C.J., and BIRD, ROGERS, and GRIFFEN, JJ., agree.

STROUD, J., dissents.

JOHN F. STROUD, JR., Judge, dissenting. I cannot agree with the majority's decision to affirm the Commission's denial of the compensability of appellant's claim for permanent partial disability benefits because the Commission ignored key testimony of Dr. Luis Cesar, the neurosurgeon who performed the anterior cervical fusion on appellant.

In support of its conclusion that appellant had failed to prove that she was entitled to permanent partial benefits as a result of her work-related injuries, the Commission stated in its decision that Dr. Cesar was unable to state whether the disc herniation or the spondylosis was the major cause for the surgery and resulting impairment rating. Yet, appellant's abstract shows that Dr. Cesar's deposition testimony includes the following:

> DIRECT EXAMINATION — The disc herniation could be produced or caused by a single traumatic event or the gradual wear and tear process that would be associated with aging and normal activities of daily living. Really, what guides us in determining that is basically on the history. If the patient has a clear cut history of having had an event that precipitated a symptom that he did not have before, I have to assume that was the cause of it. By the same token, if there was a history of similar symptoms or symptoms in the same area of the body prior to the incident, I would have to assume that there were other processes going on and this new event may have aggravated it.

. . .

> CROSS-EXAMINATION — I don't have any prior history that refers to neck problems in this patient. It is possible that a patient may have spondylosis and be asymptomatic until an event triggers the symptoms and the need for a fusion. It can occur that way. *In that situation, it would be my opinion that the major cause or need for the fusion would be the event that precipitated the symptom.*

(Emphasis added.)

The Commission's decision does not refer to this expressed opinion by Dr. Cesar, which supports appellant's position. Although a physician's opinion is not conclusive or binding on the Commission, the Commission is not free to arbitrarily disregard any witness's testimony. *Wade v. Mr. C. Cavenaugh's*, 25 Ark. App. 237, 242, 756 S.W.2d 923, 925 (1988).

Here, appellant had no prior history of problems with her neck. Dr. Cesar's medical opinion was that in such a situation the major cause for the fusion would be the event precipitating the symptom. His testimony supports appellant's position that she was asymptomatic and did not have any need whatsoever for a cervical fusion until her admittedly compensable work-related injury to her neck. In the Commission's decision, there is no explanation as to why the Commission chose to ignore Dr. Cesar's testimony in this regard.

I would reverse and remand this case to the Commission for a finding that appellant met her burden of proof and is entitled to an award of permanent partial disability benefits as a result of her compensable injury.

I respectfully dissent.

GTE ARKANSAS, INC., et al. *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 96-157 961 S.W.2d 792

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered February 11, 1998

Rick Zuker and *Ivester, Skinner & Camp, P.A.*, by: *H. Edward Skinner*, for appellant.

Arthur H. Stuenkel, for appellee.

MARGARET MEADS, Judge. This appeal is brought by GTE Arkansas, Inc., and eighteen other local exchange carriers from Order No. 15 that was entered by the Arkansas Public Service Commission in Docket No. 95-034-TF. In Order No. 15, the Commission revoked a surcharge that it had previously imposed on local exchange ratepayers to fund the costs of implementing telecommunications relay service. Appellants contend that the Commission's decision to eliminate the surcharge is unlawful and ask this court to set aside Order No. 15 and remand the case to the

Commission for further proceedings. Because the issue presented by this appeal is moot, we dismiss.

Telecommunications relay service (TRS) enables individuals with a hearing or speech impairment to communicate with other individuals through a third party by using a relay operator and a telecommunications device for the deaf (TDD). Title IV of the Americans with Disabilities Act (ADA), codified at 47 U.S.C. § 225 (1991), directed the Federal Communications Commission to ensure that interstate and intrastate telecommunications relay services were made available to hearing-impaired and speech-impaired individuals and gave all telecommunications carriers until July 1993 to implement TRS within their service areas. In response to this legislation, the Arkansas Public Service Commission initiated Docket No. 91-051-U to provide a forum for the local exchange carriers (LECs) to comply with the act.

Order No. 4 of Docket No. 91-051-U adopted the Arkansas Telecommunications Relay Center Service Rules (TRS Rules). The TRS Rules provided for the creation of a nonprofit corporation, Arkansas Relay Services, Inc. (ARSI), to administer TRS and to select a vendor to provide TRS in Arkansas. The TRS Rules also established a surcharge to be assessed on customer access lines and remitted to ARSI to fund TRS. The rules further provided that ARSI was to file a report before January 31 of each year to enable the Commission to evaluate the reasonableness of the TRS surcharge rate. In its annual report, ARSI was required to recommend whether the rate should be changed, to specify the rate it believed to be reasonable, and to explain the basis for its recommendation. The surcharge, initially established in July 1992, was twenty-five cents per month per access line. It was later reduced to fifteen cents per month per access line, and in 1994, the surcharge was zero.

ARSI's 1994 report was filed in February 1995 and Docket No. 95-034-TF was thereby created. In May, ARSI petitioned the Commission to reinstitute the TRS surcharge on local telephone bills beginning August 1, 1995, and requested that the TRS surcharge be coordinated with the implementation of the surcharge established by Act 501 of 1995 to fund the Telecommu-

nications Device Distribution Program. In Order No. 8, the Commission responded that ARSI had no responsibility for the equipment surcharge mandated by Act 501 and that ARSI's duties were limited to contracting for a TRS vendor and paying for that service with funds generated by the surcharge. ARSI then asked to be relieved of its duties if its role were limited to the ministerial tasks specified in Order No. 8.

In Order No. 13 entered September 8, 1995, the Commission notified the parties that since the operational TRS system was in place and in light of ARSI's request to be relieved of its duties, it was the appropriate time for the Commission to relinquish its role in relay service operations to those charged by ADA with providing TRS. The Commission stated that it proposed to revoke the TRS Rules as of March 31, 1996, directed ARSI to give notice to MCI (the TRS vendor) that its contract for TRS would be terminated as of March 31, 1996, and notified the LECs that, thereafter, they with the assistance of other common carriers would be responsible for providing TRS in Arkansas, individually, collectively, or through a TRS vendor. The Commission further directed the staff of the Commission (Staff) to calculate the minimum surcharge necessary to fund TRS through March 31, 1996, and to file its recommended surcharge and surcharge termination date by September 19, 1995. The Commission also scheduled a public hearing on the revocation of TRS Rules, the provision of TRS, and the recommended surcharge and surcharge termination date.

After the public hearing, the Commission entered Order No. 15, which is the order being appealed. In this order, the Commission stated that the comments filed in response to its procedural schedule did not contest Staff's calculation of a five-cent-per-access-line TRS surcharge, although several parties had urged the Commission to permanently continue the surcharge; and that, based on Staff's recommendations and the comments received in response to Staff's recommendations, the LECs were directed to amend their tariffs to begin collecting a five-cent-per-line surcharge per month not to exceed four months. The order further provided that the per-line surcharge could not be collected from the ratepayers after March 31, 1996.

Appellants petitioned for rehearing and clarification of Order No. 15, challenging the Commission's decision to terminate the surcharge after March 31, 1996. While their petition was pending, the Commission entered Order No. 18, which revoked the TRS Rules and relieved ARSI of its authority effective March 31, 1996. Order No. 18 further provided that all costs incurred by the common carriers in providing TRS after this date would be subject to recovery through the statutory ratemaking process. Appellants did not petition the Commission to rehear Order No. 18. Order No. 19 denied appellants' petition to rehear and clarify Order No. 15, and this appeal of Order No. 15 followed.

Prior to the submission of this appeal, Act 1080 of 1997 was passed into law. Act 1080 created the Arkansas Deaf and Hearing Impaired Telecommunications Services Corporation to provide TRS and gave it authority to levy assessments on all providers of local exchange service in order to fund the services provided by the corporation. The Act further authorized the LECs to collect the assessment from their ratepayers. As a result of the passage of Act 1080, this court issued a per curiam order on September 10, 1997, asking the parties to file supplemental briefs discussing the impact of the passage of Act 1080 of 1997 on appellants' appeal.

The Commission in its supplemental brief argues that the passage of Act 1080 renders appellants' appeal moot because Act 1080 established a procedure for the recovery of costs associated with the provision of TRS outside of the regulatory process and did not make the recovery of these costs subject to Commission review. Appellants agree that their appeal is moot if Act 1080 is given retroactive effect and they are allowed to impose a surcharge to recover their costs of providing TRS during the period from April 1, 1996, until the date when the Act 1080 surcharge takes effect. Otherwise, they contend that their appeal is not moot because Order No. 15 eliminated the surcharge prior to the Act 1080 surcharge taking effect and, therefore, their rights were adversely affected by Order No. 15.

We agree with the Commission that appellants' appeal of Order No. 15 is moot. The crux of appellants' appeal complains of the Commission's elimination of the TRS surcharge without

providing them a means for concurrent rate relief for continuing to provide TRS except through the statutory ratemaking process. Act 1080 allows the local exchange providers to collect the assessment to fund TRS from its customers. Nevertheless, because an unpaid period still exists between the elimination of the Commission surcharge and the date appellants began assessing the Act 1080 surcharge, appellants continue to argue that they have been injured by Order No. 15.

An issue is moot when it has no legal effect on an existing controversy; it is one in which a decision of the court on appeal could not afford the appellant any relief. *See Bryant v. Arkansas Pub. Serv. Comm'n*, 45 Ark. App. 47, 870 S.W.2d 775 (1994). *See also Dillon v. Twin City Bank*, 325 Ark. 309, 924 S.W.2d 802 (1996). Here, our reversal of Order No. 15 would not afford appellants any relief. The TRS surcharge was zero at the time Order No. 15 was entered, and to reverse that order would eliminate the four-month five-cent surcharge and reinstate the zero surcharge. Order No. 18 not only revoked the TRS Rules that allowed ARSI to recommend a change in the TRS surcharge, but also completely relieved ARSI of its authority as of March 31, 1996; however, appellants have not appealed Order No. 18. Because appellants would not gain any relief by the reversal of Order No. 15, their appeal is moot. As a general rule, the appellate courts do not address moot issues. *Dillon v. Twin City Bank*, 325 Ark. at 312, 924 S.W.2d at 804. Although there are some exceptions, those exceptions do not apply here.

Appeal dismissed.

ROBBINS, C.J., BIRD, STROUD, JENNINGS, and ROAF, JJ., agree.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY
v. Elaine BRYSON

CA 97-395 962 S.W.2d 824

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered February 18, 1998

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jim Tilley* and *Julia L. Busfield*, for appellant.

Robert S. Blatt, for appellee.

JOHN MAUZY PITTMAN, Judge. Nationwide Mutual Fire Insurance Company has appealed from an order granting a new trial in appellee Elaine Bryson's action to recover on a fire insurance policy issued by appellant. At trial, appellant defended appellee's claim on the ground that the property had burned as a result of arson caused by appellee or by someone on her behalf. The jury returned a verdict for appellant. The circuit judge set the verdict aside as clearly against the preponderance of the evidence. Because we agree with appellant that the circuit judge abused his discretion, we reverse.

From about November 1994 until February 1996, appellant rented a house she owned in Van Buren to Leslie and Roland Fohren. Appellee had a fire insurance policy with appellant in the amount of $44,000 on the property. The policy excluded any intentional loss arising out of any act committed by or at the direction of appellee with the intent to cause a loss. The policy also did not protect against loss caused by constant water seepage over a period of weeks, months, or years. On February 22, 1996, the Fohrens moved out of the house, after having notified appellee a week or so before that they were leaving. Early the next morning, the house burned. Appellant's investigation of the fire revealed that traces of an accelerant were present in the house and that the burn patterns indicated arson. The investigation also showed that, before the fire, a substantial portion of the flooring had needed to be replaced because of rot caused by water leakage. When appellant denied appellee's claim, appellee sued appellant.

Appellant stipulated that the policy was in full effect at the time of the fire and that the house was a total loss. Appellee did not dispute the overwhelming evidence that the fire had been caused by arson; instead, she contended that there was no evidence linking her to the fire.

Appellant presented extensive evidence that the fire was caused by a flammable liquid placed at floor level, which was ignited. Appellant also proved that, before the fire, the house had needed substantial repairs to the flooring. It also introduced evidence that appellee had knowledge of this extensive water damage and that she was also aware that the fire insurance on the dwelling was still in effect. Appellant also presented evidence that appellee and Kenneth Storment had access to the house immediately prior to the fire.

Appellee especially disputed the evidence introduced by appellant that she had knowledge before the fire of the extent of the damage to the flooring. Appellee testified that, after she knew that the Fohrens were vacating the premises, she made plans to rent the house to another individual. She denied knowing that the floors were in bad shape, although she admitted that she had purchased a new water heater for the house, which Mr. Fohren

had installed in December of 1995 after the Fohrens had notified her that the hot water tank was leaking. She admitted that she had known that the kitchen floor was mushy around the leaking hot water tank but denied knowing how big the problem was. She denied knowing that Mr. Fohren had attempted to brace the floor and stated that the Fohrens had never told her about any other damage to it. She stated that she had not known that it would take between $15,000 and $30,000 to repair the house and denied having made statements to that effect.

Appellee testified that she and Kenneth Storment, who lived with her, were awakened at 2:00 a.m. on February 23, 1996, by a telephone call from her sister, who said that the house was on fire. Appellee stated that, after staying at the scene while the firemen put out the fire, she went home to get the insurance policy to be sure that it was in effect; she knew it was about time for a premium notice to be sent out. She stated that, after she found the policy and saw that it had expired on January 23, 1996, she cried. She denied having received a premium notice. Appellee testified that, on the afternoon of February 23, she asked Ms. Fohren if she had received any premium notices from appellant; Ms. Fohren then brought her an envelope from appellant which contained a notice of cancellation dated February 20 which had been mailed to the rental house. According to this notice, the policy would be canceled at 12:01 a.m. on March 5 for nonpayment of the premium. In response to the question whether the Fohrens, at appellee's request, had left the keys in the house on the afternoon of the 22nd, appellee testified that Ms. Fohren had brought her the keys at the same time she brought the cancellation notice.

Appellee also testified that she is the sole owner of the house and had paid off the mortgage long ago. Appellee said that, at the time of the fire, she was not working; her income consisted of $275 per month from the rental of a mobile home, $400 per month for rental of the house that burned, and $500 per month rent from Mr. Storment. Explaining their relationship, appellee stated that, although Mr. Storment is a married man, he has rented a room from her for almost twenty years. She stated that, if she had known that the house had needed such extensive repairs, she would have had to take out a mortgage on the house to pay for

them. Appellee testified further that, at her request, Mr. Storment had gone to the house on the afternoon of February 22 to see if the Fohrens had completed the move.

Kenneth Storment testified that he went by the house the afternoon before it burned because appellee had asked him to see if the renters had moved out. He stated that, when he arrived there, the garage door was up and the front door was unlocked; no one answered his call, knock, or doorbell ring. When no one answered him, he said, he opened the screen door and walked through the house and the garage. No one was in the house, he stated, although there were some items remaining in the garage. He testified that he had picked up a new hot water tank for the house but did not know that the flooring was seriously damaged. He stated that he did not have a key to the house.

Reverend Claude Blount, who lives next door to the house that burned, testified that he noticed that the house was on fire at about 1:00 in the morning. He testified that he did not know that the Fohrens had moved and was concerned that they might be inside the house. He stated that, when he attempted to alert the Fohrens, he noticed that the front door was closed, none of the windows were open, and the garage door was down.

Appellee asserted that, at the time of the fire, she did not even know if she had insurance on the house. Richard Russell Organ, an insurance agent for appellant, testified that appellee had requested that all insurance information continue to be sent to the house that burned. He stated that, although the original policy period was from January 23, 1995, to January 23, 1996, appellant had extended the policy because it erroneously had sent return envelopes with the wrong lockbox number to policy holders in this geographical area; therefore, a lot of payments were sent to the wrong address. He stated that, when appellant became aware of the error, all policy holders in this geographical area were given an extension of their coverage, regardless of whether their money had been received, until a date in March; this notice was prepared on February 20, 1996.

Leslie Fohren testified that she had realized there was a water leak problem when one end of their couch started falling through

the floor. She stated that she had brought this to appellee's attention and had called her several times to inform her that they heard water running. According to Ms. Fohren, appellee and Mr. Storment told the Fohrens how to cut a hole in the floor and to repair the sub-floor. She stated that her husband had done this work. She was clear that appellee and Mr. Storment had come to the house and viewed the damage to the floor and, in fact, had brought tools over to assist in the repairs. Ms. Fohren stated that the new water heater also leaked. According to Ms. Fohren, when they started moving out, appellee came over and took another look at the floor in the front room; when appellee saw that the new water heater was also leaking, she got mad "and said that didn't [Mr. Fohren] know how to do anything right, and she didn't know anyone so stupid, and that he'd better not ever come back over on her property, and that she was going to drive up and down the road every fifteen to twenty minutes, and if he's out there, she's going to stop and shoot him." In response to the question whether appellee said anything about how much it would cost to fix the house, Ms. Fohren replied: "Yes, she said it was around twenty to thirty thousand dollars to repair it." With regard to the keys, Ms. Fohren stated that, when she had taken some keys to appellee, appellee had instructed her to leave the duplicate keys in the possession of her husband and children on the kitchen counter and to leave the door unlocked. Therefore, she stated, on the afternoon of February 22, the keys were at the house and the door was unlocked. She denied giving the keys to appellee on the day after the fire.

Regarding appellee's notice of the policy's cancellation on March 5, Ms. Fohren testified that she had brought the notice of cancellation to appellee the day after the fire and that she had also given appellee some correspondence from appellant a month or two before that.

Roland Fohren affirmed that he had installed the new water heater that appellee and Mr. Storment had brought over and that he had attempted to repair the floor and sub-floor. He stated that he cut away some rotted flooring in the living room on the other side of the wall by the water heater; the floor joists, however, were rotten so far back that he could not properly replace them. The

only thing he could do, he said, was to put a patch over the floor. He stated that there were gaps between the floor and the walls in the kitchen and the living room. He also testified that appellee and Mr. Storment had brought tools over and that appellee had seen the hole he had cut in the floor.

Joe Free, a fire and water restoration contractor, testified that he had prepared an estimate of $14,313.94 in repairs that would have been necessary to repair only the preexisting water damage.

At the conclusion of the trial, the jury returned a verdict in favor of appellant. After judgment on the verdict was entered, appellee moved for a new trial pursuant to Ark. R. Civ. P. 59(a)(6). In her accompanying brief, appellee did not deny that the house had burned by the use of accelerants or that the fire was not accidental. Appellee simply argued that there was no evidence in the record that she, or someone at her direction, had burned the house. The circuit judge agreed and, in his order granting a new trial, stated:

> 2. The [appellant], insuror, proved by a preponderance of the evidence that the fire that burned the [appellee], insured's, house was intentionally set by someone, or was arson and was of an incendiary nature by use of an accelerant. In fact, the evidence of an intentionally set fire to burn the house was overwhelming.
>
> 3. The [appellant], insuror, has failed to prove by a preponderance of the circumstantial or direct evidence that the [appellee], insured, set fire or caused the house to be burned. The only credible evidence linking the [appellee] to the fire was that she was the only person to have a financial interest in the burned rent house and would be the only person to benefit or suffer damages if the house burned. This is not enough direct or circumstantial evidence to prove this element.

Appellant argues on appeal that the circuit judge abused his discretion in setting aside the jury verdict and in granting appellee's motion for new trial. Rule 59(a)(6) of the Arkansas Rules of Civil Procedure provides that a new trial may be granted to all or any of the parties on all or part of the issues on the application of the party aggrieved when the verdict or decision is clearly against the preponderance of the evidence. While the trial

court has some discretion in setting aside a jury verdict, there is no longer the broad discretion that the supreme court formerly recognized. *Ray v. Green*, 310 Ark. 571, 839 S.W.2d 515 (1992). The trial court has limited discretion in the matter, as it may not substitute its view of the evidence for the jury's except when the verdict is clearly against the preponderance of the evidence. *Young v. Honeycutt*, 324 Ark. 120, 919 S.W.2d 216 (1996); *see Collins v. Treadwell*, 54 Ark. App. 100, 923 S.W.2d 882 (1996). The test this court applies in reviewing the trial court's granting of a motion for new trial is whether the judge abused his discretion; a showing of abuse of discretion is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail. *Young v. Honeycutt, supra*; *Richardson v. Flanery*, 316 Ark. 310, 871 S.W.2d 589 (1994). The supreme court has described this standard as requiring a showing of "clear" or "manifest" abuse of discretion by acting improvidently or thoughtlessly without due consideration. *See Young v. Honeycutt, supra*; *Razorback Cab of Fort Smith, Inc. v. Martin*, 313 Ark. 445, 856 S.W.2d 2 (1993).

Appellant admits that a mere showing of arson does not automatically relieve the insurer from liability under a fire policy excluding loss caused by the insured but points out that the insurer may prove that the insured set the fire or caused the house to be burned by circumstantial evidence. Citing *Haynes v. Farm Bureau Mutual Insurance Co. of Arkansas, Inc.*, 11 Ark. App. 289, 669 S.W.2d 511 (1984), appellant contends that the appellate courts of Arkansas have declared that circumstantial evidence that is sufficient to warrant a jury in drawing a reasonable inference that the insured was the author of a fire is sufficient to sustain a verdict in favor of the insurer. In that case, we affirmed the circuit court's refusal to grant a judgment notwithstanding the verdict. Margie Haynes and Clayton Haynes were divorced in 1979 and, by the terms of their court-approved property settlement agreement, Clayton was obligated to convey his interest in their former residence to Margie free of a $90,000 mortgage indebtedness. After he failed to do so, contempt proceedings were initiated. In July of 1981, the dwelling was totally destroyed in a fire that all parties conceded was of incendiary origin. Farm Bureau, which had in

force a fire insurance policy in Clayton Haynes's name in the amount of $103,000, denied liability on the ground that the fire was the result of Clayton's unlawful acts either in setting the fire or causing it to be set. The jury found that the fire loss had resulted from Clayton's unlawful acts.

The Hayneses appealed from the judgment entered in favor of Farm Bureau and argued that the trial court erred in denying their motion for judgment notwithstanding the verdict. We stated:

> There are ordinarily no eye witnesses to an act of arson because the deliberate burning of an insured building by its owner is usually accomplished alone and in secret. Any material fact in issue, however, may be established by circumstantial evidence even though the testimony of other witnesses may be undisputed. The fact that evidence is circumstantial does not render it insubstantial as our law makes no distinction between direct evidence of a fact and circumstances from which it might be inferred. The circumstances may be such that different minds can reasonably draw different conclusions from them without resort to speculation. Where there are facts and circumstances in evidence from which reasonable minds might reach different conclusions without resort to speculation the matter is an issue of fact which must be submitted to the jury for its determination. *Farmers Ins. Exchange v. Staples*, 8 Ark. App. 224, 650 S.W.2d 244 (1983).
>
> We agree that a mere showing of arson does not automatically relieve the insurer from liability under a fire policy excluding loss caused by the insured. It is also necessary to prove by direct or circumstantial evidence that the insured set the fire or caused the house to be burned. Our court on many occasions has declared that circumstantial evidence which is sufficient to warrant a jury in drawing a reasonable inference that the insured was the author of a fire is sufficient to sustain a verdict in favor of the insurer. *Rankin v. Nat'l Lib. Ins. Co. of America*, 188 Ark. 195, 65 S.W.2d 17 (1933).

11 Ark. App. at 292, 669 S.W.2d at 513.

We then reviewed the evidence demonstrating Clayton's motive for burning the house:

> In 1979 Clayton Haynes had obligated himself in a property settlement approved and enforced by the chancery court to convey this dwelling to Margie free of the $90,000 mortgage by January 1, 1980. He failed to discharge the indebtedness by that date or to convey the property to her. It was shown that he did not have sufficient cash to liquidate the mortgage as he was then having "cash flow problems." Contempt proceedings were instituted against him but an agreed extension of time until August 1, 1981 was set for his compliance.
>
> Under the terms of the divorce settlement Clayton was obligated to maintain insurance on the premises. Six or seven months before the fire he directed the insurance agent to issue the policy in his name only. This coverage was cancelled on or about the 1st of July, 1981, and from that date until the night before the fire on July 21st there was no insurance coverage on the house. Although Clayton denied that he had knowledge of this cancellation, there was testimony from an employee of the insurance agency that Clayton was previously aware of the cancellation and came to her house on July 20th, the night before the fire, to give her a check in order to reinstate the policy. At the time of the fire Clayton had had only nine days remaining in which to liquidate a $90,000 mortgage on the house and he did not have the money to accomplish it because he had "cash flow problems." There was outstanding a court order for him to appear and show cause why he had not done so. A jury could easily infer that he had a motive for the burning of the house and there is nothing in the record to disclose that anyone else did. *Westchester Fire Ins. Co. v. Tidwell*, 199 Ark. 621, 135 S.W.2d 842 (1940).

11 Ark. App. at 292-93, 669 S.W.2d at 514.

We also discussed Clayton's opportunity to burn the house:

> It was also established that the fire was first observed around 11:00 p.m. on June 21st. Haynes admitted that he had been at the house during the day to leave Margie's car there but had left before noon and had not returned. He stated that he had gone from there to attend a wedding in Texas. There was evidence that although Clayton went to Texas he had told people that he was going to Florida because he didn't want Margie to know where he was. At the time of the fire, although Margie was in possession of the house, Clayton had a key and had complete access to the house and went there frequently. Margie was

> attending school in Bastrop, Louisiana, and staying with her friends there during the week and their daughter was away at school in another state, leaving the house empty. Although Clayton offered evidence tending to prove that he was not in the State of Arkansas at the time the fire was first discovered, the jury was not required to accept that evidence if it did not find it credible. There were a number of things in the testimony about Clayton's trip to Texas which might have easily caused the jury to question the complete veracity or purpose of this testimony. Our court has recognized that a trier of fact may know that an arsonist need not necessarily be personally present at the time the flash of the fire is observed because there are methods by which one can time the origin of an incendiary fire. *Garmon v. The Home Ins. Co. of New York*, 197 Ark. 1102, 126 S.W.2d 621 (1939).

11 Ark. App. at 293-94, 669 S.W.2d at 514.

As we stated in *Farmers Insurance Exchange v. Staples*, 8 Ark. App. 224, 650 S.W.2d 244 (1983), in a case such as this, where the deliberate burning of an insured building is in issue, any evidence tending to show a motive or opportunity is admissible, and any material fact in issue may be established by circumstantial evidence from which it can be inferred. *Accord Thomas v. Allstate Ins. Co.*, 27 Ark. App. 27, 766 S.W.2d 31 (1989).

In our view, the case before us is analogous to *Haynes v. Farm Bureau*. It is true that, in *Haynes*, the trial judge did not grant the judgment notwithstanding the verdict; here, the trial judge set the verdict aside and granted appellee a new trial. We are cognizant that on appellate review in a case such as this, we only reverse if the trial judge abused his discretion. Nevertheless, the evidence that the jury heard in *Haynes* was no less compelling than that before the jury in this case. According to appellee's own testimony, appellee did not worry that she had no insurance coverage on the house until after the fire, when she looked at the policy. The jury obviously believed the testimony of Mr. and Mrs. Fohren as to appellee's knowledge of the nature and extent of the water damage to the house's floors. Additionally, it is not disputed that Mr. Storment, who has lived with appellee for approximately twenty years, was in the house on the afternoon of the 22nd or that, at the time of the fire, the tenants had moved out. Although appellee testified that she had made plans to rent

the property to another individual, the jury was not required to believe her. *See Myers v. Hobbs*, 195 Ark. 1026, 115 S.W.2d 880 (1938). It is our opinion that, on this record, the jury could find without clear error that appellee had a motive and an opportunity to burn the house; given the high cost of repairs that would have been necessary to fix the damaged floors, and appellee's lack of financial resources, we believe that the jury could likewise infer that appellee, or someone at her direction, intentionally set the fire. We therefore believe that the trial judge abused his discretion in setting aside the verdict for appellant and setting the case for a new trial.

Reversed.

AREY, STROUD, and MEADS, JJ., agree.

NEAL and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I do not agree that the trial court's grant of a new trial was a "clear" or "manifest" abuse of discretion, *see Young v. Honeycutt*, 324 Ark. 120, 919 S.W.2d 216 (1996), so as to require a reversal of this case.

For reversal, the majority relies primarily upon *Haynes v. Farm Bureau*, 11 Ark. App. 289, 669 S.W.2d 511 (1984), in which this court affirmed the trial court's refusal to grant a judgment notwithstanding the verdict in an arson case. The majority finds the evidence before the jury in *Haynes* "no less compelling" than in Bryson's case; I must strongly disagree. Haynes had only nine days to liquidate a $90,000 debt in order to comply with a court order to convey his former residence to his ex-wife free of mortgage indebtedness. He lacked the ability to do so, and faced contempt proceedings for his failure. On the night before the fire, he had gone to his insurance agent's home and reinstated insurance coverage on the house in his name only. Repairing or even selling the house was thus not an option available to Haynes. Here, Mrs. Bryson owned a house free of indebtedness that needed repairs to the floor, repairs already commenced by her tenants. While Mrs. Bryson perhaps faced some financial pressure, unlike the majority, I cannot accept that her low-income status so readily translated into a propensity to commit a serious felony.

In *Thomas v. Allstate Ins. Co.*, 27 Ark. App. 27, 766 S.W.2d 31 (1989), another case cited by the majority, this court affirmed a jury verdict in favor of the insurance company where the house was vacant, was insured for more than double the purchase price paid by the appellant when he bought it only one year prior to the fire, the insurance company had denied the appellant's request to further increase the amount of coverage, the tenants had moved out a day or two before the fire at appellant's request, and appellant had serious financial difficulties including an I.R.S. lien.

I agree with the general principles expressed in our cases involving arson of an insured building, as stated in the majority opinion. It is correct that, where an insured building is deliberately burned, any evidence "tending to show motive or opportunity" is admissible. *Thomas v. Allstate Ins. Co., supra, Farmer's Insurance Exchange v. Staples*, 8 Ark. App. 224, 650 S.W.2d 244 (1983). However, admissibility should not be equated with sufficiency, and it is the sufficiency of the evidence of motive, not its admissibility, that is at issue here.

It is also well settled that a jury may infer from circumstantial evidence that the insured set or caused a fire to be set. *See Haynes v. Farm Bureau, supra.* However, the inference must be reasonable. On this issue I agree with the trial court — the jury could not reasonably infer that Bryson caused the fire without resorting to speculation and conjecture.

Clearly, the evidence of Mrs. Bryson's "motive" is far less "compelling" than the evidence before the jury in *Haynes*, and pales in comparison to that in *Thomas*. The majority has, perhaps inadvertently, lowered the threshold in future cases such as Bryson's by reversing this case. Instead of strong, compelling financial incentives coupled with affirmative and questionable actions by the insured, henceforth, economic status alone will be sufficient evidence of a property owner's motive. This is unfortunate, because an insured property owner will almost always have a "motive" in the form of potential for financial gain when arson occurs, and will likewise always have the opportunity to set a fire or cause it to be set. Rental houses are often in need of repairs. High-income and well-to-do property owners will not be affected

by the majority's decision to reverse this case. There will be no "motive" provided by their income status, and their claims will continue to be promptly paid. However, low- and even moderate-income property owners, particularly owners of rental property, may well be branded as arsonists by their insurance companies for simply owning a home that needs modest repairs.

I respectfully dissent.

NEAL, J., joins.

Opal Jean McCOY *v.* STATE of Arknsas

CA CR 97-513 962 S.W.2d 822

Court of Appeals of Arkansas
Division II
Opinion delivered February 18, 1998

Alvin D. Clay, for appellant.

Winston Bryant, Att'y Gen., by: *Mac Golden*, Asst. Att'y Gen., for appellee.

SAM BIRD, Judge. Appellant Opal Jean McCoy was found guilty of robbery and sentenced to fifteen years in the Arkansas Department of Correction with five years suspended. On appeal she argues only that she was denied her inviolate right to trial by jury. We agree, and, therefore, reverse and remand for a new trial.

Appellant was charged with robbery after a shoplifting incident in which she allegedly threatened the store security associate with a sharp object in an attempt to escape apprehension and fought with a police officer who was trying to subdue and handcuff her. The record contains a document signed by appellant, dated and filed on February 18, 1997, entitled "Acknowledgment," in which appellant stated that she had been advised by counsel that the State had offered a plea agreement and that she had turned it down. The last sentence of the document states, "That I have been advised by my attorney that it would be in my best interest to accept the plea bargain agreement, but that I decline to do so, and wish to go forward with my right to a jury trial." In black fountain-pen-type ink the word "jury" is struck through with a line and the word "Bench" is written in cursive handwriting above it. The only issue on appeal is whether this clause in the last sentence of the "Acknowledgment" is sufficient to waive a jury trial.

The Arkansas Constitution, article 2, section 7, provides, "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law." A waiver is the intentional relinquishment of a known right. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992); *Winkle v. State*, 310 Ark. 713, 841 S.W.2d 589 (1992); *Reaser v. State*, 47 Ark. App. 7, 883 S.W.2d 851 (1994); *Duty v. State*, 45 Ark. App. 1, 871 S.W.2d 400 (1994). For a waiver to exist, there must be a "voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered." *Duty*, *supra*; *Franklin and Reid v. State*,

251 Ark. 223, 229, 471 S.W.2d 760, 764 (1971). Furthermore, the waiver of a jury trial must be knowingly, intelligently, and voluntarily made, and such must be demonstrated on the record or by the evidence. *Duty, supra.*

The Arkansas Rules of Criminal Procedure are explicit in what must be done for a defendant to waive a jury trial in order to ensure that she has knowingly, intelligently, and voluntarily waived her constitutional right to a trial by jury. Rule 31.1 provides that "[n]o defendant in any criminal cause may waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court." Rule 31.2 provides that a defendant who desires to waive his right to trial by jury, "may do so either (1) personally in writing or in open court, or (2) through counsel if the waiver is made in open court and in the presence of the defendant," and a "verbatim record of any proceedings at which a defendant waives his right to a trial by jury in person or through counsel shall be made and preserved." *See Medlock v. State*, 328 Ark. 229, 942 S.W.2d 861 (1997).

It is the trial court's burden to ensure that, if there is to be a waiver, the defendant waives her right to trial by jury in accordance with the Arkansas Constitution and Rules of Criminal Procedure. *Grinning v. City of Pine Bluff*, 322 Ark. 45, 907 S.W.2d 690 (1995). Criminal cases that require a trial by jury must be so tried unless (1) waived by the defendant, (2) assented to by the prosecutor, and (3) approved by the court. The first two requirements are mandatory before the court has any discretion in the matter. *Calnan, supra*; *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986). The only way a defendant may waive the jury-trial right is by personally making an express declaration in writing or in open court. *Calnan, supra.* The denial of the right to a jury trial is a serious error for which the trial court should intervene and is an exception to the contemporaneous-objection rule. *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996).

There is absolutely nothing in the record in the instant case to indicate that appellant waived her right to a jury trial, that the prosecution even discussed the waiver of a jury trial with appellant, much less assented to it, or that any waiver was approved

by the court. Appellant had a discussion with the trial judge about the "Acknowledgment," and admitted that she had signed it. She complained to the judge that she had not had adequate time to ponder the plea offers referred to in the "Acknowledgment" and did not have sufficient time with her attorney to obtain answers to all her questions. But there was no discussion at all about the last sentence in the document, or whether, by striking through the word "jury" and writing in the word "bench," appellant intended to waive a jury trial. In fact, the record is silent as to whether that alteration had been made when appellant was discussing the document with the judge. The trial judge never asked appellant if she really intended to waive her right to a jury trial or inquired as to whether she had waived a jury knowingly, intelligently, and voluntarily. The "Acknowledgment" document that appellant signed was obviously not prepared for the express purpose of waiving a jury trial, and we cannot accept such a casual reference to appellant's wish "to go forward with my right to a bench trial" as the making of an express, knowing, intelligent, and voluntary waiver of such a fundamental and important constitutional right.

Reversed and remanded for new trial.

MEADS and ROAF, JJ., agree.

ERC CONTRACTOR YARD & SALES and Liberty Mutual Insurance *v.* Lonnie ROBERTSON

CA 97-802 961 S.W.2d 36

Court of Appeals of Arkansas
Division I
Opinion delivered February 18, 1998

Supplemental Opinion on denial of rehearing
delivered April 8, 1998

Ledbetter, Hornberger, Cogbill, Arnold & Harrison, by: *James A. Arnold, II*, and *Rebecca D. Hattabaugh*, for appellants.

Rush, Rush & Cook, by: *David L. Rush* and *Craig L. Cook*, for appellee.

Olly Neal, Judge. Lonnie Robertson was employed by appellant as a laborer. On September 18, 1995, appellee was injured when he fell approximately ten to fifteen feet from scaffolding while at work. Appellee was taken to the hospital where he was hospitalized and treated for his injuries. Appellee filed a claim for workers' compensation disability benefits for injuries that he sustained as a result of the fall. Appellants controverted appellee's claim for benefits and asserted that his injuries were substantially occasioned by the use of alcohol and were therefore excluded from coverage under the workers' compensation act. The administrative law judge found that appellee's fall was not substantially occasioned by the use of alcohol. The Commission adopted the ALJ's opinion as its own and affirmed the order. It is from the Commission's decision that appellants bring the present appeal.

Appellants urge us to reverse the Commission's order on the grounds that the Commission incorrectly determined that no alcohol was present in appellee's system at the time of his accident and that his injury was not substantially occasioned by the use of alcohol.

Dr. MacDade examined appellee on the day he was brought to the hospital emergency room. Dr. MacDade's notes of August 18, 1995, indicate that appellee had a faint smell of alcohol on his breath. Dr. MacDade's notes of September 19, 1995, indicate that appellee had a "fruitescent" substance on his breath. Appellee's blood-alcohol content was measured as being less than .01%. Appellee also testified that he had not had a drink on the date in question.

Prior to 1993, the burden was upon the employer to prove that a claimant's injury was the result of intoxication or drug use. Act 796 of 1993 shifted the burden to the claimant by creating a rebuttable presumption that an injury was substantially occasioned by an intoxicant if one is found in the body. *Morrilton Manor v. Brimmage*, 58 Ark. App. 252, 952 S.W.2d 170 (1997). Now, if the claimant is found to have alcohol or drugs in his body after an injury, he must prove by a preponderance of the evidence that his injury was not substantially occasioned by the alcohol or drugs. *Id.*

Appellants contend that the Commission erred in finding that no alcohol was present in appellee's system at the time of the accident. In making its decision the Commission wrote:

> Claimant's initial physician noted the smell of alcohol on the claimant when claimant was brought in for treatment. However, the alcohol blood test subsequently performed revealed that claimant's alcohol level was less than .01%. We find this does not establish the presence of alcohol so as to give rise to said presumption. Further, if the test did establish the presence of alcohol, the low blood alcohol level would be sufficient to prove that the injury was not substantially occasioned by alcohol.

When reviewing a finding of fact made by the Workers' Compensation Commission, we affirm if the Commission's decision is supported by substantial evidence. *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W. 2d 584 (1996). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* Whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Id.* The Commission's

duty is to weigh medical evidence as it does any other evidence. *Id.*

The legislature has not quantified the level of alcohol that need be present in the blood to give rise to the presumption that an injury is substantially occasioned by the use of alcohol. The Arkansas courts have been admonished to defer to the legislature when such matters need to be addressed. *See* Ark. Code Ann. § 11-9-1001 (Repl. 1996). However, because the results of the blood-alcohol content testing revealed an amount of alcohol in appellee's blood, however small, we agree with appellants that there was a presence of alcohol in appellee's blood. Notwithstanding, we find that there is substantial evidence in the record that supports the Commission's finding that such a low blood-alcohol level was sufficient to rebut the presumption and prove that appellee's injury was not substantially occasioned by alcohol.

This leads us to the remaining question, i.e., does appellee's long-term use of alcohol disqualify him from receiving workers' compensation disability benefits? The gravamen of appellants' argument is that appellee's long-term alcohol use resulted in an alcohol withdrawal seizure that caused his fall, and that appellee would not have suffered from an alcohol withdrawal seizure if not for his alcohol use.

With regard to this issue the Commission employed the following rationale:

> The medical records indicate that the claimant's physicians believe he suffered an alcohol with- drawal seizure. Based upon those opinions we find that the claimant suffered a fall which was related to alcohol withdrawal. As such, the claimant's fall was caused by a condition which was personal in nature and has been defined as an idiopathic fall. Injuries from idiopathic falls do not arise out of the claimant's employment unless the employment contributed to or aggravated the risk or the injury. While the fall would normally not be compensable because it is personal in nature, in this case, claimant was placed on a scaffold 12 to 15 feet off the ground thereby increasing the effects of his fall. Therefore, claimant's idiopathic fall is compensable.

We agree with the Commission's rationale. Appellee's treating physicians opined that appellee's seizure was the result of alcohol withdrawal. Appellee's employment and his placement on scaffolding twelve to fifteen feet above ground increased the effects of the fall, thereby making the fall compensable. Though the seizure appellee suffered was the result of his long-term use of alcohol, we cannot find that appellee's injury was substantially occasioned by such use of alcohol, where his employer and girlfriend corroborated his testimony that he had not had alcohol on the date of the injury.

In his cross-appeal, appellee argues that there is not substantial evidence to support the Commission's finding that he was making $5 an hour. We disagree. Appellee testified that he was to be paid $6 an hour. On cross-examination, appellee acknowledged that he had stated during his deposition that he earned $5 per hour. Appellee did state that he misunderstood the question and thought that the question referred to his previous employment with appellant. Appellee's employer testified that appellee was to be paid at a rate of $5 an hour. The Commission has the duty of determining the credibility of the witnesses. Here, the Commission obviously afforded greater weight to the employer's testimony and appellee's deposed testimony. We conclude that substantial evidence supports the Commission's decision.

Affirmed.

STROUD, J., agrees.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. I concur in the result of this case but write separately because I am unwilling at this time to state that a blood-alcohol level of less than .01% is sufficient proof of the presence of alcohol so as to give rise to the rebuttable presumption that appellant's injury was substantially occasioned by the use of alcohol. It is the Commission's duty to find the facts, and in this case, the Commission found that a blood-alcohol level of less than .01% did "not establish the presence of alcohol as to give rise to said presumption." As in the two recent cases of *Gra-*

ham v. Turnage Employment Group, 60 Ark. App. 150, 960 S.W.2d 453 (1998) and *Brown v. Alabama Electric Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998), the Commission had the duty and authority to find whether there was the presence of drugs in the claimants' systems. The only difference between this case and those cited is the fact that in the cited cases the Commission found that there was evidence to establish the presence of drugs in the claimants' systems. The legislature chose not to include guidelines as to the minimal level of intoxicants that must be present in one's system. Because of this lack of guidance, I am more persuaded that it is the Commission's place to determine the fact question of what constitutes "presence." I believe, however, that the legislature should establish guidelines setting minimum levels of intoxicants that would trigger the rebuttable presumption.

Nonetheless, the majority opinion agrees that the Commission found the rebuttable presumption was overcome, and I agree with the Commission's award of benefits. The evidence supports the Commission's finding that appellant suffered an idiopathic fall, and I cannot disagree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

April 8, 1998

Divisions I and II

James A. Arnold II, for appellant.

Craig Cook, for appellee.

JUDITH ROGERS, Judge. ■ We write to emphasize that appellant's argument in support of his petition for rehearing is misplaced and not a correct statement of our holding in this case. In our majority opinion, we found that there was substantial evidence to support the Commission's decision that appellee's fall was not substantially occasioned by the use of alcohol. The evidence presented and relied on by the Commission and this court was appellee's testimony that he had not had alcohol on the date of the injury; appellee's employer and girlfriend's corroboration of appellee's testimony; the low level of alcohol in appellee's system; and the medical evidence that showed appellee was suffering from alcohol withdrawal. This provided substantial evidence to support the Commission's decision, and its decision was not supported only by appellee's low blood-alcohol level. In addition, appellee's alcohol withdrawal was personal in nature, and his employment placed him on a scaffold twelve to fifteen feet off the ground, increasing the effects of his fall. These facts support the Commission's finding that appellee suffered a compensable idiopathic fall.

ROBBINS, C.J., BIRD, NEAL, and GRIFFEN, JJ., agree.