Cite as 2012 Ark. App. 506

# ARKANSAS COURT OF APPEALS

DIVISION IV
**No.** CA12-213

**Opinion Delivered** September 19, 2012

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| NO WAY PULPWOOD, INC. & AMERISAFE RISK SERVICES, INC. APPELLANTS | APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [F806810] |
| V. | |
| GREGORY MCCARTER APPELLEE | AFFIRMED |

**DAVID M. GLOVER, Judge**

Gregory McCarter suffered a compensable injury to his cervical spine on May 1, 2008.[1] The Administrative Law Judge (ALJ) determined that McCarter's net average weekly wage was at least $1541 per week; this entitled him to the maximum compensation rates in effect for his injury sustained in 2008. The Workers' Compensation Commission affirmed and adopted the ALJ's opinion. Appellants, No Way Pulpwood, Inc. and Amersafe Risk Services, Inc., appeal the Commission's decision to our court. The sole issue on appeal is whether the finding of a $1541 average weekly wage is supported by substantial evidence. We affirm the Commission's decision.

In *Queen v. Nortel Networks, Inc.*, 2012 Ark. App. 188, at 3, this court held:

> Typically, on appeal to this court, we review only the decision of the Commission, not that of the ALJ. *Daniels v. Affiliated Foods Sw.*, 70 Ark. App. 319,

[1]Although McCarter owned and operated a sole-proprietorship logging business at the time of his injury, the parties stipulated that he was an employee of No Way Pulpwood, Inc., for the purpose of workers' compensation insurance.

17 S.W.3d 817 (2000). In this case, the Commission affirmed and adopted the ALJ's opinion as its own, which it is permitted to do under Arkansas law. *Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003). Moreover, in so doing, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission. *See ITT/Higbie Mfg. v. Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1991). Therefore, for the purpose of our review, we consider both the ALJ's opinion and the Commission's majority opinion.

> In appeals involving claims for workers' compensation, we view the evidence in the light most favorable to the Commission's decision and affirm the decision if it is supported by substantial evidence. *Galloway v. Tyson Foods, Inc.*, 2010 Ark. App. 610, 378 S.W.3d 210. Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Id.* The issue is not whether the appellate court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court must affirm. *Id.*

In an appeal from a determination of an employee's average weekly wage, we affirm the findings made by the Commission if they are supported by substantial evidence. *Cracker Barrel v. Lassiter*, 87 Ark. App. 286, 190 S.W.3d 911 (2004). Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission, and when there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Cedar Chem. Co. v. Knight*, 372 Ark. 233, 273 S.W.3d 473 (2008). 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 that it deems worthy of belief. *Id.*

McCarter contracted logging services from 1998 to mid-2004 with Green Pine Timber. Green Pine was a small company that was unable to purchase very good timber

tracts; as a result, McCarter worked very little during the winter or in wet weather. Likewise, Green Pine did not supply trucks for hauling; thus, McCarter was required to subcontract those trucks. Green Pine paid McCarter for his trucking expenses, and he in turn paid the truckers. This trucking expense was reflected as a part of McCarter's total business expenses.

Beginning in 2004 until he was injured in 2008, McCarter contracted his logging services with No Way Pulpwood. No Way was a larger company that was able to provide McCarter with more work. No Way also provided trucks for hauling the logs, so McCarter was no longer required to incur that business expense.

In 2002 McCarter purchased a CAT skidder, and the following year, he purchased a Hydro Ax Cutter. When these equipment purchases were made, McCarter elected to take certain front-end tax deductions and used an accelerated depreciation method over a period of five years on each piece of equipment. In July 2007, both pieces of equipment were vandalized by fire. Testimony indicated that the insurance company paid McCarter $105,000 in February 2008 for the ruined equipment and that McCarter used most of this money to pay off the equipment loans at the bank.

After McCarter's equipment was vandalized, he reduced his crew to himself and one other employee. The other employee used McCarter's old skidder (which predated the vandalized skidder), and McCarter himself operated his own chainsaws to fell the trees. By using the old skidder, McCarter's loads decreased from 40-50 loads per week to 15-20 loads per week; however, in 2008, McCarter's payment per ton increased from $11 per

ton to $16.50 per ton because of the hazardous nature of the work he was then performing near a pipeline.

Arkansas Code Annotated section 11-9-518 (Repl. 2012) provides, in pertinent part:

> (a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.
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> . . .
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> (c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

The ALJ determined that exceptional circumstances were present in the instant case. Citing our court's holding in *Vite v. Vite*, 2010 Ark. App. 565, 377 S.W.3d 453, the ALJ determined that the proper way to ascertain McCarter's average weekly wage was to take his gross receipts and deduct his business expenses, including depreciation. The ALJ determined that because of the totality of the circumstances, the average weekly wage should not be determined based upon multiple years but rather only on McCarter's 2008 earnings. The ALJ based his decision on the fact that McCarter had decided what depreciation schedule to employ years before his injury; that all depreciation deductions ended in 2007; that his new equipment was vandalized and taken out of service in 2007, forcing him to change his business plan and to downsize; and that he was being paid more per ton in 2008 due to a more hazardous contract. The ALJ, relying on *Cracker Barrel*, *supra*, in which our court held that a worker's rate of pay could be based upon the most recent rate of pay prior to the injury, found McCarter's argument more persuasive that his

average weekly wage should be based on the higher 2008 rate of pay of $16.50 per ton instead of the previous rate of $11 per ton.

The ALJ used a 2008 tax return provided by McCarter to determine his gross earnings, business expenses, depreciation, and net profit. At the time of the hearing, McCarter had not actually filed tax returns for 2007 and 2008, but he had copies of these prepared returns. Since McCarter was injured on May 1, 2008, his tax return reflected four months of operation. His gross earnings were $70,584 and business expenses were $34,260, leaving a profit of $36,324 for the year. However, the 2008 return did not reflect the wages paid by McCarter to his one employee. McCarter testified that he paid that employee $70-80 dollars per day. The ALJ took $80 per day, seven days per week from January 1 to April 30, 2008 (a total of $9680), and subtracted it from the 2008 profit, leaving a net profit of $26,645 for the 121 days McCarter worked in 2008. Dividing that number by seven, the ALJ arrived at an average weekly wage of $1541. The ALJ determined, and the parties do not now dispute, that in order to be entitled to the maximum compensation rate for an injury in 2008, a party must have had a minimum average weekly wage of $784. Since McCarter's average weekly wage was determined to be almost double that amount, the ALJ awarded him benefits at the maximum compensation rate.

On appeal, appellants present several different options to calculate McCarter's average weekly wage—computing his average income from 2003 to 2007 using tax returns; calculating an average weekly wage over the last fifty-two weeks worked by

McCarter; or throwing out the questionable 2007 and 2008 tax returns and calculating his average weekly wage on the tax returns from 2003 to 2006. However, it is not this court's function on appeal to conclude whether there was an alternative way to determine McCarter's average weekly wage; if the Commission's determination is supported by substantial evidence, we must affirm that decision. *Cracker Barrel*, *supra*.

It is evident that McCarter was a poor record keeper in his logging business. However, we hold that the ALJ's computations in arriving at a determination of his average weekly wage at the time of his injury are supported by substantial evidence.

Appellants argue that the 2008 tax return does not indicate a deduction for contract labor; however, the ALJ noted this in his opinion and made the appropriate deduction, using the highest daily amount paid to the employee and calculating the wages on a seven-day workweek. Appellants also complain that no deprecation was shown on the 2008 tax return. Although the fifth and final year of depreciation for the Hydro Ax Cutter was not shown on the 2007 tax return, the ALJ only used the gross receipts and expenses from 2008 in computing McCarter's average weekly wage; therefore, the 2007 tax return is of no consequence in that calculation.

Appellants also question why no interest expense on the loans was taken in 2008, why McCarter's insurance expenses were less in 2008 than in previous years, and why there were no office expenses or tax and license expenses in 2008, as had been shown in previous years. However, the 2008 Schedule C does indicate $321 in bank charges. The

ALJ noted in his opinion that neither party produced any documentary evidence of expenses other than those contained in the tax returns, and absent evidence to the contrary that disputed the 2008 information, he found the tax returns to be the most persuasive evidence of the accuracy of those expenses.

The ALJ made no finding as to whether any income attributable to McCarter as a result of the $105,000 insurance payment in 2008 for the vandalized equipment was taxable income to McCarter because the ALJ had already determined that McCarter had an average weekly wage that provided maximum compensation to him. If any of the $105,000 was attributed to McCarter as income, that would actually increase his average weekly wage, thereby cutting against appellants' argument for a lesser average weekly wage.

Affirmed.

VAUGHT, C.J., and MARTIN, J., agree.

*Michael E. Ryburn*, for appellants.

*Tolley & Brooks, P.A.*, by: *Evelyn E. Brooks*, for appellee.