

ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-13-1028

JOSEPHINE MOSS

APPELLANT

V.

ROGERS LOGGING CO., AMERICAN
INTERSTATE INS. CO., and DEATH &
PERMANENT TOTAL DISABILITY
TRUST FUND

APPELLEES

Opinion Delivered April 30, 2014

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. G101576]

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Josephine Moss appeals the Commission's decision denying her partial dependent benefits upon a finding that she had no reasonable expectation of monetary support from her deceased husband, Donnie Moss. On appeal, Josephine contends that there is no substantial evidentiary basis to support the Commission's decision. We affirm.

Donnie and Josephine were married in 1989. They lived together until 1999, when they separated. The Mosses never divorced. Donnie died on February 23, 2011, after being struck by a section of tree while working for Rogers Logging Company. Josephine subsequently filed for dependent benefits.

A hearing took place on October 11, 2012. Josephine testified that she lives with her mother, whom she moved in with after she and Donnie separated. She stated that although

she and Donnie lived separate and apart, he would give her money to help out. She said that she received an average of \$200 a month from Donnie. She testified that she works part-time at Best Cleaners and has done so since she was eighteen years old. According to Josephine, her average monthly income for 2011 was approximately \$619.67. She said that she also receives food stamps in the amount of \$115 a month. Josephine stated that she and her mother put their money together to pay the bills and that she does not have much left over after paying \$350 for rent, thirty to forty dollars per week for a ride to and from work, seven dollars a month for medicine, ten dollars every three or four months for the free clinic, and thirty to fifty dollars a month on clothes. She testified that she saw Donnie often before his death and that he would give her money when she asked, if he had it. She also stated that they spent a lot of nights together at her sister's house. She further said that she depended on the money Donnie gave her and that it had "been hard and a struggle, without the money that he provided."

On cross-examination, Josephine stated that she and Donnie still saw each other after they separated. She said that Donnie lived with his daughter at times and with his girlfriend at other times. She testified that she last saw Donnie in January before he was killed. She said that she would ask him for money and that he would give it to her because she was his wife. She testified that she did not have anything in writing or on paper to support her contention that Donnie financially supported her because he would always give her cash. She also stated that she and Donnie were discussing reconciling before his death. Josephine said that she was unsure if Donnie had a life-insurance policy. She testified that Donnie would also give her

mother cash. She stated that she made more money than what Donnie gave her and that she used her work income to support herself. She said that she had not tried to get another job. According to Josephine, she and Donnie never filed income taxes together. She stated that she relied on whatever Donnie gave her, and that if Donnie did not have any money, she did not get any money. She conceded that Donnie was unable to give her money every month, but that if she saw him out and he had it, he would give her money.

On re-direct, Josephine stated that she paid her mother weekly rent in the amount of fifty to sixty dollars. She contended that Donnie gave her \$200 every month.

On re-cross examination, Josephine testified that Donnie gave her twenty-five to fifty dollars each time she saw him, and that she would see him six to nine times a month. She stated that people around town also saw Donnie give her money. She said that Donnie gave her money for her birthday, their anniversary, and “a variety of reasons.” According to Josephine, her mother uses the money Josephine pays for rent to help with the shared bills.

Odean Confron testified that he and Donnie were co-workers at the time of Donnie’s death. He stated that on the morning of the incident, he picked Donnie up at his daughter’s house. However, he stated that over the years, Donnie lived with either his girlfriend or his daughter.

Elsie Curry testified that she and Josephine’s mother were first cousins. She stated that she took Josephine to the store a number of times, and that Donnie would give Josephine money if she saw him. Curry testified that she took Josephine to Walmart around Christmas

and that Josephine came out with Donnie and with \$300 in her hand. Curry stated that Josephine did not have any money in her hands before going into the store.

On cross-examination, Curry stated that she was not sure that the \$300 Josephine received from Donnie was a Christmas present. She said that she saw Donnie give Josephine money at Josephine's mother house two times.

Renell Rivers, Josephine's mother, testified that Josephine lives with her. She stated that she is retired and receives about \$819 a month. Rivers said that Josephine pays her rent in the amount of \$350 per month. Rivers testified that she would see Donnie "almost every other week or two" when he would come by her house to visit. According to Rivers, Donnie would visit at least twice a month. She stated that Donnie was always giving Josephine money to help and that during the last year of his life, he gave Rivers money "once or twice" to give to Josephine. According to Rivers, Donnie sometimes gave her \$200 to give to Josephine.

On cross-examination, Rivers stated that Donnie gave Josephine money on a regular basis. She testified that she and Josephine could count on Donnie giving Josephine money "about every two or three weeks." She said that the amounts varied between \$200 and \$330, and that they spent the money on different things. She stated that Donnie never took a bill and paid it, that she did not have receipts, and that she did not make a deposit with the money. However, she insisted that the money was used to help pay the bills. Rivers testified that Donnie gave Josephine gifts, but that the money was not a gift. According to Rivers, Donnie always gave cash. Rivers stated that if something happened to cause Josephine to lose

her job, she would not kick Josephine out because Josephine is her daughter and she loves her. She said that they use Josephine's food stamps to buy food.

Jennifer Rivers, Josephine's sister, testified that Donnie would come to her house around payday and ask her to call Josephine. She stated that Donnie and Josephine spent the night at her house about five times during the last year of Donnie's life. She said that she witnessed Donnie giving Josephine \$100 or \$200 "all the time."

On cross-examination, Jennifer stated that she knew Donnie had a girlfriend, and that Josephine was upset about it. She said that she saw Donnie give Josephine money about four or five times.

Joe Rogers, owner of Rogers Logging, testified that he never saw Donnie give Josephine any money. He stated that when Donnie died, his girlfriend was the beneficiary of his life-insurance policy. According to Rogers, Donnie referred to his girlfriend as his fiancée.

The administrative law judge (ALJ) issued a written opinion on December 28, 2012, finding that Josephine was not entitled to an award of dependency benefits. Josephine appealed this decision to the Commission. In an opinion filed on August 28, 2013, the Commission affirmed the ALJ. That opinion stated in pertinent part:

The Full Commission finds that the claimant did not prove by a preponderance of the evidence that she was entitled to partial dependency benefits in accordance with Ark. Code Ann. §11-9-527(i) (Repl. 2002).

The parties stipulated that Donnie Moss and Josephine Moss were married on November 3, 1989. However, Josephine testified that she and Donnie separated in approximately 1999. Josephine and Donnie were never divorced, but Josephine testified that Donnie Moss would occasionally see her and provide her with small

amounts of money. Josephine's testimony regarding the amount of money she received from Donnie varied between \$100.00 monthly to \$400.00 monthly. Elsie Curry, Renell Rivers, and Jennifer Rivers also testified that Donnie Moss would occasionally see Josephine and provide small amounts of cash. The claimant contends that she used this money to pay monthly expenses and was therefore "partially dependent" upon Donnie Moss at the time of his compensable injury.

A widow must establish facts showing dependency upon the decedent before being entitled to benefits. In the present matter, the Full Commission notes that the claimant was unable to provide any evidence documenting or corroborating the testimony that Donnie Moss was providing anything other than occasional amounts of money for support. The claimant was unable to testify with any specificity regarding the amount of money Donnie Moss was allegedly providing. The claimant never filed a joint income tax return with Donnie Moss. Although Donnie Moss may have provided Josephine with small amounts of money at irregular intervals, there is no evidence before the Commission demonstrating that Donnie provided support on a routine, systematic, or continuous basis. The record does not show that Josephine Moss had a reasonable expectation of support from Donnie. Questions, concerning the credibility of witnesses and the weight to be given their testimony are exclusively within the province of the Commission. In the present matter, we do not find Josephine Moss's testimony, or the uncorroborated testimony of the other witnesses, sufficient to establish a reasonable expectation of support. Nor did the claimant take any legal action to obtain any consistent level of support from Donnie to which she may have been entitled.

(Internal citations omitted.) Josephine timely filed a notice of appeal from the Commission's opinion.

On appeal, we review the evidence in the light most favorable to the Commission's findings and affirm if those findings are supported by substantial evidence.¹ Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.² The issue is not whether we might have reached a different result than the

¹*Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003).

²*Id.*

Commission, but whether reasonable minds could reach the Commission's decision.³ Additionally, questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission.⁴

Arkansas Code Annotated section 11-9-527(c)⁵ authorizes dependency benefits where a dependent was "wholly and actually" dependent upon the claimant. However, section 11-9-527(i) provides that dependency benefits may be awarded in cases of partial dependency. Factors to be considered in making a determination of partial dependency for worker's compensation purposes include whether support was given at the time of the injury and the reasonable expectation of future support.⁶

Josephine contends that the Commission's decision is not supported by substantial evidence. She argues that her testimony and the testimony of her witnesses establish that Donnie provided money to her between 120 and 520 times in the ten years proceeding his death. The numerous monetary contributions, according to Josephine, are the basis for her to have a reasonable expectation of support. However, the Commission heard this testimony and ultimately found that the testimony was not credible. We defer to the Commission's findings on what testimony it deems to be credible and the weight it is to be given; it is within the Commission's province to reconcile conflicting evidence and to determine the true

³*Pulaski Cnty. Special Sch. Dist. v. Tenner*, 2013 Ark. App. 569.

⁴*See Pack v. Little Rock Convention Ctr. & Visitors Bureau*, 2013 Ark. 186, 427 S.W.3d 586.

⁵ (Repl. 2007).

⁶*Williams v. Cypress Creek Drainage*, 5 Ark. App. 256, 635 S.W.2d 282 (1982).

facts; and the Commission is not required to believe the testimony of any particular witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief.⁷ Therefore, we affirm.

Affirmed.

WALMSLEY and WOOD, JJ., agree.

Claudell Woods, for appellant.

Michael E. Ryburn, for appellee.

⁷*Ouachita Cnty. Med. Ctr. v. Murphy*, 2012 Ark. App. 135.