

1993

The Credibility Distinction In *Kroger Co. v. Morris*

Nicole Rovner Beyer
University of Richmond

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Workers' Compensation Law Commons](#)

Recommended Citation

Nicole R. Beyer, *The Credibility Distinction In Kroger Co. v. Morris*, 27 U. Rich. L. Rev. 935 (1993).

Available at: <http://scholarship.richmond.edu/lawreview/vol27/iss4/14>

This Note is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

CASENOTES

THE CREDIBILITY DISTINCTION IN *KROGER CO. v. MORRIS*

I. INTRODUCTION

The opinion issued by the court of appeals in *Kroger Co. v. Morris*¹ was both short and, in light of precedent, predictable. The practical consequences of the reasoning used by the court in this and similar cases, however, may be much less predictable than is desirable. The case concerned a Virginia Worker's Compensation Commission decision that contained a finding regarding the credibility of a witness which contradicted the finding of the deputy commissioner who presided at the hearing. The court of appeals held that it is permissible for the worker's Compensation Commission to make a credibility finding which differs from that of the deputy, so long as the deputy's finding was based on the substance of the witness' testimony rather than the appearance or demeanor of the witness. The distinction the court has made between "demeanor credibility" and "substance credibility" has theoretical appeal to the extent that the two types of credibility differ, as "demeanor credibility" can only be evaluated by one who has actually observed the witness, while "substance credibility" can be determined from the written record alone. The possibilities, however, that deputies may not specify which type of credibility has influenced their determinations, that deputies might not be aware of the extent to which each type has influenced their decisions, and that demeanor may in any event be an unreliable indicator of veracity, call into question the court's credibility distinction.

II. FACTS

Mr. Morris was employed as a tractor-trailer driver for Kroger Company and claimed that he injured his shoulder on September 3, 1990, while unloading milk from his truck during a delivery to a Kroger store. Mr. Morris experienced a sudden pain in his shoulder while pushing a twenty-four-gallon stack of milk cartons from a two-wheel hand truck

1. 14 Va. App. 233, 415 S.E.2d 879 (1992).

onto a metal pan.² He reported the injury to co-workers and the store manager and was unable to work for the next two days until he sought treatment from Dr. LaBarbera, a chiropractor.³

While taking Mr. Morris' patient history, Dr. LaBarbera recorded that the "[p]atient stated that he injured himself on-the-job.[sic]"⁴ Mr. Morris was then referred to Dr. Watts who likewise noted that the cause of injury was work-related.⁵ Dr. Watts referred Mr. Morris to Dr. Spetzler, an orthopedic surgeon. Unlike the observations of the preceding doctors, Dr. Spetzler's report did not contain a clear description of the cause of the injury. Rather, Dr. Spetzler noted that "[h]e says that he does not remember any one accident but he noted some soreness with pushing milk on the buggies."⁶ Dr. Spetzler determined that Mr. Morris suffered from both a rotator cuff tear and cystic swelling. After surgically repairing the shoulder joint, Dr. Spetzler noted "I did tell Mr. Morris that his work-related incident is really an aggravation of a chronic problem rather than any one incident of trauma." Dr. Spetzler concluded that "[a] chronic silent tear can become symptomatic through an aggravation and I think that this is what has happened in Mr. Morris' case."⁷ Mr. Morris subsequently filed a Workers' Compensation claim against the Kroger Company.

Deputy Commissioner Costa, who heard the case, denied Mr. Morris disability benefits, finding that Morris lacked credibility and that he failed to prove that his disability was caused by the incident he described in his testimony. The credibility finding was based on the fact that Morris described the injury-causing event with more specificity while testifying than he had when he consulted his doctors.⁸

The full Commission reversed and awarded temporary total disability benefits.⁹ Rather than focusing on inconsistencies among Morris' descriptions of his injury, the Commission's opinion highlighted the conclusions of two of Morris' doctors:¹⁰

2. *Id.* at 234, 415 S.E.2d at 880.

3. *Id.* at 234-35, 415 S.E.2d at 880.

4. *Id.* at 235, 415 S.E.2d at 880.

5. *Id.*

6. *Id.*

7. *Id.* at 234-35, 415 S.E.2d at 880.

8. "Deputy Commissioner Costa found it hard to believe that the claimant could provide specific details of a particular event during direct examination, yet had not provided this same information to the various treating physicians." *Id.* at 236, 415 S.E.2d at 881.

9. *Id.*

10. The commission expressly decided not to consider the comments of Mr. Morris' first doctor: "The causation noted by Dr. LaBarbera in his Attending Physician's Report of October 8, 1990, is not persuasive inasmuch as the history reflected in his report is too general to establish an injury by accident as that term is construed in worker's compensation cases." Va. Indus. Comm'n File No. 148-65-75 at 131.

Dr. Watts noted by history "Patient states that he was unloading milk and strained his left shoulder" and related the diagnosed condition to that accident. However, we place the greatest emphasis on the reports of Dr. Spetzler. While he repeatedly stated that there was no sudden accident, the contrary is shown by the record. Dr. Spetzler's reports establish that the claimant suffered from an old rotator cuff tear which apparently was asymptomatic until aggravated by the industrial accident of September 3, 1990.¹¹

The Commission did not explicitly reject Deputy Commissioner Costa's credibility finding;¹² nevertheless, it concluded that the injury occurred in an industrial accident "at a specific time and place while the claimant was performing strenuous work."¹³

III. THE COURT'S REASONING

The Court of Appeals affirmed the findings of the full Commission, despite Kroger's contention that the Commission had erred by ignoring the deputy commissioner's conclusion that Mr. Morris lacked credibility.¹⁴ The court explained that though the Commission could not arbitrarily disregard credibility findings based on witness appearance or demeanor, the Commission was entitled to substitute its own judgment for the deputy's if the determination was based on the substance of the testimony.¹⁵

Kroger next argued that Morris failed to prove that his alleged industrial accident was the actual source of his injury. In response the court pointed out, using language virtually identical to that in *Morris v. Badger Powhatan/Figgie International, Inc.*¹⁶ that the court of appeals may not

11. *Id.*

12. The commission had only the following to say on the subject:

Upon this record, the Deputy Commissioner denied compensation essentially upon a finding of credibility. The Deputy Commissioner noted that the claimant described a specific incident at the hearing on February 5, 1991, but only generally described his work activity to Dr. Watts. Dr. Spetzler reported on September 11, 1990, that the claimant noted soreness while pushing milk on the buggies. The Deputy Commissioner further noted that the claimant completed a sickness and accident insurance form on October 16, 1990, in which he stated that his injury occurred while unloading milk cartons. However, this is what the claimant testified at the February 5, 1991 hearing.

Id. at 130.

13. *Id.* at 131.

14. 5 Va. App. 374, 363 S.E.2d 433 (1987). In *Goodyear Tire*, the court reversed a decision of the commission (then called the Industrial Commission of Virginia) which had reversed a deputy commissioner's credibility finding based on the claimant's demeanor and evasiveness while testifying. For the court's exact language regarding credibility determinations, see *supra* note 12 and accompanying text.

15. *Kroger*, 14 Va. App. at 236, 415 S.E.2d at 880-81. The court cited *Goodyear Tire* and *Rubber Co. v. Pierce* as precedent supporting its decision.

16. 3 Va. App. 276, 279, 348 S.E.2d 876, 877 (1986).

disturb the Commission's findings.¹⁷ Because Mr. Morris' testimony regarding his injury was similar to what he told to Drs. LaBarbera and Watts, and because Dr. Spetzler determined that Morris' injury had "become symptomatic through an aggravation," the court concluded that "the evidence support[ed] the finding of the full commission."¹⁸

IV. ANALYSIS: THE IMPLICATIONS OF FINDINGS (SUPPOSEDLY) BASED ON CREDIBILITY

The court's ruling in this case seems quite straightforward in light of the precedents set by *Goodyear Tire and Rubber Co. v. Pierce* and *Morris v. Badger Powhatan/Figgie International, Inc.* The Virginia Worker's Compensation Commission is not constrained by a deputy commissioner's credibility finding so long as that finding was based on the substance of the witness' testimony rather than his demeanor or appearance. However, the Commission's determination is binding on the court of appeals, so long as it is supported by credible evidence.¹⁹ The question that remains, however, despite the predictability of the court's explanation, is how well it conforms with the realities of administrative hearings and full Commission review.

In *Goodyear Tire and Rubber v. Pierce*, the court distinguished between credibility findings based on witness demeanor and those based on the substantive testimony.

When the deputy commissioner's finding of credibility is based, in whole or in part, upon the claimant's appearance and demeanor at the hearing, the commission may have difficulty reversing that finding without recalling the witness. On the other hand, if the deputy commissioner's determination of credibility is based on the substance of the testimony and not upon the witness' demeanor and appearance, such a finding is as determinable by the full commission as by the deputy.²⁰

Thus, the court views the credibility issue as falling into one of two rather distinct categories. The first category concerns a witness' presentation of his testimony, including inferences drawn from his appearance and his behavior. The second involves issues regarding the believability of the

17. *Kroger*, 14 Va. App. at 237, 415 S.E.2d at 881.

18. *Id.*

19. Although the court's use of the phrase "credible evidence" might be confusing due to the importance attached to *credibility* in this case, subsequent cases clearly state the applicable standard: "[t]he reviewing court may reject the agency's finding of fact only if, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion." *Johnston-Willis Ltd. v. Kenley*, 6 Va. App. 231, 242, 369 S.E.2d 1, 7 (1988) (citing *Kenley v. Waterway Estates, Ltd.*, 3 Va. App. 50, 56, 348 S.E.2d 31, 34 (1986)) and *Virginia Real Estate Commission v. Bias*, 226 Va. 264, 269, 308 S.E.2d 123, 125 (1983).

20. *Goodyear Tire & Rubber Co. v. Pierce*, 5 Va. App. 374, 383, 363 S.E.2d 433, 438 (1987).

story based on its content, regardless of how the story is presented. In the first category, credibility of a witness can only be observed by the person(s) presiding at the hearing; while in the second category, credibility can be gleaned from the written record alone. It further appeals that the court not only views the two categories as separate and distinct, but also assumes that deputy commissioners will specify whether the appearance and demeanor of the witness or the believability of the testimony influenced their credibility determination.

To some extent the court's expectation that deputy commissioners will identify the basis of their credibility findings is probably a sensible one, for "on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors, when the words alone leave any rational choice."²¹ Presumably, deputy commissioners often include in their opinions their reasons for believing or disbelieving witnesses. Conceivably, however, situations will arise in which the evidence standing alone, without consideration of the witness' manner, is neither inherently believable nor unbelievable *and* in which "demeanor credibility" is neither conspicuously present nor absent. Is it reasonable to expect in such situations that the deputy commissioner will rationalize her credibility findings so explicitly that the Commission will know just what level of deference to give to her factfinding on review. And even if the deputy explains the basis of her findings, can the Commission really be sure that her failure to mention demeanor means that it did not factor into her determination at all? It is likely that in "close" cases, triers of fact rely more on demeanor credibility than they are aware or perhaps more than they are willing to admit. If this presumption is correct, then the court's strict distinction between demeanor and believability is precarious.

Conversely, regardless of the frequency with which factfinders depend on evaluations of demeanor, it is arguably an unreliable indicator of veracity.²² Thus, there may be little danger in the possibility that a deputy

21. *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 429 (2d Cir. 1951).

22. Examples in legal literature of the contention that demeanor is an unreliable indicator of veracity include *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1084 (1977) (Duniway, J., dissenting) and Marcus Stone, *Instant Lie Detection? Demeanor and Credibility in Criminal Trials*, 1991 CRIM L. REV. 821. Perhaps even more important, however, is what psychologists have discovered about our ability to evaluate sincerity based on demeanor.

The results of the psychological studies call into question the judicial reliance on common sense to assess the credibility of witnesses. Simply put, the studies systematically and effectively expose the notion of common sense as a myth. They reveal that lay persons rely much on misconceptions and erroneous assumptions in assessing the credibility of others.

Steven J. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 187 (1990). Behavior researcher Paul Eckman explains: "Our research, like the research of most others, has found that few people do better than chance in judging whether someone is lying or truthful. We also found that most people think they are making accurate judgments even though they are not." PAUL ECKMAN, *TELLING LIES* (1985). Kristine

commissioner's opinion might not specifically state her reliance on the behavior of the witness. Appellate review in such cases would necessarily focus on other issues, and an incorrect evaluation of demeanor would be neutralized as a result.

The absence of a stated basis for credibility findings in the opinions of deputy commissioners might also induce the full Commission to more clearly set forth its motive of creating, changing, or elaborating upon commission policy. What may in fact be occurring in cases like *Kroger Co. v. Morris* is that the Commission is in effect making policy when it is talking about credibility. The opinion in *Kroger Co. v. Morris* sends a message that deputies do not need a high degree of certainty as to whether the claimed industrial accident is the cause of the worker's injury as was amended by Deputy Commissioner Costa. There was no question that Mr. Morris suffered a shoulder injury; the *only* question was whether the incident he described caused the injury. Deputy Commissioner Costa's credibility finding in *Kroger Co. v. Morris* simply showed he was not certain that the injury occurred on September 3, 1990, while Mr. Morris was unloading milk. Certainly the Commission respects its deputy enough that its opinion in the case was meant to explain that it should be the policy of deputy commissioner or to award benefits despite a degree of uncertainty rather than to claim that this particular deputy should have been more convinced by what he observed.

Indeed, it is "perfectly proper for agency heads to use individual cases to elaborate on, or to change, agency policy."²³ However, a court reviewing a commission decision should demand that the commission more clearly explain that it is making or illustrating policy. Otherwise, the court is left to ascertain the substantiality of evidence that had little bearing on the commission's decision.

In reviewing the full Commission's objectives in reversing a deputy's findings, two other considerations warrant attention. First, the Commis-

C. Landry and John C. Brigham add: "[P]eople who might be expected to have professional experience in detecting deceit, such as law enforcement officers and customs agents, have generally performed at the same level as ordinary citizens." Kristine C. Landry and John C. Brigham, *The Effect of Training in Criteria-Based Content Analysis on the Ability to Detect Deception in Adults*, 16 LAW & HUM. BEHAV. 663, 664 (1992).

23. STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 209 (2d ed. 1985); see also, *Summary of Action of the House of Delegates, Feb. 18-19, 1985*, A.B.A. SEC. ADMIN. L. REP. 301 at 7 ("Resolved, That the American Bar Association approves the following principles respecting the choice between rulemaking and adjudication in administrative agency proceedings: 1. An agency is generally free to announce new policy through an adjudicative proceeding.") But see KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.5 (2d ed. 1980) ("Although agencies have and have to have authority to make law through adjudication, and although their lawmaking power cannot feasibly be limited to rulemaking, they still *should* do what they can to use rulemaking as the main procedure for creating new law or new policy.") (citation omitted).

sion's inclination to completely disregard deputy commissioner findings, even for the sake of policy making, runs counter to the purpose of having deputy commissioners rather than the full Commission conduct the initial hearings. Second, the policy making activities of the Commission should be balanced against the extent to which deputies act as a check on the possible bias of the commissioners.²⁴ It is the duty of the court of appeals, the only body that has the authority to monitor the adjudicatory function of the Worker's Compensation Commission in individual cases, to ensure that the Commission gives proper weight to its deputies' opinions. This means that the Commission must be explicit in both its delineation of policy and its reliance upon deputy factfinding.

Another consideration arising from the court's holding is the possibility that deputy commissioners may manipulate the credibility distinction to avoid reversal or provide unfair advantage to one of the parties. Also, attorneys on both sides might vigorously argue demeanor credibility issues, real or imagined, in hopes of illiciting an opinion that the full Commission is unlikely to disturb. After all, it is very rare for the Commission to recall witnesses in order to make its own credibility determinations.²⁵

V. CONCLUSION

In recognizing the difficulties inherent in reviewing "another person's conclusion from evidence that has disappeared,"²⁶ the court of appeals has chosen to allow the Workers Compensation Commission to determine the amount of deference that should be given to deputy commissioner factfinding on the basis of the *type* of credibility mentioned in the deputy's opinion. Certainly some standard is necessary to ensure that the Commission does not arbitrarily disregard the deputy's observations. It seems, however, that the credibility distinction utilized by the court and the Commission places too much emphasis on the slippery concept of

24. See STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 209 (2d ed. 1985) (explaining that the federal Administrative Procedure Act created the office of hearing examiner in part to guard against agency commissioner bias).

25. Telephone interview with Susan Smith, legal intern with the Virginia Workers Compensation Commission (Nov. 15, 1992). See also THE VIRGINIA WORKERS COMPENSATION ACT ANNOTATED 232 (1991) (Rule 2C of the Virginia Worker's Compensation Commission):

No new evidence may be introduced by a party at the time of Review except on agreement of the parties. Any petition for reopening of the case and taking of additional testimony *will only be favorably acted upon by the Full Commission when it appears to the Commission that such course is absolutely necessary and advisable* and also when the party requesting the same is able to conform to the rules prevailing in the courts of the State for the introduction of after-discovered evidence.

Id. (emphasis added).

26. NLRB v. Universal Camera Corp. (I), 179 F.2d 749, 753 (1950) (referring to the demeanor and conduct of witnesses that was only observed by the hearing officer).

credibility, and too little emphasis on the actual objectives of commission decisions.

Nicole Rouner Beyer