

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301857

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| BRENDA K. RUTHERFORD, EMPLOYEE                     | CLAIMANT   |
| MID-DELTA COMMUNITY<br>SERVICES, INC., EMPLOYER    | RESPONDENT |
| AIG CLAIM SERVICES, INC.,<br>INSURANCE CARRIER/TPA | RESPONDENT |

OPINION FILED JUNE 8, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on May 5, 2005, in Forrest City, St. Francis County, Arkansas.

Claimant represented by Mr. Jesse B. Daggett, II, Attorney-at-Law, Marianna, Arkansas.

Respondents represented by Mr. Frank B. Newell, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted May 5, 2005, to determine whether the claimant sustained a compensable injury arising out of and during the course of her employment with Mid-Delta Community Services, Inc.

A prehearing conference was conducted in this claim on January 26, 2005, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order, subject to an additional stipulation concerning the applicable compensation rates. A copy of the Prehearing Order was introduced without objection as "Commission's Exhibit 1."

It was stipulated that the employment relationship existed between the

parties at all relevant times, including June 13, 2002; that the claimant was involved in an accident on said date when a vehicle she was driving was struck by a train as she was crossing railroad tracks, resulting in significant injuries, and that respondents had controverted the claim in its entirety. At the hearing, the parties agreed that if the claim was held compensable, claimant's average weekly wage was \$289.00, which would entitle her to compensation rates of \$193.00 per week for temporary total disability and \$154.00 per week for permanent partial disability.

By agreement of the parties, the primary issue presented for determination concerned compensability. By agreement of the parties, the extent of claimant's injuries, as well as claimant's entitlement to indemnity benefits, were specifically reserved.

Claimant contended, in summary, that she sustained an injury arising out of and during the course of her employment with Mid-Delta Transit as the result of a specific incident identifiable in time and place of occurrence on June 13, 2002; and that the respondents should be held responsible for all outstanding hospital, medical, and related expenses, together with continued, reasonably necessary medical treatment. Although the claimant maintained that she was totally disabled as the result of the injuries from the date of the accident and continuing through an undetermined date, which the claimant maintained had not been ascertained because respondents had failed and/or refused to pay medical and related expenses, and that she was permanently, totally disabled as the result of the

immediate claim, together with her pre-existing disabilities, the parties specifically reserved the right to join the Second Injury Fund, as well as the Permanent Total Disability Trust Fund, pending a determination on compensability. As previously noted, the parties agreed to reserve any issues related to the extent of claimant's injuries, as well as her entitlement to any disability benefits.

The respondents contended that the claimant did not sustain injuries arising out of and during the course of her employment, while maintaining that the claimant's accident and injury were the result of a personal errand, and that the claimant was not performing employment services when the accident occurred.

The claimant testified in her own behalf. Dejuan Locke and Juanita Stewart were called as witnesses by the respondents. The record is composed solely of the transcript of the May 5, 2005, hearing containing numerous exhibits, including a seventy (70) page amended packet of documentary evidence submitted by the respondents as "Exhibit A," together with a deposition taken by respondents on July 2, 2003, which was introduced over respondents' objection as "Claimant's Exhibit 1" and retained in the Commission file in bound form and which will be discussed further below. Subsequent to the hearing, respondents submitted an unsolicited, post-hearing brief on whether the deposition of Laverne Lawless should be considered as evidence. It should further be noted that respondents' packet of documentary evidence included an undated and unverified, handwritten statement from one Marie Curry which was added to the original, sixty-nine (69) page packet

of documents submitted, and to which claimant's counsel did not object. This is pointed out merely to correct any possible confusion announced at the hearing that "Respondent's Exhibit A" consisted of pages 1 through 69. (Tr.6)

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that her accident and resulting injury on June 13, 2002, arose out of and during the course of her employment with Mid-Delta Community Services, Inc.
4. A preponderance of the evidence does not support respondents' assertion that the claimant's accident and injury was the result of a personal errand.
5. Respondents are responsible for all outstanding hospital, medical, and related expenses as the result of claimant's compensable injury, and respondents remain responsible for continued, reasonably necessary medical treatment.

6. The extent of claimant's injuries, as well as claimant's entitlement to appropriate indemnity benefits have been specifically reserved.

#### DISCUSSION

This is an extremely difficult claim to adjudicate. The reason, in part, is because the claimant has very little recollection of the events surrounding her admitted accident and injury. As reflected by the stipulations, the claimant was involved in an accident on June 13, 2002. On that day, while driving a van owned by the respondent, she was struck by a train while crossing some railroad tracks in Forrest City, Arkansas. The claimant has maintained, at all times, that she was dispatched by her employer to Forrest City on June 13, 2002, and that the accident arose out of and during the course of her employment. Respondents deny that they dispatched the claimant to Forrest City on the date of the injury. It maintains that the claimant's accident occurred while she was taking a personal errand. The claimant's case, in part, depends upon circumstantial evidence which, admittedly, I found to be extremely compelling and which will be set out further below. In addition, the claimant's corroborating witness, Laverne Lawless, a friend and neighbor of the claimant, died prior to the hearing in this matter. The claimant offered the testimony of Ms. Lawless by deposition to which respondents strenuously objected, maintaining that the deposition was a discovery deposition and that the respondents did not have the opportunity to cross-examine the witness and that the testimony was hearsay. The deposition was received as a proffer. For

reasons set out further below, I do not believe exclusion of the deposition is warranted. In my opinion, respondents offered no credible evidence that the claimant was on a personal errand when the accident occurred. Admittedly, the record contains various inconsistencies and contradictions. The claimant related the inconsistencies to a loss of memory which clouded her recollection of the events which preceded the traumatic accident, as well as her course of conduct subsequent to the accident. Based upon my observations of the claimant's character and demeanor, I am persuaded that her memory loss is real rather than fictional, which is understandable based upon the nature of the accident. Unfortunately, no medical evidence was introduced by the parties related to either the claimant's physical or mental difficulties, which was, in part, because respondents controverted the claim in its entirety preventing the medical evidence from being fully or properly developed.

The claimant, Brenda K. Rutherford, began working for the respondent on or about March, 1999. The claimant was hired as a van driver. Her duties required her to pick up various clients or patients that had contracted with the respondent for personal transportation. The record reflects that the claimant had certain regular, scheduled clients. In addition, respondents also had weekly and daily additional scheduling. Finally, the record reflects that the respondents also received non-emergency calls for transportation, usually by a Medicaid eligible person requesting last minute transportation, at which point it would contact one of the drivers to cover

these “pop-up” type trips.

The claimant asserted that she received a call from one of the various dispatchers for respondent on June 13, 2002, to pickup a client in Forrest City, Arkansas. Again, the claimant could not remember who called her and directed her to go to Forrest City on the afternoon of June 13, 2002. In fact, as previously noted, and, based upon my observations, the claimant had little recollection of the circumstances and events either before or after the admitted accident. Although, in previous statements made to the employer, the claimant referenced that she went to Forrest City to pick-up one Marie Curry, it is my sincere belief that the only reason Marie Curry’s name was mentioned is because said client was a frequent user of the respondent’s transportation services in Forrest City. Ms. Curry, in an unsworn and undated statement, declared that she did not call for transportation on or for June 13, 2002. (Resp. Ex. A, p.70)

The most compelling evidence which supports the claimant’s claim is a receipt for gasoline charged on one of respondent’s credit cards in Forrest City, Arkansas, to fill-up the company van. (Resp. Ex. A, p.14)

A portion of the claimant’s testimony which I found illuminating is set out below:

BY MR. DAGGETT:

Q Did the van stay at your home all the time?

A I kept it most of the time there, yes, sir.

Q Okay. Now, on this particular day you were coming back from Forrest City –

A Yes, sir.

Q – when the accident occurred?

A Yes, sir.

Q Okay. Do you know why you went to Forrest City on that day?

A I was going to pick up somebody, or that's what – I don't remember, but that's what I was told, you know.

Q Okay, you remember you were told. Do you know why you went to Forrest City?

A I went to pick up somebody, but I don't really remember very much about it. It's all kindly a daze. I was just out of it.

Q Was a trip to Forrest City on your printed schedule for that day?

A No, sir.

Q Okay. How then or why then did you go to Forrest City? Who sent you to Forrest City?

A Okay, the best I can remember is what Ms. Laws – we went up – I don't even remember what time we went up to the café, but we went up there to eat. So when we come back, well, the phone was ringing and it was – I had it right there at the door. She was standing right there –

JUDGE GREENBAUM: I'm sorry, ma'am, I don't know who she is.

BY MR. DAGGETT:

Q Who is she? Who was with you?

A Ms. Laverne Lawson. She's dead. She died last year. She lived right next door to me.

Q So you and Ms. Laws come back from lunch, the phone is ringing, you answer the phone?

A Yes, sir.

Q And what did the person on the phone want you to do?

A They said go to Forrest City and pick up somebody, and I told them, Ms. Laws told me – said I told them I didn't want to go because I was tired.

MR. NEWELL: Judge, may I interrupt. I mean, if this witness is testifying about her recollection, that's fine, but if she's testifying about what somebody else told her about this transaction or the phone call for the truth of the matter stated, I'm going to object because it's hearsay.

THE CLAIMANT: Well, let me put it like this. I don't really remember it.

JUDGE GREENBAUM: You don't remember the phone call?

THE CLAIMANT: I don't really remember it. I just remember I took off and went and that's all. So all I can do is tell the truth about it.

BY MR. DAGGETT:

Q Did you ever use the van for your personal purposes?

A Now, like what do you mean? Now, I would do it like this. I would stop – if I was going to work, I would stop at the post office if it was on my way, or, you know, if I picked somebody else up and let them – do them a favor, like pick them up at the doctor, well, I'd stop and let him go in Wal-Mart, get their food, get their – you know, elderly people, they'd go in there and get their medicine and stuff like that and stop off at the grocery store and let them get something to eat.

Q Okay. So would that be about taking them home?

A Yeah, but it was never off my route.

Q Okay. Well, if you didn't have a patient to pick up in Forrest City, did you ever use the van to go to Forrest City to go to Wal-Mart for yourself when you didn't have –

A Oh, no, sir.

Q Okay. Was that against the company policy?

A Yes, sir.

Q And what would happen to you if you violated the company policy and you went to –

A Well, you would get fired, and I need my job too bad for that. So I wouldn't have just went to Forrest City to be going because I didn't have any money. I mean, I might have went in the store and looked around if I had been over there, but I wouldn't just make an extra trip just to go to Forrest City.

Q So do I understand your testimony to be that you actually have no recollection of a phone call sending you to Forrest City?

A No. No, sir.

Q And all you know is you had been to Forrest City and you came back. Do you remember being in Forrest City on that day?

A No, not really.

Q You got a ticket that day?

A Yes, sir.

Q Okay. We know you were in Forrest City.

A Yes, sir.

Q You bought gas over there that day?

A Yes, sir.

Q The company gas that you bought, if you were going to Forrest –

A I must have been supposed to be over there or I wouldn't have filled up my tank, put a tank of gas in the van over there, because I'd never fill up no place that I wasn't supposed to be.

Q Okay.

A I mean, I'm not smart, but I have enough sense, though, not to fill up a tank of gas over there.

Q Okay.

A You know, if you ain't supposed to be someplace.

Q All right. So we do know, though, we do know that there was a tank of gas bought over there?

A Yes, sir. (Tr.15-19)

The claimant worked for the employer herein for more than three (3) years. She was aware of company policy that vans are not to be used for personal errands. The claimant apparently had an exemplary record prior to June 13, 2002. I am persuaded that the claimant would not have gone to Forrest City for an unauthorized trip, and, at the same time, charge gasoline on a company credit card if she had not been dispatched to pick-up a client of the respondent.

In addition to the strong circumstantial evidence, the claimant offered the deposition testimony of Laverne Lawless. Ms. Lawless was a friend and neighbor of the claimant. Her deposition was taken by the respondents on July 2, 2003. Unfortunately, Ms. Lawless passed away prior to the hearing and was understandably not available to testify. However, her sworn testimony supports and corroborates the claimant's contention that she was dispatched to pick-up a client in Forrest City. Ms. Lawless testified that she overheard a conversation between the claimant and a representative for the employer. She recounted that she went to lunch with the claimant on June 13, 2002. She recalled that upon their return from lunch, the telephone was ringing and that after the claimant answered the phone, she overheard the claimant's portion of the conversation which she described

as follows:

A. She said, "Oh, ..." – well, I don't want to repeat some of the words she used, but she said, "Can't you get somebody else?" And she paused and she said, "Well," she said, "I don't feel like it," and she said, "Well, I guess, okay." She said, "I guess I can, then." Well, then, she hung the phone up, and I was still just standing in the doorway like. And she said, "Oh, 'B,' I have got to go to Forrest City." She said, "I've got a patient over there." And, now, I am assuming that it was one on dialysis, because, I mean, she usually always took a bunch of people to dialysis, but, now, I don't know that. (Cl. Ex. 1, p.9)

Ms. Lawless indicated that the claimant stated that the call came from Dejuan. She further indicated that it was apparent that the claimant did not want to go to Forrest City, but that no other driver was available at the time. She further stated that the claimant left for Forrest City between 1:30 to 2:00 p.m. on June 13, and that the next information she received concerning the claimant was that she had been involved in an accident.

Dejuan Locke is the transportation director for the employer. She was also the claimant's immediate supervisor. Ms. Locke testified that she did not dispatch the claimant to Forrest City on June 13, 2002. The record reflects that several respondent employees have the authority to dispatch transportation drivers. I found the corroborating evidence of Ms. Lawless to be credible. It is my belief that she identified Dejuan as the party that telephoned the claimant on June 13, because she was the claimant's immediate supervisor and a name either familiar to Ms. Lawless or discussed with Ms. Lawless following the accident. I do not find the conflict between Ms. Locke's allegation that she did not dispatch the claimant to Forrest City critical to this claim.

Subsequent to the hearing, respondents' attorney submitted an unsolicited post-hearing brief concerning whether the deposition of Laverne Lawless should be considered as evidence. Respondents maintain that admitting the deposition would permit hearsay testimony to come in without affording respondents the opportunity for cross-examination. I do not find respondents' arguments to be persuasive.

The use of depositions in court proceeding is governed by Rule 32 of the Arkansas Rules of Civil Procedure. Rule 32(a)(3) provides, in part:

"The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds:

(A) That the witness is dead...."

Respondents argue that the Courts look to the circumstances of each case in deciding whether the party seeking to introduce the deposition has waived his rights under Rule 32. It cites the case of *Goodwin vs. Harrison*, 300 Ark. 474, 485, 780 S.W.2d 518, 524 (1989) in which the Arkansas Supreme Court held that it is manifest that the parties "thought they were dealing with discovery depositions, not evidentiary ones,". The trial Court properly refused to permit the introduction into evidence of the deposition of a doctor who was more than one hundred (100) miles from the place of trial, thus falling under Rule 32(a)(3)(B).

First, I feel compelled to point out that unlike the *Goodwin* case, the witness in this claim is dead. The parties were not merely inconvenienced by the fact that a witness lived greater than one hundred (100) miles from the place of trial or hearing, or was out of state, which distinguishes this claim from the facts of that

case. Further, it must be noted that the deposition of Ms. Lawless was taken by the respondents which had an opportunity to cross-examine the witness. Finally, I feel compelled to further point out that although the Commission is not bound by the Rules of Civil Procedure, their guidance is instructive and supports the introduction of this valuable testimony.

As previously noted, Dejuan Locke was called as a witness for the respondents. She maintained that she did not dispatch the claimant to Forrest City on June 13, 2002. Much of her testimony centered around the employer's procedures in scheduling drivers to transport various clients. She pointed out that the employer's primary office was in Helena, Arkansas. There was also an office in Clarendon, Arkansas, which was where the claimant resides. She stated that normally driving schedules were faxed from the Helena office to the Clarendon office; however, also acknowledged that occasionally, unscheduled "pop-up type trips" had to be covered and that the employer would contact the Clarendon office and have them contact a local driver such as the claimant to cover such a pick-up. It was pointed out that the employer had between twenty (20) to thirty (30) vans on the road covering a four (4) county area. Although many of the drivers had predetermined routes, scheduled each day, Ms. Locke acknowledged that there were numerous "pop-ups" each day which she asserted would be recorded by the employer. She testified that a review of the employer's records failed to reflect that the claimant had been dispatched to respond to a daily "pop-up" on June 13, 2002.

Although Ms. Locke indicated that the employer always documented the “pop-ups,” she acknowledged that a clerical error could occur.

In addition to Ms. Locke, respondents brought several witnesses from the Helena office to testify at the hearing. In order to shorten the hearing, the following dialogue is provided:

JUDGE GREENBAUM: Any further witnesses on behalf of Respondents?

MR. NEWELL: It depends on whether we can stipulate that if I call the witnesses I’ve identified previously, they would all testify that they did not dispatch this lady. If we can, we don’t need to call them. If we can’t, I’m going to need to call all of them. I’m in the position of having to prove a negative, Judge. I’ve got everybody here from the Helena office here to testify.

JUDGE GREENBAUM: Read them into the record.

MR. NEWELL: Helen Barnes, Juanita Stewart, Annie Willis, Freddie Carter, those are the ones I plan to call, Judge.

JUDGE GREENBAUM: Can you stipulate, Mr. Daggett, that if these four witnesses were called, that their testimony would be that they did not dispatch the Claimant on June the 13<sup>th</sup> of ‘02?

MR. DAGGETT: Your Honor, I’m confident that he’s going to call them and that’s what they are going to say.

JUDGE GREENBAUM: Well, I didn’t – would you stipulate that if he calls them, that’s what they would say?

MR. DAGGETT: Yes, sir, I’ll stipulate that basically is what they will say. I won’t stipulate as to the accuracy of their system.

JUDGE GREENBAUM: I understand that, thank you. It’s been so stipulated.

MR. NEWELL: Maybe I can get one more stipulation that if called to testify, Juanita Stewart, one of the two people running the Clarendon office, Judge, would testify that this lady never came by and picked up an amended

schedule on June 13<sup>th</sup>.

MR. DAGGETT: Your Honor, if I understand the system, the system would be that once she was dispatched, they then would then print the amended schedule after the fact, and she would then go back and pick it up the following day. So she never had an opportunity to go back to pick up the amended schedule, so we won't stipulate.

MR. NEWELL: Okay.

MR. DAGGETT: I mean, we'll stipulate, I guess, that she never picked it up, but she never had an opportunity to go back. If an amended schedule had been issued, it would have been issued as a result of this pop-up.

MR. NEWELL: We're not claiming she went back, Judge. I mean, obviously, Ms. Rutherford told Ms. Locke that she had an amended schedule in front of her that she picked up that very day and that did not happen, and Juanita Stewart will say it didn't happen. I don't know what her theory of the case is, so whether she picked up the schedule telling her to go or she got this mysterious phone call from somebody she didn't know. If it's the phone call theory, then it's irrelevant whether the schedule was there, but I just want to anil all this down and Juanita Stewart will say that she didn't – wasn't dispatched with a schedule because she didn't pick one up that day.

MR. DAGGETT: Your Honor, I won't stipulate to that.

JUDGE GREENBAUM: Call her, and let's limit it to that issue, please.

Quite frankly, I don't understand the relevance of it since the Claimant's testimony was that she was responding to a telephone call, but let's go ahead and put her on. (Tr. 103-106)

Juanita Stewart was called as a witness by the respondents. As it turns out, her testimony was of little probative value because it was determined that Ms. Stewart was working in the Senior Program rather than the Transportation Program on June 13, 2002. Clearly, respondents failed to produce all employees of the respondent who were in a position to dispatch the claimant on June 13, 2002.

Respondents also introduced seventy (70) pages of documentary evidence, including multiple pages of telephone logs, the employee handbook and drivers' manual and other documents. Suffice it to say that I did not find any of the documentary evidence to be compelling. In this modern day of mass and varied telecommunications, it would be near impossible to document every telephone call that the claimant may have received on June 13, 2002.

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met her burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade vs. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After a thorough review of the entire record, without giving the benefit of the doubt to either party, I find that the claimant has shown, by a preponderance of the

credible evidence, that she sustained a compensable injury arising out of and during the course of her employment on June 13, 2002. The discovery of a charge ticket on the company credit card in Forrest City immediately prior to the accident is strong evidence that the claimant was performing employment services. The testimony of claimant's corroborating witness is compelling. Accordingly, I hereby make the following:

AWARD

Respondent, AIG Claim Services, Inc., is hereby directed and ordered to pay all outstanding hospital, medical, and related expenses as the result of claimant's June 13, 2002, compensable injury, and respondents remain responsible for continued, reasonably necessary medical treatment.

By agreement of both parties, all further issues, including the nature and extent of claimant's injuries, as well as claimant's entitlement to indemnity benefits, are specifically reserved.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge