

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602982

RITA MORT	CLAIMANT
BULLDOG DINER	RESPONDENT
FIRSTCOMP INS. CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 13, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondents represented by WILLIAM FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on September 14, 2006, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on June 28, 2006. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On February 1, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a compensation rate of \$237.00 for temporary total disability and \$178.00 for permanent partial disability.

By agreement of the parties the issues to be litigated and resolved at the forthcoming hearing were limited to the following:

1. Compensability of the lower back.
2. Medical expenses.
3. Temporary total disability from February 6, 2006, to a date yet to be determined.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that during and within the scope of her employment on February 1, 2006, the claimant was taking out trash as part of her job duties. During and within the scope of her employment, she sustained a low back injury. The claimant was earning an average weekly wage of \$131.00 entitling her to temporary total disability benefits of \$88.00 per week and permanent partial disability benefits of \$88.00 per week. The claimant obtained medical treatment. The claimant is entitled to temporary total disability benefits from February 6, 2006 to April 4, 2006. The claimant is entitled to the payment of medical expenses and attorney's fees on all controverted benefits.

In regard to the foregoing issues the respondent contends the claimant suffered an alleged injury on February 1, 2006. The claimant indicated to the respondent/employer that her problems were related to sleeping wrong on the couch. She further stated that she could not recall when her back problems began. The initial medical records indicate that the claimant denied any type of injury.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical records marked Claimant's Exhibit No. 1. The respondents submitted medical information marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

#### DISCUSSION

Roberta Slate testified that she had been working for the respondent for approximately four years as a waitress. Ms. Slate testified that she was acquainted with the claimant and had worked with her as a waitress for the respondent. Ms. Slate testified that after the diner closed at 9:00 in the evening, she and the other waitresses would help with cleanup. Ms. Slate testified that in February she would have worked with the claimant on Wednesday nights. Ms. Slate testified she does recall that the claimant did take the trash out on Wednesday night but does not recall her saying anything when she came back in from taking the trash out. Ms. Slate testified that she does not recall if she and the claimant worked the same shift the following day but does recall that they worked the same shift on Friday but does not remember the claimant exhibiting any limitations or making complaints. Ms. Slate was asked if she ever heard the claimant make a complaint after February 1 that she had hurt herself and Ms. Slate responded, "No."

On cross examination, Ms. Slate testified that after February 4 when the claimant did not come back to work she telephoned her to

check on what was going on because they were friends. Ms. Slate testified that when she asked what was wrong the claimant told her that she had slept wrong on the couch the night before and she felt like she had twisted her back while she was asleep. Ms. Slate was asked if from February 1 up until she called her after February 4 was she aware of the claimant having any back problems and Ms. Slate responded, "No, I wasn't." Ms. Slate testified that she was present when the claimant came back in from emptying the trash on February 1 and that the claimant did not make any mention of hurting herself nor did she hear the claimant tell anyone else that she hurt herself.

On redirect examination, Ms. Slate was asked questions concerning her telephone call to the claimant. Ms. Slate testified that she was not sure what date it was but did remember that when she asked the claimant what was wrong, she told her that she hurt her back the night before sleeping on the couch and assumed that it was the Friday night before she left work that Saturday.

Emily McLaughlan testified that she currently is unemployed. Ms. McLaughlan testified that she last worked for the respondent on April 26, 2006. Ms. McLaughlan testified that she worked the evening shift for the respondent on Wednesday, February 1. Ms. McLaughlan testified that she is aware that the claimant worked some evenings but could not say for certain if she worked the evening of February 1. Ms. McLaughlan testified that she was a cook for the respondent and, therefore, has contact with the waitresses when they would come to the window to pick up their

food. Ms. McLaughlan testified that at the end of the shift, she would be involved in the cleanup work in the kitchen area. Ms. McLaughlan testified that she was not sure if the claimant took the trash out that night and that she did not hear the claimant come in and made any statement that she hurt herself taking the trash out. Ms. McLaughlan testified that she worked the next two days on the evening shift and then she worked Saturday morning. This witness remembers that she heard the claimant say that her back was hurting and that she thought that she might have slept on it wrong. Ms. McLaughlan was asked what night the claimant was referring to and Ms. McLaughlan replied, "I guess on Friday night, because that was on a Saturday morning when she said that." Ms. McLaughlan testified that she did not see the claimant after Saturday morning until she returned to work before she quit on April 26. Ms. McLaughlan was asked what the claimant's condition was when she came back to work and Ms. McLaughlan testified that, "As far as I know, she was able to come back full time."

The claimant testified that she had finished the tenth grade at Mansfield High School and had worked at several different things throughout her life but worked as a waitress for the respondent. The claimant testified that she had worked for the respondent approximately three years prior to leaving their employment. The claimant testified that on February 1, 2006, she had been working the evening shift for the respondent and it was her duty to take out the trash at the closing of the establishment. The claimant testified that the trash was extremely heavy and when she swung it

up she felt something in her back. The claimant agreed that this occurred after closing at 9:00 around 9:15 or 9:30 at night. The claimant testified that the bag was filled with tea bags, coffee and coffee filters which contained water as well as their order sheets. The claimant remembered that the distance from the respondent's business to the dumpster was approximately eighty feet and she had to swing the bag in order to get it into the dumpster. The claimant testified that the minute she got the bag up and almost into the dumpster is when she felt her back pull and knew that something was not right. The claimant testified that the pain was just a little above her belt line slightly to the right but really in the middle. The claimant testified that when she went in she told Jim and Linda Wheeler, the owners of the respondent's business, that, "If I can't get out of bed in the morning, you'll know why." The claimant testified that neither Jim or Linda made any response. The claimant testified that Emily was in the doorway where the kitchen is and Bobby was about four feet away. The claimant was asked if Jim and Linda are the people she would report an injury to and she responded, "Yes." The claimant testified that she finished wiping down some of the counters and as she was leaving she stopped at the register where Linda was counting the money and she told Jim who was sitting in a chair what had happened to her and she wanted them to know that she wasn't joking around. The claimant remembers that again neither Linda or Jim made any response. The claimant testified that she went home and took it easy that evening. The claimant testified that she did not work

the next day and just kind of rested up. The claimant was asked if her back continued to hurt when she was at home that evening and the claimant responded, "Yeah, I'm sure---I know it did." The claimant was asked about the next day, February 2 and the claimant responded, "I don't---I am sure it did not feel good, but I did not do anything to make it hurt, I know that." The claimant testified that the next day she worked was Friday morning at the morning shift getting to work around fifteen till seven. The claimant testified that she was scheduled to work from 7:00 until 2:00 and she worked her entire shift. The claimant testified that her lower back was killing her by the time she left work. The claimant stated that she had low back pain and did not realize what was going on with it and that she really did not think that it had anything to do with her injury and was not sure where it was coming from. The claimant testified that on Friday when she left work she went by the pharmacy to get some medication because they were all getting what was going around. The claimant testified that when she got home she took some of her medication and sat down on the couch and fell asleep. The claimant testified that when she woke up she felt fine but when she got up her left side hurt and she had two sharp pains in her lower left side. The claimant testified that she thought that she must have laid funny and thought that the pain would go away also she could not stand up straight. The claimant testified that her husband cooked her supper and brought to her. The claimant testified that when she went to bed she was still hurting and still could not stand up straight. The claimant

testified that when she got up the next morning to get ready for work she felt very weak and it took her forever to get ready for work. The claimant testified that when she got to work she explained to Jim what was going on because her leg was trying to draw up and she could hardly stand on it and was limping. The claimant testified that she started working that Saturday morning and around 9:00 she told one of the other girls that her low back had been hurting for the last two days and she felt like if she bend over she was just going to break into. The claimant testified that Linda told her to go that they would take care of her tables. The claimant was asked if she told Linda wheeler that she was leaving because her back hurt and the claimant responded, "well, I don't know. I know I couldn't walk. My leg was killing me at that point and I don't know what was going on, to tell you the truth, at that point....I may not have told Linda. I remember making that statement to Boo---or Linda Polk." The claimant testified that she was having pain that was running all the way down to her knee and she could not stand up straight. The claimant was asked if she had made it clear to Ms. wheeler when she left that Saturday morning that she was leaving early because of her back and the claimant responded, "I don't know. I know I had told Jim that morning what was going on when I got there, but I don't know if I told Linda that or not." I would think so. I should have told her what was happening." The claimant testified that she went home and got into bed. The claimant testified that about 1:30 in the morning she got her daughter to take her to the hospital. The claimant testified

that at the hospital she answered a lot of questions for the nurse and then reported to the doctor everything as to how everything started. The claimant testified that she then saw Dr. Griffin, her family doctor, and agreed when shown Dr. Griffin's report that he had written no injury. The claimant testified that she told both doctors every thing which went on. The claimant testified that she again saw Dr. Griffin on February 13, 2006, and agrees that she reported to him that she injured her back by lifting a heavy trash bag into the dumpster on February 4, 2006. The claimant agreed that February 4 was Saturday the last day that she worked. The claimant testified that February 4 was when all the symptoms started coming out, that Friday into Saturday. The claimant agreed that it was the Wednesday night that she lifted the trash bag into the dumpster. The claimant testified that she kept all of her doctor's appointments as well as attended her scheduled physical therapy sessions. The claimant testified that she is currently being treated by a doctor and had an appointment for the 12<sup>th</sup> of the forthcoming month with Dr. Author Johnson. The claimant agreed that she underwent an MRI which she understood to show a protruded disc at L4-L5. The claimant testified that currently her symptoms are different from time to time, noting that a couple of days ago she had pain shooting down her left backside but to day she was having kind of a middle of her back pain down into her hip area, noting that that was probably from driving. The claimant testified that her pain has always been on the left side. The claimant testified that she did tell at the respondent's business that she

had slept wrong and caused her side to hurt. The claimant testified that after February 4 she quit working full time and when she did return to work for the respondent for approximately three weeks she only worked two nights a week. The claimant referred to a calendar which she kept to keep track of her tips and she agreed that she was off work from February 4 until April 6 due to her back.

The claimant testified that when she went back to work on April 6 which was a Thursday she worked from 3:00 till 9:00. The claimant testified that she continued to work two days a week for the next three weeks and that her last day to work for the respondent was April 22. The claimant testified that Linda Wheeler called her on Wednesday and told her that they would not be needing her anymore. The claimant testified that she has not worked since she was terminated and that she has applied for and received unemployment compensation. The claimant testified that she has looked for work close to her home and in fact found one job but due to her pending workers' compensation claim they would not hire her until this matter was settled. The claimant was asked if she was capable of working a full week as a waitress and she responded, "Yes, I would think so." The claimant testified that she was given a return to work slip with no restrictions from Dr. Griffin after she asked him to release her to work. The claimant testified that when she got her release to return to work with no restrictions, that is when she went back to work for the respondents. The claimant testified that she is currently being seen by Dr. Johnson.

The claimant testified that she also has been seen by Dr. Fisher for pain management.

On cross examination, the claimant testified that she still has some pain pills but tries not to take them, noting that it has been about a month since she took any pain medication. The claimant testified that when she worked for Pradco Lures she was off for twenty weeks due to carpal tunnel. The claimant agreed that during this period of time Pradco Lures' workers' compensation carrier paid her medical bills and time off as well as her impairment rating. The claimant testified that her husband's insurance has been paying on her medical bills. The claimant testified that no doctor has had her off work since she received the release from Dr. Griffin to return to work back in April. The claimant testified that she filed for unemployment benefits due to only being allowed to work part time, noting that since Ms. Wheeler would not let her come back to work she went ahead and filed for benefits. The claimant agreed that when she had her hearing for unemployment benefits she told the hearing officer that she was capable of regular full duty work. The claimant testified that on the night of February 1 Bobby Slate was standing about eight feet away from her when she came in and announced that she had hurt herself. The claimant testified that her voice carries and she was announcing it to them all. The claimant testified that Emily was not that far when she announced that she had hurt herself and she was looking right at Bobby at the time. The claimant testified that she knew that the two girls were closest to her and that Jim

and Linda Wheeler were on the other side of the wall when she announced that she had hurt herself. The claimant testified that when she worked on Friday she was sure that she moaned and groaned but that she knew for sure that she told Linda Polk before she left that her back was killing her. The claimant testified that she did not tell Ms. Wheeler that she had been working in the yard pulling weeds because she did not have any to pull. The claimant indicated that Ms. Slate and Ms. McLaughlan were correct in saying that she told them that she had slept wrong because that was all she thought it was. The claimant testified that when she was at the emergency room she said she had not done anything to hurt herself but she meant that day. The claimant testified that she does not remember being seen by a doctor in 1999 and in 2004 with reports of low back pain and shooting pain down both legs. The claimant testified that the problem she was having in December 2004 were not the same as what she is experiencing today. The claimant testified that it was no big deal it was like having a runny nose compared to what she has now. The claimant testified that when she called Linda Wheeler to report that she could not be at work that Monday, Ms. Wheeler did not offer to file a workers' comp claim for her nor did she ask for one to be filled out. The claimant testified that when she took a note to Ms. Wheeler that she could return to work with restrictions, Ms. Wheeler told her that she could not return to work. At that time the claimant testified that she told her that she would have to file for workers' comp then and Ms. Wheeler did not respond.

Jimmy Wheeler testified that he was one of the owner managers of the respondent business. Mr. Wheeler testified that on February 1, 2006, the claimant did not come in and notify him or tell him that she had hurt her back. Mr. Wheeler testified that he was not aware of the claimant telling anyone that day that she had hurt her back. Mr. Wheeler testified that he testified that he has had only one other employee be injured and in that incident he took the employee to the emergency room and was there eight hours. Mr. Wheeler testified that if the claimant had reported that she had injured herself, he would have told her to get medical help and to go to the hospital and he would have filled out an accident report like he did before. Mr. Wheeler testified that on the first and the third of February he did not notice any type of distinct difference in the way the claimant did her job but on Saturday morning when she came in she was real sluggish. Mr. Wheeler testified that the claimant is normally a real hyper type person and she came in real sluggish. Mr. Wheeler testified that on that Saturday morning she came in and said she had hurt her back and he asked her what happened. Mr. Wheeler testified that the claimant told him that she had pulled brush and weeds and stuff for her mother last night or either she had slept wrong on the couch. Mr. Wheeler testified that after that the claimant left the diner. Mr. Wheeler testified that the claimant did not call back to keep him posted as to her medical treatment nor did she call to fill out a workers' compensation claim.

On cross examination, Mr. Wheeler testified that his wife is the owner of the respondent business and she keeps the personnel files for the various employees.

Linda Polk testified that she is employed at the respondent's business as a waitress and has been working there for two years in November. Ms. Polk testified that on February 4 she recalls the claimant coming in limping. Ms. Polk testified that the claimant said that she was hurting saying that her hip was like locked up and that she had slept on the couch wrong. Ms. Polk was asked if at any time did she ever hear the claimant indicate to Mr. and Ms. Wheeler or anyone else that when had hurt herself at work and Ms. Polk responded, "No, I had never." Ms. Polk testified that she did not work on February 1.

On cross examination, Ms. Polk testified that she recalls that on that Saturday morning the claimant coming in limping and holding her left hip. Ms. Polk testified that the claimant left after the first morning breakfast rush. Ms. Polk testified that the claimant did not return to work for the respondent for a month and a half to two months after that Saturday in February. Ms. Polk testified that when the claimant returned working part time the claimant seemed fine.

On rebuttal the claimant called Linda Wheeler. Ms. Wheeler testified that she is the owner of the respondent business and keeps all the personnel records on the employees. Ms. Wheeler testified that on February 4, a Saturday, she came in around 9:00 and the claimant told her that her leg was bothering her and it

felt like it was asleep and she could not walk on it. Ms. Wheeler testified that she told the claimant to go on home and she and the other waitresses would take care of the business. Ms. Wheeler stated that she would let the claimant know about the next week's schedule. Ms. Wheeler testified that on February 10 she made a notation in the claimant's personnel file that the claimant had reported that she did not know how she got hurt. Ms. Wheeler testified that the claimant had called her on the phone and that she was trying to get a feel for when the claimant might be able to get back to work. Ms. Wheeler testified that the claimant returned to work part time in April 2006. Ms. Wheeler testified that later in April she called the claimant and terminated her employment because she had learned that the claimant was talking badly about the business, herself and her husband to the customers. Ms. Wheeler testified that the number of entries in the claimant's personnel file indicates that she was checking on the claimant's condition and when she might be able to return to work or that the claimant had called in to report her treatment progress. Ms. Wheeler testified that the first she learned that the claimant had filed a workers' compensation claim was when one of Dr. Johnson's employees called inquiring about a workers' compensation claim number. Ms. Wheeler testified that this was the first time anything had been said about a workers' compensation claim except for the time the claimant told her that if she did not let the claimant pick the hours she wanted to work she was going to file a workers' compensation claim or file for unemployment. Ms. Wheeler

testified that when the claimant brought her in a note releasing her to return to work with restrictions, she told the claimant that they did not have a job for her because each employee is expected to do their own work which involved carrying plates, sweeping the floor and helping with the cleaning chores. Ms. Wheeler testified that the first she learned of a workers' compensation claim definitely being filed by the claimant was probably when their attorney's office notified her.

On cross examination, Ms. Wheeler testified that on the night of February 1 when she and her husband were working that evening there was no injury reported by the claimant to them of throwing garbage or trash into a dumpster. Ms. Wheeler was asked, "Did she (the claimant) indicate in any way that evening that she was injured?" Ms. Wheeler responded, "No, not to me." Ms. Wheeler testified that to her knowledge the claimant did not say that to anyone that night. Ms. Wheeler was also asked if over the next couple of days before Saturday did the claimant say anything to her about her back or leg bothering her and Ms. Wheeler responded, "No."

The medical records set forth that the claimant was seen at the Sparks Regional Medical Center on February 5, 2006, at 1:44 a.m. The emergency room records set forth that the claimant was complaining of pain in her left leg and denies injury. The claimant was administered pain medications at the ER. During the examination, the claimant indicated that her problems started yesterday. The claimant was diagnosed with having lumbar

radiculopathy and was discharged with the instruction to take her medications as directed and to follow up with her family doctor. The claimant was seen by Dr. Gary Griffin on February 7, 2006, for her complaints of lower back pain, shooting down left leg and unable to bear weight. The doctor's notation appears to set forth that the claimant reports no injury and woke Friday off couch. X-rays taken of the claimant's low back were normal. Dr. Griffin saw the claimant February 10, 2006, where he notes that she has a diagnosis of lumbar strain with radiation in her left leg. On February 13, 2006, the claimant was seen at the Greenwood Physical Therapy Center and on the form which she filled out she indicated that it would be self pay and did not check the workers' comp box. The claimant also noted that she had pain in her leg and lower back and could not stand straight, noting that her date of injury was February 4, 2006. It is noted on the physical therapy center's forms that the claimant believes that her back injury was caused by lifting a heavy trash bag into a dumpster on February 4, 2006. Dr. Griffin writes on February 24, 2006, that the claimant was seen due to follow up after two weeks of physical therapy noting that she is doing better. After examination, Dr. Griffin returned the claimant to work with the restrictions of no mopping and no heavy lifting and an instruction to finish her physical therapy and to continue with her meds. On March 7, 2006, Dr. Griffin writes that the claimant continues to have lumbar pain. After examination, Dr. Griffin ordered and scheduled an MRI. The claimant underwent an MRI of her lumbar spine on March 10, 2006, which revealed a small

left posterolateral disc protrusion at L4-5 with associated neural foraminal narrowing. The finding on the MRI further notes that the remainder of the claimant's lumbar spaces were unremarkable and there is no abnormal osseous signal. On March 21, 2006, Dr. Griffin writes that he has seen the claimant for her follow up due to her MRI and after examination, the claimant was diagnosed with lumbar strain and was returned to work on April 3, 2006, with no restrictions. The claimant saw Dr. Griffin on June 8, 2006, for her continued complaints of low back pain. Problems with sleeping, numbness in her left leg and not going to the bathroom right. Dr. Griffin referred the claimant to pain management with Dr. Fisher as well as to Dr. Johnson for an evaluation.

In June 1995 the claimant was seen by Dr. Gregory Loyd with complaints of having bad headaches and shooting pains into both legs as well as low back pain and some urinary frequency and dysuria. After examination, the claimant was assessed with having febrile illness of undetermined etiology for which medications were prescribed. On December 8, 2004, the claimant was seen by Dr. White at the Greenwood Family Practice with complaints of left leg pain, noting that it was severe, noting that it starts in her thigh and goes down to the end of her leg. The claimant reports that this has been going off and on for one to two months. Dr. White prescribed medication and administered a steroid injection.

After a complete review of this case, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury while working for the respondent on

February 1, 2006. Although it is not questioned that the claimant's MRI does reveal a protrusion at the L4-L5 area, it is questioned if this particular problems occurred while she was working for the respondent. The testimony in this case is quite conflicting in that all parties agree that the claimant reported on February 4, a Saturday morning, that she slept wrong on the couch and was not able to stand straight following that evening. It is questioned, however, that the claimant reported an injury to her back on February 1, 2006, to the various employees of the respondent's business after she returned from taking out the trash. It is also noted that the claimant herself did not attribute her back problems to any job related event initially. Therefore, no benefits should be paid to this claimant for her back problems.

#### FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On February 1, 2006, the relationship of employee-employer-carrier existed between the parties.
3. The claimant is entitled to a compensation rate of \$237.00 for temporary total disability and \$178.00 for permanent partial disability.
4. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable back injury on February 1, 2006, while working for the respondent. See discussion above.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her low back while working for the respondent on February 1, 2006. Therefore, this claim should be denied in its entirety.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE