

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307580

TEENA E. McGRIFF, EMPLOYEE	CLAIMANT
ADDUS HEALTHCARE, INC., EMPLOYER	RESPONDENT
AMERICAN CASUALTY CO. OF READING, PENN., CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 28, 2005

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE JON B. GANN, Attorney at Law, Hot Springs, Arkansas.

Respondent represented by HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed November 12, 2004.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including May 28, 2003; the claimant's average weekly wage on that date was \$367.00; and the claim has been controverted in its entirety.

3. The preponderance of the evidence fails to show that the claimant suffered compensable injuries arising out of and in the course of her employment on or about May 28, 2003.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact

made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority is affirming and adopting an Administrative Law Judge's decision denying this claim. In my opinion, the Administrative Law Judge, and the Majority in adopting his findings, is misinterpreting the relevant medical records and is erroneously relying upon an

inherently unreliable witness. I, therefore, respectfully dissent from the Majority's opinion.

At the time of her alleged injury, the claimant was a home health nurse providing care to sick and disabled children. She testified that on May 28, 2003, she was attempting to assist a young child down a flight of stairs when the child unexpectedly lifted her feet, apparently trying to jump down the steps. The claimant, in an attempt to keep the child from falling caught her and held her up. Immediately after this, the claimant felt an onset of pain in her shoulder and back. Her testimony was that after this incident she and the little girl returned inside the house where the claimant discussed her problems with the child's mother. She waited until the end of her shift and went home. The following day, she advised her immediate supervisor.

The claimant first received medical treatment for her injury at the National Medical Center in Hot Springs, Arkansas on June 2, 2003. The emergency room report of that date contained several virtually illegible notations regarding the cause of the injury. The Majority interprets this writing to mean that the claimant had low back pain

radiating downward which had been going on for a period of weeks. However, after reviewing that notation, I am unable to discern clearly what the doctor was attempting to say. The handwriting is small, cramped, and seems to alternate between printing and cursive. I find this notation is subject to varying interpretations and should not be considered.

The claimant underwent a lumbar MRI on June 4, 2003. The radiologist report of that date noted some degenerative changes and diffuse bulging at L3-L4 which was associated with a small herniation. The report also noted the presence of generalized disc bulging at L4-L5 and L5-S1.

Eventually, the claimant was referred to Dr. Jim Moore, a Little Rock neurosurgeon. Dr. Moore saw the claimant on December 30, 2003. In a report of that date, Dr. Moore indicated that the claimant had given a history of a job related injury on May 28, 2003. In reviewing the claimant's symptoms, Dr. Moore noted the disc bulges but stated that he was not "comfortable with the diagnosis of a disc herniation." He also expressed his agreement with the conservative back treatment the claimant was receiving in

the form of facet injections, epidural steroid injections, and trigger blocks, and suggested that she obtain a TENS unit. He further discussed her shoulder problem and recommended that she undergo a shoulder x-ray and related diagnostic tests.

As a result of the shoulder complaints, she was eventually referred to Dr. Jay Lipke, an orthopedic surgeon in Little Rock, Arkansas. At Dr. Lipke's direction, the claimant underwent an MRI of her shoulder which demonstrated that she had a torn rotator cuff and mild degenerative joint disease. Initially, Dr. Lipke treated this condition with injections but this treatment was unsuccessful. On April 9, 2004, he performed an arthroscopic subacromial decompression to repair her torn rotator cuff.

The respondent controverted this claim in its entirety. They contend that the claimant's problems were either the result of a preexisting condition or were the result of some accident unrelated to her employment.

In denying this claim, the Majority is relying, to a great extent, on the testimony of Ms. Pam Goodnight, who identified herself as the respondent's scheduling

coordinator. Ms. Goodnight testified that she spoke with the claimant's husband on Friday, May 30th and he told her that both he and the claimant had hurt their backs while riding motorcycles on a recent vacation and had been forced to sleep on the floor of their motel room because of the resulting pain. She also testified that the claimant had called her on June 2, 2003, and told her about the claimant's emergency room visit, but did not mention a job related injury. The ALJ also cited Ms. Goodnight's testimony that the claimant had not advised her of a work related injury until June 20, 2003.

I believe the Majority's reliance upon Ms. Goodnight's testimony is misplaced. Ms. Goodnight initially testified that the claimant told her of her back injury on June 2, 2004 and, stated that she injured her back while working with a patient. This testimony had been elicited during the direct examination by the respondent's counsel. After Ms. Goodnight had testified about this conversation, respondent's attorney provided her with a letter dated June 23, 2003 (a copy of which was not made part of the record) apparently written by Ms. Goodnight.

After reviewing this letter, Ms. Goodnight testified that she had not been told by the claimant that she suffered a work related injury until June 20, 2003. However, under cross-examination, Ms. Goodnight reiterated her testimony about the June 2, conversation:

Q: And, you had indicated that there was some talk about a letter, but at one time you had said that one June 2, '03, she had told you that she had been injured, and you gave a description of "while she was with a patient?"

A: Right. I mean, I cannot remember exact dates.

Q: Okay. And it may not be that she said, "I have been injured on the job." But do you distinctly remember her saying something to you about, "I was injured with a patient"?

A: Yes, She specifically told me that, yes, sir.

On redirect examination, respondent's counsel asked Ms. Goodnight again about her conversations with the claimant and Ms. Goodnight unequivocally stated that she was not advised that the claimant suffered a job related injury until her conversation with the claimant on June 20, 2003.

After that question, the Administrative Law Judge asked Ms. Goodnight a few questions, one of which was whether she had spoken to the claimant prior to June 20, about her emergency room visit. In response, Ms. Goodnight indicated that she could not remember.

Obviously, Ms. Goodnight was somewhat confused. By my count, she changed her testimony five times in regard to when and what she was told by the claimant. While I cannot say what caused Ms. Goodnight's uncertainty, I do not believe her testimony is reliable enough to be given any weight.

I also note that it was solely from Ms. Goodnight's testimony that evidence was developed regarding a supposed injury the claimant received while on her vacation in late May 2003. The testimony from Ms. Goodnight on this point was based upon statements made to her by the claimant's husband. Since Ms. Goodnight's testimony was so obviously unreliable in regard to her conversation with the claimant, I do not see how it can be any more reliable as applied to statements made by the claimant's husband.

In addition to erroneously relying upon Ms. Goodnight, the Administrative Law Judge, whose Opinion the Majority is adopting inaccurately summarized the testimony of the claimant and her husband. In the Opinion, the ALJ stated they denied experiencing any back trouble during their vacation. However, Mr. McGriff, the claimant's husband, testified that his back had been hurting while on vacation and that he had slept on the floor. The claimant testified that she had complained about some back stiffness during the trip because she had been forced to do all of the driving and carrying of luggage because of her husband's back problem.

The Judge also cited the claimant's extensive medical history as a basis for denying her claim. It is true that the claimant has a long history of prior medical problems. The most serious of these prior injuries is a knee condition for which the claimant has previously undergone surgery, and has been extensively treated by Dr. Ross Bandy. The record contains a substantial amount of Dr. Bandy's progress notes which primarily deal with the claimant's knee problems. However, Dr. Bandy, who is a rheumatologist by

specialty, did note in progress reports prior to the claimant's injury that she had mild degenerative changes in her thoracic and lumbar spine (based upon x-rays) as well as fibromyalgia. Also, at various times in his medical reports, Dr. Bandy mentions that the claimant is complaining of back pain and stiffness. Dr. Bandy has also treated the claimant for degenerative disc disease in her cervical spine and the claimant has, in the past, complained of pain in her neck and upper back.

Dr. Bandy also discussed at times in his medical records injuries to the claimant's "tail bone" and quoted the claimant as suffering from lumbosacral discomfort since falling as a teenager. Dr. Bandy also states in a progress note of April 7, 2003 that the claimant was having some discomfort around her right shoulder.

In discussing her treatment record with Dr. Bandy, the claimant denied ever having any falls or injuries to her lower back. She also testified that the fibromyalgia condition did cause a certain amount of pain in her hip, upper arm, and upper back region. It was this condition that she had discussed with Dr. Bandy in April 2003.

The medical records after May 28, 2003 document substantially different symptoms than what the claimant had previously provided to Dr. Bandy. For Example, the claimant's later descriptions of her back problem include radiating pain into her legs as well as burning sensations. This is significantly different than the complaints made to Dr. Bandy of occasional muscle stiffness. Also, the claimant's rotator cuff tear was documented by Dr. Lipke in his MRI scan. Once again, the symptoms associated with this type of injury would be significantly different than the muscle stiffness described by the claimant to Dr. Bandy. Lastly, Dr. Lipke opined, in his report of June 1, 2004, that the claimant's injury was the result of her job related injury. Curiously, neither the Administrative Law Judge nor the Majority discuss or even mention this report.

This denial is the result of an incorrect analysis of the relevant testimony and medical records. Given Ms. Goodnight's inability to consistently testified to what she may, or may not, have been told, I simply do not believe that her testimony is entitled to any weight or credibility whatsoever. However, the Majority is accepting her hearsay

testimony as the basis for finding the claimant did not suffer a compensable injury, even though the occurrence of this injury is clearly supported by the medical evidence from Dr. Lipke and Dr. Moore. I find that the Administrative Law Judge's Opinion should be reversed and the claimant should be awarded benefits. For that reason, I respectfully dissent from the Majority's Opinion.

SHELBY W. TURNER, COMMISSIONER