

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301857

BRENDA K. RUTHERFORD,
EMPLOYEE

CLAIMANT

MID-DELTA COMMUNITY,
EMPLOYER

RESPONDENT

AIG CLAIM SERVICES, INC.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 5, 2005

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

Claimant represented by the HONORABLE JESSE B. DAGGETT,
II, Attorney at Law, Marianna, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed June 8, 2005. In said
order, the Administrative Law Judge made the following
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.

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

We therefore affirm the June 8, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the

opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairmam

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant has proven the compensability of her claim for injuries presumably having arisen out of and in the course of her employment with the respondent employer. A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that she was engaged in employment services at the time of her accident of June 13, 2002. Therefore, I find that the claimant has failed to establish that her injuries were work related, and this claim should be denied.

The nature of the claimant's accident is not in dispute. The claimant was driving a company van on the afternoon of June 13, 2002, when it was struck by a train at a railroad crossing in Forrest City. The claimant contends that she was *en route* to pick up a client, namely Ms. Marie Curry, from a Forrest City hospital when the incident occurred. The claimant further contends that she was under instructions from the respondent employer to pick Ms. Curry up from the Forrest City hospital. However, the record does not

contain sufficient evidence to substantiate the claimant's contention that she was authorized and directed by the respondent employer to be in Forrest City on company business at the time of her accident for this alleged purpose. Therefore, reasonable minds would be forced to use speculation and conjecture to reach such a conclusion.

The claimant, who had been employed with the respondent employer since March of 1999, was responsible for transporting clients who had contracted with the respondent employer for their personal transportation needs. According to the testimony of Ms. Dejuan Locke, who is the respondent employer's transportation director and was the claimant's supervisor, local drivers are furnished with computerized schedules through the main transit office in Helena, while out of area drivers receive their schedules via fax from the Helena office to their satellite office. The claimant's schedules, therefore, were faxed to the satellite office in Clarendon. Ms. Locke explained that occasional unscheduled or "pop up" appointments were called in to the Helena office, then faxed to the satellite offices in the form of schedule addendums. Dispatchers would then contact a driver to make the unscheduled run. Ms.

Locke testified, that to the best of her knowledge, the claimant was not scheduled to go to Forrest City on the afternoon in question, either by way of regular scheduling or by "pop-up" appointment. In contradiction to Ms. Locke's testimony, the claimant testified that she remembers having received instructions from someone at the Clarendon office directing her to Forrest City on a "pop-up" trip on the day of her accident. She further testified that she had just returned from lunch with a friend when she received this call. The claimant admitted, however, that her memory of the events of that day is, at best, sketchy. Therefore, she stated that she could not remember who made the call, or even having received the call. The claimant stated that she relied on information from others concerning the events of June 13, 2002. One individual in particular from whom the claimant stated that she ascertained information concerning certain events of June 13, 2004, was her next-door neighbor and friend, Ms. H. Laverne Lawless, now deceased.

The Administrative Law Judge relied heavily upon Ms. Lawless's deposition taken on July 2, 2003, in that it purportedly corroborates the claimant's testimony. However, a review of Ms. Lawless's deposition

reveals glaring inconsistencies between her recollection of events and the claimant's. For example, according to Ms. Lawless, upon arriving back at the claimant's home after lunch, the claimant received a telephone call from someone Ms. Lawless believed to be Dejuan Locke.

Concerning this call, Ms. Lawless testified as follows:

Q. And did she [the claimant] ever tell you who had called her?

A. Yes. She said that it was Dejuan. She said, "That's Dejuan."

This testimony clearly contradicts the claimant's testimony that she was uncertain who had called her on June 13, 2002, regarding her "pop up" client. In addition, Ms. Lawless's stated belief was that the claimant had transported clients for dialysis to either Searcy or Des Arc on the morning in question, when in actuality, she had transported two clients to the Loving Care adult daycare facility in Brinkley on the morning of June 13, 2002. Ms. Lawless admitted that she was undergoing cancer treatment at the time of her deposition, and that her memory of events was, therefore, somewhat unreliable. More specifically she stated:

I have been going through a lot of chemo and radiation and - - but, now, there is a lot of

things I do know, but there is a lot of things
I don't know, ...

The inconsistencies between statements made by Ms. Lawless and the claimant, plus Ms. Lawless's admissions concerning her poor health and correlating memory, show that Ms. Lawless was, at best, a poor historian. In addition, at the time of her deposition the parties were under the mistaken belief that Ms. Lawless would be available to testify at the hearing, as is evidenced by her being named as an intended witness on the claimant's December 14, 2004, prehearing filing. Therefore, it is apparent that Ms. Lawless's deposition was taken for discovery purposes, as opposed to being intended for evidentiary purposes, with the obvious expectation that her testimony would be fully developed at the hearing. Due to Ms. Lawless's untimely death, this, unfortunately, was not the case. Furthermore, Ms. Lawless's deposition is riddled with inadmissible hearsay. As Ms. Lawless is an unreliable historian, and her deposition contains inadmissible hearsay, her deposition, although generally admissible, should be given little weight.

Ms. Locke, on the other hand, offered a far more credible account of events pertaining to the claimant's accident on June 13, 2002. Ms. Locke

testified that she had not called the claimant on June 13th, nor dispatched her to Forrest City. Furthermore, Ms. Locke, referring to notes that she had taken during a unrecorded telephone conversation with the claimant a few days after she had returned home from the hospital, stated that when she asked the claimant how she knew that she was to go to Forrest City on the afternoon in question, the claimant responded that "Someone from the office" had called her. The claimant further informed Ms. Locke that she was unsure who had made the call.

When the claimant failed to pick up her two clients from Loving Care on the afternoon of June 13, 2002, Ms. Locke testified that she began making the appropriate telephone calls. She began by calling the claimant's company issued cell phone and her home phone. When all else failed, Ms. Locke stated that she phoned the Brinkley Police Department. Since the claimant's accident occurred in Forrest City, the Brinkley police were obviously unaware of what had happened, and therefore, unable to give Ms. Locke any information. Ms. Locke eventually learned of the claimant's accident through a friend of the claimant. Ms. Locke made no statements indicating that she had attempted to contact Forrest City authorities concerning the claimant's

whereabouts. This, of course, indicates that Ms. Locke had no idea that the claimant was in the Forrest City area at the time of her accident.

During their above mentioned conversation, the claimant told Ms. Locke that she had a schedule at her home that reflected her alleged appointment in Forrest City. However, the claimant failed to produce this schedule, and there is, otherwise, no record of this appointment having been scheduled. Moreover, although the Administrative Law Judge assigned little importance to telephone records from the respondent employer for the date and time in question, these records provide solid evidentiary proof that the respondent employer did not place a call to the claimant as she has claimed concerning her alleged "pop-up" appointment of June 13, 2002.

The claimant testified that she was normally scheduled for approximately four hours of driving per day, but that she was on-call at all times. She further stated that all client transportation was arranged through the Helena office, and that either someone from the Helena or the Clarendon office would contact her regarding changes in scheduling or to arrange for unscheduled client transportation. The claimant

testified that she had been issued a company cell phone over which she received dispatch calls, and that this number was unknown to the general public. The claimant acknowledged that transporting people without proper authorization was grounds for termination. Regarding her recollection of events on June 13, 2002, the claimant testified that she had no recollection of anything that happened that day, or the day before. She stated that her first memory of the events of June 13, 2002, was waking up in a Memphis hospital. The claimant agreed with statements she had made during her deposition of April 21, 2003, that she could not remember picking up her two elderly clients on the morning of June 13th, or transporting them to the Loving Care adult daycare facility. Nor could she recall having driven to Forrest City later that day or why she had done so. Finally, the claimant could not recall statements she had allegedly made to Ms. Locke several days after the accident, which indicated that she was making an unauthorized trip at the time that the accident occurred. More specifically, the claimant informed Ms. Locke that Marie Curry's boyfriend, "Charles", had telephoned her that day to come to Forrest City and pick Ms. Curry up from the hospital. As previously mentioned, the claimant had

informed Ms. Locke that she had a handwritten schedule at her home which proved that the trip to Forrest City had been authorized. However, the claimant could never produce that schedule to her employer.

Due to the claimant's extremely poor and inconsistent memory, and for other obvious reasons, the respondent employer's telephone records from the date in question are the strongest documentary evidence presented in this claim to establish whether or not the claimant's trip to Forrest City was authorized by the respondent employer. And according to those records, the claimant's trip was not authorized. The Administrative Law Judge surmised that a gas receipt from Forrest City dated June 13, 2002, which was found in the wrecked van by Ms. Locke and another employee, provided strong circumstantial evidence that the claimant was, in fact, performing employment services at the time of her accident. This receipt, however, merely proves that the claimant was in Forrest City; not that she was performing employment services. Furthermore, the Administrative Law Judge attached little importance to a handwritten note from Marie Curry stating that she had not phoned the claimant for transportation on June 13, 2002, or to the testimony of one witness and the

stipulation that four other witnesses, who are all employees at the Helena office, stood ready to testify that they had not dispatched the claimant to pick up Ms. Curry in Forrest City that day. This evidence is extremely relevant, however, in that it completely contradicts the claimant's testimony, who by her own admission, has little to no memory of June 13, 2002. Moreover, even if the claimant could prove that she was dispatched to Forrest City to pick up Ms. Curry on June 13, 2002, which I am convinced she was not, she has failed to prove that she was discharging employment services at the time of her accident. Therefore, I find that the claimant has failed to prove the compensability of her claim. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. McKINNEY, Commissioner