

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F408291 & F410666

DONNA BRADFORD, EMPLOYEE	CLAIMANT
PLAZA AT THE VILLAGE, EMPLOYER	RESPONDENT NO. 1
ST. PAUL TRAVELERS COMPANIES, INC., CARRIER	RESPONDENT NO. 1
FIRSTCOMP INSURANCE CO., CARRIER	RESPONDENT NO. 2

**OPINION FILED FEBRUARY 23, 2006**

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

Claimant represented by HONORABLE EDDIE WALKER, JR.,  
Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by HONORABLE ROBERT MONTGOMERY  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE WILLIAM C. FRYE,  
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 April 21, 2005.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 5, 2004, and August 17, 2004, the relationship of employee-employer-carrier existed between the parties.
3. Respondents No. 1 had coverage from August 6, 2003, to August 1, 2004.
4. Respondent No. 2 had coverage from August 6, 2004, to present.
5. The claimant is entitled to a weekly compensation rate of \$201.00 for temporary total disability and \$154.00 for permanent partial disability.
6. The claimant has failed to prove by a preponderance of the evidence that she sustained a work related injury on June 5, 2004, or a work related injury on August 17, 2004.

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

\_\_\_\_\_ I must respectfully dissent from the opinion of the Majority affirming and adopting the Administrative Law Judge's decision that the claimant has failed to prove by a preponderance of the evidence that she sustained a work related injury on June 5, 2004 and/or on August 17, 2004.

Based upon my de novo review of the testimony and related medical records, it is my opinion that the claimant has established that she suffered a compensable injury on June 5, 2004 and August 17, 2004. Therefore, in my opinion, the Administrative Law Judge's decision should be reversed.

The claimant has alleged that she suffered two compensable injuries while working at the respondent's restaurant. The first of these occurred on June 5, 2004. According to the claimant, who was employed as a waitress, she had spent the evening providing service to a wedding party. After the group had left, she was carrying trays of dishes back to the kitchen area when she felt a burning and

tingling pain in her neck, radiating into her arm. However, the claimant stated that she finished working her shift since the pain did not occur until she was nearly finished.

The injury described by the claimant occurred on a Saturday. The restaurant was closed on Sunday and, consequently, the claimant could not call the respondent to advise them of her injury until Monday, June 7, 2004. Also, on this date, the claimant sought medical treatment from Dr. Clay Berger, a Rogers Chiropractic physician. In his initial consultation note dated June 7, 2004, he stated that the claimant was complaining of severe spasms and neck pain that radiated into her right arm and fingers. Dr. Berger also noted, in regard to the claimant's initial onset of symptoms, "today, getting worse (flare up at work)." Also, in a letter dated January 26, 2005, to the claimant's attorney, Dr. Berger indicated that the claimant advised him that she had injured herself on the weekend while she was at work. Dr. Berger provided the claimant chiropractic treatment on June 7, 2004, and again on June 9, 2004. The claimant remained off work for the week of June 7, 2004.

The claimant testified that on June 7, 2004, the first day of business following her June 5, 2004 injury, she contacted Kathleen Nelson, the owner of the respondent employer. According to the claimant, she advised Ms. Nelson that she had injured her neck on the previous Saturday and would not be in to work that week.

The claimant returned to work on June 15, 2004, and resumed her duties as a waitress. While there was testimony from other witnesses that they assisted the claimant with any lifting that was involved, there does not appear to be any formal restrictions or limitations on the claimant's work activities at this time. On August 17, 2004, the claimant was once again working a large party which was at the restaurant, this time for lunch. The claimant stated that while carrying some dishes on a tray, she began feeling a severe shooting pain in her neck and into her arms. After advising some of her coworkers and the general manager, she left work and went directly to Dr. Berger's office. In Dr. Berger's initial consultation report dated August 17, 2004, the doctor notes that the claimant was complaining of

sharp, shooting neck pain, and that the onset of symptoms occurred that day at work while lifting a heavy tray.

\_\_\_\_\_Some time between June 5, 2004 and August 17, 2004, the respondent employer changed insurance carriers. On June 5, 2004, the insurance carrier was St. Paul Travelers Insurance Company (Travelers). On August 17, 2004, the insurance company was First Comp Insurance Company (First Comp). Travelers took the position that the claimant did not suffer a compensable injury on June 5, 2004, and has controverted her claim in its entirety. First Comp also contends that the claimant did not suffer a compensable injury at work on either June 5, 2004 or August 17, 2004, and, accordingly, controverts the claim as well. However, First Comp also argues that in the event the claimant did suffer an injury on June 5, 2004, whatever complaint she was suffering from on or after August 17, 2004, was the result of the original injury or was caused by some other event other than her employment.

\_\_\_\_\_An Administrative Law Judge conducted a hearing in regard to this claim. The Judge, noting that the claimant's

testimony was contradicted by some of her coworkers and Ms. Nelson, found that the claimant had not established her burden of proving a compensable injury on either June 5, 2004 or August 17, 2004. For that reason, the Judge denied and dismissed the claim. In denying this claim, the Judge cited testimony from the respondent employer and three of the claimant's coworkers to the effect that her neck injury of June 5, 2004 was the result of a motor vehicle accident. However, in my opinion, the testimony from these witnesses is not convincing.

\_\_\_\_\_The first of these witnesses was Tina Kendall. Ms. Kendall testified that she was also a waitress at the Plaza Restaurant but had been designated as the head server. When, Ms. Nelson, the owner, was not present, she is considered to be in charge. Ms. Kendall testified that, while it is possible that she had been working a large group with the claimant on June 5, 2004, she did not specifically remembering doing so. However, Ms. Kendall acknowledged that her employer hosted a number of large groups and it is possible that she simply did not remember this one. However,

she did state that she did not remember the claimant advising her that she had sustained a neck injury while carrying a tray of dishes on or about June 5, 2004, but that she did recall the claimant missing work at about that time but that the claimant had told her that she was missing work because of injuries sustained in a motor vehicle accident. Ms. Kendall is still an employee of the respondent.

\_\_\_\_\_The next witness to testify in this regard was Kathleen Nelson, the owner of the respondent employer. Ms. Nelson testified that the claimant told her that she was going to be off work for one week because of injuries in an automobile accident. Ms. Nelson said that she could not remember the exact date but that it was shortly after the claimant had gone to work for her. In regard to the August 17, 2004 accident, Ms. Nelson testified that she was working to clean up after a party in the dining room when one of the other employees stated that the claimant had left because of an injury.

The next witness to testify was Mallory Scott, a co-employee of the claimant. Ms. Scott also testified that

the claimant complained of a neck injury she sustained in a car accident in the first part of June. Also, according to Ms. Scott, the claimant's neck continued to bother her after she returned to work in June 2004.

The final witness to testify was Russell Williams who identified himself as the respondent's Chef. According to Mr. Williams, the claimant told him on August 17, 2004, that she had been involved in multiple automobile accidents and that she had injured her neck and was left with a large amount of medical bills. Mr. Williams also remains an employee of the respondent.

The respondent argues that these witnesses establish the claimant did not injure her neck at work, and that whatever problems she is suffering from her neck condition is the result of a non-job related automobile accident. However, in my opinion, these testimonies are not particularly convincing. In the first place, the claimant did have a series of automobile accidents in the late 1990's which resulted in serious injuries to her cervical spine. As a result of these injuries, she underwent surgery which

resulted in a multilevel cervical fusion in November 1998. While she continued to suffer from occasional neck pain and stiffness following this treatment, the last time she sought treatment prior to her injury of 2004, was in January 2001. In my opinion, the witnesses were recalling conversations they may have had with the claimant regarding these earlier traffic accidents. There is no dispute that these accidents did occur and they did cause the claimant to have recurring neck pain. However, even Ms. Nelson does not dispute that the claimant had reported a job related injury in August 2004.

Also, much of the information which the witnesses indicate they were told by the claimant is inconsistent and inaccurate. For example, Ms. Scott stated that the claimant told her she was seeing a chiropractor every one or two weeks and that the medical bills were mounting. In fact, the claimant only saw Dr. Berger on two occasions following her accident of June 5, 2004. Also, Mr. Williams related that the claimant had been injured in three automobile accidents in the course of a month and that these three accidents were

causing her problems. However, none of the other witnesses who also apparently have spoken with the claimant about these supposed automobile accidents remembered anything about multiple car wrecks. Further, Ms. Scott testified that the claimant told her, presumably in June 2004, that the chiropractor had diagnosed her as suffering from "a slipped disc." However, that is not correct and nowhere in Dr. Berger's treatment notes of June 7, 2004 or June 9, 2004, does he mention a discogenic injury or any diagnosis similar to "slipped discs."

Statements regarding injuries sustained in automobile accidents is directly controverted by what the claimant told her doctor in both June 2004 and August 2004. As related above, the claimant told Dr. Berger that her injury had occurred at work. It seems unlikely that the claimant would have told her doctor that she was injured at work but then tell her employer that she was injured in a car wreck. I also note that this hearing was conducted in February 2005. The conversations referred to by the witnesses all would have occurred seven to eight months

prior to that time. Also, the claimant had only been an employee at the restaurant for a few weeks prior to her injury in June 2004. Since she left her employment in August 2004, she would have only been acquainted with these individuals for a few weeks when these conversations occurred. It seems to be unlikely that any of the witnesses would have remembered any detailed conversations with the claimant given the limited time they knew her and the fact that they only knew her through her employment with the respondent. In my opinion, it is not surprising that the only parts of their conversations they can remember about the claimant was her descriptions of her past neck injuries which did result in extensive surgery.

It is my opinion that the claimant established that she suffered a compensable injury on June 5, 2004 and August 17, 2004. I believe that the contemporaneous statements made to her physician is far more compelling than the vague and inconsistent recollections made by the respondent's witnesses. Further, it is my opinion that Travelers is liable for the doctor visits to Dr. Berger on

June 7, 2004 and June 9, 2004. I further find that August 17, 2004 was a compensable aggravation and that First Comp is liable for all medical treatment after that date, as well as all temporary disability benefits from August 17, 2004 to a date yet to be determined. For the foregoing reasons, I must respectfully dissent from the Majority's opinion affirming and adopting the Administrative Law Judge's decision

---

SHELBY W. TURNER, Commissioner