

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307566

ALMA F. DUNN,
EMPLOYEE

CLAIMANT

LUDWIG, INC.,
EMPLOYER

RESPONDENT

AMERICAN HOME ASSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED March 19, 2007

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

Claimant represented by the HONORABLE SILAS H. BREWER,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE JARROD S.
PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed October 31, 2006. 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 of this claim.

2. The parties' stipulations outlined herein are reasonable and hereby accepted as fact.

3. The claimant has failed to prove, by a preponderance of the evidence, that her alleged shoulder injury was caused by a specific incident, identifiable by time and place of occurrence, which arose out of and in the course of her employment with Ludwig, Inc.

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.

The claimant alleges that she 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.

Therefore we affirm and adopt the October 31, 2006 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 Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's decision finding the claimant did not suffer a compensable injury in April 2003 and denying her temporary total benefits and payment of medical expenses related to that injury.

After a de novo review of the record, I find that the work incident described by the claimant is the only plausible explanation for her injury. The claimant gave credible testimony that on or around April 21, 2003 she suffered an injury to her right shoulder after pulling foam bricks from a conveyor belt. Claimant testified that a foam brick stuck to the conveyor belt. Claimant jerked the foam brick twice before she fell backwards, hitting a table and the concrete floor. Claimant testified that she immediately notified the

owner, Mark Ludwig. Witness and co-worker, LaTasha Johnson, corroborated claimant's testimony regarding how the injury occurred and was reported. Claimant gave credible testimony that she continued to work, despite the pain, until June 2003, at which time she sought medical treatment. Claimant was subsequently restricted from returning to work and did not come out of her healing period until March 2004. Claimant had not suffered any injuries prior to the accident, and her testimony supports that she sustained her shoulder injury at work. In fact, the claimant's injury was severe enough at the time of the accident, that she immediately reported the accident to her employer. Also, a co-worker corroborated the claimant's testimony of both the accident and the claimant notifying the employer. Claimant's injuries are consistent with Dr. Gati's medical testimony. The Majority's argument that the claimant's testimony is inconsistent simply does not pass muster. There is no possible way that the claimant could have injured her right arm by lifting a grandchild with her left arm or that the claimant injured herself simply walking through a doorway. The Majority's argument is simply not consistent with Dr. Gati's medical testimony. For these reasons, I respectfully dissent.

Claimant established proof by a preponderance of the evidence that she sustained a compensable injury which arose out of and in the course of employment. Claimant described the occurrence of her injury as follows, "the nail room had got hung and after it got hung you would have to jerk it to get it to go back, so I pulled it and it wouldn't go so I pulled it a little tighter and my arm, I just fell back and hit my arm on the table and then I hit the concrete floor." Claimant testified that she had to jerk it twice, and that it was on the second jerk that she fell backward and was injured. Claimant testified that the injury that she sustained was to her right shoulder, and she immediately notified her employer of the accident. Claimant also testified that she continued working for several weeks, even though she had pain in her right shoulder.

Dr. Kenneth G. Gati, a General Orthopaedic Surgeon who operated on the claimant, testified that the claimant had a 90 percent tear in her biceps tendon on her right arm. Dr. Gati also testified that "it could have been a small tear originally and then gradually have gotten worse." There has been no evidence that the claimant engaged in any activity which would make her condition worse, except for her continued employment. Therefore, it is clear that the jerking incident,

described by the claimant, is the only thing that could have caused the claimant's injuries.

The owner, Mark Ludwig, testified that on a normal day, Ludwig Inc. fills 700 cases with foam bricks, and there are 20 foam bricks per case. As such, workers, like the claimant, are performing a consistent and repetitive motion for forty hours per week. Therefore, Mark Ludwig's testimony reinforces Dr. Gati's and the claimant's testimony that her tear would have become more symptomatic over time.

The Majority argues that because the claimant did not seek medical treatment for almost two months after the April 2003 incident and that the claimant admitted that it was "no big deal" and "laughed it off," that her injury was not causally related to her employment. The Majority also argues that the claimant testified that she did not have any pain until three weeks after the accident.

However, the claimant is not required to become seriously injured in the initial accident. Claimant did not believe herself to be seriously injured at the time of the accident, thus her statement that it was "no big deal," and that she just "laughed it off" is consistent with her testimony that she did not know how badly she had been hurt at the time of the accident. Furthermore, her

condition was bad enough that she reported the incident, which illustrates that she was aware that she sustained an injury. Claimant is not required to know the full extent of her injuries on the date of the accident. Claimant continued to work despite the pain. Claimant testified that she had pain at the time of the accident, but she did not feel severe pain until three weeks after the accident. This is consistent with Dr. Gati's finding that it could have been a small tear which progressively got worse. Claimant's continuous and repetitious work made the injury gradually worse. As such, the claimant really was able to laugh off the initial injury and discount it as "no big deal" because she had no idea about the actual extent of her injury.

The Majority also cites inconsistencies with Claimant's story. The Majority argues(1) that the claimant injured her right shoulder when picking up a child and placing that child in a vehicle or (2) when the claimant walked through a doorway. In fact, when the claimant originally went to the hospital, she did mention to the hospital that she had lifted a grandchild into the car with her left arm. It is important to note that claimant stated that she lifted the child with her left arm, not her right arm. As such, she was not putting the majority

of the child's weight on her injured arm when it began to hurt the claimant.

The Majority also cites the claimant's inconsistent testimony that her arm "popped" while walking through a doorway in June 2003. Dr. Gati stated, "at her age, that would be uncommon." Dr. Gati testified that the claimant should be able to relate the level of pain that she was experiencing with a certain event.

The Majority argues that the claimant must have injured herself outside of work in order to have sustained such an injury, consistent with Dr. Gati's finding that the claimant is too young for her biceps tendon to tear by just walking through a door. However, Dr. Gati also testified that the tear in the claimant's shoulder "could have been a small tear originally and then gradually have gotten worse." As such, the claimant's injuries are consistent with Dr. Gati's medical findings. Claimant's biceps tendon would not have just spontaneously torn at the claimant's age, but the claimant's injury was sustained at work and continued to get worse until she was diagnosed with a 90 per cent tear. This explains the sudden pain that the claimant may have felt. The Majority only argues that the claimant must have injured herself outside of work in order to have sustained such an injury for someone her age, but they do not address Dr. Gati's

testimony that her condition might become worse over time. As such, the significant event was the claimant injuring herself at work, and the repetitive movement at work made the condition worse until the biceps tendon finally tore enough to cause the claimant to have substantial and continuous pain and eventually an operation.

Claimant's inconsistencies do not defeat the claimant's credibility. Claimant did not know the exact nature of her injury, nor is she required to understand the exact nature of her injury. In fact, the claimant had no idea about why she was feeling the pain that she was feeling. This is obvious in the claimant's testimony about walking through the doorway and suddenly hearing a popping noise. Claimant simply did not realize that the injury that she had sustained at work had become so bad through the course of her continuous work. As such, it was difficult for her to pinpoint the exact cause of her injury. Claimant's injury, however, is more consistent with her testimony of jerking the apparatus at work, falling, becoming injured, and continuing to work despite the pain in her shoulder.

In fact, I find the Majority's arguments are made of impermissible conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35

Ark. App. 32, 812 S.W.2d 692 (1991); Dena Construction Co. v. Herndon, 264 Ark 791, 575 S.W.2d 155 (1970); Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Witness, LaTasha Johnson, testified and corroborated the claimant's testimony about the incident. Johnson was working along side claimant at the time of the incident and witnessed the claimant jerking on the apparatus and falling back to the concrete floor. Johnson testified that the claimant often complained of pain after the incident occurred. Even if the Majority does not find the claimant's testimony credible, Johnson corroborated the claimant's testimony, and Johnson, an uninterested party, had nothing to gain from her testimony.

In contrast, Respondent had every reason to deny the occurrence. In fact, it was notable that Ludwig failed to testify regarding the incident. Respondent was notified of the accident, but did nothing and did not have the claimant fill out the proper worker's compensation form. Respondent knows that he was wrong in doing so, and as such, he had more reason to lie to the Commission. Respondent provided no witnesses of the accident or the notice, which would corroborate his story. As such, the claimant's testimony, in conjunction with Johnson's corroborating testimony and Dr. Gati's medical testimony,

should be preferred over any inference that the claimant's statements were inconsistent.

The Majority argues that the claimant must have injured herself outside of work in order to have sustained such an injury for someone her age. However, they apparently fail to acknowledge that the claimant's accident did occur or the possibility that her condition simply became worse over time. The Majority does not address the gradual onset that Dr. Gati testified could occur or the corroborating testimony of Johnson. The Commission may not arbitrarily disregard any witness's testimony. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). The Majority only addresses the claimant's inconsistencies. The Majority completely disregards Johnson's corroborating testimony, and only relies on the Respondent's uncorroborated testimony. It is impermissible conjecture and speculation to now claim that one of the other incidences was the actual cause of the claimant's injury. It is clear that the claimant established proof by a preponderance of the evidence that she sustained an injury in April 2003 which arose out of and in the course of her employment.

It appears that the Majority did not address the issue of notice, but did conclude that the claimant's failure to file a worker's compensation claim was a factor

in its finding that the claimant's injury did not arise during the course of her employment. I find this conclusion erroneous as the Majority fails to give weight to the testimony of Johnson.

Claimant testified that she told her employer, Mark Ludwig, about her fall while on break. Claimant testified that the accident occurred at "something until 2:00," and that the break began at 2:00. Claimant testified that her employer "fanned me off" so she went back to work despite the pain.

As previously noted, LaTasha Johnson, corroborated the claimant's testimony. Johnson testified that she overheard the claimant tell Mr. Ludwig that she had fallen, and Mr. Ludwig "laughed it off and went on." The evidence is proof that the claimant did in fact report her injury immediately after it occurred. Ludwig, in fact, violated company policy and did not complete an accident form or attempt to report the claimant's injury.

Evidently, the Majority once again chose to believe Respondent's testimony over the corroborating testimony of Johnson. It appears that the Majority arbitrarily and impermissibly disregarded Johnson's testimony, even though Johnson had absolutely no reason to perjure herself.

In conclusion, I find the claimant suffered from a compensable injury in April 2003. It is clear that the claimant established proof by a preponderance of the evidence that she sustained an injury in April 2003 which arose out of and in the course of her employment. The compensable injury was immediately reported, and Respondent simply failed to follow its own policies regarding reporting and documenting the injury in order to allow the claimant to file a worker's compensation claim. Claimant continued to work until it was impossible to carry on her employment duties in June 2003. Furthermore, the claimant should be entitled to receive temporary total disability benefits and payment of medical expenses related to the injury. Therefore, I find the Administrative Law Judge's decision should have been reversed by the Majority. For these reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner