

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610784

TERRI ROBERSON,
EMPLOYEE

CLAIMANT

PROCACCIANTI GROUP,
EMPLOYER

RESPONDENT

ZURICH AMERICAN INS. COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 27, 2008

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

Claimant appears Pro Se.

Respondents represented by the HONORABLE MICHAEL MAYTON,
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 May 3, 2007. 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. On August 28, 2006, the relationship of employee-employer-carrier existed between the parties.
3. The claimant earned \$7.25 per hour and worked forty hours per week.

4. The claimant is entitled to a weekly compensation rate of \$224.00 for temporary total disability and \$168.00 for permanent partial disability.

5. 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 August 28, 2006. See discussion above. (sic)

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 covered by the Act; however, the claimant has failed to establish the elements necessary to prove the compensable injury by a preponderance of the evidence.

Therefore we affirm and adopt the May 3, 2007 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

The majority is affirming and adopting an Administrative Law Judge's decision denying this claim. After a de novo review of the record, I find that the majority has not correctly evaluated the testimony presented in this case and has, therefore, reached the wrong result. Therefore, I must respectfully dissent from the majority Opinion.

The claimant testified that she was employed as a housekeeping inspector at the respondent's hotel on or about August 28, 2006, when she injured her lower back in a lifting incident. While the respondent agrees that the claimant was so employed, they dispute almost every other part of her testimony. They also deny that the claimant ever advised them that she suffered a job-

related injury to her back until they received copies of the claim for benefits filed by her attorney.

The claimant testified that, on the date of her injury, she was assisting another employee, Peggy Loman, in cleaning rooms on the 9th floor of the hotel and installing new ironing boards. The claimant testified that the ironing boards came in a container holding four to five ironing boards. She stated that she was using a cart to move them up and down the hall to the rooms in which they were being installed. After she removed one of the boxes of ironing boards from the cart, and while removing an ironing board from it, she felt a "pop" in her back. She also testified that she felt an intense pain which forced her to stop working. The claimant testified that after this incident, Ms. Loman helped her to a chair, where the claimant sat for a few minutes. According to the claimant's testimony, she then went downstairs in the hotel to get a drink of water and take some Ibuprofen. She also stated that, at that time, she told Donna Goff, who is also an inspector, that she injured her back. She testified that she later told the hotel's General Manager that she had injured her back and needed to see a doctor. Later,

she stated she advised her immediate supervisor, Lisa Fimpel, of her back injury, as well.

At the hearing, Ms. Goff, Ms. Fimpel, and Sharon Grouber, the respondent employer's Resources Manager, all testified. Each of them testified that they spoke with the claimant at some point following her claim and were aware that she was missing work because of a back problem. However, all of them denied that she had ever told them that she had injured her back at work. In fact, Ms. Goff testified that she frequently drove the claimant to work. She stated that she had previously observed bruises on the claimant from an allegedly abusive boyfriend. Ms. Goff further stated that the claimant showed her a bruise on her back allegedly caused by her boyfriend on the date of her supposedly compensable injury.

However, the claimant's testimony was substantially corroborated by that of Peggy Loman. Ms. Loman's testimony was by deposition and was introduced after the hearing. Ms. Loman testified that she and the claimant were installing the ironing boards and cleaning the rooms on the 9th floor of the respondent's hotel. She stated that she specifically recalled the claimant attempting to remove ironing boards from a box when she

heard the claimant cry out in pain. Ms. Loman went on to state that she assisted the claimant into a recliner in the hotel room where she rested for, according to Ms. Loman, approximately 30 minutes.

The medical record establishes that the claimant left her place of employment to go to the emergency room at Sparks Hospital. The treatment note from that emergency room visit, dated August 28, shows that the claimant underwent triage at the hospital at 3:23 PM. A handwritten note on the treatment note states: "33 year old, white female, complains back pain, felt pop in low back at work."

The claimant later underwent an MRI of her lumbar spine. The radiology report regarding this MRI is dated September 5, 2006, about a week following her job-related injury. It states that she had a focal right posterolateral disc herniation at T11-T12 and a moderate central posterior disc herniation at L4-L5 and at L5-S1.

The majority, in affirming and adopting the Administrative Law Judge's Opinion, is apparently finding that the claimant's testimony, even though corroborated by that of Ms. Loman and contemporaneous medical records, was insufficient to establish the

occurrence of a compensable injury. I disagree. The Administrative Law Judge's Opinion, which the majority has adopted, notes that there is a considerable variance in the testimony and essentially concludes that this variance is enough to prevent the claimant from meeting her burden of proof. However, it is the Commission's duty to weigh testimony and make findings of fact based upon our evaluation of its credibility. Merely because there is some divergence in the testimony of the respondent's witnesses and the claimant is not sufficient reason to find that the claimant's testimony is not believable or cannot establish a compensable injury.

The claimant testified that she advised Ms. Goff, Ms. Fimpel, and Ms. Fimpel's immediate supervisor, that she had injured her back at work. Ms. Goff and Ms. Fimpel testified that, while the claimant told them she was having back problems, she did not tell them that she was hurt at work. I find that the testimony of Ms. Fimpel and Ms. Goff in this regard is not believable. It seems unlikely that, when an employee has been at work in a labor-intensive job such as housekeeping for several hours and suddenly reports that they have back pain so severe that they must leave work to go to the

emergency room, a coworker and the employee's immediate supervisor would be so incurious as to not inquire as to the cause of the back problems, or even to think that it might be job related. I also note that both Ms. Goff and Ms. Fimpel were still employed by the respondent employer at the time of the hearing and could be subject to sanctions if it was determined that they failed to follow through on a report of a job-related injury. For that reason, I find their testimony that the claimant failed to tell them of a job-related injury on August 28, 2006, to be less than credible.

I also find that the claimant's contemporaneous statement to the emergency room personnel that she had injured her back at work on the date of her alleged injury is significant. As this Commission has held on numerous occasions, these types of contemporaneous statements are key in determining credibility to be given to particular witnesses. I note that the respondent places considerable importance on a report from the Good Samaritan Clinic in Fort Smith, Arkansas, dated September 20, 2006, which contains a notation that the claimant's pain had begun on August 28, 2006, after lifting a heavy box at home. The claimant testified that this was an error on the part of

the intake person at the clinic and that she specifically told them that it happened at work.

I also note that the Good Samaritan statement is contradicted by the timeline of events established by the testimony of not only the claimant, but the respondent's witnesses and the emergency room notes from Sparks Hospital on the date of the injury. That is, the claimant arrived at work at 8:00 AM, performed her job for several hours before reporting back pain, and then went directly to the Sparks emergency room. The claimant simply did not have a chance to injure her back while lifting boxes at home. I find that the claimant's testimony is entirely correct and that the Good Samaritan Clinic notation about the back injury having happened at home is merely is a scrivener's error.

Furthermore, the MRI report of September 5, 2006, supports the claimant's contention that she sustained a compensable injury. The report does not show that the claimant had sustained any significant amount of degenerative disc disease in her spine, but it does show that she had a disc herniation at three different levels. Since the only abnormalities found by the MRI were the disc herniations, the findings strongly

suggest that the injury was caused by a traumatic injury and not any type of long term degenerative process. Also, it seems unlikely that, had the claimant suffered this type of injury before August 28, 2006, she could have reported to work and performed her normal housekeeping duties for several hours prior to the incident testified to by the claimant and Ms. Loman.

In conclusion, I find that the majority has incorrectly evaluated the evidence presented in this claim and that their decision is in error. I find that the claimant's testimony is credible and, when taken in conjunction with the medical records, is more than sufficient to establish the occurrence of a compensable injury.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner