1-16-2013

Clark v. Shari's Management Corp. Appellant's Brief Dckt. 40393

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, Appellant, v. SHARI'S MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORTATION, Surety, Defendants/Respondents.	)	Supreme Court No. 40393-2012 APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

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APPEAL FROM THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO
Chairman Thomas E. Limbaugh, Presiding

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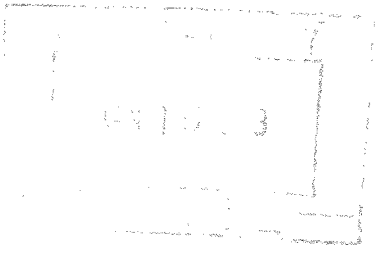

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STATEMENT OF THE CASE

1. Nature of the Case:

This is an appeal from an order by the Honorable LaDawn Marsters, Referee with the Idaho Industrial Commission concluding that the evidence was inadequate to establish Claimant's alleged back condition was caused by an accident arising out of and in the course of her employment.

The Background of this case can be taken partially from page 4 of the Referee's Findings of Fact, Conclusions of Law and Recommendation (hereinafter "Decision").

Claimant/Appellant, Dallas Clark, (hereinafter "Claimant") was an original hire (waitress) when Employer opened in September of 2008. An expert server, Claimant came to Employer with a great deal of experience. She very much liked serving, particularly the customer service aspect of her job. Claimant was soon placed on the graveyard shift, from 10:00 p.m. until 6:00 a.m., because she could manage the front of the "house" (part of the restaurant) on her own, which many servers were incapable of doing. In addition to her regular duties, Claimant also trained other servers.

Educationally, Claimant quit school sometime during her ninth grade year. She told Defendant she has a GED, but in her deposition stated she was working on it. Medically, prior to this alleged incident, she had no significant history of low back pain.

Claimant was 38 years of age when she began receiving medical treatment for low back symptoms, which she attributes to a workplace accident on or about November 24, 2008.

At this point in her Decision regarding the "Accident," - as Claimant pointed out in her Request for Reconsideration - the Referee made a number of clearly erroneous

factual findings, and went on to conclude that the Claimant did not prove that she suffered a compensable "accident" and was therefore not entitled to benefits.

The true, undisputed fact that should have been found by the Referee, is that on or about December 15, 2008, the Claimant notified the Defendant employer that she suffered a low back injury at work on November 24, 2008.[1] Even though the Surety admitted it had notice of the injury on December 15, 2008, it did not take a statement from the Claimant until May 6, 2009. [Claimant's Exhibit 11] In that statement, the Claimant described how her back hurt as she was standing above the salad bar talking to her manager, and "thought she was standing on it wrong" and then "later in the evening" lifting a silverware tray her back gave out. [Claimant's Exhibit 11, p. 4]

As discussed below, the Referee (erroneously) thought that the Claimant prepared and filed a FROI "after the surgical recommendation was made," on or about April 22, 2008, and decided that Claimant made up an accident at that time so work comp would cover her surgery.[2]

The clearly true, undisputed fact is that the employer *admitted* it had notice of the injury as of December 15, 2008, and it was the *employer, not the Claimant,* who prepared and filed a FROI in late April, 2009, *after* it found out this was possibly a surgical case. Later, the Surety decided to take a statement from the Claimant, and never interviewed any other employees about the case.

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[1] See Order Denying Reconsideration and Hearing, p. 4, third and fourth lines from the bottom of the page, and Defendants' Answer, p. 9 of the Agency Record on Appeal.

[2] See page 17, par. 38 of Referee's Decision, wherein she states, "Claimant alleges she sustained a workplace accident on November 24, 2008. However, the contemporaneously compiled documentation, through April 22, 2009, which includes Claimant's FROI, the daily manager's log and Claimant's medical records, together establish that Claimant did not attribute her low back pain to any particular event during this period."

Admittedly, over the years, Claimant's precise version of what happened the day of the accident changed. However, Claimant contends the differences are not material, and the evidence is clear she suffered a back injury at work on or about November 24, 2008.

There is no dispute that the Claimant "had no history of lumbar spine pathology until she sustained a herniated disc in her low back in late 2008." [Decision, p. 17, par. 37]

The Referee concluded, on page 20 of her Decision, that "there is credible evidence that work worsened Claimant's back pain over time...," but "No physician opined that Claimant incurred her lumbar injury while simply standing and talking at work, and Claimant has failed to prove that she was doing anything else at work that triggered her back pain or otherwise signaled a need for treatment."

Claimant contends that the evidence is clear, substantial, and competent that she suffered a compensable injury to her back at work waitressing on or about November 24, 2008.

The only issue at hearing on appeal is whether the Commission's finding that Claimant failed to prove she sustained an injury from an "accident" arising out of and in the course of her employment is supported by substantial and competent evidence.

2. Course of Proceedings and Disposition:

On November 23, 2009, Claimant filed a complaint with the IC. The matter went to hearing, which was held on June 1, 2011. The Referee's Decision was issued on March 7, 2012. Claimant filed a timely Request for Reconsideration, which was denied by the Commission August 28, 2012, and this appeal followed.

3. Statement of Facts:

As stated above, much of the Referee's "Background" in page 4 of her Decision, recited above, is not in dispute.

However, beginning at the bottom of page 4 of her Decision, in her Findings of Fact regarding the "Accident," the Referee clearly started off on the wrong foot making several factual errors, which, Claimant contends, took her and the Commission in a direction toward an erroneous conclusion.

First, in paragraph 4, on page 4 of her Decision, the Referee states,

> "Claimant completed a First Report of Injury on April 24, 2009, in which she reported an ache in her lower back, with onset on November 24, 2008, while "standing" and "making a salad." DE A, p. 2. More specifically, Claimant wrote that she was "standing there and back began hurting." *Id.*

As discussed below, both the handwritten First Report of Injury ("FROI") and the typewritten one were not prepared by Claimant but by defendants. The Referee was clearly wrong finding that Claimant completed a FROI on April 24, 2009. Claimant testified that she signed the blank forms, but it was the employer who completed them. [Hearing Transcript (HT) p. 78, l. 2, through p. 84, l. 14] To these facts there is no dispute. Both reports record that the date employer was first notified of the injury was on December 15, 2008. Furthermore "notice" was admitted in Defendants Answer and is not an issue in this case. (AGENCY RECORD, p. 9) In denying Claimant's Request for Reconsideration, the Commission, at page 17 of it's Order, found the "notice" issue to be "immaterial," stating "the mere fact that Claimant *told* people that she suffered an accident/injury does not mean that the accident and injury actually happened. (emphasis in original)

Claimant disagrees. It is in fact *very* important to note that, by their own admission, defendants had been given notice of this accident by Claimant on or before December 15, 2008. It changes the context of each medical record and statement after that date and impeaches many of the "facts" the Referee and Commission rely on in denying the claim.

Next, at the bottom of page 4, top of page 5 of her Decision, the Referee writes, as a result [of the surety's receipt of the FROI's prepared by *defendants*] by letter dated May 18, 2009, the Surety denied Claimant's claim, "because her injury was not due to a workplace accident." The Referee then writes, "Ms. Clark did not associate any injuries or trauma to the onset of her pain. DE K, p. 68." The plain reading of Claimant's statement of May 6, 2009, shows this is not true!

In her statement given to the Defendant Surety May 9, 2009, the Claimant, in no uncertain terms, told the surety that while she was working the graveyard shifts she was,

> "bringing silverware out from the kitchen and I went to put it up in the water station number two and its ... its about just barely above our drinking water and when I went to put that up there it just like a sharp pain in the same area and I drop...dropped and so I just laid it there set it down on the counter...". [Claimant's Exhibit 11, p. 4]

Clearly the Surety's denial was based on the information in the FROI's and not the Claimant's statement, since the Claimant obviously described a compensable accident and injury in her statement.

In fact, the Referee's quote comes directly from a letter from the Surety to their IME doctor, Dr. Hajjar, dated December 17, 2010, and misrepresents anything the Claimant actually said in her statement. [Defendant's Exhibit K, p. 68]

Thirdly, the Referee, at the top of page 5, par. 5 of her Decision, attempts to further discredit Claimant by falsely stating that although Claimant testified at hearing that the Surety paid some bills when "[t]here is no evidence in the record to support Claimant's assertion, which is contrary to Surety's position that it denied her claim."[3] (emphasis added) At the hearing the Claimant testified that the Surety paid at least part of Dr. Walker's bills;[4] they paid for an EMG study he ordered; they paid for an MRI and for an orthodic/prosthesis provided by Rocky Mountain Limb and Brace. [HT p. 74 line 19 to p. 76 line 23] Further, Claimant's Exhibit 19, pages 2 and 3 are part of the record, were not objected to, not rebutted, and corroborate Claimant's hearing testimony. Obviously the Surety paid for Dr. Walker's impairment rating, (Claimant's Exhibit 6, pp. 7-10) since they ordered it. The record is clear and unambiguous that defendants paid for some of Claimant's medical bills associated with her work-related accident and the Referee was in error concluding otherwise.[5]

Lastly, the Referee devotes an entire page of her Decision discrediting Claimant's testimony on "[T]he failure of the log book to record that Claimant's low back pain resulted from a workplace injury...". (Decision, p. 13, par.'s 26-28) This is not relevant and should not be used against the Claimant since, as discussed above, the Employer admitted that it had notice of the injury as of December 15, 2008.

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[3] This is also addressed in the Commission's Order Denying Reconsideration and Rehearing, p. 9, and footnote 2. Claimant agrees with the Commission that payment of a bill need not be deemed an admission, however, the Referee in her Decision uses it as one more (false) fact to find against the Claimant and wrongfully diminish her credibility.

[4] Obviously the Surety would also have paid Dr. Walker for the Impairment Rating they requested from him - Claimant's Exhibit 6, pp. 7-10.

[5] The Commission found that through "mistake or otherwise" the Surety did pay some medical expenses associated with Claimants claim and the Referee was again factually wrong. (Order Denying Reconsideration and Rehearing, p. 8, bottom line)

Nobody is perfect, but EVERYTHING the Referee refers to regarding the accident in the "Accident" portion of her "Findings of Fact" beginning on page 4 of her Decision is factually wrong. Not surprisingly, these mistakes lead the Referee to an erroneous conclusion that Claimant did not suffer a compensable accident on November 24, 2008.

These errors of fact lead the Referee to doubt the credibility of the Claimant's testimony and the obviously wrong belief that "Claimant did not attribute her low back pain to any particular event during this period".[6] [Decision, p. 17, par. 38] And the Referee came to the erroneous conclusion that "the Claimant did not file a FROI until after the surgical recommendation was made," [Decision, p. 14, par. 33] - obviously believing in the factually wrong theory that the Claimant made up the story of an accident after surgery was recommended. It was actually the Defendant Surety who took no action on the case until after surgery was recommended on April 22, 2009.

The Referee's theory is not true, is based on factually false findings, and led the Referee and the Commission to a clearly erroneous result.

ISSUE PRESENTED ON APPEAL

1. WHETHER OR NOT IT WAS ERROR FOR THE COMMISSION TO RULE THAT CLAIMANT FAILED TO PROVE THAT HER LOW BACK CONDITION WAS CAUSED BY AN ACCIDENT ARISING OUT OF AND IN THE COURE OF HER EMPLOYMENT.

ATTORNEY FEES ON APPEAL

Attorney's fees are requested per I.C. §72-313.

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[6] November 24, 2008, the date of the alleged injury, through April 22, 2009, the date she agreed with Dr. Marano to have surgery.

LEGAL SUMMARY

Workers' compensation law is to be liberally construed in favor of the injured worker, and any doubts are to be resolved in favor of the worker. *Dinius v. Loving Care and More Inc.* 133 Idaho 572, 573, 990 P.2d 738 (citations omitted). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996). The Act is to be construed broadly to bring as many workers within its coverage as possible and the Act should be construed liberally in order to effectuate its beneficent purposes. *Yount v. Boundary County*, 118 Idaho 307, 796 P.2d 516 (1990).

Accident: "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing injury. [I.C. §72-102(18)(b)]

When reviewing a decision by the Industrial Commission, the Court exercises free review over the Commission's conclusions of law, but will not disturb the Commission's factual findings if they are supported by substantial and competent evidence. I.C. §72-732; *Stewart v. Sun Valley Co.*, 140 Idaho 381, 384, 94 P.3d 686, 689 (2004). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Boise Orthopedic Clinic v. Idaho State Ins. Fund*, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996). The Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless they are clearly erroneous. *Excell Constr. Inc. v. State, Dep't of Labor*, 141 Idaho 688, 692, 116 P.3d 18, 22 (2005).

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ARGUMENT:

Claimant contends the Commission's Decision is not supported by substantial and competent evidence, and, when the Referee's clearly erroneous conclusions regarding the evidence are considered, the evidence shows the Claimant suffered a compensable accident and has reasonably located the time when, and place where, her accident occurred, causing her low back injury.

The Claimant proved with substantial and competent evidence that she suffered a compensable "accident" on November 24, 2008.

At paragraph 47 of her Decision, the Referee concluded that "Claimant has failed to adduce sufficient evidence to prove that her low back injury was caused by an accident arising out of and in the course of her employment."

In paragraphs 45 and 46 of the Decision, the Referee stated:

> "...the evidence, considered as a whole, fails to establish the occurrence of the claimed accident.
>
> "46. No physician opined that Claimant incurred her lumbar spine injury while simply standing and talking at work, and Claimant has failed to prove she was doing anything else at work that triggered her back pain or otherwise signaled a need for treatment. There is credible evidence that work worsened Claimant's back pain over time. However, this evidence is inadequate to establish Claimant's herniated disc is the result of a workplace accident." (emphasis added)

Apparently if "standing and talking" were considered by the Referee/Commission to constitute a compensable accident, the Commission might have ruled differently. Clearly Claimant injured her back. The objective evidence of the herniated disc is undisputed. This claim was not denied because the Referee found that Claimant did not injure her back at work on November 24, 2008, or that she injured it outside of work. It

was denied because the Referee found that Claimant did not "adduce sufficient evidence that her low back injury was *caused by an accident*" at work that day. (emphasis added)

The Referee agrees that waitressing "worsened" Claimant's back pain. There can be no reasonable dispute that while her back pain came on at work on November 24, 2008, and worsened during her shift, the Commission contends, to be compensable, there must be an "accident" causing the injury to this waitress.

This Court has long held that:

> "It is unnecessary that the claimant be engaged in some unusual work or that there be a slipping, falling or some sudden or violent accident preceding the injury before it is compensable. If the claimant be engaged in his ordinary, usual work and the strain of such labor becomes sufficient to overcome the resistance of claimant's body and causes an injury, such injury is compensable." *Harding v. Idaho Department Store*, 80 Idaho 156, 326 P.2d 992 (1958) citing *Lewis v. Department of Law Enforcement*, 79 Idaho 40, 311 P.2d 976.

In the case *Hazen v. General Store*, 111 Idaho 972, 729 P.2d 1035, dissenting Justice Huntley, at page 976, discussed the evolution of the interpretation of the statute that defines "accident" in the context of the workers compensation system in Idaho. He stated that:

> "The commission applied the same legal standard as that set forth in the Worker's Compensation Act (Act) from 1939 until 1971:
>
> "Accident," as used in this law, means an unexpected, undesigned, and unlooked for mishap, or untoward event, happening suddenly and connected with the industry in which it occurs, and which can be definitely located as to time when and place where it occurred, causing an injury, as defined in this law. I.C. §72-201 (1939-70)
>
> In 1971, the legislature substituted the word "reasonably" for the word "definitely" and omitted the word "suddenly."
>
> "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs,

and which can be reasonably located as to time when and place where it occurred, causing injury. [I.C. §72-102(14)(b)] (1971-83)

In substituting the word "reasonably" for the word "definitely" and omitting the word "suddenly," the legislature rejected the standard applied by the commission and adopted the standard urged by Hazen. The change in statutory language demonstrates legislative recognition of medical reality. Bones may break "suddenly" and completely, giving immediate notice of injury, thereby allowing the accident to be "definitely located as to time and place." On the other hand, more flexible internal tissues and organs may be incrementally damaged, not suddenly, but over a period of time, such as hours, days, or in some cases, weeks. The time and place of the accident may not be definitely locatable because sufficient damage has to occur before symptoms are triggered warranting medical attention, such as substantial or continuing pain."

"By way of illustration, a worker might be injured over the course of a few days. Symptoms might not arise for a few more days, and the need for medical attention might not become apparent for still another week or more. The injury causing event was not sudden and the lapse of time between the event and the need for medical attention may make it impossible to definitely locate the time and place of the event, due to the worker's failure of memory, for example. Nevertheless, proof of an "accident" is still possible if the time and place of the "untoward event" can be "reasonably located." I.C. §72-102(14(b). Proof of an "untoward event" depends on factors such as the seriousness and type of injury, presence of an unusual degree or type of stress, and the degree of connection between the stress and the injury."

In the Hazen case, which was a very, very closely decided case,[7] the Court found that Claimant:

- suffered an alleged "accident" in mid-May of 1983;[8]

- the pain continued for several weeks and she had several discussions with her employer but "never attributed the tiredness and the pain in her leg and back to her work, or any accident occurring during her work;[9]

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[7] Initially decided in Claimant's favor in a January, 1986 Majority Opinion 3-2, then reversed by Opinion dated October 21, 1986, 3-2.
[8] *Hazen v. General Store*, 111 Idaho 972, 973, 729 P.2d 1035, 1036 (1986)
[9] *Ibid.*

- the Claimant did not see a chiropractor until August of 1983, and told him that she "had no idea what the cause of the pain was";[10]

- Surgery was performed on August 29, 1983, and, "up to that time, claimant had never asserted that her medical problem was work related, or that it resulted from an accident which she had incurred during her employment.[11]

- Claimant did not ever file a Notice of Injury with the Industrial Commission.[12]

- Claimant filed an "application for hearing" on October 21, 1983, first alleging the "accident" occurred between July 9th and July 16th, 1983; and, in December of 1983, filed an amended application alleging her accident occurred "between May 13th and May 23."[13]

- Defendants submitted a deposition of an orthopedic surgeon, who testified that "there does not appear to be any specific incident which caused this lady to have a herniated disc and he attributed her injury to "gradual onset" over a long period of time.[14]

In that case, the Court upheld that the Commission's finding that claimant's condition was the result of "the aging process" and "not the result of her employment."[15] By a 3-2 vote, this Court found with the employer, that the Commission's decision was based on substantial, competent evidence. The dissents were vigorous.

This present case is similar, but very different to *Hazen*. They are similar in that both claimants' alleged a back injury, and contained medical records that do not

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[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.* at page 974, 1037

definitively express when the condition started or what caused it. However, in the present case, the Claimant:

- timely notified her employer of the accident;[16]

- in each of her statements or testimony, consistently testified that she injured her back at work, and there is no alternative explanation as to where she may have hurt it, or how;[17]

- and the defendants have no medical opinion and put on no evidence explaining what might have caused her back injury if it was not work related.[18]

- most of the medical opinions support Claimant's contention that she suffered a work-related injury, and (as discussed below regarding the opinions of Dr. Hajjar) the only adverse opinion does is admittedly weak and does not give any alternate theories of causation.

The Hazen case was closely decided. Claimant alleges the present case is not even close.

As discussed above, the Referee made numerous, obvious errors of fact leading to her erroneous Decision.

In paragraphs 37 and 38 of her Decision, the Referee stated:

> 37. "There is little doubt, based upon the medical evidence, that Claimant had no history of lumbar spine pathology until she sustained a

[16] See above discussion, p. 4.

[17] Claimant gave three versions regarding her "accident." The first was on May 6, 2009, when the Surety took her statement [Claimant's Exhibit 11] the second was her deposition taken on April 13, 2011 [Claimant's Exhibit 16] and the third at the hearing with the I.C. June 1, 2011. Although the Commission is critical of discrepancies in her versions of what happened, the Claimant was consistent in the gist of her testimony, i.e., that the pain came about on her night shift of November 24, 2008.

[18] At page 13 of her Decision, the Referee notes discrepancies in defense IME doctor, Dr. Michael V. Hajjar's, opinions, concluding, "Dr. Hajjar's opinion is not particularly persuasive on the issue of causation due to its weak foundation. It cannot be construed, however, to support Claimant's position." Of the four doctors who gave opinions regarding causation, Dr. Hajjar's is the only one adverse to Claimant's position, and, as mentioned above, he gives no alternative explanation to Claimant's version of the cause of her injury.

herniated disc in her low back in late 2008. The pivotal question is whether or not that herniated disc was the result of a workplace accident.

38. "Claimant alleges she sustained a workplace accident on November 24, 2008. However, the contemporaneously compiled documentation, through April 22, 2009, which includes Claimant's FROI, the daily manager's log and Claimant's medical records, together establish that Claimant did not attribute her low back pain to any particular event during this period."

We know that the "Claimant's FROI" was not prepared by Claimant and the manager's log is irrelevant, since the Referee was mistaken and did not consider the undisputed/admitted fact that Claimant gave notice of her injury to her employer on or about December 15, 2008.

As agreed by the Commission, the Referee was wrong when she concluded that the Claimant completed the FNOI herself only *after* she found out she needed surgery. Claimant did not complete the FNOI's in this case. The FNOI's were completed by the employer, and defendants expressly acknowledge notice of the injury was given to them on or before December 15, 2008.[19] This is 21 days after the accident. Though required by law to do so earlier, defendants waited until April 28, 2009, 134 days after receiving notice, to prepare and submit an FNOI to the Commission. The Defendant Surety waited until May 6, 2009, 142 days after receiving notice (nearly 5 months!) to investigate the accident and take a statement from the Claimant. As explained above, in that statement, the Claimant mentioned feeling pain while standing and talking with her supervisor, and also clearly described an increase in pain while attempting to put a bucket of silverware into the water station. The FNOI prepared by the employer (typewritten and included as

[19] Defendants' Exhibit K, p. 68, (in addition to misrepresenting to Dr. Hajjar that all Claimant said in her recorded statement was that her back started to hurt while "standing and talking to her supervisor" and leaves out any mention of lifting a bucket of silverware) includes the admission by adjuster Lynn Green, that, "[O]n 12/15/08 she [Claimant] *requested* a claim be filed under workers' comp.". (emphasis added)

Defendants' Exhibit B, p. 1) notes as a "cause of injury" to be a code 58, which is a "reaching" accident.

Since the Referee was of the opinion that the Claimant made up the story of the accident and completed a FNOI after she found out she needed surgery on April 22, 2009, she viewed as suspicious all of "Claimant's statements reflected in documents prepared after April 22, 2009.[20] In fact, the Referee even went on to state, in the same paragraph that "Even combined with the bulk of evidence in the record, they fail to rebut her earlier statements recorded in her FROI, her medical records, and the negative inference created by the absence of any notation in the daily manager's log linking Claimant's low back injury to her work." In other words, although the "the bulk of the evidence in the record" supports Claimant's case, it is not enough to "rebut" her earlier "statements" recorded in her FROI, that we now know was not even completed by the Claimant. We also know that any "absence of any notation in the manager's log" is not relevant because the employer admits notice as of December 15, 2008.

The only other evidence relied on by the Referee in coming to her Decision are Claimant's medical records and Claimant's own testimony, since the Defendants' called no witnesses.

The medical records relied on by the Referee and the Commission involve the following providers:

1. Orchard's Naturopathic Center (Claimant's Exhibit 2, pp. 1-5): Claimant was first seen there on December 11, 2008. On page 4 of said Exhibit, Dr. Crook attributed Claimant's back problems to her work.

[20] Referee's Decision, p. 19, par. 45.

2. Community Care (Claimant's Exhibit 3, pp. 1-4): Claimant was first seen at Community Care for sciatica on December 16, 2008. The notes indicate Claimant had been suffering from pain radiating down her left leg pain "for about three weeks." This is consistent with Claimant's testimony and is one day after her employer was given notice of the injury.

3. EIRMC (Claimant's Exhibit 4, pp. 1-6): Prior to being seen for her surgery, Claimant was seen at the Eastern Idaho Regional Medical Center (EIRMC) in Idaho Falls on December 19, 2008, for "back pain." On page 1, referred to by the Referee on page 5 of her Decision, the record indicates "onset several days ago." We know that Claimant had been to Community Care "several days ago" as the record there indicates and was referred to EIRMC by Dr. Brower at Community Care. But ignored by the Referee, is EIRMC's record regarding her x-rays taken on her December 19, 2008, visit. (Claimant's Exhibit 4, page 6) This record states, "ONE MONTH OF BACK PAIN." The EIRMC records are clearly unreliable (not competent) for the Commission to rely on to support its Decision and discredit the testimony of the Claimant.

4. Dr. Gary Walker, MD (Claimant's Exhibit 6, pp. 1-15): Dr. Walker's records clearly associate Claimant's back pain as being work related. Although in his initial record of December 29, 2008, he indicates an onset date of "early November," he notes that the pain is "associated with work." (Claimant's Exhibit 6, page 1) In the same Exhibit, page 9, Dr. Walker states in no uncertain terms his "Impression" that Claimant "had the onset of pain complaints on November 24, 2008." Despite the fact that an impairment rating was requested by the Defendant Surety, there is no basis in Dr. Walker's records to

support a decision adverse to Claimant. In fact, just the opposite is true. An honest reading of Dr. Walker's records clearly supports Claimant's alleged work-related injury.

5. Physical Therapy (Claimant's Exhibit 8, p.9): Consistent with Claimant's position, the physical therapist notes in her record of March 19, 2009, (Claimant's Exhibit 9, p. 9) that Claimant told her she had a "four-month history of pain into her left leg" and "the pain came on suddenly." This is consistent with a date of injury on or about November 24, 2008, and Claimant's statements. However, the physical therapist notes additionally state that the Claimant told her "she is unaware of any specific injury to cause her pain" and "... contributes this episode to being a server/bartender for many, many years catching up to her and not taking care of her body." This is a physical therapy record that could be construed against Claimant but can also be construed to infer the back pain does have a basis as being work related. In Claimant's opinion it clearly does not rise to the level of "substantial, competent evidence" to be used against Claimant to prove she did not suffer a compensable, work-related accident. This is especially true when considered in the context of the notice Claimant gave to her employer on December 15, 2008, that she did suffer a work-related accident on November 24, 2008, involving her back.

6. Dr. Stephen Marano, MD (Claimant's Exhibit 9, pp. 1-11): Dr. Marano's record of April 22, 2009, describes back and left leg pain at work "in early November." It goes on to state "she cannot associate any injuries or trauma to the onset of her pain. She said that it just kind of started out of the blue. She thought maybe it was due to standing funny." Although this does not prove Claimant's case as to causation, it hardly rises to the level of "substantial, competent evidence" disproving Claimant that she was not injured at work as the Commission contends. In fact, in her statement to the Surety of May 6, 2009, she

told the Surety much the same thing, i.e., she was just "standing on it wrong" before she had an incident of more serious pain at the salad bar the same evening.

Again, one must keep in mind that the Referee, when contemplating these statements, was of the incorrect understanding that the first time the Claimant claimed to have suffered a work-related injury was after this surgical consultation with Dr. Marano. In fact, she had notified her employer nearly 5 months before, on December 15, 2008, that she had injured her back at work.

That's it. Those are all the "medical records" relied on by the Commission in denying Claimant's claim.

These medical records do not provide substantial evidence for the Commission to deny this claim. On the other hand, they do in fact provide substantial, competent evidence in support of this claim.

Clearly there is more than adequate medical testimony connecting the injury to the alleged industrial accident and date of loss.

There are four doctors who gave opinions regarding causation: Hajjar, Blair, Walker and Crook.

Dr. Hajjar thought the Claimant's "initial exposure occurred in front of a house while standing." [21] Defendant's Exhibit K p. 69 Clearly, Dr. Hajjar was mislead that the Claimant initially injured herself outside of work, since the record is clear that the "house" is the kitchen and dish area of the restaurant. [HT p. 53, lines 1-11] Dr. Hajjar's opinions regarding causation are entirely taken from the FROI that, as explained above, was not prepared by Claimant. Nowhere does Dr. Hajjar state that the Claimant told him

[21] We know this was a misunderstanding as the "house" to which he refers is really the kitchen and dish area of the restaurant, and not a non-workplace location.

she injured her back at work "while standing and talking." As explained above, even the Referee found Dr. Hajjar's opinion to be unpersuasive and lacking foundation.

It is Dr. Justin Crook, DC's opinion that the herniated disc was "a direct result of the injury she sustained at work while lifting and twisting." Claimant's Exhibit 2, p. 4 He had seen the Claimant previously and was the first medical provider to examine her after her work injury.

The Community Care records beginning on 12/16/08 indicate an onset date of 11/24/08, and worsening over the three weeks intervening. On 12/19/08, she was referred to EIRMC by Dr. Brower "for further treatment." Claimant's Exhibit 3, p. 3

Although the EIRMC record of 12/19/08 indicates pain onset "several days ago" as referenced in the Decision, par. 9, she was clearly there as a result of being referred by her Community Care doctor - and those records clearly reflect an earlier onset date. So does the EIRMC radiology record of 12/19/08, which states: "HISTORY: ONE MONTH OF BACK PAIN. An honest reading of this record corroborates Claimant's story.

Dr. Walker clearly associates Claimant's initial injury as being associated with work. In his IME report he gives his unequivocal opinion, that "Ms. Clark had the onset of pain complaints on November 24, 2008." Claimant's Exhibit 6, p. 9

Dr. Marano's record of April 22, 2009, that "she cannot associate any injuries or trauma to the onset of her pain" and "she said that it just kind of started out of the blue. She thought maybe it was due to standing funny" is the one the Referee apparently relies on to conclude that there was no compensable accident. In the context of the notice to her employer of December 15, 2008, and her statement of May 6, 2009, where she talks about feeling some pain while "standing there above the salad bar," the record is not

inconsistent with Claimant's version of her injury. Claimant contends that she did hurt her back at work, and the record reflects it was not due a *traumatic* event - but due to lifting and/or reaching or bending and twisting or even "standing." There is no medical opinion from Dr. Marano that Claimant's herniated disc was *not* caused at her work as a waitress.

Lastly, Dr. Blair reviewed all of the above records and interviewed the Claimant. It is his clear opinion that the herniated disc was caused by a lifting incident at work.

The bottom line is that the medical records all are consistent in that they reflect the back problem is related to Claimant's work for Defendant Shari's. The records and the statements by the Claimant reasonably relate the time and place of the injury to Claimant's workplace. There is very little opposing evidence. It is unreasonable and not supported by substantial and competent evidence for the Referee to conclude from these records that the Claimant did not injure her back at work in a compensable "accident." It is common knowledge that waitressing is a demanding job involving lifting, reaching, bending, stooping, twisting, and even standing. There is no substantial evidence whatsoever that Claimant's injury did not originate at work.

Furthermore, taken in context of the fact that Claimant provided timely notice to her employer of the accident, has less than a 8th grade education, and she admittedly did not suffer a serious trauma in the form of a blow by a foreign object or a fall from a height, a motor vehicle accident or such, the medical records do not rise to the level of substantial evidence to a reasonable person deciding this claim.

The only other evidence considered by the Referee in coming to her findings relate with the statements made by the Claimant and witness Aaron Swenson.

The Claimant made three statements addressing the accident: to the Surety on May 6, 2009 [Claimant's Exhibit 11]; in her deposition of April 13, 2011 [Claimant's Exhibit 16]; and her hearing testimony on June 1, 2011. Although her recitation of the details may have changed a little over the years, each statement taken directly from the Claimant describes a compensable work-related accident. That an earlier statement was not taken by the Surety is the employer's fault and not Claimant's as the Referee thought. By admission the employer knew of the injury in mid December, 2008, and yet no statement was taken from Claimant until nearly 5 months later.[22]

In the case of *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho at 329, 179 P.3d at 292, the Supreme Court found that the Referee's findings with regard to the Claimant's credibility were not supported by substantial and competent evidence because, although there may have been slight differences or additions at the hearing, the claimant's testimony regarding how he was injured had remained consistent, and any differences in his testimony did not support the Referee's conclusion that the claimant was not credible. Differences or additions in testimony over the years, while substantive testimony regarding the accident or injury remains consistent, is not grounds to dismiss a Claimant's testimony. *Id.* at 331, 179 P.3d at 294.

In contrast to that case, in this case, the Referee found that Claimant appeared credible [Decision, par. 45] and yet does not accept *any* of her first-person accounts of her injury - all of which involve a workplace incident on or about November 24, 2008. Instead she relies *entirely* on third-person accounts in the medical records or FROI's that

[22] Neither the Surety nor employer took any statements from other witnesses or employees even though the Claimant identified at least three witnesses in her recorded statement - Zach, Rick and Lisa. [CE 11, p. 2]

someone else had written regarding his or her understanding of what the Claimant may have told him.

The Referee discounted witness Aaron Swenson's testimony. She wrote, at page 11 in her Decision:

> "He did not report the event to the management because, he explained, the managers all already knew about it. He testified that all of the managers had asked him about it. Claimant also testified that she reported her injury to management. However, this assertion is otherwise unsupported in the record."

As stated herein many times, the Referee was wrong again , discrediting witnesses based on false facts since the employer had notice by December 15, 2008.

The Referee also wrote, later in her Decision, page 18, paragraph 42, that:

"On its face, Aaron's testimony corroborates Claimant's later assertions. However, he recalled that Claimant dropped a *dish tub* and that he saw *plates*, as well as silverware on the ground," when the Claimant said it was only a tub of silverware. This is clearly an immaterial discrepancy -especially considering the fact that this testimony is taken nearly three years after the accident! Claimant contends the other "discrepancies" mentioned by the Referee regarding this witness's testimony, i.e., that he "did not mention making a telephone call" and claimed to have driven the Claimant home that night "which Claimant never mentioned" are not material to the fact that Claimant suffered an injury at work on the date she claimed to have.

The material question is, if defendants contend there was no accident, where is their evidence in opposition to Claimant's? Defendant's never called one witness to rebut either the Claimant's or Aaron Swenson's testimony. Defendant's never took a statement

from one of their other employee's early on, and never took a deposition of one. Clearly the best rebuttal to a witness is the testimony of another, credible witness.

Claimant's testimony and that of witness Aaron Swenson is substantial, competent, and unrebutted.

A consistent thread in all medical records, and in all accounts for that matter, is that the Claimant hurt herself at work on November 24, 2008.

The Referee states in par. 46 of her Decision that "No physician opined that Claimant incurred her lumbar spine injury while simply standing and talking at work, and Claimant has failed to prove that she was doing anything else at work that triggered her back pain or otherwise signaled a need for treatment." She goes on to contradict herself by concluding in the next sentence, however, that "There is credible evidence that work worsened Claimant's back pain over time." So, according to the Referee, waitressing certainly aggravated Claimant's back, but it could not have caused her back problem in the first place. These two sentences alone prove that the Referee's Decision is not based on substantial and competent evidence. The evidence in the record is that Claimant was an excellent worker. It is common knowledge that waitressing involves constant bending, stooping, lifting, reaching and even standing. It is disingenuous indeed for the Referee to believe that the Claimant told her medical providers and others that she injured herself doing nothing else but "standing and talking at work," but the bending, twisting, reaching, stooping and other demanding waitress work only "worsened" it. Any evidence that "work worsened Claimant's back over time" is also evidence that Claimant injured her back at work, since the same activities that might worsen a back problem could also be a cause of a herniated disc.

CONCLUSION

Clearly something with Claimant turned the Referee against her such that, at page 19 of her Decision, paragraph 44, the Referee went so far as to allege a conspiracy with witness Aaron Swenson with "an intentional plan to mislead the tribunal" and the Referee then went on to ignore the substantial evidence supporting the Claimant's work-related accident - all the while leaving a trail of obvious errors in her Findings of Fact, leading both her and the Commission to a clearly erroneous conclusion that is not supported by substantial and competent evidence.

To reiterate, for example:

- It was error for the Referee to consider any facts that the employer did not receive timely notice of the accident;

- It was error that the Referee assumed that the Claimant prepared the FROI's, and additional error to use this "fact" to discredit Claimant's testimony;

- It was error for the Referee to conclude that Claimant did not "report this event until after surgery was recommended (and to not consider that in fact it was actually the Defendant Surety who did nothing until surgery was recommended);

- It was error for the Referee to consider the manager's log books' failure to reflect an accident as being adverse to Claimant's case since the employer admitted it had timely notice of the accident - even in it's Answer to Claimant's Complaint;

- It was error for the Referee to conclude that there was no evidence in the record supporting Claimant's contention that, contrary to their alleged denial, the employer paid some of her medical bills, and then use this false finding of fact to discredit the Claimant's testimony;

- And it was unreasonable and defies common sense for the Referee to conclude that, although most of the medical records reflect a work-related incident and almost all of the medical records support Claimant's claim of a work-related injury, this "expert server" more than likely did not suffer a compensable, work-related "accident" on November 24, 2008.

All the Claimant needed to prove a compensable "accident" is prove that she suffered an "unexpected, undesigned, and unlooked for mishap or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time and place where it occurred, causing injury." [I.C. §72-102(14)(b)] She did that.

The Commission never disputed that, if a compensable "accident" occurred on November 24, 2008, it was "connected with the industry" and "reasonably located as to time when and place where it occurred." The Commission merely contends that Claimant never proved sufficiently that, on November 24, 2008, she suffered an "accident" under the definition of the law.

Arthur Larsen, in his treatise "The Law of Workmen's Compensation," states that the "by accident" requirement is now deemed satisfied in most jurisdictions either if the cause was of accidental character *or if the effect was the unexpected result of the strain of claimant's usual exertions.*[23] (emphasis added) He states therein that since a so-called "slipped intervertebral disc" is a herniation or rupture, and thus mechanically comparable to an inguinal hernia, it is not surprising to find that a heavy preponderance of

[23] Larsen, *The Law of Workmen's Compensation*, §38.00.

jurisdictions, (including Idaho)[24] afford compensation for this type of injury without exacting proof of unusual exertion or mishap as a cause.

It is a mistake of law for the Referee and the Commission in this case, to hold this Claimant to a standard higher than that of other, similarly situated Claimant's in this State, and order her to prove "unusual exertion or mishap as a cause" of her injury, when it is clear that she has proven that, whatever the cause - whether reaching, lifting, stooping, or just standing, clearly her back injury arose on or about November 24, 2008, while she was "engaged in her ordinary, usual work" as a waitress. There is no substantial evidence to the contrary.

Respectfully,

Dated: 1-15-2013

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[24] *Ibid.* §38.22, citing *Harding v. Idaho Department Store*, 80 Idaho 156, 326 P.2d 992. At page 159 of this case, this Court stated: "It is unnecessary that the claimant be engaged in some unusual work or that there be a slipping, falling or some sudden or violent accident preceding the injury before it is compensable. If the claimant be engaged in his ordinary, usual work and the strain of such labor becomes sufficient to overcome the resistance of claimant's body and causes an injury, such injury is compensable."

Certificate of Service

I hereby certify that on the 15 day of January, 2013, two copies of the foregoing **APPELLANT'S OPENING BRIEF** were served upon the following attorneys of record by the method indicated:

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