BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. G204602

CAROLYN S. KIRSHBERGER, EMPLOYEE — CLAIMANT

FROST OIL COMPANY, EMPLOYER — RESPONDENT

FEDERATED MUTUAL INSURANCE COMPANY, CARRIER — RESPONDENT

OPINION FILED JUNE 24, 2013

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

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

Respondents represented by the HONORABLE ERIC NEWKIRK, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal the decision of an Administrative Law Judge filed on January 2, 2013, finding that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her lower, left extremity on May 29, 2012, and that she is entitled to medical and temporary total disability benefits pursuant thereto.

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 sustained

a compensable injury to her lower left extremity on May 29, 2012. Therefore, the decision of the Administrative Law Judge is hereby reversed and all benefits associated with this claim denied.

Prior to her May 29, 2012, accident, the claimant had worked as a bulk plant manager at the respondent-employer's Clarksville facility for 11 years. At the time of her accident, the claimant had knowledge that the facility was either going to be sold or close. The record reveals that the claimant had attempted to purchase the plant, but that she could not obtain financing.

The record further reveals that on the afternoon of May 29, 2012, the claimant had visited extensively in her office with a long-time friend, Ann Greenhill, prior to the accident. Documentary evidence in the way of surveillance video tapes and still photographs from those videos shows the sequence of events leading up to the incident as well as the actual incident itself. At 7:40 a.m., the claimant is seen sitting at her desk pulling her left pant leg up to her knee and examining what appears to be discoloration or bruising on her left leg from her knee down to her ankle, or on her shin area. At 4:42 p.m., the claimant is shown sitting at her desk talking to Ms. Greenhill, who is seated

directly in front of her. Thereafter, Ms. Greenhill is seen walking to the front door of the facility, where she stops, turns with her left side to the claimant, and raises her right arm to shoulder level as though measuring a height. She is next shown walking back towards the claimant with both arms extended approximately hip-level at her sides. After Ms. Greenhill is again seated in front of the claimant's desk, the claimant exposes her left leg again as the two examine her shin area. Ms. Greenhill is next pictured hugging the claimant and kissing her on the check, then walking to the side door that leads into the adjacent "oil room" and out of the facility altogether. Ms. Greenhill is then shown exiting the claimant's office through the side door, with the claimant following her shortly thereafter.

Ms. Greenhill is next shown outside of the office on the porch of the loading docks, where she is pictured backing up towards the edge of the loading dock, stopping and leaning back, leaning forward again, then stepping to the right side of the door. Ms. Greenhill then turns and walks away from the side door towards a set of steps, apparently speaking to the claimant as she goes with her hand over her mouth. As Ms. Greenhill begins to descend the

steps, the claimant is pictured poking her head through the side exit door, where she pauses for approximately two seconds. Ms. Greenhill then stops and turns her head to look back at the claimant, who is proceeding out of the door head-first. Once outside of the door, the claimant is pictured walking over a rubber mat in a forward-bent position without faltering, then straight across the narrow porch as she proceeds to the edge of the loading dock. The claimant bends her knees in a diver's fashion with her arms and hands hanging loosely in front of her knees as she goes. Once at the edge of the porch, the claimant is pictured with both feet planted in the same position before she steps off of the side of the dock. The claimant's body is in an upright position as she goes off of the porch. As the claimant's body moves towards the ground, she is pictured with her right hand elevated above her head and her left arm extended outward at approximately shoulder level. The claimant is then shown falling to the ground, feet first, in somewhat of a left, slumping motion. Once on the ground, the claimant essentially slumps and crumbles to the left. The record indicates that the surface of the loading dock is approximately 29 inches above the ground.

Ms. Greehhill was the first to testify at the hearing before the Commission on October 4, 2012. According to Ms. Greenhill, she has been acquainted with the claimant for fifteen years and she considers them to be "good friends." Ms. Greenhill verified that she was at the steps of the loading dock at the time of the claimant's accident, and that she witnessed the incident. Ms. Greehhill's testimony on direct examination with regard to what she witnessed is as follows:

> Q. What did you see?
>
> A. I saw her try to catch herself, you know, get herself righted up and then she just flew off the dock. She was in a horizontal position when I saw her.
>
> Q. Did you draw any conclusions in regard to what happened?
>
> A. I didn't.
>
> Q. Did it appear she just ran and jumped off of the dock?
>
> A. No.
>
> Q. Well, what did it appear based upon what you saw?
>
> A. It looked like she tripped.
>
> Q. Did you actually see what she may have tripped on?

A. No.

Q. What caused you to conclude that she may have tripped?

A. Because of the way she came off the dock. It was like her back foot was like that and she, you know, like her toe was backwards and then she tried to put her next foot, and her next foot, and the next one she went off.

While attempting to physically re-create for the court what she had witnessed, Ms. Greenhill continued ...

Q. And did she actually stop on the dock or what happened when she came through the door? What'd you see?

A. She came flying just like she was catapulting off the dock.

Q. Did you form any opinion in regard to whether she was trying to keep from going off the dock?

A. Yes.

Q. And what was your opinion?

A. The way she kept trying to catch the next step and the next step, you know, trying to - like she was off balance and you know when you're off balance you try with your next step and your next step to right yourself.

In further questioning, Ms. Greenhill stated that the claimant was leaning forward and that it did not appear that she at any time righted herself or stopped her forward motion prior to going off the dock. Ms. Greenhill stated that the claimant moved in a continuous motion during this incident.

On cross-examination, Ms. Greenhill, who is a regular Frost Oil customer, stated that she had been at the facility to purchase fuel prior to the claimant's accident. Ms. Greenhill stated that she had arrived at the claimant's office at around 4:49 or 4:50 on the afternoon of the incident, and that she had been there approximately an hour to an hour-and-twenty minutes when the accident occurred. Ms. Greenhill, who denied that the claimant had ever paid a fuel bill for her, stated that her business transaction took approximately ten minutes to complete. Ms. Greenhill further stated that the two had spent the remainder of the time in the claimant's office "chit-chatting" about non-business related matters.

Ms. Greenhill could not initially recall having examined the claimant's left leg while seated across from her at her desk on the afternoon in question. She ultimately recalled that the claimant had shown her a rash

on her leg "from the diabetes." Ms. Greenhill affirmed that she was unaware that the claimant denied during deposition having rashes, swelling, bruising, or other problems with her legs. Further, Ms. Greenhill verified that when she left the claimant's office that afternoon, it was "closing time." Ms. Greenhill testified that the claimant followed her to the side door in order to secure it for the night and to tell her good-bye. Ms. Greenhill agreed that in the approximately three seconds that it took for the claimant to exit the side door and go off of the loading dock, she did nothing to help her. She further agreed that it was no longer her opinion that the claimant tripped on something as she exited the building. Ms. Greenhill denied that the claimant had her hands above her head in a flailing manner as she fell to the ground. She further stated that she witnessed the claimant trying to break her fall with her hands as she hit the ground. Upon reviewing still photographs of this incident, however, Ms. Greenhill agreed that the claimant's right hand was above her head as she went off of the dock.

Finally, on redirect examination, Ms. Greenhill affirmed that she had had a prior problem with the respondent-employer regarding payment of a fuel bill.

According to Ms. Greenhill, the respondent-employer had once denied her payment of a bill using her credit card.

The claimant testified after Ms. Greenhill. According to her testimony on direct examination, she and a part-time driver out of Van Buren, Arkansas, were the only two employees at the Clarksville facility. The claimant testified that she was aware that the facility was equipped with video surveillance cameras at the time of her accident. The claimant testified concerning details of the incident as follows:

> May 29th between 4:45 and 5:00 o'clock. Ann said she had to meet Willie and she got up and walked out the door and then I got up to go out and shut the door and I tripped and I tried to right myself, each step I took I was trying to stand up before I went off the dock, and I just couldn't - there wasn't enough room. The docks is not very deep and there wasn't enough room for me to regain my balance and there wasn't anything to catch hold of.

Upon testifying that she was moving forward in a continuous fashion at the time of the incident, the claimant stated that she weighs 275 pounds and the she has a very large bust. She further testified that she tripped on

something and was "bent double" as she exited the building through the side door, and that she was unable to "catch" her balance. When questioned as to whether she was tipped forward, the claimant responded, "I was tripped forward and I was putting my hands up trying to catch my balance." The claimant denied knowing what she had tripped on, but she agreed that she had not tripped on a mat placed at the outside entrance of the door. The claimant further denied having "jumped" off the dock, stating rather that she "just flew off the end of the dock."

The claimant testified that she had gotten up and walked to the side door in order to shut it. More specifically, the claimant stated, "It was time to shut the door so I could do my last minute paperwork, so I could leave at the end of the day, and I said goodbye and thank you to Ann, and I was getting ready to pull that oil room door shut." Other than an approximately ½ inch elevation in the doorway, the claimant knew of nothing else that could have caused her to trip. The claimant denied being dizzy at the time, that she was chasing after or running way from anyone, or that her legs ever gave way. Further, the claimant estimated that the distance between the doorway and the edge of the dock is approximately four to five feet.

The claimant testified that Ms. Greenhill was the first to respond to the incident, and that she called 911. The claimant testified and the record confirms that she fractured her left leg in three places, including her ankle, as a result of her fall, and that this injury required surgery. The claimant stated that she has been physically unable to return to work since the incident, and she denied that the respondent-employer has offered her light duty.

The claimant confirmed that prior to the incident of May 29, 2012, she had a disagreement with the respondent-employer over policy changes affecting customer payment arrangements. The claimant further agreed that Ms. Greenhill had been one of the customers affected by this change. The claimant stated that after this policy change, whereby customers were no longer allowed credit, Ms. Greenhill paid for her fuel using a credit card. The claimant denied that Ms. Greenhill's credit card was ever declined or rejected, and she stated that she had never had a reason to personally pay for any of Ms. Greenhill's fuel purchases. The claimant confirmed that she had attempted at one time to purchase the facility, but that she could not obtain financing without using her personal farm and investments as collateral. She denied that she had ever had

a "falling out" with the respondent-employer over this issue. She further testified that she eventually sold her farm and that she was no longer interested in purchasing her employer's business in that she no longer had a financial need to purchase the facility.

On cross-examination, the claimant agreed that she had been with the company for sixteen years, even before it became "Frost Oil." The claimant agreed that during the last eleven years that she has been employed with the respondent-employer, there have been no structural changes to the facility. The claimant further agreed that she had never tripped over the ½ elevation, or "lip", at the door to the oil room, nor did she have knowledge of anyone else ever having tripped or stumbled on this slight elevation.

The claimant admitted that she stated during deposition that she had a poor recollection of the incident of May 29, 2012. The claimant admitted that she would not be surprised if she had never used the word "tripped" during her deposition. The claimant verified that she had testified during her deposition that she had lost her balance and fallen. When questioned concerning the sudden improvement in her memory since the time of her deposition, the claimant stated, "No, it's the same. I mean, I know more

today because I've seen the film (referring to the video surveillance)." The claimant further agreed that the oil room door closes from the inside and that it slides from right to left without the use of a door handle.

The claimant denied remembering details of her discussions with Garry Smith and Nikki Harger following the incident. The claimant denied in particular recalling having told Ms. Harger that she was on the mat trying to close the door when the incident occurred. Furthermore, when questioned concerning the condition of her left leg prior to the accident, the claimant stated that she could not recall having examined her left leg as shown in the video surveillance tapes and still pictures taken from that video. The claimant agreed that it was her testimony at the hearing that she was walking, and she stumbled and tripped on the lip of the door, which precipitated her alleged fall.

On continuation of cross-examination, the claimant stated that she could not recall what she and Ms. Greenhill discussed on the afternoon of May 29, 2012. Moreover, she had no idea as to why once Ms. Greenwood exited the building, she backed toward the edge of the loading dock, leaned back, then leaned forward while talking to her. Further, the claimant generally agreed that the photographs

of the incident failed to show that her right foot was turned or twisted in any way or at any time as she crossed the porch of the loading dock to the edge. The claimant affirmed that she did not view herself on the video making any movement to stop or catch herself from hitting the ground. The claimant testified that she failed to try to break her fall with her arms because this would have put her at risk of breaking her wrist.

With regard to her relationship with the respondent-employer, the claimant testified that she had received disciplinary action on three different occasions during the year preceding her accident. Further, the claimant affirmed that she had been suspended for three days and put on 90 days probation in consequence of that disciplinary action. The claimant further affirmed that on the Friday preceding her accident, which occurred on the Tuesday following the three-day, Memorial Day holiday weekend, she had learned that the facility was potentially to be sold to a driver with whom she worked. The claimant denied being upset, however, upon learning that someone other than herself was planning to purchase the facility. Finally, the claimant affirmed that her friend, Ms. Greenhill, made no attempt to catch her or to stop her

momentum during the incident in question.

Nicole Harger, Human Resources Manager for the respondent-employer, was the third witness at the hearing before the Commission. Ms. Harger stated that she had been employed with the respondent-employer for nine years, and that she was familiar with the Clarksville facility and with the claimant. Ms. Harger indicated that the claimant was a good employee, with the exception of her last year of employment. With regard to Ms. Greenhill, Ms. Harger stated that she was a customer who had been put on a "watch list." Ms. Harger explained the meaning of this term, and she expounded upon reasons for the claimant's disciplinary action as follows:

> Customers that are cutoff or have certain actions regarding their credit terms. Those customers are not supposed to be sold to unless they're given permission by our credit manager and Carolyn (the claimant) had gotten to the point where she considered them her customers and not Frost customers and disregarded our credit application policy. And that was why she got the write up and eventually the ninety day probationary period, three days off.

Ms. Harger clarified that this disciplinary action

had been initiated because the claimant had paid Ms. Greenhill's fuel bills, as well as another customer's fuel bill in direct violation of company policy. Ms. Harger also stated that the claimant had "attitude issues," that she was unhappy with the current manager, that she was unwilling to adhere to the company's profit-loss procedures, and that she acted in "blatant" defiance against company policy and rules. Further, Ms. Harger agreed that she believed that the claimant was intentionally trying to be fired from the company prior to her accident. Ms. Harger testified that at the time of the May 29, 2012, incident, the claimant was planning to retire. More specifically, she stated, "she was supposed to be leaving to go look at a retirement place, I believe in Vermont near the Von Trapp [hotel] that she wanted to go to."

When questioned as whether anything significant had happened prior the incident to worsen the claimant's attitude, Ms. Harger stated:

> She had overheard more talk that the company was going to be sold. There was no guarantee if she was going to be with the company, if (sic) whoever bought it. She wasn't happy with that. And then she found out that another driver that reported to that location

> under dispatch authority, that he had been offered to buy that location as well.

Ms. Harger stated that she was notified of the claimant's accident by an employee at another facility whom the claimant had called after the incident. Ms. Harger stated that although she reviewed the video footage of the incident on the evening of May 29, 2012, she did not speak to the claimant about the incident until after her surgery.

According to Ms. Harger, upon first speaking with the claimant about the incident, the claimant informed her that she was closing the door to the oil room when she stumbled on a mat outside of the door. Ms. Harger stated that she found this to be "odd" due to the fact that the door in question slides closed from the inside only. More specifically, Ms. Harger stated:

> You can't close the door from outside that area. To put it, the description of the door, it's almost like one of the sliding barn doors, you have to be inside. If you're out or even in the way of the track you're going to be closing yourself in the doorway.

Ms. Harger testified that the claimant could not have been near the lip of the door because the door is shut behind the lip, which she stated is located between the

concrete and the inside of the door. "If you were to look coming out that door," Ms. Harger explained, "the door has to close before you can see that lip." "I would say it's part of the track, so to speak," she added. "It closes in front of that lip." Ms. Harger affirmed that the only handle on the door is a closed pin latch on the inside, and she agreed that if you are closing that door, there is never a reason that you would step outside. Ms. Harger testified that the claimant never told her that she had stumbled or tripped on the lip of the door. She also stated that there would have been no reason for the claimant to have touched the mat located on the porch of the dock just outside the door.

Ms. Harger testified with regard to her review of the video of the incident, as follows:

> Well, I mean, observing them red flags sticked (sic) out. Why a customer was wobbling back and forth on the patio. Why she (Ms. Greenhill), you know, was still out there. Then just noticing Carolyn having her two feet over the mat when she said she'd stumbled over it. That doesn't, you have to see a raise in the video of that mat coming up if that was play. She stepped over the lip and both feet were planted down,

> so it couldn't have been play
> for that lip either.

Ms. Harger stated that it appeared to her from the video that the claimant walked at a fast pace or jogged off of the porch, then jumped off at the end. "Yes," stated Ms. Harger, "she had a spring action to the end of her - at the end of - I'm a clumsy person. I trip constantly. So, I don't - I can't picture a stumble and at the end a spring up action and that's what I noticed."

Ms. Harger indicated that she stumbles often and that she instinctually puts her hands down in order to brace herself for impact. Ms. Harger denied seeing evidence on the video of the claimant attempting to "catch herself," nor did she view Ms. Greenhill ever attempting to stop her in any way.

On cross-examination, Ms. Harger testified that had she fallen off of the dock, she would have put her hands forward to protect her face. Ms. Harger also testified that when she reviewed the video, she saw "suspicious activity." "Why would Annie [Greenhill] be rocking back and forth on out - on our dock and then all of the sudden Carolyn come flying off?" she added. Ms. Harger further testified that the claimant had not told her that she

"thought" she had stumbled on the mat; rather, the claimant initially told her that she *had* stumbled on the mat.

In terms of the claimant's attitude and behavior in the past year-and-a half, Ms. Harger did not dispute the importance of good customer service, or that the claimant had provided such service. Ms. Harger added, however, that while good customer service is "one thing," "having somebody hug and kiss you" could be interpreted as a form of work-place harassment, and "that's another version of customer service that we would not have in our office." Further, Ms. Harger reiterated that the claimant had become disgruntled after new management and policies were put into place. "Carolyn didn't like the fact that one of her new managers is a younger employee who has never been in our industry," she stated. "She believed that this person did not have the knowledge and it rubbed Carolyn the wrong way, caused frictions, and she just blatantly refused to take action when it was told upon by that one manager and myself for that fact."

When questioned on re-direct, Ms. Harger explained that the issue with Ms. Greenhill having hugged and kissed the claimant before she left had only to do with how these activities correlated with business activities. More

specifically, Ms. Harger stated as follows:

> Q. And you heard her testify earlier, didn't you, that her transaction with that - with Ann Greenhill ended about an hour earlier in the day?
>
> A. Yes.
>
> Q. And she was - did you - when you heard her testify, did she state anything that made you think she was engaged in an employment related or customer related activities with Ann Greenhill for the last hour she was around?
>
> A. No.
>
> Q. Was there anything about her sitting there chit-chatting with Ann Greenhill that was going [to] benefit your - the interest of Frost Oil?
>
> A. No.
>
> Q. Was there anything about her hugging or kissing Ann Greenhill that would benefit Frost Oil?
>
> A. Absolutely not.
>
> Q. And whenever you tell a customer a goodbye and thank you for their service, do you hug and kiss them?
>
> A. No.
>
> Q. And whenever you thank them

for a service, do you get up out of your chair and walk them all the way to the door?

A. Never.

Q. And company policy, you indicted that she choose customer service over company policy. Is that what was going on?

A. In this instance it looks like so.

Q. That's what she thought?

A. Yeah.

Q. In your opinion, what was going on versus company policy, with respect to her and customer service?

A. She should have ended the transaction and let it be. She had other customers come in, you'll see throughout the video that stepped aside that she didn't give customer service to because Annie was still in the office.

Q. And is company policy, I mean, she had a problem with it in prior months as well?

A. Yes. Company policy was ... to keep our business running.

Next to testify at the hearing of October 4, 2012, was Mr. Garry Smith, an insurance claims investigator. Mr. Smith stated that he has over forty years of experience

investigating a variety of claims for various carriers. According to Mr. Smith, he investigates three to four claims per week, 52 weeks per year. Mr. Smith testified that he begins his investigation by contacting the insured claimant in order to get their "story" of events. Further, Mr. Smith stated that he tries to stay objective in his analysis of each claim, with approximately 50 to 60 percent of those claims being paid. Mr. Smith denied ever trying to "slant" his opinion in the insurer's favor, stating, "if you slant your opinions your reputation is going to get around pretty quick."

In the claimant's case, Mr. Smith stated that he initiated the investigation by going to the scene, taking photographs of it, diagraming it, sketching it, and taking statements. Mr. Smith stated that he took in-person statements from Ms. Greenhill and the claimant, as well. He also viewed the surveillance footage of the incident in question. Mr. Smith stated that he completed a report of the incident on June 19, 2012. This report was submitted into evidence.

Mr. Smith stated that the claimant informed him that on the afternoon in question, she had walked out onto the porch to say good-bye to Ms. Greenhill, and that she was

going to go back into the facility and secure the door when the incident occurred. Mr. Smith stated that he found this statement to be "odd" in that had the claimant been walking back into the facility when she allegedly stumbled, she would have fallen in the opposite direction that she, in fact, fell. Further, Mr. Smith affirmed that Ann Greenhill had advised him that the claimant had caught the front of her tennis shoe on the rubber mat located on the porch in front of the door as she exited the building. Finally, Mr. Smith confirmed that he did not observe the claimant trip on anything at any point in the video surveillance taken at the scene of the incident.

Moreover, Mr. Smith stated that the claimant did not mention the lip or having tripped on the lip to him at any time during his investigation. Further, Mr. Smith affirmed that the lip appeared to have no involvement in the event.

Mr. Smith stated that Ms. Greenhill had informed him that she had gone outside to assist the claimant with the door, but that he failed to see video evidence confirming this allegation. Based upon his review of Ms. Greenhill's activities on the dock porch, Mr. Smith concluded as follows:

> She was turn - she walked out - out the door and they're talking, having a conversation, and she's rocking back and forth and pointing down on the ground, and then she turns and walks to the end of the steps, gets probably the middle step, there's three or four steps, and she turns and watches.

Mr. Smith stated that his final assessment of the incident was that it was not an accident. Rather, Mr. Smith stated, "It looked intentional and staged." Upon cross-examination, Mr. Smith explained what he meant by this statement as follows:

> Q. You say it looked intentional and staged. What do you think happened?
>
> A. That when you look at the video you do not see any tripping or anything. The feet are flat forward, both of them are flat and on top of that mat, and then she has a chance to recover and her feet are still flat, then she jumps off with her hands in the air.

Although Mr. Smith acknowledged claimant's counsel's theory that when you trip forward, head-first, your body creates momentum, he added, "You're going to put your feet down or you're going to put your hands out to catch yourself." Agreeing that you would try to use your

feet to stop your forward movement, and that it would be natural to bring one foot forward at a time in order to achieve this, Mr. Smith further agreed that you could conceivably stop and put both feet together in a attempt to prevent yourself from going off of an edge, or, in this case, from going off of the edge of the dock. Further, Mr. Smith affirmed that the lip in question is high enough to cause a trip, and he acknowledged that the lip and mat are in close proximity to one another; thus, the claimant could have been confused as to what predicated her fall. However, he stated that the claimant had informed him that she "scuffed her foot, her tennis shoe on the mat" or "something," and she failed to attribute her trip to the lip of the door.

On re-direct examination, Mr. Smith affirmed that he had described the claimant's feet as having already been on top of the lip before she ever started her forward movement. Mr. Smith further affirmed that the claimant paused for a second or two after exiting the door. Mr. Smith stated that the claimant was in a "stooped over" position when she came out of the dark, and that she remained in this position until she reached the edge of the dock. When asked if he would have reacted differently to

stumbling in the manner that the claimant alleges, Mr. Smith responded, "I wouldn't do just like this video shows, going forward, just like you're running off it and raising your hands up and jumping down. I would not do that." Mr. Smith stated that he would expect someone in the claimant's position to fall to their knees on the porch rather than going off of the edge.

After a short recess by the court, Mr. Smith continued in this line of questioning as follows:

> Q. If the video were to depict a person standing or if you were standing for half a second or a second.
>
> A. Right.
>
> Q. And then began proceeding forward and even if something did catch your foot, how far do you think you would stumble.
>
> A. Two or three feet and I'm going to get down on my knees - get down on my knees.
>
> Q. Okay, and if there's a drop off four and a half feet in front of you, same thing?
>
> A. Right.
>
> Q. You can make an extra effort to get down.
>
> A. I sure would.

Q. And would you go right or left instead of forward?

A. You could.

Q. Would you make every effort to get a hand down or something?

A. I sure would before I went off the edge out there.

Q. Did you see her making any efforts to stop herself?

A. No, she just kept going, running.

Last to testify at the hearing before the Commission was Jeff Frost, President of Frost Oil. Mr. Frost testified that he was familiar with the claimant and that he considered her a good employee up until the last two years of her employment. Mr. Frost testified that the claimant had problems with regard to 1) abiding by the company's credit policy; 2) that she had a "discrepancy" with the office manager; and 3) that the claimant had a problem with changes that had been made to dispatch in that she no longer dispatched the Clarksville truck. Mr. Frost agreed that the claimant could be classified as an "unhappy" employee in the year preceding her accident. Upon confirming that the incident occurred on the Tuesday after Memorial Day, Mr. Frost testified with regard to events

leading up to this incident as follows:

Q. On the week leading up to that, did anything change in the company or did you detect that Carolyn was even more frustrated or angered with the company?

A. Well, Carolyn and I had been talking about her buying the company and she was not able to obtain financing and the driver had approached me several months ago about buying the company and he'd signed a non-disclosure agreement, but he broke that and talked to Carolyn about it and she called our office and was very upset that we were still going to try to sell the company to this driver.

Q. On that - on the Friday before Memorial Day?

A. That's correct.

Q. And that's when he violated that non-disclosure agreement?

A. That's correct.

Q. And who was that individual?

A. Jody Canada.

Q. And did you have a conversation with him the following week again?

A. I did.

A recorded copy of that conversation was

introduced into evidence in this claim, thus verifying Mr. Frost's testimony in this regard. Mr. Frost continued his examination concerning this recorded conversation between he and Mr. Canada, as follows:

> Q. Mr. Frost, what problem did breaking the confidentiality agreement create?
>
> A. He told Carolyn that he was looking at buying the company and it got her very upset because at that point, you know, I believe she thought we were going to try to work it out. She knew what - Carolyn and I had been corresponding via email on this. And I told her if she couldn't get her financing that we were going to take that truck back to Fort Smith and that dispatch would be handled out of Fort Smith, which we did. She couldn't obtain financing and she was very upset that - that we weren't going to be able to try to keep the plant as is. And - cause she knew I was going to try to - I told her, I was going to try to sell the plant or we were going to close it. She was very aware of that.
>
> Q. So do you think that had something to do with this incident?
>
> A. Absolutely. She called, she called the office very upset and just distraught that we were talking to Jody about

buy[ing] this plant.

Mr. Frost testified that he believed that the claimant had thought about the situation over the holiday weekend, discussed it with Ms. Greenhill, and followed through with a contrived plan to stage a work-related injury upon her return to work Tuesday. Mr. Frost believed that the claimant's motivation for committing such an act was due to the fact she thought she was going to loose her job due to the plant either being sold or closed. Mr. Frost stated that it was his opinion that the claimant "maliciously fell off that dock to make it look like a slip and fall."

Mr. Frost verified that customers who have a past-due balance on their fuel accounts are not allowed to purchase any more fuel from Frost Oil until that past due balance is paid, regardless of the method of payment. Finally, Mr. Frost stated that the claimant typically arrived at work between 5:30 and 6:00 a.m. in order to accommodate customers.

In rebuttal testimony, the claimant stated that she was an hourly employee for the respondent-employer. Further, the claimant admitted that she had requested to be put on salary in order to continue to work longer hours after Mr. Frost wanted to cut her hours. Finally, when

questioned about certain statements made by Mr. Smith, the claimant stated that she could not remember whether she had told Mr. Smith that she had intended on going out on the dock when the accident occurred. She stated, "I wanted to say goodbye and thank you to Ann, but I really don't remember exactly what happened." When asked if she would have had a reason to be out on the dock that afternoon other than to say goodbye to Ms. Greenhill, the claimant stated:

> No. ... Because I wanted her to keep coming back and I do that for a lot of customers. It wouldn't of matter (sic) who was in there at that time of day, I would of walked out there with them because it was time to shut the door and go home.

The claimant has the burden of proving by a preponderance of the evidence the compensability of his claim. *Jordan v. Tyson Foods*, 51 Ark. App. 911 S.W.2d 593 (1995); *Kuhn v. Majestic Hotel*, 50 Ark. App. 23, 899 S.W.2d 845 (1995). For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code. Ann. § 11-9-102(4)(A)(Supp. 2005), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course

of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in a disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code. Ann. § 11-9-102(16), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *See also*, Ark. Code. Ann. § 11-9-103(4)(E)(i)(Supp. 2005); *Freeman v. ConAgra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001); *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 72 S.W.3d 889 (2002). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997), *see also Reed v. ConAgra Frozen Foods*, Full Commission Opinion, February 2, 1995 (Claim No. E317744).

In order for an accidental injury to be compensable, it must arise out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2009). A compensable injury does not include an injury that is

inflicted upon the employee at a time when employment services are not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii)(Supp. 2009). The phrase "in the course of employment" and the term "employment services" are not defined in the Workers' Compensation Act. *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008).

An employee is performing employment services when he or she is doing something that is generally required by his or her employer. *Id.; Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002). The Commission uses the same test to determine whether an employee is performing employment services as we do when determining whether an employee is acting within the course and scope of employment. *Jivan v. Econ. Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007). The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employers interest, directly or indirectly. *Id.* In *Conner*, 373 Ark. 372, 284 S.W.3d 57, the Court stated that where it was clear that the injury occurred outside the time and space boundaries of employment, the critical inquiry is whether the interests of the employer were being directly or indirectly advanced by the employee

at the time of the injury. Moreover, the issue of whether an employee was performing employment services within the course of employment depends on the particular facts and circumstances of each case. *Id.*

Finally, pursuant to Ark. Code Ann. §11-9-401(a)(2), there shall be no employer liability for compensation where the injury or death was substantially occasioned by the willful intention of the injured employee to bring about such compensable injury or death. In interpreting this statute, the court has stated that for an injury to be found non-compensable under this section, the employee must have had a "willful intention" to "injure" himself or another. *Ramirez v. Hudson Foods, Inc.*, 53 Ark. App. 49, 918 S.W.2d 207 (1996). A willful intention to injure denotes "premeditated or deliberate misconduct," rather than a sudden or impulsive act, and includes a physical force that is designed to inflict "real injury." *Id.; citing, Johnson v. Safreed*, 224 Ark. 397, 272 S.W.2d 545 (1954).

It is undisputed that on May 29, 2012, the claimant sustained a severe injury to her left leg while on the respondent-employer's premises. We do not expound on the medical evidence supporting the claimant's injury here,

however, because we find that the claimant has failed to prove by a preponderance of the evidence that this injury was the result of employment activities, while she was performing employment services, or that it occurred during the course and scope of her employment while she was advancing the employer's interests. Rather, we find that the evidence in this claim is clear and convincing that the claimant's conduct on the afternoon of May 29, 2012, was premeditated and rose to deliberate willful misconduct. Therefore, we find that the claimant has failed to establish the compensability of her claim, and compensability must be denied.

The surveillance video tapes of the claimant's activities surrounding the incident of May 29, 2012, combined with still photographs taken from that video are compelling evidence in this claim. Closely examined, this evidence strongly supports Mr. Smith's testimony that the claimant staged the incident that led to her injury. Without repeating again the sequence of events leading up to the claimant's injury, as described fully above, it is evident that the claimant came to the threshold of the side door exiting the building, or the oil room door, briefly paused as she stuck her head out of the door, then lunged

head-first out of the door and across the porch of the dock. Once at the edge of the dock, she planted both feet in front of her, then jumped from the dock with her right arm and hand above her head and her left arm extended outward from her side, landing in a predominantly upright position on the ground below.

Whereas the claimant contends that, once at the door, she tripped on something, began stumbling forward, then could not regain her balance due to her disproportionate anatomy, we find this testimony, as well as the totality of the claimant's other testimony, disingenuous. Likewise, we find the claimant's eye-witness to this event, Ann Greenhill, to be an unreliable witness, in that her account of the incident is inconsistent with the surveillance video. Moreover, we find that Ms. Greenhill's activities prior to and during the incident were, at the very least, suspicious. Therefore, we fully discredit the testimony of this witness.

It is well settled that questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *White v. Gregg Agriculture Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001); *Johnson v. Riceland Foods*, 47

Ark. App. 71, 884 S.W.2d 626 (1994); *Scarbough v. Cherokee Enterprises*, 306 Ark. 641, 816 S.W.2d 876 (1991); *Ark. Coal Co. v. Steele*, 237 Ark. 727, 375 S.W.2d 673 (1964); *Potlatch Forests, Inc. v. Smith*, 237 Ark. 468, 374 S.W.2d 166 (1964). Moreover, uncorroborated testimony of an interested party is always considered to be controverted. This rule also applies to a non-party witness whose testimony might be biased. *Burnett v. Philadelphia Life Ins. Co.*, 81 Ark. App. 300, 101 S.W.3d 843 (2003). It is not arbitrary to choose not to credit such testimony. *Id.* Furthermore, a witness's close familial relationship to a party has been held to demonstrate a sufficient possibility of bias so as to treat the witness's testimony as disputed, *see Sykes v. Carmack*, 211 Ark. 828, 202 S.W.2d 761 (1947), and the testimony of an interested party is taken as disputed as a matter of law whether offered on his own behalf or on the behalf of another interested party. *Knoles v. Salazar*, 298 Ark. 281, 766 S.W.2d 613 (1989).

The claimant testified that she could not recall what she and Ms. Greenhill had discussed during their visit on the afternoon in question. We find this somewhat difficult to believe in view of the fact that Ms. Greenhill was admittedly in the claimant's office for over an hour

prior to the incident. Ms. Greenhill admitted, however, that the two had been "chit-chatting" about non-work-related matters during this time. Further, pictures of Ms. Greenhill while in the claimant's office depict her making certain movements and gestures suggestive of someone calculating the mechanics of a fall. This is clearly indicated by photos of Ms. Greenhill standing near the front door of the office with her right arm extended to chest level as if measuring the height of something while talking to the claimant. This is further illustrated by her walking towards the claimant's desk with her hands extended outward from her sides in much the same fashion as the claimant lunged across the dock porch shortly thereafter.

In addition, video evidence of Ms. Greenhill's activities outside on the porch illustrates suspicious activity, as well. For example, Ms. Greenhill is shown on the porch rocking back and forth in a curious manner, then walking backwards to the edge of the dock porch and stopping before she turns to walk towards the steps. As she walks to the steps, Ms. Greenhill is clearly pictured speaking to the claimant with her hand over her mouth, as though trying to conceal from the camera what is being said. That Ms. Greenhill might try to conceal from the camera what she was

saying to the claimant seconds before the incident is consistent with the claimant's testimony that she knew that surveillance cameras where in place at the time of the incident.

While we do not consider this evidence, standing alone, to be conclusive evidence that Ms. Greenhill was conspiring with the claimant with regard to the incident in question, we find that it is compelling evidence that she may have assisted the claimant in contriving the claimant's fall from the dock, especially in view of inconsistencies in Ms. Greenhill's testimony as compared to the video footage of the event. For example, Ms. Greenhill denied that the claimant had her hands above her head in a flailing manner as she fell to the ground, testifying that she, in fact, witnessed the claimant trying to break her fall with her hands as she hit the ground. Upon reviewing still photographs of this incident, however, Ms. Greenhill agreed that the claimant's right hand was above her head as she went off of the dock. Further, the video surveillance makes it evident that the claimant did not try to use her hands to break her fall. Further, Ms. Greenhill testified that the claimant moved in a continuous motion and that she, at one point, was horizontal. This is clearly in contradiction to

what is revealed by the video and still pictures in that the claimant stopped briefly at the threshold of the oil room door before lunging forward, she paused very briefly at the edge of the dock, and she was never in a horizontal position; rather, she was bent over at the waist until she went off of the dock, at which time she was in an upright position. Finally, we note that Ms. Greenhill is pictured examining the claimant's left leg prior to the incident, which is the leg that the claimant subsequently injured. Whereas Ms. Greenhill initially denied recalling that she had done so, she ultimately admitted that she was looking at a rash on the claimant's left leg.

Based upon the above and foregoing, while we find that it is far too speculative to base a determination of the compensability of the claimant's injury upon Ms. Greenhill's activities, we further find that the photographic and video tape evidence, combined with Ms. Greenhill's testimony, which we do not find credible, discredit her version of events. Further, we note that Ms. Greenhill admitted that she had problems with the respondent-employer concerning delinquent payment of her account, which we find reinforces Mr. Frost's stated belief that she may have had motivation to conspire with the

claimant to stage a work-related injury. This is further supported by the fact that both Ms. Greenhill and the claimant admitted that they have been close personal friends for several years, as is clearly demonstrated by Ms. Greenhill's familiar behavior towards the claimant prior to her departure on the afternoon in question. The pair's close personal relationship makes Ms. Greenhill, if not a co-conspirator, at the very least, a biased witness.

We find that pictures of Ms. Greenhill's activities combined with her unreliable testimony weigh in favor of finding that the incident of May 29, 2012, was premeditated and perhaps staged. We find that the claimant's testimony is simply too inconsistent to be believed. Further, we find that the claimant had sufficient motivation to commit such an act, thus reinforcing that it is more likely than not that the event was no ordinary accident.

The claimant testified that she had gotten up from her desk on the afternoon in question and followed Ms. Greenhill to the oil room door in order to tell her good-bye, thank her for her business, and secure the door for the night since it was closing time. However, pictures of Ms. Greenhill embracing and kissing the claimant before she left

clearly indicates that a parting greeting occurred prior to the claimant getting up and following Ms. Greenhill to the door. Further, both the claimant and Ms. Greenhill admitted in perhaps the only testimony of theirs that we find completely credible, that Ms. Greenhill's business transaction was completed within the first ten minutes of her lengthy visit on the afternoon of May 29, 2012. Thereafter, Ms. Greenhill stayed until closing time and visited with the claimant about personal matters, thus constituting an extended break on the claimant's part, during which she would occasionally stop to briefly assist other customers. According to Ms. Harger, whose testimony we find credible, this behavior was inappropriate and inconsistent with company policy concerning proper business conduct, in that the claimant had visited with Ms. Greenhill about non-work related issues well after having completed their business transaction, and she had concluded their visit in a unprofessional manner. According to Ms. Harger, rather than having allowed Ms. Greenhill to stay and visit about non-business related matters after having competed their business transaction, the claimant should have ended Ms. Greenhill's business transaction and "let it be." As Ms. Harger stated, the video surveillance evidence clearly

demonstrates that other customers came in throughout the day who were given improper customer service due to Ms. Greenhill's presence all afternoon. In addition, unlike Ms. Greenhill, these customers completed their business transactions fairly quickly, were apparently thanked by the claimant in an appropriate manner, then they left without lingering for an extended period of time. While this does not necessarily prove that Ms. Greenhill stayed in order to conspire with the claimant to stage an accident, it clearly corroborates testimony concerning the claimant's alleged inappropriate business behavior which prompted disciplinary action against the claimant by the respondent-employer, thus adding credibility to Ms. Harger's testimony.

Moreover, according to Ms. Harger, the claimant initially reported to her that she was in the process of closing the oil room door when she tripped on the mat outside of the door. Ms. Harger testified that she had found this account of her accident to be "odd" in that the video surveillance, which she stated she reviewed on the evening of the incident, not only establishes that the mat in question is on the outside of the oil room door, but it clearly demonstrates that the claimant's body was already in motion when she stepped outside onto the mat. Moreover,

although the claimant ultimately denied tripping over the mat, indicating that she had instead tripped on the lip of the oil room door, Ms. Harger credibly testified that the claimant could not have been near the lip of the door because the lip is located on the track of the door between the concrete and the door, and the door is shut behind the lip. Furthermore, the video footage of the incident fails to demonstrate that the clamant tripped on the lip of the door, or on anything, for that matter, in that the claimant is first pictured inside of the oil room door with her head bent down and sticking out of the doorway. Next, her head and shoulders are visible through the doorway while she is still in a bent-over position. Because the claimant's head and shoulders were extended past the doorframe in which the lip was located before her feet were visible, reasonable minds could conclude that she could not have yet tripped on a lip of a door that was located in front of her feet when she started her forward movement. In addition, Ms. Harger credibly testified that the oil room door is a sliding door that only closes from the inside. Therefore, it would have been impossible for the claimant to have been closing the door when she allegedly tripped, because doing so would require that she be standing in an upright position.

Furthermore, the video surveillance footage fails to show door movement of any kind prior to the claimant having exited the door. Because there is no evidence of the claimant having tripped on either the mat outside of the door or the lip adjacent to that mat in the track along which the door slides, the claimant has failed to prove that she tripped on anything: a mat, a lip, or even over her own feet, for that matter.

Rather, the video surveillance footage and still pictures clearly show the claimant was neither outside of the oil room door nor inside attempting to slide the door closed when the incident occurred. Instead, this evidence reveals that the claimant paused at the threshold of the door with her head sticking out, then she proceeded head-first, her body bent forward, over the mat and to the edge of the porch where she planted both feet, then jumped over the edge. In contradiction to her testimony, the evidence fails to demonstrate that the claimant used her hands to try to catch herself and stop her forward momentum, nor did she use them to protect herself from impacting with the ground. Rather, the claimant’s hands were at her sides until she went off of the porch in an upright position, at which time she raised her right hand above her head and leveled her

left arm to her side. Clearly these actions were consistent with someone intentionally jumping, versus someone stumbling forward, trying to catch their balance, then inevitably falling to the ground.

Finally, the record reveals that the claimant had ample motive for staging such an accident in that, according to Mr. Frost's credible testimony, she had become "unhappy" over the potential sale of the company to a co-worker; she had issues with a new office manager and new dispatching procedures, and she had been disciplined for violating various company policies, such as selling fuel without seeking prior approval to customers like Ms. Greenhill who were on a "watch list." Further, we find that this incident having occurred on the claimant's return to work from a three-day weekend after having just learned that the facility may be sold or closed supports Mr. Frost's suspicion that she had schemed over the holiday weekend to stage a work-related injury, and that she had followed through with this plan upon her return to work on Tuesday. This conclusion is further supported not only by the recorded conversation between Mr. Frost and Mr. Canada, wherein it was disclosed that upon learning that Mr. Canada may purchase the facility the claimant had become very

upset, but also by Mr. Smith's credible, professional opinion that the claimant's accident appeared to have been "intentional and staged."

Based upon the above and foregoing, we find that the claimant has failed to prove that she sustained a compensable injury on May 29, 2012, in that the particular facts and circumstances of this claim fail to show that the claimant was carrying out the employer's purpose or advancing the employers interest when she was injured. Rather, the preponderance of the evidence clearly establishes that the claimant intentionally jumped off of the dock porch on the afternoon of May 29, 2012, for the purpose of staging a work-related injury, albeit she clearly could not have foreseen the severity of the injury that she actually sustained as result of her actions. Therefore, the compensability of this claim is denied pursuant to the provisions of Ark. Code Ann. §11-9-401(a)(2), in that the credible evidence in this claim preponderates in favor of the claimant's injury having been substantially occasioned by the claimant's willful intention to bring about such an injury. *Ramirez, supra*.

Even if, however, the claimant's actions were found to be accidental, a finding with which we would not

agree, the claimant has failed to prove that she was doing something that is generally required by her employer at the time this incident occurred. This conclusion is not only supported by Ms. Harger's extensive testimony regarding the scope of the claimant's employment duties and her blatant disregard for company rules and policies, but it is also supported by the undisputed fact that Ms. Greenhill's business transaction was completed within the first ten minutes of her having arrived at the facility, and that the two spent the remainder of the time "chit-chatting" about personal matters. Notwithstanding that the claimant testified that she had followed Ms. Greenhill to the oil room door in order to thank her for her business, tell her good-bye, and secure the door for the evening, there is simply no evidence that the claimant was in the process of closing the door when the incident occurred. Rather, the claimant is shown with her head stuck out of the door still speaking to Ms. Greenhill. And, while she could not recall what they were discussing at that time, clearly the claimant had an opportunity to thank Ms. Greenhill and tell her good-bye not only in accordance with company policy and procedure, which would have been at the end of their business transaction, but also when Ms. Greenhill hugged and

kissed her before she left. Because the claimant, an hourly employee, had spent the majority of her lengthy visit with Ms. Greenhill discussing personal matters, and in view of the fact that the claimant was not in the process of closing the door when the incident occurred, whether she was planning or was in the process of telling Ms. Greenhill good-bye and thanking her for her business as she was poking her head out of the oil room door is inconsequential. The fact is that, in having an extended personal conversation with Ms. Greenhill following their business transaction, the claimant was advancing her own personal interests rather than her employer's. Furthermore, walking her friend to the door and poking her head out in order to tell her good-bye was not within the scope of her duties as an employee. This is true especially in view of the fact that the claimant had received disciplinary action due to her past interactions with Ms. Greenhill in which she had blatantly disregarded and intentionally violated company policy to which she was openly opposed. Therefore, even if the claimant's injury was the result of an accidental incident, we find that the claimant has failed to prove by a preponderance of the evidence that she was engaged in employment activities at the time of this incident.

In conclusion, the decision of the Administrative Law Judge is reversed in this claim, and compensability of the claimant's accident is denied along with all benefits associated therewith.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After my *de novo* review of the entire record, I must respectfully dissent from the majority opinion. I find that the claimant established that she sustained a compensable injury when she fell off a dock at work on May 29, 2012.

The claimant credibly testified that she did not intentionally injure herself. She credibly testified that she weighed 275 pounds with a 48DDD bra size and was thus top-heavy and unable to regain a standing position if she stumbled and lost her balance.

At the time of the injury, it was time to close the business for the night. The claimant had to walk to the door to close it, and she walked her friend and customer to the door and said good-bye, too. She testified that she tripped over something, and she tried to regain her balance but could not. She continued to take steps to try to right herself, but she could not regain her balance before she fell off the dock. The claimant also stated in a report given to an investigator that she was unsure upon what her foot caught, and that her foot "didn't work," and once she started falling, there was nothing to grab and no way to regain her balance. The surveillance video of the incident supports the claimant's testimony, especially in light of her physical build, the challenges made to her balance by her physical build, and in her description of her efforts to regain her balance in a short distance. The majority mentions that her arms were not outstretched before her, yet to hold her arms forward would have created more forward momentum instead of less and would have resulted in more, not less, injury, a fact the claimant acknowledged at the hearing.

The claimant testified that she had sold some

property; so, at the time of her injury and at the time of the hearing, she was not in financial distress. Thus, the suggestion that she was looking for financial gain is unjustified.

Whether the claimant was speaking to her friend or not at the time of the injury is irrelevant to the question of employment services. The fact that she did not get the door shut, because she fell out of it and off the dock does not change the fact that she was in a location in which she could be expected to perform employment services and was, in fact, performing the service of closing down the business for the night, specifically securing the door.

The reasoning behind the respondents' and the majority's position that the claimant was afraid she would lose her job when the company was sold or closed, so she threw herself off of a twenty-eight inch deck to injure herself and gain benefits is preposterous. No matter how much bad blood there might have been between the employer and employee at the time of the fall, and the majority certainly paints a grim picture, the suggestion that she would intentionally injure herself in order to *possibly* gain two-thirds of her salary for

the time that she could not work, *if* the result of the injury was that she could not work, and medical benefits which would not result in financial gain to her in any event is not supported by the record. It is certainly not logical to think that a person would intentionally injure themselves on the *possibility* that she might be injured severely enough to be entitled to disability benefits. Add the fact that workers' compensation benefits are not always automatically paid. Given the nature of the workers' compensation system and the relationship her employer had with her, she could expect to have to fight for benefits, as she is doing now, before she saw any financial benefit. This meant that she could have had to have financed some or all of her own medical care. On the other hand, the unhappy relationship between the employer and employee is evidenced by the employer's reaction to her injury of unreasonable suspicion and paranoia.

I respect the credibility findings of the Administrative Law Judge and the logic of his opinion. I would award the claimant benefits for her compensable injury.

For the foregoing reasons, I must respectfully

dissent from the majority opinion.

PHILIP A. HOOD, Commissioner