

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304388/F304389

LISA HENDRIX		CLAIMANT
BOB'S CUSTOM CABINETS, INC.		RESPONDENT
ZENITH INSURANCE COMPANY, INSURANCE CARRIER	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED DECEMBER 28, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondents No. 1 represented by JEREMY SWEARINGEN, Attorney, Little Rock, Arkansas.

Second Injury Fund represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 4, 2004, in Springdale, Arkansas. The deposition of Dr. Cyril Anthony Raben was taken on June 29, 2004, and has been admitted as Respondent's Exhibit No. 2.

A pre-hearing order was entered in this case on August 31, 2004. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On August 15, 2002 and September 14, 2002, the relationship of employee-self insured employer-third party carrier existed between the parties.
2. On the above dates the claimant's average weekly wage was \$342.56, yielding a weekly total disability of \$228.00 and a weekly for permanent partial disability rate of \$171.00.
3. The claims are controverted in their entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained compensable injuries to her low back or lumbar spine on August 15, 2002 and/or September 14, 2002.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from August 22, 2003 through June 29, 2004, permanent disability benefits for both permanent physical impairment and wage loss, and attorney's fees.
3. Second Injury Fund liability.
4. The effect of Ark. Code Ann. §11-9-701 on all potential benefits accruing prior to May 7, 2003.

In regard to these issues, the claimant contends:

"It is claimant's contention that claimant sustained three compensable injuries arising out of and in the course of her employment with the respondent, which occurred on or about 08/15/2002 and on or about 09/15/2002, both dates are approximate and will be substituted. On these approximate dates, the claimant was working for the respondent employer as a laborer when she sustained head, multiple trauma, and back injuries after, first being hit in the head by a steel door/cabinet top with loss of consciousness and then falling and injuring her back, and then, several weeks later, while carrying 300# cabinet with another co-worker, tumbling and twisting, and feeling an immediate sharp pain in her low back. The claimant continued to work and was eventually placed on light duty restrictions on 04/11/2003, and on total restrictions on 08/15/2003. The claimant has been temporarily disabled from 08/18/2003 to a date as yet to be determined."

In regard to these issues, the respondent employer-carrier contends:

"Respondents contend that the claimant cannot establish the essential requirements for proving she sustained a compensable injury on 08/15/2002 or 09/15/2002, per the requirements of Ark. Code Ann. §11-9-102 and Act 796 of 1993. Specifically, but not exclusively, respondents contend that the claimant has no objective medical findings to support the existence of a compensable injury. Specifically, but not exclusively, respondents contend that the claimant cannot prove by a preponderance of evidence that her alleged injury arose out of and in the course of her employment."

In regard to these issues, the respondent Second Injury Fund denies the claimant had any pre-existing disability, impairment, or combined disability. Finally, the Fund denies any liability for benefits.

### DISCUSSION

\_\_\_\_\_The central issue in this case is the question of whether the claimant sustained “compensable injuries” to her low back on or about August 15, 2002 and/or September 14, 2002. The burden rests upon the claimant to prove these alleged compensable injuries.

In order to meet this burden, the claimant must first show the existence of a causal relationship between a specific employment related incident or her employment activities, in general, Ark. Code Ann. § 11-9-102(4)(A)(i) and § 11-9-102(4)(A)(ii)(b). The only direct evidence to prove the existence of this necessary causal relationship is the claimant’s own testimony. Although the testimony of a party is never considered uncontradicted, this does not mean it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to address. In the present case, the claimant’s testimony would clearly be legally competent to prove the existence of a reasonably close temporal relationship between a specific employment related incident or her employment activity, in general, and the initial onset of symptoms indicative of the occurrence of the objectively demonstrated defect of her lumbar spine.

In the present case, the claimant has also offered the “expert” medical opinion of Dr. Cyril Raben, an orthopaedic surgeon and her primary treating physician. In his reports and deposition, Dr. Raben is quite emphatic that it is his expert medical opinion, “within reasonable degree of medical certainty,” that the objectively documented defects involving the claimant’s lumbar spine and her resulting lower back difficulties are causally related to her employment. However, he is obviously not sure of exactly what about her employment caused these defects and resulting difficulties. As his reports and records indicate, he has attributed these defects and difficulties to first one event or activity and then to another.

In his deposition, Dr. Raben makes the following statement concerning his initial visit with the claimant:

“What we had decided-or what she (the claimant) had told-what she told me on that day was that she sus-she had sustained multiple lifting/twisting injuries over time.” (Emphasis mine) D. 15

A further review of Dr. Raben’s deposition would indicate that his use of the plural pronoun “we” in the foregoing response, was not merely a mistake in his choice of words. Throughout his deposition, he appears to be more the claimant’s advocate, than her physician. When confronted with the fact that he had changed his opinion, in regard to the employment related cause of the claimant’s lumbar defect and resulting difficulties, whenever the claimant changed her history concerning the events or activities immediately proceeding the onset of these difficulties, Dr. Raben stated that these changes in the claimant’s history have no effect on his ultimate opinion. He further attributed these changes by the claimant merely to an improvement in her testimony after having more time for reflection. He also summarily dismisses any histories of her back difficulties that the claimant may have previously related to any other physician. Curiously, he gives as his reason for disregarding these histories that these statements would be “hearsay.” From the claimant’s testimony, it appears that her further reflection came about as the result of Dr. Raben informing her that her condition must have been due to a “one time” or singular incident of trauma.

In his deposition, Dr. Raben also comments that, based solely upon his review of the MRI study, he can determine that the damage shown to the claimant’s lumbar spine had to have occurred between four and seven months prior to the study. Clearly, the changes noted on the claimant’s lumbar MRI are commonly considered as degenerative changes that take a considerable period of time to evolve and a four month minimum might be appropriate. However, in 26 years, I have seen a multitude of cases involving similar defects and have never had a medical expert be able to place a maximum time limit for the initial onset of these types of changes (not even Dr. Raben). Perhaps Dr. Raben’s new found expertise in this area caused the claimant to request her initial treating physician to specifically refer her to Dr. Raben.

However, it is obvious that any weight to be accorded to Dr. Raben's "expert" medical opinion hinges on the accuracy of the claimant's history of the initial onset of her lower back difficulties. In reaching his opinion, Dr. Raben has clearly assumed that at least one of the histories given him by the claimant (in regard to the onset of her lower back difficulties) is accurate. This Commission does not have the luxury of that assumption.

In her testimony, the claimant focuses on two specific incidents as the cause of her complaints. She testified that the first of these occurred on August of 2002. In this incident, she was struck by an exterior door on the back of her head and the back of her neck. She stated that she was knocked unconscious and fell to the floor. When she came to, the back of her head and the back of her neck hurt. She does not specifically describe any difficulties with her lower back contemporaneous with or immediately following this particular incident.

The second incident, described by the claimant in her testimony, occurred on a Saturday in September. In this incident, she and a co-worker (named Louis) were moving a bar or island cabinet from a trailer into a house. She stated that while they were going across the yard, Louis dropped his end of the bar or island cabinet and that this caused her to jerk or twist her back. She stated that, at the time of this incident, she experienced some difficulty with her back. She described these difficulties as follows:

"I don't know if you would call it sharp pains from just muscle pulling. I don't know exactly what I had done, but I didn't drop my end. Robert got Louis' end straightened back out; we continued to carry this thing on through the house."

"Yes, it hurt."

"At that time it was a real sharp jerked muscle. I just thought I had pulled a muscle really badly at the time."

However, she continued to perform her regular duties for the remainder of the job. She testified that she continued to experience difficulties with her back and was "miserable" that night and the following day. She stated that when she went to work on the following Monday, she was not "feeling real great" and asked the owner of the respondent to fill out an accident report or

workers' compensation form. She stated that her difficulties with her back continued thereafter, even though she only performed less strenuous activity. She stated that she did not see a doctor, because she did not have the finances, herself, and the respondent failed to offer her any treatment. Finally, she stated that once her Christmas expenses were taken care of, she made an appointment with a family physician at the Northwest Medical Clinic, at the recommendation of "Joe" (apparently an owner of the respondent employer). Finally, she testified that she obtained Dr. Raben's name from the urologist, to whom she was referred by the Northwest Medical Clinic.

Although the claimant described this contemporaneous onset of significant low back difficulties with this September 2002 incident and continuing significant lower back difficulties thereafter, she repeatedly failed to relate this incident, when seeking medical treatment for her back. She also failed to specifically identify this incident on various Commission forms.

On January 14, 2003, the initial history recorded by the Northwest Medical Clinic states:

"Does not remember a specific injury but does lifting at work."

(Emphasis mine)

On February 24, 2003, the claimant saw Dr. Orlando Aguilar-Guzman, a urologist, to whom she had been referred by the Northwest Family Care Clinic. Dr. Guzman took the following history:

"Patient gives a couple of months history of low back, apparently was doing some strenuous physical work. She works in the furniture business and since then has had at times excruciating pain in her low back." (Emphasis mine)

When the claimant was initially seen by Dr. Raben, on February 28, 2003, there is again no mention of the incident with the island cabinet or bar. The patient information form, completed by the claimant, contains a curious response to the question:

"Is your problem related to a workers' compensation accident?"

RESPONSE: "Depends on outcome of first visit."

However, the form goes on to state that the injury occurred at "work" while "lifting." The date of injury is first given as "fall of 2002". It appears that the specific date of August 1, 2002, was

subsequently identified. However, there is still no description of any specific incident on that date.

In his deposition, Dr. Raben indicated that there was another form that was completed by the claimant on her initial visit. Although I cannot find where this form was ever introduced into evidence, Dr. Raben testified that it contained a history of the onset of the claimant's back difficulties with repeated lifting at work or loading firewood for her employer.

On April 10, 2003, the claimant completed an AR-C which contained two accident dates, but only listed the nature of the accidents as "multiple trauma." Again, there is no specific mention of the described incident with the island cabinet or bar. An AR-N subsequently submitted by the claimant on May 27, 2003, does describe the incident that involved the falling door, but makes no mention of the subsequent island cabinet or bar incident. The same holds true for the claimant's answers to the respondent's interrogatories. Again, the only incident described involved the falling door.

If, as the claimant testified, she had a sudden and immediate onset of significant lower back difficulties that occurred contemporaneous with the lifting or carrying incident involving the island counter or bar and that these significant difficulties continued unabated thereafter (to the point where she could not longer perform her previous employment activities), there is no reasonable explanation for her failure to mention this incident as the cause of these difficulties on repeated occasions. Dr. Raben's explanation that the claimant merely required more time to reflect on the cause of her complaints is not only illogical, but irrational. The claimant shows no indication of a mental or cognitive defect to explain her inability to recall such an obviously unusual event that occurred contemporaneously with the initial onset of her severe low back difficulties.

There is also the matter of the claimant's previous episode of lower back difficulties. The medical records show that in September of 2000, the claimant experienced sufficiently severe lower back difficulties to cause her to seek medical services. Although these difficulties were diagnosed as a low back sprain, it is important to note that her area of complaints was specifically noted as being in the area of the L5-S1 disc. This is the exact same area of the defects noted on the MRI

study and the area where the corrective surgery was performed by Dr. Raben.

In light of the inconsistencies in the claimant's histories of the onset of her difficulties and her illogical failure to report the subsequently described employment related incidents (particularly the onset in September of 2003), I find the testimony in this regard to lack credibility. Thus, the claimant has failed to prove a reasonably close temporal relationship between her lower back complaints and her employment related incident or activity. I further find the opinion of Dr. Raben to be based upon a mistake of material fact and lacking credibility, As the claimant has failed to prove this reasonably close temporal relationship, she has also failed to prove by the greater weight of the credible evidence the existence of a causal relationship between the difficulties with her low back or lumbar spine that have given rise to this case and any employment related event or activity on or about August 15, 2002 and/or September 14, 2002 (specifically the alleged incident of being struck by a falling door and the incident with the island cabinet or bar). Thus, these difficulties with her lower back or lumbar spine would not represent "compensable injuries" that occurred on or about August 15, 2002 and/or September 14, 2002. Her claims for benefits attributable to these alleged employment related injuries must be denied and dismissed in their entirety.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of these claims.
2. On or about August 15, 2002 and September 14, 2002, the relationship of employee-employer-carrier existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$228.00 for total disability and \$171.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove by the greater weight of the credible evidence that she sustained "compensable injuries" to her low back or lumbar spine on or about August 15, 2002 and/or September 14, 2002. Specifically, she has failed to prove the existence of a causal relationship between any employment related incident or

activity that occurred on or about those dates and any physical injury to or resulting difficulties with her low back or lumbar spine.

5. The respondent employer/carrier has denied the occurrence of any compensable injury to the claimant's back or lumbar spine and have controverted her entitlement to any and all benefits.
6. The Second Injury Fund has also denied any liability in this case and has controverted the claimant's entitlement to any benefits from the Fund.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss these claims in their entirety.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge