

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304388/F304389

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

OPINION FILED JANUARY 17, 2006

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

Claimant represented by HONORABLE LAURA J. MCKINNON, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by HONORABLE JEREMY SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed December 28, 2004.

The Administrative Law Judge entered the following findings of fact and 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.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority in this case is affirming and adopting an Administrative Law Judge's decision denying this claim. In my opinion, the Majority is not correctly assessing the testimony of the claimant or the medical opinions of her treating physician. Based upon my de novo review of the evidence in this case, I find that the claimant did establish that she suffered a compensable injury to her lower back and that she should be awarded all appropriate medical and disability benefits. For that reason, I respectfully dissent from the Majority's Opinion.

The claimant has alleged that she suffered injuries to her lower back as a result of her job-related activities. The claimant has identified two specific incidents which may have caused her injuries and has also testified as to the general strenuous nature of her employment. The first of these two specific incidents occurred on August 17, 2002, and the second was on September 14, 2002.

At the time of both of those accidents, the claimant was employed in the respondent's cabinet business. Her duties included assisting the manufacturing of cabinets and, occasionally, their installation in homes. On August 15, 2002, the claimant and another worker were installing a cabinet when an exterior door which was leaning against a wall fell and struck her on the back of the neck knocking her down and wedging her head against some cabinets. The second incident occurred on September 14, 2002, when she and a coworker were attempting to carry a large cabinet/bar into a home under construction. According to the claimant's testimony, this item weighed between 600-

1200 pounds and was being carried by her and one other worker. When the other worker dropped his end, the claimant was left holding hers and twisted her back. She further testified that after fellow employees assisted in moving the item, her back began hurting and she set down for a while to recover. While she did resume some work that day, she stated that she did not perform any significant tasks.

The claimant continued working following her injury even though, according to her testimony, she was essentially on light duty and her coworkers helped her with any tasks involving heavy lifting and more strenuous activities. Undoubtedly, this was facilitated because her immediate supervisor was also her husband.

The claimant did not seek medical treatment for her condition until January 2003. At that time, she saw Lucy McNair Jones, a nurse practitioner with the Northwest Family Care Center. In a progress note of that date, the claimant was diagnosed as having a lumbar strain and was restricted to no lifting over ten pounds and no repetitive bending or twisting. She was also directed to use ice or heat. The only

reference to a history of injury was the notation that the claimant began having problems "six to eight weeks ago."

Apparently, because the claimant had an existing urinary tract infection and related problems, it was suspected that her back pain could have been related to those conditions. However, when such turned out not to be the case, she was eventually referred to Dr. Cyril Rabin, a Fayetteville orthopedic surgeon, specializing in spinal injuries. Dr. Rabin saw the claimant on February 28, 2003, noting that the complaints had begun six to seven months previously. He also took a history indicating that the claimant was employed at Bob's Custom Cabinet's in Springdale and had "sustained multiple lifting/twisting injuries over time." Dr. Rabin assessed the claimant as suffering from lumbar pain without radiculopathy and directed that she undergo an MRI scan of her lower back.

The MRI scan was performed on March 5, 2003. The radiology report authored by Dr. Steven Moon, noted that the claimant had a broad based protrusion at L5-S1 which slightly displaced the right L5 nerve root. After reviewing

the MRI scan of the claimant, Dr. Rabin authored a progress report dated March 14, 2003. In that note, Dr. Rabin stated that the claimant had a broad based herniation with neuroforaminal impingement and recommended that she undergo a lumbar fusion. He also stated that, "within a reasonable degree of medical certainty" the claimant had an injury that was caused or "markedly exacerbated by her aggressive heavy industrial labor." He also stated that the necessity for surgery "was at least 51% related to her on-the-job injury."

At some point, the respondent controverted the claim in its entirety and stopped paying further medical treatment. However, the claimant underwent the recommended surgery and Dr. Rabin eventually assessed the claimant with an impairment rating between 8% and 12%. In his deposition, Dr. Rabin later clarified that to be a 10% impairment rating, "for right now."

After a hearing, an Administrative Law Judge denied this claim. His rationale, which is being adopted by the Majority, was that the claimant was not a credible witness and the medical history she provided at the hearing

and to her doctors was inaccurate and contradictory. Dr. Rabin's opinion that the claimant had injured her back in the work related accident outlined above was also rejected.

In considering Dr. Rabin's opinion, the Majority notes that Dr. Rabin had explained in his deposition that the degree of degeneration he noted in the claimant's MRI of March 2003 was in accord with a disc injury sustained in August or September of 2002. The Administrative Law Judge was very critical of that statement, questioning whether it was possible to determine the length of time which had passed between the claimant's injury and the MRI scan. The Judge stated that, in his experience, he had never known a doctor to be able to do that. He also suggested that the claimant had requested to see Dr. Rabin because she believed he would be predisposed to opine in her favor.

I find it interesting that, despite the Judge's finding of a lack of credibility, there has been no evidence offered that in any way contradicts or suggests the claimant's testimony regarding her two injuries was incorrect. The claimant testified that she advised her

employer of these instances and provided the names of coworkers who were present. While the claimant is criticized for not calling these witnesses to corroborate her story, I note that the respondent also did not call any of these witnesses, some of whom are still employed by the insured, nor did they call the owner of the business to whom the claimant reported her injuries. While I realize that the burden of proof is on the claimant, I do not believe that it is appropriate to draw inferences either way because certain witnesses were or were not called.

I also do not believe that the medical records, as relied upon by the Majority, call the claimant's testimony into question. It has been asserted that the claimant's credibility is doubtful because in her initial doctor visits in January 2003, she stated that the injuries occurred six to eight weeks beforehand. However, I note that in later doctor visits, such as with Dr. Rabin in late February 2003, she said the injury happened six to seven months prior, a more accurate estimation. While the claimant was imprecise with her dates, the information she provided to her doctors

was connected with a job-related injury. In my opinion, not being able to provide the exact dates of injury does not mean that the claimant was lying or being otherwise untruthful about the job-related nature of her injuries. While she may be a poor historian, I do not believe that she is a liar.

I also object to the Majority's cavalier dismissal of Dr. Rabin's opinion. Dr. Rabin is a licensed medical professional who has extensive experience in the area of orthopedics with a specialty in spinal surgery. While extensive experience as a lawyer or judge may give an individual some insight into medical matters, it does not provide sufficient knowledge to overrule the opinion of a professional physician.

There is no doubt that the claimant has had a number of health problems in the past. Also, the claimant has complained of prior back pain, not to mention having suffered orthopedic injuries to her knees and other parts of her body. However, the claimant's past back pain was transient in nature and understandable, in that, she has

engaged in labor-intensive jobs involving some degree of heavy lifting. However, there is no indication that any of the claimant's back injuries were combined with the severe pain and radicular symptoms she now complains of.

Dr. Rabin has clearly opined that the claimant's injury was most likely the result of the job-related accidents she described as having occurred in August and September of 2002. While Dr. Rabin was not certain which of the two accidents would have caused her injury, he is strongly of the opinion that one of them did. As the claimant's primary treating physician, I believe that his opinion is entitled to considerable weight and, when coupled with the claimant's testimony as to how these injuries occurred, should be sufficient to establish the compensability of the claimant's injury.

For the reasons set out above, I would find that the claimant established her entitlement to the requested benefits. For that reason, I respectfully dissent.

SHELBY W. TURNER, Commissioner