

**TEMPORARY AWARD ALLOWING COMPENSATION**  
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 10-051797

Employee: Ronland Ranson  
Employer: Cracker Barrel  
Insurer: Indemnity Company of North America c/o CCMSI  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge (ALJ) dated November 23, 2011.

**Preliminaries**

The ALJ heard this matter to consider: 1) whether employee sustained an accident or occupational disease arising out of and in the course of his employment; 2) whether employee's injury was medically causally related to the accident; 3) whether employee should be awarded future medical care; 4) whether employee should be awarded temporary total disability benefits; and 5) whether employee should be awarded costs for employer defending the claim upon unreasonable grounds under § 287.560 RSMo.

The ALJ found that employee failed to establish that he sustained a work-related accident. The ALJ deemed all other issues moot and issued a final award denying employee's claim for benefits.

Employee appealed to the Commission, alleging: 1) employee proved he had an accident at work; 2) the work accident was the prevailing factor in causing his injury; 3) employee is entitled to future medical care; 4) employee is entitled to temporary total disability benefits for the period of June 30, 2010, through April 10, 2011; and 3) employee is entitled to an award of costs under § 287.560 RSMo.

**Findings of Fact**

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

The ALJ stated in her findings of fact that during employee's June 20, 2010, visit to St. Francis Medical Center, "[employee] told the nurse he had pain and tenderness in his left lower back." The ALJ went on to state that employee "said his pain was caused by body motion and twisting. He alleges he was referring to the work incident when he gave that description." Missing from the ALJ's discussion of employee's June 20, 2010, visit is the fact that the Nursing Assessment shows "Pt states he slipped **at work** and caught himself in a twisting motion thinks [sic] he strained his back." (Emphasis added). In addition, employee participated in drug testing at St. Francis Medical Center and signed the custody and control form stating the reason for the test was "Post Accident."

The ALJ discussed employee's visit to Missouri Delta Express Care on June 30, 2010, and noted that the records indicate employee had a slip at work one and one-half weeks before the

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2009 unless otherwise indicated.

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appointment and that sometimes he experiences numbness in his left leg. The ALJ also noted that employee testified that a nurse from Missouri Delta called one of his managers. However, the ALJ failed to note that a record of this call was made in the "Workman's Compensation Employee Work Status Report," which shows a telephone call was made by Amy Folson PAC to one of employer's managers on June 30, 2010, at 11:00 a.m.

The ALJ indicated in her award that one of employee's managers, Patrick Sauer, submitted an employee claim form on July 1, 2010, indicating employee complained of an injury, but did not discuss what Mr. Sauer specifically stated in the claim form. Mr. Sauer stated in the form that:

[R]onland called this morning and said he hurt his back in the dishroom [sic]. He said he slipped. [I] asked him if he notified a manger [sic] and he said he told [L]eonard [S]picer (am). [I] called [L]eonard and asked if he was notified and he said no he was never told. [I] called repeatedly to get him up here for the chain of custody form to take with him. [H]e never called back or showed up. [I] left a message with a female that stayed with him and told her he has to come in today and pick this up and leave me [a] doctors [sic] note today or there is nothing [I] can do for him.

With respect to whether employee reported the work injury to management, we find employee's testimony more credible than employer's witnesses' testimony. Employee's testimony is fully corroborated by the documentary evidence submitted by employee.

### **Conclusions of Law**

Section 287.020.2 RSMo defines "accident" as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."

Section 287.020.3 RSMo provides, as follows:

(1) In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life."

In this case, the accident was not witnessed and, therefore, we must look to other evidence to verify the facts alleged by employee. The ALJ placed a significant amount of weight on the testimony of employee's managers stating that employee did not report the injury. However, employee offered multiple records showing he gave a consistent accident history to anyone

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willing to record what he said. Specifically, employee provided medical reports in which he described his accident, the post-accident drug test, the nurse's notation that she called and spoke to a manager at employee's work to report an accident, the employee claim form filed by Mr. Sauer, and the recorded interview, and the notes Katie Martz posted on the insurer's computer.

We find, based upon the aforementioned evidence and the record as a whole, that employee met his burden of proving that on June 18, 2010, he sustained an accident, as defined by § 287.020.2 RSMo.

Having found that an accident occurred, we must now turn to the issue of whether the injury arose out of and in the course of employment.

Dr. Bowen issued an opinion stating that the June 18, 2010, accident was the prevailing factor in aggravating a preexisting condition resulting in his current medical condition. Dr. Doll diagnosed a mild left lumbar strain related to the work accident.

Dr. Bowen did not believe employee was at maximum medical improvement and wanted to try additional treatment options including intrascapular injections. Dr. Doll, on the other hand, opined that employee is at maximum medical improvement and sustained no permanent partial disability attributable to the alleged June 2010 incident.

Based on all of the evidence presented, we find that employee's accident on June 18, 2010, was the prevailing factor in causing employee's injury on that day. Therefore, we find that employee's injury is medically causally related to the June 18, 2010, work-related accident.

In addition to the aforementioned, we find Dr. Bowen's opinion that employee has not achieved maximum medical improvement more convincing than Dr. Doll's opinion stating the opposite. Therefore, we order employer to provide all future medical care reasonably required to cure and relieve the effects of the injury.

With regard to employee's claim for temporary total disability benefits, we do not believe employee met his burden of proving he was totally disabled from June 30, 2010, through April 10, 2011. Section 287.020.6 RSMo defines "total disability" as the "inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident."

Employee began working for Manpower approximately two weeks after he stopped working for employer. Employee effectively represented that he was able to do any work at that time because he did not give his work restrictions to Manpower. Employee may have been given lifting restrictions, but failed to prove he was "totally disabled" from June 30, 2010, through April 10, 2011.

Lastly, with respect to employee's claim for costs under § 287.560 RSMo, employee failed to meet its burden of proving that employer defended this claim without reasonable ground. Costs should only be invoked where the employer offers "absolutely no ground, reasonable or otherwise," for refusing benefits clearly owed to a claimant because his injury was indisputably work-related. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. banc 2003). In this case, employer refused employee benefits because it believed, based on its witnesses' testimony, that employee did not suffer a work-related accident. Employer's refusal to provide benefits was not egregious.

Employee: Ronland Ranson

**Award**

We reverse the ALJ's decision and find that employee sustained an accident arising out of and in the course of his employment on June 18, 2010. Employer is ordered to provide all future medical care reasonably required to cure and relieve employee from the effects of the injury.

Employee's claim for temporary total disability benefits for the period June 30, 2010, through April 10, 2011, is denied.

Employee's claim for costs under § 287.560 RSMo is denied.

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

Colleen Joern Vetter, attorney for employee, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Maureen Tilley issued November 23, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this temporary or partial award.

Given at Jefferson City, State of Missouri, this 22nd day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
James Avery, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Ronland Ranson

Injury No. 10-051797

Dependents: N/A

Employer: Cracker Barrel

Additional Party: Left open

Insurer: Indemnity Insurance Company of North America c/o CCMSI

Hearing Date: 8-10-2011

Checked by: MT/rf

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of alleged accident? 6-18-2010.
5. State location where accident occurred or occupational disease contracted: Cape Girardeau, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how alleged accident: Employee alleges he was injured on June 18, 2010 when his right leg slipped out from under him as he reached up for a glass rack in the dish room at work. He alleged that as he slipped, he turned to the left,

dropped the rack on the counter, and grabbed the rail of the counter to prevent from falling to the floor. He said he felt a sharp pain in his lower back at that time.

12. Did accident or occupational disease cause death? No.
13. Parts of body allegedly injured by accident: Low back (body as a whole).
14. Nature and extent of any permanent disability: None.
15. Compensation paid to date for temporary total disability: None.
16. Value necessary medical aid paid to date by employer-insurer: None.
17. Value necessary medical aid not furnished by employer-insurer: None.
18. Employee's average weekly wage: \$203.66.
19. Weekly compensation rate:
  - Temporary Total disability: \$135.78.
  - Permanent partial disability: \$159.00.
20. Method wages computation: By agreement.
21. Amount of compensation payable: None.
22. Second Injury Fund liability: Left open.
23. Future requirements awarded: None.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On August 10, 2011 the employee, Ronland Ranson appeared in person and by his attorney, Colleen Joern Vetter for a temporary or partial award. The employer-insurer was represented at the hearing by their attorney, Rachel Brown. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. Covered Employer: The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act and liability was fully insured by Indemnity Insurance Company of North America c/o Canon Cochran Management Services, Inc.
2. Covered Employee: On or about the date of the alleged accident or occupational disease the employee was an employee of Cracker Barrel and was working under the Workers' Compensation Act.
3. Notice: Employer had notice of employee's accident.
4. Statute of Limitations: Employee's claim was filed within the time allowed by law.
5. Average weekly wage and rate:
  - Average weekly wage: \$203.66.
  - Temporary total disability: \$135.78.
  - Permanent partial disability: \$159.00.
6. Medical aid furnished by employer-insurer: None.
7. Temporary disability paid by employer-insurer: None.

### **ISSUES**

1. Accident: Whether on or about June 18, 2010, the employee sustained an accident or occupational disease arising out of and in the course of employment.
2. Medical causation: Whether the employee's injury was medically causally related to the accident on June 18, 2010.
3. Employee's claim for additional medical aid.
4. Employee's claim for additional temporary total disability benefits in the amount of \$5,527.60. This is for 40 weeks and 5 days for the time period of June 30, 2010 through April 4, 2011.
5. Employee's claim for penalties for defending upon unreasonable grounds under Section 287.560 RSMo.
6. Employee and Employer requests a final award if compensation is denied based upon the issue of accident or medical causation.

### **EXHIBITS**

The following exhibit were offered and admitted into evidence:

Employee's Exhibits

- A) Medical records of St. Francis Medical Center (cert. 8/12/10).
- B) Medical records of St. Francis Medical Center (cert. 6/9/11).
- C) Adjuster notes.
- D) Transcript of recorded statement.
- E) Letter dated 7/20/10 – Clare Behrle to Katie Martz.
- F) Fax dated 8/5/10 – Clare Behrle to Katie Martz.
- G) Letter dated 8/16/10 – Clare Behrle to Katie Martz.
- H) Letter dated 8/25/10 – Clare Behrle to Katie Martz.
- I) Letter dated 9/10/10 – Clare Behrle to Rachel Brown.
- J) Statement of costs with attachments.
- O) Dr. Bowen deposition dated January 24, 2011.
- P) Medical records of Missouri Delta Express Care.
- Q) Wage statement.

Employer-Insurer's Exhibits

- 1. Dr. Doll deposition dated July 13, 2011.
- 2. Medical Records of Missouri Delta.
- 3. Letter dated 10/27/10.
- 4. Letter dated 12/21/10.
- 5. Claim form.
- 6. Notice of deposition.
- 7. Patrick Sauer deposition dated April 19, 2011.
- 8. Mike Stevens deposition dated April 27, 2011.
- 9. Amy Polhamus deposition dated April 27, 2011.
- 10. Leonard Spicer deposition dated April 27, 2011.

**FINDINGS OF FACT**

Employee's Testimony

Ronland Ranson ("Employee") testified at the hearing that he is 28 years old and resides in Cape Girardeau, Missouri. He began working as a dishwasher at Cracker Barrel ("Employer") on June 2, 2010.

Employee alleges he was injured on June 18, 2010 when his right leg slipped out from under him as he reached up for a glass rack in the dish room at work. He stated that as he slipped, he turned to the left, dropped the rack on the counter, and grabbed the rail of the counter to prevent falling to the floor. He said he felt a sharp pain in his lower back at that time. Employee was unsure if anyone saw the incident. He also did not know how heavy the glass rack was but he recalled it made a loud noise when he dropped it. Employee also testified that he did not tell any of the employees about the incident and he finished working the rest of his shift that day.

Employee could not recall who was managing the restaurant on June 18, 2010, but he did recall speaking with a manager before clocking out at the end of his shift. He did not mention the incident to the manager at that time. He did not report his injury that day, nor did he ask to be sent to the emergency room, because he did not think the injury was significant.

On June 19, 2010, Employee testified that he called manager, Amy Polhamus. He alleges that he notified Ms. Polhamus that he could not come to work because of his injury. He asserted that Ms. Polhamus was wrong if she testified in her deposition that this conversation never took place.

On June 20, 2010, Employee went to St. Francis Medical Center. He told the nurse he had pain and tenderness in his left lower back. He said his pain was caused by body motion and twisting. He alleges he was referring to the work incident when he gave that description. He was diagnosed with a left lateral back muscle strain (Exhibit A). He was given pain medication and a drug screen. He also received work restrictions limiting him to no lifting over 25 pounds. On direct examination at trial Employee said he brought this slip to his supervisor, Leonard Spicer, during his next shift and he was unsure as to why Mr. Spicer testified that he did not receive the slip. On cross-examination, Employee said he had a discussion over the phone with Mr. Spicer about his work restrictions and injury. He asserts that Mr. Spicer is wrong if he testified that this conversation did not take place.

Employee testified that manager, Pat Sauer, did not show him how to do any light duty work. He also said that although he had to lift over 25 pounds as a dishwasher, he continued performing those duties after receiving his work restrictions because that was his job, but that he still had back pain during that time.

After seeking treatment at St. Francis Medical Center in Cape Girardeau, Employee went to an emergency room in Sikeston. He testified that Sikeston is a 20-minute drive from Cape Girardeau. He asserts that he went to Sikeston for a second opinion because he did not have the proper insurance in Cape Girardeau. Employee later testified that he did not have the proper insurance for treatment in Sikeston either. While he was in Sikeston, the Employee also visited his family.

Employee went to Missouri Delta Express Care on June 30, 2010. Between the St. Francis and Missouri Delta appointments, Employee continued working. He testified that he missed two shifts during that time. He alleges he called a manager to give notification of his absence, however he could not recall with whom he spoke. Employee testified he was unsure why all the managers said they had not received this phone call. Employee told the nurse at Missouri Delta he had low back pain from a slip at work 1½ weeks before the appointment and that sometimes he experiences numbness in his left leg. He also told the doctor he suffered a prior injury while cutting tree limbs in February 2010. The prior injury occurred when he slipped off a branch, reached up to grab another branch, and felt pain in his lower back.

The Missouri Delta Records also contain emergency room reports, radiograph reports, and patient instructions indicating that Employee was seen in 1995 for lesions, cysts, and

minimal joint effusion of his left knee for which rest, ice, and elevation was ordered (Exhibit 2). He was also seen for left hip pain in 1999 (Exhibit 2).

Employee testified that a nurse from Missouri Delta called one of his managers and upon getting off the phone, told Employee to go to work to pick up workers' compensation paperwork. Employee testified he decided not to pick up the paperwork that day. He denied seeing the nurse use the phone as she left the room to make a call. He did not know whom she spoke with.

On July 1, 2010, Employee was on his way to pick up the workers' compensation paperwork when he alleges that Mr. Sauer told him over the phone he should not do so because Mr. Sauer did not think Employee was injured at work. Employee acknowledged that Mr. Sauer submitted an employee claim form on July 1, 2010 indicating Employee complained of an injury and testified that Mr. Sauer stated he planned to meet with the other managers to discuss the situation.

On July 2, 2010, Employee went to work to pick up his paycheck, which he said was for the previous pay period. He testified that work schedules were not provided with employees' paychecks and the managers were wrong if they testified to the contrary. Employee stated that when he was at work, he asked Mr. Sauer for the workers' compensation paperwork, but did not receive it. He did not speak with Mr. Sauer about light duty accommodations, his claim, or his injury at that time. He also testified that he noticed he was no longer on the schedule. He alleges Mr. Sauer said he planned to meet with the other managers regarding his employment status. Employee asserted that Mr. Sauer was wrong when he said he attempted to converse with Employee about whether he would show up for his next shift. He also said Mr. Sauer's recollection of Employee shrugging and walking away from the conversation was mistaken.

On July 8, 2010, Employee picked up a work status form from Missouri Delta and was told to bring it to Employer. Employee stated that he decided to call his manager, Mr. Spicer, and tell him about the form. Employee alleges Mr. Spicer told him not to bring in the form and instructed him to call Katie Martz at the insurance company instead. He also said Mr. Spicer thought Employee had quit his job. Employee called Ms. Martz and informed her about the work incident.

Employee received training, including an employee handbook, when he was hired by Employer. He also signed various papers including an employee attendance policy. He testified he could not recall missing work on June 13, 2010 due to car problems or being scheduled on July 2, 2010 when he was marked as a "no call, no show," nor could he recall any other "no call, no shows."

Employee last went into work at Employer in late June 2010. He applied for unemployment when he stopped working for Employer, but was denied benefits. Approximately two weeks after leaving Employer in mid-July 2010, he started working with a temp agency called Manpower. He never told Manpower he had work limitations.

Employee testified that Manpower placed him with Cape Girardeau Parks & Recreation on April 11, 2011. He worked there for approximately 1 month. Employee's job duties included using a weed eater, using a push mower, driving a truck, and spreading mulch. He worked 8-hour shifts spending approximately 20 percent of his time driving and 80 percent on his feet. Employee did not have to lift over 25 pounds at that job. He is currently placed at Essex Residential Care where he provides personal care for individuals by making sure the clients have clean clothes and are exercising good hygiene. These duties do not require Employee to lift over 25 pounds. He has held this job for 1½ months. Employee is also a certified medic. He took a test to receive this certification a couple weeks before trial.

Employee has had two independent medical evaluations. He saw Dr. Bowen on behalf of his attorney and Dr. Doll on behalf of Employer/Insurer. Employee recalled that he missed his first two appointments with Dr. Doll. He alleges he missed his appointment on September 20, 2010 because he had not received a mileage check and he missed his appointment on January 17, 2011 because he could not find transportation. He did make it to his appointment on February 8, 2011. Employee stated that he did not tell Dr. Doll about his February 2010 injury because he thought Dr. Doll only wanted to know about prior work injuries rather than all prior injuries he had suffered. Employee also testified he was unsure why Dr. Bowen's report said he "twisted" when he fell from the tree limb.

In 6th grade, Employee had hip surgeries requiring hardware to address being "bow legged." In addition, he underwent knee surgery. He said his medical condition and surgeries did not affect his back and he has no ongoing symptoms in his hips. He testified he was unsure why Dr. Ritter's report indicates Employee complained of ongoing hip pain. At trial, Employee also testified he had never been in a motor vehicle accident. Although he admitted on cross-examination he had been rear-ended in a parking lot in 2009, he explained he did not count this because he was not moving at "regular" speed when the accident occurred.

Employee complains of continuing problems in his lower back and numbness in his left leg since the time of his work incident. He said he has to stand up for awhile to let the numbness dissipate before walking.

#### Dr. Bowen's Testimony

Employee was seen by Dr. Bowen at the request of his attorney on October 27, 2010 (Exhibit O at 7). Dr. Bowen testified that Employee complained of left lower back and buttocks pain, walked with a Trendelenburg gait to the left side, he had circumduction of his left leg, his back was diffusely tender, he had limited range of motion with pain in the end range, he had pain with internal and external rotation of his left hip radiating to his back and buttocks, he had two positive sacroiliac joint tests, and he had three negative sacroiliac tests (Id. at 9-10; Id., Attachment 2 at 4).

Employee's neurological examination was significant around his hip flexor and abductors because he had give-way strength and pain in that area (Exhibit O at 11-12).

Dr. Bowen recorded that Employee had four out of four on the Waddell testing which indicates whether a patient is a good candidate for surgery, but noted that he may have embellished his pain during the testing (Id. at 12, 31). Dr. Bowen explained that he depends on the veracity of a patient in formulating his opinion on causation (Id. at 21-22). He emphasized that the most compelling portion of his evaluation was the hip examination, which he said was the likely source of Employee's medical complaints (Id. at 31). He noted that Employee had prior surgery for attempted removal of screws in his hip due to complaints of significant pain in that area (Id. at 29). He testified that the decreased flexion in Employee's hip in October 2010 could be due to his pre-existing hip problem (Id. at 29). He also testified that Employee's complaint of diffuse tenderness to superficial palpitation was a nonorganic sign, as was his pain with cervical compression (Id. at 29-30). Despite Employee's subjective pain complaints as a result of superficial palpitation and cervical compression, Dr. Bowen explained that these tests are not supposed to produce back pain (Id. at 30).

Overall, Dr. Bowen felt Employee had complaints of pain in areas that should not have been caused by a back problem (Id. at 12). He also believed the pain from his hip condition, rather than a back condition, was radiating into his buttocks (Id. at 13). Dr. Bowen concluded the prevailing cause of Employee's current complaints was an aggravation of a pre-existing hip condition primarily caused by the alleged June 18, 2010 injury at work (Id. at 14). Dr. Bowen did not believe Employee was at maximum medical improvement as he wanted to try additional treatment options including intrascapular injections (Id. at 14-15).

Dr. Bowen placed restrictions on Employee for limited capacity work (Id. at 16). He restricted Employee to no lifting, pushing, or pulling greater than 25 pounds maximally, no greater than 10 pounds repetitively, no sitting or standing for more than 30 minutes at a time without changing positions, no climbing, no working overhead, no squatting, no twisting, and no bending (Id. at 16).

#### Dr. Doll's Testimony

Dr. Doll evaluated Employee on February 8, 2011 at the request of Employer/Insurer (Exhibit 1 at 8). He testified that Employee did not show up for his earlier appointments on December 20, 2010 or January 17, 2011, nor were there records indicating Employee contacted the office to give a reason for missing the appointments (Exhibit 1 at 8-9). In February 2011, Dr. Doll noted Employee complained of diffuse back pain, diffuse tenderness to very light palpation throughout the lumbar area greater on the left than on the right, mildly reduced voluntary lumbar range of motion in all planes, positive bilateral passive trunk rotation testing, and positive axial compression testing (Id. Attachment 2 at 4). He also noted there was no palpable sacroiliac joint tenderness, straight leg raise testing was negative bilaterally, Patrick's testing was negative bilaterally, and full strength was demonstrated in the lower extremities (Id.). As with Dr. Bowen's examination, Dr. Doll noted multiple non-physiological responses during Employee's examination revealing inconsistency between his subjective complaints and objective findings (Id. at 5; Exhibit O at 12, 31). Dr. Doll explained that pain is not typically reported with superficial palpitation or with axial compression, the lumbar range of motion tests were under Employee's control, and the results of the passive trunk rotation test were inconsistent with

Employee's subjective complaints (Exhibit 1 at 16-18). Dr. Doll diagnosed Employee with a mild lumbar strain related to the June 18, 2010 work incident (Id. Attachment 2 at 4).

Dr. Doll recalled that when he asked Employee if he had any prior problems with his low back or left leg, Employee said "No." (Id. at 3; Exhibit 1 Attachment 3). Despite Employee's assertions to the contrary, Dr. Doll reviewed Employee's February 1, 2010 medical records from Missouri Delta Medical Center and noted that he sought treatment for left lower back pain (Exhibit 1 Attachment 2 at 2). Dr. Doll's diagnoses that were unrelated to the June 18, 2010 incident included mechanical low back pain, a history of prior left low back pain, and morbid obesity (Id. at 4).

Based on Employee's self reported history, medical records, and physical examination Dr. Doll diagnosed Employee with a mild left lumbar strain (Id. at 22 -23). He was not asked to address whether the alleged accident occurred or if it arose out of and in the course of employment. Dr. Doll did not rely on any witness statements in formulating his opinion as they are not medical documents and he had to rely on Employee's statements in formulating his opinion (Id. at 8, 37). Dr. Doll concluded that Employee has ongoing back pain and numbness of the left leg that has been worsening over time and he does not need any further diagnostic testing, formal therapeutic intervention, prescription medication, or work restrictions attributable to the alleged mild lumbar strain (Exhibit 1 at 23; Exhibit 1 Attachment 2 at 5). Dr. Doll opined that Employee is at maximum medical improvement and sustained no permanent partial disability attributable to the alleged June 2010 incident (Id.).

#### Patrick Sauer's Testimony

Patrick Sauer was an associate manager at Cracker Barrel in 2010 (Exhibit 7 at 7). He testified that informational workers' compensation posters are hanging up in the break room and Employee was constantly in the break room (Id. at 15, 42). He explained if an Employee is injured at work they are supposed to immediately report it to a manager so the manager can give the employee a chain of custody form (Id. at 13). An employee must pick up a chain of custody form to take a drug test within 24 hours of their injury (Id. at 26). When an employee is injured, the manager fills out a computerized form indicating general information regarding the incident. Paperwork is printed and given to the employee listing all the doctors they can go to (Id. at 14, 17). Mr. Sauer explained that the home office takes over the handling of any workers' compensation claims at that point (Id. at 16). If the employee gets medical treatment, they can give doctor's notes to any one of the managers (Id. at 18).

Mr. Sauer also testified that any manager can handle the termination of an employee (Id. at 21). Employees could be terminated for being excessively absent or tardy (Id. at 21-23). Records of absences or tardiness can be kept in the computer, the manager's communication log, or the disciplinary folder (Id. at 37).

After June 18, 2010, Mr. Sauer called Employee because he did not show up for two shifts (Id. at 27). He asked Employee over the phone why he had not been coming to work and he advised that he fell in the dish room a couple of weeks ago and reported it to Leonard Spicer

(Id. at 25). Mr. Sauer testified that he had to contact Mr. Spicer to find out if the incident was reported and if an incident report was filled out (Id. at 25-26). Mr. Spicer told Mr. Sauer that Employee had not reported an injury to him (Id. at 31). Mr. Sauer continued his investigation and asked all the other managers if Employee had reported an injury to any of them, but none of them recalled such a report from Employee (Id. at 45). Mr. Sauer also testified that none of the dish room employees recalled any incident (Id. at 60). He also testified that no medical providers contacted him regarding Employee (Id. at 54). Mr. Sauer did not fill out an incident report at that time because, although he attempted to call Employee back, Mr. Sauer was unsuccessful in his attempts to reach him (Id. at 47). Mr. Sauer explained that an incident report based on the information that was available was filled out the next time he worked on the same shift with Mr. Spicer (Exhibit 7 at 47-48). Although Mr. Sauer felt certain that Mr. Spicer filled out the report, after putting more thought into it he indicated he could not recall who filled it out as it had occurred approximately 9 months before his deposition (Exhibit 7 at 47-48). The claim reporting system recorded that Mr. Sauer was actually the one who filled out the incident report on July 1, 2010 (Exhibit 8, Attachment 1). He reported that Employee had called complaining of a back injury to the right side that occurred in the dish room (Exhibit 8, Attachment 1). He also reported that, as he could not get in contact with Employee by phone, he left a message with a female at Employee's residence informing Employee that he could not be of assistance unless Employee came to pick up the chain of custody form and to deliver a doctor's note (Id.).

Mr. Sauer recalled Employee came in the following Thursday to pick up his paycheck (Exhibit 7 at 31). Mr. Sauer explained that schedules are available with employee's paychecks (Id. at 55). He asked Employee if he was going to show up for his next two shifts but Employee just shrugged his shoulders and walked away (Id. at 31). Employee did not tell Mr. Sauer he would not be working his next shift (Id. at 56). After Employee failed to show up for his next shift, Mr. Sauer called the home office (Id. at 33). They instructed him to fire Employee for his excessive tardiness and for not showing up (Id.). The Employer's official policy is that an employee can be terminated for between one and two no calls/no shows (Id. at 57). The official reason for terminating Employee was four no calls/no shows (Id. at 33). Mr. Sauer explained in greater detail that Employee was terminated because he acted as though it was not a big deal whether he was coming in for his next shift or not, he never showed up, never called, and never answered any phone calls or returned messages (Id. at 54).

Mr. Sauer attempted to call Employee several times to terminate him, but Employee never answered or called back (Id. at 35). Mr. Sauer left messages with a female when he called (Id. at 35-36). Two weeks later, Employee arrived at work and spoke with Mr. Sauer (Id. at 40). Mr. Sauer told Employee he had been terminated for excessive no call, no shows (Id.).

### Mike Stevens' Testimony

Mike Stevens is the general manager of the Employer's Cape Girardeau location and has been employed at Cracker Barrel since April 4, 2005 (Exhibit 8 at 6). Employee never spoke with Mr. Stevens about being injured at work, nor did a medical provider call Mr. Stevens to talk about Employee (Id. at 7, 27). On July 11, 2010, Mr. Sauer informed Mr. Stevens about the alleged incident (Id. at 8). Typically, a manager will inform Mr. Stevens immediately after an

accident occurs, however Mr. Stevens was on vacation from July 1, 2010 to July, 11, 2010 (Id. at 9, 23).

Employee alleges that the accident occurred in the dish room but there were no witnesses to the accident. Mr. Stevens testified that Employee would not be working in the dish room alone (Id. at 14). He explained that there are typically between two to eight in the dish room at a time (Id. at 26). He further testified that if an employee witnesses an injury they are required to report it to a manager (Id. at 14, 26).

As a general manager, Mr. Stevens is made aware every time there is an injury at work, whenever an employee is taken off work, and whenever work restrictions are issued (Id. at 16). Work slips and doctors' notes are always given to Mr. Stevens and he files them in a particular file where they can be easily accessed by any manager (Id. at 16-17).

Mr. Stevens explained when an employee is injured, the manager fills out a form on the computer, the employee writes a statement and the witnesses write a statement. The employee is sent for a drug test and is then sent out for medical treatment (Id. at 8, 30). An employee can still go to the doctor if they do not get a chain of custody form (Id. at 29).

Employer's policy is to accommodate light duty for injured workers (Id. at 20). St. Francis Medical Center limited Employee to no lifting, pushing or pulling over 25 pounds; no repetitive stooping, crawling, climbing, or squatting; and no repetitive bending or twisting of the back (Id. Attachments 6). The workers' compensation employee work status report limited him to no heavy lifting over 25 pounds (Id. Attachment 8). Missouri Delta Express Care also limited him to no lifting greater than 25 pounds (Id. Attachment 9). Mr. Stevens testified that Employer could accommodate all those restrictions, but that Employee had not given him any doctor's note with the work restrictions (Id. at 18-19). Mr. Stevens also testified that had any of the reports been given to another manager, that manager would have given the report to Mr. Stevens to be filed (Ex. 8 at 20).

Employees go through multiple hours of orientation before they can work at Cracker Barrel (Id. at 13). This includes going over handbooks, rules, procedures, video, computer work, and information on OSHA (Id.). During orientation, employees are also instructed on the attendance policy and asked to sign it (Id. at 21, 23; Id. Attachment 4). If an employee cannot work a shift then they must notify the general manager at least three days in advance unless it is an emergency (Id. Attachment 4). If an employee does not call within 24 hours of missing a shift, they will be terminated as a no call/no show (Exhibit 8 at 22-23). An employee can be terminated for one no call/no show (Id. at 23).

Mr. Stevens testified that Employees' schedules are stapled to their paychecks when employees pick them up (Id. at 25). Employee was still on the schedule after June 18, 2010 (Id. at 24). He was scheduled to work on July 2, 2010 but he was marked as a no call/no show in Employer's records (Id. at 24-25; Id. Attachment 2). Employee was officially terminated on either July 2<sup>nd</sup> or 3<sup>rd</sup>, 2010 (Exhibit 8 at 24).

Amy Polhamus' Testimony

Amy Polhamus is an associate manager at Cracker Barrel and has worked there since December 2009 (Exhibit 9 at 6). On Thursday, July 1, 2010, Mr. Sauer asked Ms. Polhamus if Employee told her he hurt himself at work (Id. at 7). She responded that she knew nothing about an injury involving Employee (Id.). Ms. Polhamus testified that Employee never told her that he injured himself or that he was unable to work because of a work-related injury (Id. at 15, 18). She testified that she worked on Father's Day weekend, June 19th and 20th, but Employee did not call to say he might miss his next shift (Id. at 14-15). She also testified that no other employee ever told her Employee was injured (Id. at 18).

Ms. Polhamus was scheduled to work on Friday, July 2, 2010 alongside Employee (Id. at 7). However, Employee did not show up to work that day (Id.). She testified that, sometimes if she is too busy, she might forget to take note of an employee's absence from work (Id. at 11). However, on July 2nd, it was recorded that Employee was a no call/no show (Exhibit 8 Attachment 2). When Ms. Polhamus called Employee's home to check on him, Employee's sister answered the phone and indicated to Ms. Polhamus that Employee was not sincere about his back problems (Id. at 8; Exhibit 8 Attachment A).

Ms. Polhamus shared with Pat Sauer the information she gathered from the phone call with whom she believed to be Employee's sister (Id. at 14). Mr. Sauer then instructed Ms. Polhamus to record a statement related to the phone call (Id.). She wrote the statement and, though no date was indicated, she believed she recorded it on Friday, July 2, 2010 (Id. at 13). The statement indicates that Employee's sister remarked, "Oh he's trying to pull that back thing on you too." (Exhibit 8 Attachment A). Ms. Polhamus placed this written statement in Employee's personal file and sent it to corporate (Exhibit 9 at 19-20).

Ms. Polhamus testified that she has, in the past, handled reports of injury filed by injured employees (Id. at 9). Ms. Polhamus testified to the process she follows when an employee reports an injury (Id. at 15-16). She pulls up a form in the computer and fills out an accident report (Id.). She prints out paperwork, has the employee sign it, and directs them to a hospital (Id. at 16). She makes sure they obtain medical attention (Id.).

If an employee called stating they were injured, Ms. Polhamus would tell them to come in and sign a chain of custody form because she would want them to take a drug test (Id. at 20-21). After they signed the chain of custody form, she would provide them medical information (Id. at 21). She has never told someone they could not file a workers' compensation claim (Id.). If an employee called her and asked about a company doctor, she said she probably would have told them a hospital they could go to (Id. at 22).

Ms. Polhamus testified she never spoke with anyone from a medical provider's office about Employee and that the Employer could have accommodated the light duty restrictions for Employee (Id. at 15 - 17). She further testified that had Employee brought any kind of documentation to work indicating he had been placed on restrictions, that she would have shared

the information with Mr. Stevens, the general manager, and put the information in a file (Id. at 17-18).

Ms. Polhamus testified that she has spoken to Mr. Stevens with regard to Employee (Id. at 12). He asked Ms. Polhamus if she knew anything about Employee's alleged injury (Id.). Ms. Polhamus told him she had no documentation related to Employee (Id.). She testified that, if anything had been placed in the file indicating Employee had been injured, it would have been in the file (Id. at 18).

### Leonard Spicer's Testimony

Leonard Spicer is an associate manager at Cracker Barrel and has worked there for approximately seven years (Exhibit 10 at 6). He testified that he was working on June 18, 2010, but he did not fill out an incident report because Employee did not advise him of an injury (Id. at 7, 13). Employee never told Mr. Spicer he was unable to work due to an injury or that he had any work restrictions (Id. at 14). Mr. Spicer also testified that he did not speak to any medical providers about Employee (Id. at 7).

Mr. Spicer testified that an employee can still go see a doctor if they have not picked up a chain of custody form (Id. at 10). He explained that Employee never asked him for medical treatment and that, although Employee never gave him any work restrictions, Employer could have accommodated the light duty restrictions (Id. at 10, 11-12; Exhibit 8 Attachment 6, 7, 8).

Despite Employee's assertions, Mr. Spicer testified that he would never tell an employee there were no company doctors for them to go see (Id. at 13). He said if an employee called to report an injury that occurred days before and requested treatment, he would refer them to Southeast Missouri Hospital even if the employee did not come speak to him in person (Id. at 15).

## **RULINGS OF LAW:**

### ***Issue 1. Accident.***

An employer shall be liable for "personal injury or death of the employee by accident arising out of and in the course of the employee's employment..." Section 287.120.1 (RSMo. 2011). The word "accident" is defined by the Missouri Workers' Compensation Act as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift." Section 287.020.2 (RSMo. 2011). Claimant has the burden to establish that his injury arose out of and in the course of employment. Choate v. Lily Tulip, Inc., 809 S.W.2d 102, 105 (Mo. App. S.D. 1991).

There is consistent testimony from multiple managers indicating that an accident never occurred and contradicting Employee's testimony regarding his reporting of the accident and providing the doctor's slips. Employee testified that he notified Mr. Spicer that he was injured.

However, Mr. Spicer testified that Employee never advised him of a work injury, never asked for medical treatment, and never gave him a copy of an off work slip (Exhibit 10 at 10, 12). Also contradicting Employee's testimony is the testimony from Ms. Polhamus and Mr. Stevens that Employee did not tell them he had been injured (Exhibit 8 at 7; Exhibit 9 at 15). Employee testified that he notified the managers about his work restrictions. However, the managers all testified that Employee never brought them any work limitation documents (Exhibit 7 at 56; Exhibit 8 at 18-20; Exhibit 9 at 17; Exhibit 10 at 11-12).

Further supporting the managers' testimony, and contradicting Employee, is the fact that no doctor's notes were contained within the Employer's files (Exhibit 8 at 19 – 20; Exhibit 9 at 18). Ms. Polhamus testified that if any doctor's note had been put in the file regarding Employee in June or July 2010 that they would have still been in the file at the time of her April 27, 2010 deposition as they are kept forever (Exhibit 9 at 18 – 19). Any doctor's notes containing restrictions for an injured worker always go in one file contained in the file cabinet at the Employer (Exhibit 8 at 17, 19 – 20; Exhibit 9 at 18; Exhibit 10 at 9). Although Employee asserted at trial that all four managers' testimony was "wrong," there is no evidence supporting that assertion.

Not only did the managers have consistent testimony regarding the alleged accident, but they established a good understanding of the process for dealing with injured employees (Exhibit 7 at 14, 17-19; Exhibit 8 at 7-8, 29-30; Exhibit 9 at 7, 9, 15-16; Exhibit 10 at 7, 10, 12-15). The managers also indicated this was not a new process and they have dealt with injured employees before (Id.). Therefore, Employee did not establish a reason as to why all four managers would have suddenly treated him differently by deciding not to report his injury or help him get treatment as they had done for other employees in the past.

Employee testified that he finished his entire shift on June 18, 2010. Then, when he went to St. Francis Medical Center on June 20, 2010, he reported his symptoms were caused by body motion and twisting (Exhibit A). This description closely resembles his prior injury in February 2010. He told Dr. Bowen that he "twisted" when he fell from one branch and reached up for another branch (Exhibit O Attachment 2 at 2). This evidence suggests that his present symptoms are related to his February 2010 injury.

Furthermore, Employee was never in the dish room by himself (Exhibit 8 at 14, 26). Therefore, if he would have slipped and dropped the glass rack someone would have noticed, especially since Employee testified that the rack made a loud noise when it landed on the counter. However, according to Mr. Sauer, all the dish room employees said they were unaware of any accident on June 18, 2010 (Exhibit 7 at 60).

Based on the evidence presented, I find that the testimony of Mike Stevens, Amy Polhamus, Leonard Spicer and Patrick Sauer is more credible than the testimony of Employee. Based on all of the evidence presented, I find that Employee failed to establish that he sustained a work related accident. Therefore, Employee's claim for compensation is denied.

***Issue 6. Issue a final award if there was a denial based on accident or causation.***

A final award has been issued based on the denial of accident. Therefore, the remaining issues will not be ruled upon because they are moot.

The Second Injury Fund was left open. Therefore even though the primary claim has been ruled upon in a final award, the Second Injury Fund still remains open.

Made by:

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Maureen Tilley  
*Administrative Law Judge*  
*Division of Workers' Compensation*