

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211814/F307154

GARY MCNABB	CLAIMANT
CARGILL, INC.	RESPONDENT
AIG CLAIM SERVICES, INC. INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 7, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by TIMOTHY BROOKS, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on October 7, 2003, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on August 6, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant earned an average weekly wage of \$394.00.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's hernia of September 5, 2002, and low back injury.
2. Related medical.
3. Temporary total disability not to exceed 26 weeks.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that he was injured in September 2002 when he aggravated a pre-existing back condition as a result of excessive, repetitive, continued and sustained heavy work activity involving the work that he did at Cargill as a parts clerk. He was cleared to go to work in July 2000 by Dr. Haws and worked for 24 months doing heavy work and simply aggravated his pre-existing condition. His condition is not to pre-injury status and he seeks temporary total disability and medical expenses. Claimant has been seen by the VA doctors and these medical reports are attached to the pre-hearing questionnaire. Claimant is still under treatment and seeks additional medical treatment and the physician's reports will be submitted at that time.

In regard to the foregoing issues the respondents contend that they deny that there was any lifting incident, or other incident, which arose out of and in the course of Mr. McNabb's employment, which led to or otherwise caused a hernia. In the alternative, the respondents contend that the claimant cannot establish all five prerequisites for compensation for a hernia as set forth in Ark. Code Ann. §11-9-523. In particular, the respondents contend that the claimant cannot establish the first three elements. With

regard to Claim No. F307154, the respondents state that the claimant did not suffer an injury to his back within the course and scope of his employment with the respondent. To the contrary, the claimant was drawing disability from the Veterans Administration for a service related back injury at the time that he was first employed by the respondent. The respondents further state that it may be necessary to make the Second Injury Fund a party to this action.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical records marked Claimant's Exhibit No. 1 and the respondents submitted to packets of documentary evidence marked Respondents' Exhibit No. 1 and Respondents' Exhibit No. 2. No objections were raised to the admission of these documents.

Prior to the hearing the respondent had requested a continuance due to their inability to get medical records from the VA hospital concerning the claimant's prior low back problems. The respondents made their argument on the record and the request for a continuance was denied, noting the respondents' objection to the denial of the continuance.

#### DISCUSSION

The claimant testified that while serving in the military, he sustained a back injury and at the time he was hired by the respondent was drawing benefits for a 20 percent disability from the VA. The claimant testified that at the time he went to work

for the respondent he was receiving treatment for his back at the VA every six months and was taking pain pills. The claimant testified that he made the respondents aware of his service connected disability before he went to work. The claimant testified that he did not have any restrictions as to his back when he went to work for the respondent. The claimant testified that the work which he did for the respondent during the two plus years he was there involved standing, walking and lifting. The claimant testified that on a frequent basis he would be required to lift parts weighing twenty pounds or less. The claimant testified that from the time he began working for the respondent until his last day of employment, he did not miss work as a result of his prior back problems.

The claimant testified that on September 25, 2002, he had gone to the parts room to retrieve a three quarter horse powered DC motor and had carried it to the issue bench, raised it and sat it on the bench. The claimant stated that he felt like he had a bug that bit him in the stomach so he stopped and felt a knot. The claimant testified that he went ahead and issued the motor out on the computer indicating that this is something he needed to do regardless since inventory needed to know where the motor came from and where it was going. The claimant remembers that he then raised his shirt and found that he had a knot in his belly button. The claimant testified that within five minutes Phillip Penn came into the maintenance area and he showed Mr. Penn his stomach. The claimant testified that Mr. Penn instructed him to go to the plant

nurse. The claimant testified that the plant nurse looked at his belly button and set up an appointment for him to be seen by Dr. Haws the next day. The claimant testified that he underwent hernia surgery at the VA hospital.

The claimant testified that since the September 25, 2002, lifting incident he has had constant pain in his back more severe than it was prior to September 25. The claimant testified that he has always had some pain in his low back but after September 25 the pain was much more severe and constant. The claimant testified that his pain was in the same area as his old injury but it was more aggravating indicating that his prior pain had been about a level two and that after September 25 it was a level eight. The claimant testified that before September 25 he had been taking Hydrocortone twice a day for his back pain as prescribed by the VA and that after September 25 he continued to take this same medication at the same dosage level but he was also prescribed Cyclobenzaprine for his back pain. The claimant testified that subsequent to September 25 he also developed leg pain which he did not have prior to the September date. The claimant testified that besides leg pain he also has numbness and tingling but that these sensations come and go. The claimant testified that he is not having any symptoms since his hernia surgery and his knot has gone away. The claimant was asked if he could currently work and he responded, "no." The claimant explained that the medications which he takes for his back forbids him from working for the respondent.

On cross examination, the claimant agreed that he was quite certain that he had checked out the motor at or around 11:30 to 11:45 on September 25, 2002, and given it to Mr. Charles Millman. The claimant examined Respondents' Exhibit No. 2 and agreed that a three quarter motor like he had checked out had been checked out of the parts room at 9:30 that evening and delivered to Mr. Charles Millman. The claimant agreed that this was the transaction which he testified to but still believed that it was around 11:30 or 11:45 in the evening. The claimant further agreed that he was seen at the nurse's station shortly after he felt a bug bit type pain in his belly button area and after he was seen by the plant nurse, he was returned to his job to finish out his shift. The claimant further agreed that he did not experience severe pain only a dull pain which drew his attention to his belly button area.

Continuing on cross examination, the claimant agreed that prior to September 25, 2002, he had been drawing disability benefits through the VA for his service related back problems. The claimant also testified that he was not bothered severely by his back prior to September 25 and had only experienced light pain before the September date. The claimant did agree that he was taking Hydrocortone twice a day for his back problems and had been doing so before September 25, 2002. The claimant testified that his act of issuing out parts that weighed too much on September 25, 2002, caused his back to become more symptomatic than it had prior to that date. The claimant testified that it was not a part that caused his back to hurt but it was the parts he handled during his

shift starting with the three-quarter horse motor which he lifted. The claimant testified that when he went to the nurse's station about his belly button problem he did not report to the nurse that he had back pain nor did he report to Dr. Haws, the next day, that he had back pain.

The claimant testified that in October 2002 he applied with the VA for an increase in his disability and was granted his request for an increase up to 60 percent. The claimant testified that he was not asked nor did he reveal that he had been lifting parts at the respondent's plant which caused his back to hurt worse. The claimant testified that the VA evaluation was based upon his pain level and his examination. The claimant testified that he had drawn short term disability benefits in connection with his back problems. The claimant agreed that on the application for his short term disability benefits he had checked the box that his injury was not due to his work. The claimant testified that on September 25 when he talked to Mr. Penn about his belly button problem he did not mention that he had hurt his back nor did he report to any of his other supervisors that he was having back problems as a result of the September 25, 2002, event.

The claimant testified on redirect examination that he drew short term disability benefits for approximately one month through the respondent. The claimant further agreed that his short term disability benefits stopped around the time that he filed for workers' compensation benefits.

Christopher Ableitner testified on behalf of the respondents stating that he was the maintenance manager for the respondent and had been for seven years. This witness identified Respondents' Exhibit No. 2 as a maintenance document for checking out parts from the parts department which was dated September 25 and 26, 2002. Mr. Ableitner stated that the respondent has a computerized program that tracks its parts in inventory and that when parts are checked out by the employees, they are to be entered into the system. When Mr. Ableitner was asked if the respondent had in place a system to ensure the accuracy of the time that parts are checked out, this witness responded, "they update the record daily." Mr. Ableitner testified that the claimant had worked with him in the waste water department while he was the supervisor and that the claimant never reported to him any problems with his back, any problems of aggravating an underlying bad back condition or that he injured his back while working.

Tiffany Franklin testified on behalf of the respondent stating that she was the respondent's first shift health nurse. Ms. Franklin testified that she was the custodian of the nurse's records and these records reflect that the claimant presented himself to the nurse's station on September 25, 2002, at 11:55 p.m. Ms. Franklin testified that after she visited with the claimant, he was returned to his work station on restrictive duty, not to lift anything. Nurse Franklin testified that the next day the claimant was sent to see Dr. Carl Haws and Dr. Haws returned the claimant to work with the same restrictions. The nurse testified that the

claimant continued to work for the respondent until she received the dictation back from Dr. Haws. This witness stated that after receiving the dictation, she called in the claimant and asked him about his medications. Ms. Franklin testified that the claimant told her that he had been taking narcotic medications every day. Nurse Franklin testified that it is the respondent's policy that an employee cannot take narcotic medications or have narcotic medications with them at their plant. Ms. Franklin was asked if the claimant had reported to her on the evening of September 25 that he had injured his back and Nurse Franklin responded, "no, sir." Ms. Franklin was also asked if on the evening of September 25 if the claimant had mentioned aggravating an underlying bad back problem or if he had ever presented to the nurse's station with complaints of back problems and the nurse responded, "no." Ms. Franklin was asked if the fact that the claimant was on narcotic pain medication was the only reason he was not allowed to return to work for the respondent and Nurse Franklin responded, "That's true. Yes, it is."

On cross examination, Ms. Franklin testified that Dr. Haws had not prescribed the claimant any medications and she had asked the claimant why he was taking these medicines and he told her that he was taking them for his back and he always took them.

On rebuttal, the claimant testified that when he returned after his bout with Diverticulitis he was asked to bring in a list of the medications he was taking. The claimant testified that he made copies of all the medications he was taking and turned it

in to the night nurse. The claimant testified that Nurse Franklin is the day nurse and he works the night shift so he turned in his list of medications to the nurse on duty at that time. The claimant testified that he also provided the respondent with a list of his medications when he was hired back on July 5, 2000

Nurse Franklin was recalled for sur-rebuttal and testified that the respondent maintains one file for each employee as to their medical records. Nurse Franklin testified that there were no lists of medications in the claimant's file when he was hired in July 2000. Ms. Franklin testified that the first time the claimant's medical file reflected that he was taking narcotic medication was when they had received the dictation from Dr. Haws. Nurse Franklin was asked if the respondent allowed any employee to work while they are on narcotic pain medications and this witness responded, "no, they don't."

The medical records set forth that the claimant was seen by Dr. Haws on September 26, 2002, and at that time, filled out a workers' compensation statement of accident setting forth that he was picking up a three fourth horse stainless steel motor and carried it to the window and placed it on the counter. The information on this form indicates that this event occurred on September 25, 2002. Dr. Haws writes on September 26, 2002, that the claimant reports that he picked up a motor to carry to a bench and began having lower abdominal pain. The doctor's notes set forth that the claimant noted a protrusion at the abdomen which was not there previously and is painful. It is further noted that the

claimant denies any other specific complaint or problem. Upon examination, Dr. Haws notes that there is obvious evidence of a small umbilical hernia at the superior aspect of the umbilicus. The claimant was diagnosed with an umbilical herniation and was advised to have a surgical evaluation and an appointment with Dr. Kendrick was scheduled. The doctor returned the claimant to work but he was restricted to no lifting, pushing or pulling of greater than ten pounds.

The claimant began being seen at the VA hospital for colon problems in July 2002. The claimant continued to seek treatment and evaluation for his abdomen problems. On August 12, 2002, the claimant was seen at the VA for complaints of chronic back pain and leg pain and it is noted that the claimant reports low back pain for several years and is in pain presently with pain in his left ankle radiating into his hip with shooting sharp pains for the past month. The claimant underwent a colonoscopy on September 6, 2002, at the VA hospital. The claimant was seen at the VA on September 16, 2002, with complaints of headaches, blurred vision and having constant pain in his feet and back. The claimant was seen at the VA on October 15, 2002, with complaints of continued low back pain and left ankle pain for thirty years. The claimant reports that the pain increases with bending and that nothing he takes will relieve the pain. The claimant was seen at the VA on October 21 and November 19, 2002, for his back pain with no mention of his hernia problem. On December 13, 2002, the claimant was seen at the VA for his complaints of hernia problems. The claimant gave the VA

a history that he noticed his hernia while he was lifting an electric motor but has been able to reduce it but it is tender and giving him problems. The claimant also reported that he has chronic back pain and takes narcotic pain medication for this ongoing problem. On December 15, 2002, the claimant was seen at the VA complaining of back pain for many years that has worsened recently and hurting down into his legs. It is further noted that the claimant has been out of work for several months due to taking narcotic medications. The claimant was scheduled for an MRI in January 2003. The radiology report dated February 5, 2003, of the claimant's lumbar spine sets forth that the claimant's lumbar vertebral bodies are well aligned, vertebral body heights are well maintained and no fractures are identified. This test also sets forth that the claimant's disc spaces are relatively well maintained and there are inplate osteophytes of varying sizes at multiple levels. This report reveals that the claimant's pedicles are in tack and his S-I joints are unremarkable. The claimant was assessed with multilevel degenerative changes. The claimant underwent hernia repair at the VA on February 4, 2003, and a second repair of his hernia on February 13, 2003, after he sustained a fall re-injuring his surgical site. On February 28, 2003, Dr. Keller at the VA writes that the claimant had a hernia repair approximately a month ago and it subsequently had a post operative reoccurrence after a fall and had a wound exploration done through the left leg. Dr. Keller notes that the claimant has a firm area on his umbilicus with the belly button sticking out a little bit,

however, the doctor did not feel this was any reoccurrence of the hernia, opining that it was all scaring and healing tissue. Dr. Keller writes that he thinks the claimant's hernia is repaired and will see him on an as needed basis.

The claimant was seen at the VA with back complaints on March 6, 2003, reporting that his back pain has increased within the last four days and the claimant was requesting pain medications. The medical notes set forth that the claimant has treated his chronic low back pain with multiple modalities including a TENS unit and oral medications. On April 10, 2003, the claimant reports to the VA that his chronic low back pain has become more severe due to weather changes and the claimant's various medications were refilled. The claimant reported to the VA on May 26, 2003, that he had sneezed about noon and had back pain ever since, reporting that he felt a ripping sensation in his back at that time. After examination, the claimant was diagnosed with acute exacerbation of chronic low back pain and medications were recommended.

After a review of this complete record, I find that the claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable hernia while working for the respondent on September 25, 2002. It is not doubted that the claimant has undergone hernia problems but it is seriously doubted that these problems occurred as a result of lifting a three-quarter horse motor on September 25, 2002, at around 11:30 in the evening. The claimant has testified that he can clearly recall lifting a motor and having a bug bite feeling which caused him to stop his

work and to examine his belly button, ultimately being sent to the nurse's station and having an appointment with a doctor scheduled the next day. The respondents computerized reports dealing with maintenance parts being issued on September 25, 2002, clearly set forth that a three-quarter horse motor was checked out at 9:31 on September 25, 2002, to Charles Millman not to the claimant. There is no indication from this record that any parts were checked out to the claimant and certainly no parts were checked out as described by the claimant in or around 11:30 on September 25. The claimant was diagnosed with a hernia when he was seen by Dr. Haws the following day but the medical records from the VA indicate some month later that the claimant had been able to push his hernia bulge in but it had become tender and a problem and he was seeking medical treatment at that time. The actual occurrence of the claimant's hernia is unknown and it may have re-manifested itself in the late evening of September 25, 2002, at which time the claimant went to the nurse's station. This problem was not severe enough to take him off work at that time or in the days following, at least up until he was terminated due to his use of narcotic medications. The medical records set forth that this claimant was seen at the VA on October 15 and 21 and November 18, 2002, with complaints of back pain, at which time there is no mention of a hernia or hernia problems. It was not until December 13, 2002, that the claimant was seen at the VA for hernia problems at which time he was scheduled for surgery.

The claimant has requested benefits for his low back problems, however, I find that he has failed to prove by a preponderance of the evidence that his ongoing back problems are as a result of or have even been aggravated by his work for the respondent. The claimant did not report a back injury to any of his supervisors, he did not report back problems to the plant nurse nor did he report back problems to Dr. Haws on September 26. In fact, Dr. Haws has noted that the claimant has no other complaints other than that of a hernia. The medical records set forth that the claimant has had extensive ongoing problems with chronic back trouble for which he has received numerous medications and conservative care. By his own testimony he had a 20 percent disability from the military as a result of his prior back problems. Prior to September 25, 2002, the claimant had reported to the VA that he was having an increase in his back pain which is radiating down into his legs. The records following the September 25, 2002, date indicate that the claimant is having back problems but there is no indication that an event, while working for the respondent, is the cause of his exacerbation of pain. Therefore, this claim for benefits should be denied in its entirety.

#### FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.
3. The claimant earned an average weekly wage of \$394.00.

4. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable hernia as well as back problems on September 25, 2002. See discussion above.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable hernia as well as back problems while working for the respondent on September 25, 2002. Therefore, this claim for benefits should be denied in its entirety.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE