

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F406438**

<b>RICKY L. LINKER, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>J.M. INVESTMENTS, EMPLOYER</b>	<b>RESPONDENT</b>
<b>TRAVELERS INSURANCE COMPANY, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED FEBRUARY 18, 2005**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on November 22, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE MICHAEL KNOLLMEYER, Attorney at Law, Jacksonville, Arkansas.

Respondents represented by the HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable hernia as defined by Ark. Code Ann. §11-9-523.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on June 15, 2004 at which time the claimant was earning sufficient wages to be entitled to a compensation rate of \$348.00/\$259.00, in the event this claim is found to be compensable.

The claimant contends he sustained a work-related hernia on June 15, 2004. He seeks payment of medical expenses, temporary total disability benefits from June 15, 2004 to a date yet to be determined and attorney's fees.

The respondents contend the claimant cannot meet his burden of proof under Ark. Code Ann. § 11-9-523.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript along with the claimant's deposition (taken October 7, 2004) incorporated by reference.

The claimant was the only witness to testify at the hearing. He used a cane due to a back injury at the hospital.

The claimant, age 38, (D.O.B. January 13, 1967) began work for the respondent-employer in June, 2003, driving delivery trucks carrying heavy construction equipment. The claimant's health history includes a right inguinal hernia repair, left foot surgery, aorta femoral bypass and mesh repair of a subsequent hernia.

On June 15, 2004, the claimant was pulling the truck's loading ramp out of the mud when he felt a tear near his stomach with knife-like pain. He held his side for ten minutes thinking he had pulled a muscle. He completed his shift making 2 or 3 more deliveries before returning to the office which was deserted.

The next day he told the owner, Mike Stewart, about the incident but declined medical care. He continued working, making a couple of deliveries with the assistance of co-workers.

The claimant told Mr. Stewart he was going to the doctor on Wednesday, June 17, 2004. At first he saw Dr. Stair but the carrier refused to authorize the surgery. Dr. Luttrell accepted the claimant as a patient and performed surgery on August 2, 2004. The claimant stated he was mishandled by the orderlies, injuring his back and reinjuring his hernia, necessitating a second surgery on August 6, 2004 for a blood clot.

On cross-examination, Attorney Cuffman pointed out that claimant's testimony at the hearing differed from his account at his deposition (compare Tr. p. 14-18 with Depo. p. 7-9). At the deposition, Mr. Cuffman explained the elements of proof to the claimant and gave him an example of "ceasing work". The claimant denied that he stopped working and testified that he continued his job. The claimant did not offer a satisfactory explanation for this contradictory testimony. It is also noted that the respondents did not rely on this testimony in deciding to controvert the case. The claim had been denied several months prior to the deposition.

### **MEDICAL EVIDENCE**

The claimant saw Dr. Stair on June 18, 2004 and was diagnosed with a recurrent hernia. The claimant reported redness of the abdominal wall for a couple of months. Dr. Stair opined that the redness was attributable to either pressure on the skin from the hernia contents or from an infection. Dr. Stair prescribed antibiotics and excused the claimant from work. The claimant described his history of injury as work-related. In a report dated June 25, 2004 Dr. Stair commented that he did not know the etiology of the claimant's skin redness.

The claimant saw Dr. Luttrell on July 29, 2004, who diagnosed an incarcerated hernia to the right of an incision. He expressed concern that the mesh from a prior surgery was infected. Dr.

Luttrell was aware that the claimant was alleging a work-related injury.

Dr. Luttrell's Report of 8-9-04:

Reason for Admission:

This is a 47-year old male who underwent repair of an incisional hernia...some time ago. Approximately one month ago he started developing increased abdominal pain with drainage from his mid incision.

PRIMARY DISCHARGE DIAGNOSIS:

Infected abdominal wall mesh.

PROCEDURE:

Removal of the infected mesh with AlloDerm placement.

HOSPITAL COURSE:

...This (the infected mesh) was cultured but there was no evidence of a significant infection...

COMPLICATIONS:

\_\_\_\_\_ Following that operation the patient was being moved from the stretcher to the bed and felt a tear. He shortly thereafter developed a swelling of his lower incision.

(After testing: two CT scans, and ultrasound revealing fluid collection) he was then taken back to surgery (on August 6, 2004) where he was found to have a large hematoma of his wound.

It is not clear from the medical records if Dr. Luttrell was aware that Dr. Stair had prescribed antibiotics. It is not clear if the antibiotics were effective in reducing the redness and infection prior to surgery. Although the medical records make reference to an "incisional" hernia from a previous surgery (with redness at the surgical site, infection of the mesh at the surgical site, and drainage from the incision), Dr. Luttrell's comment that the hernia was "to the right of the incision" convince me this claim properly falls under Ark. Code Ann. §11-9-523.

**FINDINGS AND CONCLUSIONS**

\_\_\_\_\_ As this claim arose after July 1, 1993, this case must be "strictly" construed, Ark. Code Ann. §11-9-704, Ark. Code Ann. §11-9-717. Act 796 of 1993 made no change in Ark. Code Ann. §11-9-

523, nor specifically repealed prior case law concerning the interpretation of the hernia statute.

The Court has held that a hernia is “a protrusion of an organ from the abdominal cavity through an abnormal opening in the abdominal wall.” Bottoms Baptist Orphanage v. Johnson, 240 Ark. 175, 398 S.W.2d 544 (1966). Therefore, incisional and hiatal hernias are not subject to the hernia statute, Loveless v. Garrison Furniture Company, 251 Ark. 776, 475 S.W.2d 158 (1972), James Jones v. Baldor Electric Company, Full Commission opinion December 7, 1988 (D710661), Jobe v. Wal-Mart Stores, Inc., 66 Ark. App. 114, 987 S.W.2d 764 (1999), Public Employee Claims Division et al v. Tiner, 37 Ark. App. 23, 822 S.W.2d 400 (1992).

The claimant has the burden of proving the following requirements by a preponderance of the evidence of record, which means “evidence of greater convincing force”, Smith v. Magnet Cove Barium Corporation, 212 Ark. 491, 206 S.W.2d 442 (1947).

- (a)(1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;
  - (2) That there was severe pain in the hernial region;
  - (3) That the pain caused the employee to cease work immediately;
  - (4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter; and
  - (5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.
- (d) Recurrence of the hernia following radical operation thereof shall be considered a separate hernia, and the provisions and limitations regarding the original hernia shall apply.

The cessation of work requirement is satisfied if there is sufficient enough time to establish a causal connection between the injury and the work. The cessation from work does not have to be instantaneous or continual. There is no mathematical formula and the time may involve a matter of minutes. Osceola Foods v. Andrews, 14 Ark. App. 95, 685 S.W.2d 813 (1985), Ayers v. Historic Preservation Association, 24 Ark. App. 40, 747 S.W.2d 587 (1988).

In the case at bar, the only element of proof in dispute is number three, immediate cessation of work due to pain. In his deposition (taken four months after the alleged injury) the claimant testified he did not stop work. At the hearing, (five months after the alleged injury) the claimant changed his version of events and testified he stopped work for ten minutes.

In my opinion, Attorney Cuffman's questions at the deposition were clear and there was no attempt to deceive the claimant. Mr. Cuffman even offered examples to explain the "cessation of work" requirement to the claimant. Additionally, the claimant did not offer a persuasive reason why this discrepancy should be ignored. Credibility is a factor for the Commission's consideration, Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995).

The burden of proof rests upon the claimant to prove the compensability of the claim. Ringier America v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is compensable, that the claimant's injury is job-related or that a claimant is entitled to benefits. Crouch Funeral Home v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977), O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979), Daniels v. Affiliated Foods Southwest, Full Commission opinion July 1, 1999 (E804688).

After reviewing the lay testimony, I find the claimant has failed to meet his burden of proof by a preponderance of the evidence of record.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on June 15, 2004 at a compensation rate of \$348.00/\$259.00.
2. The claimant has failed to prove by a preponderance of the credible evidence of record that he ceased work immediately due to pain caused by a hernia pursuant to Ark. Code Ann. §11-9-523.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge