

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F503897

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| JOHN D. NORTON, Employee | CLAIMANT |
| FM CORPORATION, Employer | RESPONDENT |
| S.B. HOWARD & COMPANY, Carrier | RESPONDENT |

OPINION FILED SEPTEMBER 29, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by TOD BASSETT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On September 7, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 25, 2005, and a pre-hearing order was filed on May 26, 2005. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer existed among the parties on October 11, 2004.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$299.35 which would entitle him to compensation at the rate of \$200.00 for temporary total disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of hernia.
2. Temporary total disability benefits.

3. Medical expenses.
4. Attorney fee.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "Claimant's lower abdominal was injured on October 12, 2004 when he was lifting and moving parts from a machine to a table."

The respondent's contentions as set forth in its pre-hearing questionnaire are as follows: "Claimant contends that he sustained a lower abdominal (hernia) injury on October 12, 2004 after allegedly lifting a moving part from a machine to a table. On the other hand, respondent denies that claimant sustained a compensable accidental injury at its place of business on October 12, 2004. Claimant was hired at respondent's place of business on September 30, 2004. The claimant worked ten days for respondent and on Monday, October 11, 2004, at approximately 1:15 a.m. in the morning, a little over one hour after the claimant had reported to work, he claims that he sustained an injury to his abdominal wall after performing some heavy lifting. There were no direct eyewitnesses to the alleged lifting incident. It is anticipated that the medical evidence will show that the claimant had a prior history of medical problems in the same area of the body for which he was treated at the VA Hospital. In short, respondent contends that the special and particular facts presented in this case do not meet the criteria for a hernia injury under A.C.A. §11-9-523. In addition, respondent questions whether an alleged lift even occurred which would give rise to the claimant having to statutorily prove the various requirements set forth under A.C.A. §11-9-523."

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on May 25, 2005, and contained in a pre-hearing order filed May 26, 2005, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$299.35 which would entitle him to compensation at the rate of \$200.00 for temporary total disability benefits is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable hernia while employed by the respondent.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable hernia.

5. Claimant is entitled to temporary total disability benefits beginning October 12, 2004 and continuing through December 23, 2004.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant is a 49-year-old man who began working for the respondent on September 29, 2004 as a machine operator. Claimant testified that on October 11, 2004 he was working on a mold machine which heats plastic pellets to form different molds and make parts. Claimant testified that as he was lifting a part which weighed approximately 30 to 35 pounds he felt a "ripping" sensation in his groin area. Claimant testified that after he hesitated at a table for a short period of time he reported the incident to his supervisor and was moved to a lighter machine. Claimant testified that he was unable to continue working even at the lighter machine and reported the incident to Thelma Locke, the night shift foreman, who allowed him to go home.

Claimant worked the midnight to 8:00 a.m. shift. Claimant testified that when the Veteran's Administration Hospital opened later that day he went for medical treatment and was diagnosed as suffering from a hernia. That same day claimant was sent by the respondent to Dr. Moffitt who diagnosed claimant with a groin strain, not a hernia. Although claimant continued to be evaluated by Dr. Moffitt on several occasions, claimant also continued to seek medical treatment from the VA hospital. Claimant eventually underwent a bilateral inguinal hernia repair at the VA Hospital on October 26, 2004.

Claimant has filed this claim contending that he suffered a compensable hernia while employed by the respondent. He seeks payment of temporary total disability benefits, medical expenses, and a controverted attorney fee.

ADJUDICATION

According to A.C.A. §11-9-523(a), a hernia is compensable when the following factors are shown to the Commission's satisfaction:

- (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.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable hernia while employed by the respondent.

First, I find based upon the claimant's testimony that he has satisfied the first three factors of compensability. Here, claimant testified that as he was lifting a 30 to 35 pound plastic part he felt a ripping sensation in his abdominal area. According to claimant's testimony this caused him to hesitate at the work table for a "little bit." I find claimant's testimony to be credible and sufficient to satisfy the first three elements of compensability.

I also find that claimant provided notice of the occurrence to his employer within 48 hours. While claimant's testimony that he reported the incident to Thelma Locke, supervisor, was contradicted by Locke, claimant also testified that he reported the incident to the respondent after he sought medical treatment from the VA Hospital. Clearly, this incident was reported since the respondent sent claimant to Dr. Moffitt later that same day.

Given this evidence, I find that claimant did provide notice of the occurrence to his employer within 48 hours.

Finally, I find that claimant's physical distress which such as to require the attendance of a licensed physician within 72 hours after the occurrence. Here, claimant sought medical treatment from both the VA Hospital and Dr. Moffitt that same day. Accordingly, I find that claimant has satisfied the remaining element of compensability.

Based upon the foregoing evidence, I find that claimant has satisfied the elements of proving a compensable hernia. In making this finding, I note that the respondent defends this claim in part based upon its belief that the claimant's hernia pre-existed his employment with the respondent. In support of its contention, respondent relies upon a note written by Patty Hargrave and her supporting testimony. Patty Hargrave works in the respondent's human resources department and is responsible for hiring new employees. Hargrave testified that the respondent requires prospective employees to undergo physicals prior to their employment and she explains this process to all prospective employees. Hargrave testified that when she explained the process of a physical to the claimant, he asked her if the physician would check for a hernia at the physical. Hargrave

testified that she made a note of this statement by the claimant on a post-it note and put it on claimant's application. Respondent introduced into evidence a handwritten note from Hargrave reflecting claimant's statement to her. This note is not the original note, but instead is a handwritten copy according to Hargrave.

Other than Hargrave's testimony and her note, I do not find any evidence which would support a finding that claimant had a pre-existing hernia prior to his employment with the respondent. Instead, I believe the evidence indicates that claimant had a pre-existing hemorrhoid condition for which he was undergoing an evaluation at the VA Hospital. Claimant testified that he did not have a pre-existing hernia, but instead had hemorrhoids. Claimant testified that he informed Hargrave of an upcoming assessment at the VA Hospital for his hemorrhoids, not a hernia.

I believe that claimant's testimony is supported by the remaining evidence. For instance, the medical note from the VA Hospital dated October 11, 2004 indicates that claimant was diagnosed as suffering from a right inguinal hernia. That note goes on to state:

He has an appt this week with surgeon here. Will ask them to eval hernia as well.

This statement would indicate that claimant already had an appointment scheduled for another condition (hemorrhoids) and in addition to that condition the hernia could be evaluated as well.

I also believe it is important to note that a medical report from the VA dated October 15 contains a history of claimant's medical conditions. This history includes hemorrhoids but makes no mention of a pre-existing hernia. Again, this supports claimant's testimony that his pre-existing condition was a hemorrhoid problem, not a hernia.

Finally, I note that Dr. Moffitt's medical report of October 14, 2004 indicates that claimant is having trouble with hemorrhoids and has an evaluation scheduled the next day

for a possible surgery. Furthermore, in a letter dated August 22, 2005, Dr. Moffitt again reiterated that at the time of his evaluation of the claimant claimant indicated that he was going to have hemorrhoid surgery and “made no mention of surgery for hernias.”

In summary, although Hargrave testified that the claimant inquired as to whether the pre-employment physical would check for hernias and she wrote a note to that effect at that time, I find insufficient evidence indicating that the claimant had a pre-existing hernia prior to his employment with the respondent. Instead, I find that the evidence indicates that the claimant had a pre-existing hemorrhoid condition for which he was scheduled to undergo an evaluation at the VA Hospital in October 2004. This finding is supported not only by claimant’s testimony, but also by the VA medical records and the medical records and reports of Dr. Moffitt.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable hernia while employed by the respondent. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with the claimant’s compensable hernia injury.

I also find that claimant is entitled to temporary total disability benefits beginning October 12, 2004, the day after his compensable injury, and continuing through December 23, 2004, the date he was released by the physicians at the VA Hospital. In order to be entitled to temporary total disability benefits for an unscheduled injury, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). In this particular case, when claimant was evaluated at the VA Hospital on the day of his injury he was diagnosed as suffering from a right inguinal hernia and an evaluation for that hernia was scheduled with a surgeon later that week. At the time of that evaluation on October

15, 2004, the physicians at the VA Hospital recommended a hernia repair which was subsequently performed on October 26, 2004. On December 23, 2004, claimant was released by his physicians to return to his normal job duties. Based upon this evidence, I find that claimant remained within his healing period and that he suffered a total incapacity to earn wages from October 12, 2004 through December 23, 2004.

Claimant testified that subsequent to his release on December 23, 2004 he returned to work for the respondent and continued working there until January 21, 2005. Claimant testified that he was unable to continue working for the respondent subsequent to that date and has submitted into evidence notes from his physicians indicating that claimant was limited to light-duty work beginning in January 2005. However, in order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he suffers a total incapacity to earn wages. While claimant may have been limited to light-duty work beginning in January 2005, he did not suffer a total incapacity to earn wages. Accordingly, I find that claimant's entitlement to temporary total disability benefits is limited from October 11, 2004 through December 23, 2004.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable hernia while employed by the respondent. Respondent is liable for payment of all reasonable and necessary medical treatment. Claimant is entitled to temporary total disability benefits beginning October 12, 2004 and continuing through December 23, 2004. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney

fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE