

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410043

CHRISTOPHER ROBERSON, EMPLOYEE	CLAIMANT
INTERSTATE HIGHWAY SIGN CORP., EMPLOYER	RESPONDENT
TRANSCONTINENTAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JUNE 24, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on April 8, 2005 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GEORGE BAILEY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE FRANK NEWELL, 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 pursuant to 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 preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on September 7, 2004 at which time the claimant was earning an average weekly wage of \$301.35. The claimant began work for another employer on September 28, 2004 and his average weekly wage is commensurate with his pre-injury wages.

The claimant had worked for the employer about a month before he developed a hernia in a lifting incident at work on September 7, 2004. Surgery was performed by Dr. Bevans on September 8, 2004 for two ventral hernias. He was released to return to work on September 27, 2004 with instructions to avoid heavy lifting for two weeks. The claimant seeks payment of medical

expenses (including mileage), temporary total disability from September 8 to September 27, 2004 and attorney's fees.

The respondents contend the claimant cannot meet the elements of proof under Ark. Code Ann. §11-9-523, and did not sustain a compensable injury.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The following witnesses testified at the hearing: the claimant and his great uncle, Wendell Shock.

The claimant, age 24 (D.O.B. September 12, 1980) has a felony conviction. He began work for the respondent-employer in late August and experienced abdominal pain on September 7, 2004 in a lifting incident. The claimant described the injury as a "catch", "pull" or "twitch" in his stomach or "sharp" pain above his belly button. He sat down for ten to fifteen minutes before finishing his shift.

The claimant thought he had a pulled muscle. He discussed it with his mother, a nurse, and she was concerned he had a hernia. The knot could be palpated. The discomfort grew progressively worse and the claimant went to the emergency room (ER) at 10:00 P.M. the night of the injury.

Surgery was performed the next morning on September 8, 2004 by Dr. Bevans, and the claimant was released that afternoon. The claimant's great uncle called Judy Dixon with Human Resources and told them the claimant was injured and had undergone emergency surgery. On September 9, 2004, the claimant also spoke with Judy Dixon and reported the injury.

The claimant returned to work on September 27, 2004 for two weeks with a fifteen pound weight limitation which the employer accommodated. He was released to full duty on October 6, 2004. Subsequently, he was charged with a safety violation on October 7, 2004 for not wearing steel-toed shoes. The claimant resigned effective October 11, 2004 and took another job with a different employer.

The claimant gave the adjuster a recorded statement on September 24, 2004, in which he

indicated he told his co-workers that he had a “catch” in his stomach. He explained that he had experienced injuries playing sports that were more painful than the hernia.

FORM AR-N

An AR-N or “Employer’s Notice of Injury” was part of the claimant’s exhibit packet. It was not completed or signed by the claimant. It appears the form was used by the employer to record the investigation of the claim. Apparently, the co-workers were questioned and Henry Patterson confirmed that the claimant told him his stomach was hurting.

The AR-N shows the claimant reported the injury on September 9, 2004, described as a “twitch” lifting aluminum panels.

Neither Mr. Patterson nor the author of the report were called to testify.

MEDICAL EVIDENCE

The claimant’s history of injury is consistent with his testimony. The claimant reported abdominal pain beginning that morning lifting a heavy object at work. The pain increased in the afternoon causing him to seek medical treatment. Interestingly, the ER report and the nursing records contain pain charts. Sometimes the patient is asked to rate pain from one to ten and another chart describes the “quality” of pain as “aching”, “dull”, “burning”, “cramping”, “sharp”, “stabbing”, “fullness”, “throbbing”, “pulling”, “prickly”, or “pressure”. A knot was palpated and the claimant was diagnosed with an incarcerated ventral hernia. Dr. Bevans performed surgery on September 8, 2004 and found two separate ventral hernias.

He had one in the upper midline ... incarcerated with preperitoneal fat
... consistent with epigastric hernia.

He had a second hernia at the umbilicus...

The claimant was released to return to work on September 27, 2004 with a fifteen pound weight limitation for two weeks. He was released for full duty on October 6, 2004.

RECORDED STATEMENT

The claimant described his injury as a “catch” in his stomach, that “wasn’t painful” and “didn’t hurt” (Rec. Stat. p. 5, 7, 8, 12, 13, 14, 17). The claimant thought he had pulled a muscle, “sat

back”, then finished his shift. The knot developed and he went to the ER at the urging of his mother.

The claimant also stated he was unaware of the reporting procedure because he had not yet attended the orientation class at work when the accident happened (Rec. Stat. p. 20). This statement is corroborated by the Safety Violation document referring to orientation “the day before” which would be October 6, 2004.

FINDINGS AND CONCLUSIONS

Act 796 of 1993 made no changes in Ark. Code Ann. §11-9-523, nor specifically repealed prior case law concerning the interpretation of the hernia statute.

(a) In all cases of claims for hernia, it shall be shown to the satisfaction of the Workers’ Compensation Commission:

(1) That the occurrence of the hernia immediately followed as a 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.

Based on the claimant’s unrefuted testimony, the discomfort and subsequent knot developed after a lifting incident at work causing him to strain the abdominal wall. Therefore, the claimant has met the first element of proof.

By its very use of the word “pain”, the requirement that the claimant experience severe pain in the hernial region is the most highly subjective provision of the Act. Pain tolerance and the words used to quantify pain differ greatly. In the past, the court has held that semantics are not elevated over substance and there is no requirement that hernial pain be the sole, exclusive or predominate source of pain when multiple injuries are sustained. Descriptions of pain as a “burning sensation”, “sticking” or “pinching” are sufficient to meet the element of proof. Ayers v. Historic Preservation Association, 24 Ark. App. 40, 747 S.W.2d 587 (1988), Prince Poultry Co. v. Stevens, 235 Ark. 1034, 363 S.W.2d 929 (1963), Osceola Foods, Inc. v. Andrew, 14 Ark. App. 95, 685 S.W.2d 813 (1985), Oaklawn Farms v. Payne, 251 Ark. 674, 474 S.W.2d 408 (1971), Darling Store Fixtures v.

McDonald, (1996), Miller Milling Co. v. Amyett, 240 Ark. 756, 402 S.W.2d 659 (1966), Harkleroad v. Cotter, 248 Ark. 810, 454 S.W.2d 76 (1970).

By testifying that his abdomen was painful on the day of the injury, the claimant has met the second element of proof.

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, *supra*, Ayers v. Historic Preservation Association, *supra*.

By testifying he stopped work and “sat back”, the claimant has demonstrated sufficient time to meet the third element of proof.

Notice to the employer within 48 hours is usually a matter of fact to be decided by the lay testimony.

Based on the unrefuted lay testimony that the injury was reported to Human Resources after the accident, the claimant has met the fourth element of proof.

The requirement that the claimant seek medical attention within 72 hours is presumed by the diagnosis of a hernia. The fact that the claimant’s appointment with a physician may exceed the time limit is not dispositive of the case. Prince Poultry Company v. Stevens, *supra*, Ammons v. Meuwly Machine Works, *supra*, and Brim v. Mid-Ark Truck Stop, 6 Ark. App. 119, 639 S.W.2d 75 (1982), Cagle Fabricating & Steel, Inc. v. Patterson, 36 Ark. App. 49, 819 S.W.2d 14 (1991), 309 Ar. 365, 830 S.W.2d 857 (1992), 42 Ark. app. 168, 856 S.W.2d 30 (1993).

Based on the claimant’s testimony that he suffered physical distress following the occurrence which required the attendance of a physician, the claimant has met the fifth element of proof.

There was some discussion about whether or not the surgery was an emergency procedure. Obviously, Dr. Bevans felt it was necessary to schedule the surgery quickly, but his records do not use the term “emergency.” I am aware that an incarcerated hernia can cause complications and that may explain the scheduling. Nevertheless, the evidence shows the claimant had not taken the

employer's orientation course at the time of the injury. He was not aware of the reporting procedure or authorization of physicians and he was free to see a doctor of his choosing.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on September 7, 2004 at which time the claimant's average weekly wage was \$301.35.
2. The claimant has proven by a preponderance of the credible evidence of record that he sustained a compensable hernia as defined by Ark. Code Ann. §11-9-523.
3. Respondents are directed to pay all medical expenses within thirty days pursuant to Rule 30.
4. Respondents are directed to pay temporary total disability benefits to the claimant from September 8, 2004 to September 27, 2004 as the claimant remained in his healing period, unable to work.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

6. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge