

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F602407/F602408

JACQUELINE BAKER, Employee	CLAIMANT
SUPERIOR INDUSTRIES, Employer	RESPONDENT
CROCKETT ADJUSTMENT COMPANY, Carrier	RESPONDENT

OPINION FILED JULY 28, 2006

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

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

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On July 5, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 10, 2006, and a pre-hearing order was filed on that same date. 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 employee-employer relationship existed between the parties on April 21, 2006 and March 17, 2005.

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

1. Compensability of injury to hips and back on April 21, 2005.
2. Compensability of hernia on March 17, 2005.
3. Related medical.
4. Temporary total disability benefits.
5. Attorney fee.

At the time of the hearing the claimant identified her requested dates for temporary total disability benefits to include September 15, 2005 through October 27, 2005 for her hernia and April 22, 2005 and June 17, 2005 through a date yet to be determined for her back injury.

The claimant contends she was injured on March 17, 2005 when she experienced a hernia in her right lower groin area. She further contends she was injured on April 21, 2005 when her hips and back were injured when she was pulling up a motor. She contends she is entitled to temporary total disability, related medical, and a controverted attorney fee.

The respondents contend the claimant did not sustain injuries on either date as defined by the Arkansas Workers' Compensation Act.

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 witness and to observe her 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 10, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable hernia while employed by respondent on March 17, 2005.

3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while employed by the respondent on April 21, 2005.

4. Respondent is liable for payment of all reasonable and necessary medical

treatment provided in connection with claimant's compensable hernia and compensable back injury.

5. As a result of her compensable hernia the claimant is entitled to temporary total disability benefits beginning September 15, 2005 and continuing through October 27, 2005. Respondent is entitled to a credit for any short-term disability benefits claimant received during this same period of time.

6. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits as a result of her compensable back injury.

7. Claimant's attorney is entitled to the maximum attorney fee on all indemnity benefits.

FACTUAL BACKGROUND

The claimant is a 41-year-old woman who began working for the respondent in March 1995 as a quality inspector. In 2003 the claimant became a tool crib attendant and was responsible for receiving various goods that came into the respondent's plant. Claimant testified that her job duties required her to use a cart, dolly, or pallet jack to move various goods to their proper location in the plant. Claimant testified that her job required a lot of lifting and manual labor.

Claimant contends that she suffered a compensable hernia while working for respondent on March 17, 2005. Claimant testified that on that date the respondent received a pallet of plastic sheeting which was contained in four long boxes. Claimant testified that three of the boxes were on the pallet and that the fourth had rolled off the pallet when it was delivered. Claimant testified that she was on her knees trying to push the box back onto the pallet so that it could be put away when she felt a pop in her abdominal area. According to claimant this stunned her and she stopped work for a minute. Claimant subsequently paged Randy Johnson, a first responder, on her shift.

Claimant testified that Johnson indicated that he would prefer that claimant be evaluated by a female first responder due to the location of the injury. Accordingly, claimant reported the injury to Tammy Scheff, but Scheff did not conduct a physical examination of the claimant at that time.

According to claimant's testimony she did not complete any paperwork for a work-related injury at that time. Instead, she continued to perform her normal job activities albeit with some difficulty. On May 17, 2005 the claimant sought medical treatment from Dr. Paulson, her OB/GYN physician. Following that evaluation Dr. Paulson referred claimant to Dr. Wood for an evaluation of a possible hernia. Dr. Wood diagnosed a hernia and performed a hernia repair surgery on September 15, 2005.

Claimant also contends that she suffered a compensable injury to her low back while working for respondent on April 21, 2005. On that date, claimant testified that she felt a strain in her low back around her hip area while attempting to move a motor back onto a pallet. After sitting down for a few moments the claimant reported the incident to Randy Johnson. The claimant was eventually taken to the emergency room in the late hours of April 21 and early morning hours of April 22, 2005. At the emergency room claimant was diagnosed as suffering from a back/muscle strain, was given an injection, medication, and crutches. The next day claimant was evaluated by Dr. Thorn, the respondent's company physician, and given a restriction of lifting no more than five pounds. Claimant subsequently sought medical treatment from Dr. Myshka, a chiropractic physician. Claimant also came under the care of Dr. Raben, neurosurgeon, who ordered an MRI scan of the claimant's lumbar spine. According to Dr. Raben's report the MRI scan revealed a herniated disc at the L5-S1 level. As of the date of the hearing Dr. Raben had not recommended surgery, but instead had treated claimant with lumbar epidural steroid injections.

ADJUDICATION

HERNIA.

According to A.C.A. §11-9-523(a)(1)-(5), in all cases of claims for hernia it must be shown to the satisfaction of the Commission:

- (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 satisfied all elements of the hernia statute. First, I find that claimant has proven that the hernia occurred as the result of a sudden effort, severe strain, or application of force directly to the abdominal wall; that there was severe pain in the hernial region; and that the pain caused the employee to cease work immediately. According to claimant's testimony she developed the pain in her abdominal area while she was attempting to push a heavy box of plastic sheeting back onto a pallet. Claimant testified that as she was performing this activity she felt a pop in her abdominal area. According to claimant's testimony this stunned her and caused her to stop work for a period of time. Based upon claimant's testimony which I find to be credible and entitled to great weight, I find that claimant has satisfied the first three elements of A.C.A. §11-9-523(a).

I also find that claimant provided notice of the occurrence within 48 hours after it occurred. While claimant did not complete an incident report on the date in question, it was her testimony that she reported the incident to Randy Johnson and to Tammy Scheff,

first responders. The documentary evidence contains handwritten notes from both Johnson and Scheff from August 2005 confirming that claimant reported this incident to them on March 17, 2005. In addition, I note that the documentary evidence also contains e-mail documentation indicating that claimant had reported this incident on the night it occurred. Accordingly, I find that the claimant has satisfied the fourth element of compensability.

Finally, I also find that claimant has met her burden of proving by a preponderance of the evidence that the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within 72 hours after it occurred. It has been held that A.C.A. §11-9-523(a)(5) does not require a claimant prove that they were actually seen by a physician within 72 hours after an occurrence, but merely that the claimant needed the services of a physician during that period of time. *Cagle Fabricating & Steel, Inc. v. Patterson*, 309 Ark. 365, 830 S.W. 2d 857 (1992); *Oceola Foods, Inc. v. Andrew*, 14 Ark. App. 95, 685 S.W. 2d 813 (1985).

In this particular case, while claimant did not actually see a physician within 72 hours she did report the incident to Johnson and Scheff, first responders. In addition to reporting her injury to these individuals, it is also clear from her testimony that she was seeking some type of medical attention with regard to this incident. I find based upon this evidence that claimant did require the services of a licensed physician within 72 hours after the incident occurred on March 17, 2005.

Based upon the foregoing evidence, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable hernia while employed by the respondent. In making this finding, I do note that claimant was seen by Dr. Paulson, her OB/GYN, for pelvic pain on March 9, 2005, one week before her compensable injury. However, Dr. Paulson has stated in a letter dated September 12, 2005 that the pelvic pain claimant was complaining of on March 9, 2005 was associated

with claimant's menstrual cycle and that a hernia was not suspected until a later visit on May 17, 2005. Thus, I find no evidence indicating that claimant's hernia existed prior to March 17, 2005.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable hernia injury. This includes surgery performed by Dr. Wood.

I also find that claimant is entitled to temporary total disability benefits beginning September 15, 2005 and continuing through October 27, 2005. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that she remained within her healing period and that she suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, I find that claimant remained within her healing period and that she suffered a total incapacity to earn wages beginning September 15, 2005, the date she underwent surgery to repair the hernia, until October 27, 2005, the date she was released by Dr. Wood to return to work.

At the pre-hearing conference and the hearing the parties agreed to stipulate to a compensation rate. As of this date no stipulation has been forthcoming; therefore, the claimant's correct compensation rate has not been addressed.

BACK.

Claimant also contends that she suffered a compensable injury to her low back on April 21, 2005. Claimant testified that on that date she felt a strain in her low back area around her hip while attempting to move a motor back onto a pallet. Claimant testified that she reported this incident to a foreman and to Randy Johnson.

Claimant's claim for a low back injury is a claim for a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to

Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of 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 her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back while working for respondent on April 21, 2005.

First, I find that claimant has met her burden of proving by a preponderance of the evidence that the injury arose out of and in the course of her employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. Initially, I find that claimant's testimony regarding the injury to her back at work on April 21 is credible and entitled to great weight. I also note that the documentary evidence indicates that claimant reported the incident to the respondent and completed an incident report on April 21 indicating that she had injured her back while moving a motor onto a pallet. Also on April 21, 2005, Suzanne Sommerville completed a supervisor incident report which also notes that claimant gave a history of injuring her back while moving a motor. The report indicates that claimant reported this incident to Randy Johnson on the date in question. Finally, the documentary evidence also indicates that claimant completed Form AR-N on April 21, 2005.

The medical evidence also supports claimant's testimony. Claimant was taken to the emergency room late on the night of April 21 and early morning hours of April 22nd. The emergency room records contain a history of injury consistent with claimant's testimony. Likewise, when claimant was evaluated by Dr. Thorn, the respondent's company physician, on April 22, 2005 she again gave a history of having injured her back following heavy lifting the day before.

Based upon the foregoing evidence, I find that claimant has met her burden of proving by a preponderance of the evidence that her injury arose out of and in the course of her employment with respondent and that it was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services and that she has offered medical evidence supported by objective findings establishing an injury. After her initial medical treatment at the emergency room and with Dr. Thorn, claimant came under the care of Dr. Myshka, a chiropractic physician. The medical reports of Dr. Myshka indicate that he treated claimant for various complaints including her lumbar spine. Dr. Myshka's medical reports indicate that muscle spasms were present in the claimant's lumbar spine. Muscle spasms are considered an objective finding. *Continental Express v. Freeman*, 339 Ark. 142, 4 S.W. 3d 124 (1999).

Subsequently, when claimant came under the care of Dr. Raben, Dr. Raben ordered an MRI scan of the claimant's lumbar spine. Dr. Raben has interpreted the MRI scan as revealing a herniated disc at the L5-S1 level. In addition, the MRI report of Dr. Davis indicates that bulging is present which "can slightly impinge upon the left S1 nerve root." Based upon this medical evidence, I find that claimant's injury caused internal physical harm to her body and that she has offered medical evidence supported by objective findings establishing an injury.

In finding that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back, I do note that claimant had a prior low back injury in 1994 while working for Carl's Jr. in California. Shortly after that injury the claimant moved to Arkansas and received medical treatment from Dr. Kirk Johnson and eventually settled her claim for approximately \$12,000.00. Claimant testified that she did not receive any additional medical treatment for her prior back injury after 1996 or 1997 and there is no medical evidence to the contrary. Furthermore, I note that as a result of this prior back injury the claimant underwent an MRI scan of her lumbar spine. While the MRI scan of her lumbar spine did reveal a disc protrusion at the L5-S1 level, that MRI scan was not read as impinging on the claimant's nerve root nor as being herniated as was claimant's condition after her most recent injury.

Accordingly, based upon the foregoing evidence, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back while working for respondent on April 21, 2005. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

I find that claimant has failed to prove by a preponderance of the evidence that she is entitled to any temporary total disability benefits as a result of her compensable low back injury. After her compensable injury the claimant continued to work for the respondent until she was evaluated by Dr. Raben and given work restrictions. According to claimant's testimony respondent did not have work available within those restrictions and she was placed on family medical leave. However, in order to be entitled to temporary total disability benefits a claimant must not only remain within their healing period, but they also must suffer a total incapacity to earn wages. In this particular case, Dr. Raben on June 12, 2006 indicated that claimant could return to work with restrictions of no repetitive bending, standing, sitting, stooping, twisting, reaching or grasping. He also indicated that

claimant should not lift more than five pounds. Just a few days later on June 20, 2006 Dr. Raben indicated that claimant could continue working with the only restriction of lifting no more than 12 to 15 pounds. Based upon this evidence, the claimant did not suffer a total incapacity to earn wages as a result of her back injury; therefore, she is not entitled to temporary total disability benefits for that injury.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered compensable injuries in the form of a hernia and to her low back while employed by the respondent. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injuries. As a result of her hernia claimant is entitled to temporary total disability benefits from September 15, 2005 through October 27, 2005. Respondent is entitled to a credit for any short-term disability benefits the claimant received during this period of time. Claimant's attorney is entitled to a fee on all temporary total disability benefits from September 15, 2005 through October 27, 2005.

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