

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606535

ROGER GREEN	CLAIMANT
GOFF MOVING & STORAGE	RESPONDENT
VANLINER INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 22, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by TIMOTHY MYERS, Attorney, Fayetteville, Arkansas.

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

STATEMENT OF THE CASE

A hearing was held in the above styled claim on September 25, 2006, 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 2, 2006. This pre-hearing order set forth the stipulations offered by the parties, and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

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

2. On March 16, 2006, the relationship of employee-employer-carrier-TPA existed between the parties.

3. The appropriate weekly compensation benefits are \$267.00 for total disability and \$200.00 for permanent partial disability.

4. The claim is controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. whether the claimant sustained a compensable injury, in the form of a hernia on March 16, 2006.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from March 16, 2006 and attorney's fees.

In regard to these issues, the claimant contends:

(a) That an employee/employer relationship existed at all relevant dates on or about March 16, 2006.

(b) That on or about that date, the claimant was moving furniture and felt a sudden onset of pain which arose out of and in the scope and course of his employment with the respondent/employer, causing his need for medical treatment and subsequent surgery.

(c) That the claimant is entitled to temporary total disability benefits from March 16, 2006, to a date yet to be determined in addition to medical benefits.

(d) That claimant's attorney is entitled to a controverted attorney's fee on indemnity benefits awarded.

In regard to these issues, the respondents contend that the claimant did not sustain an injury arising out of and in the course of his employment as defined by the Arkansas workers' Compensation Act.

DISCUSSION

_____The central issue in this claim is the question of whether the claimant sustained a "compensable injury". As the alleged employment related injury is in the form of a hernia, the issue of compensability is controlled by the provisions of Ark. Code Ann. §11-9-523. Thus, the claimant must do more than merely prove that his hernia arose out of and occurred in the course of his employment with this respondent, Humbert v. Arkansas State Highway and Transportation Department, 270 Ark. 853, 606 S.W. 2nd 377 (1980).

Ark. Code Ann. §11-9-523 establishes five elements which must be met in order for an employment related hernia to be a "compensable injury". These are:

- (1) The occurrence of the hernia immediately following as the result of sudden effort, severe strain, or application of force directly to the abdominal wall.
- (2) There was severe pain in the hernia region.

(3) The pain caused the employee to cease work immediately.

(4) Notice of the occurrence of the hernia was given to the employer within 48 hours after it occurred.

(5) The physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within 72 hours after the occurrence of the hernia.

The Courts have long recognized that the purpose for these various required elements is to insure that the hernia was caused by the employment, Ayres v. History Preservation Association, 24 Ark. App. 40, 747 S.W. 2nd 587 (1988). Thus, when a claimant clearly proves that his hernia arose out of and occurred in the course of his employment, the Appellate Courts have frequently excused or narrowly limited one or more of the required elements, Darling Store Fixtures v. MacDonald, 54 Ark. App. 60, 922 S.W. 2nd 748 (1996).

In the present case, the claimant's own testimony is the only direct evidence presented to prove the existence of a causal relationship between his hernia and his employment (i.e. that the hernia arose out of and occurred in the course of the employment). His testimony is also the only direct evidence to prove most of the required elements of Ark. Code Ann. §11-9-523 (a), as well. Although a testimony of a party is never considered uncontradicted,

this does not mean that it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient to prove, in and of itself, any fact it is legally competent to address.

In the present case, the claimant testified that on March 16, 2006, he had been dispatched by the respondent to move a load of furniture from Springdale, Arkansas to Jane, Missouri. He stated that while he and a co-employee were carrying a large dresser or buffet from the truck in to the garage of the Jane, Missouri, residence, he felt a "pain" below his belt in the area of his subsequently diagnosed hernia. However, he conceded that this pain did not prevent him from continuing to carry the dresser or buffet to its proper location. Nor did it prevent him from finishing the loading the truck without any break or delay. He testified that, when the unloading was completed, he returned the truck to the respondent's yard in Springdale. He indicated that he also performed his usual employment tasks on the following day. During this time, he did not report the incident or any difficulties to the respondent.

The claimant testified that this "pain" or discomfort worsened over the weekend and that on Sunday he first noticed a knot in the inguinal area, which he described as half the size of a golf ball. It was his testimony that, at that time, he was afraid that he had cancer. He stated that he did not go into work on Monday or Tuesday, and on Tuesday, Claude Green, his brother and also his supervisor, took him to the hospital. It was at that point he first learned that he had a hernia.

The claimant also acknowledged that he had had prior abdominal pains or complaints. However, he denied that these represented a hernia and contended that they were only "gas pains".

The medical evidence shows that the claimant first sought medical treatment for abdominal complaints at the emergency room of Washington Regional Medical Center at 10:04 p.m. on March 21, 2006. These records state:

"Chief complaint: Patient presents for the evaluation of abdominal pain.

Historian: History obtained from the patient.

Timecourse: Onset of symptoms recorded as gradual, onset was right inguinal area knot, pain came up last week, has gone down now, has no pain, or mass noted. Works as a mover. Complaint is resolved."

The triage history was recorded as:

"Complains of knot in groin area since Sunday. Patient stated it is very painful to touch. Denies fever, denies problems urinating."

Clearly, neither of these histories mention any specific employment activity, which involved sudden effort, severe strain, or application of force directly to the abdominal wall, as precipitating or causing the claimant's symptoms or complaints.

It is also important to note that during the physical examination, which was conducted at the time of the initial emergency room visit, no actual hernia was detected. However, "mild thickened changes" were noted along the right inguinal tract. The claimant's diagnosis was given as a "stable right inguinal hernia".

The medical evidence shows that the claimant next sought medical treatment from Dr. Nicholas Gyles, on March 24, 2006. At that time, Dr. Gyles recorded the following history:

“41 year old white male on Sunday noticed hernia (bulge) in right groin area. Non strangulated, non incarcerated. Patient is a furniture mover.”

Again, there is absolutely no mention of any particular employment related event or activity, which involved sudden effort, severe strain, or application of force directly to the abdominal wall as precipitating or even preceding the claimant's symptoms or complaints. The claimant's diagnosis was given that of a right inguinal hernia, which was reducible. Dr. Gyles even released the claimant to return to his regular employment without restrictions and only with the directions to “reduce” his right inguinal hernia should it again appear.

The first mention in the medical evidence of a possible relationship between the claimant's hernia and his employment does not appear until the emergency room records of Washington Regional Medical Center, dated May 24, 2006. In the initial emergency room admission report is a handwritten note under the section of admitting diagnosis that states:

“Workers' Comp two months ago.”

Curiously, the actual emergency room records do not indicate any history of the onset of the claimant's pain or symptoms as being precipitated by or related to any specific employment related event or activity, particularly one requiring sudden effort, severe strain, or the application of force directly to the claimant's

abdominal wall. In fact, none of the subsequent medical reports or records contain any history of the onset of the claimant's symptoms similar to that described in his testimony, nor do they relate the hernia to any specific employment related incident or activity.

In regard to the reporting of the accident and injury to the respondent, the claimant's testimony indicates that he told his brother (who was also his supervisor) about the knot on his groin on the Sunday he noticed it. This would have been March 19, 2006. However, his testimony indicates that he did not tell his brother about any employment related incident as precipitating or causing his difficulties (T.13). In fact, it is obvious from this same testimony that the claimant did not, at that time, associate his difficulties with any employment related activity or event. Instead, he attributed his complaints to a possible cancer.

In fact, it is impossible to accurately ascertain from the evidence presented exactly when the claimant arrived at the conclusion that his difficulties were causally related to the specific employment event on March 16, 2006.

At some point, the claimant and/or his brother filled out an "accident report" on a form purportedly provided by the respondent. This form has been introduced as Claimant's Exhibit No. 2. Curiously, this form is undated. More importantly, it fails to give the time or date of any specific employment incident producing the employment related injury, nor does it give any description of the incident that supposedly produced this injury. In fact, it even fails to give the type of injury sustained.

Claude Green, the claimant's supervisor and brother, testified that he filled out this "accident report" on the day following the initial emergency room visit, which would have been March 22, 2006. He also testified that by that time the claimant had advised him that this injury had occurred while he was moving furniture in Jane, Missouri. However, he offers no explanation as to why none of this information was written down on this "accident report". Claude Green further testified that, after filling out this report, he gave it to Tommy Bagwell. He stated that he expressly told Mr. Bagwell that the claimant had gotten hurt on the job. He testified that, at that point, Mr. Bagwell advised him to tell the claimant to go ahead and have the corrective surgery performed.

On cross examination, Claude Green could give no reasonable explanation for his failure to date the "accident report" or to provide any information concerning the nature or cause of the injury being reported. Finally, Claude Green testified that on Wednesday following the initial emergency room visit of March 21, 2006, he only informed Tommy Bagwell that the claimant had a hernia. Curiously, he does not testify that he advised Mr. Bagwell of the alleged employment related accident supposedly causing the hernia.

Mr. Tommy Bagwell, the respondent's vice president in charge of Operations, testified that he had never seen the "accident form" (Claimant's Exhibit No. 2) until the day of the hearing. He stated that this was a form that had been used in the past, but wasn't the form in use at the time of the claimant's alleged injury. Mr.

Bagwell denied that Claude Green had reported such an injury to him and testified that the first knowledge he had that the claimant was contending a work related hernia was when he received a call from hospital personnel wanting to know the workers' compensation claim number and seeking authorization for treatment. However, he was unable to say if this conversation took place in March or May of 2006. Finally, Mr. Bagwell testified that at that time he contacted the claimant and asked him to come in and fill out the appropriate paperwork to file a workers' compensation claim. It was his testimony that the claimant never came in and filled out these forms.

After consideration of the evidence presented, it is simply my opinion that the claimant's testimony is not sufficiently credible to prove that his right inguinal hernia was causally related to his employment with this respondent (i.e. arose out of and occurred in the course of his employment). Further, his testimony is insufficient to prove that his right inguinal hernia occurred immediately after and was the result of sudden effort, severe strain, or the application of force directly to the abdominal wall by the claimant's employment activities on March 16, 2006.

I simply find it difficult to believe that if the claimant's abdominal symptoms first occurred, as he described in his testimony, that he would have failed to associate his subsequent difficulties and incident and believed that he had cancer. It is also difficult to accept that he would have failed to report this particular work related incident to any of his various medical

providers and that he would have failed to report any employment related cause for his difficulties to his initial medical providers. It is also difficult to conceive why he failed to note this incident on the purported "accident form". The fact that the claimant continued to perform his regular and rather strenuous employment activities without difficulty or complaint, after the alleged incident on March 16, 2006, would be inconsistent with the occurrence of the right inguinal hernia on that date.

Although the claimant denied that he gave a history of a gradual onset of his abdominal difficulties at the time he initially sought medical treatment, and also testified that he told each of his various physicians about the employment related lifting incident on March 16, 2006, as the cause of his abdominal difficulties, it is impossible to believe that the personnel at the Washington Regional Medical Center emergency room would have simply made up the gradual onset history and even more impossible to believe that every physician would have failed to note the specific employment incident. Finally, it defies all logic and reason that, if such an alleged incident occurred, both the claimant and his supervisor/brother would have neglected to mention this incident or in any way identify or describe this incident when completing the so-called "accident report".

After consideration of the evidence presented, it is also my opinion that the greater weight of the credible evidence reveals that the respondent's were not notified of any alleged employment related hernia, until Mr. Bagwell was contacted by personnel at

washington Regional Medical Center. It would further appear from the evidence presented that this contact most likely occurred at the time of the claimant's emergency room visit on May 24, 2006, as the medical evidence shows that this is the first recorded indication that the claimant reported his abdominal difficulties or hernia as being work related or coming under workers' compensation. Without such a claim, the hospital personnel would have had no reason to contact the respondent employer concerning payment of the expenses. I find Mr. Bagwell's testimony to be credible concerning his lack of knowledge of the purported "accident report". However, due to the paucity of information contained in this report, this report would not, on its face, represent the reporting of an employment related accident and injury, particularly one in the form of a hernia. Therefore, I find that the claimant has also failed to prove that he reported the occurrence of the alleged hernia to his employer within 48 hours after it occurred, as required by Ark. Code Ann. §11-9-523.

In fact, the greater weight of the evidence presented fails to show that the claimant has satisfied any of the other statutory requirements for a "compensable" hernia, under Ark. Code Ann. §11-9-523. The claimant testified that he experienced some pain on March 16, 2004, but this testimony is refuted by his subsequent actions.

According to his own testimony, he continued to work at his regular position for the remainder of that day and likely the next without any complaint or apparent difficulty. His testimony further

shows that he did not even briefly stop or pause from performing his regular employment activities on March 16, 2006.

According to the claimant's own testimony, he felt no need of any medical treatment until late Sunday, March 19, 2006. The medical evidence indicates that no medical treatment was sought until late on March 21, 2006. Thus, it is my opinion that the credible evidence fails to show that the claimant required medical services for his alleged injury of March 16, 2006, within 72 hours after it occurred.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On March 16, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On March 16, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$267.00 for total disability and \$200.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a compensable injury, in the form of a right inguinal hernia, that arose out of and occurred in the course of his employment on March 16, 2006. Specifically, he has failed to prove by the greater weight of the credible evidence the existence of a causal relationship between his subsequently diagnosed right inguinal hernia and any employment event or activity on March 16, 2006. Particularly one requiring

requiring sudden effort, severe strain, or application of force directly to the abdominal wall. He has failed to prove that he experienced severe pain in the hernial region on March 16, 2006, that was sufficient to cause him to cease work immediately, that he provided appropriate notice to the employer within 48 hours after March 16, 2006, and that his physical distress was sufficient to require him to seek the attendance of a licensed physician within 72 hours after March 16, 2006.

5. The respondents deny the occurrence of any compensable hernia and controvert this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE