

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408460

CANDACE LACOTTS,
EMPLOYEE

CLAIMANT

PATRICIA PARKER and GORDON PARKER
d/b/a PARKER'S BEND,
UNINSURED EMPLOYER

RESPONDENT

OPINION FILED JANUARY 9, 2006

Hearing before Administrative Law Judge March Churchwell in
Little Rock, Pulaski County, Arkansas.

Claimant represented by Honorable George Bailey, Attorney at
Law, Little Rock, Arkansas.

Respondents represented by Honorable Kenneth A. Olsen,
Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on October
18, 2005 in Little Rock, Arkansas. A Prehearing Order was
entered in this case on May 19, 2005. This Prehearing Order
set out the stipulations offered by the parties and outlined
the issues to be litigated and resolved at the present time.
A copy of this Prehearing Order was made Commission's
Exhibit No. 1 to the October 18, 2005 hearing record.

The following stipulations were submitted by the
parties in the Prehearing Order or during the hearing and
are hereby accepted:

1. Claimant worked for Parker's Bend on date of
alleged injury, July 23, 2004.

2. The attachments referred to in Respondent's Exhibit No. 1 are no longer available.

At the request of the claimant, the issues to be litigated and resolved at the present time were limited to the following during the course of the hearing:

1. Compensability of an alleged work-related hernia.

2. The claimant's entitlement to temporary total disability and temporary partial disability, or in the alternative, benefits under Ark. Code Ann. § 11-9-505(a)(1) beginning on July 23, 2004 and continuing until her termination approximately 12 weeks later on November 3, 2004.

3. The claimant's appropriate compensation rate.

4. Reasonably necessary medical expenses and medically related travel expenses.

5. The claimant reserves the issue of her entitlement to indemnity benefits after her termination on November 3, 2004. Said reservation includes benefits for permanent physical impairment, the extent of wage loss, the necessity and propriety of a rehabilitation program, additional temporary disability benefits, and additional benefits under Ark. Code Ann. § 11-9-505(a)(1).

The record consists of the transcript of the October 18, 2005 hearing, and the exhibits contained therein.

DISCUSSION

1. Evidentiary Objections.

On page 11 of the hearing transcript, Mr. Bailey objected to the admissibility of Respondent's Exhibit No. 1, which consists of nine pages of documents related to Ms. Lacotts' application for unemployment benefits and the adjudication by the Employment Security Division and the Arkansas Appeal Tribunal on that claim. Mr. Bailey objects to any statements by Mrs. Parker and the findings of the Hearing Officer as hearsay. Mr. Olsen seeks the admissibility of those findings into evidence but did not assert that the findings of the Arkansas Appeal Tribunal are *res judicata* on any issue presently before the Arkansas Workers' Compensation Commission.

I note that the Arkansas Supreme Court has previously explained in St. Paul Ins. Co. v. Touzin, 267 Ark. 539, 592 S.W.2d 447 (1980):

First, the compensation law provides that the Commission is not bound by technical rules of evidence or procedure, but may "conduct the hearing in a manner as will best ascertain the rights of the parties." [Citation omitted]. Professor Larson discusses at length the cases construing such provisions in workers'

compensation statutes. He concludes that the factfinders are expected to adhere to basic rules of fair play, such as recognizing the right of cross examination and the necessity of having all the evidence in the record. On the other hand, a compensation commission undoubtedly has expertise much superior to that of a jury in the weighing of testimony and should therefore be left to determine the probative value of hearsay testimony and other proof that might not be admissible in a court of law. Larson, Workmen's Compensation Law, 79.00 and 79.80 79.84 (1976).

Having found no subsequent guidance from the Court or the Legislature to the contrary, I find that the proffered documents and findings of the Employment Security Division and the Arkansas Appeal Tribunal are admitted into evidence. I interpret that the Arkansas Workers' Compensation is not bound by the findings of the Arkansas Appeal Tribunal on the issue as to whether or not Ms. Lacotts is entitled to benefits under the Arkansas Workers' Compensation Law, and these documents should be examined for probative value like any other relevant evidence.

2. Compensability of Alleged Work-Related Hernia.

In order to prove that a hernia is compensable, a claimant must satisfy all the requirements of Ark. Code Ann. § 11-9-523(a) which provides:

1. That the occurrence of the hernia immediately followed as a result of sudden effort, severe strain, or the application of force 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.

In the present case, Ms. Lacotts testified that on July 23, 2004, she experienced a sharp pain in her left lower abdomen at work when she picked up a case (24 bottles) of 20-ounce Dr. Peppers. (T. 13-14). Ms. Lacotts testified that she felt like she had pulled or ripped a muscle, that she immediately told her manager, Cherrie Allen, that she felt she had pulled a stomach muscle, and that Ms. Allen told Ms. Lacotts to sit on a stool beside the manager's office. Ms. Lacotts testified that she sat on the stool for about 10 or 15 minutes until the next employee came in. Ms. Lacotts testified that Cherrie Allen told Ms. Lacotts that she needed to see a doctor. (T. 15-16).

Ms. Lacotts testified that she was in severe pain that night and that she was sore at work the next day. Ms. Lacotts testified that on the second evening, she observed

an abdominal protrusion. (T. 16). Ms. Lacotts testified that she called the doctor's office on July 26 with Cherrie Allen right beside her. (T. 66). Ms. Lacotts testified that Dr. Kristy Cowherd was not able to see her until August 5, 2004.

Ms. Lacotts' 16 year-old daughter, Nicole Bunch, testified that Ms. Bunch was with her mother, who was lying in bed, when Ms. Lacotts called Dr. Cowherd. (T. 100).

Cherrie Allen, the manager at Parker's Bend on July 23, 2004, testified that she was not aware of any physical problems sustained by Ms. Lacotts when the problems alleged occurred on July 23, 2004. (T. 105). Ms. Allen testified that Ms. Lacotts did not make any report of injury to her that day. (T. 106). Ms. Allen testified that she did not recall Ms. Lacotts at any time during the week of July 26 telling Ms. Allen that she had a physical injury, and that Ms. Allen did not recall Ms. Lacotts calling Dr. Kristy Cowherd from the store in Ms. Allen's presence on July 26, 2004. (T. 108).

Ms. Charlene England testified that she was a co-worker with Ms. Lacotts, and that Ms. England and Ms. Lacotts were the only people working at Parker's Bend Grocery on July 23, 2004. Ms. England testified that Ms. Lacotts did not tell

Ms. England that day that Ms. Lacotts had hurt herself at work. (T. 148). Ms. England testified that Ms. Lacotts did tell Ms. England a few days later that Ms. Lacotts had a doctor's appointment, that she thought she had a hernia, and that she hurt herself when she picked up two cases of 20-ounce Cokes out of the bin in front of the store. (T. 148).

Contrary to Ms. Lacotts' testimony, Ms. England testified that she asked Ms. Lacotts if Ms. Lacotts had told Cherrie Allen about the incident and that Ms. Lacotts answered that, no, Ms. Lacotts had not told Ms. Allen. (T. 149). Ms. England testified that before July 23, 2004, Ms. Lacotts had come to work for several days after moving and said that her stomach was hurting. (T. 149). Ms. England testified that Ms. Lacotts had said she thought she had a hernia in her stomach before July 23, 2004. (T. 151).

On rebuttal, Ms. Lacotts testified that the lifting incident on July 23, 2004 occurred after Charlene England left for the day. (T. 161). Ms. Lacotts testified that Ms. Lacotts and Ms. England never got along and spoke very little to one another. Ms. Lacotts testified that she never described stomach pain to Ms. England either before or after July 23, 2004. (T. 157).

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agric. Eaters., 72 Ark. App. 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id.

In the present case, I find most credible the testimony of Charlene England. In this regard, I note that Ms. England no longer works for Parker's Bend Grocery and on this record appears to no longer have any contact with the Parkers at all. (T. 146). I find that Ms. England's credible testimony establishes by a preponderance of the evidence that Ms. Lacotts was aware of the existence of a hernia in her stomach before July 23, 2004. Consequently, the claimant has failed to establish by a preponderance of the credible evidence that her hernia occurred lifting Dr. Peppers on July 23, 2004 as she asserts. I note that Ms. England's testimony is also consistent with Ms. Allen's

recollection that Ms. Lacotts did not at any time on July 23, 2004 or during the week of July 26, 2004 report a physical injury to Ms. Allen. Therefore, even if I were to find that the claimant established the occurrence of a hernia on July 23, 2004, as she asserts, I would still be constrained to find that the claimant has failed to establish by a preponderance of the credible evidence that she gave notice of the occurrence to her employer within 48 hours thereafter.

Because I find that the claimant has failed to establish by a preponderance of the evidence that she sustained a compensable hernia injury, I find that the remaining issues as to the benefits to which the claimant may have been entitled had she proven a compensable hernia injury are now moot.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Claimant worked for Parker's Bend on the date of alleged injury, July 23, 2004.
2. The attachments referred to in Respondent's Exhibit No. 1 are no longer available.
3. The claimant has failed to establish by a preponderance of the credible evidence that she sustained a compensable hernia injury on July 23, 2004 as she asserts.

The preponderance of the credible evidence establishes that the claimant was aware that she had a hernia before July 23, 2004 which was not sustained at work. In addition, a preponderance of the evidence establishes that the claimant did not give notice to her employer of the occurrence of any alleged hernia injury within 48 hours after lifting Dr. Peppers on July 23, 2004.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

HONORABLE MARK CHURCHWELL
Administrative Law Judge