

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500153

NANCY A. PHILPOTT

CLAIMANT

**METRO BUILDERS AND RESTORATION
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED JULY 24, 2006

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on June 8, 2006. A prehearing conference was held and a prehearing order was filed on May 19, 2006. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the evidence without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable December 26, 2004, injury.
2. The compensation rates are \$298/224.

The claimant contends that she sustained a compensable injury on December 26, 2004. The claimant has undergone two surgeries and a third surgery has been recommended for a recurrent ventral hernia. The claimant is also requesting temporary total disability benefits from May 10, 2005, to a date to be determined, as well as

medical benefits and attorney's fees. Claimant relies on the *Jobe v. Wal-Mart* Court of Appeals decision.

Respondents contend the claimant did not suffer any type of compensable and permanent injury. Respondents contend the second diagnosis was in October 1005 and the claimant had left her employment with the respondent employer on May 18, 2005. Respondents contend the claimant still must meet her burden of proof for compensability under Ark. Code Ann. §11-9-523. Respondents contend this is not a specific incident injury or a gradual onset injury and claimant cannot meet the burden of proof for either. Respondents contend there was a compensable hernia in December 2004, with surgery on January 12, 2005, and a second surgery on March 2, 2005, to address a reaction to some mesh from the first surgery. The claimant was released to return to work on April 21, 2005 and continued working until May 18, 2005, when she voluntarily left the employment.

ISSUED TO BE LITIGATED

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Attorney's fees.

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 Ark. Code Ann.

§11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a compensable December 26, 2004, injury.
2. The compensation rates are \$298/224.
3. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment stemming from the October 5, 2005, diagnosis.
4. The claimant has failed to prove by a preponderance of the evidence that the recurrent ventral hernia was a compensable consequence of the January 12, 2005, compensable injury.

DISCUSSION

The claimant, 48 years old, worked for the respondent employer doing manual labor. The employer is a restoration company and the claimant's duties involved packing, lifting furniture, cleaning water up, smoke damage, and other related duties. The claimant sustained a compensable hernia on December 26, 2004. The claimant treated with Dr. Haley Shaw who performed surgery on January 12, 2005 and a second surgery was performed on March 4, 2005. The claimant returned to work in April 2005 on light duty for one week and then went to part time, regular duty. The claimant testified that she moved furniture on her job and she continued to hurt and had more pain, the more she lifted. The claimant explained that she left her employer to go take care of her sister who was diagnosed with cancer.

The claimant testified that she had done nothing outside of her work to re-injure herself. She also testified that she told Britt, her supervisor, that she continued to hurt and that the lifting caused pain. The claimant confirmed that she had a previous hernia in 1995. The claimant confirmed that she has had gastric bypass surgery, gallbladder surgery and bowel obstruction surgery, in addition to the three hernia surgeries. The claimant explained that the knot she is now concerned with is right on the scar for the surgeries.

Britt Stewart, production manager for the respondent employer, testified that the claimant worked about three weeks after she was released to return to work following her surgery. Mr. Stewart testified that the claimant did not complain about problems she was having regarding performing her job nor did she ask for any job modifications.

An October 6, 2005, report from Dr. Haley Shaw diagnoses the claimant with a recurrent ventral hernia and suggests a laparoscopic repair. Respondents have controverted further benefits following the initial hernia repair on January 23, 2005 and the follow-up surgery on March 2, 2005 and conservative treatment following the second surgery. Respondents contend the claim for another hernia must meet the hernia statutory requirements of Ark. Code Ann. §11-9-523.

Ark. Code Ann. §11-9-523(d) provides:

Recurrence of the hernia following radical operation thereof shall be considered a separate hernia, and the provisions and limitations regarding the original hernia shall apply.

In the present case, I find the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable hernia arising out of and in the course of her employment pursuant to the October 6, 2005, diagnosis. The claimant left the

respondent employer in May 2005, to move to Florida to care for her sister who had cancer. The claimant testified that she had not done anything to hurt herself after she had left her employer. While the claimant testified that she continued to have some pain after she returned to work for the respondent employer following her recovery in April 2005, she did not reveal any specific incident that would satisfy the elements of Ark. Code Ann. §11-9-523. The claimant's supervisor, Britt Stewart, testified that the claimant made no complaints to him about work difficulties after her return in April 2005. Mr. Stewart had no knowledge that the claimant might be seeking better medical care in Florida.

The claimant did confirm in her testimony that she had undergone a blocked bowel surgery since leaving the respondent employer. She further confirmed that she had undergone two hernia surgeries and one excision of suture granuloma, a gastric bypass, an open gallbladder surgery, and the blocked bowel surgery. Several of these surgeries used the same incision area. There was no medical opinion presented that specifically linked the claimant's current condition to her previous hernia injury. Dr. Shaw presents a medical opinion on April 13, 2006, that stated in part:

. . . . Certainly patients that have ventral hernias are at risk for recurrent hernias as was explained to the patient preoperatively. Other factors that contribute to ventral hernia development include obesity, tobacco abuse, and heavy lifting. I have not seen Ms. Philpott since October of 2005 and cannot give a determination as to her current state as it has been more than six months since I examined her.

After considering the testimony and reviewing the medical evidence, I was not persuaded that the claimant met the elements of Ark. Code Ann. §11-9-523 for a compensable hernia stemming from the October 5, 2005, diagnosis.

The claimant may contend that the October 5, 2005, diagnosis of a recurrent ventral hernia is a compensable consequence of the December 26, 2004, compensable injury. The issue then becomes whether the treatment is reasonable and necessary and that is a question of fact for the Commission. *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001). However, when the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury, and the basic test is whether there is a causal connection between the injury and the consequences of such. *Id.* A non-work-related independent intervening cause does not require negligence or recklessness, but if the claimant is engaged in unreasonable conduct, the result may be an independent intervening cause. *Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 20 S.W.3d 326 (2000); see, Ark. Code Ann. §11-9-102(4)(F)(iii) (Supp. 1999).

In the present case, the claimant has failed to present sufficient medical evidence to link the October 5, 2005, diagnosis with the claimant's compensable December 26, 2004, compensable hernia. Dr. Slater has opined a number of things that can cause a recurrent ventral hernia and lifting heavy objects is one of the ways. The claimant did not provide with specificity any details of lifting at work that caused her recurrent ventral hernia. The claimant's current condition was not diagnosed until some five months after she left the respondent employer. I also find the claimant has failed to meet the requirements of Ark. Code Ann. §11-9-102(4)(A)(i) for a specific incident injury and has also failed to meet the requirements of Ark. Code Ann. §11-9-102(4)(A)(ii)(a) for a gradual onset injury.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment stemming from the October 5, 2005, diagnosis. The claimant has failed to prove by a preponderance of the evidence that the recurrent ventral hernia was a compensable consequence of the January 12, 2005, compensable injury. The claim for benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**