

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509424

CRUZ TORRES	CLAIMANT
SUPERIOR INDUSTRIES	RESPONDENT
CROCKETT ADJUSTMENT, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED FEBRUARY 3, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG 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

A hearing was held in the above styled claim on November 21, 2005, in Springdale, Arkansas. A pre-hearing order was entered in this case on October 27, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the parties agreed on the appropriate weekly compensation rates. A copy of this pre-hearing order with that amendment noted thereon, has been made Commission's Exhibit No. 1 to the hearing.

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

1. On all relevant dates, between May 26, 2005 and June 28, 2005, the relationship of employee-self insured employer-TPA existed between the parties.
2. The appropriate weekly compensation rates are \$466.00 for

total disability and \$350.00 for permanent partial disability.

3. 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.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from August 8, 2005 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"Claimant was injured on June 1, 2005. His abdomen was injured when he was (sic) tried to stop a wheel from falling. The extreme weight of the wheel caused him to injure his abdomen."

In regard to these issues, the respondents contend:

"The respondents contend that the claimant did not sustain an injury arising out of and in the course of his employment as defined in the Arkansas Workers' Compensation Act. If the claimant is contending he sustained a compensable hernia, the respondents contend he did not meet the required elements including, but not limited to, reporting the incident as required by law and ceasing work. In the event that the claimant is contending he has an injury other than a hernia, the respondent state in the alternative that if he did sustain an injury, which is denied, the claimant failed to report this until August 8, 2005, and the claimant should not be entitled to any benefits prior to that date."

DISCUSSION

I. COMPENSABILITY

The first issue to be addressed is the question of whether the

claimant sustained a "compensable" hernia during his employment with this respondent. The burden rests upon the claimant to prove all of the elements necessary to establish this alleged compensable injury.

The issue of compensability is controlled by the provisions of Ark. Code Ann. §11-9-523. This subsection states:

"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 the result of sudden effort, severe strain, or 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."

The claimant testified that toward the end of May of 2005, he was performing his assigned employment activities of taking rims that were hanging on rods and placing the rims onto a belt. The particular day of the incident he was performing these employment activities on rims that weighed approximately 50 pounds. He stated that, while attempting to move one of the rims, it slipped, and he grabbed it to keep it from falling. He stated that he experienced a contemporaneous extremely sharp pain in the area of his stomach

around his navel. Although he testified that this pain did not hurt "too much," it was obviously sufficient that he immediately advised his lead man, Francisco Santana. He stated that Mr. Santana took him to the office to complete the required report. While Mr. Santana was completing this report, the claimant talked to Randy Johnson, his team leader, and advised him of the incident and his difficulties. The claimant stated that he remained in the office for approximately 45 minutes to an hour. While he was in the office, Mr. Johnson asked him if he thought that he could go back to work. When the claimant gave him an affirmative response, Mr. Johnson told him to try, but advised him to refrain from lifting the heavier rims. Mr. Johnson also advised the claimant that if his difficulties worsened or did not go away, he would send the claimant to a doctor. The claimant testified that he returned to work, but that his difficulties continued and he noticed a protrusion in the area of his navel. Ultimately, the claimant expressly requested that the respondent provide him with medical services and he was sent to the company physician (although the claimant testified that this was approximately one month later, the records indicate that it was actually almost two months later in July of 2005).

The respondent has offered the testimony of Mr. Johnson, the claimant's team leader, and Mr. Robert Silverly, the claimant's general supervisor. The respondent has not offered the testimony of Mr. Santana, the claimant's lead man.

Mr. Johnson's testimony generally corresponds to the history of events described by the claimant. Mr. Johnson testified that the claimant came to him and complained of difficulties in the area of his stomach, apparently as the result of employment related activities. Mr. Johnson stated that he was not sure whether this conversation occurred in May of 2005, but that it did occur sometime during May when it was "hot." Mr. Johnson also described a second incident where the claimant reported again difficulties with his stomach to him, Robert Silverly, and Francisco Santana. He stated that at that time the paperwork was filled out by Mr. Santana. Mr. Johnson stated that at that time he told the claimant that the only thing he could suggest was to set him up with a doctor's appointment, but that he left this up to Mr. Silverly. It was Mr. Johnson's express testimony that the claimant initially reported the incident and his complaints to him before the May 26, 2005 log entry. He also expressly denied that he was in any way involved in any meeting in July of 2005 (the various required forms were ultimately completed and the claimant was sent to the company physician). However, even if Mr. Johnson's testimony is accurate, in that the claimant's initial report of the incident and injury occurred prior to May 26, 2005, it is still apparent that the claimant immediately reported both the incident and onset of difficulties (whatever the date).

Mr. Silverly testified that the first he knew about the claimant's alleged accident and injury was when Mr. Johnson informed him that the claimant had reported an employment related

incident and injury to his stomach, during the second or third week of May of 2005. He also testified that this initial report was prior to the completion of the EMT report by Mr. Sanchez on May 26, 2005 (Claimant's Exhibit No. 1, page 11). He stated that the day following this initial report to him by Mr. Johnson, he personally contacted the claimant "to see how he was feeling." He stated that at that time the claimant advised him that he was feeling better and the conversation ended. Mr. Silverly then testified that on May 26, 2005, he heard Mr. Santana paging Mr. Johnson to the maintenance office, so he went to that office also. He testified that at that time the claimant was complaining of his stomach hurting and attributed his complaints to "prior days at pulling a Harley. He stated that, at that time, both Mr. Santana (the respondent's first responder) and Mr. Johnson actually examined the claimant in the area of his complaints. He testified that he asked the claimant if he would like to see the doctor and that the claimant responded: "not at this time." He testified that in July of 2005 the claimant returned and expressly asked for medical treatment for his continuing stomach complaints. At that time, all of the various forms were generated (Claimant's Exhibit No. 1, pages 4-10). In essence, even if Mr. Silverly's testimony is correct, it, too, shows that the claimant immediately reported the employment related incident and contemporaneous onset of difficulties in his stomach area.

First, as evidenced by Mr. Johnson's testimony and the actual log report on May 26, 2005, it is obviously the respondent's policy

to record any employment related incident and injury, even those of a minor nature. It would seem unlikely that both Mr. Johnson and Mr. Silverly would receive reports from the claimant of an employment related incident and injury, prior to May 26, 2005, and yet make no written record of such reports. Further, the written report, made by Mr. Santana, on May 26, 2005, only indicates that the incident and onset of difficulties occurred on that same date, and makes no mention of any prior incident days before.

Next, the record shows that all of the subsequent forms, dealing with the claimant's complaints specifically give an incident date of May 26, 2005, These include forms signed off on by Mr. Silverly (Claimant's Exhibit No. 1, page 5-7). Although the respondents' First Report of Injury form erroneously indicated that the employer was first notified of the injury on July 27, 2005 (a statement contrary to all of the testimony), it, too, shows that the accident and injury date as May 26, 2005 at 9:45 p.m.

After consideration of all the evidence presented, it is my opinion that the claimant's testimony, concerning the various events surrounding the employment related incident on May 26, 2005 and the various events occurring subsequent thereto, is credible and represents an accurate depiction of all of these events. The claimant's testimony, in this regard coincides with the histories recorded in the various written documents admitted into evidence in this case, particularly those completed by and at the request of the respondents, and the medical history taken by Dr. Garland Thorn (the company physician). I would further note that the claimant is

a long-term employee of the respondent and clearly appears to be well motivated. Except for the matter of an earlier date of injury and reporting (then May 26, 2005), the claimant's testimony coincides with that of the respondents' witnesses. The earlier date of the incident and reporting described by the respondents' witnesses would not be consistent with these witnesses failure to record such a matter and is contrary to the written reports actually made in this case.

Although the 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 in and of itself to prove any fact it is legally competent to address. Clearly, the claimant's testimony is legally competent to address the actual occurrence of a specific employment related incident or accident on May 26, 2005, the contemporaneous onset of difficulties indicative of the occurrence of an umbilical hernia, and the various events that occurred thereafter. In this case, I find the claimant's testimony to be entirely credible and sufficient to prove these facts.

It still remains necessary to determine whether the evidence presented, including the claimant's credible testimony, is sufficient to prove that the claimant's umbilical hernia satisfies the statutory requirements for a "compensable" hernia that are set out in Ark. Code Ann. §11-9-523. It is well recognized that the legislature intended the specific requirements of this subsection to further insure that the hernia was caused by the employment. It

was not the legislature's intent that these requirements act as a trap for the unknowledgeable and to allow a respondent to escape liability for a clearly employment related injury. Darling Store Fixtures v. McDonald, 54 Ark. App. 60, 922 S.W. 2nd 748 (1996).

II. BENEFITS

Next, it becomes necessary to determine the nature and extent of benefits to which the claimant is entitled for his compensable hernia. These are also controlled by the provisions of Ark. Code Ann. §11-9-523.

Clearly, the claimant is entitled to reasonably necessary medical services for this compensable injury. These would include the services already rendered him for his hernia by and at the direction of the company physician, Dr. Garland N. Thorn and by or at the direction of Dr. Wayne Hudec. These reasonably necessary medical services would also include the surgical repair of the claimant's umbilical hernia by Dr. Hudec.

Under Ark. Code Ann. §11-9-523(b)(1), the claimant is also entitled to a maximum of twenty-six weeks of compensation for disability.

The greater weight of the evidence presented shows that the claimant has continued within his healing period from the effects of his compensable hernia, from the date of its occurrence through the present time. Obviously, this is an unusually lengthy healing period for this type injury. However, this healing period has been prolonged by the fact that the respondents have refused to provide the claimant with appropriate corrective medical services and the

claimant has been financially unable to otherwise obtain such services.

The greater weight of the credible evidence presented further establishes that the claimant has been rendered unable from performing regular gainful employment as the result of the effects of his compensable hernia from August 8, 2005 through a date yet to be determined. The evidence shows that the respondent ceased providing the claimant with limited or light duty employment on August 8, 2005. In light of the claimant's inability to speak English, limited education, and limited work skills, he is effectively restricted to heavy manually labor type positions. The continued presence of his umbilical hernia would prevent him from working in such a capacity.

Therefore, the claimant has proven by the greater weight of the credible evidence that he has continued within his healing period from the effects of his compensable hernia and has been rendered totally disabled from performing regular gainful employment as a result of this injury for the period beginning August 8, 2005, and continuing through a date yet to be determined. However, the statutory maximum of twenty-six weeks of benefits applies to such temporary total disability.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On May 26, 2005, the relationship of employee-self insured employer-third party administrator existed

between the parties.

3. On May 26, 2005, the appropriate weekly compensation rates were \$466.00 for total disability and \$350.00 for permanent partial disability.
4. On May 26, 2005, the claimant sustained a compensable umbilical hernia. The claimant has proven all of the statutory requirements of Ark. Code Ann. §11-9-523 to the satisfaction of this Commission.
5. The medical services provided to the claimant by and at the direction of Dr. Garland Thorn and the medical services provided and recommended to the claimant by and at the direction of Dr. Wayne Hudec, including the surgical repair of the claimant's compensable hernia, represent reasonably necessary medical services under Ark. Code Ann. §11-9-523(b)(1) and §11-9-508.
6. The claimant has proven that he has been rendered temporarily totally disabled, as the result of the effects of his compensable hernia for the period beginning August 8, 2005, and continuing through a date yet to be determined. However, the claimant's entitlement to temporary total disability benefits is limited to a maximum of twenty-six weeks.
7. The respondents have denied the occurrence of a compensable hernia and have controverted this claim in its entirety.
8. A reasonable fee for the claimant's attorney is the

maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

ORDER

The respondents shall pay to the claimant temporary total disability benefits commencing on August 8, 2005 and continuing through a date yet to be determined, with a maximum of twenty-six weeks.

The respondents shall be liable for the medical expenses incurred by the claimant for his compensable hernia by and at the direction of Dr. Garland Thorn and the medical expenses incurred by the claimant as the result of services provided and recommended to him by and at the direction of Dr. Wayne Hudec. This liability is subject to the medical fee schedule established by this Commission.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on all temporary total disability benefits herein awarded. One-half of this attorney's fee shall be the obligation of the respondents in addition to such benefits. The remaining one-half of this attorney's fee shall be withheld by the respondents from such benefits.

All benefits which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge

