

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F601032

DONALD WILSON	CLAIMANT
J. B. HUNT TRANSPORT	RESPONDENT
INSURANCE COMPANY-STATE OF PENNSYLVANIA INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 28, 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 JOSEPH PURVIS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 2, 2006, in Springdale, Arkansas.

A pre-hearing order was entered in the case on June 28, 2006. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to litigated and resolved at the present time. Prior to the commencement of the hearing, the parties announced that they could agree on the appropriate compensation rates. A copy of the pre-hearing order with this amendment noted thereon 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 January 3, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The appropriate weekly compensation benefits are \$468.00 for total disability and \$351.00 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 January 3, 2006.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from January 24, 2006 through February 28, 2006, and attorney's fees.

In regard to these issues, the claimant contends that he was injured on January 3, 2006. He suffered a hernia while pulling a heavy tarp.

In regard to these issues, the respondents contend that the claimant's alleged hernia of January 3, 2006, is not compensable within the requirements of Ark. Code Ann. §11-9-523.

DISCUSSION

_____The central issue in this case is the question of whether the claimant sustained a "compensable injury" on January 3, 2006. As the claimant's 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. The burden rests upon the claimant, not only to prove that his left inguinal hernia arose out

of and occurred in the course of his employment, but to also prove that it satisfies the five requirements of §11-9-523(a).

The only evidence offered by the claimant to prove these five requirements, is his own testimony. In this regard, the claimant testified that, at approximately 4:30 p.m. on January 3, 2006, he was tarping his load in Cleburne, Texas. While lifting the "big heavy tarp," he felt a sharp pain in his "left side" that caused him to "almost fall down." At that point, he stopped for a minute or maybe ten minutes. Everything was then "okay." He finished tarping down the load and proceeded on his scheduled route.

The claimant testified that on that date, he attempted to contact his supervisor, Bryan Gilreath, by telephone at the respondent's office in Siloam Springs in order to report the incident and injury. It was his testimony that when he could only get the answering machine, he left a message that simply stated that he need to talk to Mr. Gilreath as soon as possible. Although Claimant's Exhibit No. 2 indicates that the claimant had the capacity to text message his dispatcher, he apparently made no attempt to do so in order to report the alleged accident and injury. He offers no explanation as to why he elected to call rather than text message the report of the alleged accident and injury.

The claimant testified that the following morning (approximately January 4, 2006) he personally advised Mr. Gilreath, at his Siloam Springs office, that he thought he had "pulled a

groin muscle last night.” He further stated that Mr. Gilreath offered to send him to a doctor, but that he declined stating:

“I am 60 years old, I can’t complain about every little ache and pain I have. Let’s just see what happens.”

In his testimony Mr. Gilreath describes a similar conversation. However, he states that this conversation took place during the week of January 10th. This would have been approximately one week later than the claimant’s testimony. Neither party has seen fit to introduce the claimant’s logs that would show when he was in Cleburne, Texas, and when he would have been in the respondent’s Siloam Springs office, following the Cleburne, Texas trip.

The claimant testified that he continued to perform his regular employment activities, without making any attempt to seek medical treatment. He stated that he already had an appointment scheduled with his family physician, for January 19, 2006 (actually January 20, 2006). The purpose for this scheduled visit was for a separate personal problem that was unrelated to his employment. He testified that four days prior to this scheduled visit, he first noticed a swelling or knot in his groin area. When he saw Dr. Jeske, his family physician for his personal problem, he also mentioned this swelling or knot. He testified that, at the time of this visit, Dr. Jeske diagnosed a left inguinal hernia and referred him to Dr. Ronald Jackson. Neither party has introduced any reports or records from Dr. Jeske’s January 19, 2006 visit. In fact, absolutely no reports or records of Dr. Jeske have been introduced.

Although the index to Claimant's Exhibit No. 1 lists a clinic note from Dr. Jeske, dated February 10, 2006, no such note is actually contained in Claimant's Exhibit No. 1.

The claimant saw Dr. Gilreath on January 20, 2006. Dr. Gilreath diagnosed a reducible left inguinal hernia. He also recorded a history somewhat similar to the claimant's testimony. However, he recorded an injury date of approximately January 5, 2006. He also recorded the claimant's symptoms as a burning pain in the left groin. Finally, he states that the claimant notices a golf ball sized swelling or herniation in the groin region "shortly" after the incident and that this was diagnosed by the claimant's girlfriend as a hernia.

In support of his testimony, the claimant offers the testimony of Jerri Yohn, his girlfriend. Ms. Yohn testified that she recalled the claimant calling her from his truck and telling her that he thought he had injured himself. She then stated that the claimant continued to complain of difficulties until he came home two to three days following his initial call. At that time, the claimant showed her the swelling or knot in his groin area, which was the size of a golf ball. She stated that she immediately recognized this as a hernia. However, she subsequently identified the date upon which she first actually saw the hernia, as the same day as the scheduled appointment with Dr. Jeske, either January 19 or January 20, 2006. (Although both the claimant and Ms. Yohn testified about a visit with Dr. Jeske on January 19, 2006, both these witnesses also testified that the claimant saw Dr. Jeske and

Dr. Jackson on the same date. Undeniably, the claimant's first appointment with Dr. Jackson was January 20, 2006).

The law clearly provides that the testimony of a party is never considered uncontradicted. However, this does not mean 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 would be legally competent to establish the occurrence of an employment related incident that involved sudden effort, severe strain, or application of force directly to the abdominal wall. His testimony would also be legally competent to establish the contemporaneous occurrence of severe pain in the hernial region that was sufficient to cause him to cease work immediately. It would also be legally competent to prove that the resulting physical distress was such as to require the attendance of a licensed physician within 72 hours after the occurrence of the injury. Finally, it would be legally competent to prove that notice of the occurrence of the injury was given to the respondent within 48 hours.

However, the claimant's testimony in regard to these matters is confused and conflicting. This testimony is also contradicted by the claimant's subsequent actions and by other more credible evidence presented. His testimony that the severe strain occurred approximately January 3, 2006, is somewhat inconsistent with the date he related to Dr. Jackson. It is also inconsistent with the testimony of Bryan Gilreath, his supervisor, that the claimant did not report any job related incident until the week of January 10,

2006. Further, his testimony is inconsistent with that of his girlfriend, which would indicate that he first reported the incident to her approximately two to four days prior to January 20, 2006.

The claimant's testimony concerning the severity of his pain, particularly severity sufficient to cause him to immediately cease working (at least temporarily) and sufficient to require the attendance of a licensed physician within 72 hours, is clearly inconsistent with his express refusal of medical treatment offered by Mr. Gilreath during the week of January 10, 2006. It would also be inconsistent with his failure to actually seek medical treatment until his previously scheduled appointment for other difficulties.

The claimant's testimony that he continued to experience episodes of severe pain from the time of his initial accident, in early January of 2006, and his initial medical evaluation on January 20, 2006, is directly contradicted by the testimony of Mr. Gilreath to the effect that during this entire period the claimant continued to perform his regular employment activities without any complaint of pain or discomfort. This testimony by the claimant would also be inconsistent his claimant's actions in refusing medical treatment, during the week of January 10, 2006, and failing to seek any medical treatment, his previously scheduled doctor's appointment for an entirely different problem.

Finally, it must be noted that all of the evidence presented (including the claimant's own testimony) fails to convincingly show the actual occurrence of a hernia until four days prior to January

20, 2006. This lack of a noticeable hernia would not support the conclusion that the hernia “occurred” immediately following and as the result of any employment related sudden effort, severe strain, or application of force directly to the abdominal wall on or about January 3, 2006.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that his left inguinal hernia satisfies the requirement for a “compensable injury,” as set out in Ark. Code Ann. §11-9-523. Specifically, he has failed to prove by the greater weight of the credible evidence that the occurrence of his hernia immediately followed as the result of sudden effort, sudden strain, or application of force directly to the abdominal wall as the result of his employment related activities on or about January 3, 2006. I find that the greater weight of the credible evidence fails to prove that the claimant experienced severe pain in the hernial regional, sufficient to require him to cease work immediately (even temporarily) on or about January 3, 2006. I also find that the greater weight of the credible evidence fails to prove that the claimant gave notice of the alleged occurrence of his hernia within 48 hours after it allegedly occurred. Finally, I find that the greater weight of the credible evidence fails to show that the claimant experienced physical distress following the alleged occurrence of the hernia that was sufficient to require the attendance of a licensed physician within 72 hours after the hernia is alleged to have occurred.

As the Appellate Courts have recognized the purpose for the various requirements of Ark. Code Ann. §11-9-523 is to offer, in the particular case of hernias, additional assurance that the injury is, as the claimant alleges, work related. In the present case, the claimant has simply failed to provide this added assurance.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On all relevant dates, including January 3, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$468.00 for total disability and \$351.00 for permanent partial disability.

4. The claimant has failed to prove by the greater weight of the credible evidence that, on or about January 3, 2006, he sustained a "compensable hernia" within the meaning of Ark. Code Ann. §11-9-523.

5. The respondents deny the occurrence of a compensable injury, in the form of left inguinal 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