

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408592

RICHARD L. CONLEY, JR., EMPLOYEE	CLAIMANT
HERCULES MACHINERY CORPORATION, EMPLOYER	RESPONDENT
CINCINNATI INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED AUGUST 3, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on June 29, 2007, at Luxora, Mississippi County, Arkansas

Claimant represented by Mr. J. Matthew Coe, Attorney-at-Law, West Memphis, Arkansas.

Respondents represented by Ms. Cynthia Estes Rogers, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted June 29, 2007, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws.

A prehearing conference was conducted in this matter on March 21, 2007, and a Prehearing Order was filed on said date. During the prehearing conference, the claimant acted *pro se*. The claim was scheduled for a hearing on May 4, 2007. Thereafter, the claimant retained the services of an attorney and the hearing was rescheduled by agreement of the parties. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order, subject to an additional stipulation concerning the

date the claimant first saw a physician following his alleged injury, as well as a clarification by the claimant concerning the dates he claimed disability benefits. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

At the prehearing conference, it was stipulated that the employee/employer/carrier relationship existed at all relevant times, including July 29, 2004; that the claimant's average weekly wage was \$440.00, entitling him to a compensation rate of \$293.00 per week for temporary total disability and \$220.00 per week for permanent partial disability in the event the claim was found compensable; and that respondents had controverted the claim in its entirety. At the hearing, the parties stipulated that the claimant's first visit to any licensed physician following the alleged injury was August 3, 2004.

By agreement of the parties, the primary issue presented for determination was whether the claimant sustained a compensable hernia injury. If answered affirmatively, claimant's entitlement to associated benefits must be determined.

At the prehearing conference, the claimant contended, in summary, that he sustained a work-related hernia injury on July 29, 2004; that the injury was immediately reported; that respondents should be held responsible for all hospital, medical, and related expenses, including, but not limited to surgical repair of the hernia; that he was entitled to temporary total disability benefits for the dates he was required to miss work as the result of the hernia, the exact dates to be identified at the hearing. At the hearing, the claimant maintained that he was entitled to the

maximum statutory benefits of twenty-six (26) weeks. Although the claimant contended that he was totally disabled from the date of the injury through March 23, 2005 (which exceeds twenty-six [26] weeks), as will be set out further below, the record reflects that the claimant did not undergo surgical repair of a hernia until on or about April 27, 2005.

The respondents contended that the claimant did not sustain a compensable injury arising out of and during the course of his employment and could not meet the five (5) requirements under the to hernia statute; that any condition that the claimant had was pre-existing in nature and was not the result of trauma or an effort at work.

In addition to the claimant, he called Anthony Hale and Lee Clifton as corroborating witnesses. The record is composed solely of the transcript of the June 29, 2007, hearing containing numerous medical exhibits, including the evidentiary deposition of the claimant, introduced as "Respondent's Exhibit B" and retained in the Commission file in bound form.

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. The Arkansas Workers' Compensation Commission has jurisdiction over this

claim.

2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable hernia injury arising out of and during the course of his employment with Hercules Machinery Corporation on July 29, 2004.
4. The claimant has failed to prove, by a preponderance of the credible evidence, that his hernia injury, need for surgery, and disability were causally related to a work-related injury with the respondent herein.

#### DISCUSSION

\_\_\_\_\_The record in this claim is simply replete with inconsistencies and contradictions. The claim turns almost entirely upon the credibility of the claimant. A claimant's testimony is never considered uncontroverted. The testimony of an interested party is always considered to be controverted. *Lambert v. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

The record reflects that the claimant was hired by Hercules Machinery Corporation on March 30, 2004. His employment was terminated on August 16, 2004. The claimant alleges that he sustained a hernia injury on July 29, 2004. The record reflects at least three (3) different descriptions of how the injury allegedly

occurred. On direct-examination, the claimant testified that the injury occurred as the result of moving and lifting an acetylene bottle, weighing in excess of two hundred (200) pounds. The claimant's description of the injury, its prompt reporting, and his need for medical treatment is set out below:

Q Okay. So are you lifting this bottle totally off the ground?

A At first, you know, when you pick it up, then you kind of turn it, twist. It's kind of hard to pick up 207 pounds, like I said, but I did lift it and had to because the surface we was working on is slag.

Q Now, slag, describe slag.

A Slag is off of when they melt steel. It's like the top layer of water, which when it dries, it's big clumps, and then they break it up and make, you know, small gravel or large. It's not really gravel. It's metal, but it's awful unstable.

Q All right. So you testified that you wrapped your arms around this bottle about five foot tall, 207 pounds. Are you moving it forward, or are you moving it backwards?

A Forward.

Q Okay. You said you leaned the bottle back?

A Yes, against my chest and stomach area.

Q Where are your legs?

A More or less spraddled, you know, trying to – move like a ballroom dance-like with it, you know.

Q All right. So you're straddling this 207-pound bottle, and you said that you're walking it. Are you going from left to right?

A Yes, sir.

Q And you're moving it forward?

A Yes, sir.

Q Okay, and you've got the weight tilted back on you?

A Yes, sir. I wouldn't want to go backwards with it.

Q Okay. So, were you moving this by yourself?

A Yes, sir.

Q Okay. What happened?

A It mainly just fell back a little bit, and I manhandled it and strained, and felt a stinging, burning sensation. I stopped immediately.

Q Where was this stinging and burning sensation?

A It was right here.

Q Okay, right there, and you're pointing to your right –

JUDGE GREENBAUM: Right groin.

BY MR. COE:

Q Right groin?

A Yes, sir.

Q And I believe you already testified this surface you're moving this on is unstable?

A Yes, sir.

Q Were you straining to keep the bottle under control?

A Yes, sir. Yeah, I can't hardly pick up 207 pounds. It's more than I weigh, so it was a task, you know.

Q So to move this bottle takes a lot of strain and effort?

A A lot of strain.

Q And describe the pain that you felt. Was it immediate?

A It just burned. It was just a rip sensation, sting-like. It was more like a – it felt like – it happened so quick, you know.

Q Did you vomit or get hot flashes or anything like that?

A When I walked around going to the office, I did. I got a real hot flash and got sick to my stomach, throwed up.

Q And you testified you stopped work immediately?

A Immediately.

Q Any bulges or knots come up in this right groin region?

A When I went in the office and I was feeling around right there, it was a little bitty grape-size knot that just felt like a lump, you know, like you get when you have a sore throat, but it was right here. I could push on it, and it was real tender.

Q And you're pointing to your right groin?

A Yes, sir, the side of it.

Q So you stopped work immediately. Did you immediately report it?

A Yes, sir.

Q Who did you report it to?

A Lee Clifton.

Q And who was Lee Clifton?

A He had come in to take Andy's position as a supervisor.

Q Was he one of your supervisors?

A He was the new supervisor.

Q Okay. What did you tell Lee?

A I explained to him that I just believe I injured myself and that I needed to know what I needed to do, did we need to call the main office, which was in Fort Wayne, Indiana, and report the incident, and I needed to contact Justin Reed because I knew Justin Reed and Janelle was who our contacts was.

Q Now, Justin Reed is who?

A He's more or less, the way I understood, he's the guy that keeps up with time and we was instructed to report to.

Q Is he in Indiana?

A Yes, sir.

Q So, he's not physically there in Blytheville?

A No, sir.

Q Okay. So, you go in and you tell Lee that you're injured. Did you all call Justin?

A Yes, sir.

Q And what did he – did you let him know that you were injured?

A Sure did.

Q What did he say?

A He said – he informed me that he was in Indiana, and that he had never met any doctors in the Blytheville area. He wasn't aware of the doctors here. He told me to go to my family doctor, and give him a follow-up report and let him know what was going on.

Q Okay. So he didn't send you to an authorized doctor under Hercules workers' compensation plan?

A No, he didn't. I guess I'd have to go to Indiana if he did.

Q Okay. What did Mr. Reed tell you in regards to your doctor's appointment?

A He said go to the family doctor, and I said, "Well, all right." So I called around

and they was all booked up, and I more or less just kept in touch with him. (Tr.13-17)

The claimant was first examined and treated by Dr. Shalender Mittal on August 3, 2004, whose history is set out below:

**SUBJECTIVE:** Mr. Conley is a 42 year old white male who comes in with chief complaints of having pain and discomfort in his right hip and right groin going down his right leg. This has been going on from the last five days or so. He mentions he was moving some boxes at work, which were reasonably heavy and after this he started having a severe pain and discomfort, which has persisted and somewhat deteriorated. He also started noticing this rash and lesions again, which have been progressively increasing the pain that is shooting down to his knee and the leg region also. No direct injury or trauma as such. Has not noted any swelling in his knees or anything. Has not had any fevers or chills. Denies any cough or congestion. No bowel or bladder complaints mentioned at this time. Has not had any issues of his back in the past. (Jt. Ex. A, p.1) (Emphasis supplied)

The claimant was diagnosed as having sustained a probable lumbar strain, as well as right leg shingles and a questionable inguinal hernia. (Jt. Ex. A, pp.1-3)

The claimant returned to Dr. Mittal on August 24, 2004, at which time he complained of pain and discomfort in his right groin where he noticed a lump come up. The history indicated that the claimant could not think of any direct injury or trauma. (Jt. Ex. A, p.4)

The claimant was next seen by Dr. Judith Butler on August 30, 2004, at which time he had a golf-ball size lump in his right groin. Dr. Butler's history did contain, for the first time, a report that the claimant related the injury to lifting a tank at work. The report further indicates that the claimant had undergone an inguinal hernia repair on the left six (6) years previously. (Jt. Ex. A, p.5)

The record reflects that despite the diagnosis of an inguinal hernia, the

claimant specifically asked Dr. Butler for a hernia belt at which time he was instructed about different options, including surgery, which the claimant apparently did not request. The claimant was instructed as to symptoms to watch for in the event the hernia became incarcerated. The claimant elected to proceed with conservative treatment from August, 2004, through April, 2005, at which time that the knot enlarged and dropped into his right testicle at which time he sought emergency room treatment. (Tr.28-29)

Further conflicting and confusing testimony is reflected in the emergency room history on April 20, 2005. Specifically, the emergency room history reflects that the claimant was seen for right groin pain associated with a right inguinal hernia which the patient stated had been going on for the past one (1) year and eight (8) months, and had been getting progressively worse. (Jt. Ex. A, p.22)

The claimant ultimately underwent surgical repair of the hernia on April 27, 2005. (Jt. Ex. A, p.25)

On cross-examination, a slightly different history of the injury was described by the claimant as follows:

BY MS. ROGERS:

Q Mr. Conley, you were describing the time you injured yourself. You said that the surface that these bottles were on was on slag rock, is that right?

A Yes, ma'am.

Q All right. On the First Report of Injury that your employer filed, which Ms. Laurie Holt filed, and she is in the Fort Wayne, Indiana office, she listed that what you told her happened was that you undone the empty acetylene bottle, and rolled

it over out of the way, rolled the new full bottles over to tie off, and stepped on large pieces of slag rock and slipped, and that your injury was the right leg inside, pulled muscle. Is that what you told her happened?

A Pretty close, yeah.

Q All right. Well, would you say that that differs substantially from what you told us happened today?

A No.

Q You told the Judge earlier, and you told me in your recorded statement, that you were lifting the bottles and that you felt a stinging, burning sensation and stopped immediately.

A Right.

Q You didn't say anything about slipping and falling, and you didn't say anything to us today or in your recorded statement about pulling a muscle on the inside of your right leg.

A Well, at the time, yeah, that's what I said to her, you know, like it was a pulled muscle.

Q All right.

A I give it that benefit, but you can also – you got to undo the empty bottles before you put a new one in the spot.

Q All right. So, when were you injured?

A Moving the new bottle to the spot that I just got through unhooking up.

Q Okay. So did you pull a muscle in your right inside leg, or did you have a – as you slipped and fell, or did you feel a stinging, burning sensation and stop work immediately, and then feel a grape-size knot in your groin area? Those are two substantially different stories.

A Well, I'm no doctor, you know, and I just tried to not think it was like it was serious as a hernia and hoping it wouldn't be.

Q Right, but you said that you had experienced a hernia before –

A Yes, ma'am

Q – a few years before when you were working in Louisiana and you filed a workers' comp claim there, as you told me in your recorded statement. Let's see, do you remember telling me that –

A Yes, ma'am. (Tr.31-33)

I feel compelled to point out that on direct-examination, the claimant stated that, at the time of the alleged occurrence, he believed that he had sustained a hernia. However, his course of conduct and the varying historical accounts are inconsistent with this assertion. The claimant experienced a hernia injury previously. His failure to specifically report such an injury to his employer and his initial treating physician makes his claim highly suspect. Further, the claimant did not actively pursue his claim until long after undergoing surgical repair of his hernia which is inconsistent with a claim for disability. The surgical report indicates that the hernia pre-existed his employment with respondent herein.

Anthony Hale was called as a corroborating witness by the claimant. Suffice it to say that Mr. Hale's testimony was of little value. Further, a serious question was raised concerning whether Mr. Hale was even employed by the respondent at the time of the claimant's alleged injury.

Victor Lee Clifton, the claimant's supervisor on July 29, 2004, was called as a corroborating witness. Mr. Clifton testified that the claimant reported a work-related incident and injury to his neck or back while lifting acetylene bottles. Mr. Clifton did not corroborate the claimant's allegation that he reported any hernia

injury on July 29, 2004. (Tr.62, 67)

I did not find the claimant to be a credible witness. As set out above, the histories contained in the medical records are confusing and conflicting. The emergency room report reflects that the claimant's hernia injury pre-dated the date of the claim. Further, the record reflects that the claimant was convicted of a felony and has been incarcerated since the date of his injury. Having sustained a prior hernia, the claimant knew, or should have known, the proper procedure for reporting an injury and obtaining medical treatment.

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in his favor. *Pearson v. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer v. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss v. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met the burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade v. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that he sustained a compensable hernia within the meaning of the Arkansas workers' compensation laws. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge