

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F704824

BRYCE PITTMAN, Employee	CLAIMANT
ASPLUNDH TREE EXPERT CO., Employer	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED SEPTEMBER 11, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondents represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 22, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 27, 2007, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on April 30, 2007.

At the time of the hearing the parties agreed to stipulate that claimant earned sufficient wages to entitle him to compensation at the rate of \$364.00 for total disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of hernia on or about April 30, 2007.
2. Medical.

3. Temporary total disability benefits from May 1, 2007 through a date yet to be determined.

4. Attorney fee.

At the time of the hearing the claimant clarified his request for temporary total disability benefits to include the period beginning May 1, 2007 through June 14, 2007.

The claimant contends he sustained a compensable injury while working for respondent on or about April 30, 2007. At that time claimant was moving branches and timber while scaling a hill on a rope and sustained a severe strain to his abdominal region as the result of sudden effort, resulting in a hernia. Claimant contends he is entitled to the payment of medical, temporary total disability benefits, and an attorney fee.

The respondents contend the claimant did not sustain a compensable injury within the course and scope of his employment and therefore is not entitled to any medical or indemnity benefits.

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 A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on June 27, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned sufficient wages to entitle him to compensation at the rate of \$364.00 for total disability benefits is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that

he suffered a compensable hernia while employed by the respondent on April 30, 2007.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury; including, surgery performed on June 7, 2007.

5. Claimant is entitled to temporary total disability benefits beginning May 1, 2007 and continuing through June 14, 2007.

6. Respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits.

FACTUAL BACKGROUND

The claimant is a 25-year-old man who worked for the respondent approximately two years. On April 30, 2007 the claimant was working for the respondent as a bucket foreman and was working with a crew trimming trees from power lines. Claimant testified that at the job site there was a steep hillside which required them to tie a rope off on top of a hill in order to get up and down the hill safely. The claimant testified that towards the end of the day he was hanging onto the rope with one hand and grabbing brush and throwing it backwards when he felt an intense sharp pain in his groin area. Claimant testified that immediately after this occurred he went down to the bottom of the hill and took a break. Claimant testified that he completed his work that day but had to limit the work he performed because of pain.

Claimant testified that later that afternoon he and the crew returned to the respondent's office and he mentioned the incident to Sandra Lumlee. Lumlee was not claimant's direct supervisor, but instead worked for the respondent as a work planner. Claimant testified that he informed Lumlee that he thought he had pulled a muscle. Claimant testified that he went home and showed the injury to his girlfriend who stated that she believed it was a hernia.

Claimant testified that on May 1, 2007 he went to the respondent's office and informed one of the foremen, James Whatley, of this incident. According to claimant's testimony another foreman named Devon Wilson was also present in the room, but claimant was unsure whether Wilson heard the conversation. Claimant testified that he reported the incident from the day before but was informed that it would not be covered by workers' compensation.

Claimant testified that he went to work on May 1, 2007 and was eventually seen by Lumlee and Wilson at the job site that day. When claimant continued to complain of pain he was given permission to seek medical treatment.

Claimant sought medical treatment from the emergency room at the Northwest Arkansas Medical Center on May 1, 2007 and was diagnosed as suffering from a hernia. Claimant was given medication and advised to receive follow-up treatment. Claimant was also taken off work at that time. Claimant was eventually seen at the Northwest Arkansas Surgical Center and he eventually underwent surgery to repair the hernia on June 7, 2007.

Claimant has filed this claim contending that he suffered a compensable injury in the form of a hernia while working for respondent on April 30, 2007. He seeks payment of medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

The requirements for proving compensability of a hernia are codified at A.C.A. §11-9-523(a). Those requirements are as follows:

- (1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the 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.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving each element of a compensable hernia.

First, I find that claimant's hernia occurred immediately as a result of sudden effort, severe strain, or application of force directed to the abdominal wall; that there was severe pain in the hernial region; and that the pain caused the claimant to cease work immediately. Here, claimant testified that on April 30, 2007 he was standing on a hillside holding onto a rope with one hand and grabbing brush and throwing it backwards with the other hand when he felt an intense sharp pain in his groin area. Claimant testified that he immediately ceased his work and went to the bottom of the hill to take a break. I find the claimant's testimony to be credible and entitled to great weight. Based upon the claimant's testimony, I find that he has established the first three elements of a compensable hernia.

The fourth requirement of a compensable hernia is the requirement that notice of the occurrence be given to the employer within 48 hours thereafter. Much of the testimony at the hearing in this claim centered on when claimant reported the injury to the respondent and whether he reported a work-related injury or whether he attributed his hernia to an incident involving his two-year-old brother. Testimony at the hearing indicated that employees such as the claimant were required to report injuries to their general foreman immediately after they occurred. Claimant admitted that he did not report the injury to his general foreman on April 30. However, claimant did testify that he reported the incident to Lumlee when she asked him why he was holding his side. At that time claimant

believed that he had pulled a muscle and did not believe that he had suffered a hernia until his girlfriend saw the bulge in his groin area. Admittedly, Lumlee was not the proper party to whom the claimant was to report injuries.

In addition, Devon Wilson, the claimant's supervisor, testified that claimant did not immediately report an injury on the morning of May 1, 2007. Instead, Wilson indicated that claimant attributed the hernia to an incident away from work. However, Wilson did admit that after the claimant sought medical treatment he did relate the hernia to his employment with respondent. This occurred on Wednesday, May 2, 2007 and was within 48 hours of the occurrence:

Q. So when he came back in with his medical certificate, did he tell you then that it was work related?

A. Yes.

Q. Okay.

A. He claimed for it to be.

Q. And this was the next day?

A. I believe so.

Q. You'll agree he told you on Wednesday, May 2nd, when he turned in his medical release that something happened on the job, correct?

A. Yes, he stated that.

I also believe it is significant to note that claimant testified that in addition to Wilson he also reported the incident to James Whatley. Whatley was not present at the hearing to testify on behalf of the respondent. Finally, with respect to this issue, I note that the medical evidence contains a history of injury consistent with claimant's testimony that the injury occurred while he was working for the respondent on April 30, 2007.

In short, I find based upon the claimant's testimony which I find to be credible that he attributed his hernia to the incident at work on April 30, 2007. While claimant did not

report the incident to his foreman on that date, he did report the incident to Lumlee and more importantly, for purposes of the hernia statute, claimant did report the occurrence to Wilson within 48 hours when he reported it on May 2, 2007.

Finally, I also find that claimant has satisfied the remaining element of compensability that the physical distress following the hernia was such to require the attendance of a licensed physician within 72 hours. In this particular case, claimant sought medical treatment and was diagnosed as having suffered from a hernia the day after the occurrence.

In summary, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable hernia as required by A.C.A. §11-9-523(a)(1)-(5).

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable hernia. This includes surgery which was performed to repair the hernia on June 7, 2007.

I also find that claimant is entitled to temporary total disability benefits beginning May 1, 2007 and continuing through June 14, 2007. According to claimant's testimony and the testimony of Wilson, the claimant received a form taking him off work at the time of his initial medical treatment. The medical records indicate that when claimant sought medical treatment from the Northwest Arkansas Surgical Center he was continued off work and he remained in that state until he was released to return to work by his treating physician on June 14, 2007. Based upon this evidence, I find that claimant remained within his healing period and that he suffered a total incapacity to earn wages beginning May 1, 2007 and continuing through June 14, 2007, the day he was released to return to work with no restrictions.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in

2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable hernia while employed by respondent on April 30, 2007. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes surgery which was performed on June 7, 2007. Claimant is also entitled to temporary total disability benefits beginning May 1, 2007, and continuing through June 14, 2007. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$491.25.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE