

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F613429

STEVEN BATEMAN, EMPLOYEE

CLAIMANT

**HOPE SCHOOL DISTRICT,
EMPLOYER**

RESPONDENT NO. 1

**RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER/TPA**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED MAY 1, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in Texarkana, Miller County, Arkansas.

Claimant was represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

Respondent No. 1 was represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Ms. Judy Rudd, Attorney at Law, Little Rock, Arkansas..

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on February 5, 2008, in Texarkana, Arkansas. A prehearing conference was conducted in this matter on November 26, 2007, and a Prehearing Order was entered on that same day. The parties agreed, without objection, that the Prehearing Order filed November 26, 2007, would be admitted as Commission Exhibit "1", subject to any modifications made at the full hearing.

STEVEN BATEMAN - F613429

At the full hearing, the parties agreed to the following stipulations:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee-employer-carrier relationship existed at all relevant times, including October 13, 2006.
- 3) Claimant's TTD rate is \$301.00 per week and PPD rate is \$226.00 per week.
- 4) Should compensability be met, the claimant's applicable TTD period would be April 11, 2007, through May 11, 2007.

At the full hearing, the parties agreed to litigate the following issues:

- 1) Whether claimant sustained a compensable hernia injury on October 13, 2006.
- 2) If compensability is met, whether claimant is entitled to all associated medical treatment, TTD benefits from April 11, 2007, through May 11, 2007, and attorney's fees.
- 3) Notice defense.

At the full hearing, claimant contended that he sustained a compensable hernia injury on October 13, 2006, and that the medical treatment he has received to date has been reasonable, necessary, and related to the claimant's compensable injury.

Claimant contends respondents should be ordered to pay for all associated medical treatment, TTD benefits between April 11, 2007, and May 11, 2007, and attorney's fees.

At the full hearing, respondents contended that claimant did not suffer a

STEVEN BATEMAN - F613429

compensable hernia injury under the Arkansas Workers' Compensation Act.

Respondents affirmatively raise the notice defense.

DISCUSSION

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of A.C.A. § 11-9-102(4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.* Moreover, to prove the compensability of a hernia, a claimant must prove by a preponderance of the evidence the following under A.C.A. § 11-9-523(a):

STEVEN BATEMAN - F613429

- (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.

The claimant, Steven Bateman, worked for the Hope School District performing both maintenance and custodial duties. The claimant testified that on October 13, 2006, he was at the “custodial shop” to help put a cookstove in the back of a pickup truck. Claimant testified that the cookstove weighed approximately 250 pounds which he attempted to lift with just one other person. The claimant testified as follows regarding what he felt when he attempted to lift the cookstove in the back of the pickup:

Q. So as you were lifting or pick up the cook stove, what did you feel?

A. I felt . . . Again, I felt a . . . like a pulling, tearing, a discomfoting sensation in my lower abdomen and groin area.

(T. pg. 16, lines 9-13).

The claimant testified that after feeling the pulling/tearing/discomfoting

STEVEN BATEMAN - F613429

sensation in his lower abdomen that he stopped working for a few minutes to try to regain his composure and catch his breath. The claimant testified that when he was at the custodial shop/warehouse that he was the only person at the warehouse on October 13, 2006. The claimant testified that the person who assisted him in lifting the cookstove was a private citizen who had purchased the cookstove from the school, and that the private citizen left immediately upon getting the cookstove loaded. The claimant testified that his supervisor was Mr. Henry, who was not in town on the date of the incident. The claimant testified that he had been instructed in the past to report any injuries to his supervisor; however, claimant testified that he did not have access to a telephone that day in order to call Mr. Henry.

The claimant testified that after resting a few minutes following the pulling/tearing sensation, he continued to finish the day at work. The claimant testified that on October 13, 2006, he got off work at approximately 4:00 p.m., but did not feel at that time he needed to see a doctor. The claimant testified that at that point on October 13, 2006, he thought he had just pulled a muscle. The claimant testified that over the weekend his abdominal condition proceeded to get worse, and that at 8:00 a.m. when he reported to work on October 16, 2006, he immediately reported the incident to his supervisor.

Upon reporting the incident to his supervisor, the claimant testified that his

STEVEN BATEMAN - F613429

supervisor got him some forms to fill out which he called an “N” form which the claimant testified he took home, filled out, and brought back the next day to his supervisor. At some point, claimant’s supervisor gave the form into the school’s administrative offices, and ultimately the claimant did see a doctor. Finally, the claimant was diagnosed with a hernia, was given surgery, and missed approximately one month of work following the surgery.

I have outlined herein above the five requirements necessary to prove a compensable hernia injury as set forth in A.C.A. § 11-9-523(a). I find that the claimant has met four of the five necessary requirements to prove a compensable hernia injury; however, the evidence shows that the claimant did not provide notice of the occurrence to his employer within forty-eight hours.

This administrative law judge is aware of the proposition that courts should not be hyper technical when construing the hernia statute. Darling Store Fixtures v. McDonald, 54 Ark. App. 60, 922 S.W.2d 748 (1996). However, A.C.A. § 11-9-704(c)(3) requires the Workers’ Compensation Act to be strictly construed. The plain reading of 11-9-523(a)(4) clearly states that the claimant was to give notice to his employer within forty-eight hours of the occurrence. By the claimant’s own admission, he did not notify his employer within forty-eight hours of lifting the cookstove when he immediately felt the burning/pulling/tearing sensation. It was not

STEVEN BATEMAN - F613429

necessary for the claimant to report a “hernia injury.” But pursuant to 11-9-523(a)(4) it was necessary for the claimant to report his abdominal pain in the incident he felt when lifting the cookstove within forty-eight hours.

The claimant testified that his failure to give notice was because at first he did not think his abdominal problem was anything more than a pulled abdominal muscle or a groin pull. The claimant makes a compelling argument that when his abdominal discomfort increased over the weekend, that he could not have reported the incident because the school system was closed on Saturday and Sunday. It is undisputed that the incident of lifting the cookstove happened on a Friday, and that the claimant reported the cookstove lifting incident at 8:00 a.m. the following Monday. In order for this administrative law judge to excuse the claimant’s failure to report within the forty-eight hour requirement outlined in 11-9-523(a)(4), I would have to find that the claimant’s failure was excused pursuant to A.C.A. § 11-9-701(b)(1)(C). Arkansas Code Annotated 11-9-701(b)(1)(C) states “failure to give notice shall not bar any claim if the Commission excuses the failure on the grounds that for some satisfactory reason notice cannot be given.” I cannot find in this instance that notice could not be given. The claimant testified that he had his supervisor’s cell phone number but never called his supervisor within forty-eight hours of the occurrence. It is clear that the claimant had opportunity to report the incident within forty-eight hours either by

STEVEN BATEMAN - F613429

contacting his supervisor via phone or traveling approximately one mile to the superintendent's office to report the incident there. Instead, the claimant testified that the incident of lifting the cookstove whereby he immediately felt tearing/pulling discomfort in his abdomen the claimant elected to continue working the rest of the day until approximately 4:00 p.m. and then going home. The claimant never attempted to contact his supervisor within forty-eight hours of the hernia occurrence nor did he ever attempt to notify the superintendent's office on the day in question. The claimant testified at the full hearing that he did in fact know his supervisor's cell phone number:

Q Okay. Well, that was my questions. Did you know his number?

A I knew his number.

(T. pg. 42, lines 19-21).

Even though the claimant had the ability to contact his supervisor by cell phone within forty-eight hours, the claimant elected not to do so. Therefore, I must find under strict construction of A.C.A. § 11-9-523(a)(4), that the claimant has failed to prove by a preponderance of the evidence that he gave notice of the hernia occurrence within forty-eight hours thereafter to his employer. Therefore, I must find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable hernia injury on October 13, 2006.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 hereby made in accordance with A.C.A.

§ 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
- 3) The claimant has failed to establish by a preponderance of the credible evidence that he sustained a compensable hernia injury.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied and dismissed.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb