

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F705198**

**RONALD GATES, EMPLOYEE**

**CLAIMANT**

**CCC CONSTRUCTION, INC., EMPLOYER**

**RESPONDENT**

**BRIDGEFIELD CASUALTY INSURANCE CO.,  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED JUNE 11, 2008**

Hearing before Administrative Law Judge Barbara W. Webb on March 14, 2008, in Monticello, Drew County, Arkansas.

The claimant was represented by Mr. Kenneth A. Harper, Attorney at Law, Monticello, Arkansas.

The respondents were represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held on the above-styled claim on March 14, 2008, before Administrative Law Judge Barbara W. Webb. A Pre-hearing Order was entered in the case on February 1, 2008. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by agreement of the parties as applicable to this claim in the Pre-hearing Order are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed at all pertinent times, including October 11, 2006.

3. The claimant's wages were sufficient to entitle him to a compensation rate of \$485.00 for temporary total disability and \$364.00 for permanent partial disability benefits.

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Compensability of claimant's alleged injury on October 11, 2006.
2. If found compensable, claimant's entitlement to continued medical treatment and payment of past treatment and claimant's entitlement to temporary total disability benefits and permanent partial disability benefits from the date of injury until the date of maximum medical improvement.
3. Controversion and attorney's fees.

The record consists of a one volume transcript of the March 14, 2008, hearing, consisting of the testimony of Christy Smith, Ronald Keith Gates, R.L. Gates, Ronald Ferrell, and Kenneth Divine, and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); and Claimant's Exhibit No. 1 (medical records and index).

#### **FACTUAL BACKGROUND**

Christy Smith testified for the claimant. She has been a licensed practical nurse since 1996. She is currently employed at the offices of Dr. David Foscue. She is the step-daughter of the claimant. She testified that she goes daily to the claimant's house for lunch. She explained that on or about October 13, 2006, as she

was finishing lunch, her mother had asked her to look at the claimant's stomach indicating that he had done something at work the day before. She raised his shirt and observed a knot in his stomach. She noted that the knot was abnormal. She instructed him to go see a doctor to confirm her suspicions of the presence of a hernia. She explained that she had worked at a hospital and seen hundreds of cases involving hernias. She testified that the claimant was having soreness when he stretched and she told him to go to the doctor either that day or the next and to get treatment, including referral to a specialist if surgery was going to be required.

On cross-examination, she testified that the date in her letter might be off. She admitted that she cannot diagnose a patient since she is not a licensed physician. She told him to try to call the clinic and get an appointment as soon as possible. She explained that the doctor worked in another town in the afternoon and therefore he would have to schedule an appointment. She explained that the claimant did not go to the doctor until March although she asked him about his stomach on numerous times. He continued to work. She testified that there was no question in her mind that he was suffering from a hernia on that day.

The claimant, Ronald Gates, is thirty-nine years old. He completed high school and three years of an apprenticeship program for being a millwright. He has worked as a millwright for about eleven years. His job duties include aligning motors, setting machinery within a thousandths of an inch, and new installation of big machinery such as paper mills.

On October 11, 2006, he was working as a millwright for CCC Construction. He described the incident, as follows:

We were working on machine number ten, and we had been putting up a piece of monorail and a boom and stuff. We were having to climb up on what they call an unwind. It's a piece of equipment, and setting other equipment, and I had went up a ladder and then had to step over on a piece of equipment and was moving, you know, tugging on stuff, and I felt a pain and it's –well, as a guy, you would know, like you get hit in the groin.

The first thing he did was get off the ladder. He tried to rub out the muscle that was hurting and reported the incident to his supervisor, Ronald Ferrell, within five minutes. When he went home that night, he noticed a little knot by his navel. He showed his wife and had his step-daughter, Christy, look at it the next afternoon. He told Ferrell, his supervisor, that Christy had looked at his stomach and “told me it looked like a hernia”. He was told Ferrell reported the injury to the company and was assured that the company would “take care of it.”

He explained that he continued to work, even in pain, in order to work the 300 working hours required by the union to maintain insurance. He avoided lifting and his co-workers helped him. He explained that he went to the doctor when the company had a shutdown. When Ferrell told him that he needed documentation from the doctor, he made an appointment to see the doctor at a time when he wasn't working and the doctor was in town. He was treated by Dr. Foscue on March 8, 2007. The doctor confirmed that he had a hernia. Gates explained that the workers' compensation carrier refused to pay for the treatment and his own insurance wouldn't cover it. He testified that he would need surgery, but he has not had surgery because the insurance carriers would not pay for his treatment. He testified that he was laid off on June 26, 2007 and returned to work on November 5, 2007. He testified that there were jobs that he could not go to because they would not let

him work with a hernia. He testified that he could not afford the surgery. He filed a workers' compensation claim in order to get the medical treatment he needed. He did not pay Dr. Foscue for the March 2007 visit.

On cross-examination, he testified that he was pushing on a piece of equipment when he felt the hernia. He testified that after the incident, he continued to work until June 26, 2007, and was working full-time. He drew unemployment from June 27, 2007 until November of 2007. In November of 2007, he went to work for a different contractor. He told them he had a hernia. He worked until he was laid off on March 13, 2008, although he had been laid off and rehired by the same company twice during this time. He testified that he couldn't file the claim on his group insurance because the workers' compensation claim was pending. He explained that when he received notification that the workers' compensation claim was denied, his other insurance had run out.

R.L. Gates testified for the claimant. He is the claimant's father and is a retired millwright. He was working with his son in October of 2006 for CCC Construction Company. At the time of the incident, he noticed that his son had a faint look. When he asked him what was wrong, his son responded "I kind of hurt myself". His son rested for a period of time and then returned to work. He continued to work with his son after the accident. After the accident, his son didn't pick up stuff like he had previously done and other co-workers helped out.

On cross-examination, he testified that his son told him that he had a hernia within days after the incident. He testified that he did not know exactly what his son was doing at the time of his injury, but observed his son "grimace" as he was

climbing on a large piece of equipment to line it up with a monorail. He explained that he had subsequently been laid off and did not work with his son all the time.

Ron Ferrell testified for the claimant. He has worked as a millwright for forty years. He was the claimant's supervisor and was on the job when the claimant got hurt. He walked up as Gates was getting off the ladder. The claimant reported the injury to him during the break time, between 9:30 and 11:00 a.m. He observed the claimant rubbing his stomach and the claimant told him that he thought he had pulled a muscle. He suggested to the claimant that he go to the doctor, but the claimant wanted to give it a few days. He kept in contact with the claimant daily. He reported the injury to the company that they worked for and they said that they would take care of it. The claimant reported to him that the nurse told him that it was a hernia and he reported the hernia to CC&C. He testified that Gates is a real good millwright. He explained that millwrights worked when they could get a job and would work even if hurting. He observed that the claimant did not pick up heavy loads after the accident.

Kenneth Divine testified that he had worked as a millwright for eleven years and was working with the claimant on the day he got hurt. He explained that he observed the claimant on the ladder with his knee up on the unwind reaching and pulling on the boom to stand and step, when he cringed and begin rubbing his stomach. He rode with the claimant to work and learned that Christy had told him that it was a hernia. He testified that it was a common practice to work when you hurt. He observed that after the incident, Gates could not pick up as much or push things either.

The medical records in this case reflect that the claimant was evaluated by Dr. David J. Foscue on March 8, 2007, and diagnosed with a "Hernia, ventral (rupture in abdominal wall) #553.20". There is also a signed memorandum dated 10/07 by Christy Smith, L.P.N., stating that she evaluated the claimant on October 13, 2006. She reports,

He stated that he felt a tear at work the previous day with a knot developing at that time which had not been there. It was my opinion that this was a possible hernia. I advised him to see his primary care physician to confirm my suspicions.

### **DISCUSSION**

The claimant contends that he sustained a compensable injury to his abdomen and is entitled to medical benefits (past and future), temporary total disability benefits and attorney's fees. Other possible issues are reserved.

The respondents contend that the claimant's hernia injury was not compensable because it did not comply with the hernia rules, specifically, the claimant did not cease work immediately and did not require medical attention until March 8, 2007, after the injury had allegedly occurred on October 11, 2006.

### **COMPENSABILITY**

Ark. Code Ann. § 11-9-102(4)(A) defines "compensable injury":

(i) (a)n accidental injury causing internal or external physical harm to the body or accident injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence; (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence,

if the injury is: (a) Caused by rapid repetitive motion . . . (v) A hernia as set out in § 11-9-523.

Pursuant to Ark. Code Ann. § 11-9-523(a), a hernia is compensable if the following factors are established to the satisfaction of the Commission:

- (1) 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) there was severe pain in the hernial region;
- (3) the pain caused the employee to cease work immediately;
- (4) notice of the occurrence was given to the employer within forty-eight (48) hours thereafter;
- (5) 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.

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D)(Repl. 2002). Claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). If claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it

deems worthy of belief. Brotherton v. White River Area Agency, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Dec. 14, 2005); Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). The Commission may accept or reject medical opinions and determine their medical soundness and probative force. Id. It is important to note that the claimant's testimony is never considered uncontroverted. 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).

In the instant case, I find that the claimant sustained a compensable hernia while performing employment services. The case revolves largely around the credibility of the claimant. Based on the totality of the evidence, I find that the claimant's testimony is credible and consistent with the other witnesses and medical records offered.

The claimant first experienced problems with his stomach while pushing heavy equipment on October 11, 2006. The claimant immediately stopped working and was observed by his co-workers to grimace in pain. He reported the incident to his supervisor within forty-eight (48) hours thereafter. The next day he was examined by his step-daughter, a licensed practical nurse, who suggested that he see his primary care doctor for a suspected hernia. He reported to his supervisor that he had a suspected hernia and was assured that the company would take care of him. He continued to work without heavy lifting and sought medical treatment approximately five months later when he was laid off work and the doctor was in town. He explained that he did not seek medical attention sooner because he originally thought it was a

pulled muscle that would get better and that he feared that lost time from work would result in the cancellation of his insurance by the union.

In Torres v. Superior Industries, 2006 AWCC 126, Full Commission Opinion filed July 21, 2006 (F509424), the Commission observed that the Arkansas Court of Appeals has held that the Commission cannot be hypertechnical when construing the statute regarding hernia, citing Darling Store Fixtures v. McDonald, 54 Ark. App. 60, 922 S.W.2d 748 (1996). In Torres, the Commission awarded benefits even though the claimant admittedly did not seek medical attention within 72 hours. The Commission relied on the decision in Cagle v. Fabricating & Steel, Inc. V. Patterson, 42 Ark. App. 168, 856 S.W.2d 30 (1993). In Cagle, the Court of Appeals noted that “A claimant need not prove that he was actually attended by a physician within 72 hours after the injury; instead, the statute provides only that the physical distress following the occurrence of the hernia was such as to require the attendance of a physician within the 72-hour-period.” Id. In Torres, the claimant did not seek medical attention for two months but continued to experience increasing stomach pain and a “bulging navel” such that he would take vacation leave when the pain became too severe for him to work. Similarly, in Ayers v. Historic Preservation Assoc., 24 Ark. App. 40, 747 S.W.2d 587 (1988), the Court of Appeals found that where the claimant immediately reported what he perceived to be a hernia, made arrangements to see a physician as soon as practicable thereafter, and upon seeing a physician, was diagnosed affirmatively with a hernia for which surgery was required, the claimant established by a preponderance of the evidence that he had complied with the statutory requirements of Ark. Code Ann. § 11-9-523.

In Price v. Little Rock Packaging Co., 42 Ark. App. 238, 856 S.W.2d 317 (1993), the Court of Appeals considered the compensability of a hernia claim where the claimant attributed his pain to an earlier fall when he sought medical treatment two months later after experiencing pain in his groin area after lifting loads of paper. The Court noted that the Act does not require an immediate diagnosis or that the doctor's history contains the "gory details of the occurrence". See, Siders v. Southern Mattress Company, 240 Ark. 267, 398 S.W.2d 901 (1966). The claimant is "not required to give notice that he has a hernia --he is not a doctor--the statute merely requires that appellant give notice of the occurrence which resulted in a hernia." Id.

In Cooper v. McBurney Corporation, 72 Ark. App. 332, 39 S.W.3d 1 (2001), the Court of Appeals awarded benefits under facts analogous to Price. In Cooper, the claimant testified that he first noticed the pain on a Saturday night while working and that it bothered him occasionally but that he kept working. He explained that two days later on Monday night, he felt pain "like a burn" that became a "gut-twisting pain up in his stomach" and felt swelling in the groin. The Court noted that the fact that the claimant had listed the earlier date as the date of injury was of no import in light of the Price decision. Noting that there was not equivalent medical evidence as in the Price case, i.e., the treating physician's opinion to a high degree of certainty that the hernia occurred when he felt groin pain, the Court found that the clear evidence demonstrated that Cooper felt the severe groin pain and other related symptoms on the later date. Id.

The claimant in the instant case testified that as he was trying to push and move heavy equipment at his place of employment, he felt immediate severe pain –

“well, as a guy, you would know, like you get hit in the groin”. He also noted the presence of a knot during his shower that evening which was not present prior to the incident. He got down off the ladder, rubbed his stomach, and reported the incident to his supervisor.

The respondents argue that the claimant continued to work after the incident. However, all of the witnesses present at the time of the incident confirmed that the claimant had immediately come down from the ladder and stopped working. The claimant’s supervisor confirmed that the claimant followed procedure and reported to him that he had “pulled something, maybe a muscle, I don’t know” at their morning break. He encouraged the claimant to seek medical attention and reported it to the company who said they would take care of it. Although the claimant resumed work after his immediate cessation of work, the evidence demonstrates that he was not able to work his usual way after the incident and required assistance by his co-workers. The Court of Appeals has held that such evidence meets the statutory requirement of immediate cessation of work under strikingly similar circumstances. Ayres v. Historic Preservation Assocs., 24 Ark. App. 40, 747 S.W.2d 587 (1988); Osceola Foods, Inc. v. Andrew, 14 Ark. App. 95, 685 S.W.2d 813 (1985).

The respondents further contend that the claimant did not require medical attention until March 8, 2007, after the injury had allegedly occurred on October 11, 2006. The evidence in this case establishes that after the initial rest from work, the claimant returned to work and has continued to work in pain when work was available to him. He testified that he did not want to miss work in fear that if he did not work the required number of hours, his insurance would be cancelled by the union. He

explained that in March of 2007, he was laid off from work and was able to make an appointment with the doctor when he was in town. He testified that when he went to the doctor's office, he was told that his visit had been coded as workers' compensation but that the carrier had denied treatment and that his personal health insurance carrier would not cover the visit since it was coded as workers' compensation. He subsequently received a formal denial by the workers' compensation carrier but his group health insurance coverage had been cancelled due to a shortage of hours. He testified that he needed surgery but was unable to pay for the treatment since he did not have insurance. The evidence demonstrates that the physical distress suffered by the claimant following the occurrence of the hernia was such as to require the attendance of a physician within 72 hours. It is clear from the preponderance of the evidence that the claimant has complied with the statutory requirements of Ark. Code Ann. § 11-9-523. Cagle v. Fabricating & Steel, Inc. v. Patterson, 42 Ark. App. 168, 856 S.W.2d 30 (1993); Price v. Little Rock Packaging Co., 42 Ark. App. 238, 856 S.W.2d 317 (1993)

#### **MEDICAL EXPENSES AND TEMPORARY TOTAL DISABILITY BENEFITS**

Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Geo Specialty Chem., Inc. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Respondents are responsible only for medical services which are causally related to the compensable injury.

Ark. Code Ann. § 11-9-523 (b)(1) provides:

that in every case of hernia, it shall be the duty of the employer forthwith to provide the necessary and proper medical, surgical, and hospital care and attention to effectuate a cure by radical operation of the hernia, to pay all reasonable expenses in connection therewith, and, in addition, to pay compensation not exceeding a period of twenty-six (26) weeks.

Based on the preponderance of the credible evidence, I find that the medical services provided to the claimant by Dr. Foscue, including the recommended 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.

I further find that because the claimant has not missed work as a result of his hernia injury, he is not entitled to temporary total disability benefits for the period beginning October 11, 2006, and continuing through the date of the hearing. However, I find that the claimant will be entitled to temporary total disability benefits for any time missed due to the recommended surgery, subject to the limitation on compensation benefits imposed by § 11-9-523 (b)(1).

### **CONTROVERSION AND ATTORNEY'S FEES**

Based on my review of the evidence in this case, I find that respondents have fully controverted payment of medical and other benefits. However, I find that the claimant has not been awarded disability benefits and therefore claimant's attorney is not entitled to a statutory attorney's fee on the medical benefits awarded to the claimant as a result of the findings herein, in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2002).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed at all pertinent times, including October 11, 2006.
3. The claimant's wages were sufficient to entitle him to a compensation rate of \$485.00 for temporary total disability and \$364.00 for permanent partial disability benefits.
4. The claimant has proven by a preponderance of the evidence that he was engaged in employment services at the time of his injury.
5. The claimant has proven by a preponderance of the evidence that he suffered a compensable hernia injury under §11-9-523 and other applicable provisions of the Workers' Compensation Act.
6. The claimant has proven by a preponderance of the evidence that the medical treatment by Dr. Foscue, including the recommended hernia surgery, is reasonable and necessary and related to his compensable work-related injury.
7. The claimant has not proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from October 11, 2006, until the date of the hearing. Claimant will be entitled to temporary total disability benefits during any period of disability as a result of the recommended hernia surgery subject to the limitations set forth in § 11-9-523 (b)(1).

---

**AWARD**

The respondents are hereby directed and ordered to pay medical benefits in accordance with the findings of fact and conclusions of law set forth herein.

**IT IS SO ORDERED.**

---

**BARBARA WEBB**  
Administrative Law Judge