

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F706101**

SCOTT A. VANCE, EMPLOYEE	CLAIMANT
M & M CONCRETE PRODUCTS, EMPLOYER	RESPONDENT NO. 1
EMPLOYERS MUTUAL CASUALTY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

**OPINION FILED MARCH 20, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, on February 20, 2008, in Mountain Home, Baxter County, Arkansas.

Claimant represented by THE HONORABLE FREDERICK S. "RICK" SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents No. 1 represented by THE HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by THE HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas. Since the issues involving the Second Injury Fund are premature, the Fund waived its participation in this hearing.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on February 20, 2008, in Mountain Home, Arkansas. A Prehearing Telephone Conference was conducted in this matter on November 26, 2007, and a Prehearing Order was filed on that same date.

The following stipulations were submitted by the parties either during the prehearing conference or at the time of the hearing, as these are hereby accepted.

1. The Arkansas Workers' Compensation Commission

has jurisdiction of the within claim.

2. The employee-employer-carrier relationship existed at all relevant times, including May 24, 2007.

3. The claim has been controverted in its entirety.

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

1. Constitutional issues.

2. Compensability of the claimant's hernia injury.

3. Medical benefits.

4. At the time of the hearing, the parties agreed to litigate the issue of temporary total disability compensation.

5. Notice. (At the time of the hearing, respondents no. 1 withdrew its notice defense).

The claimant contends he has met all of the requirements for a compensable hernia injury.

Respondents No. 1 contend that claimant has failed to establish a compensable hernia under Ark. Code Ann. § 11-9-523.

The documentary evidence in this case consists of the Commission's Prehearing Order, the claimant's Response to the Prehearing Questionnaire, and respondents' no. 1 Response to the Prehearing Questionnaire, which were all marked as Commission's Exhibit No. 1. Attorney Pake's letter of January 15, 2008, was marked as Commission's Exhibit No. 2. Attorney Spencer's letter of January 7, 2008 was marked as Commission's Exhibit No. 3. The

claimant's medical packet was been marked as Claimant's Exhibit No. 1. The First Report of Injury was marked as Claimant's Exhibit No. 2. The claimant's Motion to Recuse and Constitutional Issues have been blue-backed and marked Claimant's Exhibit No. 3, as these are hereby incorporated herein by reference. Respondents' No. 1 non-medical packet was marked as Respondents' No. Exhibit No. 1. Respondents' No. 1 medical packet was marked as Respondents' Exhibit No. 2. Respondents' No. 1 Response to Motion to Recuse was marked as Respondents' Exhibit No. 3, as it has been blue-back and is incorporated herein by reference.

The following witnesses testified at the hearing: the claimant and Mr. Charles Royal LeDuff.

### **DISCUSSION**

The claimant, age 47, (10/21/60), has a high school diploma. He has worked for the respondent-employer since January 26, 2007, as a truck driver. The claimant testified that he continues to work for the respondent-employer. He gave the following testimony concerning the May 24, 2007, incident:

A. Well, when we load our trucks with the block we have to strap them down and secure them before we leave. The bar that we use for the ratchet straps, the one I was using is just a little short bar and I don't get enough leverage to be able to tighten on the load without really putting all your body weight into it. I was helping the other driver strap down his load and couldn't finish it. He had to finish his load and he did ask if I was okay.

\* \* \*

A. I was just strapping down a load and felt a pain.

Q. Where was the pain?

A. Just below my abdomen.

Q. And did you have to stop work immediately?

A. Yes, sir.

The claimant admitted that his pain was a sharp pain, as it hurt so badly that he was unable to finish what he was doing. According to the claimant, he sat the ratchet bar on the bed of the truck and told the other driver (Chris Kozad) that he was going to have to finish it. The claimant testified that he next rode with Mr. Kozad to deliver the load. However, the claimant denied doing any other work after feeling the pain.

Once the claimant was back at his workplace, he testified that he had to sit in the yard about a half hour before he could go to the office area. According to the claimant, he talked to Roy LeDuff and Joan LeDuff, the owners. The claimant further testified that Mr. LeDuff saw him walking in and commented that he looked like he was in pretty bad shape. At which point, the claimant maintains that he told Mr. LeDuff he had a problem, as he felt he had a hernia.

The claimant testified that Mr. LeDuff agreed for him to go see his daughter's doctor. According to the claimant, he went in that same day to see Dr. Riley at the North Arkansas Medical Clinic, who referred him to Dr. Swoyer.

He admitted to undergoing surgery with Dr. Swoyer on July 3, 2007. According to the claimant, after his surgery, he believes he was off work for about two weeks.

The claimant admitted to having completed the bottom half of the First Report of Injury, wherein he reported having felt a "a twinge," but no pain while using the short bar. According to the claimant, he had to tighten the bar down with all of his body weight (because it is so short), and it rested right on his "gut." However, the claimant denied having any pain at that time. The claimant specifically testified that he did not feel any pain until the 24<sup>th</sup>. He essentially explained that he mentioned the twinge because it was in the same area as the pain that he had on the 24<sup>th</sup>. According to the claimant, the above described "twinge" occurred a couple of weeks after the 2<sup>nd</sup> of May, which would have been around May 16, 2007. The claimant testified that after he felt the twinge, it did not interfere with any of his marital activities.

The claimant admitted he is requesting payment for his medical bills. He further testified that he is also requesting payment for the time that he missed work prior to the surgery. According to the claimant, there were days after the 24<sup>th</sup> and before his surgery that he was unable to work because of riding in the trucks and bouncing down the road, as it caused a lot of pain.

As of the date of the hearing, the claimant denied having any pain as a result of the hernia.

On cross examination, the claimant testified that when he went in to see Dr. Riley on May 24<sup>th</sup>, he explained to him how his injury occurred. According to the claimant, he told Dr. Riley about strapping down the load. The claimant admitted he told Dr. Sawyer on June 6<sup>th</sup> he had finished out the day when he hurt himself. He admitted his normal job duties entailed strapping down a load.

The claimant testified:

Q. Can you just tell us briefly what your job duties are?

A. Once the truck is loaded with the block on the side of the truck there is a nylon strap that you have to throw over the load and tighten down so it doesn't shift while you're driving. The bar that was in the truck to tighten those straps was just an 18 inch bar. Most trucks have a 48 inch bar to give the driver the leverage so he doesn't have to strain. And we did not have those.

Q. So your job physically is mostly just to drive the truck. Is that correct?

A. Strap down the loads and drive the truck and unload the truck.

Q. What does a load typically consist of? What is it you're transporting?

A. Blocks, cement blocks.

Q. How big are they?

A. 8 by 8 by 16, and there are 900 of them per load.

Q. So when you're saying that you had the hernia it's not a situation where a block was falling and you suddenly have to catch it or anything?

A. No, no, no.

Q. It was just strapping a load like you normally do?

A. It was just straining to strap down the load so that it didn't shift.

Q. There was no situation where the bar that you used struck your abdomen in any way. Is that correct?

A. No.

The claimant admitted to having surgery on the 3<sup>rd</sup> and to returning to work on July 17<sup>th</sup>.

On redirect examination, the claimant admitted he generally worked approximately 30 to 32 hours and had done so for quite some time. According to the claimant, he was paid \$10.00 an hour. The claimant admitted that his medical bills were initially paid by his group medical, but once they found out that it was a denied workers' comp claim, they refused everything.

The claimant admitted on recross examination that he typically works a 40-hour week.

Charles LeDuff, also testified during the hearing. He admitted he has owned M&M Concrete Products since November of 1999. He admitted the claimant reported an injury to him and his wife on the 24<sup>th</sup> or 25<sup>th</sup>. According to Mr. LeDuff, when the claimant walked into the office, he was limping and appeared to be in pain. He further testified that the claimant substantiated the fact that he was hurting, as he held his groin. He denied participating in the discussion to the point of finding out exactly when the incident occurred. Mr. LeDuff testified that the only information he has regarding this is from his wife. He

explained that his wife told him that the incident had occurred a few days earlier.

Mr. LeDuff testified that the claimant worked from 8:00 to 4:30 during winter months and during summertime, he worked from 7:00 to 4:30. According to Mr. LeDuff, the claimant loads the trucks, ties down the loads, gets the delivery instructions, and takes them out to the job site. He testified that the claimant operates a boom truck, as the boom is used to unload the blocks.

He testified that Ray Riley is in fact a medical doctor, and his wife Diane Riley is a physician's assistant.

On cross examination, Mr. LeDuff admitted that prior to the 24<sup>th</sup> or 25<sup>th</sup>, he had not observed the claimant walking in that manner before. He denied the claimant ever said anything to him about an injury before the 24<sup>th</sup> of May. Mr. LeDuff admitted the first time the claimant ever said anything to him about an injury was when he came into the office. He further admitted, that at that time, the claimant did state that he had hurt himself while tying down the load.

A review of the medical evidence of record demonstrates that the claimant saw Dr. Riley on May 24, 2007, due to a complaint of an inguinal herniation in the right inguinal area, which was quite prominent with the Valsalva maneuver. Dr. Riley prescribed Vicodin for pain and instructed the claimant to wear an athletic supporter. The claimant was also given an appointment to see the surgical group, Dr. Swoyer, which was scheduled for May 31, 2007.

The claimant saw Dr. Dan Swoyer on June 6, 2007. The

claimant gave the following description of his injury, "Stapping [sic] down load with an 18 inch bar instead of the 4 inch ratchet tool." Dr. Swoyer reported the following:

HISTORY OF PRESENT ILLNESS: Scott presents having been working on 5/24/2007 when he was trying to strap down a heavy load, and he felt a sudden pain and bulge in his right groin. He finished out the day. His partner at work noticed that he was very uncomfortable and recommended he stop by the office and report that day that he had the discomfort. He did this and was sent to see his family physician. He saw nurse practitioner Ray Riley at his family doctor's office the next day who felt he had a hernia. He was scheduled to see me on 5/31/07, but unfortunately the schedule was written as 6/31/2007, so he missed the appointment on 5/31/07 because of a clerical error.

In talking to Scott, he, in earnest, said he had, on a couple of occasions at work the prior week or two felt sort of a strange sensation or twinge in the same groin area, but it really was not a pain, it did not hurt, and he did not think much of this. He says that Workmen's [sic] Compensation denied his claim because he did not report the twinge, but he says he is not a doctor, he did not know what it was, he kept working, he was not malingering, and there never was a bulge at that time.

\*\*\*

IMPRESSION: Right inguinal hernia, work related as per history of present illness.

PLAN: I feel that this is an obvious work related injury based on his history and also the fact that Workmen's [sic] Compensation is denying his claim because of a trivial statement made by the patient in regard to a twinge he felt before. Not being a physician, not being a malingerer, continuing at his work, and not having any bulge or significant pain, there is no way he, or even many medical personnel, would know that this was a hernia if and when it was. He definitely had the bulge occur, however, on 5/24/2007, reported it that day, and did so appropriately with medical supervision. He will be scheduled for hernia surgery as soon as Workmen's [sic] Compensation approves.

The claimant underwent surgery on July 3, 2007 due to "Right inguinal hernia." The claimant tolerated the procedure well and was sent to recovery in satisfactory condition.

On July 16, 2007, the claimant returned to see Dr. Swoyer for follow-up care. At that time, the claimant was two weeks out status post right inguinal hernia. Although the claimant still had some discomfort, he had no other major complaints. Therefore, Dr. Swoyer released the claimant to return to work on July 17, 2007, with 50-pound lifting restrictions for two weeks.

Dr. Swoyer reported on August 7, 2007 that the claimant was back at work and doing as he pleased. His impression was "Normal postop course."

A review of the non-medical evidence demonstrates that the claimant completed the First Report of Injury or Illness on May 25, 2007. The claimant reported the specific activity that he was engaged in at the time of injury was "Securing load of block with bar." The claimant reported the work process that he was engaged in at the time of his injury was, "After loading block driver secures load with strap and tightens with the 18 inch bar." With respect to the sequence of events, the claimant reported, "Tightening strap on load I felt a twinge but no pain."

The claimant completed a Form AR-C on June 15, 2007. The claimant reported that his injury occurred while securing a load of block with an 18 inch bar.

Another Form AR-C was completed on October 11, 2007 by the

claimant's attorney. This form demonstrates that the claimant was pulling hard on a ratchet bar when he felt a tear in his back. (During the hearing, the claimant agreed that his attorney's office mistakenly filed his claim alleging a back injury rather than a hernia injury. He further testified that upon receipt of this form, he called his attorney's office to correct the matter).

A review of the wage records indicates that the claimant worked 34.90 hours during the reference week of May 30, 2007; during the reference week of June 13, 2007, the claimant worked 29.80 hours; during the reference week of June 20, 2007, he worked 33 hours; and during the week of June 27, 2007, the claimant worked 37.90 hours.

#### **ADJUDICATION**

##### **A. Motion to Recuse and Constitutional Challenges of the Act**

The claimant filed a Motion to Recuse and a Brief in support of said Motion with the Commission on January 28, 2008. Respondents No. 1 filed a Response to said Motion on January 29, 2008. Therein, the claimant sought my recusal from participating in this case, and challenged, *inter alia*, the constitutionality of the Workers' Compensation Act, as it provides for the administrative adjudication of workers' compensation claims.

At the time of the hearing, the claimant renewed his Motion to Recuse and challenged the constitutionality of the Act.

With respect to the claimant's Motion for Recusal and the

balance of the Motion pertaining to the constitutional challenges, I find that the Arkansas Court of Appeals has soundly rejected these same arguments in Long v. Wal-Mart Stores, Inc., 98 Ark. App. 70, \_\_\_ S.W.3d \_\_\_ (Ark. Ct. App. Feb. 21, 2007), Petition for Review denied, No. 07-268 (Ark. May 3, 2007). As a result, the claimant's Motion for Recusal must be denied, and I find his constitutional challenges to be without merit.

B. Compensability

The claimant contends that he sustained a "compensable" hernia during and in the scope of his employment with this respondent-employer on May 24, 2007. The burden rests on the claimant to prove all of the elements necessary to establish his alleged hernia injury. The requirements for the compensability of this injury is set forth in Ark. Code Ann. §11-9-523(a). This subsection provides:

In all cases of claims for hernia, it shall be shown to the satisfaction of the Workers' Compensation Commission:

(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 considering all of the evidence presented, I am persuaded that the claimant's testimony concerning the sequence of events surrounding his work related incident of May 24, 2007, is credible and sets forth an accurate account of these events. The claimant's testimony is corroborated by Mr. LeDuff, the medical histories, the Form AR-C, and the First Report of Injury or Illness.

Specifically, the claimant credibly testified that he felt an onset of pain just below his abdomen while trying to strap down a load to keep it from shifting. The claimant essentially testified that the bar that he used for the ratchet straps was a little short, which resulted in him not having enough leverage to tighten on the load, so he had to put all of his body weight onto it. Under these circumstances, I find that such effort amounted to a severe strain. The claimant further testified that the pain caused by this effort caused him to cease work immediately. The claimant gave prompt notice of his injury to his employer upon his return to the yard, which clearly meets the 48 hours-notice requirement of the statute. It is undisputed that the claimant sought treatment for his pain later that evening from Dr. Riley, who diagnosed the claimant with a "prominent inguinal herniation in the right inguinal area." He referred the claimant

to Dr. Swoyer for surgical repair, which was performed on July 3, 2007.

While I realize the claimant reported having felt a twinge on or about May 16, 2007, considering that the claimant did not feel any pain during this incident and because there were no other contemporaneous onset of difficulties indicative of the occurrence of a hernia, and based on the June 6, 2007, expert opinion(See discussion above) of Dr. Swoyer, I find that there is insufficient evidence to support a finding that the claimant suffered a hernia at that time.

Therefore, based on all of the foregoing, I find that the claimant has proven all of the statutory requirements of Ark. Code Ann. § 11-9-523, so as to prove that he suffered a compensable hernia injury in the course and scope of his employment on May 24, 2007.

#### C. Medical treatment

The next issue for determination in the present matter is the nature and extent of medical benefits to which the claimant is entitled to for his compensable hernia injury. This matter is controlled by the provisions of Ark. Code Ann. § 11-9-523 (b) (1) and § 11-9-508.

On the basis of the record as a whole, I find that all the medical services of record, which were provided to the claimant by and at the direction of Drs. Ray Riley and Dan Swoyer,

including the 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."

Specifically, I find that the medical treatment rendered by Drs. Riley and Swoyer was administered in an attempt to diagnosis, treat, and repair the claimant's work-related hernia.

Therefore, Respondents No. 1 shall be liable for the medical treatment of record for the claimant's compensable hernia injury.

D. Temporary total disability

An injured employee is entitled to temporary total disability compensation during the time that he is within his healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). However, for this type of injury, under the Act, the claimant is entitled to a maximum of twenty-six (26) of compensation for his disability.

The evidence presented establishes that the claimant entered the healing period from the effects of his compensable hernia on the date of its occurrence (May 24, 2007), and continued within said period until July 16, 2007.

The preponderance of the credible evidence also demonstrates that the claimant was rendered unable from performing gainful employment as the result of the effects of his compensable injury during the period of time missed from work after May 24, 2007,

and up until his July 3, 2007 surgery (See above discussion of the claimant having to leave work due to pain from riding in truck).

The evidence also establishes that the claimant was totally incapacitated to earn wages from the date of his surgery, July 3, 2007, and continuing through July 16, 2007, at which point, Dr. Swoyer released the claimant to return to work on July 17, 2007. The claimant testified to having returned to work on said date. As of the date of the hearing, the claimant testified that he was not experiencing any problems whatsoever from his compensable hernia injury.

Therefore, based on the foregoing, I find that the claimant has proven that he was been rendered totally disabled from performing regular gainful employment, as the result of the effects of his compensable hernia for the period of time/the hours missed after May 24, 2007, up until the time of his surgery on July 3, 2007. The claimant also proved his entitlement to temporary total disability compensation from the date of his surgery, July 3, 2007, and continuing through until July 16, 2007.

Respondents No. 1 shall be liable for payment of these indemnity benefits. The claimant's attorney shall be entitled to the maximum statutory attorney's fee based on the controverted temporary total disability compensation awarded herein.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed at all relevant times, including on or about May 24, 2007.
3. The claim has been controverted in its entirety.
4. The claimant's Motion to Recuse is denied and his constitutional challenges of the Act are found to be without merit.
5. The claimant proved by a preponderance of the credible evidence that he sustained a compensable hernia injury while working for the respondent-employer on May 24, 2007.
6. The claimant proved that the medical treatment of record was reasonable and necessary treatment for his compensable injury under Ark. Code Ann. § 11-9-523 (b) (1) and § 11-9-508.
7. The claimant proved his entitlement to temporary total disability compensation for the time missed from work after May 24, 2007, up until his surgery on July 3, 2007. The claimant also proved his entitlement to temporary total disability from July 3, 2007, and continuing through July 16, 2007.
8. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the controverted temporary total disability compensation awarded herein.

**AWARD**

Respondents No. 1 are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Maximum attorney's fees are herein awarded to the claimant's attorney on the controverted indemnity benefits, pursuant to Arkansas Code Ann. § 11-9-715.

All benefits herein awarded which have heretofore accrued

are payable in lump sum without discount.

This award herein shall bear the maximum legal rate of interest until paid.

**IT IS SO ORDERED.**

---

**CHANDRA HICKS**  
**Administrative Law Judge**