

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **G708792**

BLAKE MCKENZIE, EMPLOYEE	CLAIMANT
S. WALTON SUITES LLC, EMPLOYER	RESPONDENT
MIDWEST INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 18, 2018

Hearing before ADMINISTRATIVE LAW JUDGE AMY GRIMES, in Springdale, Washington County, Arkansas.

Claimant represented by JASON M. HATFIELD, Attorney, Springdale, Arkansas.

Respondents represented by MICHAEL C. STILES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 2, 2018, the above captioned claim came before the Workers' Compensation Commission in Springdale, Arkansas, for a hearing. A pre hearing conference was conducted on April 10, 2018, and a pre hearing order filed that same date. A copy of the pre hearing order has been marked as Commission's Exhibit No. 1 and with modification and no objection is made part of the record.

The parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this case.
2. The employee/employer/carrier relationship existed on December 13, 2017.
3. The respondents have controverted the claim in its entirety.
4. The compensation rates are \$346.00 for temporary total disability and \$260.00 for permanent partial disability.

The issues to be litigated are limited to the following:

1. Whether claimant sustained a compensable injury in the form of an umbilical hernia.
2. Whether claimant is entitled to medical treatment.

3. Whether the claimant is entitled to temporary total disability benefits from December 15, 2017 to December 20, 2017 and from February 23, 2018 to March 6, 2018.

4. Attorney fees.

The claimant contends that “Claimant sustained a compensable injury while working for respondent on or about December 13, 2017. At that time, claimant picked up a mini refrigerator and felt severe pain and a pulling sensation in his lower abdominal area, which caused him to stop working with the refrigerator. Claimant called out to co-employee, Wes Jacobellis, for help. Claimant finished the day. In addition to reporting the injury to Wes Jacobellis, claimant reported the injury to Trish Hackathorne within 48 hours of the injury. After discussion with Trish, claimant reported to the emergency room on December 15, 2017, and was diagnosed with a hernia within 72 hours of the injury.”

The respondents contend that:

“1. The claimant did not sustain a compensable hernia injury while employed by the respondent employer on or about December 13, 2017.

2. The claimant is not entitled to any benefits.

3. The respondents have denied and controverted this claim in its entirety on grounds that the claimant cannot meet his burden of proof regarding the alleged hernia injury pursuant to Arkansas Code Annotated § 11-9-523.

4. The claimant’s physical problems, if any, are not related to his employment for the respondent employer.

5. In the alternative, if it is determined that the claimant sustained a compensable hernia injury, then the respondents hereby request a setoff for all benefits paid by the claimant’s group health carrier, all short term disability benefits received by the claimant, all long term disability benefits received

by the claimant, and all unemployment benefits received by the claimant.”

The above stipulations are hereby accepted as fact. From a review of the record as a whole to include medical reports, documents, and having heard testimony and observed demeanor of all witnesses, the following decision is rendered. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on December 13, 2017 in the form of an umbilical hernia. Furthermore, the claimant has also proven, by that same standard, that he is entitled to the requested medical treatment and indemnity benefits. The claimant’s attorney is also entitled to a fee in this matter.

FACTUAL BACKGROUND

The claimant in this matter is a 55-year-old male who began working for the respondents in September of 2017. The claimant was employed as a maintenance technician at the time of the incident in question. On December 13, 2017 the claimant was working assembling cabinetry. The work included installing refrigerators in the cabinetry. The claimant stated that he was installing and lifting refrigerators weighing 75 pounds. He added that during the installation, he felt a “sharp and sting pull” in his umbilical area. The claimant testified that the pain was “acute, stretchy, pulling and stinging.” The claimant continued that he sat the refrigerator down “immediately”.

The claimant’s co-worker was called to testify about the events surrounding the claimant’s injury on December 13, 2017. Wes Jacobellis worked with the claimant for the respondent. Mr. Jacobellis testified as follows:

Q Were you ever made aware of an injury that Mr. McKenzie sustained while working at Walton Suites?

A Yes.

Q What happened?

A I went upstairs to get some tools, came back and he was moving

a refrigerator in. It was real low. We had just put the counter in. And I came back and he was saying his stomach hurts, he strained himself. And I said, "Well, let me push the rest in for you." And so I pushed the refrigerator the rest of the way in.

Q Will you describe Mr. McKenzie's work activities after that incident?

A He said he'd strained something in his stomach and I told him, "Well you just take it easy." And he took it easy for about 15 minutes and then we went to lunch.

The witness stated that after the incident, the claimant stopped working for about 15 minutes and then went to lunch. He added that after lunch, the claimant's activities were different. He stated that he began to do all the lifting after the injury occurred. The claimant's testimony corroborated the witness testimony about the incident on December 13, 2017. The claimant also confirmed that the incident occurred just before lunch on the day in question around 11:30 a.m. Alice Zelahy also testified at the hearing. She stated that she was not present Monday or Tuesday of the week the claimant was injured. She added that she saw the claimant on Wednesday, December 13, 2017, and did not find him to have any physical complaints. She did, however, add that she was not present in the conference room during the cabinet installation.

The claimant testified that two days later on December 15, 2017 he woke in the night with issues related to his abdomen. He stated that later in the morning, he found a "golf ball sized protrusion coming through [his] abdominal wall." He stated that he went to work and waited for his supervisor, Trish Heckathorn. Trish Heckathorn testified during the hearing at bar. She confirmed that the claimant did ask to seek medical treatment for the injury as soon as she arrived at work. She arrived at work about 9:30 a.m. on December 15, 2017. The claimant advised that he needed to go to the emergency room. The medical records in evidence confirm that the claimant was seen in the emergency room, where the claimant was diagnosed with a hernia. The hernia was reduced. Also during the

emergency room treatment, the claimant was given morphine. The claimant stated he was given prescriptions for Vicodin and Flexeril. The medical records in evidence reflect, specifically, that the claimant was prescribed Valium and Zofran. The claimant's wife, Pamela McKenzie, testified that she was providing updates to the claimant's supervisor. Furthermore, she added that she and the claimant traveled to the respondent's office to retrieve a paycheck. Ms. McKenzie also completed an incident report for the claimant.

The respondent did not investigate the claimant's report further. Ms. Heckathorn additionally testified that she did question witness Wes Jacobellis about the incident on December 13, 2017. She stated that she did not make her decision to deny the claim based on that interview. Ms. Heckathorn testified that the decision was made to deny the claimant's claim based on a statement he had made to the insurance carrier that he "worked through it." The claimant testified that he was on pain medications at the time he gave the statement. The statement date is December 18, 2017, five days after the incident in question and three days after the claimant's release from emergency room treatment.

The medical evidence in the record confirms that the claimant continued to be treated for an umbilical hernia. He was treated by Dr. Treptow on February 5, 2018. The doctor diagnosed a reducible symptomatic umbilical hernia. He further noted that the claimant was injured on December 13, 2017, while doing heavy lifting. Dr. Treptow noted that the claimant suffered from a "progressively enlarging symptomatic umbilical hernia. Surgery was scheduled for the claimant on February 23, 2018.

The claimant had surgery on the above date. Dr. Treptow noted the following:

Based upon his history and the previous ER visit, clearly the heavy lifting was most likely the inciting event that brought on the manifestation of this hernia. It is not uncommon that the hernia would become increasingly symptomatic the longer it was incarcerated within the umbilical hernia defect. Heavy lifting is the cause of the majority of hernias that we see in our surgical practice.

The claimant was taken off work from December 15, 2017, until December 19, 2017. Thereafter, he was placed on light duty after treatment in the emergency room. He was given the following restrictions: “no heavy lifting until released by physician.” Then, after surgery the claimant was placed off work under the care of Dr. Treptow from February 23, 2018 until March 6, 2018. The records in evidence confirm the above dates. The claimant was then placed on light duty with lifting restrictions from March 6, 2018 until March 19, 2018 at which time he was returned to work with no restrictions.

DISCUSSION

The claimant has asked the Commission to determine if he suffered a compensable injury on December 13, 2017 in the form of a hernia. He has also asked the Commission to determine his entitlement to medical treatment and temporary total disability benefits. I note numerous discussions and arguments in the record related to the fact that the claimant gave several statements prior to testifying at the hearing before the Commission. These statements created conflicting testimony, and placed the claimant’s credibility in question to be considered by the Commission. After a review of the record, I find the claimant’s testimony at the hearing credible. The decision in this matter is based upon the claimant’s testimony at the hearing, the witnesses presented at hearing and the medical evidence in the record.

The Commission must first address the issue of the claimant’s injury. Arkansas Code Annotated §11-9-523 defines hernia as follows:

- (a) In all cases of claims for hernia, it shall be shown to the satisfaction of the 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.

The Commission will address each element of A.C.A §11-9-523 in turn. Here, the claimant testified that he was lifting a 70-plus pound refrigerator while installing cabinetry. He stated that while performing these duties he felt sharp, stinging and pulling pain in his umbilical area. He stated the pain was “acute, stretchy, pulling and stinging.” The claimant stated that he immediately put down the refrigerator and sat down. While not present in the room during the first part of the action in question, Wes Jacobellis returned shortly to the room. He testified at the hearing that he was told by the claimant that he had strained himself and hurt his stomach. Mr. Jacobellis confirmed that the claimant immediately ended work, sat down for 15 minutes and then broke for lunch. He added that he then began doing all the lifting while working with the claimant. The medical reports in evidence reflect Dr. Treptow’s opinion that heavy lifting was the cause of the hernia and he opined that the lifting of the refrigerator caused the claimant’s hernia. Furthermore, Alice Zelahy stated that during her interaction with the claimant earlier in the day on the Wednesday, December 13, 2017, the claimant was having no physical problems. The claimant has proven that the hernia occurred as a result of sudden effort as required by the statute.

The claimant further testified to feeling a sharp, stinging pull in the umbilical area. He described acute pain, causing him to put down the refrigerator he was lifting. The claimant stated the pain was moderate to severe. Additionally, his co-worker arrived shortly after the beginning of the incident and found the claimant holding his stomach. Mr. Jacobellis confirmed this by testimony at hearing. Dr. Treptow also noted that it was not unusual for hernias to become increasingly symptomatic and heavy lifting caused the majority of hernia. At hearing, the claimant testified that he had a “high pain tolerance” which was confirmed by his wife. The claimant further stated that he had been unaware of

a prior hernia, not found until a routine check up. Arkansas courts have addressed such facts in prior opinions. They have upheld findings of severe pain for compensable hernia injuries where a claimant testified to a high pain threshold, Darling v. McDonald, 54 Ark. App. 60, 922 S.W.2d 748 (1996). The facts in the case at bar are greatly similar to Darling. The medical records in this matter reflect that the claimant's hernia was progressively enlarging and symptomatic. The claimant has proven that the hernia caused severe pain in the hernia region as required by statute.

The claimant must also prove that the pain caused the claimant to stop working. The claimant stated that he placed the refrigerator down and stopped working after feeling pain. He stated that after a brief work stoppage, he then went to lunch. Witness Jacobellis testified that he returned to the room and found the claimant holding his stomach, and was informed that the claimant had strained his stomach. Mr. Jacobellis advised the claimant to stop work for 15 minutes, and then they decided to take lunch. The claimant's and witness stories are credible here. The witness stated that the claimant did not continue lifting and that he did all the lifting moving forward. Clearly, the claimant sat down the refrigerator and stopped working as a result of the pain he stated he felt. The claimant completed the work day with no further lifting. The claimant has proven that he stopped working as required by Arkansas statute.

Next, the claimant must give notice to the employer of a hernia within 48 hours. Here, the claimant reported his issues to his co-worker on the day of occurrence, December 13, 2107. When the claimant awoke to find his symptoms worsening, he went to work and reported this injury to his supervisor, Ms. Heckathorn. She confirmed at hearing that the claimant reported his issues to her as soon as she arrived at work on December 15, 2017. The claimant testified that the injury occurred on December 13, 2017 about 11:30 a.m. The medical records indicate that the claimant arrived for treatment on December 15, 2017 around 10:46 a.m. It is therefore obvious that in addition to informing

his employer within the 48-hour requirement, he also sought medical treatment within that same 48-hour period. The claimant has satisfied the element of notice of injury required by Arkansas law.

Lastly, the claimant must prove that he received medical treatment within 72 hours of the injury from a licensed doctor. As stated above, the records in evidence reflect that the claimant sought medical treatment from the emergency room on December 15, 2017 at about 10:46 a.m. Clearly, that time frame is within the 72-hour treatment window set forth by Arkansas statute. The claimant has met the medical treatment time frame required by Arkansas law. After a review of all the evidence, I find that the claimant has proven by a preponderance of the evidence that he suffered a compensable injury in the form of a hernia on December 13, 2017 while working for the respondent. He has proven all the required elements by Arkansas law to establish a compensable hernia injury.

The claimant has next asked the Commission to determine his entitlement to medical treatment.

A.C.A §11-9-102(4)(F)(i) states:

“When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided by this chapter.”

It is factually settled that the claimant in this case sustained a compensable injury on December 13, 2017, while in the employ of the respondent. Once it is settled that the claimant has a compensable injury, the question of medical services must be determined by looking at the facts in question and determining if the medical services are reasonably necessary for the treatment of the claimant’s injury.

Arkansas Code Annotated §11-9-508(a) requires that:

“The employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee.”

What constitutes reasonable and necessary treatment under Arkansas Code Annotated §11-9-508(a) is a fact question for the Commission. Wright Contracting Co. v. Randall, 12 Ark App. 358, 676 S.W. 2d 750 (1984). Here, the claimant was treated beginning in the Mercy emergency room on December 15, 2017. He continued to be treated for an umbilical hernia until the time he underwent surgery on February 23, 2018. The medical records in evidence reflect this treatment. There is no question that the claimant's treatment is reasonable and necessary for the treatment of the compensable hernia suffered on December 13, 2017. The claimant has proven by a preponderance of the evidence that the medical treatment requested is reasonable and necessary for the treatment of his compensable injury. He is entitled to such treatment.

The claimant has lastly asked the Commission to determine his entitlement to temporary total disability from December 15, 2017 to December 20, 2017, and from February 23, 2018 to March 6, 2018. The claimant has been found to have suffered a compensable injury in the form of a hernia. Such an injury is an unscheduled injury. Therefore, the claimant must prove that during the time he is requesting temporary total disability he was in his healing period and totally incapacitated to earn wages, Arkansas State Highway & Transp. Dep't . v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Under Arkansas law, when addressing compensable hernia claims, if the five prerequisites are met the claimant is entitled to medical treatment. Additionally, while the claimant's unscheduled injury may be ripe for the award of temporary total disability, based on a total incapacitation to work, in hernia cases the claimant's indemnity benefits are limited to 26 weeks, A.C.A §11-9-523(b)(1). Here, based on the records in evidence, the claimant was off work during the time periods that he is requesting temporary total disability. He was totally incapacitated to earn wages and remained in his healing period. Therefore, the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from December 15, 2017 to December 20, 2017 and from February 23, 2018 to March

6, 2018. The respondents are entitled to the appropriate set-offs under Arkansas law. Furthermore, the claimant's attorney is entitled to an attorney fee based on the award of the above listed indemnity benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The proposed stipulations set forth above are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that he suffered a compensable injury in the form of a hernia on December 13, 2017. He has proven all the elements necessary under Arkansas law for the establishment of a compensable hernia injury.
4. The claimant has proven by the same burden that the requested medical treatment is reasonable and necessary for the treatment of his compensable hernia injury from December 13, 2017.
5. The claimant also has proven by a preponderance of the evidence that he was totally incapacitated to earn wages and is entitled to temporary total disability from December 15, 2017 to December 20, 2017 and from February 23, 2018 to March 6, 2018. The respondents are entitled to the appropriate set offs under Arkansas law.
6. The claimant's attorney is entitled to an fee based on the above findings and conclusions.

ORDER

The claimant has been found to have suffered a compensable hernia injury on December 13, 2017. He is entitled to the requested medical treatment and temporary total disability from December 15, 2017 to December 20, 2017 and from February 23, 2018 to March 6, 2018. Claimant's attorney is

entitled to a fee based on these findings.

IT IS SO ORDERED.

AMY GRIMES
ADMINISTRATIVE LAW JUDGE