

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211073

RAYMOND HICKSON, EMPLOYEE	CLAIMANT
SOUTHERN REFRIGERATED TRANSPORT, EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO, INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 16, 2004

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE GREG GILES, Attorney at Law, Texarkana, Arkansas.

Respondent represented by HONORABLE MIKE RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed September 9, 2003.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the prehearing telephone conference conducted on June 23, 2003, and

contained in the Prehearing Order filed on June 24, 2003, are hereby accepted as fact.

2. Claimant earned an average weekly wage sufficient to entitle him to a temporary total disability rate of \$298.00 per week, should the claim be found compensable.

3. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable hernia injury.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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MIKE WILSON, Special Commissioner

Commissioner Turner dissents.

**DISSENTING OPINION**

I dissent from the Majority opinion affirming and adopting the Administrative Law Judge's decision denying compensation for Claimant's hernia injury and temporary total disability benefits. I find that the Administrative Law Judge's decision should be reversed because Claimant has proved by a preponderance of the evidence that he incurred a compensable hernia injury and that he is entitled to TTD benefits.

I. History

Claimant, a truck driver, testified that he was injured on Wednesday, September 18, 2002 when the handle of a dolly jack he was using to crank down the trailer legs forcefully hit him on the right side of his groin. Claimant testified that in the course of using the dolly, another

driver tapped him on the shoulder and that he "just turned [his] head to see who was tapping [him] on the shoulder."

(R. 18). Claimant testified that at the same time that his head was turned, a fork lift operator drove a fork lift into the trailer, causing a change of pressure on the trailer and the dolly, and caused the dolly handle to swing around and strike him in the groin:

Q: We've talked about this handle. Did it just rotate all by itself, or do you associate the rotation with something that happened?

A: I associate the rotation with when he went in there with the forklift and backed out.

Q: He, being there was somebody operating a forklift to go inside?

A: The forklift operator. Yes, sir.

Q: Somebody actually drove up inside the trailer?

A: Yes, sir.

Q: These stilts that this jack handle is connected to, why would it have affected the handle at all just because he drove up in there?

A: I wasn't hooked to the truck. I had my tandems slid all the way forward to where the back of the trailer would match their dock plate.

Q: What's a tandem?

A: That's the tires on the trailer. And I had them slid all the way forward, so when I backed up the trailer would match their dock plate.

Q: What would happen typically when you would take this piece of equipment across that dock plate? What would happen?

A: It would put weight on the rear of the trailer releasing pressure on the front.

Q: So it was the fact that he drove across the dock plate that affected the stability of the trailer? That's what you think happened?

A: That's what I think happened.

Q: Now, you've been describing this handle rotating or traveling a certain distance to strike you. What distance are we talking about? ...How far do you think it swung?

A: If I had to make a guess, I'd say it probably swung maybe 8, 9 inches, 10. It's hard to say. It happened to fast.  
(R. 47-48).

Claimant testified that the dolly handle forcefully struck him, that he felt immediate pain and that he sat for approximately 15 minutes following the blow before going to the restroom to observe the injured area. Claimant testified that he observed a red spot on his groin in the area of the blow immediately thereafter. Claimant also gave undisputed testimony that he reported his injury

to, Daryl, the night dispatcher within a few hours of the incident. (R. 18-21). Claimant testified that he had no groin pain prior to this incident in which the dolly jack handle struck him. (R. 21). Claimant also testified that he is a smoker and that he has a smoker's cough, but that this cough has never caused him any pain. (R. 22). Claimant testified that he continued to experience escalating pain to the extent that when he arrived back at the yard late that Friday afternoon that he went to Marsha Stuart's office, in Respondent's insurance office, to discuss his injury with her but she had already left for the day. Claimant stated that the pain became so severe on Saturday afternoon that he could not wait to discuss it with Martha on Monday. (R. 25).

Claimant went to the Emergency Room seeking treatment for his injury on Saturday, September 21, 2002. The Emergency Room notes from September 21, 2002, state that Claimant "felt sick to stomach, and coughed and spit up some blood. Right groin hurts when he coughs." The Emergency Room's records entitled "Male Genitourinary Problems" states that his chief complaint is "right groin pain." The record states that this pain started while "lifting a joist on his truck." There is also an illustration drawn by

Dr. Reynolds, the Emergency Room doctor, on page four of the record that shows the hernia as being located above and to the right of the genitals. This report is signed by Dr. Reynolds.

While in the Emergency Room, Dr. Reynolds ordered x-rays of Claimant's chest. These results returned within normal limits and the report states that "Lungs are free of focal infiltrates. No pleural effusions are present. Soft tissues and bones are unremarkable." (R. 13).

Respondents sent Claimant to the company doctor, Dr. Kleinschmidt, on Monday, September 23, 2002. Dr. Kleinschmidt's office visit notes state: "Date of Injury 9-18-02 Trailer handle hit groin." Dr. Kleinschmidt diagnosed Claimant with a hernia.

On September 25, 2002, Claimant went to Dr. A.D. Smith upon referral by the Emergency Room for an evaluation of his hernia. Dr. Smith states in his dictation: "Mr. Hickson has a right inguinal hernia. He has had it about 2 weeks. He is a trucker and he says some panel or something hit him in the groin and it has been sore ever since. He can hardly work because of it. He thinks that caused it, but this is a right inguinal hernia. It is

reducible. It is quite tender. It is possible that it has been there longer than he thinks and he bruised it. At any rate, it needs to be repaired. He smokes." On October 3, 2002, Dr. Smith performed an outpatient procedure on Claimant to reduce the hernia. According to the record, Claimant has not received any additional treatment and he only received treatment from Dr. Kleinschmidt on September 23, 2004.

A letter dated October 23, 2002, from Dr. Kleinschmidt to Marsha Stewart of Southern Refrigerated Transport is included in the record:

This is a letter in reference to Raymond Hickson who has been seen under your workman's comp policy as a claim due to an injury that he sustained by his account on 9/18/02 from a trailer handle that apparently flipped and struck him in the right groin causing him to have pain and swelling immediately thereafter. He states that he has had pain and swelling ever since and presented to our clinic on 9/23/02 and was noted at that time to have a wide inguinal hernia, which was easily reducible. He had no other complaints at that time as far as etiology of the hernia, but on exam was noted to have no contusions or hematomas that would substantiate a blunt trauma as etiology. Upon your request other records were provided from Wadley Regional Medical Center where he apparently had been seen 2 days prior to our visit at

the clinic on 9/21/02. Upon reviewing the ER chart, his complaint was that he had been coughing and developed some pain and swelling suddenly thereafter in his right groin. There was no mention of blunt trauma as a cause of his pain at that time in the doctor's notes. Also, there was no mention of any contusion, swelling, or bruising at that time that would substantiate blunt trauma. However, the coughing with the developments of a hernia, certainly would more indicate that his hernia could have been from the coughing episodes that were quite intense at that time.

From the information provided, one would have to suspect that the hernia probably was more likely from the cough than exactly blunt trauma from a trailer hitch popping into the right groin area. Especially since the patient was not seen initially on that day of the alleged injury on 9/18/02. In any case, the patient has been referred to a surgeon for evaluation as far as his hernia. The origin of the hernia seems to be more likely due to the cough than the alleged injury that occurred on 9/18/02.  
(R. 24).

Also included in the record is a questionnaire response from Dr. A.D. Smith in which he responded to several questions after being given a brief history of Claimant's injury. The letter did not mention that the Emergency Room report stated that Claimant complained that the area of the hernia hurt when he coughed. Dr. Smith

responded that he diagnosed Claimant with a inguinal hernia, that he observed swelling in the area of the hernia and that, based upon his examination, test results, and the facts and history provided to him by Claimant as well as the history provided on the questionnaire, it was his opinion that Claimant's symptoms resulted from his work activities as described, that the accident was the major cause of his need for treatment, and that it was reasonable and necessary for Claimant to remain off of work until October 28, 2002. (R. 26-29). On November 19, 2002, Dr. Smith released Claimant to return to work without restrictions. (R. 30).

At the hearing, Respondents' claims manager, Cliff Brown, testified that the dolly handle could not have spun around in the method described by Claimant to have struck Claimant. In so testifying, Mr. Brown, over Claimant's objection, was permitted to testify that he premised his opinion based on a report that was drafted by an unidentified person and not submitted into evidence. (R. 54). Though Mr. Brown did not testify that he had personal experience using this dolly or another dolly, he testified as follows:

Q: So if I understand your testimony, Mr. Brown, what you just said is that if there was some small slack created, it would cause the handle to move. Is that what you said?

A: What I'm saying is when he released the handle, if there was some slack in it, it could fall. But as far as it spinning, no. There will be no spinning result from the landing great itself forcing.

Q: And you understand that he's not just saying that it did it all by itself. He's saying that something happened. A gentleman driving a forklift ran over the dock plate creating this imbalance in the trailer and creating some slack and imbalance in the trailer that created this. You understand that that's what he's described?

A: It wouldn't do it.

Q: You just don't think it will happen?

A: No, sir.

Q: You weren't there?

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A: No.

Q. You're just disputed that it could happen that way?

A: That's correct. I've been in this business for over thirty years. (R. 57-58).

Mr. Brown did not testify that he had personal knowledge of the particular dolly that Claimant used on the date in question.

## II. Analysis

Ark. Code Ann. § 11-9-523 outlines elements necessary for the compensability of hernia injuries:

- (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 Majority denies benefits and reasons that they "cannot find that the claimant has established by a preponderance of the evidence that he sustained a hernia 'as the result of sudden effort, severe strain, or application

of force directly to the abdominal wall.'" The Majority further states that Dr. Smith's opinion was not entitled to weight because he had not been informed that Claimant had been coughing up blood as stated in the emergency room report. Instead, the Majority gives weight to Dr. Kleinschmidt's opinion because his opinion "demonstrated a greater knowledge of all the facts surrounding the claimant's complaints and need for medical treatment."

Unlike the Majority, I find that Dr. Kleinschmidt's opinion is not entitled to any weight because it ignores significant facts in the record. Specifically, his opinion ignores the fact that the Emergency Room record does explicitly state that Claimant related a specific incident to Dr. Reynolds that Claimant believed was the cause of his groin pain as evidenced by the statement on the "Male Genitourinary Problems" record of "started: lift a joist on his truck." Dr. Kleinschmidt's opinion also ignores that the Emergency Room record states that Claimant "felt sick to stomach," which is a commonly reported hernia symptom. More importantly, Dr. Kleinschmidt's letter takes extensive liberty with the record in that he states that the Emergency Room record

states that Claimant "had been coughing and developed some pain and swelling suddenly thereafter in his right groin." The record, however, only states that "right groin hurts when he coughs." The record does not state that Claimant's hernia developed from coughing. Instead, the record further shows on the "Male Genitourinary Problems" evaluation that Claimant's groin pain started when lifting a joist on his truck, which, although Claimant disputes the accuracy of that statement, is more in line with Claimant's testimony that the dolly handle struck him in the groin when he was jacking up the trailer. Claimant testified that after he was struck, his groin hurt when he coughed. At most, the Emergency Room records that Respondents rely on to argue that Claimant's cough caused his injury only show that Claimant experienced pain while coughing, not that coughing caused the injury. Based on Dr. Kleinschmidt's letter, we can only assume that he was not given all of the relevant records or that he ignored those records for an unexplained reason.

The Respondents rely on the testimony of the carrier's claims manager, Cliff Brown, in arguing that Claimant's injury could not have been caused in the manner

that Claimant testified. I find that Mr. Brown's testimony is prejudicial in several respects and, as such, reliance on this testimony is unfair and error. First, Mr. Brown relies on a "report" not offered into evidence, not provided to Claimant's counsel, and never identified the author of the alleged "report." As such, consideration of this report is contrary to § 11-9-705(a), which requires that hearings be conducted "in a manner that will best ascertain the rights of the parties." Consideration of this testimony violates Claimant's rights. Additionally, I find that Mr. Brown's testimony regarding the operation of the dolly and the equipment in question be excluded because he did not have any first hand knowledge of operating this particular equipment and did not testify as such. The Arkansas Supreme Court, in St. Paul Ins. Co. Et Al v. Touzin, 267 Ark. 539, 592 S.W.2d 447 (1980), addressed the balance the Commission must strike when acting as the fact-finder in a case. The Commission is "not bound by technical rules of evidence or procedure" but "is expected to adhere to basic rules of fair play, such as recognizing the right of cross examination and the necessity of having all the evidence in the record." Herbert Brake v. The Kroger Co., Opinion filed August 25,

1999 (E702191), quoting Brewer v. Tyson Foods, Inc., 10 Ark. App. 88, 661 S.W.2d 423 (1983), (where the Court of Appeals held that the inclusion of two reports was inappropriate where the appellant was denied the opportunity to cross-examine the individuals who prepared the reports). Finally, Respondent's failure to include the alleged report violates § 11-9-705(c) because it was not proffered into the record as evidence at the hearing.

Respondents also argue that the dolly handle struck Claimant in the leg, not in the groin, and, therefore, the injury is not compensable under § 11-9-523(a). I find that the preponderance of the evidence shows that Claimant's hernia occurred on the right side of the groin, not the leg, and is compensable under § 11-9-523(a). Page three of the record describes the nature of the pain as "right groin pain." There is also an illustration drawn by Dr. Reynolds, the Emergency Room doctor, on page four of the record that shows the hernia as being located above and to the right of the genitals. This report is signed by Dr. Reynolds. Also, Claimant consistently testified that he only turned his head to see who tapped him on the shoulder and that he did not turn his body. Therefore, I find that he

was still facing the dolly handle and that his groin, not his leg, was in the path of the moving handle.

Here, the preponderance of the evidence shows that Claimant reported his injury to Respondent's dispatcher within a few hours of the incident, that Claimant did not have a history of hernias or preexisting abdominal bumps or pain prior to this incident, that he suffered severe pain immediately following the incident which caused him to cease work for 15 minutes, and that medical treatment was required within 72 hours. Respondents do not dispute that Claimant contacted their night dispatcher on the evening that the injury occurred and informed the dispatcher of the injury. Further, it is well settled that a finding of causation in a worker's compensation case does not need to be expressed in terms of a reasonable medical certainty when there is supplemental evidence supporting the causal connection. Heptinstall v. Asplundh Tree Expert Company, CA03-11, December 10, 2003 (E913717) (citing Osmose Wood Preserving v. Jones 40 Ark. App. 190 (1992); see also Sneed v. Colson Corp., 254 Ark. 1048, 497 S.W.2d 673 (1973) (holding medical evidence is not necessary in establishing a causal connection)).

The situation here is analogous to the Court of Appeals' decisions in Price v. Little Rock Packaging Co., 42 Ark. App. 238 (1993), where the court reversed the Commission's denial of benefits for a hernia where the claimant initially attributed his groin pain that he felt while lifting paper at work to a fall that he suffered two months earlier. Further, as in Davis v. Pilgrim's Pride, Full Commission opinion filed March 15, 2002 (F012522), I find that the Claimant credibly testified that he told the physicians that he felt abdominal pain immediately after the dolly struck him on September 18, 2002, and that his symptoms increased on September 20, 2002, causing his need for immediate medical treatment. I, therefore, find that the preponderance of the evidence shows that Claimant incurred a compensable hernia injury.

I also find that Claimant is entitled to TTD benefits from September 20, 2002 through November 19, 2002. Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying

condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Here, Dr. Smith verified in correspondence dated December 13, 2002, that it was reasonable and necessary for Claimant to remain off of work until October 28, 2002.

(R. 26-29). However, Dr. Smith also signed a document entitled "medical Review," which was printed on Respondent SRT's letterhead, releasing Claimant to return to work without restrictions on November 19, 2002. (R. 30).

Claimant testified that the Respondents required he and Dr. Smith to sign this document before he could return to work:

Q: I am going to show you what is marked on page 30 of Claimant's Exhibit a document called Medical Review. Do you recognize this document?

A: Yes, sir.

Q: It appears to have been signed by you. Is this your signature?

A: Yes, sir.

Q: And it appears to have been signed also by Dr. A.D. Smith. Is that right?

A: Yes.

Q: Can you explain how...Can you give us some information about this document? Do you know what it is?

A: Yes, sir, what that it that's a document that SRT needed signed by the doctor and me when I was released before I could come back to work for them.

Q: Did somebody at SRT give you that form?

A: Yes, sir.

Q: Do you know who it was?

A: I'm wanting to say that form, I got that Marsha. [sic]

Q: Did you take it to Dr. Smith and get him to complete it for you?

A: Yes, sir.

Q: And then after he signed it, did you take it back and give it to somebody at SRT?

A: Yes.

Although Claimant did not return to work immediately after the receiving the November 19, 2002, release, I find that Dr. Smith's release on that date establishes that Claimant's healing period ended that day and that Claimant was not able to return to work prior to that time.

For the foregoing reasons, I find that the Administrative Law Judge's decision should be reversed, that Claimant's hernia injury is compensable, and that Claimant is entitled to TTD benefits from September 20, 2002 through November 19, 2002.

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SHELBY W. TURNER, Commissioner