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 23, 2005

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 the Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes to us on remand from the Court of Appeals. In a decision filed on March 9, 2005, the court remanded this matter for a "full examination of the relevant evidence" on the issue of whether claimant incurred a compensable hernia. The opinion further stated that on remand the Commission should not consider Cliff Brown's testimony relating to the "report."

Based on our de novo review of the record, we find that claimant's hernia is compensable. Therefore, we find that the decision of the Administrative Law

Judge must be reversed and that claimant is entitled to all reasonable and necessary medical treatment related to that injury in addition to temporary total disability benefits from September 20, 2002 through November 19, 2002 as set forth below.

I. History

Claimant, an eighteen-wheel truck driver, testified that he was injured on Wednesday, September 18, 2002 when he was forcefully hit on the right side of his groin by a jack handle. Claimant was using the jack to crank down the legs of a trailer in an effort to disconnect the trailer from the truck he drove for respondent. Claimant testified that while using the jack, another driver tapped him on the shoulder and that he "just turned [his] head to see who was tapping [him] on the shoulder." 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 jack. He testified that this change in pressure on the trailer caused the jack handle to spin 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's say it probably swung maybe 8, 9 inches, 10. It's hard to say. It happened too fast.

Claimant testified that the jack handle forcefully struck him, he felt immediate pain, and that he sat down for approximately 15 minutes before going to the restroom to observe the injured area. Claimant testified that he observed a red spot on his groin where the jack handle had struck him. Claimant also gave undisputed testimony that he reported his injury to Daryl, the night dispatcher, within a few hours of the incident. Claimant testified that he had no groin pain prior to this incident in which the jack handle struck him. 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. Claimant stated that following the incident, he continued to experience escalating pain. When he arrived back at the truck yard on Friday afternoon, he testified that he went to respondent's insurance office to discuss his injury with Marsha Stewart but she had already left for the day.

Claimant stated that the pain became so severe that on Saturday afternoon he sought medical treatment because he could not wait to discuss it with Ms. Stewart on Monday.

Claimant went to the emergency room seeking treatment for his injury on Saturday, September 21, 2002. The emergency room notes from that day state that Claimant "felt sick to stomach, and coughed and spit up some blood. Right groin hurts when he coughs." The record states that his chief complaint is "right groin pain" that started when he lifted "a jack on his truck." Claimant was diagnosed with a right inguinal hernia.

The court recognized in its March 9, 2005 decision that the initial emergency room report included claimant's account of trauma to his groin:

> Medical records were also submitted into evidence. The typewritten information on the emergency-department record of September 21, 2002, at 6:50 p.m., indicated that appellant's chief complaint was hemoptysis and right groin swelling. The record provided that appellant was sick to his stomach and that he coughed and spit up some blood. The record also indicated that at 8:00 p.m., appellant's "groin hurts when he coughs." He was taken for an x-ray at 8:10 p.m. The emergency physician's record showed that he was seen at 8:20 p.m., and his chief complaint was right groin pain that started when he lifted "a jack on his truck."

Claimant was sent to the company doctor, Dr. Kleinschmidt, on Monday, September 23, 2002. Dr. Kleinschmidt's notes state: "Date of Injury 9-18-02 Trailer handle hit groin." Dr. Kleinschmidt diagnosed claimant with a hernia. In a letter dated October 23, 2002, Dr. Kleinschmidt wrote that claimant reported that he was struck in the right groin on September 18, 2002 by a trailer handle and had pain and swelling immediately thereafter. Dr. Kleinschmidt further wrote that he had reviewed the Emergency Room records and interpreted these records to state that "he had been coughing and developed some pain and swelling suddenly thereafter in his right groin" and that there was no evidence of blunt trauma. Dr. Kleinschmidt, therefore, concluded that the hernia was more likely caused by the coughing than blunt trauma.

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, claimant underwent a hernia repair performed by Dr. Smith.

Also included in the record is a questionnaire completed by Dr. Smith on December 13, 2002 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 his groin hurt when he coughed. Dr. Smith responded that he diagnosed claimant with a inguinal hernia and that he observed swelling in the area of the hernia. Dr. Smith also opined, 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, that claimant's symptoms were the result of work-related activities. Dr. Smith also responded that it was reasonable and necessary for claimant to remain off of work until October 28, 2002. On November 19, 2002, Dr. Smith signed a "Medical Review Release," which was printed on respondent Southern Refrigerated Transport's letterhead, releasing claimant to return to work without restrictions. Claimant testified that both he and Dr. Smith were required to sign this release before respondent would return claimant to work.

At the hearing, respondent's claims manager for risk management, Cliff Brown, testified that the jack handle could not have moved in the method described by claimant. Mr. Brown, over claimant's objection, testified that he premised his opinion that the handle could not have swung as claimant described based on a "report" that he received from another employee of respondent who inspected the equipment claimant was using at the time of the injury. The author of the "report" was never identified and the "report" was not submitted into evidence or otherwise provided to claimant. Mr. Brown also testified that he was familiar with jack handles on trailers. He then gave his opinion regarding whether slack created in the manner described by claimant could cause the jack handle to move:

> 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 disputing that it could happen that way?

A: That's correct. I've been in this business for over thirty years.

Mr. Brown did not testify that he had personal knowledge of the jack and trailer that claimant was working with at the time of the injury.

Following the hearing, the Administrative Law Judge issued an opinion on July 24, 2003 denying compensability for claimant's hernia. The Administrative Law Judge reasoned 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. The Administrative Law Judge instead found Dr. Kleinschmidt's opinion to be more credible because his opinion "demonstrated a greater knowledge of all the

facts surrounding the claimant's complaints and need for medical treatment." The Administrative Law Judge also relied on the "report" described in Cliff Brown's testimony. Claimant appealed and the Full Commission affirmed and adopted that opinion on June 16, 2004. On claimant's appeal to the Court of Appeals, the court rejected the Commission's reasoning and reversed and remanded in an opinion dated March 9, 2005. The court held that the "report" referenced in Cliff Brown's testimony should not be considered and that the Commission failed to consider relevant evidence supporting compensability:

> We conclude that the Commission erred in translating the evidence presented into findings of fact. Dr. Kleinschmidt's assessment was based in part on his reading of the emergency-department record. He stated in his letter that, based on the report, appellant's complaint was that "he had been coughing and developed some pain and swelling suddenly thereafter in his right groin." The record, however, only stated that appellant's chief complaints were hemoptysis and right groin swelling, that appellant "coughed and spit up some blood," and that his "groin hurts when he coughs." The doctor's assessment of the record does not comport to the statements contained in the record. The Commission's reliance on the doctor's statement led to the Commission's mistranslation of the record into findings of fact on causation. Further, while the record also indicated that he had right groin pain that started when

he lifted "a jack on his truck," the Commission stated that appellant "never provided the emergency room personnel with a history of being struck in the groin by the jack handle." We conclude that the Commission also erred in translating this evidence into findings of fact.

We also note other errors made by the Commission in translating evidence into findings of fact. The Commission concluded that the order of the complaints listed on the record translated into the priority placed on the complaints by appellant. Absent an indication of the priority of the complaints by the emergency-department physician and documented on the face of the record, the Commission can only read the record in its entirety, and to do otherwise is to assume facts not found in the record. However, to the extent that appellant's reporting of his symptoms is relevant, the Commission's findings do not consider the statement found on the first line of the record listing appellant's chief complaints as hemoptysis and right groin swelling.

Further, the emergency-department records from Wadley Regional Medical Center establish appellant's chief complaints as hemoptysis and right groin swelling. Dr. Smith's records dated September 25, 2002, establish that the emergency physician referred appellant to him for repair of his hernia. Dr. Smith's name is handwritten on the first page of the Wadley Regional Medical Center's emergency-department record. The medical records further establish that Dr. Smith repaired the hernia at Wadley Regional Medical Center. Considering the amount of documentation contained in appellant's medical records

> maintained at Wadley Regional Medical Center, it is speculation for the Commission to opine that Dr. Smith was unaware of appellant's coughing. Further, while the Commission apparently considered Dr. Smith's statement, "It is possible that it has been there longer than he thinks and he bruised it," the Commission does not consider, as Dr. Smith's later opinion implied through his finding that appellant's symptoms were the result of his work-related activities, that the hernia was of recent origin. Thus, we remand to the Commission for its full examination of the relevant evidence. See Tucker v. Roberts-McNutt, Inc., supra.
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> In keeping with the best ascertainment of the rights of the parties, the Commission, in examining the relevant evidence on remand, should not consider Brown's testimony relating to the report.

On remand, we find that Claimant has proven by a preponderance of the evidence that he sustained a compensable hernia and is entitled to reasonable and necessary medical treatment and temporary total disability benefits.

II. Adjudication

A. Compensability

Pursuant to Ark. Code Ann. § 11-9-523(a), a hernia is compensable when the following factors are shown to the Commission's satisfaction:

> (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;
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> (2) that there was severe pain in the hernial region;
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> (3) that the pain caused the employee to cease work immediately;
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> (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.

We find that claimant incurred a compensable hernia as a result of a sudden force to his abdominal wall created from the jack handle. Claimant credibly testified that he had severe pain immediately thereafter that caused him to sit and cease work for about 15 minutes before going to the restroom to observe a red spot where the jack handle had struck him. Claimant gave undisputed testimony that he informed the dispatcher within a few hours of the incident. We also find that claimant credibly testified that the pain in the area of the hernia intensified such that medical treatment was required within 72 hours.

We recognize that Dr. Kleinschmidt opined that the hernia was caused by coughing. However, we find that Dr. Kleinschmidt misinterpreted significant facts in the record when forming his opinion. Specifically, Dr. Kleinschmidt misinterpreted the medical record when he concluded that Claimant "had been coughing and developed some pain and swelling suddenly thereafter in his right groin." The emergency room report, however, only states that "right groin hurts when he coughs." At most, the emergency room records only show that claimant experienced pain when coughing, not that coughing caused the injury. We find that claimant provided a history to emergency room personnel of experiencing abdominal pain after being struck in the groin by the jack handle. When we consider the description of claimant's injury and symptoms in the medical record, Dr. Smith's observations and claimant's credible testimony, we find that Dr. Smith's opinion that the hernia was caused by claimant's work-related activities is entitled to more weight and that Dr. Kleinschmidt's opinion is not reliable.

We also note that respondents argue that the jack handle struck claimant in the leg, not in the groin. We find that the preponderance of the evidence shows that claimant suffered a hernia on the right side of the groin after being struck there by the jack

handle. The medical records consistently note that claimant experienced right groin pain after being struck there by the jack. Additionally, 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, we find that the preponderance of the evidence establishes that the jack handle struck claimant in the groin.

Respondents also rely on Cliff Brown's testimony to argue that the jack handle could not have moved as claimant described. We find that Mr. Brown's testimony fails to effectively refute claimant's credible testimony. Mr. Brown first testified that slack can be created that would result in movement of the handle and then on cross examination stated that it would not cause movement. Claimant testified that the slack, which was caused by the change in pressure on the trailer when the forklift rolled into the bed of the trailer, ultimately caused the handle to move no more than one revolution before hitting claimant. Mr. Brown did not have personal knowledge of the jack handle and trailer involved in the injury in question. We find that his testimony is not persuasive and does not discredit claimant's account of the injury.

In sum, we find that a preponderance of the evidence supports a finding that claimant incurred a

compensable hernia in course and scope of his employment. Accordingly, we reverse the opinion of the Administrative Law Judge denying benefits for this injury.

B. Temporary Total Disability

We also find that claimant is entitled to temporary total disability 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).

Claimant last worked on Friday, September 20, 2002 before seeking medical treatment the following day. 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. Dr. Smith also signed a document entitled "Medical Review Release," which was printed on respondent Southern Refrigerated Transport's letterhead, releasing claimant to return to work without restrictions on November 19,

2002. Claimant gave undisputed testimony that respondent required both he and Dr. Smith to sign this document before he could return to work.

We find that Dr. Smith's release dated November 19, 2002 establishes that claimant's healing period ended that day. We find that claimant was totally incapacitated from earning wages from September 20, 2002, the last day that he worked before seeking medical treatment, until November 19, 2002.

In conclusion, for the reasons set out above, we find that claimant incurred a compensable hernia injury on September 18, 2002, that respondents are responsible for all reasonable and necessary medical treatment related to the injury and that he is entitled to temporary total disability benefits from September 20, 2002 through November 19, 2002. Accordingly, the Administrative Law Judge's decision is reversed.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since claimant's injury occurred after July 1, 2001, claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-

715(Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of $500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Special Commissioner Wilson dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury in the form of a hernia. Based upon my review of the evidence in light of the Court of Appeals remand, I find that the claimant still cannot prove by a preponderance of the evidence that he sustained a compensable injury.

In my opinion, a review of the evidence demonstrates that the claimant cannot prove that he sustained a compensable hernia. The mechanics of the

injury as related by the claimant are not consistent with the evidence in the record. Cliff Brown, the safety manager for the respondent employer testified that he was familiar with the way a handle on a trailer works. He stated that the weight in the trailer does not make the handle move. It was the claimant's testimony that the forklift drove into the trailer and made the handle swing around. Mr. Brown indicated that the handle to jack down a dolly on a trailer is geared so that the handle has to move many times for the trailer to move very much at all. The reverse is also true. If there was pressure from the trailer on the handle, that means that if the forklift caused the dolly to move at all it would have swung the handle wildly. Mr. Brown specifically testified regarding his knowledge in general to the jack handles.

> A. [Mr. Brown] Okay, the landing gear themselves, yes. But the crank system that I'm talking about is all but an independent. It's just a gear that drives it up and down. And it locks into position wherever you stop at because the strength and the weight of the gear.
>
> Q. [Mr. Ryburn] So if the handle was at the top when you stopped, it is going to stay at the top of its arc?
>
> A. That's correct. Unless like I said some small slack. If there would be small slack, but that

> would be it. But there's nothing as far as the trailer itself causing movement. In other words, if you stopped it here and there was a slack in the gear, it may roll back a gear, but that's all its going to do.
>
> Q. Isn't it such that you move that handle. . . . Isn't it geared so that when you move that handle you have to move it a lot of times around for that trailer to move at all?
>
> A. Yes, sir, that's why I say it's a dual speed.
>
> Q. So it would be a reverse situation for the gears to make that handle move. The handle to make the gears to move?
>
> A. The handle to make the gears move. I've never seen the gears make the handle move.

According to the claimant, the jack handle only moved one revolution. The claimant stated that he was using the handle to jack the dolly down when someone tapped him on the shoulder. He said that he turned around to look at who tapped him and at the same time the handle swung and hit him on the leg. However, it appears that the claimant would have had to be standing with the handle in between his legs for it to hit him in the leg. If he was standing with the handle in between his legs, he could not have moved the handle at all. In my opinion, the claimant's history of how the alleged

injury took place is suspect at best and I find that the claimant is not a credible witness. I give more weight to the testimony of Mr. Brown and find that the claimant's injury could not have occurred in the manner the claimant said. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id. The Court of Appeals, in their remand order, specifically admonished the Commission from resorting to speculation. In my opinion, it requires conjecture and speculation to believe the incident occurred in the manner the claimant testified. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

The hernia statute requires that there must be an immediate force or sudden effort or strain directly to the abdominal wall. According to the claimant's testimony, there was no force, sudden effort, or severe strain to the claimant's abdominal wall, but the force of the handle hit the claimant in the leg. In my opinion, without the force to the abdominal wall, the claimant cannot meet the requirements of a compensable hernia.

Furthermore, the medical evidence simply does not support a finding that the claimant sustained a compensable injury. The record is void of any medical evidence that contains any notation of a scrape, bruise, swelling, redness or any indication that would likely result from a blow such as the one described by the claimant. The claimant testified that the blow was such that he had sit down and recuperate for a while. However, there was no bruising or swelling. The claimant testified that there was some redness, but the redness was not detected by any doctor.

When Dr. Smith first examined the claimant he questioned the claimant's history of how the hernia occurred. Dr. Smith noted, "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."

Simply put, I cannot find that the evidence supports a finding that the claimant sustained a compensable hernia. Therefore, I must respectfully dissent from the majority opinion.

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MIKE WILSON, Special Commissioner