NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213578

KENNY PARDUE, EMPLOYEE	CLAIMANT
WAL-MART, INC., SELF-INSURED EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 13, 2005

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

Claimant represented by HONORABLE JAY TOLLEY, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by HONORABLE DAVID J. WALL, Attorney at Law, Fayetteville, Arkansas.

Decision of the Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

This case comes on for review by the Full Commission on appeal by respondents from an opinion filed herein by an Administrative Law Judge on September 9, 2004.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On October 15, 2002, the relationship of employee-self insured employer existed between the parties.

3. On October 15, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of $418.00 for total disability and $314.00 for permanent partial disability.

4. The claimant has proven by the greater weight of the credible evidence that, on October 15, 2002, he sustained a compensable injury that was in the form of a ventral hernia. Specifically, he has proven by medical evidence, which is supported by objective findings, the actual existence of this physical injury. He has further proven by the greater weight of the credible evidence that this injury arose out of and occurred in the course of his employment, that this injury immediately followed as the result of sudden effort and severe strain on his abdominal wall, that this injury caused severe pain in the hernial region, that this pain caused him to cease work immediately, that he provided notice of the occurrence of this injury to his employer within 48 hours after its occurrence, and that the physical distress following the occurrence of this hernia was such as to reasonably require the attendance of a licensed physician with (sic) 72 hours after the occurrence.

5. The medical services provided to the claimant for his compensable hernia, by and at the direction of Dr. Abernathy and Dr. Eck, constitutes reasonably necessary medical services within the meaning of Ark. Code Ann. § 11-9-508 and § 11-9-523(b). The respondent is liable for the expenses of these services, subject to the medical fee schedule established by this Commission.

6. The medical services provided to the claimant by and at the direction of Dr. Konstantin Berestnev were provided at the express order and direction of the respondent and apparently under a contract between the respondent and Dr. Berestnev as its company physician. Thus, the respondent is liable for the expense of the medical services

provided to the claimant by and at the direction of Dr. Berestnev. This liability is subject to any contractual relationship between these parties or, if no such relationship exists, the medical fee schedule of this Commission.

7. The claimant was rendered temporarily disabled as a result of the effects of his compensable hernia for the period beginning April 7, 2003, and continuing through May 18, 2003. However, the respondent is not liable for the payment of any temporary total disability benefits during any portion of this period wherein the claimant received his regular salary.

8. The provisions of Ark. Code Ann. § 11-9- 411 apply to any benefits herein awarded which may heretofore have been paid under a policy of group insurance maintained through the respondent.

9. The respondent has denied the occurrence of any compensable injury to the claimant's abdomen and controverts this claim in its entirety.

10. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all temporary total disability benefits herein awarded to the claimant.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct 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.

We therefore affirm the September 9, 2004 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. 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 the claimant's injury occurred after July 1, 2001, the 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

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion. finding that the claimant sustained a compensable hernia for which he is entitled to medical and indemnity benefits. Based upon my de novo review of the entire record, I find that the claimant has failed to meet his burden of proof. Therefore, I find that the decision of the Administrative Law Judge should be reversed.

The credible evidence reveals that the claimant experienced pain in his abdomen when he was lifting a 50 pound sack of potatoes on October 15, 2002. The claimant described his immediate reaction to this event as "...you kind of feel pain and stop for a second, and then that kind of startled me, What was that?" The claimant reported this incident to his supervisor and promptly completed an accident report. The claimant did not request nor did he seek medical attention at that time. On November 15, 2002, the claimant told respondents that he still had pain in his stomach and he was sent to the company physician, Dr. Berestnev. According to the claimant's testimony, he felt a "little bump" there at that time.

On the AR-3 completed by Dr. Berestnev, the brief description of the accident states:

> Pt. states he was lifting bags of potato's and felt pain in his [left] abdominal area [with complaints of] a small knot.

Likewise in the letter to the third party administrator handling the respondents workers' compensation claims, Dr. Berestnev provided the following history:

> Mr. Pardue is here today for the injury of 10-15-02. The patient stated that he was lifting a bag of potatoes and felt pain in his left abdominal area and also felt the sensation of a small knot in his left abdominal area. He denies any previous surgeries. He denies having hernias diagnosed.

Dr. Berestnev examined the claimant on November 15, 2002, November 22, 2002, and December 6, 2002, and never palpated a hernia. Dr. Berestnev's medical records clearly state that there is no evidence of a hernia or hernia sac in each of his medical reports. Due to the claimant's continued complaints of subjective pain and Dr. Berestnev failure to observe any objective findings to support these complaints, Dr. Berestnev ordered a CT scan of the claimant's abdomen. This exam which was conducted on December 12, 2002, revealed the following findings:

> A small marker was placed on the area where the patient is point tender.
>
> There are a few calcified granulomas scattered throughout the spleen. Spleen size and architecture is otherwise normal. Liver size and architecture is normal. Biliary ductal system is not dilated. The region of the gallbladder is unremarkable. Pancreas size and architecture is normal. There is no free fluid in the abdomen. The adrenal glands are normal size. There are no renal calcifications. Both kidneys function normally. There are no renal masses. There is

> no evidence for pelvocaliectasis or ureterectasis. The aorta is not aneurysmal. There is no evidence for perlaortic or retiocval lymphadenopathy. **The anterior abdominal wall musculature is bilaterally symmetrical and otherwise unremarkable.** There is no abnormal fluid signal in the subcutaneous fat. Specifically, the area directly under the skin marker is normal.

(Emphasis added)

After receiving the CT results, the claimant did not seek any additional medical treatment until he sought out is family doctor, Dr. Abernathy, on March 13, 2003. Dr. Abernathy's medical record is almost illegible. However, I am able to discern that the claimant sought treatment from Dr. Abernathy for allergies as well as a second opinion on his stomach. Dr. Abernathy recorded the following history:

> W/C MD (Wmart) - Lowell for abd. pain [after] lifting 50lb pallet of potatoes. in [left] mid abd. - [diagnosed] abd strain - slowly better - Ct reported to pt as [negative].

Dr. Abernathy's actual examination findings are too difficult to decipher. However, he assessed the claimant with having a questionable ventral hernia and referred the claimant to Dr. Gareth Eck, a general surgeon.

Dr. Eck examined the claimant on April 7, 2003, at which time he recorded the following history:

> The patient is a 40-year-old gentlemen who noted a bulge and severe pain off to the left of his navel. He states this has gone on for several months and only recently has he developed a bulge in the area. On examination

> the patient has an epigastric ventral wall hernia which appears just to the left of the midline and is just above the navel. It is possible this is an umbilical hernia but, appears to be ventral wall hernia or a tear in the fascia above this. Mr. Pardue presents for repair at this time.

Since the claimant alleges that he sustained a hernia, the claimant must prove by a preponderance of the evidence that his injury was in the form of a hernia, which arose out of an in the course of his employment and that it satisfies the five requirements of Ark. Code Ann. § 11-9-523(a). These requirements are:

(1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or 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;

(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.

I am not persuaded by the evidence in the record to find that the claimant's hernia diagnosed in March of 2003 arose out of and in the course of his employment. Moreover, I find it highly questionable as to whether the claimant actually had pain

sufficient enough to cause him to cease work on October 15, 2002, or that his physical distress following the lifting incident on October 15, 2002, was such to require the attendance of a licensed physician within 72 hours after the occurrence. Accordingly, I find that the decision of the Administrative Law Judge must be reversed.

As noted by Professor Lason in Larson', Workmen's Compensation Law, § 39.70 the purpose of the specific hernia statutes is to distinguish between work-related on and non-work related hernias. The claimant testified that he stopped work "for a second." In my opinion, this testimony is simply to vague and indefinite to find that the claimant's pain caused the claimant to cease work immediately. Obviously, the claimant was physically able to continue working after this incident and he continued to work for at least a month before he even sought medical attention. Even if I were to give the claimant the benefit of the doubt, which we are specifically prohibited from doing, the claimant's testimony only supports a finding that the claimant felt the pain upon lifting the sack of potatoes, and he stopped long enough to ask himself, "What was that?" In my opinion, asking oneself "what was that" is not the equivalent of ceasing work.

Furthermore, I am unable to find that the claimant's physical distress on October 15, 2002, was sufficient enough to

require the attendance of a physician within 72 hours after the occurrence. The record clearly reflects that the claimant did not seek or request medical attention until one month after his lifting incident. While it is true that the courts have interpreted this provision as only requiring medical treatment and not actually obtaining medical treatment, I cannot find that there is anything about the claimant's condition that required medical attention on October 15, 2002, or within three days thereafter. The first physician to examine the claimant was Dr. Berestnev. Dr. Berestnev noted in his first physical exam of the claimant that he was in "no acute distress." Although the claimant's abdomen was tender to palpation, there was nothing about the claimant's examination to indicate that medical treatment had previously been warranted. Moreover, even though the claimant reported the "sensation of a small knot" at that time, Dr. Berestnev was never able to discern the presence of a hernia. In addition, the CT scan performed on December 12, 2002, clearly indicated that the claimant's abdominal wall musculature was symmetrical and otherwise unremarkable. Finally, I find the history claimant provided to Dr. Eck on April 7, 2003, is very telling in this regard. According to this history, the claimant "only recently developed a bulge in this area." Accordingly, I find that there was nothing about the claimant's lifting episode

on October 15, 2002, which resulted in a hernia that required the attendance of a physician within 72 hours.

In reaching this finding, I acknowledge that the claimant was eventually diagnosed with a hernia which necessitated surgery. However, this diagnosis was made five months after the claimant’s lifting incident. Given the intervening medical treatment and the lack of any objective evidence of a hernia at that time I find that this ultimate diagnosis is simply too remote from the work related occurrence to find that the hernia arose out of and in the course of the claimant’s employment. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. McKINNEY, Commissioner