

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509424

CRUZ TORRES, EMPLOYEE	CLAIMANT
SUPERIOR INDUSTRIES, EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 21, 2006

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of the administrative law judge: Affirmed as modified.

OPINION AND ORDER

The respondent appeals from an administrative law judge's opinion filed on February 3, 2006. The administrative law judge found, in pertinent part, "On May 26, 2005, the claimant sustained a compensable umbilical hernia. The claimant has proven all of the statutory requirements of Ark. Code Ann. §11-9-523 to the satisfaction of this Commission. The medical services provided to the claimant by and at the direction of Dr. Wayne Hudec, 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. The claimant has proven that he has been rendered temporarily totally disabled, as the result of the effects of his compensable hernia for the period beginning August 8, 2005, and continuing through a date yet to be determined. However, the claimant's entitlement to temporary total disability benefits is limited to a maximum of twenty-six weeks."

After reviewing the entire record *de novo*, the Full Commission affirms as modified the opinion of the administrative law judge. The Full Commission finds that on May 26, 2005, the claimant sustained a compensable umbilical hernia. The claimant has proven all of the statutory requirements of Ark. Code Ann. §11-9-523 to the satisfaction of this Commission. We find that the medical services provided to the claimant by and at the direction of Dr. Wayne Hudec, 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. However, the Full Commission finds the claimant has proven that he has been rendered temporarily totally

disabled, as the result of the effects of his compensable hernia for the period beginning September 6, 2005, and continuing through a date yet to be determined. We further find that the claimant's entitlement to temporary total disability benefits is limited to a maximum of twenty-six weeks.

I. History

The claimant, age 43, (7/30/62) had worked for the respondent since February 2, 1998. He is unable to speak English and requires an interpreter. According to the claimant, his job duties required that he take down rims and palletize them. In May, June and July of 2005, the claimant was required to perform these same job duties. The claimant maintains that he sustained a hernia during the latter part of May of 2005, while removing 50-pound wheel rims from rods. Specifically, according to the claimant, he sustained an injury to his stomach when he grabbed a falling rim, as he felt a real sharp pain around his navel. According to the claimant, he reported the incident to Francisco Santana, one of the leaders on the line, who took him off the line so that a report could be made of the incident. The claimant

maintains that although they went to the office and talked to Randy Johnson, Mr. Santana completed the paperwork. Thereafter, the claimant returned to work and began taking down the lighter rims.

The Physician's First Report shows that the claimant first received treatment for his injury on August 5, 2005 under the care of Dr. Garland M. Thorn due to abdominal pain after heavy lifting. He assessed the claimant as having an umbilical hernia, for which he prescribed Celebrex. Although Dr. Thorn returned the claimant to work, he directed the claimant not to lift more than 5 pounds.

On August 11, 2005, the claimant underwent evaluation with Dr. Wayne Hudec. He reported that the claimant had experienced a bulge at his umbilicus since the spring of 2005, which had caused him discomfort, especially with any vigorous activity and certain maneuvers. Dr. Hudec's assessment was, "symptomatic incarcerated umbilical hernia in an otherwise healthy male," for which he recommended surgery.

On October 19, 2005, the claimant underwent hernia repair with Dr. Hudec. Upon discharge, Dr. Hudec instructed

the claimant to avoid straining, heavy lifting, and vigorous exercise." He further instructed the claimant to call and follow-up with Dr. Kellar on Monday.

A hearing was held in this matter on November 21, 2005. During the hearing, the claimant gave testimony. According to the claimant, at the time of the incident, he immediately experienced a sharp pain in his stomach around the navel area. Immediately after this, the claimant advised Francisco Santana, his line leader, about the incident. According to the claimant, shortly thereafter, he was taken to the office and a report was filled out concerning the incident. The claimant testified that he talked to Randy Johnson, who was in the office while the paperwork was being completed. He further testified that it took approximately 45 minutes to complete the paperwork, and thereafter he returned to work, but was required to perform lighter duty work. The claimant essentially testified that Mr. Johnson advised that they would allow him to be seen by a doctor if his symptoms worsened. According to the claimant, he sought treatment for his injury from the respondent's doctor about a month (first record of treatment is dated August 5, 2005) after

the incident because his navel began to "poke out more." The claimant admitted to having injured his shoulder earlier, but he denied ever having had any problems with a hernia before the alleged incident. The claimant also admitted to being confused about the date of his injury. However, the claimant essentially testified that he is convinced that the incident initially happened in May because that is the day he started to experience pain and it is when he noticed that his navel was sticking out. On cross-examination, the claimant admitted that at the time of his deposition, he had not had surgery for his hernia because he needed to get his diabetes under control. The claimant further admitted that he last worked for the respondent on September 6, 2005, but he denied having drawn short-term disability or unemployment benefits. He also admitted to not requesting treatment until July 27, 2005. The claimant also admitted to having missed work from the time of his accident until September 6, 2005. According to the claimant, if he was not feeling well due to his injury, he would take vacation leave during the aforementioned period of time. The claimant testified that his accident

occurred around 11:00 at night, as he worked the second shift. The claimant also admitted to working the remainder of his shift that night, and thereafter until around September 6, 2005, except for maybe taking some vacation leave as previously stated. The claimant admitted to treating with Drs. Thorn and Hudec.

On redirect examination, the claimant testified he quit working for the respondent on September 6, 2005 because Cricket (Robert Siverly) laid him off. According to the claimant, Cricket told him to get himself taken care of, and when he was ready, he could come back to work.

Randy Johnson was called as a witness in behalf of the respondent. According to Mr. Johnson, he has worked for the respondent some 10 years, and as of the date of the hearing, his current position was that of catwalk coordinator/team leader. Mr. Johnson admitted to being the claimant's team leader from May through September of 2005. According to Mr. Johnson, the claimant worked as an unloader wherein he essentially removed the wheels and put them on a conveyor belt. He admitted that the claimant initially complained about some physical problems, but he was not sure if this

occurred in May, but he was certain that it was hot when the claimant told him he felt something pulling in his stomach. Mr. Johnson testified that after this date, Francisco Santana, Robert Siverly, and he met with the claimant in the maintenance office because he was experiencing pain. However, he denied that this meeting took place on July 27, 2005 or being involved in that meeting. Mr. Johnson essentially testified that their meeting took place on May 26, 2005, at which point Mr. Santana completed an EMT log of the incident. According to Mr. Johnson, when they met with the claimant about his complaints, a log of any type had not been completed. Mr. Johnson testified that during his first conversation with the claimant about his symptoms, he simply asked if he was okay and went about his business because he was tied up that night. As to the meeting on May 26, 2005, Mr. Johnson could not recall if the claimant requested medical treatment.

Robert Siverly, general supervisor, for the respondent gave testimony. According to Mr. Siverly, his nickname is "Cricket." He admitted to first becoming involved in a meeting with the claimant concerning stomach and/or physical

problems around the second or third week in May, at which point the EMT report was made. Mr. Siverly testified:

Q. What was the purpose or why was there a meeting on the 26th of May?

A. Cruz was saying that his stomach was hurting, that he was wanting to report, have it officially logged that his stomach was hurting from prior days of pulling a Harley and Francisco was checking him, and then Randy also checked him after Francisco did.

Q. Now, when you say Francisco was checking him, does he have any kind of -

A. He's the first responder.

Q. Is he a licensed EMT, if you know?

A. No.

Q. And on this date, did Mr. Torres request medical treatment?

A. No.

Prior to the hearing, a prehearing conference was held on October 24, 2005, and as a result, a Prehearing Order was entered in this matter on October 27, 2005. The following stipulations were submitted by the parties, and accepted by the administrative law judge.

1. On all relevant dates, between May 26, 2005 and June 28, 2005, the relationship of employee-self insured employer-TPA existed between the parties.

2. The appropriate weekly compensation rates are \$466.00 for total disability and \$350.00 for permanent partial disability.

3. The claim is controverted in its entirety.

By agreement of the parties the issues to be litigated at the hearing were limited to the following:

1. Whether the claimant sustained a compensable injury in the form of a hernia.

2. The claimant's entitlement to the payment of medical expenses, temporary total disability from August 8, 2005 through to a date yet to be determined, and attorney's fees.

The claimant contended he was injured on June 1, 2005.

"His abdomen was injured when he was(sic) tried to stop a wheel from falling. The extreme weight of the wheel caused him to injure his abdomen."

In contrast, the respondent contended that the claimant did not sustain an injury arising out of and in the course of his employment as defined in the Arkansas Workers' Commission Act. If the claimant is contending he sustained a compensable hernia, the respondents contend he did not meet the required elements including, but not limited to, reporting the incident as required by law and ceasing work. In the event that the claimant is contending he has an injury other than a hernia, the respondent states in the

alternative that if he did sustain an injury, which is denied, the claimant failed to report this until August 8, 2005, and the claimant should not be entitled to any benefits prior to that date.

After a hearing before the Commission, the administrative law judge found, "On May 26, 2005, the claimant sustained a compensable umbilical hernia. The claimant has proven all of the statutory requirements of Ark. Code Ann. §11-9-523 to the satisfaction of this Commission. The medical services provided to the claimant by and at the direction of Dr. Wayne Hudec, 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. The claimant has proven that he has been rendered temporarily totally disabled, as the result of the effects of his compensable hernia for the period beginning August 8, 2005, and continuing through a date yet to be determined. However, the claimant's entitlement to temporary total disability benefits is limited to a maximum of twenty-six weeks."

The respondent appeals to the Full Commission.

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;
- (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.

In the present matter, the administrative law judge found, "On May 26, 2005, the claimant sustained a compensable umbilical hernia. The claimant has proven all of the statutory requirements of Ark. Code Ann. §11-9-523 to the satisfaction of this Commission." The Full Commission affirms this finding.

We find that the claimant incurred a compensable hernia as a result of a sudden effort upon grabbing a falling rim that weighed approximately 50 pounds, on or about May 26, 2005, as evidenced by the testimony of the claimant, Mr. Johnson, Mr. Siverly, and the EMT log. The claimant credibly testified that he experienced severe pain in the stomach around the navel area, which immediately thereafter caused him to cease work. Within a few minutes after the incident, the claimant reported the matter to his team leader and was instructed to go to the office. The claimant further testified that after this incident he continued to experience stomach pain and his navel began to "poke out." The claimant also credibly testified that it took approximately 45 minutes for the report to be filled out. Thereafter, the claimant returned to work wherein he was required to perform lighter job duties.

Although the claimant's pain in the area of the hernia did not intensify such that medical treatment was required within 72 hours, the Arkansas Court of Appeals has held that we cannot be hypertechnical when construing the statute

regarding hernia. Darling Store Fixtures v. McDonald, 54 Ark. App. 60 922 S.W.2d 748 (1996).

Specifically, in Cagle v. Fabricating & Steel, Inc. v. Patterson, 42 Ark. App. 168, 856 S.W.2d 30 (1993), the Court of Appeals said:

Arkansas Code Annotated § 11-9-523(a) requires a showing 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." A claimant need not prove that he was actually attended by a physician within 72 hours after the injury; instead, the statute provides only that the physical distress following the occurrence of the hernia was such as to require the attendance of a physician within the 72-hour-period. Cagle Fabricating & Steel, Inc. v. Patterson, 36 Ark. App. 49, 819 S.W.2d 14 (1991), rev'd on other grounds, 309 Ark. 365, 830 S.W.2d 857 (1992). [Emphasis in the original.]

In the present matter, we find the physical distress experienced by the claimant following the occurrence of the hernia was such, so as to require the attendance of a physician within the 72-hour-period. Although the record shows that the claimant did not seek medical treatment until more than two months after the occurrence, the claimant continued to experience increasing stomach pain and a "bulging navel" during this time. The claimant also

testified that he missed work during this period of time, as he would take vacation leave when the pain became too severe for him to work. Therefore, in light of all of the foregoing, we find that the claimant's physical distress was such to require the services of a physician within 72 hours after the occurrence.

In sum, we find that it has been shown to the satisfaction of the Workers' Compensation Commission that the claimant suffered a compensable hernia in the course and scope of his employment. Accordingly, the Full Commission affirms the administrative law judge's finding of a compensable hernia.

B. Medical treatment

The administrative law judge found, "The medical services provided to the claimant by and at the direction of Dr. Wayne Hudec, 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."

The Full Commission also affirms this finding, as no evidence has been presented to support a finding to the

contrary. Specifically, we find that all the treatment rendered by Dr. Hudec was administered in an attempt to diagnosis, treat, and repair the claimant's work-related hernia.

C. 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).

The administrative law judge found, "The claimant has proven that he has been rendered temporarily totally disabled, as the result of the effects of his compensable hernia for the period beginning August 8, 2005, and continuing through a date yet to be determined. However, the claimant's entitlement to temporary total disability benefits is limited to a maximum of twenty-six weeks." The Full Commission disagrees in part with this finding. We find that the preponderance of the credible evidence shows that this finding should be modified so as to award the claimant temporary total disability from September 6, 2005

until a date yet to be determined. Although the administrative law judge found that the evidence shows that the respondent ceased providing the claimant with limited or light duty employment on August 8, 2005, we disagree with this finding. Here, the instant claimant credibly testified that Cricket laid him off on September 6, 2005 until he could get himself taken care of and was ready to return to work. Prior to this, on August 5, 2005, the claimant sought treatment from Dr. Thorn due to abdominal pain. On October 19, 2005, the claimant underwent hernia repair with Dr. Hudec. After his surgery, Dr. Hudec directed the claimant to avoid straining, heavy lifting, and vigorous exercise. The Full Commission finds that these restrictions rendered the claimant totally disabled from performing regular gainful employment. Hence, we find that the administrative law judge correctly noted that the claimant's inability to speak English, limited education, and limited work skills, have effectively restricted him to heavy manual labor type positions. Since the October 19, 2005 medical note, there is no other medical statement or evidence indicating that the claimant has been released from these restrictions or

otherwise returned to full duty work. Therefore, based on all of the foregoing evidence, we find that the claimant has proven by a preponderance of the credible evidence that he has continued within his healing period from the effects of his compensable hernia and suffered a total incapacity to earn wages beginning September 6, 2005 and continuing through to a date yet to be determined. However, the statutory maximum of 26 weeks of benefits applies to such temporary total disability.

III. Conclusion

Based on our *de novo* review of the entire record, the Full Commission finds that on May 26, 2005, the claimant sustained a compensable umbilical hernia. The claimant has proven all of the statutory requirements of Ark. Code Ann. §11-9-523 to the satisfaction of this Commission. We find that the medical services provided to the claimant by and at the direction of Dr. Wayne Hudec, 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. However, the Full Commission finds the claimant has proven that he has been

rendered temporarily totally disabled, as the result of the effects of his compensable hernia for the period beginning September 6, 2005, and continuing through a date yet to be determined. We further find that the claimant's entitlement to temporary total disability benefits is limited to a maximum of twenty-six weeks.

The claimant's attorney is entitled to maximum fees for legal services as provided by Ark. Code § 11-9-715 (Repl. 2002).

For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500.00), pursuant to Ark. Code Ann. §11-9-715 (Rep. 2002).

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding the claimant has proven by a preponderance of the evidence that he sustained a compensable umbilical cord hernia on May 26, 2005. My carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove all five of the statutory requirements for establishing a compensable hernia.

Ark. Code Ann. §11-9-523 requires that in order to establish a compensable hernia, there must be severe strain or application of force directly to the abdominal wall accompanied by severe pain in the hernial region which causes the employee to cease work immediately. In addition, notice of the injury must be given within 48 hours, and the physical distress caused by the injury must require the attendance of a licensed physician within 72 hours.

The claimant failed to meet all of the requirements of Ark. Code Ann. §11-9-523. In particular, the physical distress caused by the claimant's alleged injury

did not require the attendance of a licensed physician within 72 hours.

The record reveals that the claimant continued to work the remainder of his shift after he allegedly sustained a hernial injury at approximately 11:00 p.m. on the evening of May 26, 2005. Further, with the exception of some vacation time, the claimant continued to perform his normal work activities without restrictions until he first sought medical treatment on August 5, 2005, and thereafter with restrictions until September 6, 2005.

The claimant testified that his initial pain was above the area of his hernia, and he admitted that this pain was not severe. This is corroborated by the uncontroverted fact that the claimant completed his shift after the onset of his abdominal pain.

Finally, the claimant waited for 2 months before he finally sought medical treatment for his alleged injury. The claimant's general supervisor, Mr. Robert Siverly, credibly testified that medical treatment was offered to claimant at the time of his initial complaint in May of

2005. Mr. Siverly further testified that the claimant refused medical treatment at that time.

In Ayres v. Historic Preservation Assoc., 24 Ark. App. 40, 747 S.W.2d 587 (1988), the court reversed the Commission's denial of compensation for a hernia the claimant suffered while employed with Historic Preservation Associates. The claimant in that case failed to cease work immediately after the onset of his symptoms, which were reportedly not severe, but sudden. In addition, the claimant reported the incident in a timely way; however, he failed to procure medical treatment for his condition within 72 hours. Therefore, the Commission found that the claimant had failed to meet the statutory requirements set forth in Ark. Code Ann. §11-9-523. The court, in reversing the Commission, found that where the claimant immediately reported what he perceived to be a hernia, made arrangements to see a physician as soon as practicable thereafter, and upon seeing a physician, was diagnosed affirmatively with a hernia for which surgery was required, established by a preponderance of the evidence that the claimant had complied with the statutory requirements of Ark. Code Ann. §11-9-523.

The present case is consistent with Ayres, supra, in that while the claimant did not describe his onset of pain as severe, he reported the alleged incident shortly after it occurred. Thereafter, as with the claimant Ayres, supra, the claimant resumed his work activities in a lighter capacity throughout the remainder of his shift. However, whereas the claimant in Ayres, supra, did not return to work afterwards and sought medical attention as soon as possible, the claimant in the present claim resumed his normal work activities and did not seek medical treatment for 2 months following the alleged incident. Moreover, the claimant in this claim initially refused the offer of medical treatment.

Based on the above and foregoing, the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable umbilical cord hernia on May 26, 2005, in that he has failed to meet the requirements of Ark. Code Ann. §11-9-523. While it is true that a claimant need not prove that he was *actually* attended by a physician within 72 hours after the injury, the relevant statute provides that the physical distress following the occurrence of the hernia must be such as to *require* the attendance of a

physician within the 72-hour period. Darling Store Fixtures v. McDonald, 54 Ark. App. 60, 922 S.W.2d 748 (1996); citing, Cagle Fabricating and Steel, Inc. v. Patterson, 36 Ark. App. 49, 819 S.W.2d 14 (1992); see also, Ark. Code Ann. §11-9-523. The claimant having continued to work for 2 months before he sought medical treatment for his condition demonstrates that the degree of physical distress following the alleged occurrence of his hernia did not require the attendance of a physician within the 72-hour period following the incident. Therefore, I must respectfully dissent from the majority opinion and find that the claimant has failed to meet his burden of proof.

KAREN H. MCKINNEY, Commissioner