

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511565

FREDDIE N. WHITE, EMPLOYEE	CLAIMANT
GLAZE ENTERPRISES, INC., EMPLOYER	RESPONDENT
BRIDGEFIELD CASUALTY INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JULY 27, 2006

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

Claimant represented by HONORABLE CHIP LEIBOVICH, Attorney at Law, Bryant, Arkansas.

Respondent represented by HONORABLE MICHAEL E. 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 April 10, 2006.

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

1. There was an employer-employee relationship on October 5, 2005.
2. The compensation rates are \$200/154.

3. The claimant has failed to prove by a preponderance of the evidence that he has sustained a compensable hernia on October 5, 2005 or on October 14, 2005.

4. Since the claim was not found to be compensable, respondents are not liable for medical benefits, temporary total disability benefits or attorney's fees.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority's opinion finding the claimant did not sustain a compensable hernia injury on either October 5 or October 14, 2005. After a de novo review of the record, I find that there is insufficient evidence to find the

claimant sustained a hernia on October 5, 2005. However, I find that he sustained a compensable bi-lateral hernia on October 14, 2005. I further find that the claimant should be entitled to temporary total disability benefits associated with that injury.

The claimant argues that he sustained an injury on October 5, 2005 and that he sustained a compensable hernia on October 14, 2005. The Administrative Law Judge rejected this argument, indicating that she did not find the claimant to be a credible witness. She found that with regard to the October 5, 2005, incident, the claimant had not met the requirements of sections (1), (4), and (5) of Ark. Code Ann. §11-9-523(a). She further found that with regard to the October 14, 2005, incident, the claimant had not met the requirements of sections (1), (3), and (4) of Ark. Code Ann. §11-9-523(a). The Majority now affirms and adopts this decision as their own. After a de novo review of the record, I find that the decision of the Administrative Law Judge should have been affirmed in part and reversed in part.

I agree with the conclusion that the October 5, 2005, incident did not satisfy the provisions of Ark. Code Ann. §11-9-523(a). I also find that the claimant did not sustain a hernia on October 5, 2005. The claimant testified that his pain subsided by October 6, 2005, and that he did not need to seek medical attention until after the October 14, 2005, incident, indicating that he simply sustained a strain or minor injury on October 5, 2005. The claimant testified he suffered from a severe pain after lifting boxes and performing his tasks of wrapping chicken on October 14, 2005. He further indicated that while the pain from the October 5, 2005, incident quickly subsided, on this occasion it persisted. It is undisputed that he reported having a suspected hernia to Simpson, Taylor, Vacca and subsequently to Glaze. Furthermore, it is undisputed that shortly thereafter he was diagnosed with having a hernia which ultimately required treatment in the form of surgery. Accordingly, I find that on October 14, 2005, the claimant did sustain a compensable hernia injury, and that

the injury satisfies the provisions of Ark. Code Ann. §11-9-523(a).

I find the present case to be analogous to the case of Cooper v. McBurnery Corporation, 72 Ark. App. 332, 39 S.W.3d 1(2001). In Cooper, the claimant sustained an injury on April 11, 1998. The claimant's co-worker testified by deposition that on April 11, 1998, the claimant told him he had, "strained his back or stomach or something." Despite this injury, the claimant worked his full 12 hour shift and worked the following night, until, in the early morning hours of the shift, the claimant complained that his injury bothered him when urinating. The claimant continued to work without performing strenuous duties, but eventually had to stop. The claimant's roommate testified that the same night, the claimant noticed a lump in his groin area. Id.

The claimant testified that he injured himself on April 13, 1998, while lifting bags of refract. He further testified that his pain on April 11, 1998, was like a "stretching" and that the pain on April 13, 1998, was "like a burn." However, when he sought medical attention he

reported that he first noted discomfort in his groin on April 11, 1998. On the AR-C form, the claimant indicated that his injury occurred when he was, "pulling and setting 20 foot tubes." Finally, he gave statements to an insurance adjuster indicating that he noticed the pain on April 11, 1998, but that he continued to work because he thought he had a pulled muscle. He also told her he did not stop working until Monday night when his pain worsened. Id.

The Administrative Law Judge found the claimant had sustained an injury on April 11, 1998, but that it did not amount to a compensable hernia. The Administrative Law Judge also found that the April 13, 1998, incident did qualify as a compensable hernia. The Commission then reversed the decision of the Administrative Law Judge, finding that the claimant sustained a hernia on April 11, 1998, and that because the claimant did not satisfy the provisions of Ark. Code Ann. §11-9-523(a), the hernia was not compensable. The Commission likewise concluded that had the hernia occurred on April 13, 1998, the hernia would be compensable.

On appeal, the Court of Appeals found that the claimant did not sustain a compensable hernia on April 11, 1998. They further found that the claimant did not sustain a hernia on April 11, 1998. Finally, they found that the claimant had sustained the hernia on April 13, 1998, and that the hernia was compensable. In making these findings, the Court of Appeals specifically noted that the claimant initially reported that the hernia occurred on April 11, 1998. However, despite the claimant's apparent belief that his hernia was due to the April 11, 1998 injury, they concluded that the claimant's hernia did not occur until April 13, 1998. In making this finding, they noted that the physicians did not note or conclude when the hernia occurred. They further opined that because the severe groin pain and other symptoms arose on April 13, 1998, the medical and factual evidence did not support a finding that the claimant's hernia was due to the April 11, 1998, incident. Id.

In my opinion, the facts of the present case are similar to those in Cooper. Just as in Cooper, the claimant

in the present case reported that his hernia occurred due to his initial injury, despite never having been diagnosed with a hernia. Likewise, in both cases the claimants did not need medical attention prior to their second injury, supporting the finding that they did not sustain hernias at the time of the first injury. However, in Cooper, only a period of a little more than one day lapsed before the second injury, while the claimant in the present case went almost ten days of performing full time work without difficulty before the second incident occurred. I note that the claimant in the present case did indicate that the pain he experienced at the time of the two incidents was the same. However, I also note that the claimant testified that after the first incident the pain subsided, whereas after the second, it did not. Additionally, after the first incident the claimant believed he had only strained a muscle, whereas after the second incident, he immediately was aware he needed to seek medical attention, indicating that he sustained a new and different injury on October 14, 2005. Accordingly, I find that just as in Cooper, the claimant in the present case

likely sustained an injury but did not sustain a hernia at the time of the first accident.

The Majority finds that neither incident satisfies the provisions of Ark. Code Ann. §11-9-523. After a review of the record, I am not persuaded by this argument.

Ark. Code Ann. § 11-9-523(a) (Repl. 2002) provides:

- (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 Administrative Law Judge and now the Majority finds that the claimant did not sustain a compensable injury

on October 5, 2005. They opine that the claimant was not credible and found that the claimant had failed to show that he suffered an injury pursuant to the provisions of Ark. Code Ann. §11-9-523(a). Specifically, they indicate that he did not show the hernia was immediately followed as the result of a sudden effort, severe strain, or application of force to the abdominal wall. Likewise, they find that the claimant did not provide appropriate notice and that the physical distress did not require attendance of a physician within 72 hours of the incident.

While I disagree with the conclusion that the claimant is not credible, I find that the conclusion that he did not sustain a compensable injury on October 5, 2005, is correct. I make this finding because it is clear that the claimant did not sustain a hernia on October 5, 2005. The claimant testified that he thought he had strained a muscle. Likewise, he testified that by the next day the pain had subsided and that he was able to successfully perform his job until October 14, 2005, the time at which the second incident occurred. Additionally, and perhaps most

importantly, there is absolutely no objective medical evidence to show the claimant sustained an injury at that time. As such, I find that the claimant did not sustain a hernia on October 5, 2005.

While I find the claimant did not sustain a compensable hernia on October 5, 2005, I am persuaded that the Administrative Law Judge's finding that the claimant did not sustain a compensable hernia on October 14, 2005, should have been reversed. It is clear from the testimony of the parties and the medical records that the claimant's need for medical attention only arose after the October 14, 2005, incident. Likewise, the evidence indicates that the claimant relayed a specific work-related incident causing injury to both the employer and to the facility providing medical care. Finally, it is clear that the claimant was forced to stop working and had to seek medical care due to his injury on October 14, 2005. Accordingly, I find that pursuant to the criteria of Ark. Code Ann. §11-9-523(a), the claimant sustained a compensable hernia and is entitled to benefits for that injury.

To show a compensable injury, the claimant must first show a compensable injury due to a sudden effort, severe strain, or application of force to the abdominal wall. After a review of the record, I find that on October 14, 2005, such an occasion occurred. Vacca testified that the claimant worked with 35-pound boxes of chicken. He said you would put however many cases of chicken on the cart that you were going to work on for the day. He also indicated that the carts were on rollers. The claimant testified that he was stocking chicken when he felt a "red hot iron" type pain in his groin. The Administrative Law Judge and now the Majority find the claimant failed to show his injury was due to his work-related activities or due to result of sudden effort, severe strain, or the application of force directly to the abdominal wall. However, it is clear from the claimant's testimony that he was able to identify when and how his injury occurred. Furthermore, it is clear that this work-related activity would satisfy the provisions of Ark. Code Ann. §11-9-523(a)(1).

The Majority and the respondents argue that the claimant was unable to give an exact time as to when the hernia occurred. They also point out the testimony of Vacca and Taylor that the claimant said he did not know when the injury occurred. They also note a medical report indicating that the claimant relayed a history of having a hernia for several years. In my opinion, these findings do not show the claimant did not sustain a compensable injury. While the claimant was unable to say an exact time as to when his injury occurred, it is undisputed that he stopped working and "grabbed himself", immediately after he started getting pain in his groin. It is also undisputed that the claimant told Taylor of his pain and asked where to go to the doctor. As the claimant told Taylor and Vacca of his pain and requested medical attention, I find his testimony that he told them of his injury to be credible. I also find that his statements to Vacca and Taylor were sufficient to put them on notice that his injury was work-related. Finally, the claimant testified that he was able to isolate the exact time he presented with pain, indicating he did sustain an

injury as shown by a specific incident. Further corroborating the claimant's explanation for his injuries are the medical records indicating that the claimant attributed his injury to lifting boxes or twisting, both activities that are consistent with his job duties.

I note that the medical records indicate that the claimant related the incident back to the October 5, 2005, incident or due to a pre-existing condition. However, there is simply no objective evidence to indicate that he sustained a hernia prior to October 14, 2005. Additionally, this Commission has noted in the past that no matter how sincere a claimant's beliefs are that a medical problem is related to a compensable injury, such belief is not sufficient to meet the claimant's burden of proof. See, Killenberger v. Big D Liquor, Full Commission Opinion August 29, 1995 (E408248 & E408249); See also, Weaver v. Nabors Drilling USA, Inc., Full Commission Opinion April 13, 2006 (F504966).

Finally, while one medical record does indicate the claimant reported having a past hernia, the claimant

denied relaying such information to the doctor. As there is no other medical report showing that the claimant had previously been diagnosed with a hernia, and the other contemporaneous medical reports indicate the claimant's condition was new and due to lifting boxes, I find it would resort to impermissible conjecture and speculation to find he had a pre-existing hernia. Furthermore, the claimant had a physical prior to starting work and had access to free medical care prior to working for the employer, indicating that he if had such a condition, he likely would have received care for the condition and there would be a record of that treatment. Accordingly, I find that the claimant did not suffer from a pre-existing hernia.

As to the requirement that the claimant suffering pain in hernial region, there appears to be no dispute that the claimant suffered from severe pain as a result of his hernias. Additionally, the evidence is clear that the claimant suffered from such pain. The claimant testified that he felt sharp pain that was like a "red hot iron" in his groin. This is reflected by the claimant's testimony,

and by the medical reports indicating he suffered from pain in the hernial region.

The claimant has further shown that he ceased working immediately after the accident. The claimant testified that immediately after the incident on October 14, 2005, he stopped working and that he "grabbed himself" and started limping. Furthermore, it is undisputed that though the claimant finished working for the day, he did not return to work afterward and that he attributed not returning to the hernia. The respondents argue that this did not constitute cessation of work. However, as previously noted by the Arkansas Court of Appeals, the cessation of work need not be lengthy or continuous, so long as it immediately follows the experience of pain. Osceola Foods, Inc. v. Andrew, 14 Ark. App. 95, 685 S.W.2d 813 (1985); See, also, Min-Ark. Pallet Co. v. Lindsey, 58 Ark. App. 309, 950 S.W.2d 468 (1997). Therefore, I find that the claimant did momentarily stop working that day and then did not return due to the hernia; thereby satisfying the necessary statutory requirement.

The fourth requirement for showing a compensable hernia is that the claimant give notice of the occurrence within 48 hours of the incident. The claimant testified that he notified Simpson, Taylor, and Vacca of the accident immediately after it occurred. In my opinion, this in itself would be enough to satisfy the notice requirement. Additionally, the claimant told Taylor and Vacca of his need to visit a doctor on the day of the injury, and asked where to go to the doctor, indicating that they were aware of the reason for his injury and were alerted to the fact that the injury occurred at work. Likewise, the next day the claimant told Taylor he was unable to work due to his injury. The respondents argue that this did not constitute notice because Taylor was not a manager. However, Taylor testified that he would be in charge of the meat department if other managers were not there. He further testified that in the event of an injury occurring when other managers were not present, he would be responsible for telling either Vacca or Glaze of the injury. Accordingly, he did satisfy the notice requirement. Finally, I note that on October 17, 2005, the

day the claimant learned he was having surgery he told Glaze and Vacca of the incident and that he would be filing a workers' compensation claim. Accordingly, I find that the claimant's notification to the employer was within the required 48 hours of the accident.

Finally, I find that the claimant has shown by a preponderance of the evidence that the October 14, 2005, incident required the attendance of a licensed physician within 72 hours after the accident. I note that the claimant both sought treatment and received treatment within 72 hours of the accident, thus, satisfying the requirements of Ark. Code Ann. §11-9-523.

In conclusion, I find that the claimant likely sustained an injury on October 5, 2005. However, there is not enough evidence to show that injury amounted to a hernia or satisfied the provisions of Ark. Code Ann. §11-9-523(a). I further find that the claimant did sustain a hernia on October 14, 2005, and that the injury satisfied the provisions necessary in proving a compensable hernia. Finally, I find that the claimant was in his healing period

and was unable to work from the time period of October 15 to December 15, 2006. Thus, he should be entitled to temporary total disability benefits for that time.

For the aforementioned reasons I respectfully concur in part and dissent in part.

SHELBY W. TURNER, Commissioner