

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F602407 & F602408

JACQUELINE BAKER, EMPLOYEE	CLAIMANT
SUPERIOR INDUSTRIES, EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 18, 2007

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 Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed July 28, 2006. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on May 10, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable hernia while employed by respondent on March 17, 2005.
3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while employed by the respondent on April 21, 2005.
4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable hernia and compensable back injury.
5. As a result of her compensable hernia the claimant is entitled to temporary total disability benefits beginning September 15, 2005 and continuing through October 27, 2005. Respondent is entitled to a credit for any short-term disability benefits claimant received during this same period of time.
6. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits as a result of her compensable back injury.
7. Claimant's attorney is entitled to the maximum attorney fee on all indemnity benefits.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the July 28, 2006 decision 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 on appeal.

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.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable hernia on March 17, 2005, and a compensable injury to her hips and back on April 21, 2005. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant was employed by the respondent employer as a tool crib attendant. The claimant was responsible for inventorying all the parts that came into the respondent employer's plant as well as placing the items in the appropriate locations within the plant facility. The claimant's job involved lifting and using a cart, dolly or pallet jack to transfer items to the appropriate location. The claimant testified that on March 17, 2005, she had received a pallet with four

rolls of plastic sheeting. One of the rolls fell off of the pallet and she got down on her knees and attempted to push it back onto the pallet. The claimant stated that while she was pushing the roll of sheeting she felt a pop in her right hip area. She notified Randy Johnson, the first responder on the second shift and explained to him what happened. Mr. Johnson suggested that Tammy Massey, another first responder, check on the claimant because of the location of the pain. The claimant provided details of the incident. Both Mr. Johnson and Ms. Massey told her that it sounded like a hernia and she should see a doctor if the pain continued. The claimant did not ask for any medical attention and did not tell either of the first responders that she continued to suffer from pain.

In April of 2005, the claimant was receiving treatment for tendinitis in her left hand. She stated that on April 21, 2005, she was using a dolly to take motors to the buff room when one of the motors rolled off the pallet. The claimant testified that she attempted to force the motor back onto the pallet and she felt a strain that caused her significant pain in her lower back and around her hip area. The claimant paged Mr. Johnson and told him what happened. The claimant's fiancé, Frank Dehner, took the claimant to

the emergency room at Washington Regional Hospital. The claimant underwent x-rays of her lumber spine and her left hip. It was noted that the claimant's lumbar spine exhibited normal alignment with normal vertebral body heights and disc heights that were well maintained and no fractures. Dr. Jennifer Craig evaluated the claimant and diagnosed her with a muscle strain. The claimant received a shot for pain and was instructed to follow up with Dr. Thorn at the appointment that had already been scheduled for the following day due to her tendinitis problems in her hand. The claimant was told to do no lifting until she was cleared by Dr. Thorn. She was also instructed to use crutches as needed.

The evidence demonstrates that the claimant sustained a workers' compensation injury to her back on September 11, 1994, while lifting a tea urn at her employer, Carl's Junior in California. The claimant ultimately received a \$12,000.00 settlement in that case. Following her 1994 back injury, the claimant received treatment from Dr. Kirk Johnson, a chiropractic orthopedist, when she moved to Arkansas. Dr. Johnson first saw the claimant on June 30, 1995. Though the claimant testified that she sought Dr. Johnson's treatment for a mid-back injury, Dr. Johnson noted that the claimant's chief complaints were low left back pain,

left hip pain, and left thigh pain. On July 12, 1995, Dr. Johnson concluded that the claimant had a "chronic unresolved lumbo-sacral and [a] left sacroiliac sprain, which was unresolved..." A February 22, 1996, MRI of the claimant's lumbar spine showed a small left parasagittal disc protrusion at the L5-S1 level, a mild annulus bulge at the L4-5 level, and some mild hypertrophic changes of the facet joints. Dr. Herbert Hamilton, the reading physician, determined that the MRI findings indicated that the claimant suffered from degenerative disc disease at the L5-S1 level. Dr. Johnson concluded that the claimant's disc bulge at the L5-S1 level was the cause of her back pain. As a March 25, 1996, Dr. Johnson reported that the claimant's back condition had not changed significantly since July 12, 1995. In addition, the claimant subsequently underwent ear surgery in 1997.

On April 22, 2005, the claimant saw Dr. Thorn, complaining of back pain and Dr. Thorn determined that she suffered from a left strain and imposed a five pound lifting restriction. The claimant returned to work with the restrictions, and she was able to perform her job of stocking shelves. The claimant followed up with Dr. Thorn on April 29, 2005, and Dr. Thorn left the claimant's lifting restriction in place and prescribed physical therapy. The claimant underwent seven physical

therapy sessions from May 2, 2005, to May 16, 2005. At the claimant's last physical therapy visit, her therapist, Toni Griffin, noted that the claimant had corrected well, but she continued to complain of pain. The claimant worked during this time with restrictions. On one occasion, the claimant was written up for working outside the restrictions on her left wrist; however, the claimant testified that she was not aware of the restrictions, even though she admitted turning them in, in writing, to the respondent employer.

On May 2, 2005, the claimant saw her obstetrician/gynecologist, Dr. Kathleen Paulson, for right-sided pelvic pain. Dr. Paulson's notes do not contain any reference to the April 21, 2005, event or indicate that there was any physical evidence that the claimant was suffering from a hernia. Further, Dr. Paulson later acknowledged that she did not suspect that the claimant had sustained a hernia on this visit. This is significant in light of the claimant's testimony that the hernia appeared immediately following the incident. It is inconceivable to me that Dr. Paulson did not notice it but she did not. It is further inconsistent that the claimant testified that two co-workers suggested that she had suffered a hernia but she did not seek medical treatment following the accident, and, when

the claimant finally did see her OB/GYN, she did not even mention it as a potential source of her pain. There is absolutely no mention of even a potential hernia in the medical records from the claimant's May 9, 2005, visit to Dr. Paulson. The claimant saw Dr. Thorn on May 13, 2005, complaining of left hand pain and low back pain. Again, the claimant did not inform Dr. Thorn of even the possibility that she might be suffering from a hernia, and the medical record from that visit provides no mention of a potential hernia at all. Dr. Thorn evaluated the claimant's tendinitis and lumbar strain and allowed her to keep working with her left wrist splint.

On May 17, 2005, the claimant saw Dr. Paulson, complaining of right lower quadrant pain in the right inguinal area. However, Dr. Paulson again provided no indication that she observed the mass in that area, which the claimant testified came up immediately following the accident. At that point, some two months after the alleged hernia incident, Dr. Paulson referred the claimant to Dr. Stephen T. Wood, a general surgeon to assess a potential hernia apparently based solely on the claimant's complaints of pain. Dr. Wood first saw the claimant on May 24, 2005. Dr. Wood notified Dr. Paulson that he believed that the claimant had a small

hernia in her right groin and recommended exploration and repair. The claimant testified that she asked Randy Johnson if he had documented the March 17, 2005, incident, after she received Dr. Wood's recommendation. On June 7, 2005, an accident report for the claimant's March 17, 2005, incident was completed. At that time, the claimant continued to assert that the knot in her right side had appeared immediately following the incident. On July 19, 2005, the claimant saw Dr. Thorn for a re-check of her left wrist and continued working. However, the claimant did not seek Dr. Wood's treatment again until September 2005.

On July 22, 2005, the claimant saw Dr. James Myshka, a chiropractor, for neck and lower back pain, even though she testified that Dr. Johnson, who had diagnosed her degenerative disc disease, had successfully treated her in 1995 and 1996. In completing Dr. Myshka's patient information sheets, the claimant noted that her last episode of neck pain with headaches, lower back and hip pain occurred on July 22, 2005. The form also asked the claimant to check a certain box if her pain was work-related, and she did not do so. With regard to prior accidents related to her condition, the claimant noted that she had a fender bender in 1998, and that her neck had bothered her ever since. However, the

claimant did not mention the April 21, 2005, incident in any of Dr. Myshka's paperwork. Dr. Myshka provided the claimant with chiropractic treatment from July 22, 2005, to August 11, 2005.

On September 6, 2005, the claimant went on Family Medical Leave Act leave for her hernia. On September 12, 2005, the claimant saw Dr. Paulson and asked that she clarify the sequence of events related to the hernia for insurance purposes. In response to the claimant's request, Dr. Paulson authored a letter, observing that she had not suspected that the claimant had a hernia until May 17, 2005. It necessarily follows that Dr. Paulson did not suspect a hernia after the claimant's May 9, 2005, visit. On September 14, 2005, Dr. Wood's pre-surgery report stated that the claimant had "an early small right inguinal hernia." On September 15, 2005, Dr. Wood performed surgery to repair the hernia. The claimant returned to work on October 27, 2005, and she testified that she is no longer having problems with that area of her body.

Almost a year after the April 21, 2005, accident, the claimant sought treatment from Dr. Cyril A. Raben for low back pain and for the first time, complained of left leg numbness. Dr. Raben noted that the claimant had not sought chiropractic treatment for

her back in 2006 and recommended that she do so for her SI-joint problem as well as physical therapy. In addition, Dr. Raben ordered an MRI of the claimant's lumbar spine. The claimant's April 3, 2006, MRI revealed disc degeneration and mild annular bulging at L5-S1, which abutted and could be slightly impinging the left S1 nerve root. Dr. Raben reviewed the MRI and observed disc degeneration at the L5-S1 level with an annular tear. Finally, the claimant was diagnosed with a herniated disc at the L5-S1 level, almost a year after the work accident and nine years after the claimant was diagnosed with degenerative disc disease at that level.

On May 15, 2006, the claimant received a lumbar epidural steroid injection for pain from Dr. Raben and the claimant noted decreased symptoms following the treatment. On June 12, 2006, Dr. Raben's note regarding the claimant's work status provided that she could work within restrictions, including a five pound lifting restriction. On June 17, 2006, the claimant went on FMLA leave once again. On June 20, 2006, Dr. Raben increased the claimant's lifting restriction from twelve to fifteen pounds. The claimant was to undergo another steroid injection on July 17, 2006. The claimant testified that, if that steroid injection did not relieve her pain, then Dr. Raben was

going to discuss the possibility of surgery. As of July 5, 2006, the claimant testified that she continued to have back pain and that her condition had not improved. In addition, the claimant testified that she had sustained additional work injuries while working for the respondent employer other than the alleged hernia and hip/back claims. Specifically, the claimant had work incidents on April 12, 1995, September 4, 1997, May 28, 2003, and, January 20, 2004. Accident reports were completed for each of these dates.

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.

In my opinion, a review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that she sustained a compensable hernia. In order to satisfy all the requirements for proving the compensability of a hernia, the claimant must show that the physical distress following the occurrence of the hernia required the attendance of a licensed physician within seventy-two hours after the occurrence. Clearly, the claimant failed to seek medical attention within seventy-two hours after the occurrence of this alleged hernia. The medical evidence demonstrates that the claimant saw Dr. Paulson between March 17, 2005, and May 17, 2005, without any reference whatsoever to having a hernia. It was not until May 17, 2005, that Dr. Paulson referred the claimant to Dr. Wood for a suspected hernia. In fact, Dr. Paulson's letter concerning the claimant's condition specifically states that hernia was not suspected until May 17, 2005. The claimant had been seeing Dr. Paulson on a regular basis for female trouble and did not even mention the problem and the possibility that on March 17, 2005, there was an incident that was a

potential source of her pain. Further, two of her co-workers suggested that she might be suffering from an hernia at the time of this alleged incident but the claimant did not seek any medical treatment until after May 17, 2005. Simply put, I cannot find that the claimant sustained a compensable hernia on March 17, 2005. Accordingly, I must dissent from the majority's opinion find the hernia compensable.

The claimant also alleges that she sustained a compensable hip and back injury on April 21, 2005. In my opinion, the claimant has failed to meet her burden of proof. Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment refers to the origin or cause of the accident," so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An

injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly." City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the claimant must show that she sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. Id.; see also, §11-9-102(4) (A) (i) (Repl. 2002).

The evidence demonstrates that the claimant had a workers' compensation injury to her back on September 11, 1994, while lifting a tea urn at her employer in California. The claimant underwent a lot of medical treatment and eventually settled her claim for \$12,000.00. It is of note that the claimant had received treatment for this back injury by Dr. Johnson in Northwest Arkansas, however, she sought Dr. Myshka's treatment for the back pain following the work incident with the respondent employer even though she was satisfied with Dr. Johnson's prior treatment. She also noted on the emergency room form following the April 21,

2005, incident that she suffered from a prior potential disc problem which had gone untreated. The paperwork that she completed for Dr. Myshka in late July of 2005, omitted any mention of the April 21, 2005, incident. When presented with the question, she stated that she did not label her pain as work related.

Therefore, considering the fact that the claimant had prior back problems, and the fact that the claimant failed to report that she had an injury on April 21, 2005, to Dr. Myshka, I cannot find that the claimant proved by a preponderance of the evidence that she sustained a compensable injury to her hips or back on April 21, 2005.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner