

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500153

NANCY A. PHILPOTT,
EMPLOYEE

CLAIMANT

METRO BUILDERS AND RESTORATION,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED MARCH 27, 2007

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

Claimant represented by the HONORABLE PHILIP M. WILSON,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD
WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed July 24, 2006. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. There was a compensable December 26, 2004,
injury.
2. The compensation rates are \$298/224.
3. The claimant has failed to prove by a
preponderance of the evidence that she
sustained a compensable injury arising out of
and in the course of her employment stemming
from the October 5, 2005, diagnosis.

4. The claimant has failed to prove by a preponderance of the evidence that the recurrent ventral hernia was a compensable consequence of the January 12, 2005, compensable injury.

We note that on finding No. 4, there exists a clerical error and should read as follows:

4. The claimant has failed to prove by a preponderance of the evidence that the recurrent ventral hernia was a compensable consequence of the January 12, 2005, surgery.

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.

The claimant alleges that she 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.

Therefore we affirm and adopt the July 24, 2006 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 Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion finding that the claimant did not sustain a compensable injury in the form of a recurrent ventral hernia. The Majority, by affirming and adopting the decision of the Administrative Law Judge, finds that the claimant did not sustain a hernia pursuant to the criteria of Ark. Code Ann. §11-9-523. They further find that the claimant did not show that the recurrent hernia was the compensable consequence of her admittedly compensable hernia sustained on December 26, 2004. Finally, they find that the claimant's recurrent hernia does not satisfy the provisions of Ark. Code Ann. §11-9-

102(4) (A) (i) for a specific incident injury or Ark. Code Ann. §11-9-102(4) (A) (ii) (a) for a gradual onset injury.

After a de novo review of the record, I find that the Majority errs in applying the criteria of Ark. Code Ann. §11-9-523. Specifically, I find that the claimant's recurrent hernia was an incisional ventral hernia and that pursuant to the rationale of Jobe v. Wal-Mart Stores, Inc., 66 Ark. App. 114, 987 S.W. 2d 764 (1999), the claimant is not required to satisfy the provisions of Ark. Code Ann. §11-9-523. I further find that the preponderance of the evidence shows that the claimant's recurrent hernia was a compensable consequence of her original injury and developed occurred as a result of her lifting at work. As such, I would have reversed the decision of the Administrative Law Judge and awarded benefits.

The claimant testified that prior to the 2004 hernia, she had sustained a hernia in 1994 or 1995. She had no problems until the December 26, 2004, hernia. The claimant underwent surgery after the 2004 hernia and returned to work in April 2005. She said she worked light duty one week and then returned to full-duty. The claimant was assigned to help clean up a building that had smoke damage. As a result, she had to do heavy lifting.

The claimant said her pain never subsided and that she reported such to Dr. Shaw. She said she also told her supervisor, Britt Stewart, another supervisor named Don, and "half the guys in there" that she suffered from ongoing pain. The claimant said that a supervisor, Kyle Johnson told her that if she could not keep up, she would be discharged. The claimant quit working in May 2005 because her sister had cancer and because the claimant believed she was not receiving appropriate care for her hernia. When the claimant quit, she told the employer it was to care for her sister.

Britt Stewart testified on behalf of the respondents. He said that the claimant never reported pain after she returned to work. He said that the respondents' policy specifically provides that such injuries would need to be reported to him directly. He also said that the claimant was not supervised by Kyle Johnson but admitted on occasion he would be at the job site. He also said it would not be appropriate for the claimant to report problems to Kyle Johnson.

The medical records largely corroborate the testimony of the claimant. On January 12, 2005, the claimant underwent surgery for the admittedly compensable hernia. The surgery consisted of an open ventral hernia repair with mesh. At the time of the

surgery the claimant was noted to have three ventral hernias. They were repaired with mesh. The rest of the claimant's abdominal wall was also noted to be weak. On February 21, 2005, the claimant was diagnosed with, "Likely suture granuloma or small hematoma causing persistent pain." The note further provides the claimant's CT scan did not show a recurrent hernia, but that her problem could be addressed with repeat excision and re-closure.

On March 2, 2005, the claimant underwent surgery to repair the suture granuloma on her abdominal wall. The surgery notes indicate she did not have a recurrent hernia. On April 7, 2005, the claimant was treated by Dr. Stair. The claimant reported having pain and nausea. Dr. Stair indicated the claimant's CT scan did not show a recurrent hernia. He further indicated that the claimant's pain was along the left side of her incision and that her pain seemed out of proportion to the surgery performed.

On April 14, 2004, there is a doctor's note indicating that the claimant's case manager had called and that the claimant had a bulging out of her incision. The adjuster was instructed to send the claimant to the emergency room. However, on April 21, 2005, Dr. Shaw indicated the claimant's incision was completely healed

and "looked perfect." Additionally, the claimant was released to return to full-duty work.

On August 12, 2005, the claimant returned to the emergency room and was noted to have abdominal and back pain. The claimant was noted to have a stool filled colon. On October 6, 2005, the claimant presented for treatment and reported that she believed she had a recurrent ventral hernia. The claimant was noted to have, "an obvious recurrent hernia in the left upper outer quadrant in the area of her previous hernia repair." The claimant was assessed with a recurrent ventral hernia. The physician indicated that the claimant had adhesions and recommended the claimant undergo surgery to repair the recurrent hernia. On April 13, 2006, Dr. Shaw indicated that the claimant had previously suffered from a ventral hernia which was repaired with an open procedure. He further indicated the claimant had another surgery due to excision of multiple suture granulomas. He also indicated that the claimant was subsequently diagnosed with a recurrent hernia. Finally, he indicated that patients with ventral hernias were at a risk for recurrences and that obesity, tobacco abuse, and heavy lifting all contributed to ventral hernia development. At the time of the hearing, the claimant had not undergone surgery because of lack of insurance.

_____I find that the preponderance of the evidence shows the claimant's diagnosed hernia from October 2005, was that of an incisional ventral hernia. In making this finding, I note that after her second surgery, the claimant complained of continued pain in the left, upper side, of her prior incision. In fact, on April 14, 2005, the claimant reported bulging out of her incision. Likewise, the claimant repeatedly reported pain along her incision. Finally, I note that the claimant was warned that she would be subject to having recurrent hernias after her first two surgeries. Not surprisingly, the claimant was diagnosed with a hernia in the same area. Specifically, I note that Dr. Shaw indicated heavy lifting would place the claimant at an increased risk of having a recurrent hernia. Accordingly, I find the evidence supports a finding that the claimant's hernia was an incisional hernia.

_____This Commission and the Court of Appeals has previously indicated that incisional hernias are not subject to the requirements of Ark. Code Ann. §11-9-523. See, Jobe, supra; see also, James Jones v. Baldor, Commission Opinion filed July 20, 1998 (D710661); see also, Walker v. Highland Resources, Commission Opinion filed March 21, 2001 (E913919). Thus, the claimant must show that her injury is compensable under the Arkansas Workers' Compensation Act generally. In this instance, I find that it is evident that

the claimant's recurrent hernia occurred as a compensable consequence of the work she performed for the employer.

"When the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury; the basic test is whether there is a causal connection between the two episodes." Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001). It is the Commission's duty to determine whether a causal connection exists between a primary injury and any additional injuries. Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999).

In this instance there is no evidence that after her separation with the employer, the claimant engaged in any strenuous activity that would lead to her developing a recurrent hernia. In my opinion, it is evident that the claimant's admittedly compensable injury caused her to be at an increased risk of having another hernia. The claimant repeatedly presented for additional treatment after having her surgeries and after performing heavy lifting for the respondents. Heavy lifting was specifically identified as one of the risk factors that would cause the claimant to have an early recurrence. The claimant's testimony that she performed heavy lifting shortly after her second surgery is entirely consistent with her developing a recurrent hernia. Additionally, I note that the respondents' own witness,

Stewart admitted the claimant had to perform heavy lifting. Finally, I note that the medical reports consistently indicate that even after the second surgery, the claimant consistently complained of pain in the area of the incision for her past hernia surgeries, which indicates that she likely sustained the recurrent hernia as a direct result of her lifting heavy things at work.

For the aforementioned reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner