

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603078

PAUL WARE,  
EMPLOYEE

CLAIMANT

MURPHY MOTORS,  
EMPLOYER

RESPONDENT

FEDERATED MUTUAL INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 7, 2007

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

Claimant represented by the HONORABLE J. MARK WHITE,  
Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE ERIC NEWKIRK,  
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 February 14, 2007. In  
said order, the Administrative Law Judge made the  
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3. The claimant has failed to establish by a preponderance of the credible evidence that he sustained a compensable hernia injury.

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

Therefore we affirm and adopt the February 14, 2007 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.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's opinion. I find that the claimant sustained a compensable hernia injury. The requirements of Ark. Code Ann. § 11-9-523(a) (Repl. 2002) for a compensable hernia injury are very specific:

- (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, the claimant has met his burden of proof on every requirement of the above statute. First, the claimant's hernia occurred as a result of sudden effort: the act of picking up truck tires. Second, the claimant experienced severe pain in the hernial region. The claimant testified that he was picking up tires for a Nissan Titan truck when he felt a "burning sensation" in his lower abdomen. While the claimant's language suggests that his pain was severe, the statute does not require he use the word "severe" in order to comply with the severe pain requirement. In fact, the Arkansas Court of Appeals has stated "we do not put semantics before substance" when addressing severity of pain. Darling Store Fixtures v. McDonald, 54 Ark. App. 60; 922 S.W.2d 747 (1996) (citing Ayers v. Historic Preservation Assoc., 24 Ark. App. 40; 747 S.W.2d 587 (1988)). In Darling, claimant was awarded compensation for a hernia injury despite not using the word "severe" to describe his pain. Instead, the court found it sufficient that claimant "'felt as if he stretched' something, pulled something, felt a 'slight burning sensation' and a sticking or pinching feeling in

certain positions." Darling. Here, the claimant credibly testified that his pain was severe enough to cause him to sit down.

The third requirement for a compensable hernia is that the pain must cause the claimant to cease work immediately. As stated in Osceola Foods, Inc. v. Andrew, 14 Ark. App. 95; 685 S.W.2d 813 (1985), "required causal connection should be based on evidence that cessation from work became necessary soon enough after trauma to establish causal connection under the circumstances of the case." According to his testimony, the claimant sat down after he felt the burning sensation, and continued to sit down, upon the instruction of his supervisor, Denny Conway, on-and-off throughout the rest of the day. The Majority, by affirming and adopting the Administrative Law Judge's opinion erroneously found that the claimant did not "cease work" due to fact that the claimant was able to continue working for the respondents until he eventually found a "better" job elsewhere. However, the Commission has previously held that resuming work will not defeat a hernia claim, so long as the claimant stopped work for at least some momentary period of time. Grigg v. Swift-Eckrich, Full Commission Opinion filed November 13, 1997 (E612378).

As for the fourth requirement, notifying the employer within 48 hours, the claimant testified that he told his supervisor, Mr. Conway, about his injury on the date it occurred. Unlike the claimant in LeBeouf v. Cuisine of China, Full Commission Opinion filed September 7, 1995 (E408371), where the claimant was "vague" about when he reported the injury, here, the claimant was very specific. The claimant testified that after he hurt himself lifting the tires, he spoke to his wife about it on the phone, and she advised him to report the injury to his supervisor. The claimant testified that he then told Mr. Conway about the injury and that Mr. Conway instructed him to sit down for awhile. The claimant even testified that he called his wife back to tell her that he had told Mr. Conway about the injury. The claimant's wife corroborated this testimony. The claimant is not required to give notice that he has a hernia. He is not a doctor and cannot diagnose himself. The statute merely requires that the claimant give notice of the occurrence which results in a hernia. Clark v. Ottenheimer Bros., 229 Ark. 383, 314 S.W. 2d 497 (1958); McMurtry v. Marshall Model Market, 237 Ark. 11, 371 S.W. 2d 4 (1963).

The claimant has also satisfied the hernia statute's fifth requirement, that the pain be sufficient to require a doctor's visit within seventy-two hours. The Court of Appeals has previously held that a claimant need show only that his pain was sufficient to require a doctor's visit within seventy-two hours, not that he actually saw a doctor within seventy-two hours. Darling Store Fixtures v. McDonald, 54 Ark. App. 60, 922 S.W. 2d 748 (1996). Here, the medical records show that the claimant went to the Medical Center of South Arkansas Emergency Room on November 26, 2005 complaining of burning pain in his abdomen of a two to three week duration, which is consistent with the claimant's testimony that the injury most likely occurred on November 11, 2005 when he was working on a Nissan Titan truck. The medical records show that the claimant followed-up with Dr. Matthew Callaway on November 29, 2005, again complaining of abdominal pain: "the onset of the pain has been acute and has been occurring in an intermittent pattern for weeks." The medical records show that claimant saw Dr. Luis Garcia, on February 10, 2006, complaining of pain in his abdomen of a three month duration. Finally, Dr. Garcia referred the claimant to Dr. Alan K. Wilson, who diagnosed a left

inguinal hernia. Dr. Wilson immediately scheduled the claimant for hernia repair surgery which took place on March 3, 2006. The claimant should not be penalized for the fact that although he consistently reported the same pain symptoms to three doctors, a diagnosis was not made until he reached a specialist over three months after the occurrence.

In denying this claim, the Majority apparently placed great weight on the fact that the claimant could not specify the date of his injury. However, Arkansas Code Ann. §11-9-102 (4) (A) (i) does not require a claimant to identify the exact date upon which an accidental injury occurred. The statute only requires that the claimant prove that the occurrence of the injury is capable of being identified; although the inability of the claimant to specify the date might be considered by the Workers Compensation Commission in weighing the credibility of the evidence, the statute does not require that the exact date be identified. Edens v. Superior Marble & Glass, 346 Ark. 487, 58 S.W. 3d 369 (2001). Furthermore, while it may seem that the hernia statute requires a specific date because it requires that the pain be sufficient enough to require a doctor's visit within seventy-two hours, as seen above,

the claimant need not actually see a doctor within seventy-two hours. Therefore, the claimant need not specify an exact date of injury.

Based on corroborating evidence in the record, I find the claimant's testimony to be credible. The Administrative Law Judge took judicial notice that in 2005, Thanksgiving took place on Thursday, November 24<sup>th</sup>. The claimant introduced records which show that he worked on Nissan Titan trucks on 11-2-05 and 11-11-05, dates which are consistent with his testimony that the injury occurred "around two weeks before Thanksgiving." The claimant introduced medical records which show that he went to the Medical Center of South Arkansas Emergency Room on November 26, 2005 complaining of burning pain in his abdomen of a two to three week duration. The November 29, 2005 report of Dr. Matthew Callaway, referring to claimant's abdominal pain states: "The onset of the pain has been acute and has been occurring in an intermittent pattern for weeks." The February 10, 2006 report of Dr. Luis Garcia shows that the claimant was complaining of pain in his abdomen of a "three month duration." The claimant's wife, Lesia Ware, testified that "a week or two before Thanksgiving" she spoke with her husband, while he was at work, and he

told her that he had hurt himself in his lower abdominal area. She also testified that during their conversation she instructed her husband to mention the injury to his supervisor, and that she checked back with her husband later to make sure that he had done so. Further bolstering claimant's credibility is the testimony of the respondent's personnel director, Donna Greenwood. The claimant testified that he told Ms. Greenwood about the "real bad pain in his stomach" sometime in November. Ms. Greenwood testified that she recalled the claimant discussing his abdominal pain with her sometime before Thanksgiving, but that she did not realize the claimant was referring to a work injury.

All of the above corroborating evidence leads me to place greater weight on the testimony of the claimant than that of the claimant's supervisor, Mr. Conway. Mr. Conway, who still works for the respondent employer, testified that he "could not recall" the claimant reporting an injury to him. When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. White v. Gregg Agricultural Ent., 72 Ark. App. 309, 37 S.W. 3d 649 (2001). The Commission is not required to believe the

testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id. Here, I find it is more plausible that the claimant testified truthfully and Mr. Conway simply forgot than to find that the claimant, his wife and Ms. Greenwood were not credible.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner