

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F601032

DONALD WILSON, EMPLOYEE	CLAIMANT
J.B. HUNT TRANSPORT, EMPLOYER	RESPONDENT
INSURANCE COMPANY-STATE OF PENNSYLVANIA, CARRIER	RESPONDENT

OPINION FILED OCTOBER 22, 2007

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

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

Respondent represented by HONORABLE JOSEPH H. PURVIS, 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 December 28, 2006.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On all relevant dates, including January 3, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$468.00 for total disability and \$351.00 for permanent partial disability.

4. The claimant has failed to prove by the greater weight of the credible evidence that, on or about January 3, 2006, he sustained a "compensable hernia" within the meaning of Ark. Code Ann. §11-9-523.

5. The respondents deny the occurrence of a compensable injury, in the form of left inguinal hernia, and controvert this claim in its entirety.

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 Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's opinion finding that the claimant did not sustain a compensable hernia injury. The Majority essentially seems to be denying the claimant benefits because there is a discrepancy regarding the exact date his injury occurred. However, I believe that if the claimant can isolate the injury as having occurred due to a particular incident and can meet the notice provisions of the hernia statute, then his claim should be considered to be compensable. In fact, it is error of law to find that the claimant must give an exact date of injury. See, Edens v. Superior Marble and Glass, 346 Ark. 487, 58 S.W.3d 369 (2001). Rather, in my opinion, if the claimant can relate his injury to a specific incident and meet the requirements of Ark. Code Ann. §11-9-523, he should be awarded benefits. In this instance it is clear that the claimant sustained an injury due to the specific incident of tarping a truck and that he meets the statutory provisions of Ark. Code Ann. §11-9-523.

In this instance, what is important to note is that the weight of the evidence shows the claimant sustained a work-related injury in early January, that he stopped working immediately thereafter for a short period of time, reported the injury the following day, and then ultimately needed medical care.

The claimant testified that around January 3, 2006, he sustained an injury while putting a tarp on a load. The claimant said,

They started up a new dedicated route, pulling plastic pipe out of Siloam Springs, Arkansas, and they asked for volunteers to help them get started on this new account, so I had flat-bed experience from previous years, so I volunteered to help, and we went through I think it was four days of training, and I was doing real good, and around the first of January, I went out on a load; I had been out several days; went to Cleburne, Texas, to pick up a load to bring back to Siloam Springs, and while I was out there, I was tarping this load - - they required it to be tarped - - and I was picking up this big, heavy tarp to roll it down the load to completely cover it, and I felt a sharp pain in my left side, and I mean I almost fell down. I just stopped for a minute, maybe ten minutes, and everything seemed to be okay, so I just

went ahead and finished tarping the load.

The claimant testified that the injury occurred around 4:30 p.m. and that he tried to contact his direct supervisor, Gilreath. The claimant said that he reached the answering machine and asked for a return call. However, the claimant did not indicate what the message was referencing. The claimant went to work the following morning and reported the injury to Gilreath. Specifically, the claimant said he told Gilreath that he believed he had pulled a groin muscle the night before. The claimant said that he declined an offer to go the doctor because he wanted to see if his condition subsided.

The claimant said that his condition did not resolve as he had hoped. The claimant testified that while he was waiting to see the doctor, he continued to have pain, but that he managed to continue to work. He indicated that he repeatedly asked Gilreath to get him home so he could see a doctor. However, Gilreath would not "get him home" so he could seek medical attention. The claimant said that his

family members had called Gilreath and asked to let the claimant see a physician. However, despite these requests, they were denied. He indicated that his doctor's appointment was for an unrelated condition, but that eventually when he was allowed to go to the doctor, he also sought treatment for the hernia. He also said that if had not already had appointments scheduled, he would have scheduled one so he could have received treatment for the hernia.

The claimant said that around three weeks after the injury he went to his personal physician, Dr. Jeske, who referred the claimant to Dr. Jackson. The claimant said Dr. Jackson diagnosed him with a hernia, which he reported to the respondent-employer. The claimant said that he reported the injury on the "OBC, QUALCOM".

The claimant's girlfriend, Jerri Yohn, also testified. Yohn testified that the claimant called her and told her that he had injured himself. Yohn said that when the claimant arrived home he showed her the injury, which was a swollen place the size of a golf ball located on the left lower abdomen. She initially estimated that some two or

three days lapsed between the time the claimant called her and then arrived home. She later testified that some three to four dates had passed. However, throughout her testimony, the claimant candidly admitted that she was not good with dates and that she was bad with dates. Yohn also testified that the claimant called her each day and reported that he was in pain. After having a conversation with the claimant regarding Gilreath's refusal to allow the claimant to keep a doctor's appointment, Yohn had a conversation with Gilreath regarding the claimant's need to see a physician. She indicated,

Q Now, did you ever have an occasion to discuss this with Bryan?

A At the end of the duration, yes.

Q And what did you say to Bryan and about when was this?

A I believe that was on a day that Don was supposed to come in and see the doctor again and I called Bryan right away to ask where Don was. I said, "He has an appointment today and he has got to get home as quickly as possible." I said, "This is running late." And Bryan just told me his feelings.

Q MR. PURVIS: Pardon?

A Bryan told me at the time - - I asked him, I said, "He has a doctor's appointment. How quickly - - you know, he has got to get home right away." I said, "We've got to go to Broken Arrow." And Bryan said to me, he said, "Well, you don't work here and it's not your place to tell me what to do." I said, "Well, then you don't understand how bad his situation is." I said, "It could strangle itself and turn into gangrene." And he said, "Well, I'll see what I can do."

Bryan Gilreath also testified. He readily admitted that the claimant reported an injury wherein he pulled his groin. He indicated,

I don't remember the exact date, but the week of January 10th, he came in and dropped off his bills and said that, you know, he was in Texas a week earlier, that he didn't know if he was strapping a load or tarping it, but he thought he might have pulled his groin.

Gilreath indicated that he did not file an accident report because the claimant did not ask to be off work or ask to see a physician. Gilreath indicated that it is up to the worker as to whether they want to file a worker's

compensation claim. Gilreath acknowledged that Yohn had called him and asked to allow the claimant to see a physician. However, Gilreath denied that he was aware the request was made so the claimant could get treatment for his hernia. Gilreath also denied that the claimant was refused the opportunity to see a physician after reporting the injury. Gilreath further said that at the end of January, the claimant called from Dallas and indicated that he had seen his primary care physician for an unrelated condition and discovered the hernia.

Kristi Russell, Claim Specialist 3, also testified on behalf of the respondent-employer. Russell testified that she spoke with the claimant on January 27, 2006. The claimant reported that he sustained an injury on either January 3rd or 4th while strapping down a load. The claimant said he pulled a muscle in his upper left thigh. The claimant conveyed that he reported the injury to Gilreath the following day. The claimant also said that he saw his personal physician a couple of weeks later and was diagnosed with a hernia. She said that Dr. Jeske indicated that the

claim was not filed as a workers' compensation claim but would not divulge further information.

The claimant also introduced records in the form of Outboard Computer Notes. Of particular importance, there is a note from January 23, 2006, which indicates,

WITH REGARDS TO THE "PULLED GROIN MUSCLE" THAT I REPORTED TO YOU THE FIRST WEEK IN JANUARY, WELL IT NOW APPEARS TO BE MUCH MORE THAN THAT. ON FRIDAY, THE 20TH, I LEARNED THAT WHAT I HAVE IS A HERNIA. AS THIS WAS A "JOB RELATED INJURY" I FEEL THAT IT MUST NOW BE REPORTED TO SAFETY OR HOWEVER. I AM TO HAVE SURGERY FOR THIS ON FEBRUARY THE 3RD.

The claimant was initially seen by his primary care physician on January 19, 2006. Unfortunately, neither party introduced the medical reports from that day. The claimant was next seen by Dr. Jackson on January 20, 2006. The claimant reported that he was being seen for a hernia. Notably, Dr. Jackson authored a report wherein he indicated that the claimant reported, "He states that approximately (sic) January 5, he was snugging down a load on his truck and he noticed a burning pain in his left groin. He states

that shortly thereafter he noticed a golf ball size swelling in this region." Jackson diagnosed the claimant with a hernia and recommended surgery.

The claimant underwent surgery on February 3, 2006. The surgical notes indicate that the claimant had sustained a hernia. The claimant received postoperative care and on February 27, 2006, he was given a full release from Dr. Jackson.

The claimant is contending that he sustained a hernia due to a specific incident. Arkansas Workers' Compensation Law indicates that for a specific incident injury an employee does have to show an "identifiable" incident pursuant to Ark. Code Ann. § 11-9-102(4)(A)(i). However, he does not have to identify an exact date of an injury. See, Edens, supra. Further, the Court of Appeals has ruled that a generic description of work is not sufficient, instead, there must be a particular incident. Hapney v. Rheem Manufacturing, 342 Ark. 11, 26 S.W.3d 777 (2000).

As the claimant contends he sustained a hernia, he must also meet the provisions of Ark. Code Ann. §11-9-523

(a). Pursuant to Ark. Code Ann. § 11-9-523(a), a hernia is compensable when the following factors are shown:

(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 this instance it is apparent that the Majority has committed error of law in that they deny the claim simply because there were minor inconsistencies regarding the exact date his injury occurred. However, as discussed below, the claimant has established that he sustained a hernia due to the compensable injury and that he met the provisions of the hernia statute.

I first find that the occurrence of claimant's hernia was the result of sudden effort, severe strain, or the application of force directly to the abdominal wall. The overwhelming weight of the evidence shows the hernia was the result of the claimant's sudden effort and the severe strain due to tarping his truck. No other explanation for the claimant's condition has been presented, and when considering the other evidence in the record, including the testimony of the witnesses and the medical records, it is apparent that the claimant's injury was caused by tarping the load.

The claimant consistently reported that the tarp was the cause of his injury. In fact, even the respondent's own witnesses, Russell and Gilreath both testified that the claimant reported his injury was due to tarping a truck while working. Additionally, when the claimant sought medical treatment, he reported the injury was due to tarping a truck. Notably, while the surgeon did not specifically given an opinion on causation, he also did not indicate that

the claimant's injury could not be caused by tarping a truck.

The claimant's testimony regarding his actions after the injury also supports a finding of compensability. The claimant credibly testified that he reported the injury within 24 hours of the accident. Russell also acknowledged that when she took the claimant's statement, he said he had reported the injury the day after its occurrence. Likewise, while Yohn's testimony was not clear as to what date the claimant reported his hernia, she clearly articulated that he contacted her during the evening and told her of the injury immediately after it occurred. Likewise, shortly thereafter, the claimant reported to Yohn that Gilreath would not let him keep a previously scheduled doctor's appointment.

Additionally, when the claimant sought medical attention, he indicated the injury occurred on January 5, which would show that the claimant's injury did occur in early January as was corroborated by the claimant's testimony and his reports to Russell and Gilreath. Finally,

I note that the claimant reported the need for surgery in the Outboard Computer Notes. In that record, the claimant indicated that he had reported the injury during the first week in January and that the condition was more serious than what he had believed. This seems to support the claimant's testimony regarding when the injury occurred and when he reported the injury. In fact, there would be no reason for the claimant to give an inaccurate date regarding his injury when he made that report. The fact that the claimant had to use the Outboard Computer Notes to keep the employer aware of what was going on is also consistent with the claimant's testimony that Gilreath was also difficult to notify.

While Gilreath said that the injury was reported the week of the 10th, he was unsure as to what exact date the claimant reported the injury. Additionally, he did not testify as to what exact date the claimant injured himself. When Gilreath's testimony is considered in conjunction with the other facts of the case, I simply do not find him to be a credible witness. In particular, I note that both the claimant and Yohn have indicated that the claimant asked for

medical care to no avail. While Gilreath admitted that Yohn had called regarding the claimant's visits, he denied having knowledge that the claimant needed medical care due to his hernia. I do not find Gilreath's testimony to be credible as when the claimant did get medical attention, he was almost immediately referred for surgery. This is more consistent with the account of events given by the claimant and Yohn. Therefore, when considering the aforementioned evidence, I find no reason that the claimant's testimony should be rejected.

The claimant has further shown that he had severe pain in the hernial region. The claimant testified that immediately after lifting the tarp, he felt a sharp pain in his left side. He further described that the pain was so severe he almost fell down. The claimant's testimony regarding pain is corroborated by the fact that the event was significant enough to tell his girlfriend of the incident. Additionally, Yohn testified that the claimant repeatedly called her and complained of pain. The veracity of his claim is further illustrated as the claimant felt the

injury was important enough to notify Gilreath of the incident.

The next provision of Ark. Code Ann. §11-9-523 provides that the pain had to cause the claimant to cease work immediately. The claimant has satisfied this provision in that he had a brief cessation in working after he was injured.

As noted by the Court in Osceola Foods, Inc. v. Andrew, 14 Ark. App. 95, 685 S.W.2d 813 (1985), a short cessation in work after the incident or a cessation that occurs at a later time does not preclude a claimant from receiving benefits. The Court indicated,

Appellants argue that so short a pause in his work is not sufficient to meet the third statutory requirement of immediate cessation and that to hold otherwise would defeat the purpose of the requirement. We agree that due to possible uncertainty in determining which of several causes may have produced a hernia this requirement, among others, was made because a dramatic demonstration of the causal connection between the work strain and the hernia leaves little doubt as to cause and effect. However, we do not agree that such causal connection can be dramatically manifested only by an

instantaneous and continual cessation of work. Nor should the causal connection be determined by mathematical formulas or measure by minutes or hours. It should be based on evidence which satisfies the finder of fact that the cessation from work became necessary soon enough after the trauma to establish that there was a causal connection under the circumstances of the case.

Id.. See, also, Ayres v. Historic Preservation Assocs., 24 Ark. App. 40, 747 S.W.2d 587, (1988).

In fact, in Osceola, the Court awarded benefits when the claimant stopped working for some 15 or 20 minutes after the incident, and then returned to work that day and the following day until noon. Id.

Likewise, in this instance, the claimant said that his pain was so severe that he had to stop working after the event. He indicated, "I just stopped for a minute, maybe ten minutes. . ." This brief cessation, is in my opinion, enough to satisfy the statute.

Additionally, the claimant's testimony that he had to stop working once he returned is also important. Though the claimant went back to work afterwards, he eventually had

to completely stop working so he could seek medical treatment. In fact, when the claimant went back to work, he made repeated attempts to get home so he could have treatment for his hernia. As previously discussed, no one has asserted that there was some other incident that might have caused the claimant's hernia. In fact, the only plausible explanation for the claimant's hernia is because he was lifting the tarp for his truck. Certainly, as the claimant stopped working immediately after the injury, his failed attempt to return to work should not serve as a bar to him receiving benefits. As such, pursuant to the language of Osceola, the claimant's brief cessation of work satisfies the statutory requirements set forth in §11-9-523.

The claimant has also shown that he provided notice of the hernia within 48 hours. In this instance, there appear to be minor discrepancies regarding what date the claimant was actually injured. However, that is of no consequence. What is clear is that the claimant injured himself while he was putting a tarp on a truck and that he reported the injury within 48 hours.

Under Arkansas Workers' Compensation law, the claimant is not required to give notice that he has a hernia. Rather he is only required to give notice of the event that occurs in the hernia. Clark v. Ottenheimer Bros., 229 Ark. 383, 314 S.W.2d 497; McMurty v. Marshall Model Market, 237 Ark. 11, 371 S.W.2d 4.

The claimant contends that occurred around January 3, 2006. This testimony is supported by the testimony of Gilreath, who testified that the claimant reported sustaining a pulled muscle when he was tarping a load the prior week in Texas. This is entirely consistent with the claimant's own testimony that he reported the hernia injury as soon as he returned to work the next day. Likewise, the testimony of the claimant is supported by the testimony of Yohn, who indicated she discussed the claimant's hernia with Gilreath.

Finally, I find that the claimant has shown that the physical distress following the occurrence of the hernia that required the attendance of a licensed physician within 72 hours after the occurrence. While it is evident that in

this instance, the claimant did not seek treatment immediately after the accident, his testimony and the medical reports show that he remained symptomatic from the onset of the injury and that his need for care was within 72 hours of the injury.

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).

In this instance, the claimant admits that he initially denied medical care. However, the claimant should not be penalized simply because he was willing to return to work and used poor judgment in not immediately seeking attention. Rather, it is evident that the claimant did not realize the true extent of his injury, but was in need of medical attention immediately after the accident.

In fact, this need for treatment is underscored by the fact that the claimant had difficulty in returning to work after the injury. Likewise, the evidence shows that he then asked for medical attention. While the respondents assert that the claimant did not take such actions, as previously discussed, I found that the testimony of the claimant and Yohn was more credible than that of Gilreath. While Yohn's testimony was not clear with regard to dates, she did describe with specificity that the claimant had

ongoing symptoms and a knot for which Gilreath would not let him see a physician. She was also clear that the claimant's symptoms were due to his work related injury. Given Yohn's candor in admitting her inability to recall dates and her inconsistency with regard to testifying about dates, I do not believe that she would have been able to give such detail in her testimony as to how the claimant's condition and complaints unless she was telling the truth. Likewise, I do not believe she would have been able to give consistent testimony regarding the content of the conversations with Gilreath unless she was telling the truth. The significance of this testimony is that it illustrates that the claimant was in need of medical care from the time of his injury on. In fact, when he finally did receive care, he was immediately referred for surgery, which also seems to show the severity of the claimant's injury.

The Majority finds that the claimant's contentions that he sustained a hernia were essentially not credible. The basis for this opinion seems to be centered around the fact that there were discrepancies regarding the date that

the claimant was injured and reported the injury. However, the evidence overwhelmingly shows the claimant sustained a hernia while tarping his truck. In fact, there is no other explanation offered for the claimant's injury. In denying the claimant's request for benefits, the Majority places great emphasis on the fact that there were minor discrepancies in the medical reports and testimony regarding when the claimant was injured. However, I simply do not believe the claimant is required to show the exact date of his injury. Instead, all that matters is that he attribute it to a specific incident and that he meet the criteria of Ark. Code Ann. §11-9-523. It is apparent that there are discrepancies in the exact date the claimant was injured. However, the evidence has established that the injury occurred in early January. Additionally, despite the discrepancies in the record, the one thing that is consistent in the record from all the parties that testified (including the respondent's own witnesses) is that the claimant was injured while tarping a truck, reported the injury, and then was subsequently diagnosed with a hernia.

As such, I found the claimant's testimony that he reported the injury the day after its occurrence to be credible.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner