

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408592

RICHARD L. CONLEY, JR., EMPLOYEE	CLAIMANT
HERCULES MACHINERY CORPORATION, EMPLOYER	RESPONDENT
CINCINNATI INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 18, 2008

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

Claimant represented by the HONORABLE J. MATTHEW COE, Attorney at Law, West Memphis, Arkansas.

Respondents represented by the HONORABLE CYNTHIA ESTES ROGERS and the HONORABLE WILLIAM C. FRYE, Attorneys at Law, North 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 August 3, 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 over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable hernia injury arising out of and during

the course of his employment with Hercules Machinery Corporation on July 29, 2004.

4. The claimant has failed to prove, by a preponderance of the credible evidence, that his hernia injury, need for surgery, and disability were causally related to a work-related injury with the respondent herein.

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 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 covered by the Act; however, the claimant has failed to establish the elements necessary to prove the compensable injury by a preponderance of the evidence.

Therefore we affirm and adopt the August 3, 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.

OLAN W. REEVES, Chairman

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.

I find that 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 claimant credibly testified that the injury occurred as he was moving a 5-foot-tall, 207 pound acetylene tank. The claimant testified that the tank slipped and he had to strain to keep the bottle from falling. The claimant's testimony clearly shows that the first requirement of the hernia statute has been met.

Second, the claimant experienced severe pain in the inguinal region which was eventually diagnosed as an inguinal hernia. The claimant testified that he immediately felt a burning, ripping, stinging sensation in his right groin area. 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 such that while on his way to the office to report the injury he experienced a hot flash and vomited. Therefore, I find that the second requirement for the hernia statute has been met.

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 immediately stopped working and went to the office to report the injury to his supervisor. Therefore, I find

that the third requirement for the hernia statute has been met.

As for the fourth requirement, notifying the employer within 48 hours, the claimant is not required to give notice that he has a hernia. The claimant 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). Here, the claimant credibly testified that the injury was immediately reported to Lee Clifton, his supervisor. This fact was supported by co-worker Anthony Hale, who testified that he witnessed the claimant tell respondent's supervisor that he had been injured while moving an acetylene tank. As both the claimant and a witness have testified that the supervisor was on notice of an injury which was later determined to be an inguinal hernia, I find that this requirement of the hernia statute has been satisfied.

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 Dr. Mittal on August 3, 2004 complaining of pain and discomfort in his right hip and right groin (inguinal) area five days in duration, which is consistent with the claimant's testimony that the injury most likely occurred on July 29, 2004 when he was moving an acetylene tank. The claimant credibly testified that this was the earliest he was able to schedule an appointment, as he was instructed by the respondent. I find that the claimant would have seen a doctor but for the scheduling difficulties. The respondent has presented no evidence to rebut the claimant's testimony that the first opportunity to see a physician regarding his injury was on August 3, 2004. Accordingly, I find that the fifth element of the hernia statute is satisfied.

The majority and the Administrative Law Judge concluded that the claim turned "almost entirely upon the credibility of the claimant" and that the "inconsistencies and contradictions" in the claimant's

testimony were enough to find that his injury was not compensable. I respectfully disagree. The Arkansas Workers' Compensation Act does not require that the claimant insist that the doctor's history contain the gory details of the occurrence. Siders v. Southern Mattress Co., 240 Ark. 267, 398 S.W. 2d 901. 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. The majority and the Administrative Law Judge focus on the entry in Dr. Mittal's medical report: "He mentions he was moving some boxes at work, which were reasonably heavy and after this he started having a [sic] severe pain and discomfort." I fail to see how this shows that the claimant is not credible. Similarly unpersuasive is the argument that the claimant offered "substantially different stories" between direct and cross-examination. During both direct-examination and cross-examination, the claimant said he was injured

moving an acetylene tank. During cross-examination, the respondent focused on the particular wording used by the claimant and whether the claimant "slipped" and whether the claimant experienced a "stinging, burning sensation" during the injury. As stated above, the Court of Appeals has stated "we do not put semantics before substance" when addressing severity of pain. Darling Store Fixtures v. McDonald; Ayers v. Historic Preservation Assoc., supra. Pain is an objective and dynamic feeling and can be described numerous ways. The claimant should not have his credibility undercut simply because he described pain as "stinging" one moment and "burning" the next.

Lastly, I find the majority's conclusion that because the claimant initially believed his injury was a muscle pull, that the claimant's testimony is contradictory, to be unpersuasive. The claimant is not required to give notice that he has a hernia -he is not a doctor- the statute merely requires that appellant give notice of the occurrence which resulted in a hernia. Siders, supra. The claimant put the respondent on notice of the injury and was subsequently misdiagnosed. The claimant was only diagnosed properly nearly a month after the initial report of injury to the

respondent. Therefore, I find the claimant to be credible and his injury is compensable.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner