

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501576

JAMES A. HEFLEY, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., TPA	RESPONDENT

OPINION FILED JUNE 19, 2008

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

Claimant represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent represented by HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed June 29, 2007.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.

3. Claimant has not proven by a preponderance of the evidence that the hernia was a compensable injury under Ark. Code Ann. § 11-9-523(a)(3)-(4), in that the evidence clearly shows that (a) he incurred the hernia on February 4, 2005; (b) he did not cease work immediately thereafter; and (c) he did not report the hernia to his employer until February 8, 2005.

4. The reasonable and necessary medical care and temporary total disability issues are moot in light of the above finding.

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 opinion finding that the claimant failed to prove a compensable hernia injury. After a de novo review of the record in its entirety, I find that the claimant suffered a compensable hernia injury on February 8, 2005 and is

entitled to associated medical and temporary total disability benefits, therefore, I must respectfully dissent.

History

The claimant worked as an unloader at the respondent's facility. The claimant testified that on February 8, 2005, he was taking chemicals off a conveyor belt when he felt a ripping and tearing sensation. The claimant testified that he "decided there was something really wrong" and that he "needed some help." The claimant testified that he went to the office and asked for help from a manager trainee named Tabitha or Misty. The claimant testified that Cameron Davis, a manager, then took the claimant to the emergency room. The claimant also testified that he had suffered an injury 4 days prior to the February 8th injury. The claimant testified that the injury on February 4th was a muscle pull and that it was totally different from the pain he felt on February 8th. The claimant testified he did not have a burning pain on February 4th. The claimant also testified he did not stop work on February 4th. The claimant testified that he did not

tell anyone about the muscle pull at the time it occurred. Claimant testified that he worked the next day, February 5th, and then took his normal two days off, February 6th and 7th. The claimant testified that he was injured on February 8th at about 5pm and reported the injury shortly afterwards. The claimant testified that the pain on February 4th was on the upper left side near his stomach and the February 8th pain was on the right side of his body.

The claimant testified that the respondent called him in to sign the Form N on the morning of his hernia surgery, February 10th. The claimant testified that he was on pain medications when the respondent required him to review and sign the Form N in the respondent's offices and that the meeting took only two minutes. Larry Griggs, risk control manager for Walmart-Mountain Home, testified that the claimant stated that his stomach hurt on February 4th, but that the claimant did not point out anything more specifically than that. Mr. Griggs testified that he was the person who filled-out all of the Associate's statement except for the claimant's signature. Mr. Griggs testified

that he wrote "pretty much" what the claimant said and that he did not "know that that was the exact wording", referring to what the claimant said regarding the start date for a burning sensation.

The medical records set forth that the claimant went to the Emergency Room on February 8, 2005 complaining of burning pain and swelling. The medical report from this visit indicates that claimant reported that the pain began at about 5:00 p.m. that day. The medical records show that the claimant followed-up with Dr. John Spore on February 9, 2005, and was scheduled to have a surgery to repair an umbilical hernia on February 10, 2005. The claimant states in a report for Ozark Surgical Group that the injury occurred on February 4th and it occurred when he was moving an entertainment center. The claimant felt a burning feeling in his stomach. In another medical report from February 9, the injury is said to have "happened [at] work last week. Went to work last [night] for a couple of hours and area began burning, so [patient] went to ER." In a Baxter Regional Medical Center medical record dated February 9

there is a notation that the pain began "approximately 1 week ago which, when returned to work last evening, markedly increased."

Discussion

I find that the claimant sustained a compensable hernia injury on February 8, 2005. 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.

Here, the claimant has met his burden of proof on every requirement of Ark. Code Ann. 11-9-523. First, the claimant's hernia occurred as a result of sudden effort: the act of unloading cargo in the respondent's facility. Second, the claimant experienced severe pain in the affected region. 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)). Here, the claimant testified that he was unloading merchandise on February 8th, 2005 when he felt a pain in the right side of his body. The claimant experienced such pain on February 8th that he was unable to finish his shift and required a visit to the emergency room. This 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. See Darling Store Fixtures v. McDonald, 54 Ark. App. 60, 922 S.W.2d 748 (1996). Therefore, I find that elements one and two of the hernia statute are met.

The third requirement for a compensable hernia is that the pain must cause the claimant to cease work immediately. The Court of Appeals has found that the cessation from work need only become necessary soon enough after the trauma to establish that there was a causal connection under the circumstances of the case. Osceola Foods, Inc. v. Andrew, 14 Ark. App. 95, 685 S.W.2d 813 (1985); Ayers v. Historic Preservation Assoc., 24 Ark. App. 40; 747 S.W.2d 587 (1988). According to his testimony, the claimant sat down after he felt the pain and within 15 minutes of the initial pain, the claimant went to see a manager who took him to the emergency room. I find that this proximity of the initial pain in the region where the hernia was later diagnosed to the time when the claimant stopped working is sufficient to show the claimant immediately ceased working, therefore the third element of the hernia statute has been met.

As for the fourth requirement, notifying the employer within 48 hours, the claimant testified that he told his supervisor about his injury on February 8, the day

it occurred. 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 results in a hernia. Clark v. Ottenheimer Bros., 229 Ark. 383, 314 S.W.2d 497; McMurtry v. Marshall Model Market, 237 Ark. 11, 371 S.W.2d 4. The claimant testified that he told a manager trainee about the injury. The claimant testified that the trainee then called the manager of the facility and that Cameron Davis, an assistant manager, actually drove the claimant to the emergency room. Therefore, I find that the claimant has satisfied the fourth element of the hernia statute.

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. Here, the medical records show that the claimant went to the Baxter Regional Medical Center emergency room on February 8, 2005, the date of the injury that was later diagnosed as a hernia. The medical records show that claimant saw Dr. James McDaniel in the emergency room on that date. The claimant

was then referred to Dr. John Spore, who immediately scheduled the claimant for hernia repair surgery which took place on February 10, 2005, within 72 hours of the occurrence. Therefore, I find the claimant has met the fifth element of the hernia statute.

The majority has erred by finding that the claimant's hernia occurred not on February 8th, but on February 4th. Although the medical records show that on February 8th, the claimant also related a muscle pulling incident on February 4th, the report of an earlier incident does not establish either medically or factually that his hernia occurred on that date. See Cooper v. McBurney Corporation, 72 Ark. App. 332, 39 S.W.3d 1(2001). 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 (2001); 58 S.W.3d 369.

The claimant is not a doctor and he cannot be relied on for the diagnosis. At the point he was being examined by medical professionals, the claimant was simply stating whatever he thought might be a cause of the extreme pain he was experiencing in order to assist those diagnosing him. The claimant's statement that he hurt his stomach muscles in one area of his body on February 4th does not mean that the claimant did not sustain a hernia in another area on February 8th.

I find that the majority's determination that the hernia occurred on February 4th requires conjecture and speculation, which even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). If, as the respondent would have us believe, a hernia had occurred on February 4th, the claimant would have had to suffer the hernia during his shift, finish out his shift that day, come back to work with the hernia the next day and

finish that shift on February 5th. I find it unlikely that a cargo unloader would be able to adequately complete his job while suffering from a hernia. The respondents did not present any witnesses or any evidence who could directly rebut the claimant's testimony that he worked effectively from February 4th to February 8th until the occurrence of the hernia.

As for the Form N relied on by the respondents, Larry Griggs testified that he, the agent of the respondents, filled out the Form N, not the claimant, who was under the influence of prescribed Hydrocodone and awaiting major surgery later that day.

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, although

there may be confusion due to the claimant's honest account of his muscle pull on February 4th, there are no contradictions. The claimant credibly testified that he had what he felt was a muscle pull on February 4th, 2005 while he was helping to move an entertainment center for a customer. The claimant thought little of the injury and continued to work, completing his shift. The claimant was able to come into work the next day and complete his full shift that day. The claimant did not seek medical attention after the incident on February 4th. The claimant testified that after the incident on February 8th he was scared because he had never had an injury like that before. The claimant's testimony and the medical records show that on February 8 the claimant felt intense burning pain in his abdomen, immediately stopped work, notified his employer, went to the emergency room, was diagnosed with a hernia, and had surgery.

In conclusion, based on the preponderance of the evidence on record, I find that the claimant has met all five criteria for establishing a compensable hernia and the

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claimant is entitled to associated reasonable and necessary medical treatment and disability benefits. For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner