

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F900368

MARCUS FOUST, EMPLOYEE	CLAIMANT
PEPSI BOTTLING GROUP, INC., EMPLOYER	RESPONDENT
OLD REPUBLIC INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED APRIL 2, 2010

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

Claimant represented by the HONORABLE MICHAEL HAMBY,
Attorney at Law, Greenwood, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION

Claimant appeals from a decision of the
Administrative Law Judge filed September 8, 2009.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on February 25, 2009, and contained in a pre-hearing order filed February 25, 2009, are hereby accepted as fact.
2. The claimant has failed to prove by a preponderance of the evidence that he

suffered a compensable hernia on December 13, 2008.

3. The claimant failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from January 19, 2009 until February 23, 2009.
4. The claimant failed to prove by a preponderance of the evidence that he is entitled to medical treatment for his hernia.

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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant has proved a compensable hernia injury. I would award reasonably necessary medical treatment and temporary total disability benefits from January 19, 2009 until February 23, 2009, therefore I must respectfully dissent.

History

The claimant is a 44-year-old male who was employed by the respondent as a delivery truck driver. The claimant testified that on December 13, 2008, while wrapping a pallet of drink containers, he felt a pop in his groin. He testified that he would wrap the pallet from high to low, tightly and securely. The pallet of Pepsi product reached

from six inches off the floor up to six feet tall. He was wrapping it with heavy-duty Saran wrap. He reported that, as he squatted to tighten the Saran wrap around the bottom of the pallet, he felt a pop in his right groin. He was squatting down walking with the Saran wrap around the pallet. The Saran wrap weighed approximately five to eight pounds. He reported that he was in an awkward position and had to pull the Saran wrap tight, to secure the bundle so that it wouldn't fall off the back of the trailer. At first, he did not think much of the pop, other than noting that he felt a pop.

After completing the wrapping, he proceeded to get in the truck. After getting in the truck, he reached over to get something out of the passenger side of his truck, and felt excruciating pain in the area where the pop had occurred. He undid his pants and pulled his shirt out, trying to relieve the pain. He finished his final two deliveries and called his supervisor, Travis Gerard, and advised him that he thought he had a groin pull and asked that a new employee be allowed to ride with him the following day to assist. There was no one available to assist him, and he proceeded the following day to complete

his normal route. However, during the early morning of December 16, 2008, the claimant again reached for something in the passenger seat and the pain again radiated from the same area where the pop had occurred, and this time the pain did not cease. At that point, he notified his supervisor, who immediately called in a replacement driver. The claimant was then sent by his employer to Dr. Holder.

The medical records reflect that, on December 16, 2008, Dr. Holder diagnosed the claimant with right inguinal hernia. On January 20, 2009, the hernia was surgically repaired. The claimant remained off work from January 19, 2009 until February 23, 2009, when he returned to his employment, where he is still working.

Discussion

_____ 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 majority, by affirming and adopting the Administrative Law Judge, did not properly consider the severe strain requirement, incorrectly focusing on the fact that the Saran wrap was only five to eight pounds. However, as explained by the claimant, his positioning in wrapping the Saran wrap was disjointed, in that, he was squatting, walking with the wrap while in a squatted position, and pulling on the Saran wrap. I find that from this position the claimant's groin area is under severe strain, regardless of whether the item that he was holding was heavy or not. Therefore, the first requirement of the hernia statute has been met.

Second, the claimant has met the severe pain and cessation of work requirements. The claimant testified that

he felt severe groin pain when he reached to put something down or pick something up from the passenger seat of his truck. The first time was minutes after he felt the pop. While the claimant used language that suggested 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, 54 Ark. App. At 64. Here, the claimant credibly testified that his pain was severe enough to cause him to sit down. 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."

Third, the claimant notified the employer within 48 hours and the physical distress was enough to require the attendance of a physician within 72 hours. 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 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. Just as the Act does not require an immediate diagnosis, it also 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 (1966). Here, the pain was of such a magnitude that it caused him to call in and ask for assistance, which was not forthcoming.

Apparently, the pain let up somewhat until a day or two later, when it came back and did not let up, at which time he immediately stopped his employment, notified his employer for a second time, and sought medical assistance. He was immediately diagnosed with a hernia in the exact same spot the pop occurred and proceeded to undergo surgery.

In conclusion, I find that the claimant has met all of the requirements of Ark. Code Ann. § 11-9-523(a) and should be awarded reasonably necessary medical treatment and temporary total disability benefits from January 19, 2009 until February 23, 2009.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner