

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F901474

DEBBIE NOWLIN, EMPLOYEE	CLAIMANT
McDONALDS, SELF-INSURED EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER/TPA	RESPONDENT

OPINION FILED FEBRUARY 17, 2010

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

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

Respondents represented by HONORABLE CONSTANCE CLARK, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed September 11, 2009.

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 February 6, 2009, the relationship of employee/self-insured employer/third party administrator existed between the parties.

3. On February 6, 2009, the claimant earned wages sufficient to entitle her to weekly compensation benefits fo \$250.00 for total disability and \$188.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove that her right inguinal hernia constitutes a "compensable injury" under Ark. Code. Ann. §11-9-523. Specifically, she has failed to prove by the greater weight of the credible evidence that the occurrence of this hernia immediately followed as the result of sudden effort, severe strain, or application of force directly to the abdominal wall, that there was severe pain in the hernial region, and that the pain caused the employee to cease work immediately.
5. The respondents have denied that the claimant sustained a "compensable" hernia and controvert this claim in its entirety.

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 by a preponderance of the evidence that she sustained a compensable hernia injury.

On February 6, 2009, the claimant was getting a thirty-six pound case of fries out of the walk-in freezer and, when she stepped on a clump of ice, she started to fall and caught herself. She testified that she felt immediate "burning and pulling" in her groin as she struggled to keep from falling while holding the case of fries. Since she was the only manager on duty and did not know how severely she

had hurt herself, she went back to work. She repositioned herself in the drive-through so as to limit her mobility. She stated that, as the night progressed, she became more and more sore. She followed procedure and reported the injury that evening to the service that the respondent uses called "Company Nurse." She told the person she spoke with that she did not feel like she needed to see a doctor right then. She did go to work the next day and, as the claimant explained, she could work on that Saturday because she was positioned in the grill area and did not have to move around a lot. She stated, "I pretty much limped through my shift," and she was "pretty sore." That next day, Saturday, she also told her supervisor, Kim, that she had been injured. She then left an e-mail requesting to see a doctor. She was sent to the company doctor, Dr. Moffitt, on Tuesday. He assessed that the claimant did have a hernia, and recommended that she go to a surgeon, but did not refer her to one. After her claim was denied, she went to Dr. Bill Kendrick, her personal physician. He referred her to a surgeon, Dr. John Kendrick. Two days later, she had surgery, on March the 4th.

In order to prove a compensable hernia injury under Ark. Code Ann. §11-9-523, the claimant's injury must meet five requirements:

- (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, based on the claimant's credible hearing testimony, that the claimant has met the five requirements of Ark. Code Ann. §11-9-523. The claimant has met the first requirement, that of "severe strain." It is clear that the strain of stopping her fall while holding the thirty-six pound case of fries would have caused an immediate strain. When considering that the claimant had suffered a hernia in 2002, it is obvious that this kind of strain could have re-injured the same weak area that had bothered her years before.

The claimant must also prove that the hernia produced "severe pain." Pain is relative. What would be considered severe pain to one person may not be to another, depending on their individual pain threshold. In Darling Store Fixtures v. McDonalds, 54 Ark. App. 60, 922 S.W.2d 748 (1996), it was found that "slight burning" was sufficient to satisfy this requirement. In the instant case, the claimant stated that she suffered from burning and pulling. Clearly, it may or may not have been severe to her, depending on her pain threshold. The injury was severe enough to warrant surgery, which would indicate that the pain would also be considered severe.

The claimant must also prove that there was a cessation of work immediately following the injury. Importantly, the statute gives no guidelines as to the amount of time required for the cessation of work. The claimant testified that, after she injured herself in the freezer, she did stop long enough to collect herself. There is no minimum amount of time that the claimant had to stop working to satisfy the statute. Again, this would be on an individual and case-by-case basis as to how long an individual needs to stop before being able to continue. As

the claimant stated, the pain was burning and pulling. She did go back to work, but in a primarily stationary position in the drive-through. She stated that the pain got worse over the course of the night. She was able to go back to work in a stationary position but, clearly, the next day, she was "limping through."

The claimant must also prove that she gave notice to her employer within 48 hours. This burden has been satisfied with the written report by the "company nurse" submitted as evidence.

The final requirement she must meet is that the physical distress following the injury must lead to the need for medical attention by a physician within 72 hours after its occurrence. In this case, the claimant asked to see a doctor and, when the respondent set up the appointment and she was seen, it was confirmed that she had suffered from a hernia. The claimant did ask to see a doctor within the 72-hour window.

In conclusion, I find, based on the claimant's credible hearing testimony, that the claimant has satisfied the five requirements of Ark. Code Ann. §11-9-523. For the

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aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner