

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H010845

BRANNDON EBERLY, Employee	CLAIMANT
MCKEE FOODS, Employer	RESPONDENT
CCMSI, Carrier	RESPONDENT

OPINION FILED APRIL 13, 2022

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by R. SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On March 21, 2022, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on December 8, 2021 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on December 8, 2020.
3. The respondent has controverted this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant earned

sufficient wages to entitle him to the maximum compensation rates.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of hernia on December 8, 2020.
2. Related medical.
3. Temporary total disability benefits.

At the time of the hearing claimant clarified that he is requesting temporary total disability benefits from December 10, 2020 through March 22, 2021.

The claimant contends he sustained a compensable hernia on December 8, 2020 and that he is entitled to related medical, temporary total disability benefits from December 10, 2020 through March 22, 2021, and a controverted attorney's fee.

The respondents contend the claimant did not sustain a compensable injury as that term is defined by Act 796.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on December 8, 2021 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. The parties' stipulation that claimant earned sufficient wages to entitle him to the maximum compensation rates is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury pursuant to A.C.A. §11-9-523(a).

4. Respondent is liable for payment for all reasonable and necessary medical treatment for claimant's compensable hernia.

5. Claimant is entitled to temporary total disability benefits beginning February 2, 2021 and continuing through March 21, 2021.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

#### FACTUAL BACKGROUND

Claimant is a 48-year-old man who began working for respondent as an over-the-road truck driver on September 23, 2019. Claimant performed his job with a co-driver who changed on a frequent basis. Claimant and the co-driver were responsible for driving and delivering boxes of respondent's snack cakes to various locations throughout the country.

In December 2020, claimant and another driver were delivering product to various locations in Nebraska, South Dakota, Colorado, and Kansas. On December 8, 2020, claimant and his co-driver were making a delivery to a location in Sterling, Colorado. At his deposition claimant testified that he was in the process of picking up a box from the floor of the trailer that weighed at least 20 pounds and:

All of a sudden I felt a pop and an excruciating pain of - -  
I don't know what it was in my left groin area, but it hurt,  
and I had to stop for a few minutes and just take a break.

Claimant testified that he informed his co-driver that something had happened to

his groin and he needed to take a break. After resting for a few minutes they resumed unloading and delivering the product before continuing on the route which had a number of other stops before returning to respondent's facility in Gentry. Claimant testified that after the incident occurred he called a nurse at respondent and reported it in the early morning hours of December 8.

At some point after claimant and his co-driver returned to Gentry they went on another run to South Arkansas which lasted one day. Claimant then returned to Gentry and to his home where he showed his wife what had happened.

On December 11, 2020, claimant completed paperwork at respondent with Vickie Owens, an RN and the Employee Health Services Administrator for respondent, reporting the injury. Claimant was sent to Dr. Berestnev who diagnosed claimant with an inguinal hernia and referred him to an abdominal surgeon for further treatment. Claimant eventually came under the care of Dr. Schiefelbein who performed surgery to repair a bilateral inguinal hernia on February 2, 2021.

Respondent denied compensability of the hernia and as a result claimant has filed this claim contending that he suffered a compensable hernia on December 8, 2020. He requests payment of medical treatment, temporary total disability benefits, and a controverted attorney fee.

### ADJUDICATION

Claimant contends that he suffered a compensable hernia as a result of unloading a trailer of snack cakes on December 8, 2020. Claims for hernias are governed by A.C.A. §11-9-523(a) which provides:

(a) In all cases of claims for hernia, it shall be shown to the satisfaction of the Workers' Compensation Commission:

(1) That the occurrence of the hernia immediately followed as a 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.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proof. As previously noted, claimant testified that on December 8, 2020 he was picking up a 20-pound box when he felt a pop and excruciating pain in his left groin area. As a result, he stopped working for a period of time. Based on claimant's testimony, I find that he has proven that the hernia immediately followed as a 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 claimant to cease work immediately.

I also find that claimant gave notice of the occurrence to his employer within 48 hours. Claimant testified that right after the incident occurred he telephoned respondent and reported the injury to a nurse on duty because he was not sure he would be able to finish the route. With respect to this issue, I note that claimant did formally complete paperwork on December 11 indicating that he reported the injury that day. This is reflected both on Form AR-N and an Injury form completed for respondent. However,

claimant testified that he indicated that he reported the injury on that date because that is the date he was completing the paperwork with Vickie Owens, respondent's Employee Health Services Administrator.

Finally, I find that the physical distress following the occurrence was such as to require the attendance of a licensed physician within 72 hours after the occurrence. After claimant completed paperwork at respondent on December 11, he was sent to see Dr. Berestnev that same day. Dr. Berestnev diagnosed claimant with an inguinal hernia and referred claimant to an abdominal surgeon.

Accordingly, I find that claimant has satisfied the elements for claims of hernias as set forth in A.C.A. §11-9-523(a). In reaching this decision, I note that respondent contends that claimant's testimony is not credible based on several factors. First, claimant testified at his deposition that his injury occurred in Spearfish, South Dakota; not Sterling, Colorado. Claimant testified that it was only after looking at his log that he realized he had confused the accident's location. Given the number of stops claimant made according to his log and the hours when those stops were made during all times of the day, I do not find this to be a significant inconsistency under the circumstances.

In addition, there was also some confusion regarding when claimant returned to Gentry and when he went on the run to South Arkansas. Again, I do not find this evidence significant to the point that claimant's testimony is not credible. Thus, while there are some inconsistencies present, I do not find those inconsistencies significant enough to find that claimant's testimony is not credible with respect to the injury or his reporting of it shortly after it occurred.

Having found that claimant has proven a compensable hernia injury, I find that

respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable hernia.

I also find that claimant is entitled to temporary total disability benefits beginning February 2, 2021, and continuing through March 21, 2021. Claimant's injury is an unscheduled injury. In order to be entitled to temporary total disability benefits has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, I find that claimant remained within his healing period beginning on the date he was initially evaluated by Dr. Berestnev on December 11, 2020. However, Dr. Berestnev did not take claimant off work, but instead indicated that claimant could return to work with lifting restrictions of no more than 10 pounds. Claimant eventually came under the care of Dr. Schiefelbein who performed surgery to repair claimant's hernia on February 2, 2021. There is no medical evidence indicating that Dr. Schiefelbein took claimant off work prior to the date of his surgery.

Following the surgery Dr. Schiefelbein initially indicated that claimant could return to work as of March 10, 2021. However, prior to that date he again indicated that claimant was incapable of working. Dr. Schiefelbein indicated in a work note dated March 17, 2021 that claimant could return to work as of March 22, 2021 with no restrictions.

Accordingly, based on the foregoing evidence, I find that claimant remained within his healing period and that he suffered a total incapacity to earn wages beginning on February 2, 2021, the date of his surgery, and continuing through March 21, 2021.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable hernia on December 8, 2020. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. In addition, claimant is entitled to temporary total disability benefits beginning February 2, 2021 and continuing through March 21, 2021.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

The respondents are responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$476.80.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE