

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 05-137917

Employee: William Bostic

Employer: Associated Wholesale Grocers, Inc.

Insurer: Self-Insured

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 29, 2008. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued December 29, 2008, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 18th day of June 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee's left inguinal hernia arose out of and in the course of his employment.

According to § 287.195 RSMo (2005), "[i]n all claims for compensation for hernia resulting from injury arising out of and in the course of the employment, it must be definitely proved to the satisfaction of the division or the commission:

- (1) That there was an accident or unusual strain resulting in hernia;
- (2) That the hernia did not exist prior to the accident or unusual strain resulting in the injury for which compensation is claimed.

Employee alleges that on December 15, 2005, he was taking a 4-6 pound case of toaster strudel from a shelf in the freezer. He testified that he had to reach about 3.5 feet into the shelf to pull the case out. As he was pulling the case out, it became stuck on something and he had to lift the 4-6 pound case up a little in order to pull it out. Employee alleges that after this incident he felt a sharp pain in his abdomen. However, he did not report the incident at the time.

More than two weeks later, on December 30, 2005, employee went to his primary care physician, Dr. Williams, for a bronchial infection and pain in his right testicle. Upon examination, Dr. Williams diagnosed employee with a small left inguinal hernia. Dr. Williams' notes state "patient was unaware" and "no known injury."

After this appointment with Dr. Williams, employee spoke with a union representative and was advised to contact an attorney. Only after talking with the union representative and an attorney did employee finally report the alleged injury to employer.

Employee was again seen by Dr. Williams on January 11, 2006. However, Dr. Williams' records on that date are also void of any notification by employee that he was allegedly injured at work on December 15, 2005, or any other date for that matter. In fact, the only medical records mentioning that this hernia was the result of a work related injury are the records from Dr. Edwards, the surgeon that performed the repair of employee's hernia. Dr. Edwards' records from January 12, 2006 state that employee notified him that in mid-December he was "lifting and pulling heavy boxes and developed a pain and tearing sensation in his left groin."

Employee obtained an Independent Medical Examination from Dr. Koprivica on August 5, 2006. Dr. Koprivica's report notes that "in reviewing [employee's] history that he does have a somewhat complex presentation." Dr. Koprivica opines that employee's injury on December 15, 2005 is the prevailing factor in the development of the identified left inguinal hernia. Dr. Koprivica reaches this conclusion on the basis that employee had no prior history of an inguinal hernia. Employee underwent a physical examination in August of 2003 without evidence of inguinal hernia and further medical records from 2004 provided no evidence of inguinal hernia.

Employer obtained the opinion of Dr. Corsolini. Dr. Corsolini evaluated employee on May 4, 2007, reviewed all of his medical records, and concluded that employee did not sustain an injury while working for employer that resulted in a left inguinal hernia. Instead of relying on irrelevant medical records from 2003 and 2004, Dr. Corsolini primarily relied on the medical records of employee's primary care physician, Dr. Williams. Dr. Corsolini stated in his report that "[employee] did not present with symptoms in a manner that would indicate his conviction that work actually did cause the hernia to occur." Dr. Corsolini went on to state

that he would have expected employee to complain either directly to Dr. Williams or acknowledge the presence when it was found on his examination. Dr. Corsolini stated “[b]ased on these circumstances, and [employee’s] failure to report this in a timely fashion, [his] opinion is that this does not represent a work related injury and that work was not the prevailing factor in the causation of the left inguinal hernia.”

It is my opinion that Dr. Corsolini is more credible than Dr. Koprivica because Dr. Corsolini’s opinion is primarily based upon the medical records most pertinent to this claim. On the other hand, Dr. Koprivica’s opinion is primarily based upon the assumption that because employee had separate medical records in 2003 and 2004 that did not show a hernia, then his hernia must have occurred at work on December 15, 2005.

In addition, I do not find employee to be a credible witness. Employee did not report the injury on the date he alleges it actually occurred. It was only after he found out he had a hernia and spoke with a union representative and an attorney did he report the injury to employer. In fact, employee even testified that it was not his priority to report the alleged injury to his employer.

For the foregoing reasons, I do not believe employee has met his burden of proving that his left inguinal hernia actually arose out of and in the course of his employment. First, employee did not report the injury when it occurred. Second, employee did not even go to his primary care physician until after more than two full weeks had passed from the date of the alleged injury. Third, there is no record anywhere of this being a work related injury until after employee spoke with a union representative and an attorney. Fourth, Dr. Koprivica’s opinion is based upon irrelevant medical records from 2003 and 2004. Last, Dr. Corsolini opined, based upon the only relevant medical records, that employee’s work was not the prevailing factor in the causation of the left inguinal hernia. As such, I would not award employee temporary total or partial disability benefits, permanent partial disability benefits, or past medical expenses.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Alice A. Bartlett, Member

AWARD

Employee: William Bostic Injury No. 05-137917
Dependents: N/A
Employer: Associated Wholesale Grocers, Inc.
Additional Party: N/A
Insurer: Self-insured
Hearing Date: 9/23/08 Checked by: MEH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury or occupational disease compensable under Chapter 287? YES

3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: 12/15/05
5. State location where accident occurred or occupational disease was contracted: GREENE COUNTY, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
 - Did employer receive proper notice? YES
 - Did accident or occupational disease arise out of and in the course of the employment? YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted: WHILE LIFTING FELT A STRAIN IN HIS LEFT GROIN AND ABDOMEN.
12. Did accident or occupational disease cause death? NO Date of death? N/A
 - Part(s) of body injured by accident or occupational disease: BODY AS A WHOLE
14. Nature and extent of any permanent disability: 10%
 - Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0

Employee: William Bostic

Injury No. 05-137917

- Value necessary medical aid not furnished by employer/insurer? \$809.84
- Employee's average weekly wages: \$720.09
- Weekly compensation rate: \$480.06/\$365.08

20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$809.84

3 weeks of temporary total disability (or temporary partial disability)

40 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning n/a, for Claimant's lifetime

22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential (0) payable by SIF for 0 weeks, beginning N/A
and, thereafter, for Claimant's lifetime

Total: SEE AWARD

23. Future requirements awarded: NONE

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

CHRISTOPHER MOBERG

FINDINGS OF FACT and RULINGS OF LAW:

Employee: William Bostic

Injury No. 05-137917

Dependents: N/A

Employer: Associated Wholesale Grocers, Inc.

Additional Party: N/A

Insurer: Self-insured

Hearing Date: 9/23/08

Checked by: MEH

The parties appeared before the undersigned administrative law judge on September 23, 2008, for a final hearing. The claimant appeared in person represented by Christopher Moberg. The employer and insurer appeared represented by Jerry Harmison. Memorandums of law were filed by October 14, 2008.

The parties stipulated to the following facts: On or about December 15, 2005, Associated Wholesale Grocers was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully self-insured. On the alleged injury date of December 15, 2008, William Bostic was an employee of the employer. The claimant was working subject to the Missouri Workers Compensation Law. This employment occurred in Greene

County, Missouri. The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo. At the time of the alleged accident, the claimant's average weekly wage was \$720.09, which is sufficient to allow a compensation rate of \$480.06 for temporary total disability compensation, and a compensation rate of \$365.08 for permanent partial disability compensation. No temporary disability benefits have been paid. The employer and insurer have paid no medical benefits. The attorney fee being sought is 25%.

ISSUES:

1. Whether the claimant sustained an accident, which arose out of the course and scope of employment.
2. Whether the claimant gave the employer proper notice.
3. Whether the accident caused the injuries and disabilities for which benefits are being claimed.
4. Whether the employer is obligated to pay past medical expenses.
5. Any temporary total benefits owed to the claimant.
6. The nature and extent of permanent disabilities.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The claimant was working as a freezer order filler for the employer on December 15, 2005. On that date he was taking a case of toaster strudel from a shelf in the freezer. The box weighed approximately 4 – 6 pounds. The shelf was at shoulder level. He had to reach about 3 ½ feet into the shelf. When he pulled on the box it hung on something and he had to lift the box up to pull it out. When he lifted the box he felt a sharp pain in his abdomen. This was a sudden pain located just above the crease of his leg. The claimant described it as 6 on a scale of 1 – 10.

The claimant did not report the accident at that time. He felt it was a strain and would be okay after a couple of days. After a couple of days he began to develop diarrhea and stomach cramps. He has also had urinary tract infections since 2004. Claimant did not report the injury at that time because he was confusing the symptoms of the strain and the diarrhea and stomach cramps.

On December 30, 2005, the claimant went to his private physician, Dr. Rick Williams, for a bronchial infection and pain in his right testicle. Claimant complained of a two-week history of sinus congestion, cough, and intermittent right testicular pain. Claimant gave no history of an injury. At this visit, Dr. Williams found a nodule in claimant's right testicle and diagnosed the claimant with a hernia on the left side. Claimant was unaware he had a hernia. He opted for observation of the hernia at that time.

Claimant discussed the hernia with a union representative who suggested he talk to an attorney before he talked to his employer. It took a couple days for him to see an attorney. On January 5, 2006, claimant contacted Carolyn Phipps, the Workers' Compensation Supervisor for the employer.

Ms. Phipps testified that the employer has a policy that all injuries are to be reported immediately. They post this on a bulletin board in the lunch room. The reason for this policy is that they want to do a drug screen on the injured employee. She testified the employer was prejudiced because they could not do an immediate drug screen. She admitted that the claimant had reported the injury within 30 days.

A written report of injury was prepared. A recorded statement of the claimant was taken on January 6, 2005. In that statement the claimant gives a history of feeling a strain in his lower abdomen while taking a case from an upper slot on December 15, 2005, at approximately 8:00. The claimant was not having any pain at that point but did ask for it to be checked out.

The claimant next sought treatment with Dr. Williams on January 11, 2006. Dr. Williams referred him to Dr. Chris Edwards, a surgeon. Dr. Edwards saw the claimant the next day and discussed surgery to repair the hernia. The claimant gave a history of an injury on December 15, 2005. Dr. Edwards performed a left inguinal hernia repair with Kugel mesh. The claimant was off work from the date of surgery, January 13, 2006, to February 1, 2006. The claimant paid out of pocket a total of \$809.84 as set out in Exhibit K.

The claimant testified that when he initially returned to work he had trouble making his quota. Because of seniority he has been able to transfer to a different position with the employer. He is now required to lift heavier weight.

The claimant currently still has pain. He takes Ibuprofen on a regular basis, usually once a day. He only needs them the days he works, usually not when he is off. He cannot roughhouse with his kids. Riding a bike and jogging is uncomfortable. He cannot continuously push mow his yard without taking breaks.

Dr. Koprivica evaluated the claimant on August 5, 2006, at the request of the claimant. Dr. Koprivica took a history from the claimant regarding any prior knowledge of a hernia before December 15, 2005. The claimant had a physical before going to work for the employer and no hernia was detected. He also was seeing Dr. Woods in August 2004 for urinary tract infections. The claimant recalled that he was examined for hernias at that time and none were

found. The claimant gave a history of pulling a case of toaster strudel on December 15, 2005, that hung up and straining his left groin and abdominal area. Claimant was also reporting a constant ache in his left groin as well as soreness and aching with heavy activities.

Dr. Koprivica concluded that the claimant's injury of December 15, 2005, was the prevailing factor in the development of his left inguinal hernia. He takes into account the fact that there was no history of a hernia when examined for employment in August 2003 and again when being treated for the urinary tract infections. He also states: "Finally, there is the history of onset of groin pain followed by the identification of the inguinal hernia would be consistent with its development as a result of the injury of December 15, 2005." Dr. Koprivica also concluded that the claimant was temporarily and totally disabled from January 12, 2006, to February 2, 2006. He further concluded that the claimant had a permanent partial disability of 10% of the body as a whole related to the hernia and the ongoing impact on his lifting and carrying capacity.

Dr. Corsolini evaluated the claimant on May 4, 2007, at the request of the employer. Dr. Corsolini found claimant to have had a successful treatment for a left inguinal hernia. It was his opinion that, regarding causation, "Mr. Bostic did not present with symptoms in a manner that would indicate his conviction that work actually did cause the hernia to occur." He continues to state that he would have expected the claimant to complain either directly to Dr. Williams or acknowledged the presence when it was found on his examination. Dr. Corsolini states: "Based on these circumstances, and his failure to report this in a timely fashion, my opinion is that this does not represent a work related injury and that work was not the prevailing factor in the causation of the left inguinal hernia."

Based on these facts, I make the following findings:

1. Whether the claimant sustained an accident which arose out of the course and scope of employment.

I find the claimant to be a credible witness. After carefully considering all of the evidence, I find that the claimant sustained an accident that arose out of the course and scope of his employment on December 15, 2005, when he was lifting a case of toaster strudel as part of his regular duties as an order filler in the freezer department and felt a strain in his left groin.

2. Whether the claimant gave the employer proper notice.

The claimant gave written notice within 30 days as required by Section 287.420 RSMo. The employer's internal policy requiring immediate reporting is not controlling. The claimant complied with the requirements of the statute, therefore, notice was timely.

3. Whether the accident caused the injuries and disabilities for which benefits are being claimed.

Dr. Corsolini and Dr. Koprivica have different opinions on whether claimant's work caused the inguinal hernia. After carefully considering all of the evidence as a whole, I find Dr. Koprivica's opinion more convincing, and therefore give his opinion more weight than Dr. Corsolini. The claimant had a specific incident of lifting the box and feeling a strain in his groin, followed by the identification of the inguinal hernia. Dr. Koprivica found this consistent with the development of the hernia as a result of the injury of December 15, 2005. I agree. Therefore, I find that the accident of December 15, 2005, caused the injury of an inguinal hernia for which benefits are being claimed.

4. Whether the employer is obligated to pay past medical expenses.

Claimant is requesting out of pocket past medical expenses of \$809.84 incurred as a result of the medical treatment for this inguinal hernia. I find that this is reasonable and necessary and therefore order the employer to pay the amount of \$809.84 for past medical expenses.

5. Any temporary total benefits owed to the claimant.

The claimant was unable to work from the date of his surgery, January 13, 2006, to the date he was released, February 2, 2006. I find the claimant was temporarily and totally disabled during this time as a result of his work-related injury. Therefore, the employer shall pay 3 weeks temporary total disability at the rate of \$480.06.

6. The nature and extent of permanent disabilities.

Based on the testimony of the claimant, the medical records, and the opinion of Dr. Koprivica, I find that the claimant has sustained a permanent partial disability of 10% of the body as a whole at the 400 week level as a result of his work-related injury.

Attorney for the claimant, Christopher Moberg, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Date: December 29, 2008

Made by: /s/ Margaret Ellis Holden
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker
Jeffrey W. Buker
Director
Division of Workers' Compensation