

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

Injury No.: 03-049872

Employee: Fred Hulsey
Employer: Shop N Save
Insurer: American Protection Insurance Company
Date of Accident: Alleged March 30, 2003
Place and County of Accident: St. Louis County, Missouri

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 September 3, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued September 3, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 5th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Fred Hulsey

Injury No.: 03-049872

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Shop N Save

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: American Protection Insurance Company

Hearing Date: June 30, 2008

Checked by: KOB:dwp

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: alleged March 30, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
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: Claimant alleges he was pulling a large piece of equipment when he experienced the symptoms of a hernia.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Fred Hulsey

Injury No.: 03-049872

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$340.59

19. Weekly compensation rate: \$227.06 / \$227.06

20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

22. Second Injury Fund liability: No.

Total: \$0.00

23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW

Employee: Fred Hulsey

Injury No.: 03-049872

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Shop N Save

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

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PRELIMINARIES

The matter of Fred Hulsey ("Claimant") proceeded to hearing to determine whether he sustained an accidental injury arising out of and in the course of employment. Attorney Danelle Duffy represented Claimant. Attorney William Lemp represented Shop N Save ("Employer"), and American Protection Insurance Company, Employer's insurer.

The parties stipulated Claimant was an employee of Employer on March 30, 2003, earning an average weekly wage of \$340.59, which corresponds to a rate of compensation of \$227.06 for both temporary total disability ("TTD") benefits and permanent partial disability ("PPD") benefits. Employer has denied the claim and paid no benefits. Venue, notice, timeliness of the claim, and coverage of the Act were not at issue.

The issues to be determined are: 1) Did Claimant sustain an accidental injury arising out and in the course of his employment; 2) Is Claimant's medical condition causally related to his alleged accident; 3) Is Employer liable for paying medical benefits up to \$16,013.23; 4) Does Employer has a defense to payment of the bills on the grounds it did not authorize treatment; 5) Is Claimant entitled to recover TTD benefits from March 30, 2003 through May 15, 2003; and 6) What is the nature and extent of Claimant's PPD?

FINDINGS OF FACT

Based on the competent and substantial evidence presented in this case, including the testimony of Claimant and other witnesses, deposition testimony of expert witnesses, records received into evidence, and my personal

observations, I find:

1. Claimant is a 25 year old man who worked in the Meat Department of Employer's Maplewood and Lemay stores from May 2001 to May 2004. When he worked the late shift, his job duties included closing and cleaning the department.
2. Claimant testified that on the evening of March 30, 2003, while engaged in his clean up duties alone, he was pulling out the meat grinder, which is a four to five foot high machine weighing up to 200 pounds on broken wheels. Claimant testified he engaged in less than one minute of exertion when he felt a rip or tear-like sensation in his left groin area, and experienced a "horrible" pain which knocked him to the ground. Claimant said he reported the incident and injury to Kevin McFarland, the "person-in-charge," who sent him home.
3. Mr. McFarland remembers Claimant asking to go home early on March 30, 2003 because he reported not feeling very well. Claimant displayed no visible symptoms of injury at the time, and did not report an injury or ask for authorized treatment. Since it was not busy, Mr. McFarland granted permission for Claimant to leave early. I find the testimony of Mr. McFarland to be credible.
4. On the day in question, Claimant left work two hours earlier than he had been scheduled to leave with the permission of the person in charge.
5. On March 31, 2003, Claimant presented to his primary care physician, Dr. Bernhard, with complaints of "diarrhea and stomach pains" (Exhibit C, p. 6). Dr. Bernhard diagnosed a large, non-reducible hernia in the left groin. According to the records, Claimant stated the hernia had been present for one year, but he had never brought it to his doctor's attention. The left lower quadrant pain was likely associated with the hernia, and Dr. Bernhard made an immediate referral to Dr. Vadlamani, a surgeon.
6. Dr. Vadlamani examined Claimant on April 2, 2003 (Exhibit C, p. 21). The history indicated Claimant, "apparently knew he had swelling for the last six months to a year, and recently has had severe cramping associated with nausea and vomiting on several occasions." Further, "[h]is father had congenital hernia operated at the age less than six months."
7. On April 7, 2003, Claimant underwent a repair of a partially incarcerated left inguinal scrotal hernia by Dr. Vadlamani, who noted "[a]n internal ring was quite patulous" (Exhibit E, p. 17).
8. Neither Dr. Bernhard's nor Dr. Vadlamani's records contain a history of onset consistent with Claimant's testimony at hearing.
9. Claimant proceeded with surgery based on the understanding his private health insurance would pay, however, post-surgery, the insurer refused to provide coverage. Claimant incurred a total of \$16,013.23 in medical expenses for the reasonable and necessary treatment of his hernia.
10. Claimant has no complaints or limitations associated with his hernia repair, which by all accounts was successful.
11. Dr. Kenneth J. Bennett, a board certified surgeon with a particular and strong interest in, and experience with, hernias and hernia repairs, testified by deposition for Employer. His testimony supports the following findings of fact (Exhibit 1):
 - a. Claimant suffered from an "indirect inguinal hernia," which is known to be congenital in origin (p.13). Furthermore, that the hernia arose at the internal or deep inguinal ring is further evidence of a congenital hernia (p. 27). Claimant's father was born with a hernia (p.14).
 - b. Claimant's weight and smoking history facilitated hernia development (p.14).
 - c. A patulous internal ring, or one which is loosened and weakened, "is evidence of chronicity, and not of an acute onset." It takes months to render an internal ring patulous (p. 13, 22).

d. A hernia can cause vomiting when it becomes incarcerated and kinks (p. 15).

12. Dr. Robert Poetz is an osteopathic physician and surgeon who conservatively treats hernias in the course of his practice, but does not perform surgical repairs. He evaluated Claimant, prepared a report dated December 28, 2005, and testified by deposition on April 15, 2008 (Exhibit A). Dr. Poetz concluded Claimant's hernia was the result of the March 30, 2003 injury, which caused PPD of 25% of the body as a whole. Dr. Poetz believed Claimant when he said the incident of March 30, 2003 caused his hernia symptoms (p. 21).

ADDITIONAL FINDINGS OF FACT AND RULINGS OF LAW

Based on the above findings of fact, and the Workers' Compensation Law of the State of Missouri, I make the following additional findings of fact, and rulings of law:

The credible evidence does not support a finding Claimant sustained an accidental injury arising out of and in the course of his employment which caused his hernia.

Claimant's initial hurdle is to provide credible evidence the alleged injury occurred in the manner described, resulting in the injury in question. The claimant has the burden to establish that he has sustained an injury by accident arising out of and in the course of employment, and the accident resulted in the alleged injuries. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102, 105 (Mo.App. 1991); *See also, Williams v. DePaul Health Center*, 996 S.W.2d 619 (Mo. App. 1999)(Employee must show a causal connection between the injury complained of and the job or accident)(*both overruled in part by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003)). An injury is only compensable if it is clearly work related. *Cahall v. Cahall*, 963 S.W.2d 368 (Mo. App. 1998)(*overruled in part by Hampton*). An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition. § 287.020.2 RSMo.(2000).

The Law sets for specific requirements in hernia cases. Section 287.195 RSMo provides:In 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.

Thus, in addition to accident and causation, Claimant must prove the hernia was not preexisting.

With respect to the issue of accident, I do not find Claimant's testimony credible. The finder of fact is charged with the responsibility of passing upon the credibility of witnesses. It may disbelieve testimony of a witness even though no contradictory or impeaching information is introduced. *See, Lawson v. Emerson Electric Co.*, 833 S.W.2d 467, 470 (Mo.App. S.D. 1992) (*overruled in part by Hampton*). I find no credible contemporaneous evidence to support Claimant's trial testimony he felt a pull while moving equipment. Although he left work early on the day in question with permission, he left because he was not feeling well. He did not report an accident to Mr. McFarland. The histories he gave his doctors were devoid of any mention of a pulling incident, a tearing sensation, or sudden onset of pain. Rather, the records reflect Claimant gave a history in direct opposition to his trial testimony, that he had no recent accident or incident, but rather had experienced symptoms of swelling for six months to a year. The vomiting and related symptoms for which he sought treatment are consistent with an incarcerated and kinked hernia. In sum, I find Claimant's description of his accident to be not credible, and inconsistent with the overwhelming weight of the credible evidence.

I further find Employer's expert medical evidence on causation to be more credible than the conflicting expert opinion proffered by Claimant. Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App.

1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop ' N Save Warehouse Foods Inc.*, 855 S.W.2d 460, 462 (Mo. App. E.D. 1993); *See also Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999).

Dr. Bennett's testimony regarding causation is far more compelling than Dr. Poetz's. Dr. Bennett is a surgeon specializing in the diagnosis, treatment, and surgical repair of hernias, whereas Dr. Poetz merely has generic and completely non-surgical experience with hernias. In finding no causal connection between the alleged accident and the hernia, Dr. Bennett provided a detailed, clear explanation which was well founded in the medical evidence and consistent with the factual findings. In contrast, Dr. Poetz's belief was conclusory, and based on facts I did not find to be true. I reject as not credible Dr. Poetz's opinion Claimant's hernia was caused by a March 30, 2003 work incident. Rather, I find Dr. Bennett's opinion that Claimant had a chronic, congenital, preexisting hernia to be more compelling, credible, and consistent with the evidence.

CONCLUSION

For the reasons stated above, I do not find sufficient credible evidence to support a finding Claimant sustained an accidental injury arising out and in the course of his employment. I further find Claimant's alleged March 30, 2003, work incident is not a substantial factor in the cause of his hernia or need for treatment thereof. The hernia preexisted the alleged date of injury. The remaining issues are moot. Claimant shall not recover any workers' compensation benefits.

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation