2004 ACO #64

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

TERRY L. BARCEWSKI,
PLAINTIFF,

V   DOCKET #03-0004

YELLOW FREIGHT SYSTEM, INCORPORATED,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE WAGNER.

DAVID B. CELELLO FOR PLAINTIFF,
GARRETT J. TENHAVE-CHAPMAN FOR DEFENDANT.

OPINION

WILL, COMMISSIONER

This case was heard by Magistrate Wagner on October 16, 2002. On December 9, 2002 the magistrate's decision was mailed. The magistrate granted plaintiff a closed award for time lost from work for a hernia repair together with "reasonable medical treatment for treatment of his left inguinal hernia"

Defendant filed a timely appeal to the Worker's Compensation Appellate Commission. Defendant begins its brief with the following introduction:

> This is a hernia case. Trial was conducted at the Escanaba bureau on October 16, 2002. In his Opinion & Order dated November 20, 2002, and mailed December 9, 2002, Magistrate Michael Wagner awarded claimant benefits for the closed period at issue, December 19, 2001 through January 14, 2002.
>
> Defendant-Appellant Yellow Freight System, Inc. appeals this decision of the magistrate.

Defendant offered the following statement of facts.

STATEMENT OF FACTS

Appellant accepts, for purposes of this appeal, the magistrate's factual findings that:

Claimant-appellee first noticed hernia symptoms which he believed to be work-related on October 26, 2001.

Claimant-appellee first reported his hernia as work-related to supervisor, Brian Haemker, on December 18, 2001.

This gap in time between October 26, 2001 and December 18, 2001 amounts to 53 days, or 7 weeks and 4 days.

The sole issue presented by the defendant is found at page 4 of its brief.

ARGUMENT

THE MAGISTRATE ERRED, AS A MATTER OF LAW, BY FAILING TO HOLD THAT CLAIMANT'S 53-DAY GAP BETWEEN ONSET OF HIS HERNIA AND REPORTING IT TO HIS SUPERVISOR COMPLIED WITH THE STATUTORY REQUIREMENT THAT THE HERNIA BE PROMPTLY REPORTED TO THE EMPLOYER.

This Commission may review questions of law. MCL 418.861a(11).

After accurately reviewing the lay and medical evidence presented at trial, Magistrate Wagner made the following findings:

> The issue is whether or not Plaintiff's hernia is compensable within the meaning of the statute, which requires the hernia to be of recent origin and promptly reported. Based upon a review of the testimony at trial, I specifically find that the evidence established that Plaintiff's hernia that was surgically repaired by Dr. Simpson was of recent origin. Plaintiff gave a history to Dr. Simpson that he had a work related strain in the groin on October 30, 2001. The evidence at trial established that coworker Mike Chmela witnessed the injury. Plaintiff's surgery was successful. I did not give credence to any claims of prior hernia problems because Plaintiff stated he had no symptoms and received no treatment.
>
> I further find that Plaintiff met the reporting requirements of the statute because he did report his injury to supervision on December 18, 2001, his last day of work prior to surgery. I accept Plaintiff's testimony that he basically assumed the pain he experienced on October 26th as the result of his injury would go away and that testimony was confirmed by Plaintiff's Exhibit 4 in which Plaintiff indicates he "ignored the problem" initially. His testimony that the pain gradually worsened until his last day of work on December 18th made sense to me and therefore, I find that Plaintiff's hernia is compensable within the meaning of the Act and Defendants
> are ordered to pay weekly benefits for the closed period at the stipulated compensation rate as well as the reasonable medical treatment for treatment of his left inguinal hernia.[1]

[1] Magistrate Wagner's Opinion, pgs. 3-4

It is true that the magistrate cites MCL 418.401(2)(b) from the occupational decision portion of the Act as controlling law. We find Chapter 4 of the Act inapposite to the case at hand. Rather, the record in this matter as interpreted by the magistrate strongly suggests that the hernia in this case occurred as the quick and direct result of plaintiff's pushing a 2900 pound dolly at which time he felt a "popping sensation in the left groin.[2]

This witnessed injury was found to have occurred on October 30, 2001. We do not see any record evidence that establishes there were "causes and conditions which are characteristic of and peculiar to" defendant's business which is required to trigger application of Chapter 4 of the Act. [3] To the contrary, we find the description of this injury to fall within MCL 418.301(1) as it was clearly a single-event trauma occurring while pushing a 1½ ton dolly. There is venerable but vital Supreme Court authority for the proposition that hernias can be compensable on a single-event injury basis. For example, see *Hargrove v Ford Motor Co*, 313 Mich 199 (1945) where the Court underscored the distinction between Chapter 3 single-event hernias and Chapter 4 gradual onset occupational disease type hernias[4]:

> Hargrove was an employee of the defendant, Ford Motor Company. At the time of his rehiring on September 15, 1938, he was found to have a bilateral hernia. On May 30, 1944, while testing motors he slipped and fell, aggravating the pre-existing non-disabling hernia. Prior to that time he had experienced no difficulty in doing his regular work. After the accident he had continuous trouble, until the hernia was surgically repaired on July 30, 1944.
>
> Defendant contends that the department was in error in holding that a hernia may be compensable even though not recent in origin and not the result of a strain arising out of and in the course of the employment. Plaintiff states the question involved as follows:
>
> "Is an accidental injury which aggravates a pre-existing hernia and causes total disability compensable under part 2 of the workmen's compensation law?"
>
> A somewhat similar situation was presented in *Barclay v. General Motors Corp.* 309 Mich. 534. In that case there was no accidental injury and the court held that a recurrent hernia is not a hernia of recent origin, and that the one for which Barclay sought compensation, not being recent in origin, notwithstanding the fact that his condition was not previously a disabling one, he was not entitled to compensation.

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[2] *Id.*, pg 3.

[3] As interpreted by the Michigan Supreme Court this phrase requires a finding that the stresses of work constitute a hazard that distinguishes the work from the general run of occupations. In addition, a finding under Chapter 4 requires disability resulting from continued protracted exposure to the inherent elements of employment. See, *Roberts, deceased v Tilden Magnetite,* 1997 ACO #605 and cases cited therein.

[4] Please note that where the *Hargrove* court refers to Part 2 of then there-existing Worker's Compensation Act, the modern equivalent to that section is Sec. 301(1) of the Act. References to Part 7 would equate to today's Sec. 401.

Plaintiff seeks to distinguish the *Barclay Case* on the ground that it involved a claim brought under part 7 of the act as it existed before the 1943 amendment, and was not based upon an accidental injury. He insists that part 2 of the act is alone applicable to his situation.

Act No. 10, pt 7, § 1, Pub. Acts 1912 (1st Ex. Sess.), as added by Act No. 61, Pub. Acts 1937, and amended by Act No. 245, Pub. Acts 1943 (Comp. Laws Supp. 1945, § 8485-1, Stat. Ann. 1945 Cum. Supp. § 17.220), reads:

> "Definition. Whenever used in this act:
>
> "(a) The word 'disability' means the state of being disabled from earning full wages at the work in which the employee was last subjected to the conditions resulting in disability;
>
> "(b) The word 'disablement' means the event of becoming so disabled as defined in subparagraph (a);
>
> "(c) The term 'personal injury' shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of employer and which arises out of and in the course of the employment. Ordinary diseases of life to which the public is generally exposed outside of the employment shall not be compensable; *Provided, however*, That a hernia to be compensable must be clearly recent in origin and result from a strain arising out and in the course of the employment and promptly reported to the employer."

The facts in the instant case are distinguishable from those in the *Barclay Case*. Hargrove's claim arose out of and accidental injury, while Barclay's did not. Hargrove experienced no difficulty between his rehiring on September 15, 1938, and May 30, 1944, when he was, according to his testimony - "in the test room and I was washing down a motor. There is oil all over the floor and I slipped and my feet went from under me."

* * *

The provisions of part 7, as amended, do not apply to or limit other provisions of the act applicable to accidental injuries. Such injuries are still compensable when they arise out of and in the course of the employment. 2 Comp. Laws 1929, §8407 (Stat. Ann. §17.141); §8417, as amended by Act No. 245, Pub. Acts 1943 (Comp. Laws Supp. 1945, §8417, Stat. Ann. 1945 Cum. Supp. §17.151).

The occupational disease amendment was intended to broaden the compensation act. The qualification therein that a hernia, to be compensable, must be

> clearly recent in origin and result from a strain arising out of and in the course of employment and promptly reported to the employer (part 7, § 1) is applicable only in occupational diseases. *Barclay v. General Motors Corp., supra*, was such a case.
>
> If Hargrove's injury had occurred prior to the occupational disease amendment, plaintiff could have recovered compensation. *Herman v. Ford Motor Co.*, 279 Mich. 106. There is nothing in the amendment which precludes the award of compensation under the facts herein stated.[5]

We are confirmed in our view that hernias resulting from a specific event are compensable under Chapter 3 by our review of the historical underpinning of the *Hargrove* decision. A hernia caused by accident was compensable from the inception of the Michigan Workmen's Compensation Act. The Act imposed no special requirements for a hernia to be compensable,[6] however, hernias sustained as a result of regular work, however strenuous, were not accidental.[7] Also, a hernia under Part II need not be caused by work as long as it was aggravated by an accidental injury.[8]

In 1935 the Michigan Legislature created a Commission of Inquiry to investigate the wisdom of compensating occupational diseases as part of the Workmen's Compensation Act.[9] In 1937 the committee issued its report. The general conclusions regarding compensation for diseases was summed up as follows:

> The Commission is of the opinion that the same reasons which justify the Workmen's Compensation Act for accidents are applicable to disability or death due to occupational diseases. However, it is most evident from the testimony submitted to the Commission at its various hearings, and from the study of the matter made by the individual members of the commission, that from the very nature of an occupational or industrial disease, it is extremely difficult to legislate fairly both as to the employee and the employer in regard to compensation to be paid for disability or death. Necessarily, there are certain diseases which occur to workmen in industry but which are common to the public at large and the source or the origin of which it is difficult to determine. We do not feel that industry should be charged with disability or death resulting from such common diseases.[10]

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[5] *Hargrove, supra* at 200-203.

[6] *Schanning v Standard Castings Co*, 203 Mich 612 (1918).

[7] See, *e.g.*, *Kutschmar v Briggs Mfg Co*, 197 Mich 146 (1917); *Nagy v Solvay Process Co*, 201 Mich 158 (1918).

[8] *Herman v Ford Motor Co*, 279 Mich 106 (1937)

[9] 1935 PA 164.

[10] 1937 Journal of the Senate 124.

The majority report favored limiting compensation for occupational diseases to a schedule of diseases with a corresponding cause. Only listed diseases were compensable and only if contracted according to the provisions of the corresponding cause. In addition, the committee made the following recommendations regarding hernias:

> In connection therewith we recommend that a hernia be compensated provided; (1) it arises out and in the course of the employment, (2) is of recent origin, (3) is accompanied by pain, (4) that notice thereof is given the employer within fifteen days after its occurrence, and (5) that claim is made therefore as provided in the Compensation Act for accidental injuries.[11]

As enacted later in 1937 the strictures regarding compensable hernias were somewhat less. The enacted provision read:

> The disablement of an employe[e] resulting from an occupational disease or condition described in the following schedule shall be treated as the happening of a personal injury by accident within the meaning of this act and the procedure and practice provided in this act shall apply to all proceedings under this part, except where specifically otherwise provided herein:

Disabilities arising from	Caused by
* * *	
28. Hernia	Clearly recent in origin and resulting from a strain, arising out of and in the course of employment and promptly reported to the employer.[12]

As can be gleaned from the introductory text of the schedule, the intent was to create certain occupational diseases as a subset of accidental injuries. These diseases had special requirements for compensability. The legislature did not limit compensability of conditions which could arise from accident, but expanded in a limited manner the way certain conditions could be work related.

In 1943 the legislature came to accept the wisdom of general compensability for occupational diseases, however, in doing so retained the requirements for hernias:

> The team "personal injury" shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment. Ordinary

[11] *Id.*

[12] 1937 PA 61.

> diseases of life to which the public is generally exposed outside of the employment shall not be compensable: Provided, however, [t]hat a hernia to be compensable must be clearly recent in origin and result from a strain arising out of and in the course of the employment and promptly reported to the employer.[13]

Throughout all these changes in the occupational disease portion of the act, the legislature never added the special requirements for compensable hernias to Part II or Chapter 3. The requirements for a Chapter 4 hernia are the same as they were in 1937. To this day the distinction between Chapters 3 and 4 has been preserved. As a result, the requirements of a compensable hernia under chapter 3 are not governed by the language of chapter 4 requiring that a hernia be recent in origin and promptly reported.

In general there is little difference between the compensability of conditions under Chapter 3 and Chapter 4. However, this case demonstrates that there are vestiges of difference which remain very significant.

The facts of this case fit the *Hargrove* scenario very well. With this modification, we affirm the magistrate's opinion, finding it based on competent, material and substantial evidence as required by Sec. 861a.(3) of the Act.

The decision of the magistrate is affirmed.

Chairperson Reamon and Commissioner Leslie concur.

Rodger G. Will	Commissioner
William G. Reamon, Jr.	Chairperson
Richard B. Leslie	Commissioner

[13] 1943 PA 245.

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This cause came before the Appellate Commission on defendant's appeal from Magistrate Michael D. Wagner's decision, mailed December 9, 2002, granting plaintiff a closed award. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed.

Rodger G. Will Commissioner

William G. Reamon, Jr. Chairperson

Richard B. Leslie Commissioner