

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F200348

TINA MARIE BAPTISTA, EMPLOYEE

CLAIMANT

KROGER COMPANY, EMPLOYER

RESPONDENT

RSKCO SERVICES, INC., CARRIER

RESPONDENT

OPINION FILED JULY 15, 2003

The hearing was conducted on April 29, 2003, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Little Rock, Pulaski County, Arkansas.

The claimant was represented by Thomas W. Mickel, Attorney at Law, Conway, Arkansas.

The respondent was represented by Wendy S. Wood, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The hearing was held on April 29, 2003, in Little Rock, Arkansas. It was stipulated as follows:

1. The employee-employer-carrier relationship existed at all relevant times.
2. The compensation rates were \$252.00 for temporary total disability and \$189.00 for permanent partial disability.

The issues to be litigated at the hearing were as follows:

1. Did claimant sustain a compensable gradual onset injury to her cervical spine on September 17, 2001, and January 1, 2002?
2. Is claimant entitled to medical benefits? (Respondent alleges that the

claimant, should the claim be determined to be compensable, should receive no medical benefits prior to December 31, 2001, since the claimant did not report an injury until that date.) The claimant seeks medical benefits from the time of the emergency room visit of September, 2001, to a date to be determined.

3. Is claimant entitled to temporary total disability from January, 2002, to a date to be determined?

4. Is claimant entitled to an attorney's fee?

The claimant testified at the hearing. She is 49 years old and testified that she has extensive training in aesthetics---meaning the ability to give facials, massage therapy and skin analysis. The claimant has been hard working all of her life, working as a bartender, a server and in different grocery stores. In 1991, the claimant moved to Arkansas. She laid concrete for a year and a half and then worked in home health care. She began working for Kroger in 1996. She worked in grocery, unloading trucks and stocking frozen foods, and worked in the dairy department, unloading and stocking dairy products. She stated that she did some work which was above her eye level and required overhead movements.

She testified that in January, 2001, she had her first neck surgery. The claimant testified that she had a non-work related automobile wreck due to ice on the streets. She slipped getting out of her car, injuring her neck. In February, 2001, the claimant had neck surgery which was performed by Dr. Robert Dickens. Even though claimant had surgery, she continued to have neck pain. However, her left arm pain resolved. Dr. Dickens died, and the claimant was referred to Dr. Zachary Mason, who resumed her care in May, 2001. He returned the claimant to work doing her regular

duty with some restrictions in June, 2001. The claimant testified that she continued to have neck pain after she returned to work. She began stocking frozen foods. According to the claimant, she did not have any other doctors appointments from June, 2001 to September, 2001. The claimant testified that she had some assistance in stocking the items after she returned to work.

The claimant also testified that until September, 2001, she worked as a waitress at the Little Rock Country Club. She admitted that she had to carry food trays on her left shoulder, but ultimately quit because she was hurting so bad.

According to the claimant, in September, 2001, her job duties had changed. A co-employee took leave to have surgery, which left the claimant to stock frozen foods on her own. The claimant had to unload trucks and put produce in the freezer in the back of the store, as well as perform other duties. The claimant also had to assume the duties in the milk department, in addition to stocking frozen foods. These additional duties required her to unload the truck, take the milk to the other end of the store, stack the milk in the cooler, and then take it out to the store area to stock shelves. The claimant is 5' 4" tall and she testified that at that time she had to start working significant overtime in order to keep both departments completely stocked. According to the claimant, she received no help in her job, since her co-employee, Mr. Washburn had not returned from medical leave.

The claimant testified that on September 17, 2001, she performed her usual job. The next morning, she had numbness and tingling in her arms, along with chest pains. She went to the emergency room at St. Vincent's Infirmary for the symptoms. They put her on light duty for five days. The claimant soon had an MRI of

her neck and was referred to Dr. Scott Schlesinger, a neurosurgeon. Dr. Schlesinger referred the claimant to Dr. William Ackerman, a pain management specialist in Little Rock, AR. After some attempts at relieving claimant's pain, he released claimant to return to duty with no overhead lifting, and no lifting of any kind above twenty pounds. Dr. Ackerman, ultimately, took the claimant off work altogether.

The claimant testified that she told all the managers working at the store that she had to go to the emergency room on September 17, 2001. According to the claimant, even though she gave these managers a copy of her work restrictions, none of them attempted to comply with them and none required her fill out any reports of work related injury. According to the claimant, in December, 2001, she went to see Mr. Sam King, the manager of the store, telling him that she needed to complete a work-related injury report. Mr. King, at that time, had the claimant fill out reports and he sent her to Concentra Medical Center.

The claimant testified that she continued to see Dr. Ackerman after January, 2002. He ultimately sent her to see Dr. Richard Peek. Dr. Peek performed a myelogram and in April, 2002, he performed surgery on her neck. The claimant testified that the surgery from Dr. Peek was different from the first surgery in 2001 because he went in through the back of her neck.

The claimant testified about other injuries that she had during this time. She testified that she fell and fractured some ribs while looking for a dog in her back yard in October, 2001. The claimant also had an automobile wreck in June or July, 2001. She testified that she fell in the back of a truck while moving items into a new residence in 2001. According to the claimant, none of these incidents increased the

claimant's neck and arm pain, nor did it require medical treatment. The claimant testified that she was also involved in an abusive relationship with a boyfriend, and admitted that her boyfriend pushed and hit her. She testified that the assault by her boyfriend occurred between her non-work related surgery in January, 2001, and her alleged compensable injury in September, 2001. However, later she testified that he assaulted her in 2000, which would be prior to her non-work related neck surgery in January, 2001.

The claimant stated that she was aware of the respondent's accident reporting procedure, having used the procedure in the past to report a spider bite injury.

The claimant stated that she was lifting fifty pounds of milk over-head everyday for multiple days, and she was required to do lifting on a continuous basis, both over-head and below eye level. She stated that it was not just milk she was lifting all day, but there was heavy lifting involving stocking and keeping up the frozen food department.

Sam King was called to testify. He is the manager of the Kroger store on Beechwood Street in Little Rock, Arkansas. He testified that either he or two other members of management would be the persons to whom accidents would be reported. He explained that the store received three basic frozen food loads a week, that come in three to six pallets. He confirmed that these items must be off-loaded from an 18-wheeler onto a pallet jack, and either put in the storage freezer or taken to the sales floor. He testified that the store received three trucks of milk per week. The milk is removed from the truck and put in the milk cooler. He did admit that the milk cartons are stacked about six high. The milk containers are about a foot tall and they are

stacked six high on a pallet, four gallons for each layer, and there were nine and a half gallon containers per layer. He admitted that the milk was stacked higher than claimant's height.

Mr. King testified that he knew the claimant had a neck injury in January, 2001, because he went to see the claimant in the hospital after her surgery in February. According to Mr. King, the claimant returned to work without restrictions in June, 2001. Mr. King stated that he could not recall claimant stating anything about an injury in September, 2001. However, he was aware that in September, 2001, the claimant was suffering from neck pain based on comments the claimant made. He stated that he was not aware that the claimant was alleging her neck was hurt at work until early January, 2002, when the claimant came to him to report that her neck problems were work-related and she wanted to file a workers' compensation claim. Mr. King stated that the claimant complained of neck pain throughout 2001, and stated that her neck never quit hurting after she returned to work in June, 2001. (After the non-work related injury in January, 2001.)

Mr. King stated that when the claimant came to see him in January, 2002, she told him that she wasn't really sure when her neck injury happened, but it was probably in September or October, 2001.

Jim Washburn testified at the hearing that he is the dairy manager at the Kroger store on Beechwood Street. He worked with the claimant and remembered her complaining of neck pain from time to time after she returned to work in June, 2001. Mr. Washburn testified that he helped the claimant move from one residence to the next in July, 2001. He testified that the claimant told him that a boyfriend pushed her

across a room and pushed her off a porch. He testified that this abuse occurred after her first neck surgery in January, 2001.

James Smith, the grocery manager at Kroger on Beechwood Street, testified that he was aware of the claimant's first surgery in February, 2001. He testified that after claimant returned to work from that surgery in June, 2001, she continued to complain of neck pain. It was Mr. Washburn who received a phone call from the claimant on September 17, 2001, advising him that she was at the emergency room. The claimant told Mr. Washburn that her friend took her to the emergency room and that she needed a ride back home. Mr. Washburn drove her back to Mayflower, Arkansas. He stated that the claimant did not tell him why she was in the emergency room.

The parties stipulated to the testimony of Ms. Daisy Fowler, the Deli manager, and Mr. Charles Tyler, the meat manager. The stipulation stated that these witnesses would testify that the claimant constantly complained of neck pain after she returned to work in June, 2001. It was stipulated that these witnesses would testify that there was no report of a new work injury by the claimant, and that the claimant never reported to them that she sought medical treatment at the emergency room for a work related injury in September, 2001. It was stipulated that these witnesses would testify that they attributed her neck pain to her prior surgery or the motor vehicle accident that she was involved in.

The deposition of Dr. Richard Peek was offered into evidence. Dr. Peek testified that he was aware of the claimant's prior neck injury and fusion surgery at C5-6. He stated that the fusion probably never united initially, but it had healed enough for

Dr. Mason to return the claimant to work. He opined that repetitive lifting caused the failed “non-union” (from surgery) to become aggravated. He stated that the claimant’s compensable injury was the major cause of her need for treatment. He stated that his opinion was within a reasonable degree of medical certainty.

He stated that the claimant’s fusion “probably never totally united initially.” He testified that the fusion “never healed totally.” (Deposition., p. 21, 25, 41) **Dr. Peek testified that the reason the claimant needed surgery performed by him in April, 2002, was to repair the fusion that never healed totally.** (Dep., P. 24, 25, 32) Dr. Peek opined that the major cause of the claimant’s current disability, including the need for his surgery to “re-do” the fusion, **was based solely upon the history provided by the claimant of her lifting overhead up to sixty pounds.** Dr. Peek testified that the claimant never told him she worked a second job 15 to 22 hours a week as a waitress. He opined that if the claimant’s injury had occurred while working at Little Rock Country Club as a waitress, then he would have relied upon her opinion that that was the major cause of her injury. He testified “I said it doesn’t matter if you’re lifting 20 to 60 pounds overhead, you could injury your neck whether you are at Kroger, or at the Little Rock Country Club, or at Wal-Mart.” (Dep. p. 23) Dr. Peek testified that the claimant never reported to him that she fell over a dog in January, 2002, fracturing several ribs. His records did not reflect that the claimant reported to him that she had been involved in two motor vehicle accidents or had fallen off the back of truck while moving a refrigerator. There is no indication that she told Dr. Peek that she suffered an abusive relationship with her boyfriend who struck her in the face on at least two occasions, and

pushed her off a porch on another occasion. He testified that it is possible to separate the cervical fusion in a motor vehicle accident, by being struck in the head by someone or falling over a dog.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer-carrier relationship existed at all relevant times.
2. The compensation rates were \$252.00 for temporary total disability and \$189.00 for permanent partial disability.
3. The preponderance of the evidence reflects that the claimant did not sustain a compensable gradual on-set cervical spine injury in September, 2001 or January, 2002. The preponderance of the evidence reflects that the claimant's injury was not caused by rapid, repetitive motion, nor was any work-related injury the "major cause" of her disability and need for treatment.

DISCUSSION

The claimant contends that she suffered a gradual on-set neck injury. A gradual on-set compensable injury can occur if "an injury causing internal or external physical harm to the body and arising out of and in the course of employment is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is: **caused by rapid and repetitive motion.**" A.C.A. § 11-9-402(4)(A)(ii)(a).

The Arkansas Workers' Compensation Act also requires that for injuries falling within a gradual onset definition, the burden of proof shall be by a preponderance of the evidence and the resultant condition is compensable only if the alleged

compensable injury is the **major cause** of the disability or need for treatment. A.C.A. § 11-9-102(4)(E)(ii).

Major cause means more than 50% of the cause. A.C.A. § 11-9-102(14).

The claimant has the burden of proving the compensability of her claim by a preponderance of the evidence. Georgia-Pacific Corp. v. Carter, 62, Ark. App. 162, 969 S.W.2d 677 (1998). Arkansas case law provides that a gradual onset neck injury does require the rapid repetitive motion element along with the major cause element. Hapney v. Rheem Mfg. Co., 342 Ark. 11, 26 S.W.3d 777 (2000). Therefore, to prove a rapid repetitive motion injury, the claimant must show by a preponderance of the evidence that the injury 1) arose out of and in the course of employment; 2) caused internal or external physical harm to the body requiring medical services; 3) was caused by rapid repetitive motion, and; 4) was the major cause of the disability or need for treatment. The preponderance of the evidence in this case reflects that the claimant has failed to prove by a preponderance of the evidence that she suffered a gradual onset neck injury. First, she cannot establish the rapid and repetitive motion element. The “rapid and repetitive motion” standard is a two prong test. 1) The task must be repetitive, and 2) the repetitive motion must be rapid. Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W.2d 644 (1998). “As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. Arguably even repetitive tasks and rapid work, standing alone, do not satisfy the definition that repetitive tasks must be done rapidly.”

The claimant described her job at Kroger:

“Mr. Washburn would come out and bring the 6-wheeler to me and I would

unpack the boxes and fill the shelves, straighten up all the cases, and help him with displays. I tried to keep the frozen food coolers nice and neat and help Jim with anything I could in the frozen foods.

(T-16)

.....

Well, when the truck comes in, we unload. The frozen food truck would come in anywhere between two to three in the morning. If I happen to be there to do an order, I would have to unload the truck. Sometimes the grocery department would unload the truck, but most of the time it would be there for me when I got there. I would have to go in there and break it down and put it on the 6-wheeler. I would have to take it on the sales floor and stock my product. Then I would have to go back in the freezer and load my 6-wheeler back up and take it on the sales floor and do all of that on my eight hour shift. I would try to keep the frozen food cooler on my side straightened up because I had to share it with the meat department and the deli. We had a small cooler, and I had to keep my side straightened up so when we had inventory or I had to get something, I knew where it was.”

(T-17-18)

Mr. King testified as follows:

“We get three basic frozen food loads a week. They come in on a frozen truck. They’re palletized, and there’s usually anywhere from three to six pallets.

...

Milk, we get three trucks a week - Tuesday, Thursday and Saturday. It comes in on an 18-wheeler. We basically take it off the truck and put it in the milk cooler. Then we’ll break it down onto skids. A pallet of milk is stacked about six high, so it’s pretty heavy.

Then we break it down onto skids or stock trucks and work it out onto the sales floor.

...

You take it off and stack it down. Then you push it out, and you’re stocking four or six high on a skid. Then you take it off and either set it on a shelf or - you know, you work it in front of you. So it’s a variety of lifting and a variety of motions.”

(T-56, 57)

The preponderance of the evidence in this case reflects that the claimant

did not sustain an injury by rapid and repetitive motion. There is no testimony from any witness that the claimant's work was "rapid." The description given by both the claimant and Mr. King do not fulfill the "repetitive" element either. The claimant, in one day, performed many different functions requiring many different movements. She might stock items, unload a truck, load a pallet, stock shelves, straighten up dairy cases, help with the displays, or keep the frozen food coolers neat.

Not only is the "rapid and repetitive" motion element not satisfied, but the claimant is unable to establish the major cause element. The claimant points to the deposition testimony of Dr. Richard Peek for the support of the major cause element. However, when closely reviewing Dr. Peek's deposition, his basis for the major cause opinion is simply insufficient. It is obvious that Dr. Peek's opinion was based primarily on the history given by the claimant. Dr. Peek on many occasions, in his deposition, referred to repetitive lifting overhead of 60 pounds as the major cause of the claimant's injury. However, the claimant admitted during the hearing that she was not constantly lifting 60 pounds overhead each day. (T-45) As earlier stated, Dr. Peek never knew of the claimant's prior accidents, assaults, or fractures. He also testified that a fusion could separate or fail to completely heal if the claimant is a smoker. He stated: "Smokers have a high incidence of it not repairing." (Dep., p. 20) The claimant testified that she was a smoker.

It is well settled that the Commission has the authority to accept or reject medical opinions and the authority to determine its medical soundness and probative force. The Commission is not bound by a doctor's opinion that is based largely on facts related by a claimant where the claimant's own testimony is less than determinative.

Williams v. Brown's Sheet Metal, (CA02-428) (Ark. App. 4-23-03).

The clear weight of evidence in this case shows that the claimant suffered a neck injury in January, 2001. She had surgery for that non-work related injury in February, 2001. She was returned to work following the surgery in June, 2001, but her pain continued at that time. She was still taking prescription medication for her pain in July, 2001. Many witnesses who testified at the hearing say that the claimant continually complained of pain in her neck after June, 2001. She had other accidents that were of such a nature to have harmed her neck also. It is also noted that Dr. Peek performed surgery in the very precise place that Dr. Dickens performed surgery. It was undisputed that Dr. Peek had to "re-do" the fusion. (T-28). I could not find testimony that would indicate to me that the claimant's condition changed in September, 2001, leading a reasonable fact finder that an incident in September, 2001 was a cause of her problems more than any other cause (like another car accident or a fall.)

The stipulated testimony of Ms. Fowler and Mr. Tyler was that they attributed all of claimant's neck pain to either the prior surgery or to one of her motor vehicle accidents.

The preponderance of the evidence in this case reflects that the claimant never reported a work injury to any of the employees at Kroger until late in December, 2001. She testified that in September, 2001, she reported a work injury and reported going to the emergency room on September 17, 2001, to seven people in management positions at Kroger. Five of those seven employees testified at the hearing. I find that they are credible witnesses. The only evidence offered by the claimant concerning her reporting this injury is her own testimony. The testimony of an interested party is

always considered to be controverted. Cooper v. Highland Dairy, 69 Ark. App. 200, 204, 11 S.W. 3d 5 (2000).

The claimant's credibility on the reporting issue is very questionable. Therefore, I find that the claimant has not shown by a preponderance of the evidence that she sustained a compensable injury which arose out of and in the course of her employment, caused internal physical harm to her body, or was caused by rapid and repetitive motion. It follows then that she has not shown that the work related injury was the major cause of her disability of need for treatment. Having failed to prove her case by a preponderance of the evidence, the claimant's claim is denied and dismissed. The other issues need not be addressed

IT IS SO ORDERED.

DON N. CURDIE,
Administrative Law Judge

DC