

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F203809

CLARA GRAHAM, EMPLOYEE

CLAIMANT

RUBATEX CORPORATION, EMPLOYER

RESPONDENT

**ROYAL INSURANCE COMPANY,
INSURANCE CARRIER/TPA**

RESPONDENT

OPINION FILED SEPTEMBER 3, 2003

Hearing before Chief Administrative Law Judge David Greenbaum on July 25, 2003, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. John C. Bartlett, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. Jeremy Swearingen, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 25, 2003, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

This claim has an unusual procedural history. A prehearing conference was conducted in this claim on December 11, 2002, and a Prehearing Order was filed on December 12, 2002, at which time the case was scheduled for a formal hearing to be conducted on February 21, 2003. Prior to the February 21 scheduled hearing, the parties submitted a proposed Joint Petition and requested that the hearing be cancelled. A Joint Petition hearing was conducted on February 21, 2003, in place of the formal hearing; however, the

proposed settlement was denied because the parties failed to obtain a release of a subrogation claim of a group health insurance provider that paid various medical bills related to the claimant's alleged injury pursuant to A.C.A. §11-9-411. The claimant subsequently requested that the claim be reassigned to an administrative law judge for a hearing on the issue of compensability, and a second prehearing conference was conducted May 28, 2003, at which time the parties agreed that the issues, stipulations, as well as their respective contentions remained as set out in the Prehearing Order filed December 12, 2002. The claim was then rescheduled for a formal hearing on July 11, 2003. At respondents' request and, by agreement of the parties, the hearing was rescheduled for July 25, 2003.

It was stipulated that the employee/employer/carrier relationship existed at all relevant times through September 6, 2002; that in the event the claim was found compensable, the claimant earned sufficient wages to entitle her to compensation rates of \$260.00 per week for temporary total disability and \$195.00 per week for permanent partial disability; and that respondents had controverted the claim in its entirety.

The primary issue for determination concerned compensability. If answered affirmatively, claimant's entitlement to associated benefits must be determined.

Claimant contended, in summary, that she sustained compensable,

gradual onset injuries to her right wrist, as well as to her right arm and shoulder; that respondents should be held responsible for all hospital, medical and related expenses, together with continued, reasonably necessary medical treatment; that she was entitled to temporary total disability for the period beginning March 21, 2002, and continuing through August 9, 2002; and that a controverted attorney's fee should attach to any benefits awarded.

Concerning compensability of the alleged right shoulder injury, respondents contended that the claimant could not meet the requirements of A.C.A. §11-9-102 to establish compensability, specifically maintaining that there was no objective medical findings of right shoulder injury; that the claimant could not establish a compensable, work-related injury was the major cause of the alleged condition; and that claimant could not prove that her work duties for the employer were rapid and repetitive. Respondents further contended that claimant could not establish compensability of her alleged carpal tunnel syndrome condition, specifically, but not exclusively maintaining that claimant could not establish that a compensable injury was the major cause of the alleged condition. Alternatively, and as an affirmative defense, respondents contended that the claimant did not provide timely notice of her alleged injuries until March 22, 2002, and if she could establish compensability of one or both, she was barred from any award of benefits prior to that date. As a second alternative, affirmative defense, respondents maintained that even if the

claimant could establish the existence of a compensable shoulder or carpal tunnel syndrome condition, existing prior to December 1, 2001, she sustained a non-work-related injury as the result of falling off a ladder on or about December 1, 2001, which constituted an independent, intervening cause of her alleged disability and subsequent need for treatment. Finally, in the event compensability was established, respondents claimed a credit or offset in the amount of \$1,600.00 for short-term disability benefits the claimant received through the employer's self-funded plan for the period beginning March 28, 2002, through June 6, 2002. As previously noted, a substantial portion of the claimant's medical bills were also paid by the employer's health insurance carrier. (Tr.5)(Comm. Ex. 1)

The claimant testified in her own behalf. Tracy Michelle Webster, the employer's human resource manager, was called as a witness by the respondents. The record is composed solely of the transcript of the July 25, 2003, hearing containing numerous exhibits, together with the evidentiary deposition of Dr. Claiborne L. Moseley which was introduced as "Joint Exhibit B" and retained in the Commission file in bound form.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties and contained in the Prehearing Order filed December 12, 2002, are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the credible evidence, that she sustained gradual onset injuries to either her right wrist or right upper extremity and right shoulder which arose out of and during the course of her employment with Rubatex Corporation.
4. The claimant has failed to establish, by a preponderance of the credible evidence, that her physical problems, need for treatment, and disability are in any way causally related to a work-related injury.
5. In the event compensability is established, which is not conceded herein, the claimant did not notify her employer of any alleged injury prior to March 22, 2002.
6. In the event claimant could prove a compensable injury or injuries, which is not conceded herein, respondents have failed to prove, by a preponderance of the evidence, that an incident during December, 2001, when she injured her right knee at home stepping off a ladder constituted an independent intervening cause of claimant's disability and need for

treatment.

7. In the event compensability is overcome, respondents are entitled to an offset for benefits the claimant previously received under the employer's group health insurance plan, as well as the employer's group disability policy.
8. Respondents have controverted this claim in its entirety.

DISCUSSION

_____The record in this case is replete with inconsistencies and contradictions. This claim turns almost entirely upon the claimant's credibility. A claimant's testimony is never considered uncontroverted. In fact, the testimony of an interested party is always considered to be controverted. *Lambert vs. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix vs. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express vs. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

HISTORY

The claimant, Clara Graham (Thompson), who married after the claim was filed, testified in her own behalf. The claimant is thirty-eight (38) years old. She began working for Rubatex during May, 1993. The claimant maintained that she began experiencing physical problems involving her right shoulder and right upper extremity during the later part of 2001. She stated

that she had been working as a “box maker” during the last year of her employment with the respondent. She maintained that she reported her physical problems to her immediate supervisor, Greg Bolden, at the time the symptoms manifested themselves. The claimant testified that she told Mr. Bolden that her job was causing her physical problems. However, the claimant did not request that a workers’ compensation claim be filed at that time. (Tr.10, 29)

The record reflects that the claimant first made complaints of physical problems involving her right shoulder when she went to see her family physician, Dr. James Jacobs, on December 3, 2001. The claimant had previously seen Dr. Jacobs in November, 2001, with complaints of migraine headaches. The claimant returned to Dr. Jacobs on December 3, 2001, following an incident when she stepped off a ladder while hanging Christmas lights for her mother, at which time she injured her right knee. Although the claimant complained of problems involving both the right shoulder and knee to Dr. Jacobs on December 3, 2001, his notes reflect no known injury. The claimant returned to Dr. Jacobs for additional office visits and to obtain off-work slips. Dr. Jacobs referred the claimant to Dr. Claiborne Moseley, an orthopedic surgeon in Jonesboro. (Tr.10-11)(Jt. Ex. A, pp.1-3)

The claimant was first examined by Dr. Moseley on December 11, 2001. Again, the records from Dr. Moseley failed to contain any history attributing any

of the claimant's physical problems to a work-related injury. Dr. Moseley did note that the claimant's right knee problems were the result of stepping off a ladder. Dr. Moseley has remained the claimant's primary care physician since December 11, 2001. The claimant's medical treatment from Dr. Moseley was submitted under her health insurance policy. The record reflects that the claimant returned to Dr. Moseley in early March, 2002, with complaints of headaches, as well as right shoulder pain. Following additional diagnostic studies, Dr. Moseley diagnosed right CTS. The claimant eventually underwent a carpal tunnel release on the right on May 14, 2003. She was actually taken off work by Dr. Moseley on March 21, 2002, through August 9, 2002. The claimant returned to work for the employer herein on August 9, 2002, and worked approximately two (2) months, at which time she was part of a general plant lay-off.

As previously pointed out, during the last year of claimant's employment, she worked as a box maker, primarily constructing cardboard boxes of various sizes. The claimant described her work in great detail. Although it was extremely difficult to conceptualize the work, her duties included folding the boxes with both hands, gluing the boxes by squeezing the trigger of a glue gun to make the cardboard boxes stick, rotating the boxes, placing them on the floor or possibly conveyor and then repeating the process. The claimant indicated the work was rapid and repetitive. She stated that she made

between thirty (30) to fifty (50) boxes per hour depending on the size of the box. (Tr.20-27)

The record further reflects that the claimant had prior workers' compensation claims and that she knew, or should have known, the procedure for obtaining medical treatment. The record further reflects that the claimant began missing a great deal of work beginning in 1998, specifically, one day for every three and one-half (3-1/2) days worked. The claimant first requested that her claim be filed as a workers' compensation claim on March 22, 2002, at which time she went to the personnel supervisor, Gary Looney, and told Mr. Looney that she had injured her arm at work. Although the claimant maintained that she had previously told her immediate supervisor, Greg Bolden, that her work was causing her physical problems, I found the claimant's testimony to be extremely suspect because she failed to causally relate the problems to her employment when questioned by her medical providers. Although the claimant maintained that she filed her claim for medical treatment under group health because workers' compensation had denied her claim. This testimony also lacks credibility because no notice of injury was reported until March 22, 2002, and her medical treatment was filed under her health insurance before that date.

COMPENSABILITY

In the present claim, the claimant does not contend that her injury was

caused by a specific incident and identifiable by time and place of occurrence. Instead, she contends that she sustained an injury as the result of repetitive work activities. Accordingly, in order to receive benefits, the claimant must satisfy all of the following requirements:

(1) Proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;

(2) Proof by a preponderance of the evidence that the injury cause external or internal physical harm to the body;

(3) Medical evidence supported by objective findings as defined in A. C. A. §11-9-102(16);

(4) Proof by a preponderance of the evidence that the injury was caused by rapid repetitive motion; and,

(5) Proof by a preponderance of the evidence that the injury was the major cause of disability or need for treatment.

If a claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, she fails to establish compensability of the claim, and compensation must be denied. *Lay vs. United Parcel Service*, 58 Ark. App. 35, 944 S.W.2d 867 (1997).

In addition to the foregoing, medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(B)(Repl. 2002).

While the claimant is not required to establish that her work duties required rapid repetitive motion in order to establish compensability of her carpal tunnel syndrome injury, she must still prove that she sustained a carpal tunnel syndrome injury arising out of and in the course of her employment, that a work-related injury is the major cause of her disability or need for treatment, and the compensable injury must be established by objective medical findings. *Kildow vs. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 664 (1998).

Although it can be argued that claimant has satisfied requirements 2 - 5, aforementioned for establishing compensability, she has failed to prove, by a preponderance of the evidence, that her injury arose out of and during the course of her employment. Further, the only medical opinion of record addressing compensability, specifically, the opinion of claimant's primary treating physician, Dr. Claiborne Moseley, reflects that the claimant's carpal tunnel injury was not causally related to her work activities.

"Arising out of the employment" refers to the origin or cause of the accident, while the phrase "in the course of employment" refers to the time, place and circumstances under which the accident occurred. *Gerber Products vs. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1995); *Pilgrims Pride Corp. vs. Calderera*, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

The evidentiary deposition of Dr. Claiborne Moseley was taken at the instance of respondents and introduced as "Joint Exhibit B." Rather than

conduct an exhaustive analysis of Dr. Moseley's deposition, suffice it to say that when he was asked to render an opinion as to the cause of claimant's injury, he did not relate it to her employment. (Jt. Ex. B, p.40)

In fact, Dr. Moseley specifically pointed out the inconsistency in the number of boxes that the claimant reported making per day. He opined that the job duties mitigated against her carpal tunnel injury being related to her work. On cross-examination, Dr. Moseley conceded that some of claimant's work "could" cause the injury. (Jt. Ex. B, pp.51-54, 58)

Dr. Moseley's evidentiary deposition indicates that he did not believe the claimant's carpal tunnel syndrome was causally related to her employment. Our Supreme Court has consistently held that a doctor's opinion that the work *could* produce the injury is insufficient to meet the standard of within a reasonable degree of medical certainty. *Frances vs. Gaylord Container*, 341 Ark. 527, 20 S.W.3d 280 (2000); *Freeman vs. ConAgra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001).

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d

629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met her burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade vs. Mr. C. Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

As previously noted, the record in this case is replete with inconsistencies and contradictions. In addition, I found the claimant's testimony to lack credibility. If indeed she related her physical problems to her work and reported same to her supervisor, it is highly suspect that she would then fail to relate the problem by history to her medical providers. The claimant had prior workers' compensation claims and knew, or should have known, the procedures for obtaining treatment. Further, the only medical opinion of record fails to relate the claimant's injury to her employment. It would require sheer speculation and conjecture to attribute the claimant's physical problems, need for treatment, and disability to her employment. Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Dena Const. Co. vs. Hearndon*, 264 Ark. 791, 575 S.W.2d 155 (1979); *Arkansas Methodist Hospital vs. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove that she sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge