

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F300131**

<b>MICKEY D. SMITH, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>TEMPLE INLAND FOREST PRODUCTS, EMPLOYER</b>	<b>RESPONDENT</b>
<b>INS. CO. – STATE OF PENNSYLVANIA, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED DECEMBER 11, 2003**

Hearing before Administrative Law Judge J. Mark White on November 6, 2003, in Hope, Hempstead County, Arkansas.

Claimant represented by Mr. Joseph P. Graham, Attorney at Law, Prescott, Arkansas.

Respondents represented by Mr. Eric Newkirk, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On November 6, 2003, the above-captioned claim came on for a hearing in Hope, Arkansas. A pre-hearing conference was conducted on September 8, 2003, and a Prehearing Conference Order was entered that same day. A copy of the September 8, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed between the parties in March of 2001; that the claimant earned an average weekly wage of \$553 that would entitle him to a temporary disability rate of \$369, and a permanent partial disability rate of \$277; and that Arkansas Blue Cross Blue Shield has asserted a lien on this claim.

The parties agreed that the issues to be presented for determination were whether the claimant sustained a compensable gradual-onset injury to his elbow; if he sustained such an injury, whether medical treatment is reasonably necessary in connection with the injury; and controversion and attorney's fees.

The claimant contends that he suffered a compensable injury to his elbow caused by rapid repetitive movement and that he is entitled to medical benefits as a result of this injury.

Respondents contend that the claimant cannot prove the existence of a gradual-onset injury within the course and scope of his employment; and that the claimant did not file a claim or give notice until February 13, 2003.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 hereby made in accordance with ARK.

CODE ANN. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that his work consisted of rapid repetitive motion.
4. The claimant has proven by a preponderance of the evidence that he sustained a compensable gradual-onset injury to his elbow.
5. The claimant has proven by a preponderance of the evidence that the medical treatment he has received has been reasonably necessary in connection with his compensable injury.
6. A preponderance of the evidence establishes that the employer was aware of the claimant's alleged work injury prior to the claimant's surgery, and therefore any failure to notify the respondents is excused and will not bar this claim.
7. The respondents have controverted this claim in its entirety.

## DISCUSSION

### I. History

The claimant has been employed by the respondent-employer since 1995. In March, 2001, he was working as a quality control lab technician, responsible for testing the particle board produced by the plant. The claimant testified that he began working in this position in the fall or winter of 2000, but the respondents contended he started work in that position on February 28, 2001. In March, the claimant began to experience problems with his elbows, the right arm more than the left. He sought treatment from Dr. Mark Jansen, who diagnosed him with bilateral epicondylitis (tennis elbow) and treated him conservatively. The claimant informed Patricia Muldrew, the respondent-employer's Safety and Health Manager, of his injury, though the claimant and Muldrew disagree as to whether he informed her the injury was work-related.

Ultimately, Dr. Jansen referred the claimant to a specialist, Dr. David Rhodes, who diagnosed left lateral epicondylitis with radial tunnel syndrome. When conservative treatment failed, Dr. Rhodes performed a left lateral epicondylectomy on December 13, 2002. By February 6, 2003, Dr. Rhodes reported that the claimant had full range of motion and no complaints. Dr. Rhodes released the claimant to return to work on April 14, 2003. The claimant received short-term disability

benefits while he was off from work, and his group health plan paid for his medical treatment.

## **II. Compensability**

### **Elements of a gradual-onset injury**

To prove the compensability of a gradual-onset injury, a claimant must establish by a preponderance of the evidence that the injury arose out of and in the course of his or her employment; that the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and that the injury was a major cause of the disability or need for treatment. *Wal-Mart Stores v. Leach*, 74 Ark. App. 231, 48 S.W.3d 540 (2001); ARK. CODE ANN. § 11-9-102 (4)(A)(ii). Objective medical evidence is necessary to establish the existence and extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. *Id.*; ARK. CODE ANN. § 11-9-102 (4)(D). Most gradual-onset injuries must be shown to have been caused by rapid repetitive motion. ARK. CODE ANN. § 11-9-102 (4)(A)(ii)(a).

The claimant's treating physician, Dr. David Rhodes, diagnosed the claimant with left lateral epicondylitis, a diagnosis he confirmed following the claimant's surgery. Dr. Rhodes opined that the claimant's "job is directly greater than 50% responsible for the lateral epicondylitis." Dr. Rhodes noted that the claimant's job

description was consistent with the claimant's disabling condition. The claimant credibly testified that his symptoms began shortly after he began working as a quality control lab technician, and he noted that his symptoms worsened with particular tasks. The claimant's work responsibilities were hand- and arm-intensive, and as explained below his work included rapid repetitive movement. Considered together, this evidence is sufficient for the claimant to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment; that his injury caused internal physical harm to the body requiring medical services; and that his injury was a major cause of his need for treatment and associated disability.

In making this finding, I note the respondents' assertion that the claimant did not start his job in the quality control area until February 28, 2001, only days before his first visit to Dr. Jansen. The claimant told Dr. Jansen at that visit that he had been experiencing problems for several months. The claimant testified that he started working in the quality control area in the fall or winter of 2000 and had been working there for several months before visiting Dr. Jansen.

The respondents submitted a printout of a computer screen that the respondents' attorney asserts shows the claimant did not change jobs until February 28, 2001. The printout in question is entitled, "Administer Workforce (US) - Use - Job

Data". It contains the claimant's name and identifying information, followed by, "Effective date: 02/28/2001." Below that it reads, "Action/Reason: Data Chg G/L Account Code Change." Towards the bottom of the page, to the right of an account code it reads, "Quality Control." The claimant testified that his opinion was that February 28, 2001, was the date he was certified in the new position, so as to receive a higher rate of pay, but that he had actually started working in the new position several months prior. Patricia Muldrew testified that her opinion was that the date entered was the date the claimant started working in his new position. But none of the witnesses had or claimed to have personal knowledge of this computer screen printout or its meaning. Their testimony was little more than speculation, and speculation can never be substituted for credible evidence. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1980). There is simply no credible evidence in the record to conclusively determine what this printout means, and the printout itself is too vague and insubstantial to successfully contradict the claimant's testimony that he had been working in his new position for a month or two prior to his first visit with Dr. Jansen.

In finding that this claim satisfies the first three elements of compensability, I also note the gap in treatment cited by the respondents on cross-examination. The claimant first saw Dr. Jansen for treatment of his elbow problems on March 6, 2001.

The next visit for elbow pain for which full documentation is contained within the record is March 18, 2002, more than a year later. However, the claimant credibly testified that he saw Dr. Jansen for treatment of his elbow on May 7, 2001, and on July 2, 2001. Though the record contains no documentation of the substance of these visits, payment records do confirm that the claimant saw Dr. Jansen on these dates. More importantly, the claimant testified that he continued to take the medicine prescribed by Dr. Jansen for his elbows throughout this “gap” in treatment. Considering the lack of any evidence of an intervening cause, this gap in treatment is insufficient to break the chain of causation between the claimant’s work and his injury.

Finally, I note that the claimant admitted to engaging in physical labor by removing limbs and other winter storm debris in the months prior to his first visit with Dr. Jansen. Nothing in the record suggests or establishes that the claimant complained of pain following this work, nor does the medical evidence make any connection between this work and the claimant’s injury. As above, the mere act of cleaning up limbs is insufficient to break the chain of causation.

### **Rapid repetitive motion**

The only remaining element of compensability to be considered is whether the claimant’s work consisted of rapid repetitive motion. The appropriate test to

identify rapid repetitive motion is two-fold: the tasks must be repetitive, and the repetitive motion must be rapid. *Hapney v. Rheem Manufacturing Company*, 342 Ark. 11, 26 S.W.3d 777 (2000). The rapidity question is not reached unless the task is first repetitive. *Id.* The courts have found motion to be rapid and repetitive where it involved 115 to 120 motions per day, *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998); and where it involved 190 to 210 motions per day, *Hapney v. Rheem Manufacturing Company*, 342 Ark. 11, 26 S.W.3d 777 (2000). Conversely, the courts have affirmed that work tasks are not rapid and repetitive where several different tasks are performed only 12 to 15 times per day, *Malone v. Texarkana Pub. Schs.*, 333 Ark. 343, 969 S.W.2d 644 (1998); or where the claimant performed several different motions within a brief time, but repeated the motions at varying intervals separated by periods of several minutes or more, *Lay v. United Parcel Service*, 58 Ark. App. 35, 944 S.W.2d 867 (1997).

The respondents in the present claim submitted a video of a representative individual performing the claimant's work activities. The claimant conceded the video was an accurate but partial representation of his work activities as of March, 2001. The testing process performed by the claimant begins with the selection of a large piece of particle board removed from inventory by forklift. The representative used a circular saw to cut off a sample piece appearing to measure approximately

four feet by five feet. This sample was taken to an L-shaped table equipped with a table saw. The representative then cut the sample into a variety of shapes. He first cut thin strips of particle board, and then cut those strips into smaller pieces. Cutting the wood required repetitive movements of his arms and hands – sliding the wood across the saw and back, assembling the cut pieces, and discarding the waste pieces. Over the course of nine minutes and 45 seconds, the representative made 72 individual cuts (or series of movements), for an average of one cut or movement series every 8.125 seconds. Some individual pieces involved more rapid movement – for example, the cutting of one strip into small squares took 14 cuts in 35 seconds, an average of one cut or movement series every 2.5 seconds.

After cutting the wood, the representative then transported the pieces to what appears to be a testing lab. The work in the lab consisted of making notes, operating a computer, and examining the wood pieces over the course of 18 minutes and 30 seconds. None of the movements in the lab appeared to be rapid or repetitive, and they are not considered in this analysis.

The claimant testified he would perform the process portrayed in the video, a “hot test”, four times per day in a 12-hour shift or three times per day on an 8-hour shift. The claimant testified that he also performed two or three “sanded tests” in a shift, and these tests appear to require similar movements as the “hot test” outlined

above. One of the claimant's co-workers, Reanna Key, testified that she was familiar with the claimant's work activities as of March, 2001. Key testified that a "sanded" test required a total of 19 cuts. She testified that a worker in the claimant's position would be expected to perform three "hot" tests and one "sanded" test each 8-hour shift.

Considering only the video evidence and the testimony of the respondents' witness, Reanna Key, I find that the claimant would have typically performed 235 movements per 8-hour shift. I reach this total by adding 72 movements for each of the three "hot" tests, plus the 19 cuts for the "sanded" test. Though this is not "assembly-line" work, and though the claimant does not perform this same function all day, his work with the table saw is clearly repetitive – the same motion of pushing wood through the saw is performed repeatedly for nearly ten minutes, four or more times per shift. A total of 235 movements per shift clearly falls within the definition of "rapid" as interpreted in the case law cited above. Therefore, I find that the claimant has proven by a preponderance of the evidence that his work consisted of rapid repetitive motion.

Because the claimant has proven all of the elements of compensability, I find that he has proven by a preponderance of the evidence that he sustained a compensable gradual-onset injury to his elbow.

### III. Additional medical treatment

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). The claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of his compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291); *Mickey v. Arkansas Methodist Hospital*, Workers' Compensation Commission F002633 (July 22, 2003). It is well established that success of a treatment is a relevant factor to be considered in determining whether a treatment was reasonably necessary. *Winslow v. D&B Mechanical Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000).

There is no credible evidence in the record to suggest that anything other than the claimant's work is responsible for his compensable injury, or that any other factor has contributed to or aggravated his compensable injury. The claimant did acknowledge to having problems with his elbow as a child, but there is no medical evidence in the record to credibly connect this childhood problem with his compensable injury. Nothing in the record contradicts or questions Dr. Rhodes'

diagnosis or treatment of the claimant, and both Dr. Rhodes and the claimant considered the treatment to be a success. I therefore find that the claimant has proven by a preponderance of the evidence that the medical treatment he has received has been reasonably necessary in connection with his compensable injury.

#### **IV. Notice of injury**

Employees are required to promptly notify their employers of any injury, and employers are ordinarily not responsible for payment of indemnity or medical benefits accrued prior to the employee's report of injury. ARK. CODE ANN. § 11-9-701 (a)(1). There is a prima facie presumption that sufficient notice was given. ARK. CODE ANN. § 11-9-707 (2). It is thus the respondents' burden to overcome the prima facie presumption by a preponderance of the evidence. *See, e.g., Country Pride v. Holly*, 3 Ark. App. 216, 624 S.W.2d 443 (1981) (application of different prima facie presumption in workers' compensation context).

Failure to notify the employer can be excused if the employer had knowledge of the injury, if the employee had no knowledge the injury arose out of and in the course of his employment, or if the employee had some other satisfactory reason for not giving notice. ARK. CODE ANN. § 11-9-701 (b)(1). If an employee's failure to give notice is properly excused, the employer is liable for all benefits owed, regardless of whether they were accrued before or after the notice is given. *Weyerhaeuser*

*Company v. Johnson*, 48 Ark. App. 100, 891 S.W.2d 64 (1995).

The respondents have contended that the claimant failed to give notice of his injury until February 13, 2003. Though the claimant and the respondents' witness, Patricia Muldrew, disputed whether the claimant gave notice of a *work* injury prior to February 13, 2003, both witnesses agree that the claimant informed Muldrew of an injury to his elbow in March, 2001. Going simply by the plain language of the exception provided by § 11-9-701, whether the claimant told her it was a work injury matters not. The statute requires only that the employer be aware of the injury itself, not that the employer be aware that the injury is work-related. However, I note that the Court of Appeals has implied in *dicta* that the "knowledge of the injury" exception requires that the employer be aware of the injury itself *and* be aware that the injury is work-related. See *Willis v. Whirlpool Corp.*, 12 Ark. App. 101, 671 S.W.2d 760 (1984). The Court noted, "There was no allegation, and the evidence does not support any finding, that the employer had knowledge of the injury; in fact, the employer was notified that the injury was non-job-related." *Id.* Despite the plain language of the statute, this statement by the Court of Appeals constrains me from finding that the employer's knowledge of the injury in March, 2001, excuses the claimant's failure to give notice.

However, the employer did eventually have knowledge of the injury and its

alleged work-relatedness. The claimant testified that before his surgery, he informed Paul Broussard, the respondent-employer's human resources manager, of his belief that his injury was work-related. The claimant testified that Broussard came back and informed the claimant that the respondents would not accept the claim as compensable. Broussard did not testify at the hearing. Patricia Muldrew testified that she first discussed the injury with the claimant before he saw Dr. Jansen in March, 2001, but she denied that the claimant alleged a work injury at that time. Muldrew said that "approximately a year passed", and "Paul, the HR manager" came to her and said the claimant was alleging a work injury. The passage of one year would put this conversation in March, 2002, several months *before* the claimant's surgery. However, on later examination by the Commission Muldrew testified that the conversation with Broussard did not take place until February, 2003, well *after* the claimant's surgery.

Given this discrepancy in Muldrew's testimony, and given the lack of any other evidence contradicting the claimant's plausible testimony, I must find by a preponderance of the evidence that the employer was aware of the claimant's alleged work injury prior to the claimant's surgery, and therefore any failure to notify the respondents is excused and will not bar this claim. Because the claimant's delayed notice is excused, the respondents are liable for all benefits owed, regardless

of whether they were accrued before or after the notice was given. *Weyerhaeuser Company v. Johnson*, 48 Ark. App. 100, 891 S.W.2d 64 (1995).

### **AWARD**

The claimant has proven by a preponderance of the evidence that he sustained a compensable gradual-onset injury to his elbow. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Joseph P. Graham, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to ARK. CODE ANN. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to ARK. CODE ANN. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge