

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E905210

RANDY R. STULL,  
EMPLOYEE

CLAIMANT

PACE INDUSTRIES,  
SELF-INSURED EMPLOYER

RESPONDENT

**OPINION FILED FEBRUARY 4, 2004**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Harrison, Boone County, Arkansas.

The claimant was represented by HONORABLE JASON WATSON, Attorney at Law, Fayetteville, Arkansas.

The respondents were represented by HONORABLE JAMES D. SPROTT, Attorney at Law, Harrison, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on November 18, 2003 in Harrison, Arkansas. A prehearing order was entered in this case on August 14, 2003. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted by the parties and are hereby accepted:

1. The employee/employer relationship existed at all relevant times, and the claimant earned sufficient wages to

be entitled to a temporary total disability rate of \$260.00 per week and a permanent partial disability rate of \$195.00 per week.

2. The claimant has already been paid for a 10% permanent anatomical impairment rating to the upper extremity as a result of the Commission's prior finding in claim number E905210. The claimant asserts that he is now entitled to a 27% permanent impairment representing the difference between Dr. Martinson's 37% rating to the upper extremity and the 10% rating to the upper extremity already paid.

By agreement of the parties, the issues to be litigated are limited to the following:

1. Compensability of the claimant's gradual onset ulnar nerve injury.
2. Temporary total disability for 11 weeks beginning 9/21/01.
3. Related medical.
4. 27% PPD rating to the upper extremity.
5. A controverted attorney's fee.

**DISCUSSION****Issue One: Admissibility of Mr. Flynn's testimony regarding the absence of any prior claims at Pace Industries for cubital tunnel problems.**

Steve Flynn testified that he is the personnel manager at Pace Industries and has been so for almost 21 years. During that period of time he has been responsible for handling the personnel on the forklifts. Mr. Flynn testified that, with three shifts running 24 hours per day, Pace Industries has approximately 100 people working on forklifts. Mr. Flynn testified this has been the case during the entire time that he has been the personnel manager at Pace Industries.

The testimony, whose admissibility is in question, is Mr. Flynn's proffered testimony that, to his memory, there has never been a claim for injury due to cubital tunnel problems, such as the claimant is raising in this case, during his 21 years as personnel manager at Pace Industries. The claimant has objected to the relevancy of this proffered testimony.

My research indicates that there is not a rule of evidence in Arkansas which specifically addresses the issue of admitting proof on the existence or non-existence of prior accidents or injuries to show negligence, notice, or

causation. The Arkansas courts have adopted the general rule with respect to the admissibility of evidence of similar occurrences that such evidence is admissible only if "the events arose out of the same or substantially similar circumstances." See *Fraser v. Harp's Food Stores, Inc.*, 290 Ark. 186, 718 S.W.2d 92 (1986).

In the present case, the claimant asserts that he developed cubital tunnel syndrome in his left arm as a result of rapidly and repetitively turning the steering wheel of a forklift over a number of years. Therefore, I find that the presence or absence of prior cubital tunnel syndrome injuries sustained by forklift operators at Pace Industries is relevant to the causation issue presented in this case. In addition, based on my understanding from the testimony that Pace Industry forklift operators, in general, maneuver warehouse forklifts by turning a steering wheel similar to the video I reviewed, I am convinced that Pace Industry has satisfied the requirement of a similarity of circumstances.

**Issue Two: Compensability of cubital tunnel syndrome injury.**

In order to establish a compensable gradual onset cubital tunnel syndrome injury, the claimant must prove by a preponderance of the credible evidence that he sustained an

injury (1) which arose out of and in the course of his employment, (2) which caused internal or external physical harm to the body requiring medical services, (3) which was caused by rapid repetitive motion, and (4) which was the major cause of his disability or need for medical treatment. *Hapney v. Rheem Mfg. Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000). In addition, objective medical evidence must prove that an injury exists, but it does not have to prove the circumstances under which the injury was sustained or the precise time of the injury's occurrence. *Aeroquip, Inc. v. Tilley*, 59 Ark. App 163, 954 S.W.2d 305 (1997); *Stephens Trucklines v. Millican*, 58 Ark. App 275, 950 S.W.2d 472 (1997).

**Objective findings and physical harm to the body requiring medical services.**

In the present case, there is no dispute that the claimant's cubital tunnel syndrome nerve damage is documented through electrodiagnostic testing and surgical observations. Clearly the nerve injury at issue in the present case caused physical harm to the body requiring surgical treatment; therefore these requirements have been satisfied.

**Rapid repetitive motion.**

In *Westside High School v. Patterson*, 79 Ark. App 281, 86 S.W.3d 412 (2002), the Arkansas Court of Appeals summarized the test for establishing the presence or absence of rapid repetitive motion in work tasks as follows:

Arkansas Code Annotated section 11-9-102(4)(A)(ii)(Repl. 2002) provides that a compensable injury includes:

(ii) An injury causing internal or external injury to the body and arising out of and in the course of employment if it is not caused by a specific incident and is not identifiable by time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion.

The supreme court in *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1998), noted that the legislature did not establish guidelines as to what constitutes "rapid repetitive motion" and that as a result, the determination has been made by the fact-finder in each case. After reviewing rapid repetitive motion cases, the court in *Malone, supra*, established a test for analyzing whether an injury is caused by rapid repetitive motion: "[T]he standard is a two-pronged test: (1) the task must be repetitive, and (2) the repetitive motion must be rapid. As a threshold issue, the task must be repetitive, or the rapidity element is not reached. Arguably, even repetitive tasks and rapid work standing alone, do not satisfy the definition. The repetitive task must be completed rapidly." *Id.* at 350, 969 S.W.2d at 648. This court found the facts of *High Capacity Products v. Moore*, 61 Ark. App 1, 962 S.W.2d 831 (1998), to be the most compelling case demonstrating rapid

repetitive motion presented to this court to date. There, the testimony indicated that the claimant used an airgun to assemble blocks by attaching two nuts to each block. Her assembly duties required her to ensure that one nut was placed on an average of every 15 seconds during the majority of her shift.

The claimant testified that when he first went to work at Pace Industries he would load an average of six to seven trucks per night with 42 pallets of product each. Later, the company increased the number of pallets put in each truck. The forklift operator would go down into the warehouse and pull out the particular pallet of product to be loaded one pallet at a time. The pallet would be pulled and moved out into the aisle. Several pallets would be lined up in this manner and then brought to the front of the warehouse for quality control inspection. The claimant testified the overall operation involving pulling pallets, quality control inspection, and truck loading meant that he virtually handled each pallet three times before it went on the truck.

The videotape appears to indicate that the racks of pallets in the warehouse and in the quality control area are oriented in a 90° angle as compared to the path to the truck. In other words, if the trucks were aligned in a

north-south orientation, the pallets in the warehouse and in the quality control area would be aligned in an east-west orientation.

Based on the videotape, it appears that in order to make the 90° change in orientation of the forklift, the operator would turn the steering wheel between one and two revolutions either clockwise or counter-clockwise (depending on the direction change) and then turn the wheel an equal opposite amount to straighten the forklift up. Therefore, in order to turn the forklift 90°, the operator turned the wheel a total of between two and four revolutions. Because the steering wheel revolutions in opposite directions required essentially identical elbow flexions and extensions, I find that turning the wheel clockwise and counter-clockwise are two motions which may be considered together in order to establish whether or not the task of operating the forklift required rapid repetitive motion of the left elbow.

The first 16 minutes and 50 seconds of the video demonstrated forklift operation to load pallets from the quality control area into the truck. During this 16 minutes and 50 seconds, I counted 63 forklift directional changes as described above, necessary to move pallets into the truck

and to move pallet racks out of the way. Again, each directional change required a minimum of one steering wheel revolution clockwise and one steering wheel revolution counter-clockwise for a minimum of two steering wheel revolutions per directional change. Accordingly, the forklift operation required at least 126 steering wheel revolutions per 16 minutes 50 seconds for an average of 7.5 steering wheel revolutions per minute. In addition to these 7.5 steering wheel revolutions, I note that the operator in the videotape also engaged in many more smaller steering wheel adjustments, each requiring some lesser degree of elbow flexion and/or extension, which were not capable of being counted in the videotape presented. However, I note that 7.5 steering wheel revolutions per minute, even without considering the more frequent but less obvious steering wheel manipulations, would appear to far exceed what the Arkansas Court of Appeals called the most compelling rapid repetitive motion presented to the court to date, when the court was presented with evidence of approximately four task per minute in *High Capacity Products v. Moore, supra*.

The next 4 minutes and 40 seconds of the videotape demonstrated the forklift tasks required to transfer pallets from the warehouse to the quality control area. The tasks

performed in 4 minutes and 40 seconds required 21 directional changes. Each directional change again required at least two revolutions of the steering wheel, one clockwise and one counter-clockwise, for a minimum of 42 steering wheel revolutions in 4 minutes and 40 seconds. Forty-two steering wheel revolutions performed in 4 minutes and 40 seconds is equivalent to nine steering wheel revolutions per minute, again far exceeding the number of tasks per minute recognized as the most compelling case demonstrating rapid repetitive motion to the Court of Appeals in *High Capacity Products v. Moore, supra*. Because I find that turning the forklift steering wheel clockwise and counter-clockwise qualify together as repetitive tasks, and because I find that these tasks were performed at much greater rapidity than the tasks considered rapid by the Arkansas Court of Appeals in *High Capacity Products v. Moore, supra*, I find that the claimant has established by a preponderance of the evidence that his job duty steering a forklift required rapid repetitive motion of the left elbow engaging in flexion and extension.

**Injury arising out of and in the course of employment  
which was the major cause of disability or need for  
medical treatment.**

The record contains a number of different relevant medical reports addressing the cause or causes of the claimant's ulnar nerve syndrome condition. For example, Dr. James Moore, a hand surgeon who performed the claimant's ulnar nerve transposition surgery on September 21, 2000 indicated as follows in his November 7, 2000 report:

First, Randy did undergo the surgical treatment with anterior transposition of the ulnar nerve of the left elbow on 09/21/00. He has since been followed up. He appears to be doing well. I did have a short note typed for him on 10/03/00, and after a description of his job given to me of his continual motion with flexion and extension of his left elbow driving a fork, loading trucks under a timed schedule and so forth, that there was a significant relationship of the job to the elbow problems with the ulnar nerve. I felt that this was greater than 50% causation from the use of the left upper extremity in his work to the development of the ulnar nerve problems.

Earlier, on July 11, 2000, Dr. Charles Ledbetter the orthopedic specialist treating the claimant for a left carpal tunnel syndrome, expressed his opinion, within a reasonable degree of medical certainty, that the claimant's employment as a forklift operator produced his carpal tunnel syndrome. However, in a July 31, 2000 letter addressed to the respondent's attorney, Dr. Ledbetter opined that there

was no causal connection between the claimant's cubital tunnel syndrome and his employment at Pace Industries. Dr. Ledbetter indicated in relevant part:

He was then seen in my office on April 12, 2000 for complaints of left hand pain and numbness. At this point he had pain in his left elbow. He denied any job requirement that would produce compression of the ulnar nerve in the cubital tunnel.

...

The patient had resolved his carpal tunnel syndrome on the left and he had a tardy ulnar nerve palsy on the left at the level of the elbow. I could not determine any job causative factors of his employment at Pace Industries that would produce any tardy ulnar nerve palsy. He was placed on Celebrex and placed into an elbow protector with thoughts of repeating his nerve conduction in a month.

...

I could find no causal evidence of the patient's tardy ulnar nerve syndrome to his job at Pace Industries and explored that with the patient during my conversations with him in my office.

The claimant presented to Dr. Michael Moore, a Little Rock hand surgeon, at the request of the respondent on August 16, 2000 for his evaluation of the claimant's left elbow. His opinion regarding causation was as follows:

Apparently, there is a question as to whether Mr. Stull's part-time work as a farmhand could aggravate his symptoms. According to him, when he works on the farm he does not use his left arm to perform significant lifting, gripping, pushing, or pulling. Based on this history, I cannot

definitely state that the work Mr. Stull performs on the farm would aggravate his current [cubital tunnel syndrome] symptoms.

In an August 31, 2000 letter to the claimant's attorney, Dr. Michael Moore addressed the causation issue further as follows:

In regards to whether Mr. Stull's left cubital tunnel syndrome is related to his employment duties, it is difficult to determine whether his symptoms are primarily related to his work as a forklift operator, or the work he performs on a farm. Mr. Stull does report that he uses his left hand to control the forward and reverse handle. In addition, he uses his left hand to steer the forklift. I cannot definitely state that this work activity would be the primary cause of a carpal tunnel syndrome or cubital tunnel syndrome. Specifically, it is my understanding the work does not require significant pulling or lifting using his left arm or activities which could precipitate a cubital tunnel syndrome. If Mr. Stull uses his left arm to perform repetitive work, this type of work activity could exacerbate the symptoms associated with cubital tunnel syndrome and carpal tunnel syndrome. The work activity may not be the primary cause of the carpal tunnel syndrome or cubital tunnel syndrome. If Mr. Stull's work on the farm requires gripping, pulling, pushing, or lifting, this type of work activity could exasperate symptoms associated with carpal tunnel syndrome or cubital tunnel syndrome.

In a deposition taken on September 18, 2000, which primarily addressed the claimant's work-related carpal tunnel syndrome, Dr. Ledbetter also had the following observations bearing on the claimant's cubital tunnel syndrome, as well as the claimant's diagnosis as a diabetic:

Q I notice that in fact Mr. Stull [in April of 1999] was being treated for diabetes, was he not?

A Well, he had what we called "diet controlled diabetes", which I don't consider a problem in terms of a peripheral neuropathy.

Q Okay, in other words you're saying the diabetes that he has had not gotten - - was not severe enough to have caused the swelling in his carpal tunnel; is that true?

A Right. Most of the time the diabetes will cause what's called a peripheral neuropathy, which is actually a disease of the nerve itself, not something extrinsic pressing on the nerve. So peripheral neuropathies are - - you can't feel your toes, and this sort of stuff, and it comes out - - it would not show the same sort of E.M.G. and nerve conduction studies as an extrinsic pressure. In other words, it's not something on the outside pushing on the nerve causing it. It's a disease of the blood vessels that supply the nerves.

...

Q You do not relate the problems or symptoms he's having with his ulnar nerve to any of his operations at work do you?

A No.

Q Okay.

A O.S.H.A. has a big list of occupations that cause repetitive motion disorders, and this sort of stuff, and ulnar neuropathy is not usually associated with forklift drivers.

Finally, I note that ALJ Bill Daniels had Dr. Alice Martinson, an orthopedic specialist, perform an independent

medical evaluation on July 22, 2002. Dr. Martinson summarized some of the conclusions of other physicians, and her own conclusions on the cause of the claimant's cubital tunnel syndrome as follows:

As I have evaluated his records, Dr. Ledbetter's initial notes from 1999 do not document numbness in the ring and little fingers, although they do document complaints of cramping in the hand and forearm. The patient states that he complained of pain and numbness in his entire hand from the beginning, but felt that the problem with the thumb, index, and long fingers was worse. Dr. Moore, sometime later, does document the complaint of numbness of the entire hand. In July, 2000, Dr. Ledbetter expressed the opinion that the ulnar nerve palsy was not related to Mr. Stull's work as a forklift operator because the job did not put direct pressure on the left elbow. In November, 2000, Dr. Moore expressed the opinion that the ulnar nerve problem was work related and attributed the problem to the rapidly repetitive flexion and extension activities of the elbow as the patient drove his forklift.

It is my opinion today that his [sic] man has experienced both carpal tunnel syndrome and cubital tunnel syndrome which is known to occur in the context of rapidly repetitive gripping activities in the arm. The fact that Mr. Stull is a recently diagnosed diabetic may very well play a role in both the susceptibility of his peripheral nerves to compressive problems as well as the incomplete recovery which he has experienced. Sufficient time has passed since his two surgeries so that he has reached maximum medical improvement.

In trying to make sense out of these conflicting, and frankly confusing medical conclusions, I initially note

that, if cubital tunnel syndrome routinely occurs in the general population with no known cause, no physician made that fact apparent in their reports in the record. Instead, the reports focused on three potential causes: driving a forklift, working on a farm, or diabetes.

While Dr. Martinson postulated that diabetes may have some causal role, I am persuaded by Dr. Ledbetter's quoted deposition testimony that the claimant has not experienced any type of diabetic peripheral neuropathy. While Dr. Michael Moore described farmwork as a possible causal factor, I am persuaded by the right-hand dominant claimant's testimony that he did not use his left hand extensively in his farming activities. Through the process of elimination then, I am left with left elbow flexion and extension while rapidly and repetitively steering a forklift as the remaining likely cause of the claimant's left cubital tunnel syndrome condition.

I note that the claimant's steering duties on the forklift did not involve any significant left arm gripping, lifting, pushing, or pulling which some of the quoted medical reports seem to associate as specific risk factors for causing cubital tunnel syndrome. On the other hand, Dr. James Moore discussed only the elbow extension and flexion,

without reference to gripping, lifting, pushing, or pulling, and Dr. James Moore has unequivocally opined that the claimant's forklift driving was more than 50% of the cause of the claimant's ulnar nerve problems.

As far as I can tell, while the different doctors in this case have different perceptions of the type of physical activity that can cause cubital tunnel syndrome, none of the other physicians have specifically indicated that Dr. James Moore is in error by indicating that elbow flexion and extension causes (and here did cause) cubital tunnel syndrome. Likewise, I am mindful of Mr. Flynn's testimony that none of Pace's other forklift operators have contracted cubital tunnel syndrome and Dr. Ledbetter's testimony mentioning OSHA and stating that "ulnar neuropathy is not usually associated with forklift drivers." Dr. James Moore may or may not have been aware of these pieces of information when he rendered his causation opinion on November 7, 2000. However, I am certain that Dr. James Moore's description of the claimant's relevant work activities is consistent with both the claimant's testimony and with what I saw on the videotape. In other words, I see

nothing to persuade me that Dr. James Moore's expert medical opinion is based on any mistake of material fact regarding the claimant's work.

In summary, because I find that the claimant's diabetes and his farmwork did not cause his ulnar nerve problems, and because I find credible Dr. James Moore's opinion that elbow extension and flexion as a forklift driver can and did cause the claimant's ulnar nerve problems, I am constrained on this record to find that the claimant proved by a preponderance of the credible evidence that his ulnar nerve injury arose out of and in the course of his employment at Pace Industries. Since there is no dispute that the ulnar nerve problems are what caused the disability and need for surgical treatment required to repair the ulnar nerve entrapment, I am likewise constrained to find that the compensable injury is the major cause of the disability and need for medical treatment at issue.

For all of the foregoing reasons, I find that the claimant has satisfied each and every element necessary to establish the compensability of his gradual onset ulnar nerve entrapment injury.

**Issue Three: Eleven weeks of TTD.**

An employee with a scheduled injury is entitled to temporary total disability compensation during the time that he remains within his healing period and has not returned to work. *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

In the present case, the claimant entered his post-surgical healing period on September 21, 2000. Dr. Moore originally projected up to 12 weeks post-surgical healing with increased range of motion before resuming active driving. Dr. Moore then released the claimant to active driving on December 4, 2000. Consequently, Dr. Moore's reports establish that the claimant was within his post-surgical healing period until December 4, 2000, and established, along with the claimant's testimony, that the claimant was off work during this period. Therefore, the claimant proved by a preponderance of the evidence that he was temporarily totally disabled from September 21, 2000 until December 4, 2000.

**Issue Four: 27% anatomical impairment to the left upper extremity.**

In the present case, Dr. Martinson has assigned to the claimant a 37% impairment to the upper extremity using the

AMA Guides to the Evaluation of Permanent Impairment (Fourth Edition) for a combination of median nerve injury and ulnar nerve injury. There is no dispute that the claimant sustained a 10% permanent impairment due to his work-related carpal tunnel syndrome. Utilizing the combined values chart of the Guides, the combined 37% rating equates to the previously paid 10% rating for carpal tunnel syndrome and an additional 30% rating for cubital tunnel syndrome. The respondent's attorney advised us at the hearing that he had no evidence to present to contradict Dr. Martinson's rating, and I note that a 30% rating for cubital tunnel syndrome is coincidentally the same rating assigned for a moderate neuropathy of the ulnar nerve in the elbow pursuant to Table 16, page 3/57 of the fourth edition of the Guides.

Furthermore, the objective findings indicative of ulnar nerve problems in the elbow include Dr. Moore's surgical observation of a 50% enlargement of the size of the nerve in the area of the cubital tunnel, as well as objective electrodiagnostic studies identifying nerve function abnormality. Finally, I note that the work-related cubital tunnel syndrome is not only the major cause, but on this record is also the sole cause, of the 30% impairment to the upper extremity indicated by Table 16. Since neither the

respondent's attorney nor I have identified any evidence to refute the conclusions of Dr. Martinson, and in light of my conclusions described herein regarding ulnar nerve impairment ratings under the AMA Guides, I find that the claimant has established by a preponderance of the evidence that he is entitled to benefits for an additional 27% impairment to the left upper extremity solely attributable to his compensable cubital tunnel syndrome injury.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee/employer relationship existed at all relevant times, and the claimant earned sufficient wages to be entitled to a temporary total disability rate of \$260.00 per week and permanent partial disability rate of \$195.00 per week.

3. The claimant has already been paid for a 10% permanent anatomical impairment rating to the upper extremity as a result of the Commission's prior finding in claim number E905210. The claimant asserts that he is now entitled to a 27% permanent impairment, representing the difference between Dr. Martinson's 37% rating to the upper

extremity and the 10% rating to the upper extremity already paid.

4. Mr. Flynn's proffered testimony that, to his memory, there has never been a claim for injury due to cubital tunnel syndrome by forklift drivers at Pace Industries during his 21 years as personnel manager at Pace Industries is relevant and is hereby admitted into the record as relevant testimony on the compensability issue presented.

5. The claimant has proven by a preponderance of the credible evidence that he sustained a compensable gradual onset cubital tunnel syndrome injury.

6. The claimant has proven by a preponderance of the credible evidence that he was temporarily totally disabled from September 21, 2000 until December 4, 2000.

7. The claimant has established by a preponderance of the credible evidence that he is entitled benefits for an additional 27% impairment to the left upper extremity at the elbow.

**AWARD**

The respondent is directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to the maximum statutory attorney's fees on benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondent in accordance with Ark. Code Ann. § 11-9-715; and *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge