

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303604

ARDELIMA MACON,
EMPLOYEE

CLAIMANT

BLACKHAWK MOLDING, INC.,
EMPLOYER

RESPONDENT

VALLEY FORGE INSURANCE COMPANIES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 1, 2005

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Conway, Faulkner County, Arkansas.

The claimant was represented by HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

The respondents were represented by HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on September 21, 2005 in Conway, Arkansas. A prehearing order was entered in this case on July 11, 2005. 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 record.

The following stipulations were submitted by the parties either in the prehearing order or during the course of the hearing and are hereby accepted:

1. Employer-employee-carrier relationship existed at all relevant times.
2. This claim has been controverted in its entirety.
3. The claimant's average weekly wage was \$304.00 per week entitling the claimant to TTD at \$203.00 per week and PPD at \$154.00 per week if this claim is found compensable.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited during the course of the hearing to the following:

1. Compensability of alleged gradual onset neck injury and alleged CTS injury with attendant medical expense and TTD from 10/1/2002 to 8/8/2003.
2. Controversion and attorneys' fees.

The record consists of the September 21, 2005 hearing transcript and the exhibits contained therein, a video cassette offered as respondent's exhibit no. 1 and retained in the Commission file, and the respondents' post hearing brief which I have blue-backed to designate as part of the record.

DISCUSSION

The claimant seeks benefits for a gradual onset carpal tunnel syndrome and a gradual onset neck injury, each allegedly sustained from her work at Black Hawk Molding.

1. Carpal Tunnel Syndrome

A claimant seeking benefits for an allegedly work related carpal tunnel syndrome injury must prove by a preponderance of the evidence that (1) the carpal tunnel syndrome arose out of and in the course of employment; (2) that the injury caused internal or external physical harm to the body that required medical treatment or resulted in disability or death; and (3) the injury was the major cause of the disability or need for treatment. In addition, the compensable injury must be established by medical evidence supported by objective findings. Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001).

In the present case, the claimant's right wrist carpal tunnel syndrome diagnosed in 2002 is established by medical evidence supported by objective findings, including NCS-EMG testing performed on May 20, 2005. This study objectively indicated median nerve entrapment in Ms. Macon's right wrist. This study also confirms the necessary internal harm to Ms. Macon's body caused by carpal tunnel syndrome.

I also find that the diagnosed carpal tunnel syndrome is the major cause of the medical treatment that Ms. Macon received for that injury and the major cause of her temporary disability between October of 2002 and August of 2003 caused by her inability to perform repetitive gripping activities with her right hand, as documented by Dr. Marcia Hixson on April 10, 2003. In concluding that Ms. Macon's carpal tunnel syndrome is the major cause of her treatment for carpal tunnel syndrome and her temporary disability between October of 2002 and August of 2003, I recognize that Ms. Macon also had some neck-related complaints for which she also received treatment through Dr. Richard Peek. I am persuaded that the carpal tunnel syndrome, not the neck-related problem, was the major cause of the medical treatment for CTS and the temporary disability at issue based on Dr. Richard Peek's June 2, 2003 conclusion that, although Ms. Macon had some degree of cervical complaints, "[s]he has really more carpal tunnel syndrome than a cervical problem."

I also find that the claimant has established by a preponderance of the evidence that her right hand carpal tunnel syndrome arose out of her work-related job duty of folding approximately 90 box tops per shift while working as

a machine operator in 2002 at Black Hawk Molding. In finding that the claimant has established by a preponderance of the evidence that her diagnosed carpal tunnel syndrome in 2002 arose out of her employment at Black Hawk Molding, I am persuaded by (1) Ms. Macon's lack of symptoms or medical treatment for carpal tunnel syndrome before 2002 (2) the lack of evidence of any activities outside of work to account for her development of carpal tunnel syndrome (3) Dr. Hixson's April 10, 2003 report indicating that the diagnosed carpal tunnel syndrome appears to be related to job activities of right hand pulling and gripping and (4) Dr. Hixson's February 14, 2005 deposition opinion clarifying her belief that Ms. Macon's job caused her carpal tunnel syndrome to become symptomatic. [Dep. 11-12].

In reaching my conclusion that Ms. Macon established that her carpal tunnel syndrome arose out of her employment, within the meaning of the Arkansas Workers' Compensation Law, I am aware of Dr. Hixson's deposition testimony on page 12, that carpal tunnel syndrome is an anatomic problem, so that work would not cause carpal tunnel syndrome but could cause the anatomic problem to become symptomatic. While there is no evidence in the record to dispute Dr. Hixson's medical explanation on page 12, I note that the Arkansas

General Assembly has specifically categorized carpal tunnel syndrome as a rapid repetitive motion injury in Act 796 of 1993 for purposes of the Arkansas Workers' Compensation Law. See Ark. Code Ann. § 11-9-102(4)(A)(ii)(a)(Repl. 2002). Although the Arkansas Courts have apparently never considered a doctor's testimony suggesting a blanket rejection of all carpal tunnel syndrome injuries as arising out of employment duties, I note that in Sallie M. Thrower v. Kroger Company, Full Workers' Compensation Commission, Opinion filed November 5, 1999 (E711966), the Full Commission considered but rejected as inconsistent with legislative intent in Act 796 a physician's expert testimony that there are insufficient medical studies to ever causally relate an onset of carpal tunnel syndrome to repetitive work duties. Based on the Commission's finding in Thrower, I conclude that a claimant does not need to establish that work duties caused an anatomical constriction in the wrist to establish a compensable gradual onset carpal tunnel injury pursuant to Act 796 of 1993. Instead, I conclude that Ms. Macon met her burden of proof that the carpal tunnel syndrome arose out of her employment when she established that the work duties caused her to develop carpal tunnel syndrome symptoms with objectively documented

nerve abnormality. To conclude otherwise (based on Dr. Hixson's medical explanation regarding "anatomic" constriction) would eliminate the compensability of all gradual onset carpal tunnel syndrome injuries in Arkansas, which was clearly not the intent of the General Assembly in enacting Act 796 of 1993.

In find that the claimant has established that her carpal tunnel syndrome arose out of her employment, I am also aware that the claimant did not complete a Form AR-C until June 13, 2003, and drew periods of short term disability and unemployment benefits prior to that filing. However, I am persuaded that Ms. Macon attempted to report her carpal tunnel syndrome to Ms. Hooks long before that date, and that, due to Ms. Hooks' misunderstanding of the Arkansas Workers' Compensation Law (and perhaps for other reasons), Ms. Hooks took action to report the injury as non-work related for purposes of initiating short term disability instead of reporting the injury to Valley Forge Insurance Company as allegedly work-related. Furthermore, in light of the gradual onset nature of the injury involved, the nature of the symptoms involved with carpal tunnel syndrome and a separate diagnosed neck condition, the claimant's lack of medical training, the claimant's

deposition testimony at page 51 explaining that actually Dr. Oberlander gave her the workers compensation papers to be filled out after she had been off work for a lengthy period, and Ms. Hooks' testimony explaining incorrectly that an employee only has 10 days under the law to report an injury (which Ms. Hooks did not report further), I find no significance in Ms. Macon's not reporting her symptoms initially as work related, or in the delay in filing a Form AR-C. Accord Thrower, supra. [Finding understandable a delay in reporting as work related a gradual onset carpal tunnel syndrome injury where the employee was not medically trained and where such determinations are made by the medical profession and the Commission, not the injured worker].

2. Gradual Onset Neck Injury

Under the provisions of Act 796 of 1993, in order to receive benefits for a gradual onset or a cumulative trauma injury, a claimant must prove by a preponderance of the evidence (1) that she sustained an injury arising out of and in the course of her employment; (2) that the injury caused external or internal physical harm to the body; (3) that the injury is supported by objective medical findings; (4) that the injury was caused by rapid repetitive motion; and (5)

that the injury was the major cause of any disability or need for treatment. Stevenson v. Frolick Footwear, 70 Ark. App. 383, 20 S.W.3d 413 (2000).

However, two exceptions existed under Act 796 of 1993 to the general requirement that a claimant with a gradual onset injury must establish that the injury was caused by rapid repetitive motion. First, carpal tunnel syndrome is specifically categorized as a compensable injury, and the Arkansas Supreme Court has interpreted a claimant therefore need not specifically prove that a carpal tunnel syndrome injury was caused by rapid repetitive motion in order to establish the compensability of a gradual onset carpal tunnel syndrome injury. Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 969 S.W.2d 190 (1998). Second, a claimant may establish a compensable gradual onset "back" injury under Act 796 without also establishing that the injury was caused by rapid repetitive motion. See Ark. Code Ann. § 11-9-102(4)(A)(ii)(b)(Repl. 2002). However, the Arkansas Supreme Court has also interpreted that the General Assembly did not intend the term "back" to also include an injury to the "neck". Hapney v. Rheem Mfg. Co., 341 Ark. 548, 26 S.W.3d 771 (2000).

In the present case, the claimant does not assert and has not established that her neck problems at issue were caused by rapid repetitive neck motion at work. Instead, the claimant asserts her neck problems were caused by having her head bent down watching parts go by on the machine. Neither the witness testimony, the documentary evidence or the videotape indicate that Ms. Macon's job required rapid repetitive motion causally related to her neck injury at issue. Therefore, I find that Ms. Macon failed to establish one of the elements necessary to establish a compensable gradual onset neck injury pursuant to the law in effect in 2002 (when her neck symptoms started) or in 2003 (when she filed her Form AR-C).

At the hearing, the claimant's attorney asserted that the claimant's gradual onset neck injury should be governed not by the provisions of Act 796 of 1993, but instead by the provisions of Act 1250 of 2005, which now provides for the compensability of gradual onset back or neck injuries without proof that the injury was caused by rapid repetitive motion.

The respondents' post-hearing brief notes that Act 1250 does not contain an emergency clause, and does not indicate whether or not Act 1250 applies retroactively to injuries

occurring before the effective date of the act. The respondents assert that retroactive application would not be proper where, as here, the Act redefines "compensable injury" in a manner that affects vested rights. I agree. The Arkansas Court of Appeals has concluded that changes in the law affecting wage loss disability benefits are substantive, and will not be applied retroactively without an expressed declaration by the General Assembly indicating the Legislature's intent to do so. Arkansas State Police v. Welch, 28 Ark. App. 234, 772 S.W.2d 620 (1989); Driscoll v. Oklahoma Gas & Elec. Co., 28 Ark. App. 352, 775 S.W.2d 84 (1989). In the present case, Act 1250 establishes a new form of compensable neck injury, and therefore is a substantive change in the law affecting vested rights. I therefore find that Act 1250 of 2005 has no retroactive application to an injury sustained in 2002.

3. Medical Benefits and Temporary Disability For Carpal Tunnel Syndrome

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for

treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

The claimant's work related carpal tunnel syndrome in the wrist is considered a scheduled injury. See Ark. Code Ann. §11-9-521(a). For a scheduled injury, a claimant is entitled to temporary total disability benefits until her healing period ends or until she returns to work, whichever occurs first. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2002). The healing period continues until the injured employee is as far restored as the permanent character of the injury will permit. The healing period ends once the underlying condition has become stable and when nothing further in the way of medical treatment will improve the permanent character of the injury. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The persistence of pain is not sufficient, by itself, to extend the healing period provided that the underlying condition has stabilized. Id.

In the present case, I find that the medical treatment for Ms. Macon's carpal tunnel syndrome documented in the record was reasonably necessary for diagnosis and treatment of that condition. However, I also find that the respondents are not liable for referrals or any specific treatment for Ms. Macon's neck condition, since Ms. Macon has failed to establish that she sustained a compensable neck injury.

I further find that Ms. Macon has established by a preponderance of the evidence that she remained within the healing period for her carpal tunnel syndrome injury and off work from the point that she was placed on disability status in October of 2002 until August of 2003, when she was able to return to new work in a school cafeteria. With regard to the healing period, I note from the medical reports that Dr. Hixson saw Ms. Macon on only one occasion in April of 2003. However, Ms. Macon continued to complain of documented wrist problems and therefore was in need of additional medical treatment in late 2003, which she could not receive from Dr. Hixson because her work injury was controverted. Consequently, I find that Ms. Macon has established both requirements necessary to establish her temporary total

disability from October 1, 2002 until her return to work on August 8, 2003.

However, I point out that the respondents are entitled to an offset under the provisions of Ark. Code Ann. § 11-9-411 for any disability benefits or medical benefits which Ms. Macon received that are described in Section 411(a). Likewise, the respondents are entitled to a reduction in liability for temporary disability compensation pursuant to Ark. Code Ann. § 11-9-506(b) for unemployment benefits which Ms. Macon received between October 1, 2002 and August 8, 2003.

4. Evidentiary Objection

On page 15 of the hearing transcript, Mr. Newell objected to Ms. Beck's testimony that Ms. Macon told Ms. Beck that Ms. Macon had hurt herself. Since both Ms. Beck and Ms. Macon were present to testify at the hearing regarding the statement, Mr. Newell's objection is overruled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Employer-employee-carrier relationship existed at all relevant times.
2. This claim has been controverted in its entirety.
3. The claimant's average weekly wage was \$304.00 per

week entitling the claimant to TTD at \$203.00 per week and PPD at \$154.00 per week if this claim is found compensable.

4. The claimant established by a preponderance of the evidence that she sustained a compensable carpal tunnel syndrome injury in her right wrist.

5. The claimant failed to establish by a preponderance of the evidence that she sustained a compensable gradual onset neck injury.

6. The provisions of Act 1250 of 2005 do not apply retroactively to a neck injury sustained in 2002.

7. The claimant proved by a preponderance of the evidence that she is entitled to a period of temporary total disability from October 1, 2002 until August 8, 2003. The respondents are entitled to an offset under the provisions of Ark. Code Ann. § 11-9-411 for any disability benefits or medical benefits which Ms. Macon received that are described in Section 411(a). The respondents are also entitled to a reduction in their liability for temporary disability compensation pursuant to Ark. Code Ann. § 11-9-506(b) for unemployment benefits which Ms. Macon received between October 1, 2002 and August 8, 2003.

8. The claimant proved by a preponderance of the

evidence that the medical treatment that she has received for her carpal tunnel syndrome was reasonably necessary for treatment of her compensable injury.

AWARD

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

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents 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.

MARK CHURCHWELL
Administrative Law Judge