

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F204900 & F306449

**LATESHA DEAN MORGAN,
EMPLOYEE**

CLAIMANT

**DELUXE VIDEO
SERVICES, INC.
EMPLOYER**

RESPONDENT

**LIBERTY MUTUAL
INSURANCE CO.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED DECEMBER 21, 2005,

Pursuant to a hearing conducted September 28, 2005, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Christopher C. Mercer, Jr., Attorney at Law, Little Rock, Arkansas, appearing for the claimant, and

Mr. Michael R. Mayton, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to consider compensability of the claimant's carpal tunnel syndrome and her entitlement to medical benefits, temporary total disability benefits, and an attorney's fee for controversion.

The claimant contended that she sustained compensable bilateral carpal tunnel syndrome, by gradual onset, and should be awarded benefits, including reasonably necessary medical and related expenses and temporary total disability benefits from June 1, 2003, until the present. An attorney's fee for controversion was also requested. Other possible issues, including permanent anatomical impairment, were reserved.

The respondents controverted the claim, contending that the claimant's carpal tunnel syndrome cannot be established by medical evidence, supported by objective findings, as required by the Act.

They further contended that any carpal tunnel syndrome is not related to the claimant's employment with Deluxe Video Services but may be related to her work elsewhere, specifically including Downtown Dental, or may represent pre-existing problems or a spontaneous condition. They noted that the claimant's condition was diagnosed after her employment with Deluxe Video had ended and she had worked for Downtown Dental, and the opinion of Dr. Rhodes that the claimant's condition was work related fails to specify which employment was intended. They also contended that there is no medical report, based upon a reasonable degree of medical certainty, relating the claimant's carpal tunnel syndrome to her employment with Deluxe Video.

As to entitlement to temporary total disability benefits, they contended that, even if the claimant has carpal tunnel syndrome, she was not temporarily disabled until her surgery, after which she was released to return to work November 3, 2003, by Dr. Rhodes and never again taken off work. Thus, any period of temporary total disability would begin on the date of surgery, October 27, 2003, and end November 3, 2003.

Finally, they requested an offset for payment of unemployment benefits prior to the surgery and for payment of benefits by group health insurance.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; on or about April 12, 2002, the claimant sustained a compensable ganglion cyst; her average weekly wage was \$428.00; Dr. Marcia Hixson was an authorized treating physician for the claimant's ganglion cyst; the ganglion cyst required surgery, performed by Dr. Hixson July 15, 2002; the claimant drew temporary total disability benefits for that condition; the claimant returned to work for the employer on or about November 2, 2002, after being released to return to work in October, 2002; a 4% impairment rating by Dr. Hixson was accepted and paid by the respondents; the claimant's employment was terminated in January, 2003; the claimant began to work for Downtown Dental at that time; the claimant filed a Form AR-C in May, 2003, alleging carpal tunnel syndrome; the claimant underwent carpal tunnel release surgery by Dr. Rhodes on the left wrist October 17, 2003.

3. Compensable carpal tunnel syndrome has not been established by medical evidence, supported by objective findings, as required by the Act.

DISCUSSION

The claimant testified that in 1995 while she was employed by ADIA Temporary Service she was assigned to work at Deluxe Video in its North Little Rock facility where it produces VHS or VCR video tapes, primarily of movies. In about 1999, she went to work there as an employee of Deluxe Video.

The claimant described her varied work activity over a long period of time and stated in 1997 and 1998 she noticed fatigue in her wrist and hands and thought it was because of her twelve hour shifts. She said she let her supervisors know the job was hurting her and they would give her wristbands and splints. She said she started wearing wristbands in 1998 and that she tried to use the splints but it made it hard to pick up tapes and she could not work with it. During this period, she also took Tylenol and Advil to keep going.

She stated at the end of 1999 or the beginning of 2000 she became a team leader with less physically demanding job duties. However, at the end of 2000, some of the employees were let go and she had to start downloading activities, often for long periods of time.

On or about April 13, 2002, while downloading, the claimant felt a pop in her wrist. She told her team leader and the team leader switched positions, so that the claimant could do paperwork. However, the claimant's hand and fingers started swelling and aching, so she told the supervisor and went to the doctor. Eventually, she was diagnosed as having a ganglion cyst and was referred to Dr. Hixson whose treatment included surgery. She testified that after she had felt this pop, she knew something was wrong and she was having weakness and tingling in her fingers, so that it was sometimes difficult to do things around the house like ironing the kids' clothes.

The claimant testified that after the surgery she was returned to work and was supposed to be on light duty, but they did not really have a light duty position. Consequently, she developed pain and returned to see Dr. Hixson in November. In January, 2003, the claimant would go home from work because there was not appropriate light duty. Her employment was terminated at about this time.

When she saw Dr. Hixson in February, she stated that the work at Deluxe still hurt her and she still had pain. However, she stated that she also told her that she was at a new job, working as a hygienist assistant at Downtown Dental. She stated that she found herself picking things up and dropping them and that her hands would lock when she was trying to spread plastic over trays. She also had problems tearing dental floss. Eventually, Dr. Hixson diagnosed carpal tunnel syndrome and began to treat the claimant. However, Dr. Hixson did not think her condition was work related and the claimant returned to her primary care physician, Dr. Stephen Tucker. The claimant was also seen by Dr. David Rhodes and also underwent an electromyographic study by Dr. Bradley S. Boop on April 9, 2003. His conclusion was that the claimant's findings were uncertain but could be seen in mild early carpal tunnel syndrome. However, he stated that he did not consider the study to be diagnostic of that condition. Similarly, on May 21, 2003, Dr. Reginald J. Rutherford, conducted electrodiagnostic testing and found the study to be normal. The claimant, however, asserts that she has sustained compensable job-related carpal tunnel syndrome and should receive benefits as described above.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986;

Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

A threshold and pivotal issue in this claim is presented by the statutory requirement that a compensable injury be established by medical evidence, supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). Where carpal tunnel syndrome is alleged, a positive nerve conduction test is typically considered sufficient to meet the requirements of the statute.

Briefs of counsel addressing this issue were received following the hearing. However, they do not contain authority for the proposition that the statutory requirements are met for carpal tunnel syndrome when nerve conduction studies are not positive for that condition. This is true of the cases cited by the claimant, none of which provide a basis for finding that carpal tunnel syndrome has been established by medical evidence, supported by objective findings in this case, as required by the Act.

Some of the claimant's cases dealt with problems related to other kinds of injuries. For example, Hayes v. Wal Mart Stores, 71 Ark. App. 207 (2000), addressed the question of whether a passive range of motion evaluation could be considered a sufficient objective physical finding to support an award of permanent anatomical impairment, where the claimant had a left shoulder injury. GEO Specialty Chemical v. Clingan, 69 Ark. App. 369 (2000), considered a request for additional medical treatment for otherwise compensable injuries to the claimant's hip, leg, and back, which occurred by specific incident. Wackenhut Corp. v. Jones, 73 Ark. App. 158 (2001), involved a specific injury to the claimant's left knee and found that in that case the physician's use of the word "probably" was sufficient to relate the claimant's surgery to the compensable injury, in light of the

separate statutory requirement for statement of medical opinions within a reasonable degree of medical certainty, as set forth in Ark. Code Ann. §11-9-102 (16) (B).

Lloyd v. UPS, 69 Ark. App. 92 (2000), reversed the Commission and found that the claimant's carpal tunnel syndrome was related to her employment. However, in Lloyd, there was a nerve conduction study which showed bilateral moderate carpal tunnel syndrome, unlike the present case.

In Krudup v. Regal Ware, Inc., 341 Ark. 804 (2000), benefits were denied because the proof failed to relate the claimant's carpal tunnel syndrome to the employment, either as an aggravation of a previous admittedly compensable ganglion cyst or as a new gradual onset injury. However, the existence of carpal tunnel syndrome had been established by electrodiagnostic studies, which begs the question, but does not support the claimant's position that the record establishes a compensable injury, supported by objective findings, even without positive electromyographic studies.

Here, on April 9, 2004, Dr. Boop performed electrodiagnostic studies that he found to be uncertain but could be seen in mild early carpal tunnel syndrome. However, he did not consider the study to be diagnostic of that condition. This is not objective findings sufficient to "establish" the existence of carpal tunnel syndrome for purposes of the Act. Thereafter, Dr. Reginald Rutherford found the claimant to have a negative nerve conduction study.

Moreover, the claimant's employment had first been interrupted and then terminated prior to the diagnosis of carpal tunnel syndrome, which came at a time when she worked for Downtown Dental, as well as Kroger, on occasion.

When the entire record is reviewed, the threshold requirement of establishment of a compensable injury by medical evidence, supported by objective findings, has not been met, which

is fatal to her claim. Certainly, the statutory requirement draws a line that may deny injuries that are related to the employment and require medical attention. Nevertheless, once such lines are drawn, the Commission and the Courts are required to respect them.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge