

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211496

IRMA Y. ROBERTS, EMPLOYEE

CLAIMANT

**GEORGIA PACIFIC CORPORATION,
SELF-INSURED EMPLOYER**

RESPONDENT

OPINION FILED APRIL 8, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on January 7, 2005 at Monticello, Drew County, Arkansas.

Claimant represented by the HONORABLE GEORGE BAILEY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE J. MATTHEW MAULDIN, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits, temporary partial disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on April 5, 2002 at which time the claimant was earning sufficient wages (\$593.99) to entitle her to a compensation rate of \$396.00/\$297.00 for temporary total disability. The compensation rate for permanent partial disability was disputed. Some benefits have been paid by the claimant's group carrier, Blue Cross Blue Shield, and Nelson Trust.

The claimant contends she injured her right wrist on April 5, 2002. She seeks payment of medical expenses, temporary total disability benefits (from September 14, 2002 to July 4, 2003 and from July 19, 2003 to September 25, 2003), temporary partial disability (from April 13, 2002 to April 20, 2002 April 20-27, 2002/November 8-November 22, 2002) and attorney's fees.

The respondents contend the claimant cannot meet her burden of proving a compensable injury. Alternatively, in the event of an award, the claimant cannot prove that she is entitled to any indemnity benefits and the medical treatment sought is unreasonable and unnecessary.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript. Also considered in this decision is the post hearing brief filed by the respondent on January 14, 2005.

The claimant, who spoke English with an accent, was the only witness to testify at the hearing. The claimant came to the United States in 1976 from Mexico, taking lessons for one month to learn English. She is 48 years old (D.O.B. March 14, 1957) with no formal education. Her work history includes jobs as a housekeeper and factory work. Her health history includes two work-related injuries – a 1982 motor vehicle accident and a 1994 neck injury with surgery.

The claimant began work for the respondent-employer on December 9, 1999. Her job duties included pulling plywood sheets off a line and loading them into a buggy. The plywood was held in place by four posts. She stated the buggy was filled to capacity every ten minutes with about 100 sheets of plywood, 8 feet long.

On Friday, April 5, 2002, at 3:30 a.m. the claimant struck her wrist twice against the buggy posts. She experienced pain and a bruise and knot developed. She told Roy Williams about the injury and he slowed the line down for her.

The claimant also reported the injury to Lisa Gibson, her supervisor. She was told to wait until her break and they would take care of it in the morning. However, she couldn't find Ms. Gibson the next day.

The claimant also reported the injury to the safety director, Jon McQuilken, who gave her aspirin and an arm brace. He did not offer her medical care. The claimant continued working and wore out eight arm braces supplied by the safety department.

Mr. Williams, Ms. Gibson and Mr. McQuilken were not called as witnesses to refute this testimony. The claimant did not file an AR-N, or report of injury form, until November, 2002, about

seven months after the accident.

The claimant's daughter, Veronica Martinez, helped fill out forms for group insurance and short-term disability after her workers' compensation claim was denied. Nelson Trust has filed a lien in this case but Blue Cross Blue Shield did not respond to the hearing notice.

The claimant had surgery on her right wrist on October 11, 2002 and February 7, 2003. She needs a third surgery to remove a metal plate in her arm but she is financially unable to pursue treatment.

Employment records show the claimant signed a form on December 13, 1999 acknowledging Georgia-Pacific's policy for reporting injuries, obtaining medical treatment and refusing to pay benefits if the policy was not followed.

The respondents also presented the claimant's time sheets showing she worked 2:43 p.m. to 11:07 p.m. on the day of the injury. She continued to work thereafter, even earning overtime pay. A "Summary of Communications" report makes no mention of an accident at work in April, 2002. But the claimant was disciplined on excessive absenteeism and tardiness on March 28, May 9, and May 26, 2002.

MEDICAL EVIDENCE

There are several inconsistencies between the claimant's testimony and her medical records. She felt the doctors misunderstood her. In a bizarre example, the claimant allowed her physician to conduct a pelvic exam and ultrasound because her doctor thought she had abdominal symptoms when she was merely holding her wrist in front of her stomach while she complained of pain. She stated her medical records are also in error about the onset of symptoms.

The claimant's medical exhibit packet is not arranged in chronological order as requested by the prehearing notice – the exhibits are grouped by medical providers. Sorting through the stack, it appears the records begin in November 2001 when the claimant was hit in the right arm at work. In February, 2002, a couple of months before the accident on April 5, 2002, Dr. Henry prescribed Celebrex for treatment of osteoarthritis after the claimant complained of pain in her joints, fingers,

elbow and hip for over one year.

The claimant saw Dr. Henry on April 11, 2002 complaining of an injury to her right wrist eleven days ago (which would make the date of injury March 31, 2002 instead of April 5, 2002. Dr. Henry recorded, "pt states she has sprained her wrist x2 in the past 11 days at work. Pt states she pulls lumber at work."

The claimant was excused from work April 16, 2002 to April 25, 2002, by chiropractor, Dr. Tice. Five months later, Dr. Tice issued a report dated October 2, 2002 indicating he had seen the claimant on April 10, 2002 for a April 5, 2002 on-the-job injury, "she complained of right wrist and forearm pain and they were swollen. Georgia-Pacific was called for permission to treat Mrs. Roberts and permission was denied by John. He told us to have Ms. Roberts return to the mill and see him, which she did, and he gave her a brace to wear on her hand and forearm."

A claim for short term disability benefits was completed on April 23, 2002 showing that the injury did not happen at work and the claimant has not filed and does not plan to file a workers' compensation claim.

In August 2002, the claimant was treated by Dr. Burke for right wrist pain and a knot as well as other symptoms in her hips and legs.

The claimant saw Dr. Gati, an orthopedic surgeon, on August 28, 2002 with a six month history of wrist pain. The claimant denied any trauma. The doctor noted swelling and x-rays confirmed a dislocated distal radialulnar joint. Dr. Gati prescribed medication and advised her to continue wearing her brace at work. He opined, "this is not an acute injury."

Dr. Gati filled out a Georgia-Pacific form regarding the claimant's ability to perform specific tasks. He excused her from work on September 1 and September 2, 2002. Once again, the claimant applied for short-term disability benefits on September 16, 2002 showing this was not a work-related injury and she had no plans to file a workers' compensation claim.

The claimant saw Dr. Nguyen on September 25, 2002 "for complaints of a right wrist injury at work. She did some housekeeping and was pulling something and felt wrist pain two months

ago.” An MRI scan confirmed a torn triangular fiber cartilage and osteoarthritis. The claimant was referred to Dr. Thompson on September 30, 2002. Surgery was performed on October 11, 2002 by Dr. Berry Thompson for ulnar shortening osteotomy and cartilage repair. X-rays showed a non-union and broken wire.

Dr. Thompson’s report of October 28, 2002 notes the claimant wants to file a workers’ compensation claim for the wrist injury which he felt was consistent with her claim that she hurt her wrist in March 2002 while at work.

A second surgery was performed on February 7, 2003 for non union of the ulna and a broken wire. Later, repeat x-rays confirmed another broken wire. He opined that if her symptoms flared again, a third surgery might be necessary for removal of the hardware. Nevertheless, Dr. Thompson pronounced the claimant “stable” and released her on February 19, 2004.

INDEMNITY BENEFITS

The claimant’s time off from work is well documented with leave slips from her physicians, (Drs. Nguyen and Thompson, Tice, Gati) missing time for doctors visits, therapy, surgery and recovery. Her release for light duty (restricted hours, weight limitations) is equally well documented in Dr. Thompson’s records. As a scheduled injury, temporary total disability benefits are payable during the healing period or until the claimant returns to work, Ark. Code Ann. §11-9-521(a). Temporary partial disability benefits are payable when the claimant is still in the healing period but has returned to work at decreased wages. The amount of temporary partial disability is calculated at 66-2/3% of the difference between the average weekly wage prior to the accident and the wage-earning capacity after the injury, Ark. Code Ann. §11-9-518(a)(1) and §11-9-520.

The respondents’ calculations appear to be correct. The average weekly wage is not rounded off and the claimant’s temporary partial disability are calculated correctly. The average weekly wage minus earning = difference x 66-2/3% = temporary partial disability.

REASONABLE AND NECESSARY

The respondents have argued that the claimant’s medical treatment was unreasonable and

unnecessary. I note that Dr. Thompson incidentally treated the claimant's knee and x-rayed her shoulder, prescribing medication. Obviously, these expenses are unrelated to the wrist claim and would not be the respondent's liability. Otherwise her wrist treatment appears to be appropriate.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means "evidence of greater convincing force," Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

_____ or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The first element of proof, a specific incident, is troubling in this case because of the discrepancies in the onset of the claimant's symptoms. However, regardless of the precise time and numerical date, the claimant did identify the occurrence of the injury, striking her wrist against the post while working. Dr. Trice's records confirm objective medical findings, disability and the approximate date of injury. Dr. Trice also confirms the respondents were on notice of the injury and controverted the claim, requiring the claimant to rely on group insurance and disability out of

financial necessity.

The second element of proof, arising out of and in the course of employment, is also a concern given the gaps in time and mention of housekeeping work. However, I notice her symptoms of swelling and pain have been consistent since April, 2002. Accordingly, I find the claimant has met her burden of proof and benefits are hereby awarded.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on April 5, 2002 at a compensation rate of \$396.00/\$297.00.
2. The claimant has proven by a preponderance of the credible evidence that she sustained a compensable injury, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. The respondents are directed to pay medical bills associated with the claimant's wrist injury within thirty days of receipt pursuant to Rule 30.
4. The respondents are directed to pay temporary total disability benefits from September 14, 2002 to July 4, 2003 and from July 19, 2003 to September 25, 2003 as the claimant remained in her healing period and had not returned to work.
5. The respondents are directed to pay temporary partial disability benefits from April 13, 2002 to April 27, 2002, and from November 8 to November 22, 2003 based on the calculations provided by the respondent.
6. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.
7. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries,

(March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. 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 A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge