

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F411115

**CYNTHIA G. WATSON,
EMPLOYEE**

CLAIMANT

**MUNRO & CO., INC., D/B/A
LAKE CATHERINE FOOTWEAR,
SELF-INSURED EMPLOYER**

RESPONDENT

**CROCKETT ADJUSTMENT,
BENEFITS ADMINISTRATOR**

RESPONDENT

OPINION FILED NOVEMBER 16, 2005,

Pursuant to a hearing conducted August 18, 2005, before Administrative Law Judge Richard B. Calaway in Hot Springs, Garland County, Arkansas, with

Mr. Donald C. Pullen, Attorney at Law, Hot Springs, Arkansas, appearing for the claimant, and

Mr. Robert L. Henry, III, 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 cubital tunnel syndrome.

She contended that during her employment she developed bilateral cubital tunnel syndrome, by gradual onset, which became disabling September 21, 2004, and that she should be awarded benefits, including additional medical care recommended by Dr. Vladimir Karpitskiy. An attorney's fee for controversion of the claim was also requested. Other possible issues were reserved.

The respondents contended that, although the claim was initially accepted as compensable and benefits were paid for temporary total disability and medical treatment, the claim is now controverted because: (1) the claimant's symptoms are not causally related to any injury arising out of and in the course of her employment; (2) a compensable injury cannot be established by medical evidence, supported by objective findings; (3) there is no proof that a compensable injury is the

major cause of any disability or need for treatment the claimant has experienced; and (4) the claim is barred by the statute of limitations.

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; in September, 2004, the claimant reported that an event or problem occurred on or about September 21, 2004, involving her wrists, forearms, and pain; the respondents provided some initial medical treatment and temporary total disability benefits; the claimant's average weekly wage was \$300.00; and, although no AR-C was filed, a letter from claimant's counsel dated February 22, 2005, should be treated as a claim on behalf of the claimant.

3. The preponderance of the evidence shows that as a result of rapid repetitive motion at work the claimant sustained compensable cubital tunnel syndrome, which has been established by medical evidence, supported by objective findings, and which arose out of and in the course of her employment and is the major cause of her disability and need for treatment.

4. The claimant is entitled to return to Dr. Karpitskiy for such medical care as may be reasonably necessary in connection with her compensable injuries, at the expense of the respondents.

5. The respondents have failed to establish that the claim is barred by the statute of limitations.

6. This claim has now been controverted in its entirety and claimant's counsel has provided valuable legal services and is entitled to the maximum attorney's fee on benefits paid, including indemnity benefits previously paid by respondents, payable one-half by the claimant and one-half by the respondents. See, Cleek v. Great Southern Metals, 335 Ark. 345 (1998).

DISCUSSION

On or about September 21, 2004, the claimant, a production line worker at the employer's shoe factory, reported to her employer that she was having pain in her elbows and her arms. The respondents provided temporary total disability benefits and medical care. Although her condition was recognized as bilateral cubital tunnel syndrome by orthopedic surgeon Dr. Bruce L. Smith (letter dated September 17, 2004), the company physician Dr. Michael K. Atta (note dated October 8, 2004), hand specialist Dr. Michael M. Moore (letter dated November 18, 2004), and neurologist Dr. Vladimir V. Karpitskiy (August 27, 2004, EMG and NCV report), the respondents now controvert the claim in its entirety, as stated above.

After the claimant started her work with the respondent employer in 1985, she experienced some back problems and upper arm problems but, she testified, those problems just went away after she went to the doctor. However, in September, 2004, her arms were hurting real bad to where she could not hardly do anything and they hurt even when she stopped and gave them a break. Her symptoms included pain in her elbows and arms, and her fingers and hands were cramping real bad with muscle spasms. She said they just gave out and she had no strength and she suspected that she had carpal tunnel syndrome. She further testified that at this time she told the pull lady, her supervisor, Jeff Fitzhugh, the lady at the desk, and Mr. Monroe about her problems.

These symptoms developed while the claimant was working on the production line of the respondent's shoe factory, where she operated a Boothco trim machine, inspected shoes, did a Bema spray job, and worked on a pounding machine and dye out machine. She described her activity at work and testified that this was hand work that involved movements with her arms and hands and that she was constantly moving her arms from right to left, picking up stacks of shoes. The rate of work varied but sometimes she did 600 to 700 pairs of shoes per hour all day long.

The claimant began treatment with Dr. Thomas Hollis in August, 2004, apparently before reporting her problem to the respondents. The notes from his office indicate that the claimant was suffering bilateral upper extremity pain and he prescribed medication and light duty work. At his request, neurologist Dr. Karpitskiy performed the EMG and NCV study of August 27, 2004, which he stated showed evidence of mild bilateral ulnar nerve entrapment at the elbow. Specifically, the study showed decreased velocity across both elbows for the right and left ulnar motor nerves.

On September 18, 2004, Dr. Bruce L. Smith, an orthopedic surgeon, examined the claimant and reviewed the diagnostic studies and wrote to Dr. Hollis that, as he well knew, the studies were consistent with a possible tardy ulnar nerve palsy. He also wrote that the claimant asked if this could be related to work and that he certainly thought it was in the category of repetitive overuse type syndrome and she does a lot of this at work.

After her injury was reported to the respondent employer, the claimant began to see the company physician Dr. Michael K. Atta. In his note of September 30, 2004, Dr. Atta acknowledged that nerve conduction testing performed in August, 2004, indicated mild bilateral ulnar nerve entrapment at the elbows. He also stated that the claimant was finding it difficult to perform any of her work activities and was having difficulty gripping or grasping items or performing repetitive

movements. He described her condition as possible bilateral ulnar nerve entrapment at the elbows and recommended work restrictions, Bextra, and, a referral to a hand surgeon if she continues to have severe symptoms. On October 8, Dr. Atta saw the claimant who was experiencing severe pain in both arms. He again prescribed medication and work with restrictions and noted that the claimant would be referred to a hand surgeon for further evaluation if her condition did not improve. The record shows that in October the claimant also received physical therapy. The physical therapist's notes indicate that the claimant's pain increased with work activity and that she was unable to change the ways of doing things secondary to her work environment.

When the claimant saw Dr. Michael M. Moore in November, 2004, his letter mentioned the claimant's repetitive gripping and pulling and that her treatment had included splinting, elbow pads, and therapy but her symptoms have persisted. It was his opinion that the claimant's clinical history and physical examination were consistent with bilateral cubital tunnel syndrome or overuse syndrome. He stated that he had reviewed the nerve conduction and EMG study with Dr. Reginald Rutherford who did not feel the study was entirely complete. Dr. Rutherford wrote that there was no evidence of cubital tunnel syndrome. It was Dr. Moore's opinion that further evaluation was indicated.

Of course, the earlier study by Dr. Vladimir V. Karpitskiy in August, 2004, had indicated decreased velocity across the elbow for both right and left ulnar motor nerves, evidence of mild bilateral ulnar nerve entrapment at the elbow. On March 23, 2005, Dr. Karpitskiy wrote claimant's counsel that after his study in August, 2004, it was possible that conservative treatment and decreased workload resulted in recovery of a conduction velocity due to remyelination and this resulted in normal NCS performed by Dr. Rutherford in November, 2004.

Thus, the preponderance of the evidence of record shows that the claimant has sustained compensable cubital tunnel syndrome as the result of rapid repetitive motion in a production line setting. The claimant's testimony and the medical records do not indicate any other possible cause for her condition. The medical record shows that, in addition to physical therapy and medication, she was advised to limit or modify her work activities, another indication of the causal connection. Thus, the preponderance of the evidence indicates that her work activity was the cause of her injury, and the injury appears to be the cause of her disability and need for treatment. The objective diagnostic study of Dr. Karpitskiy before the claimant had started treatment with medication indicated mild cubital tunnel syndrome, consistent with the opinions of several other physicians, including hand specialist Dr. Moore, who has recently retired. The claimant's request to continue her treatment with Dr. Karpitskiy, under these circumstances, should be granted.

Finally, respondents contend that the statute of limitations bars the claim because the statute began to run as early as 1989 and a claim was not filed until February 22, 2005. Their theory is that, under Ark. Code Ann. §11-9-702, a claim is barred unless filed with the Commission within two years from the date of injury which, in this case, should be when the injury first became apparent to the claimant in 1989 or 1998. However, the claimant should not be expected to have diagnosed her earlier problems as cubital tunnel syndrome if her physicians were unable to do so.

To support the statute of limitations defense, respondents cite Minnesota Mining & Manufacturing v. Baker, 337 Ark. 94 (1999), which held that with respect to hearing loss cases, the statute of limitation begins to run when the hearing loss becomes apparent to the claimant. The Arkansas Supreme Court noted that the statute of limitations begins to run from the time of injury and, in Arkansas, the time of injury means when an injury becomes compensable, not the date of the

accident. For purposes of the statute of limitations, an injury does not become compensable until (1) it develops or becomes apparent and (2) the claimant suffers a loss in earnings because of it.

The Court noted that gradual onset hearing loss injuries generally do not result in time missed from work or in a loss of earning capacity, except that, as a scheduled injury, and one involving permanent impairment, a loss in earnings is conclusively presumed due to the operation of Ark. Code Ann. §11-9-521, a provision describing the benefits available for scheduled injuries, if permanent, in addition to compensation for the healing period. However, this reasoning may be less appropriate for other scheduled injuries, since not all scheduled injuries necessarily yield permanent injury or impairment from the outset, if treated promptly. Hearing loss, on the other hand, is generally permanent in nature so that the statutorily presumed loss in earnings logically relates to the onset of the injury, when the claimant first became aware of it.

Respondents' cases also show that an injury is not usually thought to be apparent to the claimant until it has been diagnosed by a physician. Here, there is no medical record from 1989 or 1998 showing a diagnosis of cubital tunnel syndrome. The medical record shows that the claimant was examined in 1998 for symptoms which may or may not have been related to cubital tunnel syndrome. On October 29, 1998, her orthopedic surgeon Dr. Dodd wrote that an EMG had been obtained by Dr. Hollis and was read as normal on both upper extremities and that he really could not explain this "vague type of pain she describes in both upper extremities." Similarly, in a letter also dated October 29, 1998, Dr. Dodd wrote that he could find nothing on her examination consistent with any specific pathology.

Thus, although the claimant was aware of her earlier discomfort, she could not be said to have been aware of supposedly having cubital tunnel syndrome. Indeed, had she filed a claim at that

time, it would have failed for lack of proof sufficient to satisfy the statutory requirements concerning the existence of an injury. In short, an injury was not apparent to the claimant until 2004 and her claim is not barred by the statute of limitations.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge