

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509268

JAMES PAUL COUNCE, EMPLOYEE	CLAIMANT
SELLARS & PIERCE ELECTRIC, INC., EMPLOYER	RESPONDENT
EMPLOYERS MUTUAL CASUALTY COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MARCH 8, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on February 10, 2006, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. John C. Barttelt, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted February 10, 2006, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws.

A prehearing conference was conducted in this claim on January 4, 2006, and a Prehearing Order was filed on said date. At the conference, it was stipulated that the employment relationship existed at all relevant times beginning November 24, 2004, and continuing through August 10, 2005; and that the claim had been controverted in its entirety. At the hearing, the parties stipulated that the claimant's wages were sufficient to entitle him to compensation rates of \$298.00 per week for temporary total disability and \$223.00 per week for permanent partial disability in the event the claim was found compensable.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed. In addition, respondents raised lack of notice of the claim as a defense.

Claimant contended, in summary, that he sustained a gradual onset, right carpal tunnel injury arising out of and during the course of his employment with Sellars & Pierce Electric, Inc.; that respondents should be held responsible for all medical and related treatment; that he was entitled to temporary total disability benefits for the period beginning August 9, 2005, and continuing through October 3, 2005; and that a controverted attorney's fee should attach to any benefits awarded.

The respondents contended that the claimant did not sustained a compensable injury while maintaining that the medical evidence did not support a causal connection between the claimant's work activities and his need for medical treatment and claim for disability. Alternatively, respondents asserted a notice defense, maintaining that the claimant did not give notice of any alleged injury until September 8, 2005, and that it would not be liable for any benefits prior to receipt of the actual notice of the claim in the event compensability was found.

The claimant testified in his own behalf. Carolyn McKeel was called as a witness by the respondents. The record is composed solely of the transcript of the February 10, 2006, hearing containing numerous exhibits.

From a review of the record as a whole, to include medical reports,

documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the evidence, that he sustained an injury arising out of and during the course of his employment with Sellars & Pierce Electric, Inc., specifically, a right carpal tunnel injury as reflected by medical evidence supported by objective findings which was the major cause of the claimant's disability and need for treatment.
4. The claimant did not give notice of his injury to the employer until September 8, 2005. Accordingly, the employer is not responsible for benefits prior to receipt of the employee's report of injury. The claimant has failed to offer any valid reasons to excuse the failure to give a timely notice to the employer.
5. The claimant is entitled to temporary total disability benefits beginning September 8, 2005, and continuing through October 3, 2005.
6. The claimant's healing period ended October 3, 2005.
7. Respondents are not responsible for any medical or related treatment prior

to receipt of the report of injury on September 8, 2005.

8. Claimant's entitlement to permanent disability benefits, if any, are by necessity, specifically reserved.

DISCUSSION

The claimant, John Paul Counce, testified in his own behalf. The claimant has been a licensed electrician for approximately fifteen (15) years. At the time of the within hearing, the claimant was working as an electrician for another employer. The claimant began working for the respondent, Sellars & Pierce, on November 24, 2004. The record reflects that prior to going to work for the respondent, the claimant had taken a three (3) year absence from his primary vocation to attend law school at Loyola University in New Orleans. After graduation, the claimant resumed his work as an electrician before taking a bar examination. The claimant denied experiencing any problems with carpal tunnel syndrome prior to his employment with the respondent. The claimant acknowledged having sustained prior injuries, including breaking his right wrist in a skateboard accident in 1983 or '84 and breaking a finger on his left hand in 2003 or '04. Again, the claimant denied having any physical problems at the time he went to work for the employer. He asserted that he first began experiencing pain in his right hand on or about February, 2005. He related that the pain grew progressively worse depending on the type of electrical work he was assigned to perform. The claimant also alleged that he sustained an injury to his left elbow on or about April 27, 2005, as the result of a specific incident

identifiable in time and place of occurrence while lifting a thirty (30) foot extension ladder at which time he went to his family physician with complaints involving both his left elbow, as well as his right upper extremity. The claimant stated that his elbow problem had since resolved and that he was not seeking any benefits for the alleged elbow injury. (Tr.11-14)

The claimant was initially examined by his primary care physician, Dr. Stephen Golden, on April 27, 2005. Dr. Golden's report of April 27, 2005, does not reflect any history of job-related injury, but did diagnose possible carpal tunnel syndrome on the right. The claimant was treated with medications and continued working. (Cl. Ex. A, pp.1-2)

The claimant returned to Dr. Golden for a number of follow-up visits with a variety of ailments, including complaints with his right hand and was subsequently referred to Dr. Spencer H. Guinn, an orthopedic surgeon in Jonesboro, Arkansas. Dr. Guinn conducted diagnostic studies, including a EMG which revealed severe carpal tunnel on the right. The claimant underwent a carpal tunnel release on August 11, 2005, by Dr. Guinn. It must be noted that, in the history provided to Dr. Guinn, the claimant related primary complaints of right hand numbness and tingling, and left elbow pain since December, 2004. After undergoing surgery on August 11, 2005, the claimant continued under the care of Dr. Guinn. Dr. Guinn last evaluated the claimant on October 3, 2005, at which time he was released without complaints.

The respondents contend that the claimant did not sustain a compensable

injury within the meaning of the Arkansas workers' compensation laws, maintaining that the medical evidence does not support a causal connection between the claimant's work activities and his need for medical treatment and claim for disability. Respondents' position is simply inconsistent with the only medical opinion of record. Admittedly, the record reflects that the claimant had previously sustained a broken right wrist, as well as a ganglion cyst on the right wrist. However, there is no medical whatsoever that the claimant experienced any carpal tunnel symptoms prior to his employment with the respondent herein. Further, the only medical opinion of record attributes the claimant's carpal tunnel injury to his work. In a report dated January 25, 2006, Dr. Guinn states:

In my professional medical opinion, with a reasonable degree of medical certainty, I feel Mr. Counce's carpal tunnel problems are related to his work. (Cl. Ex. A, p.29)

In the present claim, the claimant does not contend that his injury was caused by a specific incident and identifiable by time and place of occurrence. Instead, he contends that he sustained an injury as the result of repetitive work activities. Accordingly, in order to receive benefits, the claimant must satisfy all of the following requirements:

- (1) Proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) Proof by a preponderance of the evidence that the injury cause external or internal physical harm to the body;
- (3) Medical evidence supported by objective findings as defined in A. C. A. §11-9-102(16);

- (4) Proof by a preponderance of the evidence that the injury was caused by rapid repetitive motion; and,
- (5) Proof by a preponderance of the evidence that the injury was the major cause of disability or need for treatment.

If a claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, he fails to establish compensability of the claim, and compensation must be denied. *Lay vs. United Parcel Service*, 58 Ark. App. 35, 944 S.W.2d 867 (1997).

Because the claimant's injury was a carpal tunnel syndrome, claimant must establish each of the aforementioned requirements except for rapid repetitive motion which is not required when the diagnosis is carpal tunnel syndrome. *Killdow vs. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998).

I find that the claimant has satisfied each and every element necessary to establish compensability. The claimant's description of his work activities, his onset of symptoms after going to work for the respondent, together with the medical evidence establishes that the claimant sustained a work-related, carpal tunnel injury. No other valid explanation has been offered for the claimant's injury. Compensability has been established.

Alternatively, respondents contend that the claimant did not give notice of any alleged injury until September 8, 2005, and that it would not be liable for benefits prior to receipt of the actual notice. Ark. Code Ann. §11-9-701 is set out in its entirety below:

(a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

(2) All reporting procedures specified by the employer must be reasonable and shall afford each employee reasonable notice of the reporting requirements.

(3) The foregoing shall not apply when an employee requires emergency medical treatment outside the employer's normal business hours; however, in that event, the employee shall cause a report of the injury to be made to the employer on the employer's next regular business day.

(b)(1) Failure to give the notice shall not bar any claim:

(A) If the employer had knowledge of the injury or death;

(B) If the employee had no knowledge that the condition or disease arose out of and in the course of the employment; or

(C) If the Commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

(2) Objection to failure to give notice must be made at or before the first hearing on the claim.

The record contains conflicting testimony between the claimant and Carolyn McKeel, the office manager for the employer.

The claimant maintained that he told Ms. McKeel that he was undergoing surgery on his hand for carpal tunnel on August 11, 2005, and that he, "felt that the reason I had carpal tunnel was because of my job." However, it is undisputed that the claimant did not file a claim for benefits until after August 27, 2005. (Tr.19-20)(Resp. Ex. B, p.2)

Carolyn McKeel, a witness called by the respondents, testified that the claimant never reported a work-related injury to her. She stated that she first became aware that the claimant was claiming some type of work-related injury was after she received a notification from the Arkansas Workers' Compensation Commission advising her that a claim had been filed on or about September 8, 2005, at which time she filled out a Commission Form AR-1. Ms. McKeel asserted that if the claimant had related his need for surgery to a work-related injury, she would have filled out the appropriate forms at that time.

I found Ms. McKeel to be a credible witness. The record reflects that the claimant had a prior work-related injury. He was smart enough to obtain a Commission Form AR-C from the internet and file a claim on his own following his surgery. The claimant candidly conceded that he, at no time, requested that Ms. McKeel assist him in filling out a workers' compensation claim. (Tr.33-34)

A claimant's testimony is never considered uncontroverted. The testimony of an interested party is always considered to be controverted. *Lambert vs. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix vs. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express vs. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

Although I am persuaded that the claimant's carpal tunnel injury is causally related to his employment, I specifically find that the claimant failed to give notice of his injury until September 8, 2005. Under A.C.A. §11-9-701(a), the employer is not

responsible for benefits prior to receipt of an employee's report of injury. Again, no injury was reported until September 8, 2005. The claimant has failed to offer any valid reasons for his failure to give notice. No satisfactory reasons were given to excuse failure to give notice as required by A.C.A. §11-9-701(b). Accordingly, respondents are only responsible for benefits after September 8, 2005.

AWARD

Respondent, Employers Mutual Casualty Company, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$298.00 per week beginning September 8, 2005, and continuing through October 3, 2005.

All benefits having accrued, respondents are to pay same in lump sum and without discount.

Additionally, claimant's attorney, Mr. John C. Bartelt, is hereby awarded the maximum statutory attorney's fee on this entire Award to be paid in accordance with Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

Additional issues not addressed herein are specifically reserved.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge