

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512053

DONNA ERBACH,
EMPLOYEE

CLAIMANT

UNIVERSITY OF CENTRAL ARKANSAS,
EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 21, 2006

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

The claimant was PRO SE.

The respondents were represented by HONORABLE RICHARD S.
SMITH, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on May 17,
2006 in Conway, Arkansas. A prehearing order was entered in
this case on March 28, 2006. 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 and are hereby accepted:

1. The employer-employee-carrier relationship existed
on October 4, 2005 and at all relevant times.

2. The claimant's average weekly wage was \$403.78 yielding a total disability compensation rate of \$269 per week and a permanent partial disability compensation rate of \$201.89 per week.
3. Respondents have controverted this claim in its entirety.

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

1. Compensability of gradual onset right carpal tunnel syndrome and CMC joint arthritis of the right thumb.
2. Notice pursuant to Ark. Code Ann. § 11-9-701.
3. TTD/TPD from October 19, 2005 through January 9, 2006, plus possible additional hours prior to October 19, 2005.
4. Medical treatment including but not limited to surgery for carpal tunnel syndrome and right thumb arthritis performed on October 19, 2005.

The record consists of the May 17, 2006 hearing transcript and Claimant's Exhibit 6, a video cassette, which is incorporated into the record by reference.

DISCUSSION**1. Evidentiary Objections**

The claimant objects to that portion of Respondents' Exhibit No. 1 which includes records of medical treatment that the claimant received between July 12, 2002 and June 9, 2004. The claimant contends that these documents do not relate to her hand conditions at issue, and are therefore irrelevant to the issues presented in this case. However, I note that the respondents deny the compensability of both the claimant's carpal tunnel syndrome and to the compensability of her CMC joint arthritis of the right thumb. I find these records sufficiently relevant on the issues as to when the claimant's hand and thumb symptoms began to admit these medical reports into the record.

The respondents object, on relevance grounds, to Claimant's Exhibits 18, 19, and 20. Claimant's Exhibit 18 purports to be medical information regarding arthritis of the thumb from the American Academy of Orthopedic Surgeons. Since the claimant contends that she sustained compensable arthritis of the thumb, this document would certainly appear relevant to the cause and nature of that type of medical condition. The respondents' relevance objection is therefore overruled; Claimant's Exhibit No. 18 is accepted

into the record, and the documented will be accorded the weight to which it is entitled. Claimant's Exhibit 19 includes information which the claimant has received from her physician regarding blood glucose, including hand written notations provided by her physician. These documents are accepted into the record for the same reason that the medical reports at issue from Respondents' Exhibit No. 1 have been accepted into the record. Claimant's Exhibit 20 contains several purported explanations as to why some individuals with carpal tunnel syndrome do not exercise a right to receive workers' compensation benefits for that injury. Because the respondents have raised a notice defense in this case, I find Claimant's Exhibit 20 sufficiently relevant to be admitted on that issue. The respondents' relevance objection is therefore overruled; the document will be accorded the weight to which it is entitled.

On page 60 of the hearing transcript, the respondents' attorney objected to the relevance of the claimant's testimony that she knows other people at UCA in clerical, data entry, and secretarial positions who have had carpal tunnel syndrome. My research indicates that there is not a rule of evidence in Arkansas which specifically addresses

the issue of admitting proof on the existence or non-existence of prior accidents or injuries to show negligence, notice, or causation. The Arkansas courts have adopted the general rule with respect to the admissibility of evidence of similar occurrences that such evidence is admissible only if "the events arose out of the same or substantially similar circumstances." See Fraser v. Harp's Food Stores, Inc., 290 Ark. 186, 718 S.W.2d 92 (1986).

In the present case, since the claimant acknowledged that the persons with carpal tunnel syndrome did not work in her office, I find that the claimant has failed to establish that their experience with carpal tunnel syndrome arose out of the same or substantially similar circumstances to the claimant's specific job duties at issue in this case. I therefore find that the respondents' objection is sustained and the claimant's testimony at issue on page 60 of the hearing transcript is excluded from consideration in rendering a decision in this case.

On page 66 of the hearing transcript, the respondents' attorney objected to Mr. Beatty, the claimant's supervisor, rendering an opinion as to whether or not he felt key stroking is a repetitive job duty. The respondents' objection is sustained since I was essentially asking a lay

witness to render a legal opinion. Accord Holland Group, Inc. v. Hughes, ___ Ark. App. ___, ___ S.W.3d ___ (June 14, 2006).

2. Compensability of Carpal Tunnel Syndrome and CMC Joint Arthritis

Arkansas Code Annotated § 11-9-102 (4) (A) (Suppl. 2003) defines "compensable injury" in relevant part as follows:

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence; if the injury is:

(a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition[.]

The test for determining whether an injury is caused by rapid repetitive motion is two-pronged: (1) the task must be repetitive and (2) the repetitive motion must be rapid. Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W.2d 644 (1998). Multiple tasks involving different movements can be considered together to satisfy the "repetitive element" of rapid repetitive motion. Id. It is unnecessary to prove rapid repetitive motion when there is a diagnosis of carpal tunnel syndrome. Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 969 S.W.2d 190 (1998).

A compensable injury must also be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D); Ark. Code Ann. § 11-9-102(16). For a gradual onset injury caused by rapid repetitive motion, including carpal tunnel syndrome, the resulting condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4)(E)(ii); Medlin v. Wal-Mart Stores, Inc., 64 Ark. App. 17, 977 S.W.2d 239 (1998).

In the present case, I find that the claimant has failed to establish the existence of her carpal tunnel syndrome at issue with medical evidence supported by objective findings. In this regard, I note that objective findings are defined as those findings which cannot come under the voluntary control of the patient. See Ark. Code Ann. § 11-9-102(16)(A)(i). In the present case, there are no diagnostic test results in the record. Dr. Ghormley's surgical report contains no observation to confirm the presence of carpal tunnel syndrome during surgery. While Dr. Ghormley's December 21, 2004 report contains a notation of a positive Phalen's test, the Full Commission has previously held that a positive Phalen's test is not objective within the meaning of Arkansas Code Annotated §

11-9-102(16). See Jeremy Walters v. US Timber Co., Full Workers' Compensation Commission, Opinion filed September 16, 2004 (F304712).

I also find that the claimant has failed to establish by a preponderance of the credible evidence that her CMC joint arthritis of the right thumb arose out of her employment duties at the University of Central Arkansas. In reaching this conclusion, I recognize that on November 1, 2005, Dr. Ghormley indicated in a written letter to whom it may concern that CMC joint arthritis "could easily be caused by her excessive repetitive activities that she does at UCA." However, I note that by use of the term "could", Dr. Ghormley did not state a medical opinion within a reasonable degree of medical certainty.

I further note that Ms. Erbach appears to attribute her CMC joint arthritis to repetitive activities of tearing three-part paper into sections with her right hand and thumb. Finally, I note the claimant's testimony that her thumb problem started in 2002. However, the claimant's medical reports in the record from 2002 and 2003 make no reference to any thumb problems. I further note that a medical report from June 9, 2004 indicates that Ms. Erbach fell on her right thumb approximately two weeks prior to

that date, had been unable to grip, and that the thumb remained swollen. I further note that Dr. Ghormley's December 21, 2004 office note, some six months later, indicates that the claimant reported having bruising, swelling and tingling in her hand ever since falling on the hand in July. Finally, while the claimant attributes her thumb problems to rapid repetitive motion, the claimant has acknowledged that she tears paper only approximately thirty minutes per day, and that she works on the voluminous monthly report only approximately three days per month. In light of medical evidence indicating that Ms. Erbach fell on her right thumb in late May or early June of 2004, in light of the medical evidence indicating that she developed persistent bruising, swelling and tingling thereafter for six months, and in light of the lack of mention of any thumb problems in the medical record prior to the 2004 fall, the claimant has failed to prove by a preponderance of the credible evidence that her right thumb CMC joint arthritis arose out of her employment duties for the University of Central Arkansas.

Therefore, for the reasons discussed herein, I find that the present claim for workers' compensation benefits for carpal tunnel syndrome and CMC joint arthritis must be,

and hereby is, denied. Because I find that the claimant has failed to establish that she sustained a compensable injury in the form of either carpal tunnel syndrome or CMC joint arthritis, I find that Ms. Erbach's group health insurance, QualChoice through Health Care Recoveries, has no subrogation claim for Workers' Compensation benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer-employee-carrier relationship existed on October 4, 2005 and at all relevant times.

2. The claimant's average weekly wage was \$403.78 yielding a total disability compensation rate of \$269 per week and a permanent partial disability compensation rate of \$202 per week.

3. Respondents have controverted this claim in its entirety.

4. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable carpal tunnel syndrome injury. Specifically, the claimant has failed to establish the existence of carpal tunnel syndrome by medical evidence supported by objective findings.

5. The claimant has failed to prove by a

preponderance of the evidence that she experienced compensable CMC joint arthritis of the right thumb. Specifically, the claimant has failed to prove by a preponderance of the evidence that this condition arose out of her employment duties with the University of Central Arkansas.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge