

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410921

LAVERN CARTHAN, EMPLOYEE

CLAIMANT

SCHOOL APPAREL, INC., EMPLOYER

RESPONDENT

**CONTINENTAL CASUALTY COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED MARCH 28, 2007

Hearing before Administrative Law Judge Barbara W. Webb on June 9, 2006, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. Philip M. Wilson, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This case is on remand from decision of the Full Commission vacating in part the Opinion entered in this case on September 13, 2006, and remanding the case for a decision on the issues of compensability and entitlement to temporary total disability benefits, medical benefits, and attorney's fees.

A Prehearing Order was entered in this case on April 24, 2006. The Prehearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the hearing. A copy of the Prehearing Order was made Commission Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties and the Prehearing Order as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed at all relevant times, including August 2, 2004, to a date yet to be determined.

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3. The claimant earned sufficient wages to entitle her to a temporary total disability rate of \$267.00 and a permanent partial disability rate of \$200.00.

By agreement of the parties, the issues to be litigated are:

1. Compensability of the claimant's alleged carpal tunnel syndrome.
2. Claimant's entitlement to temporary total disability benefits, medical benefits, and attorney's fees.
3. Claimant reserves all other issues.

The record consists of a one volume transcript of the June 9, 2006, hearing consisting of the testimony of the claimant, Lavern Carthan, and all documentary evidence consisting of Claimant's Exhibit 1-2 (medical reports) and Exhibit 3 (Job Description and Job Evaluation) and Respondents' Exhibit 1 (medical reports), Exhibit 2 (deposition of Smelz) and Exhibit 3 (deposition of Carthan). In addition, the post-hearing letter brief of claimant received June 27, 2006, and the post-hearing letter brief of respondents received June 15, 2006, have been blue-backed and will be made part of the record of this case.

FACTUAL BACKGROUND

The claimant is fifty-one (51) years of age (b. 4/24/55). She graduated high school. She has worked for School Apparel for 18 years as a seamstress. In August of 2004, the claimant's job was sewing sleeves on a sweater and arm binders on vests. The claimant's testimony was that she produces around 800 sweaters daily; therefore, performing 1600 sewing operations in an eight hour period of time. She estimated that she attached one sleeve every five seconds in addition to re-threading, tying and using scissors. The claimant testified that in August of 2004 her fingers started getting numb and at night she could hardly sleep due to the pain in her hands and arms. She testified that in 2002 she had

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previously sought treatment for a similar condition which improved after she underwent a nerve conduction study and received an injection.

The claimant testified that she reported her injury in 2004 to her supervisor, Laura Mays, after her primary doctor, Dr. Whipple, had advised her that he was going to monitor the condition of her hands, in light of a potential diagnosis of carpal tunnel. Two weeks later, Dr. Whipple referred the claimant for a nerve conduction test. The nerve conduction test was performed by Dr. Silas. Dr. Silas then referred the claimant to the orthopedic specialist, Dr. Clark. The claimant continued to work from the time she began having the problems until the day before her initial surgery which was performed on September 29, 2004. She returned to work on January 10, 2005, following surgery on both wrists. She testified that surgery had helped but that her hands still hurt.

The medical records reflect that on August 2, 2004, the claimant sought medical treatment by Dr. Paul Whipple with complaints of numbness in both hands. He assessed her with carpal tunnel syndrome bilaterally and prescribed a hand splint and medication for muscle relaxation and pain. On a follow-up examination on August 16, 2004, Dr. Whipple referred the claimant to Dr. Silas for a nerve conduction test due to continuing pain in her wrists and hands. The study revealed that the claimant had a "positive Tinel and Phalan sign indicating CTS. NCV done today shows a motor latency on the left median nerve of 6.4ms and on the right at 5.7ms indicating a bilateral CTS with the left being worse than the right." The claimant was referred and evaluated by Dr. Clark on September 8, 2004, who recommended carpal tunnel release surgery. The doctor's notes indicate that the claimant was previously treated in 2002, at which time the diagnosis of bilateral carpal tunnel syndrome was established. He noted that he believed the reason she

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cancelled surgery the last time was because she could not get it filed under workers' comp. He further noted that the claimant continued to have significant pain and problems and that her symptoms in 2004 were "in all likelihood" work-related based on her history. Surgery was performed on her left wrist on September 29, 2004, by Dr. Clark at Jefferson Regional Medical Center. On October 11, 2004, the claimant returned for post-op evaluation. Dr. Clark noted marked improvement and that the claimant reported feeling a lot better with some tingling in her fingers. On November 9, 2004, Dr. Clark noted that the claimant could make a fist and was getting a lot stronger. At that time, he scheduled her for carpal tunnel release surgery on her right wrist. On November 24, 2004, she underwent carpal tunnel release surgery on the right wrist. On December 7, 2004, she returned to Dr. Clark for a post-op evaluation. He noted she was pleased with the results. On January 4, 2005, the claimant returned to Dr. Clark for a follow-up for both bilateral carpal tunnel releases. He noted that both seem to be doing quite well. She noted decreased sensation in her ring finger on both sides. She was released to return to work on the following Monday without any specific limitations. On March 3, 2005, she returned to Dr. Clark for a follow-up evaluation with complaints of numbness and tingling in her right hand after returning to the same job. He treated her with an injection and repeated the nerve conduction studies which resulted in positive findings of bilateral carpal tunnel syndrome with the right worse than the left.

Respondents offered the deposition testimony of Dr. Johnny Kathleen Smelz. Dr. Smelz testified that she was board certified in physical medicine and rehabilitation. She testified that she has been employed at the Central Arkansas Veterans Hospital for approximately five and one-half years and routinely treats patients with carpal tunnel. She was provided copies of the claimant's medical

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records. Based on her review, she agreed that the claimant was properly diagnosed with bilateral carpal tunnel syndrome, but opined that the claimant's condition stemmed from a disease process and not a work-related injury. She based her determination on the fact that claimant had a number of risk factors including, but not limited to, age and weight. Further, Dr. Smelz indicated that based on her knowledge of the job performed by the claimant, the job would not involve "high torque" activities and therefore was not the likely cause of her condition. Dr. Smelz further testified that the claimant had a hypertrophic transverse carpal ligament and mild synovitis. Dr. Smelz concluded from the combination of hypertrophy as well as the lack of inflammation noted during the surgery, it was highly unlikely that the claimant's carpal tunnel problems were directly related to work activities. She also pointed to the fact that the claimant was diagnosed in both wrists and noted that such diagnosis "reduces the likelihood that it is occupational in etiology and increases the likelihood that it is due to idiopathic or health factors".

A. COMPENSABILITY

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). A claimant seeking workers' compensation benefits for a gradual-onset injury must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; (3) the injury was the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4) (A) (ii) and (E)(ii) (Repl. 2002). Because carpal tunnel syndrome is by definition a gradual onset injury, it is not necessary that the claimant prove that

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this injury was caused by rapid repetitive motion. See Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 969 S.W.2d 190 (1998).

After review of the evidence, I find that the claimant was a credible witness. The claimant testified that she first experienced numbness in her fingers and thumbs and pain in her hands and arms in 2002 while performing employment services. She sought treatment on her own and following testing, she was administered an injection. She testified that her pain became tolerable after the medical treatment such that she was able to adjust and continue working.

The claimant explained that her work required her to guide fabric in the sewing machine, continuously, every day. After performing the same job duties for approximately two years, she began experiencing pain and numbness again in 2004. After evaluation and treatment by Dr. Clark, the claimant underwent bilateral carpal tunnel release surgery on her right wrist on September 29, 2004, and her left wrist on November 24, 2004. She testified that the surgeries had helped, but "it still hurts some".

The respondents rely on the testimony of Dr. Smeltz who attributes the claimant's carpal tunnel problems to other present non-work related risk factors, such as her gender, weight, age, and genetic predisposition.

The Commission has the duty to resolve conflicting medical evidence, including medical testimony. Maverick Transportation v. Buzzard, 69 Ark. App. 128 (2000). The Commission may review the basis for a doctor's opinion in determining its weight and credibility. Id; Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 84 S.W.3d 878 (2002). When medical opinions conflict, the Commission may resolve the conflict based on the record as a whole and reach the result consistent with reason, justice, and common sense. Barksdale Lumber v. McAnally, 262 Ark. 379,

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557 S.W.2d 868 (1977). A physician's special qualifications and whether a physician rendering an opinion ever actually examined the claimant are factors to consider in determining weight and credibility. Id.

In the present matter, I find that Dr. Smelz's opinions on causation are entitled to minimal weight. Dr. Smelz never examined the claimant and relied on her experience, studies, and her review of the operative report. Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B)(Repl. 1996). The Arkansas Court of Appeals has held:

the plethora of possible causes for work-related injuries includes many that can be established by a common-sense observation and deduction. To require medical proof of causation in every case appears out of line with the general policy of economy and efficiency contained within the workers' compensation law. To be sure, there will be circumstances where medical evidence will be necessary to establish that a particular injury resulted from a work-related incident - but not in every case. We find the Court of Appeal's reasoning in *Millican* and *Tilley* persuasive. We therefore adopt the holding in *Millican* that objective medical evidence is necessary to establish the existence and extent of an injury, but is not essential to establish the causal relationship between the injury and the work-related incident (emphasis added).

Freeman v. Con-Agra Frozen Foods, 70 Ark. App. 306, 27 S.W.3d 762 (2000), quoting Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). See Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997) and Aeroquip, Inc. v. Tilley, 59 Ark. App.163, 954 S.W.2d 305 (1997).

Based on this reasoning, Freeman, summed up the current state of the law as such:

Medical evidence is not ordinarily required to prove causation, i.e., a connection between the injury and the claimant's employment, but if an unnecessary medical opinion is offered on that issue, the opinion must be stated with a reasonable degree of medical certainty.

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Freeman, supra, citing Wal-Mart Stores, Inc. v. Van Wagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

The law is clear that medical opinions based upon “could”, “may”, “possibly”, and “can” lack the definitiveness required by Ark. Code Ann. §11-9-102(16)(B)(Supp.1999) which requires that medical opinions be stated within a reasonable degree of medical certainty. Scott v. Middleton Drywall, 2005 AWCC 22 (Feb. 9, 1005) (“probably did” found insufficient to prove causation); Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000) (overruling prior Court of Appeals decision and holding that “could” was insufficient to satisfy standard); Crudup v. Regal Ware, Inc. , 341 Ark. 804, 20 S.W.3d 760 (2001) (“theoretical possibility” did not meet standard of proof); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001) (to pass muster, opinion must be more than speculation and go beyond possibilities).

After review of the credible evidence, I find that the preponderance of the evidence demonstrates that claimant’s carpal tunnel syndrome was work-related. I would note that Dr. Clark, the treating surgeon, did not attribute the claimant’s bilateral carpal tunnel syndrome to non-work related “idiopathic” factors, but rather was most likely caused by repetitive movement and was job-related. Based on the preponderance of the evidence, I find that the claimant sustained a compensable injury in the form of bilateral carpal tunnel syndrome. I find that the compensable injury caused physical harm to the claimant and arose out of and in the course of her employment. Moreover, the medical evidence is supported by objective findings, namely the severe bilateral carpal tunnel syndrome shown by electro-diagnostic testing. Finally, I find that the preponderance of the credible evidence

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proves that the compensable injury was the major cause of her disability and need for treatment.

B. MEDICAL EXPENSES AND TEMPORARY TOTAL DISABILITY BENEFITS

Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Geo Specialty Chem., Inc. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Respondents are responsible only for medical services which are causally related to the compensable injury. Post-surgical improvement is a relevant consideration in determining whether surgery was reasonable and necessary. Winslow v. D & B Mech. Contractors, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Dr. Clark performed bilateral carpal tunnel syndrome release surgery. The record plainly shows post-surgical improvement.

Based on the preponderance of the credible evidence, I find that the medical services provided to the claimant beginning in 2004, by and at the direction of Dr. Clark, including the surgical release of the claimant's bilateral carpal tunnel syndrome, represent reasonably necessary medical services under Ark. Code Ann. § 11-9-508.

Finally, an employee who has sustained a compensable scheduled injury is to receive temporary total disability compensation during her healing period or until she returns to work. Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. § 11-9-102 (12); Ketcher Roofing Co. v. Johnson, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

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I further find that the claimant has proven that she was rendered temporarily totally disabled, as the result of the effects of her compensable injury for the period beginning September 29, 2004, the date of her first surgery, and continuing through the date she returned to work on January 10, 2005.

C. CONTROVERSION AND ATTORNEY'S FEES

The claimant's attorney is entitled to a maximum statutory attorney's fee on the disability benefits awarded to the claimant as a result of the findings herein, one-half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2002).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed at all relevant times, including August 2, 2004.
3. The claimant earned sufficient wages to entitle her to a temporary total disability rate of \$267.00 and a permanent partial disability rate of \$200.00.
4. The claimant was released to return to work on January 10, 2005, with no restrictions.
5. The claimant has proven by a preponderance of the evidence that she suffered a compensable injury, i.e. bilateral carpal tunnel syndrome, while performing employment services.
6. Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from the date she last

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worked, September 28, 2004, until the date she was released to return to work, January 10, 2005.

7. Claimant has proven by a preponderance of the evidence that the medical treatment by Dr. Whipple, Dr. Silas and Dr. Clark, including the bilateral carpal tunnel release surgeries, was reasonable and necessary and related to her compensable work-related injury.
8. Claimant is entitled to the maximum attorney's fee on the disability benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

AWARD

The respondents are hereby directed and ordered to pay benefits and attorney's fees in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge