

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508487

ROBERT FITZPATRICK	CLAIMANT
RHEEM MANUFACTURING COMPANY	RESPONDENT
OLD REPUBLIC INSURANCE, INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 15, 2007

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG, in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on April 3, 2007, in Fort Smith, Arkansas.

A pre-hearing order was entered in this case on February 14, 2007. The pre-hearing 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 pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On all relevant dates including July 18, 2005, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation benefits are \$384.00 for total disability and \$288.00 for permanent partial disability.

3. On or before July 18, 2005, the claimant sustained a compensable cumulative trauma injury in the form of bilateral carpal tunnel syndrome.
4. There is no dispute over the payment for medical expenses incurred for the bilateral carpal tunnel syndrome.
5. There is no dispute over temporary disability benefits accruing through December 14, 2005.
6. The respondents are entitled to the statutory set off for any benefits, which may be found owing under the workers' Compensation Act, but which have been paid under group insurance.

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

1. whether the claimant has also sustained a compensable injury to his cervical spine during his employment with the respondent.
2. The claimant's entitlement to the payment of medical expenses associated with the cervical injury or condition.
3. The claimant's entitlement to additional temporary total disability from December 15, 2005 through a date yet to be determined.
4. Appropriate attorney's fees.
5. whether the claimant unjustifiably refused suitable employment.

In regard to these issues, the claimant contends:

“On the same date, the claimant suffered an injury to his neck due to rapid and repetitive motion required on this job, the same being misdiagnosed and accepted as carpal tunnel, when in fact, it was a disc herniation of the C2-3 disc. That the claimant is entitled to TTD from August 18, 2005 through a date yet to be determined as well as statutory attorney’s fees.”

In regard to these issues, the respondents deny that the claimant sustained a compensable injury to his cervical spine. The respondents also deny that the claimant is entitled to any additional temporary total disability benefits.

#### DISCUSSION

##### I. COMPENSABILITY OF THE CLAIMANT’S CERVICAL DEFECTS

\_\_\_\_\_The first issue to be addressed is whether the claimant has also sustained a compensable injury to his cervical spine, during his employment with the respondent. As the claimant alleges that this injury was not caused by any specific incident and is not identifiable by time and place of occurrence, the question of compensability is controlled by the provisions of Ark. Code Ann. §11-9-102(4)(A)(ii)(b). The amendment to this section by Act 1250 of 2005, became effective shortly before this claim arose. Thus, it is the foregoing section, rather than §11-9-102(4)(A)(ii)(a), that is controlling on the question of compensability. The claimant need not prove that his alleged cervical injury was caused by “rapid repetitive motion”. However, the claimant must still prove that his alleged cervical injury arose out of and occurred in the course of his employment with the respondent, caused internal or external physical harm to his body, and was to his back or neck.

The claimant must also prove that his alleged compensable injury is the major cause of his disability and need for treatment, Ark. Code Ann. §11-9-102(4)(E)(ii). Further, he must satisfy the statutory requirements for a compensable injury found in Ark. Code Ann. §11-9-102(4)(D).

Under Ark. Code Ann. §11-9-102(4)(D), the claimant must establish by “medical evidence” the actual existence of the physical injury or condition alleged to be compensable. Further, the claimant must show that the actual existence of this physical injury or condition is supported by or based upon “objective findings”, as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

The burden rests upon the claimant to prove all of these essential statutory requirements. Should the claimant fail to prove even one of these requirements, then he has failed to prove that his alleged employment related cervical injury is compensable.

The medical evidence presented is clearly sufficient to satisfy the statutory requirements of Ark. Code Ann. §11-9-102(4)(D). The medical evidence establishes the actual existence of various physical defects involving the claimant’s cervical spine. Further, the actual existence of these physical defects is supported by and, in fact, is based upon purely objective radiographic findings. This evidence shows that the claimant is experiencing a central and right posteriolateral herniation of the C2-3 intervertebral disc together with transverse bilobular posterior disc protrusions and mild bilateral osteophyte formations

involving the discs and vertebra at both the C5-6 level and C6-7 level. He is also experiencing degenerative narrowing of the disc spaces at the C5-6 and C6-7 levels.

In order to satisfy the statutory requirement that the injury must "arise out of and arrive in the course of the employment" the claimant must prove by the greater weight of the credible evidence the existence of a causal relationship between these medically established and objectively documented cervical defects and his employment with this respondent. While medical evidence is not absolutely essential to prove such a causal relationship, it is certainly helpful. However, in order to be considered, any expert medical opinion on causation must be stated within a reasonable degree of medical certainty, Ark. Code Ann. §11-9-102(16)(B).

In the present case, the only expert medical opinions, concerning the existence of a causal relationship between the claimant's employment and his cervical difficulties are found in the October 16, 2006 report of Dr. James E. Kelly, III, and a May 16, 2006 letter and clinic note of Dr. Arthur Johnson to Dr. Kelly. In his report Dr. Kelly states:

"What you are asking me to do is give you a yes or no answer on something that I cannot do. Essentially if he (the claimant) had some history of neck injury while in the job or his job can be related that requires a lot of hyperextension and flexion of the neck, etc. that is related directly to his employment and requirement of that employment, then I can state that this definitely has a relationship to his job as the reason why he has the degree of degenerative disc disease. If, however, none of this can be stated as being true, then he unfortunately just has degenerative disc disease, which we all get as we age, but his is to the point that it is causing symptoms. I think this is self explanatory and, seeing I have only started him since February of 2006, it

is hard for me to determine whether this was related to his employment and whether he has a history of problems related to his employment that he had complaints with. I do not feel that I can really give you a definitive yes or no answer on this and really it would come down to the history that he has had with his employer as to whether this would be related.”

In his report, Dr. Johnson states:

“He does have some degenerative changes of his cervical discs at C5-6 and C6-7 that most likely are responsible for his radicular type symptoms, however, I do suspect that these are more degenerative as opposed to acute changes.”

Clearly, Dr. Kelly’s opinion (if, in fact, it is an opinion) is not stated within a reasonable degree of medical certainty. I would also note that Dr. Kelly is a plastic surgeon. He has no particular expertise in the area of medicine associated with the evaluation, diagnosis, and treatment of cervical injuries and resulting neurological conditions.

I would also note that there is no evidence presented to show that the claimant has a history of a specific injury to his neck during his employment with this respondent. Further, the evidence presented fails to show that the claimant’s employment activities for this respondent required “a lot of hyperextension or flexion of his neck”. Thus, even under Dr. Kelly’s hypothesis, his cervical defects would not be reasonably result from his employment.

Although Dr. Johnson attributes the claimant’s “radicular type” symptoms to the documented cervical defects, he would appear to limit this to the complaints of pain in the neck and shoulders. In his clinic note of the same date (i.e. May 16, 2006), Dr. Johnson specifically stated that it is his expert opinion that

these cervical defects “would not be responsible for the patient’s pain in his extremities.” More importantly, in both the letter to Dr. Kelly and his clinic note, Dr. Johnson attributed the cause of the claimant’s various cervical defects to simple degenerative changes that occurred with time and were not the result of any recent or “acute” trauma or activity.

After consideration of all the medical evidence presented, it is my opinion that the greater weight of this evidence fails to prove the existence of a causal relationship between the claimant’s objectively demonstrated cervical defects and his employment with this respondent. In fact, the greater weight of the evidence supports the conclusion that the claimant’s cervical defects are degenerative in nature, are unrelated to any recent trauma (employment related or otherwise). Clearly, these defects are longstanding, particularly in regard to the extensive arthritic spurring of the vertebral bodies, and are merely part of the aging process.

However, as previously stated, expert medical opinion and evidence is not essential to prove the existence of the necessary causal relationship between the claimant’s employment and his injury. Such a causal relationship can also be proven by showing that the claimant’s employment could have reasonably caused the injury, that there is no equally reasonable cause of the injury, and that the injury occurred within a reasonable period of time following the employment related activity or event, Hall v. Pittman Construction Company, 235 Ark. 104, 357 S. W. 2<sup>nd</sup> 263 (1962).

In the present case, the description of the claimant's employment activities would not indicate that they placed any particular stress on his cervical spine. The employment activities described by the claimant would not be reasonably likely to produce or aggravate the claimant's diagnosed degenerative disc disease and arthritic spurring at multiple levels. At the time of the onset of the claimant's difficulties, the claimant was 53 years of age and according to his own statements, had lived an active life. The various medical records chronicle complaints involving multiple joints of the claimant's body, after July 18, 2005. The various tests also note degenerative and arthritic changes at multiple levels of the claimant's cervical spine. All of these factors would more reasonably support the conclusion that the claimant's cervical defects were merely the result from the day to day activities of the claimant's active life over a 53 year period.

Finally, the claimant's testimony (contrary to the history he related to Dr. Johnson), indicates that he did not begin to experience any difficulties with his neck, upper back, shoulders, and upper arms, until November or December of 2005. This would have been several months following the cessation of his regular employment position with the respondent. This testimony would also coincide with the medical evidence which shows no complaints by the claimant with these portions of his body prior to January of 2006. Thus, there would not appear to be any reasonable close temporal relationship between the claimant's employment activities for this

respondent and the initial onset of symptoms indicative of the occurrence of a cervical injury.

I have no doubt that the claimant sincerely believes that the difficulties that he began experiencing with his hands in July of 2005, were initially misdiagnosed by his physicians as carpal tunnel syndrome, and that these difficulties were actually the result of the subsequently discovered cervical defects, and that these cervical defects are somehow related to his employment. The claimant's conclusions, in regard to these matters would appear to be based upon various statements made by Dr. Kelly. However, belief, regardless of its sincerity, is not a substitute for factual proof. This is particularly true when this belief is based upon conclusion of fact that are contrary to the evidence presented.

Dr. Kelly has repeatedly opined that the claimant's continuing complaints with his hands are radicular in origin and are related to the objectively documented cervical defects. However, I would note that Dr. Kelly is essentially a plastic surgeon with limited expertise in the diagnosis and treatment of neurological conditions in general and cervical defects in particular. More importantly, his opinion on the etiology of the claimant's hand complaints is clearly contradicted by to the greater weight of the evidence presented. From the evidence presented, there is no doubt that the claimant was experiencing bilateral carpal tunnel syndrome, in July of 2005. The presence of this condition was shown by abnormalities on nerve conduction studies performed by Dr. William Griggs. Dr.

Griggs is a highly competent board-certified neurologist with considerable experience in the diagnosis of neurological conditions. He is certainly qualified to distinguish between a neurological deficit located in the wrist area from one located in the cervical spine. The testing he performed clearly indicated a neurological deficit with its origin in the area of the claimant's wrists or carpal tunnels. The accuracy of Dr. Griggs diagnosis is supported by the visual observations of the actual nerves made by Dr. Bise during the corrective surgery. His diagnosis is further supported by subsequent nerve conduction studies, which all showed a resolution of the neurological abnormalities in the area of the carpal tunnel after the corrective surgery.

The subsequent electroneurological studies, which were performed at Dr. Kelly's request by Dr. Bolyard did reveal abnormalities indicative of a radiculopathy. However, these abnormalities involved only the cervical paraspinal muscles and there was no evidence of any abnormality indicative of a radiculopathy or neuropathy of any kind involving the claimant's upper extremities, particularly his wrists and hands.

Dr. Kelly's conclusion that the claimant's wrist and hand difficulties are the result of a cervical neuropathy is not only inconsistent with the neurological studies that have been performed on the claimant, but are also inconsistent with the results of the clinical examinations performed by all of the other physicians involved in this case. None of the numerous physical examinations performed on the claimant have noted the presence of any objective

evidence of an ongoing radiculopathy, such as abnormal reflexes, muscle atrophy, etc.

In part, Dr. Kelly's opinion appears to be based in part upon another of his conclusions which appears contrary to the evidence of record. He indicates that the x-ray studies and MRI performed on the claimant's cervical spine showed significant compression or stenosis of the claimant's spinal cord or exiting nerve roots in the C5-6 and C6-7 area. However, in his interpretation of the cervical MRI, Dr. Neil Crow (the attending radiologist) noted no impingement, compression, or stenosis involving either the spinal cord or the exiting nerve roots in the C5-6 and C6-7 areas or any other cervical level. On his review of the cervical MRI and x-rays, Dr. Johnson noted no impingement, compression, or stenosis involving either the spinal cord or the exiting nerve roots of the claimant's cervical spine. As previously noted, Dr. Johnson specifically stated that, in his opinion, the claimant's various cervical defects "would not be responsible for the patient's pain in his extremities" and noted his other symptoms as only "radicular like".

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence the existence of a causal relationship between his employment with the respondent and any cervical defects or conditions, which he may have and any difficulties that these defects or conditions may currently be causing. In fact, it is my opinion that the greater weight of the credible evidence fails to

show that the claimant's difficulties with his hands and wrists, beginning in July of 2005, are in any way the result of the subsequently observed cervical defects. Rather, the greater weight of the credible evidence shows that the claimant's difficulties with his hands and wrists were the result of employment related bilateral carpal tunnel syndrome.

Therefore, the claimant has failed to prove that any medically established and objectively documented cervical defects that he may have represent "compensable injuries", as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(ii)(b). He would not be entitled to any benefits under the Act attributable to these cervical defects. This would include both medical benefits and indemnity benefits for disability.

## II. ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

The next issue concerns the claimant's entitlement to additional temporary total disability benefits for the period beginning December 15, 2005 and continuing through a date yet to be determined. In order to be entitled to such benefits, the claimant must prove that he has continued within his healing period from the effects of his compensable injury and has not "returned to work", Ark. Code Ann. §11-9-521(a).

The only injury sustained by the claimant, which has been proven to be compensable, is his bilateral carpal tunnel syndrome. Therefore, he would only be entitled to temporary total disability benefits for this particular compensable injury. NO other injury, condition, or complaints can be considered in resolving this issue.

The duration of the healing period is a medical question, which must be resolved on the basis of the medical evidence presented. The healing period ends when the claimant has achieved the maximum benefit of time and medical treatment in regard to the resolution or stabilization of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, at a level where nothing further in the way of medical treatment offers a reasonable expectation of improvement, then the healing period has ended. The mere continuation of chronic symptoms, after this has occurred is not sufficient to extend the healing period.

In the present case, the medical evidence shows that the claimant underwent surgery on his right wrist and hand, in the form of a carpal tunnel release, on August 17, 2005. This same procedure was subsequently performed on his left hand on September 21, 2005. The medical evidence shows that the claimant continued under active medical treatment for his bilateral carpal tunnel syndrome by Dr. Roger Bise, through January 10, 2006. At that time, Dr. Bise noted:

“I saw Mr. Fitzpatrick in follow up today to review his repeat nerve conduction study. This was essentially normal and indicates recovery following surgery. He still complains of symptoms but I am not sure the symptoms relate to carpal tunnel syndrome and some are vague or non specific in nature. I see no indication that he cannot work at this point in time. I will see him in follow up in three months if he desires but I have no recommendations.”

The claimant was subsequently seen and evaluated by Dr. Kelly, following a change of physicians. Following his initial evaluation, Dr. Kelly concluded that the claimant's current difficulties were not attributable to the compensable carpal tunnel syndrome, and he has provided the claimant with no subsequent treatment for this compensable injury.

After consideration of the medical evidence presented, it is my opinion that the preponderance of the medical evidence establishes that the claimant's healing period, from the effects of his compensable bilateral carpal tunnel syndrome, ended on January 10, 2006. Therefore, he has proven this first requirement for his entitlement to temporary total disability benefits through this date, but has not proven his entitlement to any temporary total disability benefits for this compensable injury after this date.

The record shows that the claimant was periodically taken off work and returned to limited or light duty work by his treating physicians between July 18, 2005 and January 10, 2006. On November 29, 2005, Dr. Bise released the claimant to limited or light duty. The record shows that the only work available to the claimant, at that time, would have involved continuous repetitive use of his hands (Claimant's Exhibit No. 1, page 50). As a result, the company physician (Dr. Greg Loyd), continued to keep the claimant off work. On December 14, 2005, Dr. Loyd released the claimant to return to limited or light duty work with only light use of his hands, especially his right hand, no repetitive forceful gripping with either hand, no use of the screw gun, and a maximum work day

of 8 hours with a maximum work week of 40 hours. This release was effective December 15, 2005. The clinical note of Dr. Loyd, dated December 14, 2005, indicates that he advised the claimant of this release to return to work on December 15, 2005. The record shows that the claimant failed to report to work on December 15, 2005.

Afer consideration of the evidence presented, it is my opinion that the greater weight of the credible evidence proves that the claimant had not "returned to work" on December 15, 2005, and, in fact, has not returned to work since that date. Thus, I find that the claimant has proven the second and final requirement for his entitlement to additional temporary total disability benefits for the period of December 15, 2005 through January 10, 2006.

However, there remains the issue of whether the claimant is barred from receiving temporary total disability benefits during this period by the provisions of Ark. Code Ann. §11-9-526. Ark. Code Ann. §11-9-526 provides that no disability benefits are to be paid during any period wherein the claimant unjustifiably refuses suitable employment offered to or procured for him by the respondent. As this section inures to the respondents' benefits, the burden rests upon the respondents to prove all of the essential elements necessary to invoke the provisions of this section.

As previously noted, the medical evidence shows that the claimant had been released to return to limited or light duty employment by both his treating physician, Dr. Bise, and the company physician, Dr. Loyd, on December 15, 2005. However, Dr. Loyd had previously noted that the only limited or light duty

employment that the respondent had available still required continuous and repetitive use of the claimant's hands. There is no evidence that any new position had become available or the claimant's condition or Dr. Loyd's opinion had changed on or after December 15, 2005. If the required activities of the available employments were medically contraindicated prior to December 15, 2005, I see no logical reason why suddenly they would become acceptable on and after that date.

After consideration of the evidence presented, it is my opinion that the respondents have failed to prove that "suitable" employment that was within the claimant's limitations or restrictions was offered him during the period of December 15, 2005 though January 10, 2006. Therefore, the claimant would not be prevented from receiving temporary total disability benefits during this period by the provisions of Ark. Code Ann. §11-9-526.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On all relevant dates, including July 18, 2005, the relationship of employee-employer existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$384.00 for total disability and \$288.00 for permanent partial disability.

4. On or before July 18, 2005, the claimant sustained a compensable cumulative trauma injury to his hands and wrists in the form of bilateral carpal tunnel syndrome.

5. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a compensable cumulative trauma injury to his cervical spine during his period of employment with this respondent. Specifically, he has failed to prove the existence of a causal relationship between his employment and/or employment activities for the respondent and any cervical injuries or defects that he may be experiencing.

6. There is no dispute over the payment of medical expenses incurred for the claimant's compensable bilateral carpal tunnel syndrome and the respondents remain liable for such expenses.

7. Any medical expenses incurred by the claimant as a result of his cervical injuries or defects would not represent reasonably necessary medical services for a compensable injury. Thus, the respondents would not be liable for any such expenses.

8. There is no dispute over temporary total disability benefits accruing through December 14, 2005.

9. The claimant was rendered temporarily totally disabled as a result of the effects of his compensable bilateral carpal tunnel syndrome for the period of December 15, 2005 through January 10, 2006. During this period, the claimant has proven that he continued within his healing period from the effects of his compensable bilateral carpal tunnel syndrome and had not returned to work.

10. The claimant is not barred from receiving temporary total disability benefits for the foregoing period by the provisions of Ark. Code Ann. §11-9-526. Specifically, the respondents have

failed to prove that he was offered or provided suitable employment during this period.

11. The respondents have denied the occurrence of any compensable injury to the claimant's cervical spine and have controverted this entitlement to any benefits attributable thereto. The respondents have also controverted the claimant's entitlement to any temporary total disability benefits on and after December 15, 2005.

12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

#### ORDER

The respondents shall pay to the claimant temporary total disability benefits for the period of December 15, 2005 through January 10, 2006. The respondents are entitled to a credit or a set off against these benefits for any short term or long term group disability benefits which were paid for this same period.

The respondents shall pay the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. One half of this fee is the obligation of the respondents in addition to these benefits and the remaining one-half of this fee is to be withheld by the respondents from such benefits.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE