

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F608264

SHIRLEAN GILMER, EMPLOYEE	CLAIMANT
J R SIMPLOT COMPANY, INC., EMPLOYER	RESPONDENT
LIBERTY INSURANCE CORPORATION, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 23, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on March 16, 2007, at Marion, Crittenden County, Arkansas.

Claimant represented by Mr. Marc I. Baretz, Attorney-at-Law, West Memphis, Arkansas.

Respondents represented by Mr. Michael R. Mayton, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted March 16, 2007, 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 24, 2007, and a Prehearing Order was filed on said date. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

At the prehearing conference, the parties agreed that the employment relationship existed at all relevant times and that the claim had been controverted in its entirety for purposes of attorney's fees. At the hearing, the parties stipulated that during October, 2004, the claimant's average weekly wage was \$386.00,

entitling her to compensation rates of \$257.00 per week for temporary total disability and \$193.00 per week for permanent partial disability in the event compensability was overcome and that after June, 2005, the claimant's average weekly wage was \$627.00 which would entitle the claimant to temporary total disability benefits in the amount of \$418.00 and permanent disability benefits in the amount of \$314.00 per week.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed.

At the prehearing conference, the claimant contended, in summary, that she sustained a gradual onset, bilateral carpal tunnel injury which arose out of and during the course of her employment which became severe enough in 2006 to require surgery and a period of disability. Claimant requested payment of all medical and related expenses, including surgery, together with continued, reasonably necessary medical treatment; that she was entitled to temporary total disability benefits for the period beginning on or about June 22, 2006, following the first surgery, and continuing through the present, less credit for any dates that the claimant worked. The claimant requested a controverted attorney's fee. Claimant reserved the issue of permanent disability. At the hearing, the claimant amended her contentions to request temporary total disability at the rate of \$418.00 per week, the rate in effect at the time of claimant's surgery. The claimant further contended

that in response to respondents' statute of limitations defense, that, at the very earliest the claim began to run during October, 2004, and that the claim was timely filed.

At the prehearing conference, the respondents made the following contentions:

1. The claimant did not sustain compensable bilateral carpal tunnel syndrome injuries while employed by the respondent employer.
2. This claim has been denied and controverted in its entirety.
3. The claimant was not entitled to any benefits.
4. The statute of limitations has expired in this case, and the claim filed on behalf of the claimant is barred.
5. The claimant was aware of her bilateral carpal tunnel syndrome injuries in 2004 and did not file her claim for over two (2) years.
6. The claimant did not timely and properly report her alleged bilateral carpal tunnel syndrome injuries.
7. The respondents are not responsible for any benefits until they had notice of the alleged bilateral carpal tunnel syndrome injuries in July, 2006.
8. The claimant's medical bills have been paid by her group health carrier and the respondents hereby request a setoff for all benefits paid by the claimant's group health carrier in the event this case is determined to be compensable.
9. The claimant has drawn short-term disability benefits, and the respondents hereby request a setoff for any short-term disability benefits received by the claimant in the event this claim is determined to be compensable.
10. In the alternative, if it is determined the claim is compensable, the respondents hereby request a setoff for any unemployment benefits received by the claimant.

At the hearing, respondent amended its contention asserting that even if the

claim was compensable, the rates during 2004 should apply, specifically, \$257.00 per week for temporary total and \$193.00 for permanent partial disability, maintaining that is when the injury became apparent to the claimant. Respondents further contend that the claimant's healing period ended October 19, 2006, pursuant to a report from Dr. Sam Meredith.

In addition to the claimant, her husband, James Gilmer, was called as a corroborating witness. The record is composed solely of the transcript of the March 16, 2007, 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 employee/employer/carrier relationship existed among the parties at all relevant times. On and before October, 2004, the claimant's average weekly wage was \$386.00, which would entitle her to compensation rates of \$257.00 per week for temporary total disability and \$193.00 per week for permanent partial disability. After June 26, 2005, claimant's average weekly wage was

\$627.00 which would entitle her to compensation rates of \$418.00 per week for temporary total disability and \$314.00 for permanent partial disability.

3. The claimant has proven, by a preponderance of the credible evidence, that she sustained a gradual onset, bilateral carpal tunnel injury which arose out of and during the course of her employment with J R Simplot Company, Inc., which became severe enough to require surgical intervention and a period of disability beginning on or about June 22, 2006.
4. Although the claimant's symptoms may have manifested themselves earlier, the earliest date that the claimant's injury was diagnosed as carpal tunnel injuries and that the claimant became aware of said injuries was October 11, 2004.
5. This claim is not barred by statute of limitations. The claim was filed on August 17, 2006, which was within the two (2) year period following when the injury became apparent to the claimant, specifically, October 11, 2004.
6. The claimant did not miss any work before June 22, 2006. The claimant was temporarily totally disabled for the period beginning June 22, 2006, at which time she underwent surgical release of her right carpal tunnel injury and continuing through August 8, 2006, at which time she returned to work for the employer herein. The claimant returned to work from August 8, 2006, through August 21, 2006. The claimant was again temporarily totally disabled for the period beginning August 22, 2006, and continuing through

October 27, 2006, at which time she was released to return to work.

7. The claimant's healing period ended on or before October 27, 2006.
8. Respondents are not responsible for any benefits prior to July 18, 2006, the date the claimant first reported her injuries to her employer pursuant to Ark. Code Ann. §11-9-701(a)(1)(Repl. 2002).
9. Respondents are entitled to a set-off or credit equal to, dollar-for-dollar, the amount of benefits the claimant has previously received for medical services or short-term disability benefits paid under group health care service plan or disability policy pursuant to Ark. Code Ann. §11-9-411.
10. The claimant's entitlement to temporary total disability are the rates in effect during 2006 at which time the claimant first became disabled.
11. The issue of claimant's entitlement to permanent impairment benefits has been specifically reserved.
12. Respondents have controverted this claim in its entirety.

DISCUSSION

_____ The facts in this claim are basically undisputed. Although the claimant's recollection of specific dates contained inconsistencies, I found her to be a credible witness. As will be set out further below, the causal connection between the claimant's bilateral carpal tunnel injuries and her employer with J R Simplot are clearly supported by the record as a whole. Respondents' primary defense to the claim appears to be its affirmative defense that the claimant became aware of her

injuries in June, 2004, but did not file her claim for more than two (2) years. However, the time lines reflect that the injury did not become apparent to the claimant until October 11, 2004, and that the claimant timely filed her claim within two (2) years thereafter. Unfortunately, the claimant did not timely and properly report her injuries to her employer until after undergoing the initial carpal tunnel release on the right. Accordingly, respondents would not be responsible for any benefits until they had actual notice of the claim which was filed on July 18, 2006, as reflected by a first report of injury. (Cl. Ex. B)

After the respondent notified its carrier of the claim, which was controverted in its entirety, the claimant filed a claim with this Commission and requested a hearing for additional benefits on August 21, 2006. (Cl. Ex. C, p.2)

The claimant began working for the respondent on or about September, 1995. The claimant worked on an assembly line, packing frozen foods of various weights into boxes on a conveyor belt. The record reflects that the claimant's work was extremely hand intensive. The claimant was right hand dominant. The medical evidence reflects that the claimant made complaints of problems involving her right hand and arm as early as March, 2000, to her family physician, Dr. Trent Pierce; however, it is equally apparent that the claimant's primary complaint involved problems with hemorrhoids. The claimant next made complaints concerning hemorrhoids, as well as both arms and shoulders to Dr. Floyd Shrader in March, 2004, at which time the claimant was referred to Dr. Guy L'Heureux to evaluate the

shoulder and arm pain. (Cl. Ex. A, pp.1-5)

The claimant was first examined by Dr. L'Heureux on June 8, 2004. Dr. L'Heureux's final diagnosis was overuse syndrome of the right and left forearm which he attributed to the type of work that the claimant was performing. Dr. L'Heureux suggested a modification in the claimant's work, as well as the use of braces while working while treating the claimant with medications which substantially improved the claimant's symptoms. (Cl. Ex. A, pp.6-9)

The claimant returned to Dr. L'Heureux on October 11, 2004, with additional complaints. Dr. L'Heureux, based upon a clinical examination as well as nerve conduction studies, determined that, in addition to tendinitis of the forearms due to the overuse syndrome, the claimant had also developed bilateral carpal tunnel syndrome. Dr. L'Heureux recommended that the claimant continue to wear bilateral carpal tunnel brace in her work, while recommending steroid injections of the carpal ligament, and permitting the claimant to continue working. The final diagnosis was tendinitis of the flexors of the right and left forearm as well as carpal tunnel syndrome, right and left wrist. It is clear from the claimant's credible testimony, together with the medical evidence that October 11, 2004, was the earliest date the claimant was aware that she had developed carpal tunnel injuries related to her employment. (Tr.30)(Resp. Ex. A, p.5)

The record reflects that the claimant continued to perform her regular job duty on the assembly line through April, 2005. Although the conservative treatment

initially helped the claimant, her condition grew progressively worse, at which time the claimant applied for and obtained a promotion from the assembly line to machine operator which involved substantial computer work as well as paperwork. Despite the change in job activities, the claimant's condition grew progressively worse even after changing jobs. Dr. L'Heureux subsequently referred the claimant to Dr. James Meredith, an orthopedic surgeon in the same clinic who performed a carpal tunnel release of the claimant's right wrist on June 22, 2006. The claimant did not miss any work before undergoing the carpal tunnel release on June 22, 2006. As previously pointed out, after the claimant underwent surgery, she formally notified her employer that she wished to file a workers' compensation claim which was apparently first reported to the employer on July 18, 2006. The claim was subsequently controverted by the employer's insurance carrier. The record reflects that the claimant did return to work following the carpal tunnel release on the right and worked from on or about August 8, 2006, through August 22, 2006, at which time she underwent a carpal tunnel release on the left. Dr. Meredith released the claimant to return to work on October 27, 2006. (Resp. Ex. A, p.23)

The claimant apparently received an incomplete result from the carpal tunnel surgery. Because Dr. Meredith opined that the claimant was probably at risk for recurrent symptoms if she returned to her former work environment, the claimant sought a different type of employment. The record reflects that during January, 2007, the claimant began working for a different employer. (Resp. Ex. A,

p.24)(Tr.54)

COMPENSABILITY

In the present claim, the claimant does not contend that her 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, she fails to establish compensability of the claim, and compensation must be denied. *Lay v. United Parcel Service*, 58 Ark. App. 35, 944 S.W.2d 867 (1997).

_____ Although the record reflects that the claimant's work activities at J R Simplot Company, Inc., were diagnosed as tendinitis of the flexors of the right and left forearm, as well as carpal tunnel syndrome of the right and left wrists, because the

carpal tunnel syndrome is, by definition a gradual onset injury, it is not necessary that the claimant prove that this injury was caused by rapid repetitive motion. See, *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998).

Rather than conduct a further analysis of the record in this cause, suffice it to say that the claimant has satisfied each and every element necessary to establish compensability of her carpal tunnel injury which entitles the claimant to the benefits claimed, subject to respondents' entitlement to an offset pursuant to Ark. Code Ann. §11-9-411.

STATUTE OF LIMITATIONS

Ark. Code Ann. §11-9-702(a) requires that a claim for compensation for disability on account of an injury shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury. The statute of limitations provided in subsection (a) does not begin to run until the true extent of the injury manifests itself and causes an incapacity to earn the wages which the claimant was receiving at the time of the accident. *Arkansas LA. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983); *Halls Cleaner v. Wortham*, 38 Ark. App. 86, 829 S.W.2d 424, Aff'd 311 Ark. 103, 842 S.W.2d 7 (1992).

For purposes of commencing the statute of limitations under subdivision (a)(1), the word "injury" is to be construed as "compensable injury" and an injury does not become "compensable" until (1) the injury develops or becomes apparent

and (2) claimant suffers a loss in earnings on account of the injury, thus the statute of limitations does not begin to run until both elements of the rule are met. *Halls Cleaner v. Wortham*, 311 Ark. 108, 842 S.W.2d 7 (1992).

In *Minnesota Mining & Manufacturing v. Baker*, 337 Ark. 94, 982 S.W.2d 11 (1999), our Supreme Court addressed when a scheduled-injury claim becomes compensable for statute of limitations purposes. The Court reasoned that loss of earnings are conclusively presumed in scheduled-injury cases, and, therefore, the statute of limitations begins to run when the scheduled injury became apparent to the claimant.

Accordingly, since the claimant's injuries are scheduled injuries, the only factual dispute which must be addressed in determining when the statute of limitations began to run in the instant case requires a determination as to when the injury became apparent to the claimant. Admittedly, arguments can be made that the claimant's symptoms manifested themselves before October 11, 2004. However, manifestation of symptoms does not determine when the statute begins to run. Clearly, the record reflects that the claimant continued to aggravate her pre-existing condition through her continued employment duties with the respondent herein. Also, admittedly, arguments can be made that the medical providers recognized a causal connection between the claimant's symptoms and her employment before October 11, 2004, but even the physicians did not diagnose a carpal tunnel injury until October 11, 2004. In *Pina v. Wal-Mart Stores, Inc.*, 91 Ark.

App. 77 (2005), the Court of Appeals pointed out that a claimant's injury became apparent at least by the date a claimant reported her symptoms of pain and numbness to her supervisor and was provided accommodations by the employer. Clearly, that case is distinguishable from the immediate claim because although the claimant may have reported symptoms to her medical provider before October 11, 2004, she did not report her symptoms to her employer, and, in fact, continued working at all times through June 22, 2006. Our courts have recognized that the statute of limitations does not begin to run until a nexus between the injury and the work environment is established, and, further, that the condition has stabilized. *Pina v. Wal-Mart Stores, Inc.*, supra. See, also, *Powers v. City of Fayetteville*, ___ Ark. App. ___, ___ S.W.3d ___ (C.A. 06-685 Opinion issued January 31, 2007).

In view of the foregoing, it is hereby concluded that the claimant has proven, by a preponderance of the credible evidence, that she sustained compensable bilateral carpal tunnel injuries arising out of and during the course of her employment with J R Simplot Company, Inc., and that her claim is not barred by statute of limitations.

However, it is undisputed that the claimant did not report her injury to the employer until on or about July 18, 2006. Accordingly, respondents are not responsible for any benefits either disability or medical prior to said date. See, Ark. Code Ann. §11-9-701.

Further, it is undisputed that the claimant's medical bills have been paid, in

substantial part, by her group health insurance carrier, and that, in addition, the claimant has received short-term disability benefits from her former employer. Pursuant to Ark. Code Ann. §11-9-411, the benefits payable to the claimant must be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the claimant has previously received.

Finally, as an alternative contention, respondents maintained that, in the event the claim is compensable, it is entitled to a set-off for any unemployment benefits received by the claimant.

The record reflects that the only unemployment benefits that the claimant received were received prior to the immediate claim and were the result of a general lay-off, unrelated to the workers' compensation claim. Accordingly, respondents are not entitled to any set-off for unemployment benefits previously received.

AWARD

Respondent, Liberty Insurance Corporation, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$418.00 per week consistent with the foregoing findings and conclusions.

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

Additionally, respondents are to pay and/or reimburse to the claimant all co-pays and out-of-pocket medical expenses related to claimant's compensable injuries and surgeries, and, respondents remain responsible for continued follow-up,

reasonable medical treatment.

Additionally, claimant's attorney, Mr. Marc I. Baretz, is hereby awarded the maximum statutory attorney's fee, to be paid in accordance with Ark. Code Ann. §11-9-715.

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

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge