

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F603901

AZIZE NOSTHAS, EMPLOYEE	CLAIMANT
FEDEX FREIGHT, EMPLOYER	RESPONDENT
FIDELITY & GUARANTY INSURANCE CO., CARRIER/TPA	RESPONDENT

OPINION FILED JULY 9, 2007

Hearing before Administrative Law Judge O. Milton Fine II on April 17, 2007, in Harrison, Boone County, Arkansas.

Claimant represented by Ms. Adrienne Kincaid Murphy, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 17, 2007, the above-captioned claim was heard in Harrison, Arkansas. A prehearing conference took place on February 12, 2007. A Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit

1. They are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer/carrier relationship existed at all relevant times.

3. The Claimant earned wages sufficient to entitle her to compensation rates of \$488/\$366.
4. The Claimant received medical and temporary total disability benefits through July 21, 2006.
5. Claimant returned to work for Respondent FedEx on January 28, 2007.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1.

Following an amendment by Claimant of her third issue, the following were litigated:

Claimant:

1. Whether Claimant is entitled to additional reasonable and necessary medical treatment.
2. Whether Claimant is entitled to additional temporary total disability benefits from approximately July 21, 2006 to January 28, 2007.
3. Whether Claimant is entitled to a controverted attorney's fee.

Respondent:

1. Whether the Claimant sustained a compensable injury.
2. Whether the Claimant is entitled to additional temporary total disability and medical benefits.

Contentions

Claimant:

1. The Claimant contends that her gradual onset injuries to her right shoulder, arm, and wrist are compensable. The Claimant sustained a medically compensable injury to her left shoulder and arm while working for FedEx in

California before being transferred to Arkansas. Due to the left arm injury, the Claimant was overcompensating with her right arm. The Claimant contends that the overcompensation combined with the repetitive movements required in her job and caused her right shoulder, arm, and wrist overuse injuries. It is also the opinion of her treating physician, Dr. Mark Powell, that clinical findings support the diagnosis of overuse tendinitis and that her injuries are work related.

2. The Claimant also contends that she is entitled to temporary total disability benefits from July 21, 2006 to a date yet to be determined.
3. The Claimant also contends that she is entitled to a controverted attorney's fee.
4. The Claimant reserves her right to any and all additional benefits associated with this claim, including, but not limited to, an anatomical impairment rating, permanent disability benefits, and/or wage loss.

Respondents:

1. The Respondents contend that the Claimant does not have a compensable injury to her right arm, wrist, or shoulder. She has a gradual injury and her job is not rapid and repetitive. There are no objective medical findings. Additional treatment or temporary total disability benefits are not reasonable or necessary.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including 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, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that she incurred a compensable gradual onset injury.
4. Claimant has not proven by a preponderance of the evidence that her job entailed rapid and repetitive motion.
5. Claimant's contention that her injuries were due to overcompensation as a result of her left arm injury that was found to be compensable in California will not be addressed because it is questionable whether the Commission could appropriately exercise jurisdiction over it in light of the lack of evidence in the record regarding whether she actively initiated a workers' compensation proceeding in California or knowingly received benefits therefrom for purposes of the election of remedies doctrine.
6. The reasonable and necessary medical care, temporary total disability, and controverted attorney's fee issues are moot in light of the above findings.

CASE IN CHIEF

Summary of Evidence

_____ Two witnesses testified at the hearing: Claimant and David Green, Senior Manager of Information Technology for Respondent FedEx Freight.

In addition to the prehearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Joint Exhibit 1, a compilation of Claimant's medical records consisting of one index page and three individually numbered pages regarding her California claim, and one index page and 40 individually numbered pages thereafter concerning her treatment in Arkansas; and Respondents' Exhibit 1, a spreadsheet showing the devices Claimant worked on as a P.C. technician at Respondent FedEx Freight from September 1, 2005 through March 23, 2006, and consisting of two unnumbered pages.

Testimony

Azize Nosthas. Claimant testified as follows:

She is a resident of Harrison, Arkansas and is 46 years old. She has worked for Respondent Federal Express 10 to 11 years, beginning in Santa Clara, California. In California she was a senior computer operator. Her job there required a lot of monitoring and typing, along with some data and programming work. When the company was closing her department, Claimant was in charge of taking a large amount of inventory and handling a number of phone calls.

It was while in this position in California that she injured her left arm, which she reported in September 2003 and which was found to be compensable under California law. She stated that she received physical therapy for the injury, and was placed on a no-lifting restriction by her physician. Claimant testified that while she took the restriction to FedEx,

she was not accommodated. However, she stated that she tried to do her job the best that she could. Her arm still hurt at the time of her transfer to Arkansas in December 2003.

Once in Arkansas, Claimant was given the job title of p.C. technician, which she still holds. Her duties include the repairing of equipment such as printers, personal computers, and lasers. In addition, she types reports. Her duties depend on what needs to be done that day. As an example, Claimant stated that she recently has been working to replace old printers with new ones. The units weigh between 60 and 85 pounds.

Claimant testified that throughout her tenure at FedEx in Arkansas, her left arm has hurt. However, she has worked despite the pain and has not refused any work; but she has compensated by using her right arm more. However, her right arm began to hurt so badly that she reported it. Claimant stated that this was when she began work on a special project involving new scan guns around February 2006. She testified that "sometimes there were like 200, 400, 500 scan guns that I need to finish in the day." Later in her testimony, she estimated that this entailed 25 to 40 scanners per hour in an eight-hour day. She described her duties as having to remove the two to three-pound gun from a big box, then take it from its individual box, remove a screw from the gun, install a cable in it, and scan it on a piece of paper in order to program it and make it ready for use.

She stated that she experienced "[v]ery sharp pain" in her right arm that hurt regardless of what job duties she was performing. She saw Dr. Bishop, who referred her to Dr. Powell. Dr. Powell recommended physical therapy, which she stated she underwent for nine months to a year. He gave her restrictions, which she communicated to FedEx. She testified that she was told that she could not come back to work until she was at 100 percent. She stated that she continued to communicate to FedEx when her restrictions

were modified or updated, and that Dr. Powell released her with restrictions prior to her January 2007 return. But Claimant testified that FedEx would not allow her to return as long as she had restrictions.

Claimant stated that her workers' compensation benefits were terminated in July 2006. However, despite the lack of coverage, she continued to seek treatment for her right arm. She testified that she returned to work in January 2007 because "I wanted to go back to work." As for her condition at that time, she stated, "I, I think that I was feeling a little better." Claimant testified that Dr. Powell has indicated that future medical treatment is necessary, and that while he has not yet given her an impairment rating, he has discussed the matter.

She testified that she is still in pain, but that she is doing her best, loves her job, and wishes to retire from FedEx. She stated that she gets her job done and has never been disciplined at work. Claimant has tried to seek less physical jobs at FedEx, without success. She testified that she believes she overused her right arm at work, and can think of nothing else that would have caused the nerve impingement.

On cross-examination, she testified that her left arm injury in California was caused by her department being short on staff. She was having to handle whatever jobs came up. She described having to cradle the telephone receiver between her chin and her left shoulder while typing and performing other functions. This was the reason she stated that her left arm was injured in spite of the fact that she is right-handed. She testified that she has tendinitis in the left arm, and underwent x-rays and an MRI to diagnose it. Claimant believes that her right arm has the same condition. She says her entire right arm is in "a

lot of pain” that occurs “when I’m doing a lot of lifting, when I’m typing, and when I do a lot of movement.”

Claimant testified that she does not have right carpal tunnel syndrome, and that the MRI of her elbow was normal as well. She has had two MRI tests performed on her shoulder as well. Claimant did not recall being treated for arthritis in the shoulder. She admitted that she was released from treatment of her left arm with no impairment rating.

She described her work station at FedEx as a large table in a big room with a lot of people. She works at that station on “trouble tickets,” where equipment is repaired or replaced, labeled, and shipped. The type of equipment she works on varies from scanners to printers, personal computers, monitors, keyboards, etc. She has the tools to work on this equipment.

When asked by Respondents’ counsel to describe what feature of her job requires rapid and repetitive motion, Claimant testified:

Typing. I do a lot of typing. Also, all the time that we receive the trouble tickets, we have to send e-mail to the user telling them that we received the equipment and we have to write down the tracking number. Then, we have to update the trouble tickets. And like I say, we have a specific request of, let’s say stand down printers or p.c.’s, we have to keeping doing that the same day.

Claimant admitted following a demonstration that her shoulder does not move while she is typing. She stated, “Well, but sometimes at the point that when you are doing a lot of typing, maybe the shoulder gets tired. I don’t know what I can say, but I have pain.”

With regard to the scanner project, Claimant testified that she at one time kept track of the number of units she worked on in a day, but no longer had that information. She stated that the manager would have the information. She stated that David Green was

new to the position at the time of the project, that he was taking over for the previous manager and was not in that position during much of the project. Claimant disputed the accuracy of a record that showed she only worked on a total of 134 scanners, which she described as hand-held devices used to scan a bar code. She stated that the scanners had to be repaired one at a time, that the number she worked on varied with the number received in a given day, and that FedEx has “thousands” of them.

She again described the process of removing the scanner from the large box and its own box, taking a screw out of the scanner, removing the back off the scanner, scanning a sheet to program the chip inside of it, and then putting the scanner back together and placing it back inside the box. Claimant described the rapid and repetitive motion involved as “[l]ifting up the box, taking it out, and trying to finish it, everything up.” She stated that the boxes involved and sometimes higher than her shoulder, but that she works on them at a level a “little bit higher” than waist or table level.

At the time of the scanner project, Claimant was also working on something else. While she could not recall the nature of the job at the hearing, she testified that she could not recall anything that she worked on as much as the scanners. At the time of the project, according to Claimant, her left arm was in pain. She stated that her left arm still hurts today.

She testified that she was fully released with no restrictions. Claimant stated that her pain is “[a] little bit different now” with no restrictions than it was when she was under restrictions.

Claimant testified that while she was off work, FedEx paid her until July 21, 2006. And then she did not get anything, including disability income of any type or unemployment

compensation, until she returned to work in January 2007. During that period, she also did not receive compensation from the claim on her left arm. She testified that she did not work anywhere during that period because she was in treatment and wanted to get better in order to return to her job. But she admitted that she still has the same problem and is back at work.

She stated that Dr. Powell treated both her right and left arms, and that she received physical therapy on both. However, she stated that the treatment has been mostly for the right arm. Claimant testified that her right arm is worse than her left. She stated that her left arm is still covered by her California claim; but she has to have prior authorization for treatment of it. She did not recall at the hearing whether she was on light duty due to her left arm when she came to Arkansas from California.

On re-direct, Claimant testified that she worked on the scan gun project for a "couple of weeks," and that she worked on 200 to 400 guns per day. These were new guns for all of the distribution centers that had to be configured to comply with the FedEx system. At the time, she was relying more on her right arm because her left arm still hurt. She testified that she has pain in her right hand, wrist and arm. She demonstrated that the pain goes from her shoulder, through her arm and down to her wrist. Claimant stated that she has a lot of pain in her right wrist, and that the pain radiates all the way down to the fingers on her right hand.

Under re-cross examination, Claimant testified that the scan gun project took place around February and March of 2006. She was not sure how long it took her to complete one scanner, but estimated between five and ten minutes. She testified that she was under a quota to complete between 200 and 400 scanners per day, but was unable to

explain how her numbers were accurate when such a quota could not possibly be met in an eight-hour workday if each unit took that long to program.

When questioned by me, Claimant testified that her work station was over three and one-half feet tall. Sometimes she sat at the station, and sometimes stood. She used a stool that was adjustable for height. She described the boxes that contained the scanners as being untaped. The scanners were in a plastic bag. A screw had to be removed from the scanner in order to install a cable. She described the process of holding the scanner with her left hand and using a screwdriver with her right hand. Claimant used both manual and electric screwdrivers. After scanning the test sheet on the wall to test and activate the unit, Claimant placed it back in the plastic bag and returned it to the box.

David Green. Called by Respondents, Green testified as follows:

He stated that he has worked at FedEx for 11 years. He is currently the Senior Manager of I.T., a position he has held for a little over one year. This is the department where Claimant works. Green testified that he is familiar with what Claimant does and what occurs in the department on a daily basis. He was Senior Manager in February and March of 2006.

Green stated that Claimant holds the title of P.C. Technician; she is one of eight personnel who have that position. They handle the configuration and repair of all I.T. technology equipment for FedEx Freight. Equipment from all over the country is sent to them. Green stated that there are multiple bench areas throughout the facility for the technicians.

He testified that FedEx Freight uses a "paragran" (phonetically spelled), which is a ticketing system. This system tracks two things. The first are "trouble tickets," which are

things that are sent in for repair. The second are requests for new I.T. equipment. In addition, there is an data base that keeps up with the actual repair of equipment. There is a program that tracks what each technician does each day. Green identified Respondent's Exhibit 1 as a spreadsheet that "listed out all the different pieces of equipment that were assigned to [Claimant] from the dates of September 1st through the end of March, or March 23rd," when Claimant went on disability status. The exhibit showed that there is nearly a dozen different pieces of equipment that Claimant worked on. In addition to scan guns, which is a tethered device that is attached to a wall-mounted computer, there are Intermecs, which are hand-held devices used by FedEx Freight drivers. The two items are tracked separated on Respondents' Exhibit 1.

Green denied that Claimant was under a quota to finish so many pieces of equipment in a given period of time. While she was working on scan guns and Intermecs, she also had repairs. Green stated that each technician is given a wide variety of items on which to work on a daily basis, from "trouble tickets" to repairs and new I.T. equipment. The technicians do not sit in one place working on the same thing all of the time. There are a variety of activities.

From Respondents' Exhibit 1, Green testified that out of 66 working days, Claimant worked on 134 scan guns, 33 RIM devices 404 Intermec devices—all of which fall under the hand-held scanner category. Green testified that not only does the exhibit not reflect that Claimant was doing 200 to 400 scanners per day, but that it would be impossible to do 400 in a day and "very difficult" to do 200. Green testified that Claimant was describing the programming of a scan gun in her testimony—which the exhibit reflects she did 134 times. He described the process as follows:

Okay. Basically, with a scan gun device, it is, it's a box similar to this size (demonstrating). You take the gun out. It does have one Phillips screw that has to be removed to attach a, much like a phone cable, plugs into, or Ethernet cable for your computer. Plugs into the device. You reattach the screw. The screw is basically to keep the cord from pulling out. It's plugged into a PST port on the back of a wall mounted computer. And then, there's a, basically, a 8 ½ by 11 sheet of paper that's attached to the wall that has a series of bar codes that have, I think about 8 to 10, and you basically just scan each bar code. At that time, you take it apart, you take it out, put it back in the box, and it's ready for shipment.

Green stated that the only paperwork to be completed following this process is to put in the completed dates in the database, along with any notes and the item worked on. According to Respondents' Exhibit 1, the most scan guns Claimant ever completed in a single day was 21, on March 20, 2006. He stated that technicians are not rewarded for productivity. FedEx tries to stay away from giving a technician only one type of work to do. That is reflected on the exhibit; it shows that Claimant had a variety of projects each day.

On cross-examination, Green testified that while he is in the department all of the time, he did not work "hand in hand" with Claimant. He testified that during the period covered by Respondents' Exhibit 1, he was Claimant's direct supervisor. He stated that there have been occasions where they have worked with Claimant to try to get her technical ability on par with the other technicians. Green testified that the numbers on Respondents' Exhibit 1 are accurate. He agreed that the technicians are required to use their hands all day long when dealing with the equipment.

When questioned by me, Green testified that the scan project was wrapping up by the time he became Senior Manager. He stated that Respondents' Exhibit 1 only reflected the number of scan guns that Claimant completed—not what other technicians did. The 134 reflected on the record was not confined to the project, but was a combination of

“trouble tickets” and I.T. requisitions. He also testified that Claimant might have worked on scan guns with another technician and it not be not reflected in the numbers on the exhibit, if she were not the original technician assigned. He testified that such a practice was not common, however.

Records–Medical

Joint Exhibit 1. The medical records of Claimant that were introduced at the April 17, 2007 hearing and are part of Joint Exhibit 1 reflect the following:

On October 17, 2006, Cambridge Integrated Services Group, Inc., notified Claimant that a medical report dated July 15, 2006 from Qualified Medical Evaluator Dr. Stephen T. Imrie indicates that she has recovered from her injury with no permanent disability. However, the letter indicates that Claimant is entitled to future medical treatment.

A prescription from Dr. Lisa Bishop on October 13, 2005 reflects that she gave Claimant a ten-pound lifting restriction, and noted that she would benefit from a job that did not require any lifting.

On March 24, 2006, Claimant presented to Dr. Shannon Brownfield with pain in her right arm from the shoulder to the hand, with the worst pain being in the wrist area. In addition, she presented with tingling in the hand in the past (but none at the time of examination) and fingers that spars the fifth finger, along with weakness. She also complained of right neck pain into the post shoulder. Dr. Brownfield noted “swelling and tenderness at medial wrist and pain at anterior shoulder over biceps tendon.” She suspected tendinitis or carpal tunnel syndrome as the cause. That day, the doctor took Claimant off of work for one week and prescribed Celebrex.

When Claimant returned to Dr. Brownfield on March 31, 2006, she stated that the pain was no better with the exception of some improvement at the shoulder level. She presented with pain with minimal palpation/manipulation of the hand and wrist, and also pain in the biceps and shoulder. Dr. Brownfield noted that “[h]er pain is out of proportion to the exam and hx [history]—I am not sure as to etiology.” X-rays were ordered of her wrist and shoulder. The doctor pulled her off of work and prescribed no lifting until the evaluation on April 12, 2006.

Joint Exhibit 1 contains a report from Dr. Mark Powell dated April 12, 2006:

Azize Nosthas is a 45 y/o right hand dominant computer technician for Fed Ex who presents today with right shoulder pain and right wrist pain. He [*sic*-- Claimant is actually female] complains of pain for the past 2 months. He states that he does a lot of repetitive work and lifting at his place of employment. He denies any specific injury to his shoulder and wrist. He complains of decreased range of motion in his right shoulder. He states he has trouble with activities of daily living. He states the pain wakes him up at night. He denies any catching in his right shoulder. He complains of pain throughout his right wrist. He complains of occasional numbness and tingling. He complains of pain in his right forearm. He states his forearm is tender on palpation. He is wearing a wrist splint. He saw Dr. Brownfield initially and he has been off work since March 24, 2006.

Dr. Powell noted that the x-rays of Claimant’s right wrist and shoulder were “within normal limits.” He found the Neer, Hawkin’s and cross body impingement tests to be positive. In addition, he found the Tinel’s test at the carpal tunnel to be positive and the Phalen’s and compression tests to be negative. He assessed Claimant as having right shoulder impingement and right wrist tendinitis, and recommended an MRI of the shoulder and cervical spine, along with a nerve conduction study of the right upper extremity. He kept her off work until further notice.

On April 26, 2006, Dr. Christopher Arnold stated that the MRI of Claimant's right shoulder showed "AC arthropathy and impingement of the underlying cuff," and assessed her as having right shoulder pain secondary to AC arthropathy and right wrist pain secondary to probable tendinitis. He could not rule out carpal tunnel syndrome.

In a note dated June 7, 2006, Dr. Powell noted that Claimant is attending therapy and states that her arm is a little less painful. She remains off work. He gave the assessment of right shoulder pain, right shoulder impingement and right acromioclavicular joint osteoarthritis, along with right wrist tendinitis. He permitted her to return to work with a five-pound lifting restriction and no repetitive work with the right upper extremity.

On July 26, 2006, Claimant returned to Dr. Powell. He noted that she had been attending therapy three times per week and was feeling better. He found her to have positive signs of impingement, and also assessed her as having the same conditions as she had on June 7. He instructed her to continue with right shoulder and wrist therapy, and released her to work with no restrictions.

Claimant had a follow-up visit with Dr. Powell on November 8, 2006. She presented with worsening pain in the right shoulder, forearm and wrist. She stopped taking physical therapy and had begun a home exercise program. Following examination, he assessed her as having right shoulder impingement, right shoulder AC joint osteoarthritis, and right wrist tendinitis. The notes for that visit also reference an examination of her left shoulder—she told the doctor that she was transferred from California before she could complete therapy on that shoulder. He took her off work until further notice and directed her to return to therapy for her right shoulder and wrist.

Her physical therapy record for November 13, 2006, notes that her April 25, 2006 MRI report “reveals arthritic changes in the ACJ with down going osteophyte which does impinge on the underling RC of the R shoulder. No definite tears identified.” The record notes that Claimant’s “job entails her working on computers in Information Technology and must do a significant amount of repetitive lifting with her arms.”

On December 13, 2006, Claimant saw Dr. Powell regarding pain in her left shoulder, arm and wrist. He noted that the x-rays of her left shoulder, forearm and wrist did not show any abnormalities, but assessed her as having left shoulder impingement, left elbow lateral epicondylitis and left forearm tendinitis. He recommended MRIs of the left shoulder and forearm, and removed her from work until further notice.

Dr. Powell examined Claimant’s right shoulder and wrist on January 31, 2007, and found no changes. He released her to work regular duty on February 5, 2007, but directed that she continue to received therapy for the shoulder and wrist. Also on January 31, he examined Claimant’s left shoulder, forearm and wrist. Dr. Powell noted that the MRI of the left shoulder did not substantiate any internal derangement of the left glenohumeral articulation. The MRI of the left forearm found no evidence of muscular edema, tendinous abnormality or osseous abnormality. He assessed her as having left shoulder impingement, left forearm overuse tendinitis and left wrist overuse tendinitis, and recommended physical therapy for her left shoulder, forearm and wrist. Again, he directed that she could return to regular duty on February 5.

On January 31, 2007, Dr. Powell wrote that it was his medical opinion that Claimant has sustained an injury to her right shoulder and wrist in the forms of right shoulder impingement, right shoulder AC joint osteoarthritis, and right wrist overuse tendinitis. He

opined that these injuries were work-related, and that these work-related injuries were the major cause of Claimant's need for medical treatment. He cited the following as the objective findings supporting his medical opinion: "tender over [right] ACJ; + Impingement test MRI confirmation of ACJ arthritis Clinical findings suggestive of overuse tendinitis." He stated that it was his medical opinion, to a reasonable degree of medical certainty, that the injuries were work-related; were the cause of Claimant's need for medical treatment; and were supported by objective findings.

Dr. Powell on March 13, 2007 found no changes in Claimant's right upper extremity since his last examination and assessed her as having reaching maximum medical improvement. He stated she could discontinue therapy, and noted that she needed to have an impairment rating and functional capacity evaluation. Dr. Powell released Claimant to return to work in keeping with the restrictions in the FCE once it has been completed.

ADJUDICATION

A. Compensability

1. Gradual onset injury.

Claimant has first contended that she incurred compensable gradual onset injuries to her right shoulder, wrist and arm as a result of rapid repetitive motion.

Arkansas Code Annotated § 11-9-102(4)(A)(ii) & (a) (Repl. 2002), which the I find applies to the analysis of all of Claimant's alleged injuries, defines "compensable injury":

(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 and is identifiable by time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion.

Under the gradual onset exception to the specific incident requirement, the claimant must establish a causal connection between his or her injury and his employment by medical evidence supported by objective findings, and must also establish that his or her injury was the major cause of his disability or treatment. A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). "Objective findings" are those findings which cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16). The element "arising out of . . . [the] employment" relates to the causal connection between the claimant's injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant's employment "when a causal connection between work conditions and the injury is apparent to the rational mind." *Id.* If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

After review of the evidence presented in this case, I find that Claimant has not proven by a preponderance of the evidence that her injuries at issue were caused by rapid and repetitive motion. Therefore, apart from her ability to meet her burden on the other elements of this issue or the burden on the other issues, her claim must fail at the outset.

In *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1998), the Arkansas Supreme Court held that there is a two-part test for determining whether an injury is caused by rapid repetitive motion: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. If the first element is not met, the second is not reached. *Id.*;

Westside High School v. Patterson, 79 Ark. App. 281, 86 S.W.3d 412 (2002). Moreover, “even repetitive tasks and rapid work, standing alone, do not satisfy the definition. The repetitive tasks must be completed rapidly.” *Malone, supra*.

In seeking to meet her burden of proof, Claimant testified that around February and March of 2006, she worked on a project to configure and program new scan guns for use at Respondent FedEx Freight. She had to perform the same steps with each gun: (1) remove the box containing the gun from the large box; (2) remove the gun from its individual box; (3) remove the plastic from the gun; (4) while holding the gun in her left hand, use a screwdriver to remove a screw from the gun; (5) insert a cable into the gun; (6) program the gun by scanning a piece of paper mounted on a wall; (7) return the gun to its plastic packaging; and (8) place the gun back into the box. Her testimony regarding her output varied, to say the least. She stated more than once that she performed these tasks on 200 to 400 guns per day. As Respondents’ attorney correctly pointed out at the hearing, in an eight-hour day the above numbers would require completing a gun every 1.2 to 2.4 minutes.

On the other hand, David Green, Claimant’s supervisor and Senior Manager in her department, testified that it would be impossible to complete 400 units in a day, and “very difficult” to do 200. Moreover, according to the database that tracked technician activity, an excerpt of which was admitted as Respondents’ Exhibit 1, Claimant never even came close to this type of output. On her most productive day, March 20, 2006, the spreadsheet reflects that Claimant completed work on 60 units total—and this includes devices other than scan guns. Green stated that it was possible that Claimant did not receive credit on the spreadsheet for helping another technician with guns to which she was not assigned.

But he testified that this was not a common practice. Hence, this cannot account for the huge discrepancy between Claimant's testimony and Respondents' Exhibit 1.

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.* Based upon my observation of Claimant and Green, and following consideration of Respondents' Exhibit 1, I do not credit Claimant's testimony on this point. She clearly exaggerated at trial regarding the number of units she completed each day.

In *Baysinger v. Air Systems, Inc.*, 55 Ark. App. 174, 934 S.W.2d 230 (1996), the Arkansas Court of Appeals held that multiple tasks could be considered together to determine compensability. Hence, even if all of the steps necessary to program a scanner or similar device are considered together, the fact remains that on March 20, 2006, which was by far her most productive, her completion of 60 units means that she averaged one every eight minutes in that particular eight-hour day. Most days she had far less output—the average day, according to the spreadsheet, saw her complete 11.46 units, or one every 41 to 42 minutes. As Green testified, Claimant did not have to meet a quota of scanners or other units each day. Under these facts, Claimant has not established that her job was either rapid or repetitive in nature. *Cf. Lay v. United Parcel Service*, 58 Ark. App. 35, 944 S.W.2d 867 (1997)(activities of driver who made deliveries every eight minutes involving several different actions held not rapid repetitive motion).

As quoted above, when Claimant was asked what feature of her job required rapid and repetitive motion, she answered, "I do a lot of typing." However, Claimant did not quantify this activity in any way; *i.e.*, she did not explain how much typing she did and how often. In short, the record is devoid of evidence showing that this activity was rapid and repetitive.

Because she has clearly failed to meet this critical element of compensability, there is no need to analyze whether she has met the other elements of the issue.

2. Compensable Consequence

Claimant has also contended in the alternative that her right wrist, shoulder and arm injuries were caused by her overcompensation due to her previous left arm injury that she incurred in California. In other words, she appears to be arguing that the injuries at issue were a compensable consequence of her California injuries. As Joint Exhibit 1 reflects, she had a previous injury to both of her upper extremities that was apparently found to be compensable in that the documentation reflects that she was deemed entitled to future medical treatment. Claimant, however, has argued that only her left arm was involved under this claim. Regardless, because of the California claim, I find that it is very questionable whether the Commission could exercise jurisdiction over this aspect of Claimant's claim. See *Biddle v. Smith & Campbell, Inc.*, 28 Ark. App. 46, 773 S.W.2d 840 (1989) ("The determination as to whether an election of remedies has been made depends upon whether the claimant actively initiated the proceedings or knowingly received benefits pursuant to the laws of another state"). Because of the paucity of evidence in the record regarding whether she "actively initiated" a workers' compensation proceeding in California or "knowingly received benefits" thereby, I cannot make a finding here regarding jurisdiction

and thus decline to address this contention. See *Houston Contracting Company v. Young*, 267 Ark. 322, 590 S.W.2d 653 (1979).

B. Balance of issues

Because of the above finding regarding the threshold issue of compensability, the other issues litigated at the hearing— whether Claimant is entitled to reasonable and necessary medical care, temporary total disability and a controverted attorney’s fee—are moot and will not be addressed.

CONCLUSION

In proving that her injuries are compensable, Claimant bears the burden of proving by a preponderance of the evidence that, *inter alia*, her job involved rapid and repetitive motion. She has not done this. Therefore, her claims must be, and hereby are, denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge