

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F604159

DAVID H. WAGGONER

CLAIMANT

STUART'S BRAKE SHOP

RESPONDENT EMPLOYER

MID-CENTURY INSURANCE CO.

RESPONDENT CARRIER

ORDER AND OPINION FILED APRIL 12, 2007

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents did not appear.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on February 21, 2007. A Prehearing Questionnaire Notice was sent to the parties on October 3, 2006, even though the claimant had made his filing. Twenty days were provided for responses. Respondents did not respond and on November 16, 2006, a default order was filed allowing respondents until November 30, 2006, to respond or risk the opportunity to present evidence. Mark Hundley from Mid-Century Insurance Company signed for the certified order on November 21, 2006. After allowing extra time and not having any response from respondents, a final order was filed on December 14, 2006, precluding respondents from offering any defenses. That certified order was signed by someone at Mid-Century Insurance Company on December 19, 2006.

A prehearing order was filed on January 24, 2007, setting the matter for the hearing. Since Mid-Century Insurance Company has not participated at any stage in the claim process, there are no stipulations.

The claimant contends he sustained a compensable injury resulting from continuous use of his hands. The claimant contends his injury is gradual onset. The claimant requests medical benefits and temporary total disability benefits from March 31, 2006 to April 15, 2006, and from August 1, 2006, until his return to work on February 11, 2007, as well as attorney's fees. All other issues are reserved.

Respondents did not attend the hearing and were precluded to present evidence to defend the claim. Mark Hundley from Mid-Century Insurance signed the certified mail notice on January 27, 2007, for the hearing setting notice.

ISSUES TO LITIGATE

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Attorney's fees.

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. There was an employer-employee relationship at all relevant times.
2. The claimant has proven by a preponderance of the evidence that he sustained a compensable gradual onset injury with working for the respondent employer.
3. Respondents are responsible for all reasonable and necessary medical benefits.
4. The claimant has proven by a preponderance of the evidence that he remained in his healing period and did not return to work from March 31, 2006 to April 15, 2006 and from August 1, 2006 until February 11, 2007.
5. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.
6. Respondents are ordered to pay the court reporter's bill within 30 days of receipt of the bill and this Order.

DISCUSSION

The claimant, 45 years old, began his employment with the respondent employer on December 15, 1990, where he was a mechanic or brake specialist. In January 2005, the claimant was making \$24,500 per year, working from 7:30 to 5:00. The claimant worked on automobiles; performed brake jobs; worked on CV axles; and

operated hand tools and impact wrenches. Most of the jobs required the use of vibrating tools with the impact wrench moving back and forth and other vibrating tools moving right to left.

According to the claimant, his right hand started hurting in early 2005 and he reported the problem to Larry Levy. Eventually, Mr. Levy sent the claimant to Dr. Marcia Hixson, a hand specialist. The claimant's employer paid him his full salary while he was off work until March 2006. The claimant got a bank loan co-signed by his employer to pay his medical bills. The claimant was not paid his salary from March 31, 2006 through April 15, 2006, and from August 1, 2006 through February 11, 2007, while he remained unable to work and he was off work.

The claimant described his job as hand intensive, working with vibrating tools, to include impact wrenches, air chisels and air hammers. Out of an eight-hour day, the claimant stated he would be using one of the vibrating tools at least four or five hours. The claimant's right hand is worse and the claimant stated in addition to using vibrating tools he would also use the palm of his hand to hit objects he was working on. At the time of the hearing, the claimant had begun working for another employer in a lighter type job where he changed oil, performed lube jobs and did tire work. While he had not worked there long, he was able to handle the work.

The claimant initially contended he had sustained a compensable gradual onset injury to his hands but also contended, alternatively, a specific incident injury. When a gradual onset injury as a result of rapid repetitive motion is contended, the requirements of Ark. Code Ann. §11-9-102(4)(A)(ii) (Supp. 2005) are controlling and the following requirements must be satisfied:

(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 caused internal or external physical harm to the body which required medical services or resulted in disability or death;

(3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;

(4) proof by a preponderance of the evidence that the injury was caused by rapid repetitive motion;

(5) proof by a preponderance of the evidence that the injury was the major cause of the disability or need for treatment.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, he fails to establish the compensability of the claim and compensation must be denied. See, *Jerry Reed v. ConAgra Frozen Foods*, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744).

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right hand as the result of a gradual onset injury. The claimant was a credible witness and provided a credible account of a 16-year employment history of being a mechanic and brake specialist for the employer where he began having hand problems in 2005. The claimant underwent both a repair of the thrombosed ulnar artery in the right hand and a release of the right ulnar nerve at Guyon's canal. Dr. Marcia Hixson, the claimant's treating physician, has opined that the most often cause of the claimant's condition is the result of repetitive force striking the palm of the hand, such as hitting solid objects using the hand as a hammer. Dr. Hixson, in her February 6, 2007, report, opined, in part:

In my opinion, within in [sic] a reasonable degree of medical certainty, that the major cause of the arterial problems for which I treated Mr. Waggoner are related to the repetitive pounding of his hand on pieces of equipment. (Cl. Exh. No. 2.)

In analyzing whether an injury is caused by rapid repetitive motion, the standard as set out in *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1988), is a two-pronged test: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. *Westside High Sch. v. Patterson*, 79 Ark. App. 281, 86 S.W.3d 412 (2002). Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition; the repetitive tasks must be completed rapidly. *Id.* The issue of whether an injury meets the rapid repetitive motion requirement will ordinarily be a question of fact, not one of law; however, although a question of fact, the Commission must apply the appropriate law to the evidence to reach a conclusion. *Id.*

The claimant described his job as hand intensive, using vibrating tools daily from four to five hours each day. The constant activity of using vibrating tools would satisfy the rapid repetitive requirement for a gradual onset injury. The medical documentation provides the claimant did not have an ulnar pulse in his right hand and was diagnosed with thrombosis (blood clot) of the right ulnar artery in the wrist.

While there is no requirement that a claimant show his work to be the major cause of his disability or need for treatment, the claimant is required to show that his injury was the major cause of his disability or need for treatment. *Medlin v. Wal-Mart Stores, Inc.*, 64 Ark. App. 17, 977 S.W.2d 239 (1998); Ark. Code Ann. §11-9-

102(4)(E)(ii). Nonetheless, the claimant must still prove a causal connection between his employment and the injury. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). I find the claimant has satisfied the major cause requirement for a gradual onset injury.

Respondents are responsible for the reasonable and necessary medical treatment the claimant has pursued for his right hand injury. See, Ark. Code Ann. §11-9-508.

The claimant next contends he is entitled to temporary total disability benefits from March 31, 2006 to April 15, 2006 and from August 1, 2006, until his return to work on February 11, 2007. The claimant sustained a scheduled hand injury. The claimant is, therefore, entitled to temporary total disability compensation while he is within his healing period and has not returned to work. See, Ark. Code Ann. §11-9-521(a)(Supp. 1999); *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

The claimant has proven by a preponderance of the evidence that he remained in his healing period from March 31, 2006 through April 15, 2006 and again from August 1, 2006, until his return to work on February 11, 2007. The claimant underwent his right hand surgery on March 31, 2006 and was released to return to work on April 15, 2006, with the requirement that he limit use of the right hand. The medical records and the claimant's testimony indicate the claimant was off work again from August 1, 2006, until he returned to a job on February 11, 2007, that was lighter work. The medical records indicate he had a release of the right ulnar nerve at Guyon's Canal on September 29, 2006 and he remained in his healing period. The claimant provided credible testimony that he returned to work on February 11, 2007 and continued to work

at the time of the hearing.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable gradual onset injury with working for the respondent employer.

Respondents are responsible for all reasonable and necessary medical benefits. The claimant has proven by a preponderance of the evidence that he remained in his healing period and did not return to work from March 31, 2006 to April 15, 2006 and from August 1, 2006 until February 11, 2007.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

Respondents are ordered to pay the court reporter's bill within 30 days of receipt of the bill and this Order.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**