

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F702724

LARRY D. BUTLER, EMPLOYEE	CLAIMANT
EVERGREEN PACKAGING, INC., EMPLOYER	RESPONDENT NO. 1
ACE AMERICAN INSURANCE COMPANY/ GALLAGHER BASSETT SERVICES (TPA), INSURANCE CARRIER	RESPONDENT NO. 1
INTERNATIONAL PAPER COMPANY, SELF-INSURED EMPLOYER	RESPONDENT NO. 2
SEDGWICK CLAIMS MANAGEMENT SERVICES (TPA), INSURANCE CARRIER	RESPONDENT NO. 2

OPINION FILED MAY 29, 2008

Hearing before Administrative Law Judge Barbara W. Webb on February 29, 2007, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. Thomas Mickel, Attorney at Law, Conway, Arkansas.

Respondents No. 1 were represented by Mr. William Frye, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 were represented by Mr. Michael Dennis, Attorney at Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on February 29, 2008, before Administrative Law Judge Barbara W. Webb. A Pre-hearing Order was entered in this case on January 15, 2008. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the hearing. A copy of the Pre-hearing Order was made Commission Exhibit No. 1 to

the hearing record. The following stipulations as submitted by the parties and the Pre-hearing Order as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed between claimant and respondent No. 1 on or about February 15, 2007.
3. The employer/employee/carrier relationship existed between claimant and respondent No. 2 until January 31, 2007.
4. The claimant's earnings were sufficient to entitle him to the maximum compensation rate.
5. Respondents No. 1 and 2 have controverted this claim in its entirety.

By agreement of the parties, the issues to be adjudicated are as follows:

1. Compensability of claimant's alleged bilateral carpal tunnel syndrome.
2. Claimant's entitlement to medical benefits.
3. Controversion and attorney's fees.
4. In the alternative, the claimant would assert apportionment.
5. All other issues are reserved, including claimant's entitlement to temporary total disability benefits.

_____The record consists of a one volume transcript of the February 29, 2008, hearing consisting of the testimony of the claimant, Larry Butler, James Parsons, and Steve Badamo, and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Claimant's Exhibit 1 (medical reports with index);

and Respondents' No. 2 Exhibit 1 (DVD). In addition, the post-hearing letter brief of claimant dated March 14, 2008, and the post-hearing letter brief of Respondents' No. 1 dated March 14, 2008, and the post-hearing letter brief of Respondents' No. 2 dated March 13, 2008, have been blue-backed and will be made part of the record of this case.

FACTUAL BACKGROUND

The claimant is fifty-one (51) years of age. He completed the twelfth grade. He began working for International Paper on July 19, 1976. Butler has worked continuously as a machine operator for International Paper and the successor company, Evergreen. When the company changed from International Paper to Evergreen on January 31, 2007, his job remained the same. His job duties included running heavy equipment in the wood yard unloading log trucks and grinding up the wood to make chips. The large machines consist of four stations and are stationary, consisting of a crane, big loaders, a slasher saw, and the chipper. The machines are operated by joysticks or buttons. Butler testified that when he wasn't working on one of the four stations, he was the ground man and required to do whatever needs to be done. He explained that he was usually on a machine, a front-end loader, a bobcat, or operating a haul truck. Butler testified that he had generally been performing the same job duties for approximately twenty years.

Butler testified that he began having problems in his hands when he was running the crane in late 2006 or early 2007. He asked his supervisor, James Parsons, to take him out of the crane earlier due to problems with his hands. Due

to problems with his neck, he underwent an MRI of the cervical spine in January of 2007 and on January 31, 2007, had a needle test done on his arms. He testified that he had a real sharp pain in his hand, numbness and tingling. He requested medical treatment on February 13, 2007, because his hands were hurting. He was seen by the company doctor on February 15, 2007. He sought treatment with Dr. Winston and was referred to Dr. Slater. Dr. Slater initially treated him with shots which did not improve his symptoms. He ultimately underwent surgery on both hands. He had surgery on the left hand on October 1, 2007, and on the right hand on November 26, 2007. He was off work from September 30, 2007 until February 4, 2008. On February 4, 2008, Butler tried to return to work but was unable to work due to pain and swelling in his hands.

Butler testified that he had a broken ankle in the 80's, but that he had no prior accidents or problems. He testified that he does not use his hands vigorously outside of work.

He testified that he had continued to receive his whole salary while he was off work. His medical bills were paid by his group health insurance except for the deductibles. He underwent a nerve conduction study by Dr. Hussain on January 31, 2007 in the afternoon. He testified that he had reported that his hands had been hurting around February 13, 2007, but he had put it off as long he could.

On cross-examination, Butler explained that the jobs were assigned daily by seniority. He testified that he used his hands regardless of which station he was

assigned to work. He explained that he used his whole hand and wrist when using the joysticks and not one finger and a thumb as depicted in the DVD.

James Parsons testified for Evergreen Packaging, Inc. ("Evergreen"). He testified that it was known as the paper mill. He testified that he worked for International Paper for thirty years and after January 31, 2007, for Evergreen. He has worked as the chip mill manager since 1997. He was the claimant's supervisor for a period of time. He testified that he had performed and was familiar with all of the jobs depicted on the DVD. He explained that some of the jobs required the use of the joysticks but there were times when the workers were watching the wood and not having to straighten or feed the system or at times when the machines are not running.

He testified that he recalled Butler coming to him in the latter part of 2006 and complained that his hands hurt. He was taken off the crane. On February 13, Butler told him that his hands were still bothering him and went to see the mill doctor.

Steve Badamo testified for International Paper. He is employed as the Health and Safety Manager at the Pine Bluff paper mill. He also has oversight over claims management, including workers' compensation claims. He has worked at the mill for three years and nine months. He testified that he was not aware of any other operators of the machines asserting that they developed carpal tunnel syndrome from operating the machines. On cross examination, he testified that he would not be aware of any claims made prior to his being at the mill.

The medical records reflect that the claimant underwent an MRI of his cervical spine on January 22, 2007. The MRI revealed the following impression:

Severe right neural foraminal narrowing at the C4-5 level.
Moderate to severe left-sided neural foraminal narrowing at the C5-6 level
Associated mild-to-moderate central canal stenosis at C4-5 and moderate stenosis at C5-6 secondary to large disc-osteophyte complexes and associated cord deformity.

On January 31, 2007, Dr. Ironside performed a nerve conduction study on the claimant. The test revealed an "abnormal study suggesting left carpal tunnel syndrome, as well as cervical radiculopathy particularly in c5 innervated muscles." On February 23, 2007, the claimant was evaluated by Dr. Winston. The records reflect that he complained of pain in both hands with tingling. It was noted that the claimant has worked for 30 plus years with repetitive motion, using joy sticks at work. He was diagnosed with neuropathy in both hands with weakness in his hand grasp. Dr. Winston noted that he wanted to rule out bilateral carpal tunnel (work-related). He prescribed a medrol dose pack, bilateral wrist braces, and an ortho evaluation. On March 20, 2007, the claimant was evaluated by Dr. Slater. The report reflects that the claimant's chief complaint was bilateral hand pain for one month. The examination revealed no swelling of his hands and the Tinel's test over carpal tunnel was negative. He was diagnosed with bilateral hand arthralgia and referred for a bone scan. On March 23, 2007, the claimant underwent a three-phase bone scan of the hands and a whole body bone scan. The tests revealed: "1. No focal abnormal 3-phase hand activity. 2. Mild degenerative change in the hands/wrists. 3. Peripheral and spinal degenerative changes."

On April 10, 2007, Dr. Slater notified the claimant of the results of the bone scan showing mild degenerative changes in his hands and wrists. He noted that he wanted to review the nerve test and ordered him to use NSAIDS for his hand pain and possibly paraffin bath. Following review of the nerve test results, Dr. Slater noted that the claimant could have a double crush syndrome and recommended an epidural steroid injection for the carpal tunnel. He further noted "I would say that the carpal tunnel syndrome is related to his work, as he uses his hands all day long. His cervical nerve root impingement is probably not."

On August 8, 2007, the claimant returned for a follow-up evaluation with Dr. Slater. The physical examination revealed a negative Tinel's test bilaterally over the carpal tunnel and a negative Phelan's test with good grip strength. The doctor noted his impressions of right carpal tunnel syndrome, left carpal tunnel syndrome (confirmed with electrodiagnostic studies of January 31, 2007), and impingement cervical nerve root C4-5 and left C5-6 (confirmed by cervical MRI of January 22, 2007). He gave the claimant epidural injections in both carpal tunnels and noted that carpal tunnel release would be considered if he did not show improvement in three to four weeks.

A DVD depicting a typical day of operating the machines and a characterization of what was required of the operators was introduced. A review of the DVD reveals that the operators must use their hands to adjust the joy sticks which control the loading and unloading of the logs.

DISCUSSION

The claimant contends that he developed carpal tunnel syndrome from performing rapid, repetitive motion at his workplace as a machine operator over the last 30 or so years. The claimant was initially seen by his family physician and was referred to Dr. John Slater. Dr. Slater feels the claimant's bilateral carpal tunnel syndrome is related to the claimant's employment. The claimant contends that he meets the criteria to prove a compensable carpal tunnel syndrome injury by gradual onset and that either respondents, or both, should be held liable for payment of medical benefits and indemnity benefits, if found to be due, as well as attorney's fees.

Respondents No. 1, Evergreen and its insurance carrier, have controverted this claim in its entirety contending that the claimant cannot prove entitlement to benefits and that there are no objective measurable findings to support claimant's claim of bilateral carpal tunnel syndrome. Alternatively, respondents No. 1 contend that it is entitled to an offset under Ark. Code Ann. § 11-9-411 for any group health benefits paid. Alternatively, respondents No. 1 contend that it is not responsible for any medical benefits prior to January 31, 2007. Alternatively, respondents No. 1 contend that claimant's medical problems manifested themselves before respondents No. 1 took over the plant.

Respondents No. 2, International Paper and its third-party administrator, have controverted this claim in its entirety. Alternatively, respondents No. 2 assert the right to apportionment.

A. COMPENSABILITY

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). A claimant seeking workers' compensation benefits for a gradual-onset injury must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; (3) the injury was the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4) (A) (ii) and (E)(ii) (Repl. 2002). Because carpal tunnel syndrome is by definition a gradual onset injury, it is not necessary that the claimant prove that this injury was caused by rapid repetitive motion. See Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 969 S.W.2d 190 (1998).

After review of the evidence, I find that the claimant was a credible witness. The claimant testified that he first experienced pain and numbness in his hands in 2006 while performing employment services. The claimant explained that his work required him to operate large machinery with his hands, continuously, every day. The nature of the work activity as described by the claimant is clearly depicted in the DVD introduced into evidence in this case. After evaluation and treatment by Dr. Slater, the claimant underwent bilateral carpal tunnel release surgery on his left hand on October 1, 2007, and his right hand on November 26, 2007. He attempted to return to work on February 4, 2008, but was unable to work due to continued pain

and swelling in his hands for which he was continuing medical treatment at the time of the hearing. The claimant's testimony is supported by the credible medical evidence in this case, the positive nerve conduction study and the subsequent treatment by Dr. Slater. Dr. Slater opined that the carpal tunnel problems were work-related even though the claimant's neck problems were not. Moreover, there is no probative evidence, medical or otherwise, to suggest that the claimant's injuries resulted from any other cause or activity. Cottage Café, Inc. v. Collette, 94 Ark. App. 72, 226 S.W.3d 27 (2006).

Dr. Slater examined the claimant and relied on his experience and medical studies in his diagnosis and treatment. Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B)(Repl. 1996). The Arkansas Court of Appeals has held:

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

Freeman v. Con-Agra Frozen Foods, 70 Ark. App. 306, 27 S.W.3d 762 (2000), quoting Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

See Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997) and Aeroquip, Inc. v. Tilley, 59 Ark. App.163, 954 S.W.2d 305 (1997).

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

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

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

The law is clear that medical opinions based upon "could", "may", "possibly", and "can" lack the definitiveness required by Ark. Code Ann. §11-9-102(16)(B)(Supp.1999) which requires that medical opinions be stated within a reasonable degree of medical certainty. Scott v. Middleton Drywall, 2005 AWCC 22 (Feb. 9, 1005) ("probably did" found insufficient to prove causation); Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000) (overruling prior Court of Appeals decision and holding that "could" was insufficient to satisfy standard); Crudup v. Regal Ware, Inc. , 341 Ark. 804, 20 S.W.3d 760 (2001) ("theoretical possibility" did not meet standard of proof); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001) (to pass muster, opinion must be more than speculation and go beyond possibilities). In the instant case, Dr. Slater opined that the carpal tunnel syndrome was related to the claimant's work as he uses his hands all day, but that his cervical nerve root impingement is "probably not".

After review of the credible evidence, I find that the preponderance of the evidence demonstrates that claimant's carpal tunnel syndrome was work-related. I would note that Dr. Slater, the treating surgeon, did not attribute the claimant's bilateral carpal tunnel syndrome to non-work related "idiopathic" factors, but rather was caused by repetitive movement and was job-related. Based on the preponderance of the evidence, I find that the claimant sustained a compensable injury in the form of bilateral carpal tunnel syndrome. I find that the compensable injury caused physical harm to the claimant and arose out of and in the course of his employment. Moreover, the medical evidence is supported by objective findings, carpal tunnel syndrome shown by electro-diagnostic testing and subsequent surgical procedures. Finally, I find that the preponderance of the credible evidence proves that the compensable injury was the major cause of his disability and need for treatment.

The only remaining issue is to determine which respondent is liable for the payment of benefits. The Court of Appeals has held that the proper standard to determine when the gradual onset injury legally commenced is when the injury first became apparent to the claimant. Pina v. Wal-Mart Stores, Inc., 91 Ark. App. 77, ___ S.W.3d ___ (May 11, 2005); Cottage Café, Inc. v. Collette, 94 Ark. App. 72, 226 S.W.3d 27 (2006). In the instant case, Butler's carpal tunnel injuries became apparent at least by the date he reported his symptoms of pain and numbness to his supervisor in late 2006 and was provided accommodations by his employer. When he noted no improvement, he sought medical treatment. The nerve test resulting

in the diagnosis of carpal tunnel syndrome was conducted on January 31, 2007. Based on the preponderance of the evidence in this case, I find that the claimant's bilateral carpal tunnel syndrome clearly developed prior to Evergreen taking over the plant. I do not find there is evidence of subsequent compensable acceleration or aggravation of the carpal tunnel syndrome to support apportionment or any liability against Respondent No. 1, the successor employer, Evergreen. William F. Warren v. H & L Poultry Processing LLC, Full Workers' Compensation Commission, Opinion filed December 9, 2005 (F209440).

B. MEDICAL EXPENSES

Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Geo Specialty Chem., Inc. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Respondents are responsible only for medical services which are causally related to the compensable injury. Based on the preponderance of the credible evidence, I find that the medical services provided to the claimant in 2007, including the surgical release of the claimant's bilateral carpal tunnel syndrome, represent reasonably necessary medical services under Ark. Code Ann. § 11-9-508.

C. CONTROVERSION AND ATTORNEY'S FEES

In the instant case, the parties agreed to reserve the issues of temporary total benefits or other indemnity benefits. Moreover, the evidence showed that the

claimant has remained on a continuation of salary during his time off from work as a result of his surgery. Therefore, because this award is limited to compensability and medical determinations, I find that the claimant is not entitled to an award of attorney's fee at this time, in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2002).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed between claimant and respondent No. 1 on or about February 15, 2007.
3. The employer/employee/carrier relationship existed between claimant and respondent No. 2 until January 31, 2007.
4. The claimant's earnings were sufficient to entitle him to the maximum compensation rate.
5. Respondents No. 1 and 2 have controverted this claim in its entirety
6. The claimant has proven by a preponderance of the evidence that he suffered a compensable injury, i.e. bilateral carpal tunnel syndrome, while performing employment services for Respondent No. 2.
7. The claimant has not proven by a preponderance of the evidence that he suffered a compensable injury, i.e. bilateral carpal tunnel syndrome, while performing employment services for Respondent No. 1.

8. Claimant has proven by a preponderance of the evidence that the medical treatment by Dr. Winston and Dr. Slater in connection with the treatment , including the bilateral carpal tunnel release surgeries, was reasonable and necessary and related to his compensable work-related injury.
9. Respondents No. 2 are entitled to an offset under Ark. Code Ann. § 11-9-411 for any group health benefits paid.
10. Claimant is not entitled to an attorney's fee at this time since this award is for medical expenses only pursuant to Ark. Code Ann. § 11-9-715 (a)(1)(B).

AWARD

Respondents No. 2 are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge
