

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F705238

IVORY COLEMAN, EMPLOYEE

CLAIMANT

**ARMSTRONG WOOD PRODUCTS, INC.,
EMPLOYER**

RESPONDENT

**AMERICAN INTERNATIONAL SOUTH INS. CO./
SPECIALTY RISK SERVICES (TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JUNE 27, 2008

Hearing before Administrative Law Judge Barbara W. Webb on April 3, 2008, in Monticello, Drew County, Arkansas.

Claimant represented by Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Jefferson County, Arkansas.

Respondents were represented by Mr. Jarrod Russell, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on April 3, 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 on or about March 1, 2006.
3. The claimant earned an average weekly wage of \$509.00 which would, if found compensable, entitle her to a temporary total disability rate of \$339.00 and a permanent partial disability rate of \$254.00.
4. Due to her carpal tunnel surgeries, claimant was off work from March 29, 2007, until May 22, 2007, and from July 11, 2007, until September 24, 2007.
5. Respondents 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. If found compensable, claimant's entitlement to medical expenses, temporary total disability benefits and permanent partial disability benefits.
3. Notice.
4. Respondents alternatively assert a credit for any group health insurance and short term disability paid to claimant.
5. Controversion and attorney's fees.

_____The record consists of a one volume transcript of the April 3, 2008, hearing consisting of the testimony of the claimant, Kerwin Coleman, Marty Reep, Marilyn Rawls and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Commission's Exhibit No. 2 (Letter dated 3/5/08);

Commission's Exhibit No. 3 (Letter dated 3/25/08); Claimant's Exhibit 1 (medical reports with index); and Respondents' Exhibit 1 (medical records with index); Respondents' Exhibit 2 (non-medical records with index); and Joint Exhibit No. 1 (Deposition of Ivory Coleman dated May 5, 2008). In addition, the post-hearing letter of claimant dated April 15, 2008, and the post-hearing letter of respondents dated April 16, 2008, with exhibits, and the ALJ post-hearing letter dated April 18, 2008, have been blue-backed and will be made part of the record of this case.

FACTUAL BACKGROUND

The claimant is forty-four (44) years of age (b.d. 8/16/63). She is married and has two children. She graduated from Warren High School in 1981. She began working for Armstrong Wood Products ("Armstrong") as a "nester" in 2000 and has continued to work in the same job. In 2007, she received short-term disability in the amount of \$160.00 per pay period for six weeks for her carpal tunnel surgeries. Her job duties consisted of standing next to a conveyor belt and picking up wood pieces off the belt with her right hand and transferring it to her left hand and then placing the piece of wood in a box for shipping. The boards are about a half-inch thick, 2 ½ - 3 inches wide, and range from 1 foot to 10 feet in length. She estimated that she filled up about 400 boxes of wood in a day. She described the work as "fast work". She explained that there are five "nesters" on each side of the belt grabbing the different size pieces of wood. Once the box is full, the nester pushes it on a conveyor belt, gets another box from above the conveyor belt, and the full box moves to someone else. She normally worked a shift from 6:00 a.m. until 3:30 p.m.

on Monday through Friday, with two ten minute breaks and a thirty minute lunch. Marilyn Ross was her supervisor for seven years until she had her first carpal tunnel surgery. She was then moved to second shift which began around 3:00 p.m. and basically worked the same type schedule. She currently earns \$12.75 per hour on second shift and recalled earning approximately \$10.00 per hour on the first shift.

She testified in the Spring of 2006, she began to feel pain from the tips of her fingers all the way to her elbows with the right side being worse. She reported the problem to her supervisor who provided her a splint to wear. She wore it on her right hand for two months, but it did not provide her any relief. She explained that other nesters used the splints occasionally. She went to see her family physician, Dr. Purvis, with complaints of pain and numbness in both hands. He prescribed her pain medication. She reported to her supervisor that her problems were work-related and told her that she was going to see Dr. Purvis. She was treated with prescriptions, injections, and wore carpal braces on both hands. She continues to wear the braces at work. Dr. Purvis referred her to Dr. Clark. Dr. Vora ran some nerve tests. Dr. Clark performed carpal tunnel surgery in March of 2007. The surgery provided her relief. She was off work for six weeks and returned to work in September. Her right hand began hurting again in October. She returned to Dr. Purvis who recommended additional surgery.

She talked with her supervisor about the pain in her hands more than a dozen times. She did not fill out a report. She reported the problem to Marty Reep, the HR director at Armstrong on March 27, 2007. She met with her supervisor and

Reep on April 18, 2007, because he told her that he would have all the workers' comp paperwork ready. She testified that Reep and her supervisor told her that filling out workers' comp was just like filling out her insurance, but that filing insurance was better. He talked with her about workers' compensation but did not have her fill out any forms. She filed the claim for medical treatment with Dr. Purvis under her medical insurance at the suggestion of Reep, who told her that workers' comp would not help her and was a waste of her time. On May 1, 2007, she contacted Reep by telephone to ask him about her claim. He told her "no, because they denied it" and that her carpal tunnel was not job related.

She testified that she had no prior problems with her hands. She is not able to fix her hair and has to drive with her left hand.

The claimant's husband, Kerwin Coleman testified. He noticed her complaining a lot about her hands in the spring of 2006. She would stay up all night crying and could not open jars, or even a coke bottle. He was not aware of any other injuries or circumstances other than her work that has contributed to her wrist problems.

Marty Reep testified for the respondents. He has been the Environmental Health and Safety Manager at Armstrong Hardwood Floors since 1997. He has known the claimant since she was hired in 2000. He recalled a meeting with the claimant and Marilyn Rawls to discuss the difference between short-term disability and workers' comp. He testified that he told her that short-term disability was not available under a workers' comp claim. He explained that he did not discourage her

from filing a workers' comp claim but only explained the difference. He testified that he handles the workers' comp claims but does not deal with short-term disability. The meeting with the claimant occurred after her surgery. He also recalled a later telephone conversation with the claimant. He testified that she asked him if he had the proper paperwork to file a workers' comp claim and then hung up on him. He first learned that Coleman was asserting a workers' comp injury when he got a call from the insurance that she had filed a claim with the Workers' Compensation Commission.

On cross-examination, Reep testified that he could only recall one other employee who developed carpal tunnel back in the 90's. He explained that the nesters are boxing several different lengths of wood together and that the job did not require the nesters to be constantly grabbing and turning. He explained that there are four nesters lined up on each side and that they rotate with the one in the back not getting as much wood. He estimated the distance between the sander feeders and the nesters at 50 yards and explained that it takes seven minutes for the wood to go from the sander to the nesters. He explained that once he is notified of a workers' comp claim, he provides the paperwork and calls the claim in to a claims representative.

Marilyn Rawls testified that she has been employed by Armstrong for twelve years and as a supervisor in the day shift of the finish line for eight years. Prior to supervising, she worked as an hourly employee and did everything on the line. She has known the claimant for sixteen years and worked with her at an earlier job.

She explained that Armstrong has an expectation that a nester can fill a two-and-a-quarter-box within one-and-a-half to two minutes, and a three-and-a-quarter box in 50 seconds to 75 seconds because the wood is wider and fills the box faster. She estimated that a nester would probably average 40 boxes in an hour. She explained that they work eight hour shifts with two ten minute breaks and a thirty minute lunch. The workers are allowed to go to the bathroom or stop for a drink of water or blow their nose. She explained that the claimant was trained as a nester and a grader. Graders look at the wood for defects and mark it for second quality or cutting. She testified that Coleman worked as a grader for five months off and on during 2006 and 2007. She testified that Coleman had returned from her surgeries to work as a grader on the second shift.

Rawls recalled being in the front office when Coleman came in to talk to Reep after her surgery on her right hand. She recalled that Reep was explaining to Coleman that she could file workmen's comp but she couldn't file for workmen's comp and short-term disability and that she needed to decide what she wanted to do. She recalled that the claimant wanted time to talk to her husband. She testified that the claimant was not discouraged from filing workers' comp. Rawls testified that the claimant did not report a work-related injury to her.

On cross-examination, Rawls testified that she did not know Coleman on a personal basis and could not testify to her reputation for honesty. She testified that Coleman was a good worker but would sometimes show up a minute or two late. She agreed that the work as a nester was constant, but the time varied based on

the rotation which occurred every two hours since the work was slower on the back two tables.

The medical records reflect that on April 28, 2005, the claimant was treated by Dr. Purvis for De'Quervain's tenosynovitis with pain in the right wrist and with discomfort in the wrist joint. He prescribed a Medrol pack. On May 2, 2005, clinic notes reflect that the claimant's "D'Quervain's tenosynovitis is much improved with the Medrol". Although she continued to treat regularly with Dr. Purvis through 2005 and 2006 with other medical complaints, clinic notes reflect that the claimant made no complaints of pain in her hands until September 20, 2006. On January 29, 2007, the notes reflect that the claimant presented "with a history of again missing Follow-up appointments." Notes reflect that "she complains bitterly of pain in both hands and paresthesias. This is not clearly carpal tunnel syndrome." Clinic notes reflect that she returned on February 21, 2007, and February 28, 2007, with similar complaints. On February 28, 2007, Dr. Purvis referred the claimant to Dr. Vora for an EMG. On March 26, 2007, notes reflect that she presented with "continued bilateral carpal tunnel pain. Her EMG showed definite CTS". At that time, Dr. Purvis referred her for evaluation to Dr. Clark.

On March 28, 2007, the claimant was evaluated by Dr. Clark. Based on his examination, Dr. Clark recommended that the claimant undergo bilateral carpal tunnel release. On April 4, 2007, Dr. Clark performed a carpal tunnel release on the right wrist. On April 18, 2007, after a post-op evaluation, Dr. Clark noted that she was to remain off duty for two weeks and could return to full duty at that point in

time. On May 9, 2007, she returned for a follow-up evaluation. At that time, Dr. Clark released her to return to work without limitations and without any permanent disability as of May 22, 2007.

On June 14, 2007, the claimant returned for evaluation by Dr. Clark. At that time he noted that she had been able to work about a half a day before becoming sore and that Dr. Purvis had placed her on light duty. Dr. Clark recommended that she remain on light duty for three weeks and obtain an FCE.

On July 11, 2007, Dr. Clark performed a carpal tunnel release on the claimant's left wrist. On August 20, 2007, Clark noted that the claimant was doing quite well with some persistent tenderness in the right wrist. He ordered occupational therapy for four weeks. On September 17, 2007, she returned for a follow-up examination by Dr. Clark. He released her to return to work on the following Monday without limitations. On March 11, 2008, she returned to Dr. Clark with complaints of hypersensitivity at the wound site of the right wrist and a trigger thumb at the A-1 pulley. He recommended an A-1 pulley release of the right thumb and a medial nerve neurolysis to relieve the hypersensitivity. Surgery was scheduled for March 20, 2008.

Records reflect that the claimant was granted FMLA leave for purposes of her medical treatment for carpal tunnel syndrome and received short-term disability for the two periods of time she missed work due to her carpal tunnel surgeries. Records reflect that the claimant filed her workers' compensation claim on May 21, 2007.

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 on or about March 1, 2006.
3. The claimant earned an average weekly wage of \$509.00 which would, if found compensable, entitle her to a temporary total disability rate of \$339.00 and a permanent partial disability rate of \$254.00.
4. Due to her carpal tunnel surgeries, claimant was off work from March 29, 2007, until May 22, 2007, and from July 11, 2007, until September 24, 2007.
5. Respondents have controverted this claim in its entirety.
6. Claimant has failed to prove by a preponderance of the evidence that she suffered compensable work-related bilateral carpal tunnel syndrome.

DISCUSSION

The claimant contends that her bilateral carpal tunnel syndrome is work related and compensable; it has been controverted and her attorney is entitled to the maximum fee. The claimant further contends that her healing period ended on September 24, 2007, and that she is entitled to temporary total benefits from March 29, 2007, through May 22, 2007, and from July 11, 2007, until September 24, 2007.

The respondents contend that the claimant's bilateral carpal tunnel syndrome did not arise out of and in the course and scope of her employment but, rather, was pre-existent in nature. Respondents assert a notice issue that claimant contends her alleged carpal tunnel syndrome began in the Spring of 2006; however, claimant provided no notice to her employer of any work-related injury or illness until May of 2007. Respondents further contend that all of claimant's treatment was covered under her group health insurance and that there may be a lien should her injury be found compensable; and finally, that should the alleged injury be found compensable, respondents assert a credit for benefits paid under the claimant's short-term disability plan.

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).

Ark. Code Ann. § 11-9-102(4)(A)(ii)(a) (Supp. 2005) defines a “compensable injury” as:

(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 or is not identifiable by time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition[.]

The meaning of the term “rapid repetitive” motion has been construed many times. See Lay v. United Parcel Service, 58 Ark. App. 35, 944 S.W.2d 867 (1997); Kildow v. Baldwin Piano & Organ, 58 Ark. App. 194, 948 S.W.2d 100 (1997); and Baysinger v. Air Sys., Inc., 55 Ark. App. 174, 934 S.W.2d 230 (1996). On May 21, 1998, the Arkansas Supreme Court reversed the decision of the Arkansas Court of Appeals in Kildow. See Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 969 S.W.2d 190 (1998). It held that the Commission, and consequently the Court of Appeals, had erred in its interpretation of Ark. Code Ann. § 11-9-102(5)(A)(ii), now codified §11-9-102(4)(A)(ii), and said:

[T]he meaning of section 11-9-102(5)(A)(ii) is plain and unambiguous. That statute explicitly provides that CTS is both compensable and falls within the definition of rapid repetitive motion. To accept the Commission’s interpretation that CTS is merely a type of rapid and repetitive motion still requiring proof of that element would be to ignore the second sentence of the provision. We do not interpret statutes to create superfluity. The statute provides that CTS is specifically categorized as a compensable injury, not that it is categorized as a type of rapid repetitive motion. We will not add words to convey a meaning that is not here. Moreover, we will not disregard the legislative intent expressed in Ark. Code Ann. § 11-9-1001 (Repl. 1996) mandating strict and literal construction of the workers’

compensation statutes and admonishing the court to leave policy changes to the legislature. (Emphasis in the original.)

The Supreme Court went on to say that the statute safeguards employers because a claimant must prove the injury arose out of and in the course of employment, provide objective medical evidence of the physical harm, and show that the rapid-repetitive-motion injury is the major cause of the disability or need for treatment.

The claimant must prove that she sustained a carpal tunnel syndrome injury arising out of and in the course of employment, that a work-related injury is the major cause of her disability or need for medical treatment, and the compensable injury must be established by objective medical findings.

In the instant case, the claimant has failed to prove that her injury arose out her employment.

The claimant had been working for the respondent employer since 2000. She testified that she noticed a problem with her wrists in the spring of 2006. However, her medical records reflect that claimant sought medical treatment with her family physician as early as April of 2005 with complaints of wrist pain. She was originally diagnosed with D'Quervain's tenosynovitis. She was treated conservatively and continued to work until September of 2006, when she returned to her doctor with complaints of pain in her hands. She was treated conservatively and continued to work without complaints until January of 2007. In March of 2007, after conservative treatment failed, she underwent an EMG and was diagnosed with bilateral carpal tunnel syndrome. A comprehensive review of the evidence demonstrates that claimant has failed to prove that the claimant's carpal tunnel

syndrome is related to her employment. The claimant never told the respondent employer when she was seeking medical attention that it was for a work-related injury. It is clear that the claimant did not relate her problems to her job duties. Although she was advised by the health and safety manager of her option to file a workers' compensation claim, she chose to seek coverage under her group health policy and short term disability policy. The evidence shows that it wasn't until she was released to return to work without restrictions after her first carpal tunnel surgery and her family medical leave expired for that period of disability that she chose to file her workers' compensation claim.

Uncorroborated testimony of an interested party is always considered to be controverted. This rule also applies to a non-party witness whose testimony might be biased. Burnett v. Philadelphia Life Ins. Co., 81 Ark. App. 300, 101 S.W.3d 843 (2003). It is not arbitrary to choose not to credit such testimony. Id. The testimony of an interested party is taken as disputed as a matter of law whether offered on his own behalf or on the behalf of another interested party. Knoles v. Salazar, 298 Ark. 281, 766 S.W.2d 613 (1989). Therefore, I find that the only evidence offered to establish that claimant's bilateral carpal tunnel syndrome was work-related is the testimony of the claimant offered at the hearing which is inconsistent with the actions of the claimant at the time she first sought medical treatment. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that her carpal tunnel arose out of and in the course and scope of her employment.

Even if the claimant had proved that she sustained a compensable injury in the form of bilateral carpal tunnel syndrome, the preponderance of the evidence establishes that the respondent did not receive notice of the injury until May 21, 2007. The claimant told Reep and Rawls that she had carpal tunnel in 2006 but she did not relate it to her employment. It was not until she was notified that her FMLA was exhausted that she filed a claim with the Workers' Compensation Commission. The claimant was well aware of the procedures for filing claims. Ark. Code Ann. §11-9-701 (a) (1) states:

Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury. However, Ark. Code Ann. §11-9-701 (b) (1) states: Failure to give notice shall not bar any claim: (A) If the employer had knowledge of the injury or death; (B) If the employee had no knowledge that the knowledge that the condition or disease arose out of and in the course of the employment.

After review of the evidence, I find that the claimant has failed to prove by a preponderance of the evidence that her bilateral carpal tunnel syndrome was work-related. There is no medical evidence offered to support the claimant's contentions that her carpal tunnel syndrome was caused by her work in the Spring of 2006. Moreover, there is probative medical evidence which suggests that the claimant's injuries resulted from pre-existing conditions. Cottage Café, Inc. v. Collette, 94 Ark. App. 72, 226 S.W.3d 27 (2006).

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, the preponderance of the evidence demonstrates that the bilateral carpal tunnel caused physical harm to the claimant and is supported by objective findings, i.e. bilateral carpal tunnel syndrome shown by electro-diagnostic testing and subsequent surgical procedures. However, based on the preponderance of the evidence, I find that the claimant has failed to prove a compensable injury in the form of bilateral carpal tunnel syndrome which arose out of and in the course of her employment. Therefore, it is not necessary for me to address the notice issue or whether claimant is entitled to additional medical or disability benefits.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge