

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F207970

TINA JOHNSON, EMPLOYEE	CLAIMANT
DELTA PLASTICS, INC., EMPLOYER	RESPONDENT
FEDERAL INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 11, 2003

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE CHARLES R. PADGHAM, Attorney at Law, Hot Springs, Arkansas.

Respondent represented by HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals from a decision of the Administrative Law Judge filed on January 15, 2003, finding that the claimant sustained a compensable specific incident injury to her right upper extremity on May 28, 2002, and awarding temporary total disability benefits from June 12 through October 25, 2002. Based upon our de novo review of the testimony and evidence in this case, we find that the claimant has failed to prove by a preponderance of the evidence that she sustained an injury as a result of a specific incident identifiable by time and place of

occurrence. Accordingly, we reverse the decision of the Administrative Law Judge.

In order to establish the compensability of an injury, a claimant bears the burden of proving by a preponderance of the evidence that she sustained an accidental injury as a result of a specific incident, identifiable by time and place of occurrence, which caused internal or external harm to the body, which arose out of and in the course of her employment, and which required medical services or resulted in disability or death. Ark. Code Ann. §11-9-102(4)(A)(i) and §11-9-102(4)(E)(i). In determining whether a claimant has sustained her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704.

The claimant testified that she was lifting boxes on May 28, 2002, when she felt a pop and a sharp pain in her right hand. She was first seen by Dr. Sorrells on May 29, 2002. The office note from that visit provides the following history:

Discomfort in right hand, wrist and elbow x a little over a week. About ten days ago, she went to work at Delta Plastics and noticed some swelling of the metacarpophalangeal joints of the right hand. She was off work Monday and Tuesday, and didn't notice too much

problem, but on Wednesday, her hand was still swollen and began to have pain. That was one week ago. She wrapped it with an ACE wrap, but has not done anything else for it. . . . She has not had any trauma, although she lifts boxes at work on a daily basis. She doesn't remember injuring herself the day before the initial swelling and discomfort started.

The claimant saw Dr. Sorrells a second time on June 12, 2002. The progress note from that date states:

[The claimant] presents today for reevaluation of right hand which she apparently injured prior to her initial contact on 5/29/02. I do not have that note in front of me, but what I gathered is the patient who works as an operator, I believe in a factory, states that she packs boxes and somehow injured it while at work. She wasn't really descriptive. She states however, that she did not have an acute injury that she knows of, it just began to hurt extremely bad one day upon awakening and has hurt ever since.

The claimant was referred to Dr. Rudder, who ordered an MRI, diagnosed the claimant with acute lateral epicondylitis and performed surgery on July 31, 2002.

The claimant's supervisor, Lavonne Palmer, testified that the claimant's work duties involved lifting 20 to 22 boxes during an 8-hour shift. She stated that the claimant alternated between packing boxes, lifting boxes and assembling jars. Ms. Palmer was asked whether the claimant

reported any problems regarding her right arm on May 28, to which she responded:

[The claimant] came to me, and she said that her wrist was hurting. And I asked her -- I said, 'Did you hurt it?' And she said, 'No, it's just sore.' And we talked about an ace bandage.

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When I asked her if she had hurt herself, if she would have told me she had, then I would have automatically right then filled out an accident report. But, when I asked her if she'd hurt herself, she said, 'No.' so I didn't do an accident report.

Manager Kelly Massey, testified that he first spoke to the claimant about the problem she was having with her right hand on June 5, 2002. He testified that the claimant told him that her wrist had started hurting the Wednesday prior to that, but she did not want to report the injury. Mr. Massey testified that he had asked the claimant at that time if she knew when she had hurt her wrist, and the claimant had said she was unsure. He stated that the claimant never described any specific injury occurring.

After weighing the evidence impartially, without giving either party the benefit of the doubt, we find that the claimant has failed to prove by a preponderance of the evidence that she sustained a specific incident injury. The

only evidence that supports such a conclusion is the claimant's own testimony, and her version of events is not corroborated by any other witness, nor by the medical evidence. In a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable, ie., that his injury was the result of an accident that arose in the course of his employment and that it grew out of, or resulted from the employment. Ringier American v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993); Carman v. Haworth, Inc., 74 Ark. App. 55, 455 S.W.3d 408 (2001). Further, the claimant must prove a causal connection between the work related accident and the later disabling injury. Bates v. Frost Logging Co., 38 Ark. App. 36, 827 S.W.2d 664 (1992). The claimant must show a causal relationship exists between his condition and his employment. Harris Cattle Co. V. Parker, 256 Ark. 166, 506 S.W.2d 118 (1974).

In determining whether a claimant has sustained his or her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987). Questions concerning the credibility of witnesses and the

weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001).

When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. 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.

Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. There is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000). By allowing the Commission to review evidence or, if deemed advisable, hear the parties, their representatives and witnesses, Ark. Code Ann. §11-9- 704(b) (6) (A) (Repl. 2002), adequately protects a claimant's due-process rights. Id. When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Numerous other

factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. "The flexibility permitted the Commission adequately protects the claimant's right of due process of law." Id.

At hearing, the claimant had alternatively asserted that she sustained a gradual onset, rapid repetitive injury. We find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury under this alternative theory.

In Le v. Superior Industries, Full Commission Opinion filed February 12, 1999 (Claim No. E708248), the Commission determined that the claimant's position required rapid and repetitive motion sufficient to satisfy the Act where the claimant handled approximately 30 tire rims per hour for 50 or more hours per week. She processed approximately 300 wheels per shift using essentially the same four steps: (1) lifting a wheel rim onto a table, (2) sanding the wheel with a circular motion, (3) deburring the wheel with a pneumatic grinder, (4) lifting the wheel onto a cart or bin. When the plant ran chrome wheels, the claimant was also required to use a four-pound stamper and a

five pound shop hammer to mark each wheel. The tasks were clearly repetitive. The Commission applied the analysis of the Court of Appeals in Boyd v. Dana Corp., 62 Ark. App. 78, 966 S.W.2d 946 (1998), to determine that the tasks were performed rapidly under the Act.

In Boyd, the Court of Appeals compared the duties of a worker who repeated a four-step metal fabricating process approximately 100 to 125 times per shift to the duties of a delivery man whose repetitive motions were separated by intervals of several minutes in the case of Lay v. United Parcel Service, 58 Ark. App. 35, 944 S.W.2d 847 (1997). In comparing these two situations, the Court of Appeals in Boyd found that the metal fabricating process involving 100 to 125 parts per hour was sufficiently rapid and repetitive to satisfy the requirements of Act 796 of 1993. In this regard, the Court stated:

...[i]n the instant case, the evidence is that the appellant's series of repetitive motions were performed 115 to 120 times per day separated by periods of only 1.5 minutes, and we do not think that this brief interval rises to a period of "several minutes or more" as stated in Lay. Boyd, Supra, at 83.

In McDonald v. Tyson Foods, Inc., Full Commission Filed June 3, 1999 (Claim No. E713336), the claimant failed to satisfy the elements of proof for a gradual onset injury.

In McDonald, the claimant's physicians opined that her work was conducive to or was sufficient to account for the claimant's clinical findings. However, this was insufficient to a finding that the claimant had satisfied the rapid repetitive motion element of proof necessary to prove the compensability of her claim. "Claimant must present more evidence than medical opinions linking her condition to her work." The claimant had failed to satisfy her burden of proof where there was no evidence with regard to the rate of speed within which the claimant performed the tasks of lifting the belts on the machine which she contended was the repetitive task responsible for her injury. On cross-examination, the claimant was asked how long it would take for her to lift the wire belts for bracing, to which she responded:

It depends on what kind of mood you are working in. If you are in a hurry, it's going to take anywhere from ten minutes, maybe a little longer, but if you are just taking your time - I can't tell you how long it takes, I really can't. Because everybody is different and I haven't been doing that in so long and all.

In Rodman v. ACX Technologies, Full Commission Opinion Filed July 8, 1999 (Claim No. E804579), noted that the Court of Appeals has stated it "must consider the

positioning of the part of the body as well as the number of movements the claimant has to undergo to determine if the movement is 'rapid and repetitive'." See, Patterson v. Frito-Lay, Inc., 66 Ark. App. 159, 992 S.W.2d 130 (1999). In Rodman, the claimant failed to prove a gradual onset cervical injury where there was no evidence as to the position of her neck or cervical spine during the repetitive tasks she performed with her upper extremities. The Commission also found that the claimant had failed to prove that the repetitive motions of her upper extremities were performed rapidly under the two-prong test set forth in Malone v. Texarkana Public Schools, because the claimant testified that "she had to be deliberate and careful in performing her job functions, but that she also tried to perform these deliberate and careful moves as fast as she could." The Commission stated that "this testimony does not satisfy the rapid repetitive motion requirement. There is void from the record any persuasive evidence which would establish the speed at which claimant performed her job duties."

In High Capacity Products v. Moore, 61 Ark. App. 1, 962 S.W.2d 831 (1998), the Court of Appeals affirmed the decision of the Full Commission finding that the claimant proved by a preponderance of the evidence that her

job duties producing electrical meter boxes required rapid repetitive motion. In reaching this decision the Court summarized the following relevant evidence:

Moore, a thirty-eight-year-old woman, worked for appellant for approximately five years. She used an air gun to assemble blocks with a quota goal of one thousand units per day. She was required to assemble each block by using an air-powered appliance to attach two nuts to each block. She would hold the parts of the unit with her left hand and work the air gun with her right hand. She averaged using the air gun to attach one nut every fifteen seconds, according to the testimony of her supervisor. The majority of her time was consumed in this quota assembly. Her job required three maneuvers to be repeated in succession all day: assembling the separate parts, using the air-compressed equipment to attach the parts together with nuts, and throwing the units into a box.

In reaching its decision, the Court commented that "we believe that this is the most compelling case demonstrating rapid repetitive motion presented to this Court to date." Id. At 962 S.W.2d 831. The "rapid repetitive motion" standard 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; the repetitive tasks must be completed rapidly. Malone v.

Texarkana Pub. Schs., 333 Ark. 343, 969 S.W.2d 644 (1998).

The Arkansas Supreme Court, in Malone, explained that because the legislature had not established guidelines necessary to the determination of what constitutes "rapid and repetitive motion", that determination is made on a case-by-case basis. The Court provided guidance for the Commission, stating that to determine rapid repetitive motion requires a two-pronged test: (1) the task must be repetitive, and (2) the repetitive motion must be rapid. More specifically, "as a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition. The repetitive tasks must be completed rapidly." Id. at 350, 969 S.W.2d at 647-48.

We do not find that the claimant's claim succeeds on this alternate theory. The testimony established that the claimant only lifted approximately 20 boxes per day, and alternated packing and lifting the boxes with assembling jars. After analyzing the claimant's job duties under the guidance offered by the Courts, we find, there was no rapid or repetitive motion involved in her job duties.

Therefore, the Administrative Law Judge's opinion is reversed, and this claim is hereby denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the majority decision finding that claimant failed to prove that she sustained a compensable injury. I believe that claimant's testimony is sufficient to establish the occurrence of a specific incident injury, thereby entitling her to receive the appropriate medical and disability benefits.

At the hearing, claimant testified that on May 28, 2002, she was moving some boxes at work when she felt a "pop" in her right hand. There is no dispute that claimant reported that her hand was hurting to her immediate superior on that night and that she saw the doctor the following day. Claimant was eventually diagnosed as having acute lateral epicondylitis of her right elbow, a condition for which she would eventually undergo surgery.

The Administrative Law Judge, who heard the testimony in this case, found that claimant was a credible witness and that her testimony was sufficient to establish the occurrence of a compensable injury. The majority, after having read a transcript of the hearing, has reached the opposite result.

I object to the Commission's decision in this specific case to find that claimant's testimony is insufficient to establish her compensable injury. I also profoundly disagree with the majority's statement that claimant's testimony was not corroborated by any other witnesses or the medical evidence.

Lavonne Palmer, the claimant's immediate supervisor, who testified on behalf of the respondent at the hearing, reported that the claimant had told her that her wrist was hurting on May 28, 2002. Kelly Massey, another witness called by the respondent, testified that he spoke to the claimant about her hand injury on June 5, 2002. He testified that her wrist starting hurting the prior Wednesday. Dr. Sorrells, who first saw the claimant, noted in a progress note of June 12, 2002 that the claimant had injured her hand at work.

The most significant medical evidence supporting the injury as described by the claimant was generated after

Dr Sorrells referred her for an orthopedic evaluation. An MRI performed in connection with this evaluation discovered an edema within the muscle of the claimant's arm. Dr. Kevin Rudder, a Hot Springs orthopedic surgeon, opined that this edema was consistent with a diagnosis of an acute injury.

In my opinion, the claimant's testimony is corroborated both by the testimony of other witnesses and by the medical evidence. It is also significant that there is no direct evidence rebutting the claimant's testimony.

I concur with the Administrative Law Judge who observed the witness at the hearing, and who, I believe, accurately assessed her as a credible witness. For that reason, I find that the claimant did establish, by a preponderance of the evidence, that she sustained a compensable specific incident injury and is entitled to all appropriate benefits.

SHELBY W. TURNER, Commissioner