

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E906933

SARAH PARKER,
EMPLOYEE

CLAIMANT

ATLANTIC RESEARCH CORP.,
EMPLOYER

RESPONDENT

INSURANCE CO. OF STATE OF PENNSYLVANIA,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 17, 2003

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

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

Respondents represented by HONORABLE ERIC NEWKIRK, Attorney
at Law, West Memphis, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an opinion and order filed by
the Administrative Law Judge on January 31, 2003. In that
opinion and order, the Administrative Law Judge found that
in 1999, the claimant sustained a gradual onset neck injury
arising out of her employment caused by rapid repetitive
motion which caused internal harm to her body requiring
medical services and which was the major cause of her
disability and need for medical treatment pursuant to Ark.
Code Ann. § 11-9-102(4)(A)(ii). The Administrative Law
Judge also found that the neck injury was established by

objective medical findings, specifically a final diagnosis of "neck pain with spasm" in the June 15, 1999 emergency room report of the Ouachita County Medical Center. The Administrative Law Judge found that the claimant was temporarily totally disabled as a result of her progressive neck problems and fusion surgery during the period beginning November 17, 1999 and continuing through March 9, 2000. The Administrative Law Judge has also awarded the claimant benefits for a 5% permanent physical impairment rating to the body as a whole.

After conducting a de novo review of the entire record, we find that the claimant has failed to establish by a preponderance of the evidence that any work-related aggravation/injury to a preexisting condition is the major cause of her disability or need for treatment. The claimant has therefore failed to establish that she sustained a compensable gradual onset injury. Consequently, the Administrative Law Judge's finding that the claimant sustained a compensable injury and the Administrative Law Judge's award of benefits must both be reversed.

The claimant asserts that she sustained a work-related inflammation of a previously asymptomatic degenerative neck condition during the course of her employment in 1999.

Since the claimant asserts that she sustained a gradual onset injury that occurred after July 1, 1993, this claim is governed by the provisions of Act 796 of 1993, as amended thereafter. The elements of a gradual onset injury are found in Ark. Code Ann. § 11-9-102(4) (A) (ii) (Repl. 1996). While there was some question at one time as to whether or not the neck was a part of the back within the meaning of Act 796 of 1993, the Arkansas Supreme Court has concluded that the neck is not part of the back for purposes of determining the elements of establishing a gradual onset neck injury. Hapney v. Rheem Mfg. Co., 342 Ark. 11, 26 S.W.3d 777 (2000). Therefore, in order to establish a compensable gradual onset neck injury, the claimant must prove by a preponderance of the evidence that she sustained an injury (1) which arose out of and in the course of her employment, (2) which caused internal or external physical harm to the body requiring medical services, (3) which was caused by rapid repetitive motion, and (4) which was the major cause of her disability or need for medical treatment. Id. In addition, objective medical evidence must prove that an injury exists, but it does not have to prove the circumstances under which the injury was sustained or the precise time of the injury's occurrence. Aeroquip, Inc. v.

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

A. Objective Findings

The Arkansas Supreme Court has held on one occasion that a doctor's prescription of Valium for muscle spasm is an indication that the doctor felt that muscle spasms were present. See Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000). The Arkansas Courts have also long noted that "muscle spasm" is an objective medical finding within the meaning of Act 796 of 1993.

As the Administrative Law Judge noted in the present case, the Ouachita County Medical Center final diagnosis from the emergency room on June 15, 1999 of "neck pain with spasm," and a prescription for Valium, would appear to be adequate objective medical evidence to establish the existence of an inflammation type injury to the claimant's underlying degenerative neck problems as indicated by Dr. Giles' testimony. Therefore, we conclude, as did the Administrative Law Judge, that the claimant has satisfied the objective medical findings requirement.

B. Rapid Repetitive Motion

Based on the testimony in the record, it is somewhat difficult to determine exactly the sequence of events that the claimant routinely performed at work, or the precise hand, arm, and neck motions involved. However, it appears that the claimant would pick up small parts coming down a conveyor belt, inspect the parts, and then put each part in a box. Each box contained 96 parts. According to the claimant's supervisor's testimony, it took the claimant approximately 15 minutes to fill each box. Ms. Hannegan also testified that the motions involved quick and fast movements of the head and neck, apparently requiring the claimant to look to one side to find an appropriate part as it came down the belt, inspect the part, and then look in the other direction to place the part into the appropriate slot in the box. Therefore, it appears that the claimant engaged in at least two neck movements per part.

Consequently, if the claimant inspected approximately 6.5 parts per minute (96 parts ÷ 15 minutes), and if this work required only two neck movements per part, the claimant would engage in 13 neck movements per minute.

The Arkansas Court of Appeals on one occasion stated that four movements per minute was the best example of rapid

repetitive motion that the Court had seen to date. See High Capacity Prods. v. Moore, 61 Ark. App. 1, 962 s.W.2d 831 (1998). If four movements per minute is an example of rapid repetitive motion, then clearly 13 neck movements per minute would also fit within the definition of rapid repetitive motion.

However, Dr. Giles' opinions on causation are somewhat ambiguous as to what role, if any, that neck motion played in causing the inflammation at issue. For the most part, Dr. Giles' opinions appear to indicate that the claimant's neck inflammation was caused by working in a flexed position, and was not necessarily related to the fact that her work required rapid repetitive neck movements.

In this regard, Dr. Giles wrote on June 1, 2001:

I am in receipt of your letter of May 30, 2001. Based on the history that Ms. Parker gave me, I would feel certain that she had a preexisting condition which was aggravated as a result of her work status, by her description, which became symptomatic, resulting in a radicular pain syndrome from (sic) which she subsequently had surgical intervention. This opinion is based strictly on the history given by the patient who stated that she worked 10 to 12 hours daily with her neck and head in a flexed position. This began causing her neck and shoulder pain which developed into severe arm discomfort which became unrelenting and unresponsive to conservative modalities. Certainly, if she had been treated previously by her physician for neck and shoulder discomfort six months prior to the onset of her

symptoms, then her preexisting condition would have already become symptomatic at some point in time. Otherwise, based on the history that she gave me, I would have to feel that it did become manifest as a result of her work status and, therefore, was the major cause for the surgical treatment and intervention which I performed. [Emphasis added.]

Likewise, in his deposition on page 6, Dr. Giles testified:

Q. When you saw her, what were her complaints?

A. She complained at that time that she had been having difficulty since May of that year with neck, shoulder, and right arm pain, stating that she worked ten to 12 hours a day with her neck and head in a flexed position.

And the shoulder and arm pain had begun with that with radiation and numbness from her neck into both her right and left arm, but worse on the right. She has more difficulty resting at night and stated her pain was worse when she would use the arm. She had been on steroids and had been on pain medication and had an MRI scan performed.

Q. Okay. When she informed you of her job duties -- and I think you noted that her neck and head is in a flexed position. When you use that term, or I guess, did she use that term to you or is that something that, I guess from her description of her job, you termed it as to being in a flexed position?

A. This was the term she used to me.

Q. And what do you make of -- in your terms, what does flexed position mean?

A. It means that they have their head in a -- they're in a head down position more than up. It's done with the neck protruding forward, and forward meaning toward her chest cavity more than

in the upright position. That was what she explained to me.

Q. Okay. And is that something that she informed you that she was in for the continuous ten to 12 hours?

A. No. She just stated that she worked ten to 12 hours and stated that her head was frequently, and her neck, in a flexed type of position. [Emphasis added.]

In light of Dr. Giles' deposition testimony regarding the history he received, and in light of his written letter indicating that his opinion was based on the history he received, the above opinions of Dr. Giles seem to relate the claimant's neck inflammation solely to working in a flexed neck position, rather than being causally related to any type of neck motion.

However, after being advised that the claimant's work actually involved moving her head and not merely standing in a flexed position for hours on end, Dr. Giles changed his testimony, indicating that neck movements played some role in causing the claimant's inflammation type injury. In this regard, Dr. Giles testified on page 12 through 13:

Q. So, Doctor, if that evidence is entered into -- I'm sorry. If that information is entered into evidence at the time of the hearing, that her head was not in a flexed position for an entire ten to 12 hour period, would that change your opinion to where you could not state within a reasonable degree of medical certainty that the spondylitic

condition was traceable to her employment versus simply becoming asymptomatic [sic] on her own?

A. I think I would read before I would make that statement plus or minus, favorable or unfavorable, an adequate description of what she did at work.

Q. Okay. Doctor, if she were to testify -- or I'm sorry. If there were testimony that she were to be looking down for ten to 20 seconds in front of her and would then look to her right and move a box or do something to her right and then turn back and finish doing some work here and then looking to her left every -- looking right or left every ten to 20 seconds, would that change your opinion?

A. Rotational movements can elicit shoulder and arm pain.

Q. Okay.

A. Just as flexion and extension can. I think that I would have to stand by the fact that this lady, if she had never had neck, shoulder, arm complaints of any type nor treatment of an inflammatory condition six months to a year prior to onset of work status, then the likelihood of her inflammatory state becoming inflamed would be more likely related to her work status. Had she been treated with anti-inflammatory medications for up to six months for neck, shoulder, and arm pain, then it was already symptomatic.

In light of Dr. Giles' testimony that rotational movements can elicit shoulder and arm pain, the claimant has established that her aggravation type injury on preexisting neck problems is at least somewhat related to her rapid and repetitive neck motions.

Major Cause

Again, as we interpret Dr. Giles' testimony and written opinion report, Dr. Giles has concluded that the claimant's previously asymptomatic neck abnormalities became inflamed/symptomatic as a result of her job duties. Based on the fact that the claimant's neck was asymptomatic prior to the new job duties in 1999, and in light of the temporal relationship between the start of the new job duties and the beginning of her symptoms, Dr. Giles has concluded that the claimant's work-related aggravation of a preexisting degenerative neck condition was the major cause of the surgical treatment (diskectomy and fusion at C6-7) that Dr. Giles performed. On the other hand, Dr. Giles has also testified that all of the disk abnormalities observed on MRI, myelogram, and post-myelogram CT, all preexisted the claimant's work-related aggravation.

Since the facts which form the basis of Dr. Giles' opinion are not in dispute, this case appears to present primarily an issue of law: Can an injured worker with a work-related aggravation of preexisting disk abnormalities establish the major cause requirement of Ark. Code Ann. § 11-9-102(4)(E)(ii)(a) by establishing that the disk abnormalities were asymptomatic for at least a significant

period before a work injury but became symptomatic when work conditions gradually aggravated the preexisting asymptomatic disk abnormalities?

While it does not appear that the Arkansas Courts have ever addressed this precise question stated in this precise manner, we interpret Section 102(4)(E)(ii)(a) to require the claimant to establish more than just that her preexisting degenerative disk condition was asymptomatic before a work-related aggravation in order to establish that the work-related aggravation was the major cause of a disability or need for treatment. Although addressing a slightly different question, we note that in Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 141 (1998), the Court affirmed a Commission denial of permanent partial disability benefits under circumstances where a doctor rendered a medical opinion quite similar to Dr. Giles' opinion in this case. See Id. (Judge Stroud dissenting.)

Absent any further guidance from the Courts, we interpret that an injured worker cannot establish, within the meaning of Section 102(4)(E)(ii)(a), that a work-related aggravation injury is the "major cause" of a disability or a need for medical treatment simply by establishing that preexisting disk abnormalities were asymptomatic prior to

becoming inflamed by work. Because we find that the claimant has failed to establish by a preponderance of the evidence that her injury from work was the major cause of her disability or need for medical treatment at issue, we find that the claimant failed to establish by a preponderance of the evidence that he sustained a compensable gradual onset back injury. Therefore, the Administrative Law Judge's award of benefits must be, and hereby is, reversed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

JOE E. YATES, Commissioner

Commissioner Turner dissents.