

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210305

RAFAEL GRACIAN (CHAVEZ), EMPLOYEE	CLAIMANT
CARGILL, INC., EMPLOYER	RESPONDENT
INS. CO-STATE OF PENNSYLVANIA, THIRD PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED MAY 5, 2004

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

Claimant represented by HONORABLE JAY TOLLEY, Attorney at
Law, Fayetteville, Arkansas.

Respondents represented by HONORABLE TIMOTHY BROOKS,
Attorney at Law, Fayetteville, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed August 15, 2003. The administrative law judge
found that the claimant sustained a compensable injury, for
which the claimant was entitled to reasonably necessary
medical treatment and temporary total disability
compensation. After reviewing the entire record *de novo*,
the Full Commission reverses the opinion of the
administrative law judge. We find that the statute of
limitations bars the claimant's claim.

I. HISTORY

Rafael Gracian Chavez, age 57, testified that he came to the United States in March 1975. The claimant testified that he first became employed with Cargill in 1982 but then quit for a time. The parties stipulated that the employment relationship existed beginning in December 1985. The record contains an Incident Investigation Report dated April 20, 1987. The claimant reported that his fingers had broken out in a rash while at work. The Investigation Report stated, "Hands were swollen when showed to supervisor A.M. of 4/16/87, but no rash was present. He was rotated off of cropping to take stress off hands." The Report indicated that corrective action would be "more job rotation." The Report also indicated that the "Severity Potential" was "not serious." The "Probable Recurrence Rate" was "occasional."

The claimant was diagnosed with acute lateral epicondylitis of the left elbow in March 1988 and was assigned restricted work duties for several weeks. The record contains a U.S. Department of Labor form, "Supplementary Record of Occupational Injuries and Illnesses," indicating that the claimant reported an injury on November 6, 1989. The form indicated that the claimant was injured while "Reaching up into birds & pulling out lungs & crops." The accident occurred while "Continually

reaching w/L hand pulling out lungs & crops w/L hand." The injury was described as "Overuse L 4th & 5th finger." Another Occupational Injury was reported on August 31, 1990. The claimant reported being injured while "pulling crop from inside the turkey." The claimant "c/o numbness R hand & fingers secondary to swelling....repetitive motion of pulling/gripping crop from inside turkey."

The record contains an Employer's First Report Of Industrial Injury, dated October 28, 1991. The First Report indicated that an accident occurred on October 24, 1991, because of "excessive overuse of hands due to increased work load due to increase of number of big toms." It was noted that there was a "knot at base of right 5th finger." After electrodiagnostic testing was carried out on November 7, 1991, Dr. David L. Brown's impression was "Bilateral carpal tunnel syndromes. No evidence of ulnar neuropathy on the right both proximally and distally." An Occupational Injury was reported on December 10, 1991, showing a date of injury of November 14, 1991. As stated previously, an accident occurred because of "repetitive motion of pulling the crop from the turkey neck - uses both hands alternately....repetitive motion of pulling crop for years."

The claimant testified at deposition:

Q. When did this problem with the pain in your wrists first develop?

A. It really happened about 14 or 13 years ago. I can tell you that I had been working there for three years when these problems arise.

Q. And has that pain that developed three years after you first started pretty much stayed with you?

A. It depended on what I was doing, the activity that I was doing, the work that I was performing. Sometimes it was a constant pain and sometimes it would go away and come back. I think the worst thing or the thing that worked the worst against me was doing overtime. I can tell you that I worked about seven years overtime during the entire amount of years that I worked there, the 17 years that I worked there.

Dr. Timothy W. Yawn assessed the claimant as having "Right Shoulder Pain" and "Adhesive Capsulitis of the Right Shoulder" on September 6, 2000. The record from that date reflects, "Patient states that the right shoulder pain started about 2 months ago....Patient states that before the pain started he was lifting weights trying to build up his strength." Dr. Yawn treated the claimant conservatively.

The claimant testified at deposition:

Q. Why did you stop working at Cargill?

A. Because they closed the area of the company where I was working. I had problems with my hands quite a while ago and all the people that had problems with their hands, they laid them off....Where I was working the place was offal....

Q. How long did you work in the offal room?

A. I worked there for approximately two years.

Q. Explain to me specifically what your daily tasks were while you were working for that two year period of time in the offal room?

A. Well, first when I showed up I was in charge that the trucks were completely full of meat and also that every single thing was processing or being processed the way it was supposed to be. I was supposed to wash everything off with the use of hoses. When the truck was completely full then we had to take that one out and then put another one in.

Q. Did any of the specific tasks that you were required to perform during the two years that you worked in the offal room involve the rapid and repetitive use of your hands or wrists?

A. Yes. The hose that we use there they have a pressure of about 50 p.s.i., or 50 pounds of pressure, and we have to use those to wash off the blood, because there is blood all over. When you hold the hoses that's how you hold them and that's how you have to do.

Q. Are you saying the hoses are under a lot of pressure and therefore that you have to be careful or apply an extra amount of force in order to hold the hose?

A. Yes. You have to do that and also they are very warm. Very hot.

Q. Did working with this hose in the offal room lead to pain or other symptoms in your hands or wrists?

A. Yes. You know, that was kind of logical. It was very heavy-duty work.

The claimant sought medical treatment on August 14, 2002:

Works a lot with hands and wants to know if anything can be done about the pain and numbness. Has been laid off of work for three weeks, they want him to take a different job not using hands as much but does not want this....

He works for Cargil, washing ofal (sic) with a hose. He wants a better job there. He has not been fired. He has been off x 1 week....

Complains of numbness in his bilaterally 4th and 5th fingers x 12 years, intermittently, worse x 3 weeks now. He has weakness as well with some pain in his bilaterally elbows and left shoulder....

A registered nurse noted, "Onset (+) fourteen years ago." Dr. Shannon Wipf assessed "Paresthesias (Tingling or Numbness) #782.0. bilaterally upper extremity with decreased sensation in median and ulnar distributions."

Electrodiagnostic testing was performed on August 19, 2002, and a physician's impression was "This bilateral nerve conduction study reveals bilateral carpal tunnel syndrome, worse in the right hand. There is no evidence of ulnar neuropathy in either arm."

The claimant visited Dr. Yawn on August 23, 2002, at which time it was reported, "Pain has improved since being off of work for 2 weeks. Was wearing splints at bedtime in the past but has not worn them now for approximately 10

years." Dr. Yawn assessed "Bilateral Carpal Tunnel syndrome."

A physician entered the following report on August 28, 2002:

The patient presents for a Cargill pre-placement physical examination. He is being evaluated due to a change in position at Cargill, with departments being eliminated. He will have to switch jobs, and is being evaluated for another position. When he presented to the clinic, on check-in with my nurse he stated he thought he had bilateral carpal tunnel syndrome. He states he had the same problem 10-12 years ago....On direct questioning of the patient, he denies any other medical injuries since his previous episode of what he calls carpal tunnel syndrome 10-12 years ago....

I discussed the patient's condition with him at length. He displays obvious evidence of overuse syndrome of the upper extremities bilaterally. He has not had formal nerve conduction velocity testing, so I would not call this a true carpal tunnel syndrome at this point. However, to place him in a repetitive motion position would almost certainly worsen his condition as it is displayed today and could have very well led to carpal tunnel syndrome in the past, so it would be intent that he be restricted from any repetitive motion positions involving the upper extremities.

It is also of note in reviewing his past medical record that he has had multiple injuries of various types over the years, and over the past 2-3 years has had several instances where he had complained simply of pain without any specific injury....

The bottom line in this patient, given his presentation today and his complaints of problems with his upper extremities dating back 10-12

years, and a physical exam indicating overuse syndrome, I do not feel it is in his best interest to place him in a repetitive motion position, which ultimately could worsen his condition. His other underlying conditions, such as his previous back injury and evidence of recurrent/chronic pain issues, should be strongly considered as well in regards to placement.

Dr. Yawn noted on October 7, 2002, "Patient states that he is needing paperwork filled out stating that he has bilateral carpal tunnel syndrome. States that he is still working but would like a note stating that he would like his job to not require use of his hands. Patient is presently laid off work with last day of work being on 8-2-2002. Patient has been dropping things when holding them."

Mr. Gracian claimed entitlement to worker's compensation, and a pre-hearing conference was held on January 13, 2003. The claimant contended that he sustained an injury to his hands and wrists on August 14, 2002. The claimant contended that "it was a wear and tear injury from years of repetitive movement." The respondents contended that the claimant did not sustain a compensable injury. The respondents contended that if the claimant did sustain a compensable injury, then the statute of limitations barred the claimant from receiving compensation.

Hearing before the Commission was held on May 29, 2003.

The claimant testified:

Q. Now, how long have those symptoms been present?

A. Since I have carpal tunnel, since '82, 85.

Q. But did you ever lose any time off from work from that symptom there until you were no longer able to work in August?

A. No. I never lose one day....

Q. Why can't you work there now? Seventeen years is a long time. That's longer than I was married. Why can't you work there as we sit?

A. Well, because my hands start -

Q. Go ahead. Go ahead. Tell me why you can't work there after 17 years.

A. Because I was working too much, my hands hurt.

The respondents' attorney cross-examined the claimant:

Q. The problems with your hands and wrists that you told Mr. Tolley about today, those problems first developed about 13 or 14 years ago, didn't they? Yes?

A. Yes.

Q. While you were working for Cargill?

A. Because they never sent me to the doctor, no....They never send me to a doctor. Also, if I complain, they fire me....

Q. Did these problems with your hands and wrists that you've complained of today, did they first start 13 or 14 years ago?

A. Yeah....

Q. Did they first start when you were cropping turkeys?

A. When I was cropping.

Q. And cropping is where you pull innards out of the turkey?

A. With the tongs like that....

Q. The pain that you have described today to Mr. Tolley, isn't it true that you have continued to have those same problems with your hands and wrists ever since you first developed those problems in the late 80's or early 90's?

A. Yeah.

John F. Crowley, IV, assistant human resource director, testified for the respondents:

Q. Can you explain the circumstances for the Judge as to why Mr. Gracian stopped working at Cargill.

A. Sure. We had a departmental closure and it was early August, actually the month before previous; we closed a portion of the plant in which we had to scale back in all areas. We did a selection grid; Mr. Gracian was selected out of maintenance and was told to select another job within the plant to go to.

Q. And after he selected another job, what did Cargill do as a part of its due diligence in placing him in that position?

A. As in any move in procedural that would take place as far as Cargill goes, we move, ask them to pick a spot where they would like to go, any open position, they're supposed to, and then they're

given a prehire or preplacement physical through the nursing staff.

Q. And what happened when Mr. Gracian went through his preplacement physical?

A. The nurse showed some concerns about repetitive motion syndrome and sent him off to the company doctor.

Q. And who was the company doctor?

A. Karl Haws.

Q. Was Karl Haws' report, which is in evidence - well, let me ask it this way: First of all, was Mr. Gracian placed in the job that he had requested to be assigned to?

A. Not at that time, after those were brought to light.

Q. Why not?

A. Because it was a job he selected where it was tied to line production and would have been repetitive.

Q. And it would have been against Dr. Haws' advice to place him in that position?

A. Correct.

The administrative law judge did not enter a specific finding of fact with regard to the respondents' statute of limitations argument, but he determined that the claim was not barred by the statute of limitations. The administrative law judge found that the claimant sustained a compensable injury, for which the claimant was entitled to

reasonably necessary medical treatment and temporary total disability compensation. The respondents appeal to the Full Commission.

II. ADJUDICATION

The Full Commission reverses the administrative law judge's award of benefits. Ark. Code Ann. § 11-9-702(a) provides:

(1) A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury. If, during the two-year period following the filing of the claim, the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.

In Minnesota Mining & Mfg. v. Baker, 337 Ark. 94, 989 S.W.2d 151 (1999), the Supreme Court of Arkansas held, "a work-related noise-induced hearing-loss injury does not become compensable until (1) the injury develops or becomes apparent, and (2) the claimant suffers a loss in earnings on account of the injury, *which loss is conclusively presumed*. Because the statute of limitation does not begin to run until both elements of the rule are met, and because of the *conclusive presumption* as to loss of earnings, which satisfies the second element, the statute of limitation with

respect to work-related noise-induced hearing loss begins to run when the hearing loss becomes apparent to the claimant."

The Supreme Court in Baker was specifically referring to hearing loss injuries as scheduled injuries, but the Court's holding also clearly implies to any scheduled injury. The instant claimant is claiming benefits related to bilateral carpal tunnel syndrome, a scheduled injury. Based on our review of the record, the claimant's carpal tunnel injury "became apparent" to the claimant perhaps as early as April 1987, but certainly no later than October 1991. The claimant complained in October 1991 of work-related symptoms resulting from overuse of his hands. The claimant was diagnosed with bilateral carpal tunnel syndrome, as shown by electrodiagnostic testing, in November 1991. The claimant intermittently complained of chronic upper extremity symptoms related to his employment over the course of the next several years. The claimant's credible testimony indicated that his problems began in about 1991. The parties appear to agree that the claimant did not file a claim for worker's compensation until September 19, 2002, approximately 11 years after the claimant's work-related symptoms became apparent to him. The preponderance of evidence before the Commission shows that the claimant's

bilateral carpal tunnel syndrome "became apparent" to the claimant no later than October 1991. In order to meet the requirements of Ark. Code Ann. § 11-9-702, the claimant could have filed a claim no later than October 1993. The claimant did not file a claim until September 2002, many years past the expiration of the two-year statute of limitations found in Ark. Code Ann. § 11-9-702(a)(1).

Based on our *de novo* review of the entire record, the Full Commission finds that the instant claim is barred pursuant to Ark. Code Ann. § 11-9-702(a)(1). The Full Commission therefore reverses the decision of the administrative law judge, and we hereby dismiss this claim.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the majority's opinion and find that the statute of limitations does not bar Claimant's claim for benefits.

I find that Claimant's condition was asymptomatic after being transferred to a less hand-intensive position

following the carpal tunnel injury in 1991 until August 2002, which was two years after he had begun working in a hand-intensive position as an offal operator. An aggravation is a new injury with an independent cause. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). I find that the Administrative Law Judge properly found that Claimant's August 2002 injury was an aggravation of his previously diagnosed condition:

The episode of difficulties experienced by the claimant in August of 2002, was not a continuation of a simple reoccurrence of his previously diagnosed bilateral carpal tunnel syndrome. Rather, it was the culmination of a series of distinct episodes of employment related stress or trauma, with each episode independently contributing to the ultimate injury. Thus, this ultimate injury would represent "new" injury occurring in August of 2002, that would be separate and distinct from the prior individual injurious episodes of increased employment related stress and trauma that combined to cause this ultimate injury.

I, therefore, find that Claimant's September 2002, claim was timely filed because his August 2002 injury was a new injury that was causally related to his job as an offal operator.

For these reasons, I dissent from the Majority opinion and would affirm the Administrative Law Judge's holding.

SHELBY W. TURNER, Commissioner