

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F300131

MICKEY D. SMITH,
EMPLOYEE

CLAIMANT

TEMPLE INLAND FOREST PRODUCTS,
EMPLOYER

RESPONDENT

INS. CO.-STATE OF PENNSYLVANIA,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 18, 2004

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

Claimant represented by HONORABLE JOSEPH P. GRAHAM, Attorney
at Law, Prescott, Arkansas.

Respondents represented by HONORABLE ERIC NEWKIRK, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed December 11, 2003. The administrative law judge found that the claimant proved his work consisted of rapid repetitive motion, and that the claimant proved he sustained a compensable gradual-onset injury to his elbow. After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. We find that the claimant did not prove he sustained a compensable injury.

I. HISTORY

Mickey D. Smith, age 54, testified that he began working for Temple-Inland in September 1995. Mr. Smith

testified that he began as a press console operator, a job which was not physical but required watching a monitor. After about one year, the claimant became an RMS and milling technician. The claimant agreed that this position, where he worked two years, required "about 25 to 30 percent physical work and the rest was monitoring." The claimant then worked as a drying and environmental technician before ultimately becoming a quality-control technician in 2000. The claimant testified that his duties as quality-control technician entailed monitoring and testing the qualities of particle board. The claimant agreed that he did not work on an assembly line. The respondent-employer's safety and health manager, Patricia Muldrew, testified that the claimant's work duties were not repetitive, and that the claimant was allowed to work at his own pace.

The claimant testified:

Q. As far as your physical actions, can you describe what you would be doing in doing your work? Picking up the board?

A. To a degree, yes. I had a table that was built at 90 degrees, the left side being basically for the board itself and to the right would be where the saw itself was at. The fence, or the gate that controls the length of the cut, extended 50 inches, so one cut would be 50 inches. I couldn't cut it in half or something like that and then break it down from that, I'd have to take a 50 inch cut and maybe cut some more, and I would have to slide it back and forth. It was the same level but I would have to slide the board from one side to the other. One of the problems I would have sometimes is not so much the sliding of it, because I could get it off the edge and get hold

of it, but once I started the test pattern, the board was forced to be flat and I had no way to get my hands under it to change anything. I had to put a downward pressure on it, so I was pushing across instead of actually gripping the board.

Q. And is that some of the activity in your job that caused you the most trouble?

A. I think so....

Q. What other motion to your knowledge contributed to this problem?

A. Okay. When you push the board through the saw and you complete the cut, you have to clear the board from the saw and in order to do so you have to get a grip on it somehow and most generally the way you do it is push it just a little excess past half way to where the board until tilt up, and when it does, then you can get a grip on it with your hand and thumb, you know, and then pull back. That was the pattern that originally started the left arm and the - I mean the right arm is where it originally started, which generally is the scrap piece, and the left side is where you start cutting the pattern. Usually I could hold the left side down, pull the right side back, and then take two hands and try and pull the left side back.

Q. So you have attributed your problems to two major motions that you were doing?

A. I believe that would be correct but as to what motions do what, you know, I couldn't swear to it.

Q. How many times a day would you do those particular motions that you have attributed as causing your problems?

A. Seven to ten times a day.

Q. During an eight hour shift?

A. Twelve hour shift. Eight hour shift would be six to seven maybe, sometimes five....

Q. When did you first notice having any affliction in your elbows?

A. I'd say probably the first couple of months into the new year of 2001, and by the third month it was really starting to be quite a problem for me....By March it really started bothering me quite a bit, more so in the right arm than anywhere.

The record indicates that the claimant presented to Dr.

Mark Thomas Jansen on March 6, 2001:

Mickey presents with bilateral elbow pain, right greater than left over the past 2 months or so. By history, he is required to lift repetitively. This does involve elbow out and palm down lifting....His examination shows bilateral lateral epicondylitis (sic) which is more prominent on the right side. I think his condition is such that if we can change his lifting techniques and start him on conservative treatment with tennis elbow bands and anti-inflammatories, we should be able to avoid steroid injections or surgical intervention. He will attempt to avoid this type of maneuver at home or work....

The claimant returned to Dr. Jansen on March 26, 2001:

Mickey presents for his complete physical. He is complaining of nocturnal myoclonus which is not on a regular basis....I have gathered history of blood transfusions back in the mid 1970's. These ocured (sic) during hospitalization for perforated gastric or duodenal ulcer. Additionally, he had traumatic severance of the medial left elbow. This resulted in ulnar nerve injury and also required at least 1 blood transfusion. I don't recall the date of this particular injury. Otherwise he has no new complaints....He does have post surgical changes and post traumatic changes of the left elbow with some hypoesthesia of the left 5th finger as a result....

The physician's impression included "Post traumatic injury to the left ulnar nerve."

On April 5, 2002, Dr. Jansen noted "persistent pain of the right elbow consistent with lateral epicondylitis." The

claimant testified, "I continued to work and it seemingly would get a little worse and a little worse. I'm not sure if it was a couple, maybe three months later, but I went back to the doctor and my left arm seemed to be flaring up at this time. I'd gotten another air cast and was doing the same thing as I'd done with the other." Dr. Jansen noted on July 2, 2002, "left lateral epicondylitis similar to what he had on the right side."

Dr. Jansen referred the claimant to Dr. David M. Rhodes, who reported on October 14, 2002:

The patient is a 52 year old left hand dominant male, lab tech., who for the past year has been diagnosed with bilateral tennis elbow. He has received two injections in each elbow with minimal improvement....

X-RAYS: 3 views of the left elbow show a bone spur on the olecranon.

Dr. Rhodes assessed, "Left lateral epicondylitis with radial tunnel syndrome." Dr. Rhodes' report also contained a supplemental diagnosis, "Synovitis left elbow and radial tunnel." Dr. Rhodes planned conservative treatment, including a referral for physical therapy.

On November 25, 2002, Dr. Rhodes assessed "left tennis elbow" and planned to schedule a "left lateral epicondylectomy." Dr. Rhodes operated on December 13, 2002:

A 4 cm longitudinal incision was made over the lateral base proximally of the lateral epicondyle. The subcutaneous tissue was dissected down to the level of the lateral epicondyle. The extensor carpi radialis brevis origin was dissected out and

transected 1 cm distal to the origin. The pathological tissue was also debrided with a rongeur. The lateral epicondyle was removed using an osteotome, smoothed with a rasp and covered with bone wax....

Dr. Rhodes reported on January 6, 2003:

Mr. Mickey Smith is diagnosed with left lateral epicondylitis and initially conservative treatment. However, secondary to chronic condition the patient underwent surgery on December 13, 2002. Mr. Smith is employed as a quality control lab technician and his job is directly greater than 50% responsible for the lateral epicondylitis. Mr. Smith showed me a work description which is consistent with contributing to his condition.

An occupational therapist's notes indicate that the claimant had good results from surgery. The claimant testified that he returned to work on April 14, 2003.

Mr. Smith claimed entitlement to worker's compensation. The claimant contended that he sustained "a compensable injury to his elbow caused by rapid repetitive movement and that he is entitled to medical benefits as a result of this injury." The respondents contended that the claimant could not prove he sustained a compensable injury.

The respondents submitted into the record a videotape of the workplace taken August 29, 2003. The videotape showed an individual, not the claimant, cutting wood with a power saw and stacking cut boards. The employee worked deliberately, and his upper extremity motions did not appear to be rapid or repetitive. The individual was also seen pushing boards and cutting boards with a table saw. The

videotape demonstrated no rapid repetitive motion involving the employee's elbows or upper extremities. Reanna Key, a quality assurance technician for the respondents, testified that she made the video. Ms. Key credibly testified:

Q. And in making that video, did you ask that the pattern be set up according to conditions as they were in early 2001?

A. Yes.

Q. And that video reflects a hot test. Is that accurate?

A. Yes, just a hot test.

Q. There is not a sanded test on that video?

A. No.

Q. Okay. Could you go through what happens on a sanded test?

A. A sanded test? A technician goes over to the strapping line for the board, writes down the information that is on the unit ticket. A forklift brings it to their table and puts it on the table and they cut it down into smaller pieces and basically cut the six MOR strips, six IB's, three DOC samples, two moistures, and two 12 by 12's.

Q. How long does that whole process take?

A. Fifteen minutes....

Q. As far as in an 8 hour shift in March of 2001, how many hot and how many sanded tests was a quality control technician expected to do?

A. In 2001? They would have done 3 hot tests and 1 sanded test.

Q. And in a 12 hour shift in March of 2001, how many would they have done?

A. They would have done 4 of the hot tests and 2 of the sanded tests.

Q. And which takes longer? Do they both take about the same amount of time?

A. Hot test takes a little longer.

Q. Okay.

A. They don't have to do the breaking of the samples.

Q. And so, how long does a hot test take?

A. 30 minutes.

Q. So basically in an eight hour shift there were four tests to be done, 3 hots and 1 sanded. Is that accurate?

A. Yes.

Q. How much time would that then leave them as far as when they are not doing any testing at all?

A. Probably 40 percent of the time.

Q. And that's assuming that that is a normal shift?

A. That's a normal shift, yes.

Q. And what would they be doing during that 40 percent of the time when they are not doing testing?

A. I guess whatever they needed to do or just sitting around.

Q. Okay. And during the 60 percent of the time when they are actually doing their tests and stuff, were they constantly doing something with their hands?

A. No.

Q. How much time are they doing something with their hands and arms?

A. Probably about 50 percent of the time.

Q. Is it very fast paced?

A. No. You can work at your own pace.

Q. As far as the type of movements that you are making with your arms and hands, are they the same movements over and over?

A. No, they are random.

The administrative law judge (ALJ) found that the claimant proved "that his work consisted of rapid repetitive motion." The ALJ found, "The claimant has proven by a preponderance of the evidence that he sustained a compensable gradual-onset injury to his elbow." The ALJ found that the claimant proved that the medical treatment he had received was reasonably necessary in connection with the compensable injury. Finally, the ALJ found that "the employer was aware of the claimant's alleged work injury prior to the claimant's surgery, and therefore any failure to notify the respondents is excused and will not bar this claim."

The respondents appeal to the Full Commission.

II. ADJUDICATION

According to Ark. Code Ann. § 11-9-102(4)(A),

"compensable injury" means:

(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.

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). The claimant's burden of proof shall be a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4)(E).

In the present matter, the Full Commission finds that the claimant did not prove by a preponderance of the evidence that his work duties involved rapid repetitive motion. The claimant did not prove by a preponderance of the evidence that he sustained an injury causing physical harm to the body and arising out of and in the course of employment. Nor did the claimant establish a compensable injury supported by objective findings. In addition, the claimant did not prove by a preponderance of the evidence that a compensable injury was the major cause of his disability or need for treatment.

The test for determining whether an injury is caused by rapid repetitive motion is two-pronged: (1) the tasks must be repetitive; and (2) the repetitive motion must be rapid. Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W.2d 644 (1998). The Full Commission finds in the present matter that the claimant's testimony did not describe rapid and repetitive work duties. The record does not show that any

of the "test patterns" described by the claimant or the pushing or stacking of boards involved rapid or repetitive motion. The claimant testified that he attributed his problems to "two major motions" performed at work. We are unable to determine from the record that these "two major motions" were repetitive; however, even if these two motions were performed repetitively, the preponderance of evidence does not show that the motions were rapid. The claimant further testified that these motions were performed only 7-10 times daily during a twelve-hour shift and 6-7 times during an eight-hour shift. We also note the credible testimony of Reanna Key, who stated that the "sanded test" performed by the claimant lasted only 15 minutes. Ms. Key further testified that during an eight-hour shift in March 2001, the claimant would perform only 3 hot tests and 1 sanded test. During a twelve-hour shift, the claimant would perform only 4 hot tests and 2 sanded tests. The claimant must prove by a preponderance of the evidence that his bilateral elbow problems were caused by rapid repetitive motion. See, Lay v. United Parcel Service, 58 Ark. App. 35, 944 S.W.2d 867 (1997). Like the claimant in Lay, the Full Commission is unable to determine from a preponderance of the evidence that these work duties performed by the claimant, separated by periods of several minutes or more, constituted rapid repetitive motion.

The Full Commission recognizes Dr. Rhodes' January 2003 report, where he wrote, "secondary to chronic condition the patient underwent surgery on December 13, 2002. Mr. Smith is employed as a quality control lab technician and his job is directly greater than 50% responsible for the lateral epicondylitis. Mr. Smith showed me a work description which is consistent with contributing to his condition." The Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. Hill v. Baptist Med. Ctr., 74 Ark. App. 250, 57 S.W.3d 735 (2001). Based on the record before us, the Full Commission is unable to assign probative weight to Dr. Rhodes' opinion that the claimant's job was "directly greater than 50% responsible for the lateral epicondylitis." We are likewise unable to find that the "chronic condition" described by Dr. Rhodes arose out of and in the course of the claimant's employment with the respondents. Nor was the alleged compensable injury the major cause of the claimant's chronic elbow condition.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove he sustained a compensable injury. The claimant did not prove by a preponderance of the evidence that he sustained bilateral epicondylitis which arose out of and in the course of his employment with the respondents. The claimant did

not prove that his work duties constituted rapid repetitive motion, nor was the alleged compensable injury the major cause of the claimant's disability or need for treatment. The Full Commission's adjudication renders moot any findings with regard to notice pursuant to Ark. Code Ann. §11-9-701. The Full Commission therefore reverses the opinion of the administrative law judge, and we hereby deny and dismiss this claim.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

MIKE WILSON, Special Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the opinion of the majority finding that claimant did not sustain a compensable injury in the form of epicondylitis or tennis elbow.

Claimant was a quality control technician for the employer. The employer manufactures particle board and part of claimant's job duties required him to cut a sample into smaller pieces for testing. After carefully reviewing a video purportedly outlining claimant's job duties, the Administrative Law Judge made the following observations:

The respondents in the present claim submitted a video of a representative individual performing the claimant's work activities. The claimant conceded the video was an accurate but partial representation of his work activities as of March, 2001. The testing process performed by the claimant begins with the selection of a large piece of particle board removed from inventory by forklift. The representative used a circular saw to cut off a sample piece appearing to measure approximately four feet by five feet. This sample was taken to an L-shaped table equipped with a table saw. The representative then cut the sample into a variety of shapes. He first cut thin strips of particle board, and then cut those strips into smaller pieces. Cutting the wood required repetitive movements of his arms and hands - sliding the wood across the saw and back, assembling the cut pieces, and discarding the waste pieces. Over the course of nine minutes and 45 seconds, the representative made 72 individual cuts (or series of movements), for an average of one cut or movement series every 8.125 seconds. Some individual pieces involved more rapid movement - for example, the cutting of one strip into small squares took 14 cuts in 35 seconds, an average of one cut or movement series every 2.5 seconds.

After cutting the wood, the representative then transported the pieces to what appears to be a testing lab. The work in the lab consisted of making notes, operating a computer, and examining the wood pieces over the course of 18 minutes and 30 seconds. None of the movements in the lab appeared to be rapid or repetitive, and they are not considered in this analysis.

The claimant testified he would perform the process portrayed in the

video, a "hot test", four times per day in a 12-hour shift or three times per day on an 8-hour shift. The claimant testified that he also performed two or three "sanded tests" in a shift, and these tests appear to require similar movements as the "hot test" outlined above. One of the claimant's co-workers, Reanna Key, testified that she was familiar with the claimant's work activities as of March, 2001. Key testified that a "sanded" test required a total of 19 cuts. She testified that a worker in the claimant's position would be expected to perform three "hot" tests and one "sanded" test each 8-hour shift.

Considering only the video evidence and the testimony of the respondents' witness, Reanna Key, I find that the claimant would have typically performed 235 movements per 8-hour shift. I reach this total by adding 72 movements for each of the three "hot" tests, plus the 19 cuts for the "sanded" test. Though this is not "assembly-line" work, and though the claimant does not perform this same function all day, his work with the table saw is clearly repetitive - the same motion of pushing wood through the saw is performed repeatedly for nearly ten minutes, four or more times per shift. A total of 235 movements per shift clearly falls within the definition of "rapid" as interpreted in the case law cited above. Therefore, I find that the claimant has proven by a preponderance of the evidence that his work consisted of rapid repetitive motion.

Based on the above evidence, I likewise find that claimant has proven by a preponderance of the evidence that his job duties involved rapid repetitive motion. Claimant must also show that there is a causal connection between his

epicondylitis and the employment. Based on claimant's credible testimony and Dr. Rhodes' opinion that claimant's "job is directly greater than 50% responsible for the lateral epicondylitis," claimant has met his burden of proof in this regard.

Finally, claimant has established his injury with objective findings. Dr. Rhodes' operative report details sufficient abnormal objective findings, as required by Ark. Code Ann. § 11-9-102(4)(D) (Supp. 2003).

The extensor carpi radialis brevis origin was dissected out and transected 1 cm distal to the origin. The pathological tissue was also debrided with a rongeur. (Emphasis added.)

Claimant has met his burden of proving by a preponderance of the evidence that he sustained a compensable injury. Accordingly, the opinion of the Administrative Law Judge should be affirmed. Therefore, I must respectfully dissent.

SHELBY W. TURNER, Commissioner