

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400912

MICHAEL NELSON,
EMPLOYEE

CLAIMANT

DELTA CONSOLIDATED INDUSTRIES,
EMPLOYER

RESPONDENT

GAB ROBINS,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 21, 2005

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

Claimant represented by the HONORABLE KEITH BLACKMAN,
Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MELISSA ROSS
CRINER, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed August 18, 2004. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations of the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that he sustained a gradual onset injury

to his right upper extremity which arose out of and during the course of his employment with Delta Consolidated Industries within the meaning of Ark. Code Ann. §11-9-102(4) (A) (ii) (a).

4. The claimant has proven, by a preponderance of the credible evidence, that the injury to his right upper extremity was caused by job activities which involved rapid repetitive motion.
5. Respondents are responsible for all medical and related treatment for claimant's right elbow injury, and respondents remain responsible for continued, reasonably necessary medical treatment, including, but not limited to surgery.
6. The claimant is entitled to temporary total disability benefits beginning March 17, 2004, and continuing through the date of the within hearing and until such time as his healing period is determined to have ended.
7. Respondents are entitled to a credit or offset in an amount equal to, dollar-for-dollar, the amount of benefits the claimant has previously received under a short-term disability policy pursuant to Ark. Code Ann. §11-9-411, as well as a credit for any unemployment benefits the claimant has received pursuant to Ark. Code Ann. §11-9-506 (Repl. 2002).
8. Respondents have controverted this claim in its entirety.
9. Claimant's entitlement to permanent disability benefits has been specifically reserved.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by

a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 18, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in

accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury to his right elbow. Based upon my de novo review of the entire record, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

The claimant was employed by respondent employer as a welder. The claimant utilized a wire welder to weld sheet metal with various attachments. The claimant testified that he works a ten hour shift and that he normally welds chests for about six of those hours. The claimant also testified that he often volunteered for overtime and would work up to twelve hours a day. The claimant explained that when welding a

chest, the employees have a tack time that they are required to meet and if the tack time is not met the employee would be warned and may eventually get written up for being slow. The claimant further testified that he had to work fast or he would get behind in his work. As far as the production requirements, the claimant testified that he normally processed about 250 to 300 chests a day and between 75 and 100 monster boxes a day. Finally, the claimant testified that the basic requirement of his job was to perform repetitive work, performing the same welding on each of these chests or boxes.

The claimant began experiencing problems with his right elbow and reported his problem to his supervisor. He was advised to soak his arm in hot water and Epsom Salts, but this did not improve his condition. Respondents provided the claimant with an elbow brace when he continued to complain about the pain. On October 27, 2002, the claimant reported the problem again, and he was taken to the company doctor by Mike Bishop. The claimant explained that he tried to give the elbow brace a chance to work that is why he did not go to the doctor sooner. The claimant described his pain as "sharp burning sensations in my arm and my elbow and about three inches down right there." When he was asked what

activity caused his arm to hurt more, the claimant testified:

Well, the chests, picking them up on that ramp to my table made it hurt worse than most, and standing up the nine series boxes, the 98's and 94's and things.

A videotape was introduced into evidence which showed another employee performing the claimant's job duties. The claimant testified that he usually worked a little faster than the employee shown of the videotape.

The claimant was asked on cross-examination to explain how he felt he was injured. Again, the claimant testified that he felt he was injured, "Just from the repetitive work and lifting up the chest boxes." When questioned about lifting the chest boxes, the claimant responded, "Mostly, yes, but all the heaving lifting and all that contributed, I'm sure." The claimant described the lifting of chest boxes as scooting the box up a ramp and pushing it up the ramp unto the work table with his right arm while his left arm was used to guide the movements.

The Administrative Law Judge questioned the claimant about the number of welds he had to make each day. The claimant testified that he would guide the welding tool with his right arm and he had to squeeze the trigger about 14 times on the chests. When

questioned by the Administrative Law Judge, Dennis Dent, the employee pictured in the videotape, testified that up to 60 welds were required on the monster boxes. The Administrative Law Judge, and now the majority, relied upon this testimony in finding that the claimant established by a preponderance of the evidence that his injury was caused by rapid repetitive motion.

The courts have provided guidance in determining whether a claimant has proven that his injury was caused by rapid repetitive motion. In Baysinger v. Air Systems, Inc., 55 Ark. 174, 934 S.W.2d 230 (1996) the Court held that multiple tasks may be considered together in determining whether the repetitive requirement has been met. In Lay v. United Parcel Service, 58 Ark. App. 35, 944 S.W.2d 867 (1997) the Court of Appeals declined to find work duties satisfied the definition of rapid repetitive motion when the duties or tasks were separated by periods of several minutes or more. In reviewing the Court of Appeals prior decisions, the Arkansas Supreme Court in Anna Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W.2d 644(1998) determined that the rapid repetitive motion requirement establishes a two prong test "(1) the task must be repetitive, and (2) the repetitive motion must be rapid." The Court further stated:

As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. Arguably, even repetitive tasks and repetitive work, standing alone, do not satisfy the definition. The repetitive tasks must be completed rapidly.

In Rodman v. ACX Technologies, Full Commission Opinion filed July 8, 1999 (AWCC No. E804579), noted that the Court of Appeals stated that we "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 in Rodman further found that the claimant had failed to prove that the repetitive motion of her upper extremities were performed rapidly under the two-prong test set forth in Malone v. Texarkana Public Schools. After analyzing the evidence presented in this claim, I find that the claimant has failed to prove that he performed rapid repetitive motion with his right upper extremity. The claimant attributed his right elbow condition to lifting

and pushing chests. After reviewing the videotape, I cannot find that the lifting of chests amounted to rapid repetitive motion of the claimant's right upper extremity. This lifting motion was performed repetitively in that the claimant may work on as many 300 chest per day, but the repetitive motions were not completed rapidly in succession to rise to the level of rapid repetitive motion. Moreover, there is nothing depicted in the videotape to persuade me to find that the claimant's utilization of the welding tool required rapid repetitive motion of the claimant's right elbow. From my review of the videotape, the only time the employee ever moved his elbow joint while welding was when he first picked up the welding tool to begin welding, and when he had to make five or six welds along the top of the monster box. More often than not this motion was performed at the shoulder and not the elbow. In fact, the videotape demonstration of the employee's activities does not reveal the actual movements necessary to perform the welding tasks would generally be considered rapid. See, Smith v. Temple Inland Forest Products, Full Commission Opinion filed August 18, 2004 (AWCC No. F300131). In Smith, the Full Commission concluded that while the claimant worked deliberately, his upper extremity motions did not appear to be rapid

or repetitive, and that the claimant's elbows and upper extremities were not shown to be involved in rapid repetitive motion. In my opinion, this claim is sufficiently similar to Smith, so as to find that the claimant has failed to meet his burden of proof.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner