

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400932

DEL EADS, EMPLOYEE	CLAIMANT
ROGERS GROUP, INC., EMPLOYER	RESPONDENT
HARTFORD INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JULY 24, 2006

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

Claimant represented by HONORABLE AARON L. MARTIN, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury in the form of a gradual onset shoulder injury. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a truck driver. His job duties required that he

drive a large dump truck between a place where raw materials were being excavated to the place where the raw materials were dumped. The claimant had driven the truck for approximately one month when he began having problems with his left shoulder. The claimant did not know what caused the problems and went to the doctor with the generalized complaint of pain in the entire left side of his body. The claimant underwent a cervical MRI as well as an MRI of the left shoulder. The cervical MRI was interpreted as being normal and the MRI of the left shoulder stated that it was "suspicious" for a tear. The claimant contended that he sustained an injury to his left shoulder in the form of a gradual onset injury.

In order to establish compensability of an injury, the claimant must satisfy all the requirements set forth in Ark. Code Ann. §11-9-102 (Repl. 2002). See, Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). The claimant does not contend that the injury is identifiable by time and place of occurrence, but that the injury is a rapid repetition motion injury. In

order to prevail on a rapid, repetitive motion claim, the claimant must prove by a preponderance of the evidence that he/she sustained an injury causing internal or external harm to the body which arose out of and in the course of their employment and which required medical services or resulted in disability or death; that the injury was caused by rapid repetitive motion; that the injury was the major cause of the disability or need for treatment; and must establish a compensable injury "by medical evidence supported by "objective findings".

However, in addition to these requirements, if the injury falls under one of the exceptions enumerated under Ark. Code Ann. § 11-9-102(5)(A)(ii), 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)(ii)(Repl. 2002). If an employee fails to establish by a preponderance of the credible evidence any of these requirements for establishing the compensability of the alleged injury, he fails to

establish the compensability of the claim and the claim must be denied. Reed v. ConAgra, supra.

In applying the controlling law under Act 796 of 1993 to the evidence in this case, the Commission is to strictly construe the Act. Ark. Code Ann. § 11-9-704(C)(3). Under the gradual onset exception to the specific incident requirement, the claimant must establish a causal connection between his injury and his employment by medical evidence supported by objective findings and he must establish that his injury is the major cause of his disability or need for treatment. We find that the claimant in the present case has simply failed to meet his burden of proof on the major cause requirement. 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 evidence demonstrates that the claimant drove the truck between the excavation site and the dumping site 15 to 100 times a day and that he worked approximately 12 to 14 hours per day. He admitted that the only activity that he performed with his left shoulder was to back the truck up to the site of excavation. He testified that at the other end he did not have to back the truck up to dump the load. The

trucks had automatic transmission and power steering. By dividing 75 trips into the 13 hours a day that the claimant worked, the claimant was performing this activity once every 10.4 minutes. In our opinion, this simply does not rise to the level that the claimant can prove that his job duties entailed rapid repetitive motion. The claimant turned the steering wheel an unknown number of turns as he was backing up in intervals of approximately 10 minutes apart. In our opinion, this does not sufficiently establish that the claimant was performing a job duty that required rapid repetitive motion. As such, he cannot satisfy the requirements of proving that he sustained a gradual onset injury. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____I, respectfully, dissent from the Majority's opinion reversing the January 11, 2006 opinion of the Administrative Law Judge. Based upon my de novo review of the record, it is my opinion that the claimant has met his burden of proving a compensable gradual onset injury to his shoulder and the Administrative Law Judge's decision should be affirmed and adopted.

The claimant began working for the respondent on September 16, 2002. Initially, the claimant worked in grounds maintenance, cleaning and performing general maintenance. After three months in maintenance, he switched to driving a 40-ton dump truck in the "crusher" area. A month later, the claimant switched to driving an older 35-ton dump truck in the "stripping" area. After four months of driving the older truck, claimant began noticing problems in his left shoulder. He initially thought it was just a sore muscle, until it began to swell. Claimant's testimony

indicated that the operation of this vehicle required him to use his left arm and shoulder in a strenuous manner to steer the vehicle for some 12 to 14 hours a day 5 days a week. Claimant's testimony, in this regard, is consistent with the description of the onset of his left shoulder difficulties that he gave to the respondents and to all of his various physicians. In my opinion, claimant testimony is credible.

The claimant reported the injury to his supervisor, and scheduled an appointment to see Dr. Wilson. The claimant was referred to an orthopedic surgeon, Dr. Powell, who ordered an MRI. The radiologist, Shane McAlister, reviewed the MRI and reported:

Small amount of fluid identified within the glenohumeral joint with fluid also identified within the subcromial and subdeltoid bursa.

Heterogeneous signal intensity present within the rotator cuff tendon near its insertion on the greater tuberosity.

Dr. Powell examined the claimant on multiple occasions and reviewed his MRI. His assessment was that the claimant was

suffering from a "left shoulder partial rotator cuff tear and impingement." Dr. Powell recommended an additional MRI.

In order to establish compensability of an injury, the claimant must satisfy all the requirements set forth in Ark. Code Ann. §11-9-102 (Repl. 2002). See, Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion, Filed February 2, 1995 (Claim No. E317744). Claimant contends that his injury is a rapid repetitive motion injury. In order to prevail on a rapid, repetitive motion claim, the claimant must prove by a preponderance of the evidence that he/she sustained an injury causing internal or external harm to the body which arose out of and in the course of their employment and which required medical services or resulted in disability or death; that the injury was caused by rapid repetitive motion; that the injury was the major cause of the disability or need for treatment; and must establish a compensable injury "by medical evidence supported by 'objective findings'."

However, in addition to these requirements, if the injury falls under one of the exceptions enumerated under

Ark. Code Ann. §11-9-102 (5) (A) (ii), 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) (ii) (Repl. 2002). If an employee fails to establish by a preponderance of the credible evidence any of these requirements for establishing the compensability of the claim then the claim must be denied. Reed v. ConAgra, supra.

In applying the controlling law under Act 796 of 1993 to the evidence in this case, the Commission is to strictly construe the Act. Ark. Code Ann. §11-9-704(C) (3). Under the gradual onset exception to the specific incident requirement, the claimant must establish a causal connection between his injury and his employment by medical evidence supported by objective findings and he must establish that his injury is the major cause of his disability or need for treatment.

_____ In my opinion, the current medical record clearly establishes the actual existence of a physical injury or damage to the claimant's left shoulder. All of the

physicians, who have seen the claimant, have diagnosed some type of injury to his left shoulder. The images produced by an MRI are clearly findings that cannot come under the voluntary control of the patient. The radiologist report notes three specific objective findings from the MRI: (i) fluid in the glenohumeral joint, (ii) fluid in the subcromial and subdeltoid bursa, and (iii) signal intensity in the rotator cuff. Dr. Powell's assessment was based upon these objective findings.

In order to "arise out of and occur in the course of the claimant's employment," the claimant's left shoulder difficulties must be causally related to the employment. Therefore, the claimant must prove by the greater weight of the credible evidence the existence of a causal relationship between his left shoulder difficulties and his employment with the respondent. However, he need not prove the existence of such a causal relationship to an absolute or mathematical certainty. There is no evidence that the claimant had sustained any injury or damage to his left shoulder, prior to his employment with the respondent. The

claimant's difficulties with his left shoulder first began after the claimant was assigned to driving an oversized dump truck in the respondent's "stripping" operations. This is a large vehicle used in mining and quarrying operations. It far exceeds the size of a regular dump truck and is not "street legal".

The medical evidence shows that the MRI study revealed objective defects that were compatible with and indicative of damage caused by overuse or over exertion of the left shoulder joint. Specifically, these tests showed defects that were consistent with chronic tendinitis, a small but complete tear of the supraspinatous muscle or tendon, and edema or swelling that was "suspicious" for a repetitive injury.

In his report of August 11, 2005, Dr. Powell opined:

[M]ore likely than not he [the claimant] has an acute exacerbation of his previous work related injury sustained in May, 2003, and it is within a reasonable degree of medical certainty that his left shoulder problem is work related.

_____ In my opinion, the evidence presented clearly shows that the claimant's employment related use of his left arm and shoulder could have reasonably caused the medically established and objectively documented physical injuries or damage to this portion of his body. The claimant's difficulties with this portion of his body first appeared within a reasonable period of time after his employment related activities for the respondent which demanded essentially constant strenuous use of his left arm and shoulder. The evidence also fails to show any other reasonable explanation for the occurrence of the medically established and objectively documented physical injuries or defects to the claimant's left shoulder. Thus, in my opinion, under the rule set out in Hall v. Pittman Construction Company, 235 Ark. 104, 357 S.W.2d 263 (1962), claimant has proven the existence of a causal relationship between his left shoulder difficulties and his employment with the respondent.

The next issue is whether the claimant's gradual onset injury was caused by rapid repetitive motion. If an

injury cannot be identified by a single incident, a claimant can still prove that he/she sustained a compensable injury if it was caused by rapid repetitive motion. See Ark. Code Ann. §11-9-102(4)(A)(ii)(a). In Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W.2d 644 (1998), the Court established a two-prong test requiring proof that (i) the task performed is repetitive, and that (ii) the repetitive motion is rapid. In my opinion, the claimant proved both prongs.

The claimant gave a specific description of his job as a heavy-duty dump truck operator. Generally, claimant would drive the dump-truck to pick up material, drive away to dump the material, turn around and pick up the next load. Initially, claimant operated a "newer" dump truck while working in the "crusher" area. This vehicle was described as a true automatic, which allowed the claimant to keep the truck in gear and switch arms to rotate the steering wheel. After one month, claimant was re-assigned to the "stripping" area and had to operate an "older" model truck. The claimant testified that this older truck was more difficult to turn,

and was not automatic, so he was required to shift with his right arm and rotate the steering wheel with his left arm. The claimant testified that while working in the "stripping" area, he would make fifty (50) to one hundred (100) trips per day. Each trip required the claimant to turn-around after dropping off a load. To turn around required the claimant to maneuver the vehicle back and forth three (3) to four (4) times. Each back and forth maneuver required five (5) rotations of the steering wheel. Therefore, the claimant was required to completely rotate the steering wheel, anywhere from seven hundred and fifty (750) to two thousand (2,000) times a day. Again, the rotations of this steering wheel were all done with claimant's left arm only. It is apparent that, during the majority of claimant's work day, he was required to constantly use his left arm and shoulder to hold and turn the steering wheel on the oversized dump truck. It is my opinion that such activity involving the claimant's left arm and shoulder would be considered both "rapid" and "repetitive" given the usual and customary meaning of those words.

Finally, the claimant must prove that the employment related aspect of his left shoulder injury was the "major cause" of either his "need for medical treatment" for his left shoulder difficulties or of any "disability" that his left shoulder difficulties have occasioned, Ark. Code Ann. §11-9-102(4)(E)(ii). This subsection does not require the employment related aspect or contribution to a total "resultant condition" to be the "major cause" of the "resultant condition", itself. This section only requires that the employment related aspect or contribution to the total "resultant condition" be the "major cause" of either the resultant condition's need for medical services or of any disability the resultant condition may have produced. Such an employment related injury may still be compensable, even if it is merely the straw that broke the camel's back, if it was the "major cause" that the total resultant condition now required medical treatment or began to cause disability.

In the present case, the MRI study of the claimant's left shoulder was interpreted as also showing

degenerative osteoarthritic changes (osteophytes) involving the left shoulder joint. Although these defects may have pre-existed the claimant's employment with this respondent, there is no evidence that, prior to the claimant's employment with this respondent, these osteoarthritic defects required any medical services or produced any disability. In fact, the medical evidence even fails to show that these particular osteoarthritic defects are, even at the present time, playing any causal role in the claimant's current need for medical services or current disability.

Rather, the medical evidence shows that the claimant's current difficulties with his left shoulder, which are requiring medical services and resulting in disability, are the result of the documented defects in the form of a possible complete tear of the supraspinatous muscle or tendon, edema and tendinitis at the base of the greater tuberosity of the rotator cuff tendon, and/or chronic tendinitis or bursitis of the left shoulder joint. It is these particular defects that the greater weight of the evidence presented shows to have likely been caused by

the claimant's employment activities with this respondent that required "rapid repetitive motion" of his left arm and shoulder. Thus, the claimant's employment related activities for this respondent were the "major cause" for his need for medical services for his current left shoulder difficulties. Thus, in my opinion, the claimant has satisfied the statutory requirement for a "compensable injury" that is contained in Ark. Code Ann. §11-9-102(4)(E)(ii).

In summary, it is my opinion, that the claimant has proven that during his employment with this respondent, he has sustained a "compensable injury" to his left shoulder, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(ii)(a). He has further proven that this left shoulder injury satisfies all of the necessary requirements for a "compensable injury" contained in the Act. He is therefore, in my opinion, entitled to appropriate benefits, under the Act, for this compensable injury.

Ark. Code Ann. §11-9-508 entitles the claimant to "reasonably necessary medical services" for this compensable injury. Reasonably necessary medical services are those

services medically appropriate for and necessitated by the compensable injury, which have a reasonable expectation of accomplishing the purpose or goal for which they are intended. Such purposes or goals include the accurate diagnosis of the nature and extent of the injury, the resolution or improvement of the actual physical damage caused by the injury, and the reduction or resolution of symptoms and complaints produced by the injury.

The evidence presented in this case shows that the medical services provided the claimant by and at the direction of Dr. Robert B. Wilson, Jr., Dr. Shane McAlister, and Dr. Mark Powell, all represent reasonably necessary medical services for the claimant's compensable left shoulder injury. All of these services were necessitated by or connected with the claimant's compensable left shoulder injury and resulting difficulties. Further, these services are of a type generally recognized by the medical community as being appropriate to accurately diagnose the nature and extent of the injuries to the shoulder, to

actively treat such injuries, and to reduce the symptoms produced by such injuries.

In my opinion, the evidence establishes that the additional medical services that have been recommended by Dr. Powell (a diagnostic and possibly corrective arthroscopy of the left shoulder) also represents reasonably necessary medical services for the claimant's compensable left shoulder injury. Again, this type of procedure is widely recognized as being appropriate to accurately diagnose and treat injuries and difficulties such as those experienced by the claimant. Clearly, Dr. Powell is of the opinion that such a procedure is appropriate. As a board certified and orthopaedic surgeon with particular expertise in the area of medicine associated with the diagnosis and treatment of shoulder injuries, Dr. Powell's opinion in this regard is entitled to great weight and credit.

For the foregoing reasons, I respectfully dissent from the Majority's opinion reversing the January 11, 2006 opinion of the Administrative Law Judge. It is my opinion

that claimant has met his burden of proving a compensable gradual onset injury and therefore the Administrative Law Judge's decision should be affirmed and adopted.

SHELBY W. TURNER, Commissioner