

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407843

KAY JARRELL, EMPLOYEE	CLAIMANT
INTERNATIONAL PAPER COMPANY, EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES, CARRIER	RESPONDENT

OPINION FILED APRIL 13, 2006

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

Claimant represented by HONORABLE KENNETH E. BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondent represented by HONORABLE MICHAEL J. DENNIS, Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission from an appeal by the respondents from a decision filed by an Administrative Law Judge on June 9, 2005, wherein the Administrative Law Judge found, in relevant part, that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right hand arising out of and in the course of her employment with the respondent employer on June 19, 2004. In accordance with this finding, the Administrative Law Judge

awarded the claimant expenses for the treatment of her injury, temporary total disability benefits from June 20, 2004 through November 7, 2004, and attorney's fees. The respondents specifically appeal two issues. First, the respondents appeal the compensability of the claimant's right hand injury, including her carpal tunnel syndrome. Second, the respondents appeal the Administrative Law Judge's exclusion of proffered testimony concerning the length of time that the claimant had experienced right hand symptoms prior to claiming an injury to that hand.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable specific incident injury to her right hand. In addition, a review of the record reveals that the Administrative Law Judge erred in failing to consider proffered testimony in her decision. Taking the totality of the evidence into consideration, including the proffered testimony, the compensability of the claimant's hand injury

is hereby denied and the decision of the Administrative Law Judge is, therefore, reversed.

Concerning the issue of proffered testimony, the respondent asserts that statements the claimant made to Ms. Polly Sweet, the plant nurse, in a recorded conversation, are relevant in that they show prior inconsistent statements made by the claimant. The respondent attorney contends that these prior inconsistent statements are admissible. The claimant's attorney objected to these statements being admitted as they were part of a "recorded statement." The respondent attorney, however, did not offer the recording as evidence, nor did he offer statements made by Ms. Sweet. In fact, the respondent attorney stated that it was not his intention to do so. Rather, the respondent attorney explained that he was simply trying to ask the claimant about the conversation, and to establish the fact that the conversation was recorded "as a precursor of the circumstances of the conversation," in order to then "ask her if she recalls something that's attributed to her in that conversation." The Administrative Law Judge allowed the

respondent attorney to proffer that question, warning that she would not take that part of the record into consideration in her decision. Generally, one who offers evidence has the burden of proving its admissibility. Benson v. Shuler Drilling Co., 316 Ark. 101, 875 S.W.2d 552 (1994). Moreover, in the Pre-Hearing Order filed November 23, 2004, the Administrative Law Judge advised the parties that they were bound by the exhibits and witnesses disclosed at the prehearing conference, and that evidence, (either in the form of depositions, documentary evidence, or testimony of witnesses), not disclosed through the prehearing questionnaire or set forth within the terms of the prehearing order would not be considered as evidence at the hearing absent a showing of good cause. It is noted, however, that the Commission has broad discretion in the admission of evidence, and is not bound by the Rules of Evidence.

The respondent attorney did not intend nor did he attempt to introduce the taped conversation of the claimant and Ms. Sweet into evidence. He merely pointed out that the

conversation between those two individuals had been recorded in order to give the claimant a point of reference, and to lay a proper foundation for his question. The claimant was certainly present at the hearing and available for re-direct examination by her own attorney. Therefore, the claimant was not unduly prejudiced by the question presented to her by the respondent attorney regarding statements she may have made to another individual. Whether or not those statements were recorded is insignificant because that recording and/or statement made in that recording by Ms. Sweet were not offered into evidence. Therefore, we find that the question proffered by the respondent attorney, and the claimant's response thereto, are admissible and are being considered in this de novo review.

This is not a situation where the respondents sought to impeach the claimant with a prior inconsistent statement. Since the respondents had not disclosed the recorded statement as potential evidence in the pre-hearing questionnaire, the respondents took a gamble in questioning the claimant about her previous conversation, for if she had

denied her disclosure to Ms. Sweet of a history of pain and swelling in her right arm for three months, the respondents would have been saddled with this denial without a means of impeachment. As this was not the case, and the respondents were merely laying a foundation for the question, we find that the question and answer were proper and should have been permitted by the Administrative Law Judge.

The claimant asserts that she sustained a compensable, specific incident injury to her right hand and wrist on June 19, 2004. For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings,

as defined in Ark. Code Ann. §11-9-102(16), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997). The claimant does not assert that hers was a gradual onset of carpal tunnel syndrome. Therefore, the provisions set forth in Ark. Code Ann. §11-9-102(4)(A)(ii)(a) do not apply to this claim, in that the claimant does not have to prove that her carpal tunnel was caused by rapid repetitive motion. However, in order to prove compensability, the claimant must still establish compensability by medical evidence supported by objective findings.

During the time that the claimant's injury allegedly occurred, the claimant worked as a process specialist in the extruder department of the claimant's Pine

Bluff plant. According to the claimant's testimony, her job duties included loading a machine called a winder with large rolls of freshly coated paper. The claimant explained this process essentially as follows. A large roll of paper was "finished" with a polycoating in a machine called an extruder. Once this coating process was complete, a large overhead crane would remove the roll from the extruder, and place it into the winder. The claimant testified that the crane is operated by hand controls, i.e. push buttons and levers. The claimant stated that she was responsible for loading the rolls of paper, which average from eleven inches in length up to forty-eight inches in length, into the winder machine via the crane. The claimant further stated that the paper on the rolls occasionally overlaps, requiring them to be cut or trimmed with a paper knife, which creates slabs of scrap paper. The claimant explained that she was occasionally required to drag these slabs of cut paper, which can be "extremely thick and extremely long", to the shredder operator. The claimant testified that she also assisted with cleaning the extruder and re-threading this

machine when the paper broke during the polycoating process. However, in further testimony, the claimant admitted that problems with processing the paper did not necessarily occur on every shift. The claimant also testified that the rolls of paper were switched out approximately six times per hour, unless a problem arose and the machine was stopped. When work was progressing at a normal rate and pace, the claimant testified that her main job function was "moving buggies around unloading the cores off of the buggies... ." The claimant further stated that these empty cores, on which paper was wound, are approximately five to six feet long and that there are between thirty-six and fifty-one per buggy. The claimant testified that the cores are unloaded by hand.

The claimant, who is currently employed with the respondent employer in another position, had performed her job with the respondent employer in the extruder department for approximately two years and nine months prior to her alleged injury of June 19, 2004. The claimant further testified that she had experienced no problems with her right hand and wrist prior to her alleged accident. However,

when questioned by the respondent attorney concerning her having told Ms. Sweet that she had been having problems with pain and swelling in her right arm for approximately three months prior to her alleged accident of June 19, 2004, the claimant responded:

I had some problems on and off, yes. I was left on a winder for twelve weeks in a row without rotation. We're supposed to rotate every three weeks and I wasn't rotated.

In addition, the claimant's testimony reveals that prior to coming to work for the respondent employer, she had been employed in several occupations that required extensive use of her hands. For example, just prior to coming to work for the respondent employer, the claimant worked in a manufacturing plant where automobile components, such as gas caps and radiators, were made. The claimant stated that her primary duties at this manufacturing plant were inspecting gas caps and driving a fork truck. The claimant agreed that inspecting gas caps was a hand intensive activity. Furthermore, driving the fork truck required the claimant,

who is right-hand dominate, to operate levers with both hands. Prior to her manufacturing job, the claimant was self-employed in what she described as a private interconnect telephone service. The claimant admitted that her main duty there was to write down information regarding "trouble calls", which required considerable use of her right hand. Finally, the claimant testified that she has been a licensed beautician since 1973, and that she actually discharged those services for a period of about eight years out of the twenty years that she has been licensed.

The claimant testified that on June 19, 2004, she reported to her foreman that she had been experiencing swelling, tingling, and numbness in her right hand during her shift. An incident and investigation report dated June 22, 2004, reflects that the claimant reported swelling in her right fingers and hands, and that she was placed on light duty. Further, that report indicates that the claimant attributed her problems to overuse of her right hand, as opposed to a specific incident. More specifically, this report states:

No certain incident occurred - appears to be caused by repetitious actions - Kay has been working for the PSII winder task for several weeks & all of the work of handling of paper cores may have attributed to her swollen fingers.

The medical records reflect that the claimant presented to Dr. John O. Lytle on July 13, 2004. In his report of that visit, Dr. Lytle noted observable signs of swelling in the claimant's right hand, decreased sensation in her median nerve distribution, tenderness at the DIP joint of the claimant's index finger, and tenderness at the PIP joint of the claimant's long and ring fingers. At that time, Dr. Lytle diagnosed the claimant with acute tenosynovitis, attributable to overuse, and carpal tunnel syndrome of her right hand. Due to the claimant's sensitivity to anti-inflammatory medications, Dr. Lytle instructed her to take aspirin with Maalox, and to do range of motion and stretching exercises with her right hand. In addition, Dr. Lytle placed the claimant on light duty. As of her examination on August 10, 2004, the claimant's symptoms persisted, and Dr. Lytle recommended NCV studies be

undertaken. On September 1, 2004, the claimant underwent carpal tunnel release surgery. Upon her follow-up appointment with Dr. Lytle twelve days after that procedure, Dr. Lytle reported:

There is no question in my opinion that this is a stressful job and has caused the tendonitis and soreness in her hand and aggravated her carpal tunnel symptoms.

Sometime between the claimant's initial appointment with Dr. Lytle and her follow-up appointment with him on August 10th, the claimant was seen by Dr. Tim J. Wilkin by referral of the plant nurse. In contrast to Dr. Lytle's assessment of the claimant's condition, Dr. Wilkin noted that Phelan and Tinnell were negative bilaterally, that the claimant's muscle strengths were five over five and equally symmetrical in the upper and lower extremities, and that deep tender reflexes were two over four and equally symmetrical in the claimant's upper and lower extremities. Dr. Wilkin assessed the claimant with tendonitis of the right hand with hypertension. In his

report of that examination, Dr. Wilkin made the following statements:

I do not feel that this is a work related injury and her return to work should be on her regular schedule. I would recommend that she uses her soft wrist support during her job task.

On October 14, 2004, six weeks after her carpal tunnel surgery, Dr. Lytle released the claimant to return to her regular duties as of November 8, 2004. On December 8, 2004, Dr. Lytle reported that the claimant had made a complete recovery from her tendonitis, and that she had sustained no long term impairment from her injury.

Based upon the above and foregoing, we find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury in the form of carpal tunnel syndrome, as a result of a specific incident which is identifiable by time and place of occurrence. By her own admission, the claimant had been experiencing pain and swelling in her right hand for several months prior to her alleged injury of June 19, 2004.

Moreover, the claimant's treating physician and surgeon, Dr. Lytle, testified by deposition on July 11, 2005, that the claimant's acute problem at the time she alleges to have sustained a carpal tunnel injury was tendonitis, rather than carpal tunnel. Dr. Lytle's testimony regarding this issue is as follows:

Q. Have you formed an opinion of whether Ms. Jarrell's carpal tunnel syndrome was caused by her employment at International Paper?

A. I think that her hand problem, in general - - as I look back at my record from July of last year, her acute problem at that time was tendonitis. I think that was work related.

Q. Okay.

A. Carpal tunnel is something I'm not sure that she had actually recognized at that point. ... Whether her work caused carpal tunnel or the activity aggravated the symptoms and caused it to be more prevalent, I cannot tell you which came first. ... But I do believe her work was aggravating her hand and caused tendonitis. And that was the reason she actually came in the office.

When questioned about the symptoms of carpal tunnel syndrome and tendonitis, Dr. Lytle continued his testimony as follows:

Q. ... Are swollen fingers a indicator of carpal tunnel syndrome?

A. Swollen fingers could be, but not the same type as what Ms. Jarrell presented with.

Q. Okay.

A. She had acute tenosynovitis.

Dr. Lytle agreed that the claimant's history that she presented to him during her initial visit regarding the origin and duration of her symptoms is consistent with the development of tenosynovitis.

Finally, Dr. Lytle, stated that he had been the claimant's physician for "many years" prior to her alleged carpal tunnel injury. When questioned about her work as a hairdresser, Dr. Lytle commented that the claimant had a "long and storied career, 20 years plus as a hairdresser." This statement contradicts the claimant's testimony that she had been licensed for more than 20 years, but had not

actually worked in the business for all of those years. Dr. Lytle's testimony is consistent, however, with information that the claimant gave on her employment application with the respondent employer that she had been employed in a beauty salon for 20 years.

The preponderance of the evidence demonstrates that the origins of the claimant's carpal tunnel syndrome is essentially unknown. Even Dr. Lytle agreed that the claimant's past employment, especially her many years as a hairdresser, could have contributed to her carpal tunnel syndrome. In addition, certain diseases and habits, such as diabetes and smoking, could, according to Dr. Lytle, cause carpal tunnel syndrome. According to the records, the claimant is a smoker. Furthermore, Dr. Lytle could not state with medical certainty that her employment with the respondent employer had caused her carpal tunnel syndrome; only that it had caused her acute tenosynovitis. To state definitively that the claimant's carpal tunnel syndrome is causally connected to her employment with the respondent employer would call for conjecture and speculation, which,

even if plausible, cannot take the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Moreover, and more importantly, the weight of the evidence overwhelmingly preponderates against the claimant's hand and wrist conditions having been caused by a specific incident that is identifiable by time and place of occurrence. The record is devoid of any evidence that one particular act or event caused the claimant's onset of pain and swelling. Rather, the record reveals that the claimant's carpal tunnel syndrome developed over a period of time, and that her tendonitis likely developed from a prolonged period of overuse.

For the reasons set forth above, we find that the claimant has failed to prove by a preponderance of the evidence that she sustained compensable carpal tunnel syndrome during the course and scope of her employment with the respondent employer, and that this condition was the result of a specific incident which is identifiable by time and place of occurrence. Likewise, we find that the claimant has failed to prove by a preponderance of the evidence that

her tendonitis was caused by a specific incident which is identifiable by time and place of occurrence. The claimant has not asserted that she sustained a gradual onset type injury to her hand or wrist. Therefore, even if the claimant's tendonitis were proven to be work related, which it has not, the claimant is not entitled to compensation for that condition, because the preponderance of the evidence reveals that the claimant's tendonitis most likely developed over a period of months. Therefore, we find that the decision of the Administrative Law Judge should be reversed and that this claim for benefits is hereby denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority is reversing an Administrative Law Judge's determination that the claimant suffered a compensable cumulative trauma injury to her wrist and hand. Because I believe the facts of the case establish the claimant suffered a compensable injury of this nature, I must respectfully dissent from the Majority's Opinion.

My primary objection to the Majority's decision in this case is that they have placed form over substance. The claimant in this case has alleged that she suffered an injury in the form of carpal tunnel syndrome and tenosynovitis to her right hand. These two conditions were diagnosed by her treating physician, Dr. John Lytle, a orthopedic surgeon in Pine Bluff, Arkansas. Dr. Lytle initially examined the claimant on July 13, 2004. In his treatment note of that date, he discusses his finding that the claimant's right hand was swollen and that she had decreased sensation in a median nerve distribution. He also

stated that she had a positive tinel's sign and a positive phalen's test.

Dr. Lytle goes on to state in his report that the claimant had begun suffering from swelling and pain in her hand beginning on June 19, 2004. He also discussed the nature of her job and noted that her hand ached and cramped at work. Lastly, he stated that he had spoken with the nurse at the respondent employer and indicated that the employer was questioning whether the injury was work related. However, Dr. Lytle in his report stated that it certainly was. He concluded that she stated that she could work only on restricted duty with no repetitive use of her hand.

When the claimant's condition did not improve, Dr. Lytle directed the claimant to undergo a nerve conduction velocity test. After receiving the results of that test, he performed a carpal tunnel release on her right wrist. In a reported dated September 13, 2004, which he states was following her surgery, he notes that she is having no pain and her symptoms of carpal tunnel syndrome

had resolved. He also states his opinion regarding the etiology of her condition:

“There is no question in my opinion that this is a stressful job and has caused the tendinitis and soreness in her and aggravated her carpal tunnel syndrome.”

The claimant also testified extensively about her job duties. As stated by Dr. Lytle, the claimant's employment clearly required her to engage in hand-intensive work involving frequently gripping, lifting, pulling, and pushing. As this Commission has stated in innumerable past cases, these are the activities most often responsible for causing carpal tunnel syndrome. While carpal tunnel syndrome can be the result of a traumatic injury, most often it is caused by the cumulative trauma of performing hand-intensive activities over a long period of time.

Nonetheless, it appears that at the Prehearing Conference, it was alleged that the claimant's injury was the result of a specific incident. It is on that basis that the Majority has analyzed the claimant's condition. Their conclusion was that the claimant had not established a

specific incident injury causing her carpal tunnel syndrome. In fact, other than stating that her symptoms began on June 19, 2004, the claimant did not relate any specific blow or traumatic event to her wrist. However, I find that her testimony was more than sufficient to establish that the repetitive nature of her job was the event that caused her to develop carpal tunnel syndrome. Dr. Lytle stated, both in this medical opinion and in his deposition, that he believed the stressful nature of the claimant's job either caused or severely aggravated her wrist condition and was the cause of her development of carpal tunnel syndrome.

In spite of the overwhelming evidence that demonstrates that this is a cumulative trauma claim, the Majority insists on evaluating the claim as if it involved a specific traumatic event. I do not believe that we should be rigidly analyzing these cases with blinders on. It is obvious that this is a repetitive motion case in which the claimant developed a problem in her wrist because of four years of performing a hand-intensive job.

I further believe that the nature of this claim is being misconstrued. In the Prehearing Questionnaire filed by the claimant's attorney, there is no specific contention that the injury was caused by a specific incident. The specific contentions set out in the Prehearing Questionnaire, which was filed on October 7, 2004, reads as follows:

"Contentions: The claimant contends that her medical problems that have caused her to miss work from June 19, 2004 to a date yet to be determined are caused by her work and that this is a compensable matter. Everything has been controverted."

Also, in the pretrial dialogue between the attorneys and the Administrative Law Judge, it was merely stated that the issue was compensability. In fact, the only place where a statement exists that the claim was being pursued on the basis of a specific incident injury was in the Judge's Prehearing Order where it states that the claimant contends she injured her right hand in a specific incident at work on June 19, 2004. However, in her Opinion, the Administrative

Law Judge analyzes this case as if it were a repetitive motion injury. Likewise, in their briefs, both parties analyze the case based upon the question of whether the claimant sustained a cumulative trauma injury. Of particular interest is the initial accident report prepared by the employer. That report, dated June 22, 2004, contained the following statement:

"No certain incident occurred - appears to be caused by repetitious actions - Kay has been working for the PSII winder task for several weeks & all of the work of handling of paper cores may have attributed to her swollen fingers."

Everyone, except the Majority, seems to have understood that this claim was based upon the repetitive, hand-intensive activity the claimant engaged in at her place of employment. In denying this claim because the claimant was unable to establish a specific incident injury, the Majority is simply ignoring all of the evidence presented at the hearing and the arguments advanced by the parties.

I also object to the Majority's speculation that the claimant may not have had carpal tunnel syndrome or, if

she did, that it may have been unrelated to her employment. The only real basis for this speculation is the statement from Dr. Tim Wilkins, an osteopathic physician who the claimant saw at the direction of the respondent after she had seen Dr. Lytle. Dr. Wilkins first stated that he agreed with Dr. Lytle's diagnosis and treatment of the claimant's injury, but then stated, "I do not feel that this is a work-related injury... ." However, Dr. Wilkins did not explain his conclusion or cite any facts supporting this statement. I believe the opinion of Dr. Lytle, a Board Certified orthopedic specialist, should be given more weight than that of Dr. Wilkins, who lacks similar credentials.

The Majority talks at length about the claimant's past employment as a hair dresser. They imply that somehow this job, in which the claimant had not engaged in over seven years prior to the time of the hearing, caused her to develop carpal tunnel syndrome. However, it seems unlikely that a condition which arose from activity seven years in the past would have gone unnoticed until four years after performing a hand-intensive job for the respondent. In my

opinion, this entire discussion is based upon nothing more than speculation and conjecture, two factors which this Commission cannot consider in making decisions.

For the reasons set out above, I find that the decision of the Majority is not based upon the evidence contained in this record and I therefore respectfully dissent from the result.

SHELBY W. TURNER, Commissioner