

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F607655

DONNA BOWLING, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., CARRIER	RESPONDENT

**OPINION FILED OCTOBER 8, 2007**

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE TOD BASSETT, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed November 29, 2006.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on September 13, 2006, and contained in a pre-hearing order filed September 14, 2006, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her left hand which arose out of and in the course of her employment with the respondent.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

The claimant appeals the November 29, 2006, opinion of the Administrative Law Judge finding that the claimant did not sustain a compensable injury to her left hand. The Majority now affirms and adopts the decision of the Administrative Law Judge as their own. After a de novo review of the record, I find that the decision of the

Administrative Law Judge should have been reversed. As such, I must now respectfully dissent.

The claimant in the present case worked as a cashier for the respondent employer. The claimant testified that she began working in 2002 and was employed as a cashier. However, in July 2005, the claimant was injured at work when a box of frozen food struck her on her shoulder. The claimant had to have surgery and was on one-armed duty. As a result, she was heavily reliant on the use of her left arm and hand.

The claimant testified that she had surgery in September 2005, and that until that time she was on one-armed duty. While she was on one-armed duty, she was stocking shelves eight hours a day with two 15 minute breaks and one half hour lunch. Six weeks after surgery, the claimant returned to working in the deli. The claimant's job required her to perform various hand intensive duties. The claimant said that while she was not given restrictions in using her right hand, she nonetheless had to rely on her left hand more. The claimant said that she no longer has

strength in her right hand in order to do her work. She said she has no grip in her left hand and described that she would have to balance items on her left hand and use her right hand to compensate.

The claimant testified that she began having problems with her left hand in April 2006, when her left hand started swelling and when she became unable to make a fist with her left hand. The claimant said she went to Dr. Magre, who took x-rays and sent her to Dr. Benafield. The claimant said she received injections to her hand and received temporary relief of her symptoms. Then when she began having problems again, the claimant reported her injury and went to the respondent employer's physician. The claimant said that the physician ordered physical therapy which she never received.

The medical records show the claimant reported for treatment on April 27, 2006. The claimant reported that over the last month she had been suffering locking of her long finger on her left hand when she flexed fully. The claimant reported that she suffered from swelling and stiffness in

the other digits in both hands. The claimant was diagnosed with, "Left long trigger digit with developing synosing tenosynovitis of all the digits of the hand." The claimant was given an injection of Depo-Medrol to the long finger of her left hand. She was given anti-inflammatories to help with her other fingers.

The claimant returned on May 30, 2006, indicating that she had improved, but that she still had some clicking and catching of the left long finger. Dr. Benafield indicated that the claimant should continue with her treatment and that if her symptoms recurred then another injection or a trigger digit release on the left would be considered.

In July 2006, the claimant was seen by Dr. Vandergriff. The claimant reported that she had suffered an increase in her symptoms. The claimant reported that her pain began as a gradual burning and constant pain. She then began suffering from swelling in her hand. The claimant described that she could no longer make a fist and that her numbness was the worst in the afternoon. The claimant was

diagnosed with bilateral hand pain and swelling.

Dr. Vandergriff recommended the claimant have "carpal tunnel labs" and recommended physical therapy. Dr. Vandergriff also prescribed the claimant Lodine. As previously, indicated, the claimant was not able to continue with treatment due to the respondents' refusal to authorize treatment.

\_\_\_\_\_After a de novo review of the record, I find that the claimant has met her burden of proof in showing that she sustained a compensable gradual onset injury. The claimant credibly testified that her symptoms began due to the tasks performed at her work. Likewise, when the claimant was treated, she was given anti-inflammatories, indicating that she had an objective physical injury.\_\_\_\_

The claimant is required to prove that she suffered a compensable injury. A compensable injury means:

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.

Ark. Code Ann. § 11-9-102(4)(A)(ii)(a) (Supp. 1999).

In addition, subsection (E)(ii) states that the burden of proof shall be by 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)(ii).

In my opinion, the claimant has met her burden of proof in showing that she sustained a compensable injury. The claimant credibly testified that she began suffering hand pain in April 2006, and that she believed her problems were related to her work condition. Likewise, the medical reports show that the claimant's condition is consistent with the her testimony regarding the onset of her symptoms. Specifically, the medical reports indicate that the claimant suffered from hand numbness and pain. In particular, the claimant's left long finger was noted to be symptomatic. The claimant testified that due to a prior shoulder injury, she was more reliant on her left hand. As such, it is only

logical that she would suffer from more problems with her left hand than with her right. Additionally, swelling and numbness and the condition of tenosynovitis is entirely consistent with the rapid and repetitive nature of the claimant's job and with the chronology given by the claimant. As such, I find that the claimant has shown that she sustained a compensable injury in the form of tenosynovitis.

The Majority first denies the claimant benefits on the basis that she could not show a causal connection between her injuries and her work. In making this finding, the Majority, by relying on the Administrative Law Judge, notes the claimant contended her left-handed problems were caused by overuse due to compensating for her shoulder, and because she complained of bilateral problems. The Majority concludes this was somehow inconsistent, and that the claimant had not met her burden of proof. I find that this approach is flawed.

The claimant testified that while she had bilateral symptoms, her problems were worse in her left hand

because she had suffered a right shoulder injury. There is simply nothing inconsistent in this statement. It is only logical that since the claimant had suffered from a right shoulder injury, she would be more reliant on her left hand. As she was more reliant on her left hand, it stands to reason that the swelling and pain would be proportionate to the increased use of that hand. However, that does not mean that the claimant never used her right hand. Nor does the claimant's increased reliance on the use of her left hand somehow mean that she would not be able to sustain an injury to her right hand. In fact, the claimant was undoubtedly required to use her right hand in order to perform her job. She simply did not use that hand as much, thus she had lesser symptoms in that hand.

When reviewing the claimant's job duties, it becomes even more apparent that the claimant's job caused her to become symptomatic. The claimant's job essentially required her to place items in a deep fryer and remove them every seven minutes. In the interim, she was constantly performing hand intensive activities, such as filling orders

and removing the food from the deep fryer. Each of these tasks would require the claimant to use both hands in a manner that is entirely consistent with the injuries for which she is seeking compensation.

The Majority also concludes that the claimant could not meet her burden of proof because there was no medical opinion regarding causation. However, I note that such an opinion is simply not required by law. As the claimant correctly noted in her brief, in Wal Mart Stores, Inc., v. Leach, 74 Ark. App. 231, 48 S.W.3d 540 (2001),

A claimant seeking benefits for a gradual-onset injury must prove by a preponderance of the evidence that: (1) The injury arose out of and in the course and scope of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was a major cause of the disability or need for treatment. Furthermore, objective medical evidence is necessary to establish the existence and the extent of an injury, but it is not essential to establish the causal relationship between the injury and the job.

The claimant in the present case credibly testified that she did not have problems with her hands until after she began working in the deli. Likewise, the claimant was documented to have an injury that is consistent with her job duties. As such, I find that regardless of whether a doctor's opinion regarding causation exists, the claimant has met her burden of proof. Accordingly, I find that the Majority errs in finding that the lack of a medical opinion regarding causation is a sufficient reason to deny the claimant benefits.

The respondents further argue that the claimant cannot show that her work was rapid and repetitive in nature. I disagree. The claimant's job had various components that all required her to perform hand intensive tasks. From reviewing the claimant's testimony, it is evident that these tasks were performed in rapid succession and that, when considered as a whole, the claimant's job was both rapid and repetitive in nature.

The Court has previously determined that an injury caused by rapid and repetitive motion must be evidenced by

tasks that are repetitive and that the repetitive motion itself must be performed rapidly. As such, a repetitive motion that is not performed rapidly Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W.2d 644 (1998). The Court has further indicated that multiple tasks may be considered together in determining whether the repetitive requirement is met. Baysinger v. Air Systems, Inc., 55 Ark. 174, 934 S.W.2d 230 (1996). However, the Court has also determined that in instances where the duties or tasks are separated by intervals that are several minutes long, the work is not rapid and repetitive. Lay v. United Parcel Service, 58 Ark. App. 35, 944 S.W.2d 867.

The Court has also determined that a worker who used an air gun to attach bolts at the rate of one per fifteen seconds would be sufficient to constitute rapid and repetitive motion. See High Capacity Prods. V. Moore, 61 Ark. App. 1, 962 S.W.2d 831 (1998). Additionally, the Court has awarded benefits when a worker performed repetitive motions at the rate of 115 to 120 times per day with 1.5 minute intervals between. See Boyd v. Dana Corp., 62 Ark.

App. 78, 966 S.W.2d 946 (1998). However, the Court has held that a custodian did not perform rapid repetitive motions, despite repeating motions, because the movements in completing the tasks were different and were separated in time. See Malone, supra. The Court has further determined that one 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'" Patterson v. Frito-Lay, Inc., 66 Ark. App. 159, 992 S.W.2d 130 (1999).

In the present case, the claimant worked in the deli. The claimant testified that in order to perform her job, she had to perform various tasks that involved the use of her hands in a rapid and repetitive fashion. Though when considered independently each of these tasks might not seem to have been performed rapidly, when one considers the performance of the tasks in a cumulative nature, it is apparent that the tasks were both rapid and repetitive.

The claimant testified that she worked eight to nine hours per day and that her job required her to perform extensive moving and gripping. She testified as follows,

Q. What were the kind of things you had to move or grip?

A. We have to work with baskets lifting food in and out of grease. You have to grip the handles to lift them. We have a paddle with a long handle we have to dip the chicken out of the grease and over onto what we call a dump table. You are working with tongs to serve all the food. Or, you know, we wear gloves on some of it. We change our gloves and just use our hands to dish it up with. And you're having to grip the chicken and clean them and prep them and put them into the rotisseries.

The claimant further described that the fry time for the meat was seven minutes and that she estimated cooking meat some 30 to 35 times per shift.

More importantly, the claimant described that there were also additional items that had to be fried and given to customers. The claimant said that there were over 20 items that were in the "hot case". The claimant indicated that those items had to be "refreshed" every two hours and

that, in addition, any items that were bought by customers would have to be replaced. The claimant described that she usually had items in the fryer while she was waiting on customers and filling orders. She would wash dishes when she had a chance, but usually had to wash dishes and perform cleanup immediately before going home.

When considering the claimant's job, I find that it is evident that it was performed in both a rapid and a repetitive nature. Considering the above testimony, the claimant has established that she had to perform a myriad of tasks which would require her to perform hand intensive activities. These tasks were performed continually throughout her day and when considered as a whole, can only be considered as both rapid and repetitive.

In sum, I find that the claimant has shown that the claimant's job was both rapid and repetitive in nature. Only after the claimant began working in the deli did she begin suffering pain and swelling in her hands, especially in her left hand. The claimant's job duties are exactly the type of work that is usually diagnosed with tenosynovitis.

Furthermore, as the claimant had no history of having problems with such a condition before working in the deli, it is only logical that the claimant's job caused her condition. Therefore, I would have awarded all requested benefits to the claimant.

Accordingly, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner