

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506728

BOBBY DAVID WATTS, EMPLOYEE	CLAIMANT
UNITED PARCEL SERVICE, EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JANUARY 29, 2007

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

Claimant represented by HONORABLE STEPHANI BRADY JUNGMEYER, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE JAMES A. ARNOLD, III, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed April 21, 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 January 19, 2006, and contained in a pre-hearing order filed January 20, 2006, are hereby accepted as fact.

2. The parties' stipulation that claimant provided notice of his workers' compensation claim to the carrier on January 13, 2005 is accepted as fact.

3. The parties' stipulation that Form AR-C was filed with the Commission on September 12, 2005 is accepted as fact.

4. Claimant's claim for a compensable ganglion cyst to his right wrist is barred by the statute of limitations.

5. Claimant has failed to prove by a preponderance of the evidence that the ganglion cyst on the finger of his right hand is compensable.

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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion finding that the claimant's request for compensation regarding the cyst on his wrist is barred by the statute of limitations and that the cyst on the claimant's finger was not related to any gradual onset injury arising out of the course and scope of employment.

After de novo review of the record, I find that the claimant sustained compensable injuries to the wrist and the finger, and that he filed a timely claim. Specifically,

I find that while the claimant had suffered from cysts on his wrists in the past, those had resolved. Accordingly, the cysts for which the claimant had to undergo surgery were new injuries. I further find that since the cysts were new injuries, the claimant filed a timely claim. I also find that the cysts were gradual onset injuries that were caused by rapid and repetitive work activities. As such, the claimant should be entitled to medical and temporary total disability benefits associated with those injuries. Therefore, I would have reversed the decision of the Administrative Law Judge.

I first find that the claimant's claim for benefits related to the cyst on his wrist should not be barred by the statute of limitations. The Majority argues that the claimant's condition was pre-existing and that the claimant's need for treatment was related to a condition that had existed for several years. The claimant argues that while he had pre-existing cysts, they had always disappeared. Therefore, he asserts that his need for

treatment was related to a new cyst for which he filed a timely claim.

For a gradual-onset injury, the injury legally commences on the date the injury became apparent to the claimant. Cottage Café Inc., et al. v. Collette, ___ Ark. App. ___, ___ S.W. 3d ___ (February 1, 2006). The claimant's injury is scheduled, so the statute of limitations for filing a claim is within two (2) years of when the injury became apparent to the claimant. Pina v. Wal-Mart Stores, Inc. 91 Ark. App. 77, 975 S.W.2d 863 (2005).

The claimant filed an AR-C form with the Commission on September 12, 2005. Therefore, the claimant's claim would be barred if his injury became aware to him by September 13, 2003. I find that in the present case, the claimant's injury did not become apparent to him until he went on vacation in California and discovered knots in his wrist. This occurred around July or August of 2004, which would be before the two year time limitation would bar his claim.

The record as a whole supports a finding that the claimant's cyst was new, and not merely a continuation of a chronic condition. The claimant testified that while he had suffered from cysts in the past, they had always resolved. In fact, the claimant's most recent cyst had occurred in July 2001 which would be some three years before he received treatment for the cyst in question. Likewise, the claimant credibly testified that his 2001 cyst had resolved.

I note the claimant's testimony that even after 2001 his cysts would reappear. However, I also note that the claimant later testified that his cysts were in a different location. In my opinion, the claimant's testimony regarding the location of his past cysts seems to indicate that his 2004 cyst was in a different location. When asked if his past cysts had ever gone away on a permanent basis, he testified,

- A. I'm not sure. I don't think it was the same. It might have been the same cyst. I don't think it was. Sometimes it would show up further down the arm. Sometimes it would show up in a different place (indicating).

Q. Okay. You just pointed to an area on your wrist, and it appeared that you went from a spot from about the level of your wrist up to about 2 or 3 inches - -

A. Yes.

Q. - - is that right?

A. Yes.

Likewise, Dr. Moore's deposition testimony also seems to indicate that the claimant's cysts were separate and distinct. He indicated,

Q. Okay. I just - - I think that answered my question. When these things reoccur, is it a continuation of the old ones, or is this like a new cyst?

A. It's called a recurrent ganglion cyst when it comes back.

Q. Okay. Uh-huh.

A. You know, and I think that implies that it - - that it's at least - - and I'm talking about just any cyst.

Q. Uh -huh.

A. It may not be the - - and - - and the literature supports this, that it may not be the exact same spot. It may be an adjacent area that

attaches on the joint or the sheath of the tendon that breaks down and then formed this cyst. But it's still called a recurrent cyst, if it's close enough to that same area.

Q. Okay. But it's not necessarily the
- -

A. Uh -uh.

Q. - - very same cyst that fills back up with fluid?

A. It's not like - - no, it's not there. It's not there. And it's not like - -

Q. Okay.

A. - - like a malignancy, where any tissue left behind may - - grows again, you know.

Q. Uh - huh.

A. It's like some other process that involves the sheath that that tendon breaks down to form a conduit for fluid to come out and -
-

In my opinion, this testimony is indicative that the fact that the claimant had a history of having cysts is not enough to show that his past cysts were the same as the

ganglion cyst that was removed in association with this claim.

I also find that the claimant's testimony and the medical records show the claimant had a new cyst. In the past instances, the claimant was simply diagnosed with a cyst. Additionally, on January 14, 2005, Dr. Berestnev specifically indicated that in 2003 the claimant had an evaluation and was not found to have a ganglion cyst. As there was no specification that the claimant's past cysts were atypical ganglion cysts, I find that there is simply not enough evidence to show that the claimant's diagnosed atypical cyst from 2004 was a continuation of his prior cysts.

Therefore, when considering the claimant's testimony, the testimony of Dr. Moore, and the medical reports, I find that while the claimant had cysts in the past, his cyst from 2004 was new. As the claimant became aware of the cyst in 2004 and filed his claim for benefits in 2005, his claim is timely and should not be barred.

I further find that the claimant has met his burden of proof in showing that the claimant's ganglion cysts were a gradual onset injury that were a direct result of rapid and repetitive actions that arose out of the course and scope of employment.

The claimant is required to prove that he 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 this instance, the Majority finds that the claimant's finger cyst was not the major cause for the claimant's disability or need for treatment. However, I find that the cyst on the claimant's finger was as a direct result of his work and was the major cause for the claimant's need for treatment. Though Dr. Moore was unable to state the reason for the claimant's finger cyst, I find the evidence is clear it was due to rapid and repetitive work. In particular I note the claimant testified that he did not engage in other rapid or repetitive activity. As the claimant's wrist cyst was attributed to his work-related activity and his physician directly related his activities to his condition, I find that it is only logical that the claimant's conditions were caused by the same thing. Likewise, given the similarity between the problems associated with the claimant's finger and wrist, I find that it is only logical that they were caused by the same thing. Therefore, I find that a preponderance of the evidence shows that the claimant's need for having his cyst on his finger removed was as a direct result of his work-related actions.

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For the aforementioned reasons, I would have reversed the decision of the Administrative Law Judge and must now respectfully dissent.

PHILIP A. HOOD, Commissioner