

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508487

ROBERT FITZPATRICK, EMPLOYEE	CLAIMANT
RHEEM MANUFACTURING COMPANY, EMPLOYER	RESPONDENT
OLD REPUBLIC INSURANCE, INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 30, 2008

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

Claimant represented by the HONORABLE STEPHEN M. SHARUM,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE E. DIANE
GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

NUNC PRO TUNC ORDER

The following paragraph found on page three and
four of the Full Commission Opinion Filed July 21, 2008
in this case which states "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)." has been omitted.

The Opinion and Order filed on July 21, 2008, is hereby modified only to delete the above mentioned paragraph, as reflected herein. In all other respects, the Opinion and Order shall remain the same and shall not be otherwise affected.

Claimant appeals an opinion and order of the Administrative Law Judge filed June 15, 2007. 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 of this claim.
2. On all relevant dates, including July 18, 2005, the relationship of employee-employer existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$384.00 for total disability and \$288.00 for permanent partial disability.
4. On or before July 18, 2005, the claimant sustained a compensable cumulative trauma injury to his hands and wrists in the form of bilateral carpal tunnel syndrome.
5. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a compensable cumulative trauma injury to his cervical spine during his period of employment with this respondent. Specifically, he has failed to prove the existence of a causal relationship

between his employment and/or employment activities for the respondent and any cervical injuries or defects that he may be experiencing.

6. There is no dispute over the payment of medical expenses incurred for the claimant's compensable bilateral carpal tunnel syndrome and the respondents remain liable for such expenses.

7. Any medical expenses incurred by the claimant as a result of his cervical injuries or defects would not represent reasonably necessary medical services for a compensable injury. Thus the respondents would not be liable for any such expenses.

8. There is no dispute over temporary total disability benefits accruing through December 14, 2005.

9. The claimant was rendered temporarily totally disabled as a result of the effects of his compensable bilateral carpal tunnel syndrome for the period of December 15, 2005 through January 10, 2006. During this period, the claimant has proved that he continued within his healing period from the effects of his compensable bilateral carpal tunnel syndrome and had not returned to work.

10. The claimant is not barred from receiving temporary total disability benefits for the foregoing period by the provisions of Ark. Code Ann. §11-9-526. Specifically, the respondents have failed to prove that he was offered or provided suitable employment during this period.

11. The respondents have denied the occurrence of any compensable injury to the claimant's cervical spine and have controverted this entitlement to any benefits attributable thereto. The respondents have also controverted the claimant's entitlement to any temporary total disability benefits on and after December 15, 2005.

12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

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.

The claimant alleges that he sustained a compensable cumulative trauma 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 covered by the Act; however, the claimant has failed to establish the elements necessary to prove the compensable injury by a preponderance of the evidence.

Therefore we affirm and adopt the June 15, 2007 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

The majority has affirmed and adopted an Administrative Law Judge's decision finding the claimant did not establish he sustained a compensable cervical injury or is entitled to certain temporary total disability benefits. After a de novo review of the record, I find that the majority has misinterpreted the medical evidence and reached an incorrect result, therefore, I must respectfully dissent from their opinion.

The claimant went to work in the respondent's manufacturing facility in 1994. Beginning in 2003, he was assigned the duties of a manifold assembler. This job required him to pick up a small part, reach above his head and pull down a suspended air wrench, screw some parts together, and repeat the process. According to the claimant, it required about 20 seconds to perform these tasks and his normal production was about three units per minute. This job was carried on throughout his workday.

In July 2005, the claimant began to complain to his employer of pain and numbness in his hands and

fingers. Eventually, the claimant was diagnosed with bilateral carpal tunnel syndrome and eventually underwent carpal tunnel release surgery in both hands. The respondent accepted liability for this injury and paid the claimant appropriate medical and disability benefits including permanent partial disability benefits based upon an impairment rating to each of his hands.

Following the carpal tunnel surgeries, the claimant had near complete relief in his left hand. However, he continued experiencing pain and numbness in his right hand.

The claimant's right carpal tunnel release was performed in August 2005. The surgery was performed by Dr. Roger Bise, a Fort Smith hand and reconstructive surgeon. The claimant has also been followed by Dr. Greg Loyd, a general practitioner who is directly employed by the respondent. In a clinic note of September 14, 2005, Dr. Loyd noted that the claimant was still having parathesis and that he was experiencing a catching in his fifth finger upon flexion. In Dr. Bise's progress note of October 9, 2005, shortly after his left carpal tunnel release, he noted that the claimant had undergone a dramatic improvement on his left side. The doctor further noted that the claimant

still had persistent tingling and numbness in his right hand with a positive Tinel's sign in the claimant's middle finger. In his treatment note of October 11, 2005, Dr. Bise observed that the claimant's left hand had already recovered far more than the right hand and that the claimant was still having a positive Tinel's sign in his right middle finger.

Both Dr. Loyd and Dr. Bise continued to note the claimant's ongoing right hand problem in their progress notes generated throughout October and November 2005. In fact, Dr. Bise began treating the claimant with steroid injections in his wrist and hands to relieve swelling and other symptoms. By November 2005, Dr. Bise began discussing the possibility of the claimant returning to light duty work with his right hand even though he continued to note the ongoing problems the claimant was having with it. However, both he and Dr. Loyd continued to consider the claimant's right hand problems as being related to his carpal tunnel surgery. The claimant's status in this regard was noted by Dr. Bise in a letter dated November 16, 2005, in which he stated that the claimant's surgical scars on his right hand were well healed but that he was

still symptomatic. Dr. Bise went on to state that the claimant could return to work but not on regular duty.

Both Drs. Bise and Loyd continued to note the claimant's consistent complaints of ongoing symptoms in his right hand. Eventually, they scheduled a follow-up nerve conduction study which was negative for carpal tunnel syndrome in both hands. Eventually, Dr. Bise opined in a letter dated January 16, 2006 that the claimant's symptoms were not related to carpal tunnel syndrome. Because of the inability of Dr. Bise or Dr. Loyd to treat his condition, the claimant eventually sought and received a change of physician from the Workers' Compensation Commission to another Fort Smith physician specializing in reconstructive and hand surgery. At Dr. Kelly's direction, the claimant underwent additional electro diagnostic testing, this time including an EMG of the claimant's cervical area. This test noted that there was abnormal activity in the claimant's cervical paraspinal area. Even Dr. Loyd, who continued to see the claimant, stated in his note of February 22, 2006, that his findings suggested a cervical impingement. Dr. Kelly apparently agreed with his assessment and in his progress note of March 6, 2006, directed the claimant undergo an MRI of the

cervical spine to determine if there was any cervical problems that could be causing his hand condition.

The MRI was performed on March 10, 2006, and found that the claimant had a central and right posterolateral herniation at the C2-C3 discs and bilobular posterior disc protrusion at C5-C6 and C6-C7. In reviewing the MRI results, Dr. Kelly noted in his report of March 15, 2006 that the "involvement" in and around the C5-C6 cervical level would cause the claimant symptoms similar to carpal tunnel. Because of this conclusion, Dr. Kelly directed the claimant to see Dr. Arthur Johnson, a Fort Smith neurosurgeon for further evaluation.

Dr. Johnson saw the claimant on May 16, 2006. In his report of that date, Dr. Johnson outlined the claimant's cervical spine abnormalities, specifically noting the protrusions and osteophyte formations at C5-C6 and C6-C7. Dr. Johnson also stated that the claimant had a disc herniation at C2-C3 but that this would not be causing the pain in his extremities.

Dr. Johnson discussed this matter further in a letter to Dr. Kelly, also dated May 16, 2006. In that letter, Dr. Johnson stated: "He does have some degenerative changes of his cervical disks at C5-C6 and

C6-C7 that **most likely are responsible for his radicular type symptoms**, however, I do suspect that these are more degenerative as opposed to acute changes." (Emphasis added)

Dr. Kelly also addressed the relationship between the claimant's cervical condition and his hand symptoms. In a progress note of September 18, 2006, Dr. Kelly stated that, "I really feel this problem is in the neck as does Dr. Johnson." More specifically, Dr. Kelly, in answer to a question posed by the claimant's counsel, stated in a letter dated October 16, 2006:

Essentially if he had some history of neck injury while on the job or his job can be related that requires a lot of hyperextension or flexion of the neck, etc, that is related directly to his employment and requirement of that employment, then I can state that this definitely has a relationship to his job as the reason why he has this degree of degenerative disc disease . If however, none of this can be stated as being true, then he unfortunately has degenerative disk disease, which we all get as we age but his is to the point that it is causing symptoms."

The majority, in adopting the Administrative Law Judge's findings, has misconstrued not only the medical opinions, but the underlying medical evidence as well. Dr. Kelly's opinion is dismissed because he is

characterized as being "essentially a plastic surgeon" who has "limited expertise" in the area of neurological conditions. However, Dr. Kelly's qualifications are essentially identical to those of Dr. Bise. I note that the majority had no problem accepting Dr. Bise's opinion that the claimant does not have such a problem or Dr. Bise's conclusions regarding when the claimant is able to return to work. Further, Dr. Kelly was not holding himself out to be a neurological or neurosurgical expert, merely noting that the claimant's cervical condition could be associated with the problems the claimant is having with his wrist and hands. As a surgeon who has focused a portion of his practice on the repair of hand and wrist injuries, Dr. Kelly is certainly in a position to know the etiology of these causes and what sort of ailments he is capable of treating and which he cannot. In this case, he recognized that the claimant's problems are most likely not associated with carpal tunnel syndrome but were related to an underlying cervical condition.

In attempting to establish his claim, the claimant is not relying solely upon the opinion of Dr. Kelly. Dr. Johnson, who is a Board Certified neurosurgeon, clearly opined that the claimant's

cervical condition was the cause of the claimant's radicular symptoms. However, this opinion is dismissed by the majority, which simply states that the symptoms that Dr. Johnson is referring to are the complaints of neck and upper back pain. However, that is clearly not a reasonable interpretation of Dr. Johnson's wording, since localized pain in the claimant's neck would not be a "radicular" symptom. The radicular symptoms the claimant was complaining of were numbness, pain, and tingling in his right hand. Obviously, since the reason the claimant was seeing Dr. Johnson was because of these symptoms, the doctor's reference to the radicular symptoms would be to the problems the claimant was having with his hand.

The majority also misinterprets another segment from Dr. Johnson's reports. In his note of May 16, 2006, Dr. Johnson at first states that the claimant has disc bulges at C5-C6 and C6-C7. He then says the claimant also has a disc herniation at C2-C3 which would not be responsible for the patient's pain in his extremity. The majority is attempting to construe Dr. Johnson's report to reflect that none of the claimant's spinal conditions are causing his extremities pain. However, it is obvious that Dr. Johnson was only

referring to the disc herniation at C2-C3 as not causing the extremity pain, not the abnormalities at C5-C6 and C6-C7. This conclusion is fully supported by the statement Dr. Johnson made in his letter of the same date.

The majority has also pointed out that the diagnostic testing did not specifically find that there was any nerve root impingement which would cause the claimant's underlying radicular symptoms. However, my review of the radiologists reports regarding the claimant's cervical x-ray and the MRI scans, demonstrate to me that the reports are silent on this issue. That is, they do not specifically state that the claimant does not have some type of impingement or related syndrome that would cause the radicular symptoms. I also note that Dr. Johnson specifically states in his letter, which is quoted above, that the claimant's neck condition was the cause of the radicular symptoms. I do not believe that Dr. Johnson would make such an explicit finding if he believed that the bulging discs in the claimant's neck were not causing a neurological problem resulting in the claimant's pain, tingling, and numbness.

The relevant medical evidence clearly establishes that the complaints made by the claimant relating to his right hand problems are attributable to the cervical condition diagnosed by Drs. Johnson and Kelly. To find otherwise, requires a conclusion that flies in the face of all of the available medical evidence. In fact, I note that neither Dr. Bise, nor Dr. Loyd, who is employed by the respondent, ever doubts the claimant's complaints of hand pain or related symptoms. These complaints had been consistently made throughout the course of his treatment, and are exactly in accordance with the type of problems someone would have if they had a cervical abnormality such as the claimant's.

I also note that the type of gradual onset injury the claimant is alleging is entirely in accordance with the type of work the claimant was performing. That is, he was required to reach above his head, pull down an overhead air wrench, and assemble a small part using repeated motions with his hands. According to the claimant's testimony, he performed a cycle of these motions approximately every 20 seconds. Obviously, this required repeated flexion of his neck, both looking up to grab the wrench and looking back down

to assemble the part. This is exactly the type of motion referred to by Dr. Kelly as being a likely cause of his cervical condition.

Of particular interest in regard to this issue is the Supreme Court case of Hapney v. Rheem Manufacturing Company, 342 Ark. 11, 26 S. W. 3d 777 (2000). That case, which involved the same employer, concerned a claimant who was alleging that she had sustained a cumulative trauma injury to her neck as a result of her job related activities. In discussing the action undertaken by the claimant, the Court noted that she was required to assemble a small part about once every 20 seconds. The Commission had denied the claim finding that this job was not sufficiently repetitive to have caused the claimant's injury. However, the Court reversed that finding, holding that a reasonable mind could not reach that conclusion.

In considering the medical evidence in this case, as well as the claimant's testimony regarding his job duties, I am of the opinion that the claimant offered more than enough evidence to meet his burden of proof. Not only was the claimant's actions in performing his job repetitive, the medical evidence supports that such an activity would likely cause his condition. I do

not see what other evidence the claimant would need to offer to establish his entitlement to benefits.

I also find that the claimant is entitled to receive temporary total disability benefits to a date yet to be determined. The claimant had just begun treatment for his cervical condition when the respondent controverted his entitlement to further benefits. Clearly, he is still within his healing period for this condition and continues to need additional medical treatment. I therefore find that he is still within his healing period and disabled, therefore entitled to appropriate temporary total disability benefits to such a date as his condition has become medically stable. I also find that the respondent should be liable for providing all reasonable and necessary medical treatment for the claimant's cervical condition.

For the reasons set out above, I respectfully dissent from the majority's denial of benefits in this case.

PHILIP A. HOOD, Commissioner