

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F702470

KIMBERLY D. HARRIS, EMPLOYEE	CLAIMANT
COLUMBIA SEWING CO., INC., EMPLOYER	RESPONDENT
STATE AUTOMOBILE MUTUAL INS. CO., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED SEPTEMBER 19, 2008

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

Claimant represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent represented by HONORABLE A. GENE WILLIAMS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed December 20, 2007.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The parties stipulations outlined herein are reasonable and are hereby accepted as fact.
3. Claimant has failed to prove by a preponderance of the evidence that the injuries she sustained to her right upper

extremity arose out of and in the course of her employment.

4. Therefore, the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable gradual onset injury to her right upper extremity.

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's opinion. The majority, by affirming and adopting the December 20, 2007 opinion of an Administrative Law Judge, finds that the claimant failed to prove compensability of a gradual onset injury to her right upper extremity. Based on a de novo review of the record, I find that the claimant has met her burden of proof by the preponderance of the evidence for a compensable gradual onset injury and, therefore, I must respectfully dissent.

History

_____ The claimant worked for Columbia Sewing Co., Inc. inspecting and manually trimming loose strings from the shirts produced by the respondent. The claimant testified that her job of trimming could be accomplished in two ways, either with scissors using her right hand or with an air trimmer. The claimant testified that she used the scissor method because it was quicker and her pay was based on the number of garments she could finish.

The claimant testified that she began work for the respondent sometime in November of 2006. The claimant

testified that her right hand began getting sore in December of 2006, and the same symptoms continued to January and February of 2007. The claimant testified that the pain in her right upper extremities became so great that on February 21, 2007, she sought medical treatment.

The medical records show that on February 21, 2007, Nurse Jakeeli Bennett of Dr. Goins' clinic noted "work requires repetitious wrist movement", "no history of injury", and "onset of pain several weeks ago - job requires use of clippers." Nurse Bennett issued the claimant a 2-week release from work. Additionally, the nurse applied an Ace bandage and prescribed the non-steroidal anti-inflammatory drugs Naprosyn and a Medrol dose pack.

The March 15, 2007 medical records indicate that the claimant was prescribed Toradol and Lortab and told to see an orthopedic specialist. The medical notes indicate the claimant could not see a specialist because the respondent had denied the Workers' Compensation claim. On her March 15, 2007 visit to Dr. Goins' clinic, the claimant was prescribed Lortab (for pain) and given a Toradol injection, another non-steroidal anti-inflammatory drug. Also in the March 15 notes, the nurse recommended the claimant see an

orthopedic specialist about her condition, but the claimant stated that she could not because the respondent had denied Workers' Compensation benefits.

On April 11, 2007, the medical records from Dr. Goins' clinic show that Nurse Bennett noted "swelling of tendon at base of right thumb." The claimant was advised to consult an orthopedic doctor. The next visit for medical treatment was on August 1, 2007, when Dr. Goins diagnosed the claimant with tendinitis of the right thumb due to repetitive motion, noting swelling and knots along the tendon of the right thumb, recommending that the claimant consult an orthopedic doctor.

On June 1, 2007, Ms. Bennett and Dr. Goins both signed a questionnaire stating that there were objective medical findings of the claimant's injury and that the injury was related to the claimant's work. Dr. Goins' medical notes from August 1 diagnosed tendinitis in the claimant's right wrist and related this to a "repetitive motion injury." Also, the August 1, 2007, doctor's note indicates that the claimant was responsible for between 75 and 125 shirts per day, with an average of 30 clips of string per shirt.

Discussion

A claimant seeking Workers' Compensation 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 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. Ark. Code Ann. § 11-9-102(4) (A) (ii) & (E) (ii) (Supp. 1999). Furthermore, a compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4) (D) (Supp. 1999). Because the injury in question here is not recognized as a per se rapid repetitive injury under Ark. Code Ann. § 11-9-102(4) (A) (ii) (a), the claimant must additionally prove by a preponderance of the evidence that her upper extremity problems were caused by rapid repetitive motion. Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 304, 40 S.W.3d 760 (2001).

I find that the claimant has proved by a preponderance of the evidence that she sustained a compensable right upper extremity gradual onset injury.

First, the claimant proved she sustained an injury, supported by objective findings. Objective findings are defined as findings that cannot come under the voluntary control of the patient. Continental Express, Inc. v. Freeman, 66 Ark. App. 102, 989 S.W. 2d 538 (1999). Arkansas Courts have held that swelling is an objective medical finding. Meister v. Safety Kleen, 339 Ark. 91, 3 S.W. 3d 320 (1999). The June 1, 2007 questionnaire indicates that both Dr. Goins and Nurse Bennett noted swelling. Furthermore, while the claimant had been using Naprosyn prior to the time she saw Nurse Bennett, on February 21, 2007, the claimant was prescribed Medrol for her right upper extremity in addition to the Naprosyn she was already taking. The Arkansas Supreme Court has held that treatment designed to relieve symptoms associated with an objective finding is sufficient to meet the objective medical findings criteria in the Workers' Compensation Act. See Fred's Inc. v. Jefferson, 361 Ark. 258, 206 S.W.3d 238 (2005) and Estridge v. Waste Management, 34 Ark. 276, 33 S.W.3d 167 (2000). Here, the claimant's medical record contains evidence of swelling, through treatment with an anti-

inflammatory, clearly satisfying the objective medical findings requirement.

Second, the claimant has proved by a preponderance of the evidence that her right upper extremity injury was caused by rapid repetitive motion. The Arkansas Supreme Court in Malone v. Texarkana Pub. Schools, 333 Ark. 343, 969 S.W.2d 644 (1998), explained that because the legislature had not established guidelines necessary to the determination of what constitutes "rapid and repetitive motion", that such a determination is made on a case-by-case basis. The Court provided guidance for the Commission, stating that to determine rapid repetitive motion requires a two-pronged test: (1) the task must be repetitive, and (2) the repetitive motion must be rapid. More specifically, "as a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition. The repetitive tasks must be completed rapidly." Id. at 350, 969 S.W.2d at 647-48. In Hapney v. Rheem Manufacturing Co., 342 Ark. 11, 26 S.W.3d 777 (2000), the Arkansas Supreme Court provided more guidance as to what "rapid and repetitive" means. Movements repeated every

fifteen seconds have been found to be sufficiently "rapid" to satisfy § 11-9-102(4)(A)(ii)(a). Citing High Capacity Prods. v. Moore, 61 Ark. App. 1, 962 S.W.2d 831 (1998). Similarly, body movements separated by periods of only 1.5 minutes can constitute rapid motion within the meaning of the statute. Boyd v. Dana Corp., 62 Ark. App. 78, 966 S.W.2d 946 (1998). Here, the movements of the claimant were repeated five (5) to eight (8) times per minute, or once every twelve (12) to seven point five (7.5) seconds. Based on the evidence of record, it is clear that the movements of the claimant are sufficiently rapid and repetitive according to Arkansas case law.

Third, the claimant proved the injury arose out of and in the course of the employment. Arkansas Courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 234 Ark. 104, 357 S.W.2d 263 (1962).

Here, while working for the respondent the claimant used the specific area of her body that was later injured and, while working for the respondent, the claimant was injured in a manner logically attributable to the physical activities involved in her job. I find that if the claimant used scissors with her right hand for the same, repetitive task day after day, hour after hour, it is not mere speculation or conjecture to attribute tendinitis in the right thumb to this repetitive work. Furthermore, the respondent has simply been unable to posit any explanation for the claimant's injury in the face of the claimant's credible testimony and relevant medical history. The majority, by affirming and adopting the decision of the Administrative Law Judge, apparently finds the claimant's testimony not to be credible because she failed to mention a once-a-week job the claimant had for 2 months in which she was paid \$20-25 per week for sweeping and tidying-up an acquaintance's workstation at a local hair salon. I disagree. The job used to discredit the claimant's testimony happened, at most, eight (8) times and did not require similar body movements as the job which gave rise to the claimant's injury. The claimant's omission of a once-a-week task one

year prior to the injury is a tangential matter and its omission is excusable.

Lastly, the claimant proved that the injury was a major cause of the disability or need for treatment. A finding of "major cause" can be established in a situation in which a claimant was symptom-free prior to the work-related aggravation of a pre-existing condition.

Parker v. Atlantic Research Corp., 87 Ark. App. 145, 189 S.W.3d 449 (2004). The claimant had no symptoms of her current injury prior to working for the respondent. Dr. Goins and Nurse Bennett both testified within a reasonable degree of medical certainty that the hand movements required by the claimant's work were the major cause of claimant's injury and need for treatment. The majority, by affirming and adopting the Administrative Law Judge's opinion, disregards Dr. Goins and Nurse Bennett's testimony, in part, because it is based on the claimant's statements. The majority, according to the Court's holding in Roberts v. Whirlpool, ___ Ark. App. ___ (May 14, 2008), cannot reject medical testimony based on claimant history if there is no reason to find the claimant's history is inaccurate. Here, the respondent has never proffered an explanation as to what

other source of the claimant's gradual onset injury exists. The respondent never contested the claimant's credible testimony that she clipped loose strings off of their shirts manually with scissors in a rapid, repetitive manner. This is the same history given to Dr. Goins and Nurse Bennett, and it cannot be disregarded.

In conclusion, I find that the claimant has proved, by a preponderance of the evidence, all of the elements of a compensable right upper extremity gradual onset injury, and accordingly is entitled to an award not limited to appropriate reasonable and necessary medical treatment, temporary total disability from February 21, 2007 to a date yet to be determined, and attorney's fees. For the aforementioned reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner