

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F706526

DEONA PIPER,
EMPLOYEE

CLAIMANT

BENTON COUNTY JUDGE,
EMPLOYER

RESPONDENT

AAC RISK MANAGEMENT SERVICES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 16, 2008

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

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

Respondent represented by the HONORABLE MICHAEL E. RYBURN,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed October 31, 2007. The administrative law
judge found, among other things, that the claimant proved
she suffered a compensable injury to her left shoulder.
After reviewing the entire record *de novo*, the Full
Commission reverses the administrative law judge's opinion.

We find that the claimant did not prove she sustained a compensable injury.

I. HISTORY

_____Deona K. Piper, age 39, testified that she began working for the Benton County Circuit Clerk in March 1994. Ms. Piper testified that she worked for the respondents in microfilming for about six years. After microfilming "went to a scanning system," the claimant scanned deeds and mortgages for about two years. The claimant testified that "the system changed again to where it was recording and scanning all at the same time." The claimant testified that she became a supervisor in about April 2006, and "I still filed some when people are missing, indexed, I put in judgments, liens, stuff like that." The claimant testified on direct examination:

Q. Now, describe your duties in that - the last four years before you became a supervisor, after the system changed. Exactly what did you do each day?

A. It was putting every page of a document into a stamping machine, and then you had to put it into a scanner and scan every page in.

Q. And what - what hand would you use to do that?

A. The left.

Q. Are you left-handed?

A. Yes.

Q. Did you use your right hand some, too?

A. Yes.

Q. And how many hours of your day did you spend doing that?

A. Seven.

Q. Okay. Now, when you - when you switched to the supervisory position, about how many hours of your day was spent doing those kind of duties?

A. Maybe one or two on the actual scanning.

Q. Okay. And was that all at once, or was that spread out?

A. Spread out.

Q. Now, during this time when you were doing your supervisory work, what - what did you do the other seven hours or eight hours of the day?

A. Typing, answering phones, filling in....

The parties stipulated that the employment relationship existed on June 20, 2007. The claimant testified:

Q. Now, what happened on June 20th of 2007?

A. One of the other employees called in sick, and I was filling in for him....I did it over a three-day period.

Q. Okay. And in those three days, exactly what were you doing?

A. I was putting the papers into the stamping machine and then in to scan.

Q. Were you doing that all day long?

A. Yes....

Q. So during those three days, how many hours during the day do you believe you were stamping and scanning?

A. I did it all day, around seven hours, except on the Friday.

Q. What Friday are you talking about?

A. The Friday when I filed the workman's comp claim and left.

The claimant sent an e-mail to Brenda DeShields on June 22, 2007 and stated, "My shoulder is killing me it hurts all the way down into my elbow. I think all the repetitive motion over the years have taken a toll on it. When I filed for title companies my shoulder hurt all the time. Here lately since I have been filing it is back to hurting."

Ms. DeShields replied on June 22, 2007, "Have you went to the doctor concerning this? I'm sure the repetitive motion hasn't helped anything, but unfortunately we are not getting any younger either and that also effects our body along with the toll of everything we do. Hopefully Nick will be back on Monday, and when hiring for position I will keep this in mind as well so that maybe we work around it. How does that sound to you? I would have to use you from

time to time on the counter or even other positions when short handed but I will try my best to work with you on it."

The claimant testified that, after she received Ms. DeShields' response, "I went upstairs to the human resources department and filed a workman's comp claim....they set up an appointment with the Wellquest Clinic." The record indicates that the claimant was seen at Wellquest Medical Clinic on June 22, 2007, where it was noted, "38 year old female presents with c/o shoulder pain has been hurting for the last three days, no direct trauma to it, at work she moves it constantly. c/o radiation of pain down to elbow and a little into L side of chest....shoulder pain off and on x 5 years - filing at work hurts." The claimant was assessed with "1. Pain in limb" and "Advised not to file if this aggravates (sic). Advised on proper stance for filing and if scanning aggravates - to possibly raise her chair height."

It was noted at Wellquest on June 24, 2007, "38 year old female presents with c/o not any better....states that she works this shoulder all the time and feels like repetative (sic) motion has caused this pain. No acute injury. No relief with the systemic steroids given....Pain

all the time. Pain worse when she lays on it, hurts more when she moves the arm. Reaching up causes the most pain....Arm is not getting better, only worse. Arm is starting to tingle. She thinks she needs an MRI."

Dr. B. Shane Holland returned the claimant to work at full duty on June 24, 2007 but checked a box indicating that the claimant had not reached maximum medical improvement. Dr. Holland also assessed "1. Transarthropathy shoulder" and "2. Subacromial bursitis."

Dr. David L. Beeman saw the claimant on June 25, 2007:

The patient states for the last eight years she's been having just intermittent left shoulder pain. States she was doing a lot of microfilm copying file work and the more she works the more it would hurt. She does state in the last year or so they've allowed her to do a different job but some people at work have not been there and so she's had to increase the amount of filing and scanning where they have an extensive work load due to increased housing and states that her left shoulder is now worsening....

Left shoulder - she does have full range of motion but has pain when she abducts and flexes to above 90 degrees from midline. She does have full range of motion with passive motion. There is no swelling, erythema or bony deformities. No crepitus.

Dr. Beeman assessed "Left shoulder pain, possibly underlying tendonitis/bursitis. Will send for x-ray and will refer to orthopedic surgeon for evaluation due to the

chronic nature with acute worsening...." Dr. Beeman treated the claimant conservatively and recommended "Decreased activity."

An x-ray of the claimant's left shoulder was taken on June 25, 2007, with the impression, "Mild to moderate narrowing of the acromioclavicular joint consistent with arthritic change. Otherwise, unremarkable left shoulder."

The claimant testified that Dr. Beeman took her off work for two days. The claimant's testimony indicated that she returned to work on June 27, 2007, and that she was "Filing judgments." The claimant testified that she argued with Brenda DeShields over leaving work early, and Ms. DeShields "told me to get my things and leave." The claimant testified that she again argued with Brenda DeShields on about Friday, June 28, 2007, "and we got into an argument again, and she fired me for insubordination....As soon as she told me I was fired, I left."

Dr. Christopher A. Arnold saw the claimant on July 2, 2007:

She has had off-and-on pain in both shoulders for five years. Work was repetitive.

She quit doing her job for about a year, but she filled in for a co-worker on 06-20-07 and started having pain. By Friday, it was unbearable....

RADIOGRAPHS from outside of her left shoulder reveal some AC arthrosis.

Dr. Arnold's impression was "Left shoulder pain after a work-related injury secondary to probable rotator cuff tendinosis. I cannot rule out a tear, cannot rule out AC arthropathy and cannot rule out referred pain from the neck, lungs or other....I discussed the options with her and have recommended an MRI. She understands that I cannot rule out anything atypical. At the current time, I would recommend no left-handed duty."

An MRI of the claimant's left shoulder was taken on July 6, 2007, with the following impression:

1. Tendinopathy with less than 50% partial thickness tearing of the supraspinatus and infraspinatus tendons.
2. Peribursal inflammation.
3. No muscle atrophy or tendinous retraction.

Dr. Arnold's impression on July 10, 2007 was "Left shoulder pain secondary to partial cuff tear....I would recommend three months of aggressive therapy, anti-inflammatory but no left-handed duty. If it is not better, we will inject the AC joint. It may ultimately come

to a scope. She understands a partial cuff tear may complete itself and may have to have surgical treatment. She agrees with this plan and will return to see me in three months." Dr. Arnold signed a Certificate Of Release For Return To Work on July 10, 2007, with the limitations of "no L handed duty."

A pre-hearing order was filed on August 15, 2007. The claimant contended that she "was injured on June 20, 2007 when her left shoulder was injured doing filing and recording while filling in for a missing co-worker. She contends she is entitled to temporary total disability, medical, and an attorney fee."

The respondents contended that "this claim is barred by the statute of limitations. The shoulder condition has been present for eight years according to the medical reports. It was not reported as a work related injury until June 22, 2007. The claim is not compensable. The claimant's job is not rapid and repetitive and it appears the alleged condition is due to a gradual incident. There was no specific incident. There are no objective medical findings."

The parties agreed to litigate the following issues:

"1. Compensability of injury to claimant's left shoulder.
2. Medical. 3. Temporary total disability benefits from
June 28, 2007 until a date yet to be determined. 4.
Attorney fee. 5. Statute of limitations."

An administrative law judge found, among other things, that the claimant proved she suffered a compensable injury to her left shoulder. The respondents appeal to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-102(4)(A) (Repl. 2002) defines "compensable injury":

(ii) 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....

The standard for interpreting "rapid repetitive motion" is a two-pronged test: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. *See, Malone v. Texarkana Pub. Schs.*, 333 Ark. 343, 969 S.W.2d 644 (1998). The repetitive tasks must be completed rapidly. *Id.*

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann.

§11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i). Objective medical evidence is necessary to establish the existence and extent of an injury but not essential to establish the causal relationship between the injury and a work-related accident. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999).

The claimant's burden of proof shall be 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). "Major cause" means "more than fifty percent (50%) of the cause," and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, an administrative law judge found that the claimant proved she sustained a compensable injury to her left shoulder. The Full Commission reverses

this finding. The claimant began working for the respondent-employer in 1994. The claimant testified that her work duties included stamping documents, scanning, microfilming, and filing. The record does not support the claimant's assertion that these activities were "continuous." The claimant testified that she also performed typing and answered the telephone. Even if the claimant's work duties were repetitive, which the evidence does not show, the record does not demonstrate that the claimant performed repetitive tasks which were completed rapidly. *See, Malone, supra.* The claimant testified that her symptoms intensified over a three-day period in June 2007 when, according to the claimant, she was required to put papers into a stamping machine for seven hours daily. The Full Commission is unable to determine that the claimant's work duties over this three-day period constituted rapid repetitive motion. We are unable to find that any of the claimant's work duties for the respondent-employer constituted rapid repetitive motion which caused an injury to the claimant's left shoulder. Moreover, the record does not demonstrate that the partial thickness tearing and inflammation shown on the July 2007 MRI was

causally related to rapid repetitive motion at work. See, *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove she sustained an injury causing internal or external physical harm to her left shoulder. The claimant did not prove she sustained an injury to her left shoulder which arose out of and in the course of employment, and the claimant did not prove she sustained an injury caused by rapid repetitive motion. The claimant did not establish a compensable injury by medical evidence supported by objective findings. Finally, the claimant did not prove that the alleged compensable injury was the major cause of her disability or need for treatment. Because the Full Commission finds that the claimant did not prove she sustained a compensable injury, the respondents' statute of limitations defense is moot. We therefore reverse the administrative law judge's decision, and this claim is denied and dismissed.

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. The majority, reversing the Administrative Law Judge, finds that the claimant did not prove she sustained a compensable injury. After a de novo review of the record, I find, as did the Administrative Law Judge, that the claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable gradual onset injury to her left shoulder while employed by the respondent, and therefore, I must respectfully dissent.

The Commission must make findings of fact which are more than mere conclusions. A simple narration of the testimony followed by a conclusion is insufficient. The Commission must detail or analyze the facts upon which the findings are based. Otherwise, a meaningful review is not possible. Lowe v. Car Care Marketing, 53 Ark. App. 100, 919 S.W.2d 520 (1996). Here, the majority has made two "naked" findings that in addition to being mere conclusions, are also clearly contradicted by the evidence of record. The majority finds that the claimant did not prove she "sustained an injury causing internal or external physical harm to her left shoulder" and "did not establish a compensable injury by medical evidence supported by objective findings." While the majority is correct that the

definition of "compensable injury" in Ark. Code Ann. §11-9-102(4) (A) (i) requires "internal or external physical harm" and while it is also true that Ark. Code Ann. 11-9-102(4) (D) states that "[a] compensable injury must be established by medical evidence supported by objective findings" the majority's assertion that the claimant has failed to prove these elements of compensability is egregious error. The medical record unquestionably shows that the claimant has a left shoulder injury. The claimant has introduced an MRI report with objective findings of a rotator cuff tear which has required medical treatment. For the majority to conclude that the claimant has not produced "objective findings" and has failed to prove "internal or external physical harm" based on the record at hand calls into question the thoroughness of the de novo review performed by the majority.

When a claimant requests benefits for an injury characterized by gradual onset, Ark. Code Ann. § 11-9-102(4) (A) (ii) (Supp. 2005) controls, defining "compensable injury" as:

(5) (A) (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of the employment if it is not caused by specific incident or is not identifiable by the time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion...

The test for what constitutes "rapid repetitive motion" was set out by the Arkansas Supreme Court in Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W. 2d 644 (1998) as a two-pronged test: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. Here, the majority's finding regarding rapid and repetitive motion is not supported by the evidence of record. I find, as did the Administrative Law Judge, that the claimant's job duties with the respondent required her to engage in rapid repetitive motion.

As noted by the Court in Malone, the threshold issue is whether the tasks are repetitive. Here, the claimant testified as to the repetitive nature of her job duties. The claimant testified that in order to perform the job of scanning documents, it is first necessary to get the document, remove any staples and/or paper clips, stamp each page of the document, and run each page through the scanner. If the document has information on both sides, it must be reinserted into the scanner. Once the document has been scanned, it is necessary to reassemble the document. The claimant testified that deeds recorded and scanned consist of one to two pages, and mortgages can consist of anywhere from

two to 100 pages and are frequently two-sided. Prior to April 2006 when claimant became a supervisor, she performed this job scanning documents seven hours each day. It was while she was performing this work that claimant first developed shoulder problems. The claimant testified that these shoulder problems would last during the work week and would improve over the weekend. After the claimant became a supervisor, she was still required to scan documents for one to two hours over the course of each workday. On June 20, 2007, when an employee called in sick, the claimant was required to scan the documents all day long. It was during this three-day period that claimant's shoulder problems worsened.

As for the second prong of the Malone test, the claimant testified as to the rapid nature of her document scanning duties:

Q:...And do you have time to rest in between these stamping and scanning pieces?

A: It depends on how much you have to do and how fast you're going.

Q: Okay. During these three days, what was your normal rate of speed?

A: I would say it was a pretty - just average rate of speed at that point, because it wasn't the large volume like we had done before.

Q: So describe that. What was that-

A: It was just a - steady pace all day.

Q: Okay. So at a steady pace, can you just demonstrate for us, what would a steady pace be?

A: Well, when you're filing an instrument, you have to put every page in the endorser first. So it has to go through a machine, and then you flip it over, and you just take the document and do every page like that. Once you get all your pages stamped, then you take the whole document and you put it into the scanner. Now, most of your mortgages are double sided. So you can't just put the whole thing in there and let it scan it. You had to feed it one at a time.

Q: Okay. So was your arm moving all the time, or were there breaks?

A: It was moving most of the time. Not all the time. There was break in between.

Q: Okay. So what would the breaks be?

A: Just a few seconds to (attorney interruption) let a document do its thing and then finish it out.

While the Commission has the authority to resolve conflicting evidence, including medical testimony, Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996), the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. Coleman v. Pro-transportation, ___ Ark. App. ___, ___ S.W.2d_____, (2007). Here, the majority, has clearly disregarded the claimant's uncontradicted testimony regarding the rapid and repetitive nature of her job duties, which is corroborated by the medical evidence of record. I find, based on the above, that the preponderance of the evidence of record clearly shows

that the claimant has satisfied the rapid and repetitive motion test as set out in Malone, supra.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner