

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F609549

SHARON RANEY, EMPLOYEE	CLAIMANT
LENNOX INDUSTRIES, EMPLOYER	RESPONDENT
ESIS, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 31, 2008

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

Claimant represented by the HONORABLE PHILIP WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY HARDY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed February 14, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on August 28, 2006 at a compensation rate of \$371.00/\$278.00.
2. The claimant has proven by a preponderance of the credible evidence of record that she sustained a gradual injury, caused by rapid and repetitive

motion arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, which was the major cause of disability or the need for medical treatment, pursuant to A.C.A. §11-9-102.

3. Respondents No. 1 is directed to pay all medical expenses for the right hand within thirty days of receipt pursuant to Rule 30.
4. Respondents No. 1 is directed to pay temporary total disability benefits from September 13, 2006 to March 2007 during which time the claimant was in her healing period and was not working.
5. Pursuant to Ark. Code Ann. §11-9-511, the Commission orders the claimant to see Dr. Kenneth Rosensweig (sic) for assessment of anatomical impairment, apportioning the rating between the preexisting condition and the aggravation. An award of permanent partial disability benefits will be held in abeyance.
6. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.
7. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992) (E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by

the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act. 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

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

We therefore affirm the February 14, 2008, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

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).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that she sustained a gradual onset injury to her right thumb. Based upon my de novo review of the record, I find that the claimant

has failed to meet her burden of proof. Accordingly, I would reverse the decision of the Administrative Law Judge.

The claimant began working for the respondent employer in 2004. Prior to that time, the claimant was employed by Kender-Harris for 23 years producing picture frames. In June of 2006, the claimant began working on Line Seven Bay Station and in August of 2006, she reported an injury to her right thumb. The claimant admitted that she had arthritis in her hands to the point that she had knots coming up. Approximately four years before she even began working for the respondent employer she had x-rays of her hands at that time which showed arthritis.

The claimant contended that she did not have any problems with her hands until she started the job on the Line Seven Bay Station with the respondent employer. However, her medical records indicate that on January 19, 2005, the claimant sought treatment from Dr. Morgan and was complaining of "chronic pain in her hands." The note from that date also stated that "she does have some abnormalities in her partial metacarpal joint with some obvious chronic joint deformity."

A video was introduced at the hearing which showed the claimant's job duties. Mr. David Earney, the

Business Unit Leader, and the claimant's supervisor over Line Seven Bay Station, testified that the video was a correct depiction of what took place each day on the claimant's job. He stated that nothing was staged and that it showed everyday work. Mr. Earney explained the work in question performed by the claimant was to build a section of the unit and that two people are working on the unit at each section. As the video of the job duties was played, Mr. Earney explained that the person was first painting on the drain pan with a paint brush to keep the arc welds from rusting. She would next use a spot gun to place a nail on the metal with a spot welding gun, but using her index finger to press a trigger. Then the person will apply an adhesive, with a paint roller, to hold the insulation on, along with a pen spot, and apply insulation. He explained that the person puts a metal ring over the nail and in a very simple operation bends it down. The job requires that the employee build three walls using this process for the unit and then apply the walls to the unit with an air gun. The employee uses the air gun, which is powered by a trigger that the employee uses their index finger to activate.

The employee builds about 30 units per 8-hour shift, but the line is not power based. The employee

moves the unit when their part of the job is completed. He also explained that the metal already has engaging holes and pilot holes so the employee does not drill through pieces of metal, but instead into the engaging hole or pilot hole. Finally, the employee uses a regular caulk gun to caulk the corners to keep air flow from going through and then completes paperwork to go to the next station with the unit.

Kim Chastain, nurse for the respondent employer, testified that she took the claimant's report of an injury to the right thumb. She stated that the claimant told her that her right hand started hurting about two weeks prior and that she already had arthritis in both hands, but she believed the air gun made the arthritis in her hand worse. She further testified that the claimant applied for and received short term disability benefits provided to employees by the respondent employer from August 29, 2006, through March 5, 2007, at the standard rate of \$212.30 per week.

The video reviewed by the claimant and Mr. Earney at the hearing was taken by Ms. Mira Sims. Ms. Sims also conducted a job analysis with ergonomic risk factor comparison. In her report she went into great detail about the movements required to perform the duties of the claimant's job. Ms. Sims's analysis and

impression was that the job had a high frequency of grasping with low forces, but that the activities only comprise fifty percent of the work activity, with recovery time between activities.

With regard to gradual onset injuries other than carpal tunnel syndrome, the Court has given the Commission some guidance in analyzing rapid repetitive claims. First, in Baysinger v. Air Systems, Inc., 55 Ark. 174, 934 S.W.2d 230 (1996), the Court held that multiple tasks may be considered together in determining whether the repetitive requirement has been met. In Kildow v. Baldwin Piano and Organ, 58 Ark. App. 194, 948 S.W.2d 100 (1997), the Court held that the ordinary meaning of rapid means swift or quick. In Lay v. United Parcel Service, 58 Ark. App. 35, 944 S.W.2d 867 (1997), the Court of Appeals declined to find work duties satisfied the definition of rapid repetitive motion when the duties or tasks were separated by periods of several minutes or more.

The standard set out in Malone v. Texarkana Pub. Schs., 333 Ark. 343, 969 S.W.2d 644 (1988), for analyzing whether an injury is caused by rapid repetitive motion, is a two-pronged test: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. As a threshold issue, the tasks must be

repetitive, or the rapidity element is not reached. Westside High School v. Patterson, 79 Ark. App. 281, 86 S.W.3d 412 (2002). Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition; the repetitive tasks must be completed rapidly. Westside High School, supra. The issue of whether an injury meets the rapid repetitive motion requirement will ordinarily be a question of fact, not one of law. However, although a question of fact, the Commission must apply the appropriate law to the evidence to reach a conclusion. Westside High School, supra; Malone, supra. The Arkansas Supreme Court in Malone, supra, explained that because the legislature had not established guidelines necessary to the determination of what constitutes "rapid and repetitive motion", that determination is made on a case-by-case basis.

In determining whether a worker's injury was the result of repetitive and rapid motion, the appellate courts have required some showing of how rapidly the repetitive actions were performed. See, Hapney v. Rheem Mfg. Co., 342 Ark. 11, 26 S.W.3d 777 (2000) (Commission's denial of benefits reversed where movements repeated every twenty seconds); Parker v. Atlantic Research Corp., 87 Ark. App. 145, 189 S.W.3d

449 (2004) (where the Commission found that appellant's job duties fell within the meaning of rapid repetitive motion, considering the multiple tasks that she was required to perform at high volume and with quick and fast movements in a repetitive nature over the course of a sometimes ten-to-twelve hour shift, six to seven days a week, there was substantial evidence to support the Commission's finding that appellant's job duties required rapid repetitive motion); Boyd v. Dana Corp., 62 Ark. App. 78, 966 S.W.2d 946 (1998) (a series of repetitive motions, performed 115 to 120 times per day separated by periods of only 1.5 minutes, constituted rapid motion within the meaning of the statute); High Capacity Prods. v. Moore, 61 Ark. App. 1, 962 S.W.2d 831 (1998) (movements repeated every fifteen seconds found to be sufficiently "rapid").

In Boyd, the Court of Appeals compared the duties of a worker who repeated a four-step metal fabricating process approximately 100 to 125 times per shift to the duties of a delivery man whose repetitive motions were separated by intervals of several minutes. In comparing these two situations, the Court of Appeals in Boyd found that the metal fabricating process involving 100 to 125 parts per hour was sufficiently

rapid and repetitive to satisfy the requirements of Act 796 of 1993. In this regard, the Court stated:

...[i]n the instant case, the evidence is that the appellant's series of repetitive motions were performed 115 to 120 times per day separated by periods of only 1.5 minutes, and we do not think that this brief interval rises to a period of "several minutes or more" as stated in Lay. Boyd, Supra, at 83.

Likewise, the Commission has addressed the issue of rapid and repetitive movement, as it applies to our statute. For example, in Le v. Superior Industries, Full Commission Opinion, February 12, 1999 (Claim No. E708248), the Commission determined that the claimant's position required rapid and repetitive motion sufficient to satisfy the Act where the claimant handled approximately 30 tire rims per hour for 50 or more hours per week. She processed approximately 300 wheels per shift using essentially the same four steps: (1) lifting a wheel rim onto a table, (2) sanding the wheel with a circular motion, (3) deburring the wheel with a pneumatic grinder, and (4) lifting the wheel onto a cart or bin. When the plant ran chrome wheels, the claimant was also required to use a four-pound stamper and a five pound shop hammer to mark each wheel. The tasks were clearly repetitive. The Commission applied the analysis

of the Court of Appeals in Boyd, supra, to determine that the tasks were performed rapidly under the Act.

In contrast to Le, supra, in McDonald v. Tyson Foods, Inc., Full Commission Opinion, June 3, 1999 (Claim No. E713336), the claimant failed to satisfy the elements of proof for a gradual onset injury. In McDonald, the claimant's physicians opined that her work was conducive to or was sufficient to account for the claimant's clinical findings. However, this was insufficient to make a finding that the claimant had satisfied the rapid repetitive motion element of proof necessary to prove the compensability of her claim. "Claimant must present more evidence than medical opinions linking her condition to her work." The claimant had failed to satisfy her burden of proof where there was no evidence with regard to the rate of speed within which the claimant performed the tasks of lifting the belts on the machine which she contended was the repetitive task responsible for her injury. On cross-examination, the claimant was asked how long it would take for her to lift the wire belts for bracing, to which she responded:

It depends on what kind of mood you are working in. If you are in a hurry, it's going to take anywhere from ten minutes, maybe a little longer, but if you are just taking

your time - I can't tell you how long it takes, I really can't. Because everybody is different and I haven't been doing that in so long and all.

In Rodman v. ACX Technologies, Full Commission Opinion, July 8, 1999 (Claim No. E804579), the Commission noted that the Court of Appeals has stated it "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'." See, Patterson v. Frito-Lay, Inc., 66 Ark. App. 159, 992 S.W.2d 130 (1999). In Rodman, the claimant failed to prove a gradual onset cervical injury where there was no evidence as to the position of her neck or cervical spine during the repetitive tasks she performed with her upper extremities. The Commission also found that the claimant had failed to prove that the repetitive motions of her upper extremities were performed rapidly under the two-prong test set forth in Malone, supra, because the claimant testified that "she had to be deliberate and careful in performing her job functions, but that she also tried to perform these deliberate and careful moves as fast as she could." The Commission stated that "this testimony does not satisfy the rapid repetitive motion requirement. There is void from the record any persuasive evidence which would

establish the speed at which claimant performed her job duties.”

Finally, in High Capacity Products, supra, the Court of Appeals affirmed the decision of the Full Commission finding that the claimant proved by a preponderance of the evidence that her job duties producing electrical meter boxes required rapid repetitive motion. In reaching this decision the Court summarized the following relevant evidence:

Moore, a thirty-eight-year-old woman, worked for appellant for approximately five years. She used an air gun to assemble blocks with a quota goal of one thousand units per day. She was required to assemble each block by using an air-powered appliance to attach two nuts to each block. She would hold the parts of the unit with her left hand and work the air gun with her right hand. She averaged using the air gun to attach one nut every fifteen seconds, according to the testimony of her supervisor. The majority of her time was consumed in this quota assembly. Her job required three maneuvers to be repeated in succession all day: assembling the separate parts, using the air-compressed equipment to attach the parts together with nuts, and throwing the units into a box. In reaching its decision, the Court commented that “we believe that this is the most compelling case demonstrating rapid repetitive motion presented to this Court to date.” Id. At 962 S.W.2d 831.

The claimant was seen by Dr. Rhodes on September 11, 2006. He noted the claimant was

complaining of right thumb pain and he reviewed the claimant's x-rays. He indicated that the x-rays showed osteophytes of the right thumb CMC joint and that there was joint narrowing with subluxation. Dr. Rhodes was of the opinion that the claimant's thumb problems were not work-related, but instead due to pre-existing arthritis. It was at this point that the respondents denied the claimant's claim. Thereafter, the claimant went to Dr. Hixson on September 21, 2006, under her group health insurance. Dr. Hixson noted in her report for that initial visit that the claimant had bilateral thumb basal joint osteoarthritis and right carpal tunnel syndrome. On October 19, 2006, Dr. Hixson performed surgery on the claimant's right thumb. The postoperative diagnosis was "severe osteoarthritis, right thumb, carpometacarpal joint." Dr. Hixson followed the claimant after surgery and on March 29, 2007, stated that "Ms. Raney has basilar osteoarthritis in both thumbs. Today, in order to help the symptoms, the CMC joint of the left thumb was injected with cortisone." The report also stated that the claimant was starting to develop some enlargement of the index and middle finger MP joints and may have a generalized osteoarthritic process. Additionally, on April 2, 2007, the claimant was seen by Dr. Daniels. He wrote in his report that "she ended up

having surgery on the thumb where she had extensive osteoarthritis on the right and she's going to probably ultimately need surgery on the left. She has very premature osteoarthritis involving the hands."

On June 22, 2007, Dr. Hixson wrote a report to "Whom it May Concern." In the report she stated that:

Ms. Raney has an osteoarthritic condition in both of her thumbs which causes her to have pain and swelling when the thumbs are used for repetitive gripping, pinching and twisting and it more likely than not that these symptoms will continue despite having had surgery on the right thumb. Future medical treatment for this condition is probable because of the ongoing nature of this problem.

Likewise, in her deposition testimony, Dr. Hixson commented on the severe arthritis at the base of both of the claimant's thumbs and the fact that her pre-existing arthritis had been aggravated. She stated it was not caused by the job claimant described to her she was doing, but the duties aggravated it. Even the testimony of Dr. Hixson revealed that the surgery was to remove the arthritic joint. Also, in Dr. Hixson's testimony it was revealed that the claimant gave her a history that her symptoms did not start until she began doing the job at Line Seven Bay State. However, as noted in the claimant's medical records from 2005, she was

complaining to her doctor of "chronic pain in her hands."

The testimony of Dr. Rhodes demonstrated that the claimant's job was not the major cause of her need for treatment and was entitled to more weight because Dr. Rhodes viewed the video of the claimant's job at the time of her alleged gradual injury to her right thumb. Also, he was given a history of the claimant's prior hand intensive work building picture frames for 23 years. He testified that the claimant's job at the respondent employer could have aggravated the claimant's pre-existing severe osteoarthritis some, but in his opinion would not be more than 50% of the need for her treatment. He gave the opinion that due to the severity of the arthritis that the claimant could have woke up one day with anything happening and her thumbs would have been painful. The testimony of Dr. Rhodes clearly shows that the claimant's history of no problems with her hands or thumbs before June 2006, when she began working on the Line Seven Bay Station was not correct. He stated that his examination of the claimant showed that her severe osteoarthritis took longer than two months to take effect. That is supported by the fact that four years earlier the claimant's doctor noticed knots on her hands and took x-rays and she was

complaining to her doctor in 2005 of chronic pain in both hands.

Dr. Rhodes reviewed the operative report for the surgery Dr. Hixson performed on October 19, 2006, and stated it was the type of surgery that is performed for severe osteoarthritis. He described that it was to remove the bone spurs that have been developing over time.

In my opinion, a review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that the major cause of the claimant's problems with her right thumb was her employment with the respondent employer. The testimony of both Drs. Hixson and Rhodes indicates that the major cause of the claimant's need for treatment was her pre-existing severe degenerative condition. Her job activities may have aggravated her condition but that does not rise to the level of major cause. "Major cause" is defined as 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) (A) (Supp. 2005); see, Pollard v. Meridian Aggregates, 88 Ark. App. 1, 193 S.W.3d 738 (2004).

The claimant failed to mention that she had symptoms with her thumb before the alleged injury working for the respondent employer and she also failed to recognize that she also had problems with her left thumb with the same pre-existing degenerative condition. Finally, the claimant cannot prove that her job activities were rapid and repetitive which is a necessary element for a gradual onset claim. Accordingly, I find that the claimant has failed to meet her burden of proof. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner