

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701887

JESSE RODGERS, EMPLOYEE	CLAIMANT
TRANSCO LINES, INC., EMPLOYER	RESPONDENT
RETENTION MANAGEMENT SERVICES, CARRIER/TPA	RESPONDENT

**OPINION FILED SEPTEMBER 18, 2008**

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

Claimant represented by HONORABLE J. MARK WHITE, Attorney at Law, Bryant, Arkansas.

Respondent represented by HONORABLE MELISSA WOOD, 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 November 15, 2007.

The Administrative Law Judge entered the following findings:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed at all relevant times, including February 7, 2007.

3. The claimant's average weekly wage was \$682.32 per week entitling him to a weekly temporary total disability benefits of \$455.00 and weekly permanent partial disability benefits of \$341.00
4. The claim has been controverted in its entirety.
5. The claimant failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset injury to his left foot and leg during and in the course of his employment with the respondent.

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

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 Administrative Law Judge, finds that the claimant failed to prove the compensability of any injuries suffered by the claimant. Based on a de novo review of the record, I find that the claimant has met his burden of proof by the preponderance of the evidence for a compensable gradual

onset left lower extremity injury and, therefore, I must respectfully dissent.

#### History

The claimant was a long-haul truck driver for the respondent on January 7, 2007. The claimant's job required him to manually shift gears in his 18-wheeled truck. The claimant testified that he was stuck for several hours in a traffic jam on January 7, 2007. The claimant further testified that he began experiencing discomfort in his foot shortly after the traffic jam and that when he woke up the next morning, his foot was swollen and he could not walk on it. The claimant testified that he used the truck's clutch repeatedly throughout the stop-and-go traffic of the traffic jam, pressing in, letting up, and maintaining pressure on the clutch. The claimant testified that after the traffic jam and after he made his delivery and pick-up, he spent several days at a truck stop in Pennsylvania waiting for the swelling in his foot to go down so that he could resume driving.

Sandy McDonald, the claimant's girlfriend and driving partner, was in the truck with the claimant the entire time. In her testimony, Ms. McDonald specifically corroborated the testimony of the claimant.

The medical records show that the claimant first sought medical treatment at King's Daughters Hospital on February 11, 2007, five weeks after January 7. The claimant told the hospital staff on February 11 that his problems began "approx. 3 weeks ago."

The claimant was referred to his personal physician, Dr. Marion Sigrest, by the King's Daughters Hospital staff. Dr. Sigrest wrote in his note of February 15: "States this has been going on for the past 3 weeks. Patient is a truck driver. He is using that left foot a lot to push down on the clutch." The claimant was then referred to a podiatrist, Dr. Mary Ann Ezzeh. Dr. Ezzeh diagnosed the claimant with tarsal tunnel syndrome on February 20. Dr. Ezzeh described this condition as an "overuse syndrome similar to carpal tunnel syndrome." Dr. Ezzeh instructed

the claimant to "avoid repetitive work (overuse) ex: constant foot pressure on clutch."

Dr. Ezzeh referred the claimant to a podiatric surgeon, Dr. Larry Cruel, who saw him on February 22. In his deposition testimony, Dr. Cruel described the history provided by the claimant, as follows:

He complained of pain and swelling. He said that he had been driving a truck and he had been stuck in traffic for, oh two (2) hours, I don't remember how many hours, but he had said that he had been stuck in traffic for a few hours. He was constantly having to clutch in bumper to bumper traffic, and he came in complaining of pain and swelling to his foot. To his left foot.

Dr. Cruel described his diagnoses of the claimant as follows:

[Tarsal tunnel syndrome is] basically like a nerve entrapment. And that can happen from...it's similar to tarsal...to Carpal Tunnel Syndrom (sic), where you get some nerve entrapment from any type of repetitive...anything that you're doing

repetitively, basically. And that's what I related to him constantly having to clutch the pedal in the truck. And the second one (1), the Metatarsalgia, that's pain of the...basically the forefoot area. And Bursitis is kind of with the Metatarsalgia.

Dr. Cruel further testified that only certain parts of the history were relevant to his causation conclusion. Dr. Cruel specifically stated that his opinion would be changed by the absence of repetitive motion, or by the presence of some other disease such as diabetes. Dr. Cruel agreed that the key facts supporting his causation opinion were that the claimant "had repetitive motion, with pain and swelling beginning shortly thereafter, and within a couple of months of when he first sought medical treatment."

#### Discussion

In order to establish compensability of an injury, the claimant must satisfy all the requirements set forth in Ark. Code Ann. § 11-9-102 (Repl. 2002). The claimant does not contend that the injury is identifiable by time and place of occurrence, but that the injury is a rapid

repetition motion injury. In order to prevail on a rapid, repetitive motion claim, the claimant must prove by a preponderance of the evidence that he sustained an injury causing internal or external harm to the body which arose out of and in the course of their employment and which required medical services or resulted in disability or death; that the injury was caused by rapid repetitive motion; that the injury was the major cause of the disability or need for treatment; and must establish a compensable injury "by medical evidence supported by "objective findings."

I find that the preponderance of the evidence shows that the claimant suffered a compensable gradual onset injury. The claimant had no symptoms of his current injury prior to working for the respondent. The respondent has been unable to posit any explanation for the claimant's injury in the face of the claimant's credible testimony and relevant medical history regarding his tarsal tunnel syndrome. While working for the respondent, the claimant used the specific area of his body that was later injured

and the claimant was injured in a manner logically attributable to the physical activities involved in his job. I find that if the claimant pressed down on his 18-wheeler's clutch in a manner and with the frequency he testified, it is not mere speculation or conjecture to attribute tarsal tunnel syndrome in the left lower extremity to this repetitive work.

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 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 further defined 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). The movements of the claimant in the instant case were repeated three to six times per five minute period, or once every 1.6 minutes to 40 seconds. While the totality of the movements involved should be taken into account, I need not discuss this because it is clear that the movements of the claimant are sufficiently rapid and repetitive.

A claimant is required to prove that the work-related injury is the 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 preexisting condition. Parker v. Atlantic Research Corp., 87 Ark. App. 145, 189 S.W.3d 449 (2004). But for the work-related injury in the instant case, there would have been no disability or need for treatment. Prior to working for the respondent, the claimant had no history of tarsal tunnel syndrome. The respondent cannot show any prior complaints regarding the claimant's ability to perform the work he was assigned. Dr. Cruel opined that the claimant's injury was probably caused or aggravated by the repetitive movement of the claimant at his job.

The medical records show objective medical findings that the claimant sustained a compensable injury. 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). Dr. Cruel noted swelling and edema as well as subjective pain.

I find that the majority, by affirming the Administrative Law Judge's decision, erroneously rejects Dr. Cruel's opinion as based on an inaccurate history. I find that Dr. Cruel's deposition testimony and the extensive corroboration it provides for the claimant's testimony to be credible. The rejection of Dr. Cruel's opinion is wholly unsupported by the record. Dr. Cruel is the medical professional that saw the claimant first-hand, and Dr. Cruel has stated that, within a reasonable degree of medical certainty, that the cause of the injury was his use of his left lower extremity in such a manner described by the claimant.

Both Dr. Cruel and Dr. Ezzeh have stated that tarsal tunnel syndrome is caused by repetitive use, or overuse, of the foot and leg, and both doctors have related this overuse with the claimant's use of the clutch in his truck. Both doctors compared the tarsal tunnel syndrome condition with carpal tunnel syndrome. Carpal tunnel

syndrome is caused by repetitive use of the hand, "especially ... against force; ... with repeated wrist flexion, extension, deviation, forearm rotation, or constant firm gripping; or, with awkward hand or wrist positions." A.W.C.C. Rule 099.37(VI). Here, the claimant was pushing down and letting up with his left foot on the clutch. This movement was done "against force", which requires frequent flexion and extension of the claimant's left ankle, foot, and knee. When the claimant was not moving his foot to operate the clutch, he was maintaining pressure on the clutch, which would require constant friction and force on the left ankle, foot, and knee. The respondents' fleet manager, Thomas Hanks, who himself is an experienced driver, corroborated this portion of the claimant's testimony, by agreeing that the claimant would have been repetitively engaging and releasing the clutch in stop-and-go traffic. The record identifies no other credible cause of these symptoms and this diagnosis, and the Commission cannot replace expert medical testimony with conjecture and

speculation. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002).

I find that the uncontradicted evidence of record establishes beyond any dispute that the claimant was in a traffic jam on January 7, 2007, though the tangential matter of location is disputed. Similarly uncontradicted is the fact that the claimant repetitively used his left foot and leg to operate the truck's clutch during that traffic jam and that he began to have discomfort in his left foot that same evening, and severe swelling the next day. The claimant sought and received medical treatment several weeks later as a result of attempting to "work through" the injury. I find that any inconsistencies or conflicts that may exist in the evidence relate to tangential matters. The claimant's treating physician has opined that the repetitive motion of operating a clutch caused the claimant's tarsal tunnel syndrome, and the record identifies no other credible cause for the claimant's condition.

In conclusion, I find that the claimant has shown, by a preponderance of the evidence, all of the elements of a

gradual onset injury. I find that the claimant has met his burden of proof by the preponderance of the evidence for a compensable gradual onset lower left extremity injury, and therefore, I must respectfully dissent from the majority opinion.

---

PHILIP A. HOOD, Commissioner