

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610742

ROBERT SALLY, EMPLOYEE	CLAIMANT
REDGIE JOHNSON ENTERPRISE, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INS. CO., CARRIER	RESPONDENT

OPINION FILED JUNE 19, 2008

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

Claimant represented by HONORABLE JOHN BARTELT, Attorney at Law, Jonesboro, Arkansas.

Respondent represented by HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed on May 24, 2007, finding that the claimant proved by a preponderance of the evidence that the claimant sustained a work related injury in the form of bilateral carpal tunnel syndrome and awarding the claimant temporary total disability benefits for the period from October 11, 2006, through a date to be determined. The Administrative Law Judge also found that the claimant gave notice to the employer that he was experiencing symptoms of

a work-related injury as of mid-August, 2006. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a janitor. The claimant contends that his work for the respondent employer has caused him have bilateral carpal tunnel syndrome. The respondents contend that the claimant has failed to show that he has an injury arising out of his employment. We agree with the respondents.

The claimant asserts that he sustained a work-related gradual onset of carpal tunnel syndrome. Therefore, the claimant is not required under the provisions of Act 796 of 1993 to establish that his work duties required rapid repetitive motion in order to establish the compensability of his carpal tunnel syndrome injury. See Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 969 S.W.2d 190 (1998).

Ark. Code Ann. § 11-9-102(4) (A) (ii) (a) (Supp. 2005) defines a "compensable injury" as:

(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. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition[.]

The meaning of the term "rapid repetitive" motion has been construed many times. See Lay v. United Parcel Service, 58 Ark. App. 35, 944 S.W.2d 867 (1997); Kildow v. Baldwin Piano & Organ, 58 Ark. App. 194, 948 S.W.2d 100 (1997); and Baysinger v. Air Sys., Inc., 55 Ark. App. 174, 934 S.W.2d 230 (1996). On May 21, 1998, the Arkansas Supreme Court reversed the decision of the Arkansas Court of Appeals in Kildow. See Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 969 S.W.2d 190 (1998). It held that the Commission, and consequently the Court of Appeals, had erred in its interpretation of Ark. Code Ann. § 11-9-102(5)(A)(ii), now codified §11-9-102(4)(A)(ii), and said:

[T]he meaning of section 11-9-102(5)(A)(ii) is plain and unambiguous. That statute explicitly provides that CTS is both compensable and falls within

the definition of rapid repetitive motion. To accept the Commission's interpretation that CTS is merely a type of rapid and repetitive motion still requiring proof of that element would be to ignore the second sentence of the provision. We do not interpret statutes to create superfluity. The statute provides that CTS is specifically categorized as a compensable injury, not that it is categorized as a type of rapid repetitive motion. We will not add words to convey a meaning that is not here. Moreover, we will not disregard the legislative intent expressed in Ark. Code Ann. § 11-9-1001 (Repl. 1996) mandating strict and literal construction of the workers' compensation statutes and admonishing the court to leave policy changes to the legislature. (Emphasis in the original.)

The Supreme Court went on to say that the statute safeguards employers because a claimant must prove the injury arose out of and in the course of employment, provide objective medical evidence of the physical harm, and show that the rapid-repetitive-motion injury is the major cause of the disability or need for treatment.

In sum, the claimant must still prove that he sustained a carpal tunnel syndrome injury arising out of and in the course of employment, that a work-related injury is

the major cause of his disability or need for medical treatment, and the compensable injury must be established by objective medical findings. The claimant cannot prove that his injury arose out of his employment.

The claimant had been working for the respondent employer as a janitor since June of 2005. The claimant had worked as a janitor for other companies for approximately 20 years before going to work for the respondent employer. The claimant's job duties required him to clean classrooms in schools. His duties during the school year were different than they were during the summer. During the school year, his duties entailed emptying trash, dust mopping floors, wiping down desks, and cleaning chalkboards. During the summer, his duties required that he work on the floors in the schools. The claimant worked with a team of one or two others and they would clean four or five classrooms per shift. The claimant would be running the stripper machine sometimes and he stated that it required pressure on the handles to squeeze the handles. The claimant testified, however, that his job duties would change and he was not

always running the stripper machine. He testified that he noticed a problem with his wrist starting in June but it was not until August when he was emptying some trash into a dumpster that his wrist started hurting.

The respondents offered the testimony of Shari Finchem, the claimant's supervisor. Ms. Finchem testified that the claimant was not always running the stripper machine and that it did not require pressure on the handles to guide the machine.

Ms. Finchem also testified about how she found out about the claimant's problems with his hands. She noticed that the claimant had a wristband on his wrist in August just before school started. She inquired of the claimant what was wrong and he told her he had carpal tunnel syndrome. He never related it to his work. Ms. Finchem testified that the claimant was given the procedures for filing a workers' compensation claim as part of his orientation process.

The claimant sought treatment at the emergency room on August 31, 2006. The claimant left work at 11:30

p.m. but failed to tell his supervisor that he was seeking medical treatment. The claimant was off work till September 5, 2006, as September 4, 2006 was the Labor Day holiday. The claimant continued to work. He underwent an EMG/NVC test which yielded abnormal results. The claimant did not notify the respondent employer until September 20, 2006 that he was claiming a workers' compensation injury. Ms. Finchem went to the claimant's home to complete the paperwork.

After our review of the evidence, we cannot find that the claimant's carpal tunnel syndrom is related to his employment. The claimant never told the respondent employer when he was seeking medical attention that it was for a work-related injury. It is clear that the claimant did not relate his problems with his wrist to his job duties. In fact, he related to Ms. Finchem in August that he had carpal tunnel problems and appeared to be very familiar with it. The claimant would have us believe otherwise. We give more weight to Ms. Finchem's testimony than that of the claimant. Uncorroborated testimony of an interested party is always

considered to be controverted. This rule also applies to a non-party witness whose testimony might be biased. Burnett v. Philadelphia Life Ins. Co., 81 Ark. App. 300, 101 S.W.3d 843 (2003). It is not arbitrary to choose not to credit such testimony. *Id.* The testimony of an interested party is taken as disputed as a matter of law whether offered on his own behalf or on the behalf of another interested party. Knoles v. Salazar, 298 Ark. 281, 766 S.W.2d 613 (1989). Therefore, we find that the claimant has failed to prove by a preponderance of the evidence that his carpal tunnel arose out of and in the course and scope of his employment.

Even if we were to find that the claimant sustained a compensable injury in the form of bilateral carpal tunnel syndrome, a finding we do not make, we find that the respondent did not receive notice of the injury until September 20, 2006. The claimant told Ms. Finchem in August that he had carpal tunnel but he did not relate it to his employment. It was not until he went to the doctor on September 20, 2006 and was refused treatment did he file a

claim with the respondent employer. The claimant was well aware of the procedures for filing claims.

Therefore, for all the reasons set forth herein, we hereby reverse the decision of the Administrative Law Judge. 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's opinion. The majority, reversing the Administrative Law Judge, finds that the claimant failed to prove by a preponderance of the evidence that he sustained compensable bilateral carpal tunnel syndrome injuries. Based upon a de novo review of the record, I find that the claimant has met his burden of proof by a preponderance of the evidence

for compensable bilateral carpal tunnel syndrome injuries and is entitled to reasonable and necessary medical treatment as well as temporary total disability benefits from October 11, 2006 through a date yet to be determined, and therefore, I must respectfully dissent.

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. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition[.]

A claimant is not required to prove that the condition was caused by rapid repetitive motion when the diagnosis is carpal tunnel syndrome. See Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 969 S.W.2d 190 (1998). However, the claimant must still prove that he sustained a carpal

tunnel syndrome injury arising out of and in the course of his employment, that a work-related injury is the major cause of his disability or need for medical treatment, and the compensable injury must be established by objective medical findings. Id.

I find that the claimant has shown, by a preponderance of the evidence, all of the elements of compensable gradual onset bilateral carpal tunnel syndrome injuries. The claimant testified that he started work for the respondent as a janitor on June 15, 2005. The claimant successfully performed his assigned job duties throughout the summer of 2005, and the regular school year of 2005-2006. However, during the summer of 2006, the claimant's job duties and work location changed. The claimant was assigned to work on the floor crew, maintaining the floors at two facilities. During the claimant's eight hour shift, a substantial amount of the claimant's time was spent stripping floors, which included operating a motorized side-by-side scrubber. The claimant testified that in order to keep the scrubber running continuously, moving cleaning

liquid over the floors, he had to hold down levers located on both sides of the scrubber handle, for at least twenty-five minutes, while the machine, which looked like a lawnmower with a two-foot pad instead of wheels, moved from side to side. The claimant testified that after using the scrubber, he would use a large wet/dry vacuum to remove the cleaning liquid from the floors. The claimant testified that starting in June, he began to experience pain symptoms in his upper extremities, the left worse than the right. The claimant testified that the pain was in the middle of his wrists. The claimant testified that he could not bend his left wrist, but he assumed that he had sprained it. The claimant testified that in July, he went to Walgreens and purchased an immobilizing device for his left wrist. The claimant testified that on August 31, 2006, the pain in his left wrist grew worse, causing him to go to the Emergency Room at St. Bernard's Medical Center in Jonesboro.

The August 31, 2006 medical report from the St. Bernard's ER shows that the claimant presented complaining of bilateral wrist pain, left worse than right,

of two weeks duration. The medical report shows that the claimant reported no specific incident injury, but that he does janitorial work. The medical report shows that the claimant stated that the pain was intermittent but is now constant. The claimant was treated with prednisone, a steroidal anti-inflammatory drug, relafen, a non-steroidal anti-inflammatory drug and was also given bilateral wrist splints. The release given to the claimant by the ER shows that the claimant was diagnosed with carpal tunnel syndrome and was directed to remain off work the following day, as well as the date of the recommended diagnostic tests, which had not yet been set. The medical record shows that on September 7, 2006, the claimant underwent nerve conduction studies at St. Bernard's Medical Center, which confirmed bilateral abnormalities in the claimant's upper extremities. Based on the claimant's credible testimony and the corroborating medical record, I find that the claimant has met his burden of proving by a preponderance of the evidence that he has sustained compensable gradual onset injuries

bilaterally arising out of and in the course and scope of his employment with the respondent employer.

I also find that the respondent did have notice of the claimant's injuries before September 20, 2006. Ark. Code Ann. §11-9-701 (a) (1) states:

Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury. However, Ark. Code Ann. §11-9-701 (b) (1) states: Failure to give noticed shall not bar any claim: (A) If the employer had knowledge of the injury or death; (B) If the employee had no knowledge that the knowledge that the condition or disease arose out of and in the course of the employment.

Here , the claimant credibly testified that he learned that he had carpal tunnel syndrome and the fact that it was work-related following the August 31, 2006 emergency room visit. The claimant credibly testified that the day

after the ER visit he called his supervisor, Ms. Shari Finchem, and told her that he had been to the hospital and that he had been diagnosed with carpal tunnel syndrome and advised that he would need to be off work that day and on the day he reported for nerve conduction studies. The claimant also testified that he notified the respondent of the results of the nerve conduction studies when he received them, prior to September 20, 2006, however, the claimant did not insist that the respondent complete a Form N and an accident investigation report until September 20, 2006, the date on which, based on the results of the nerve conduction studies, the claimant attempted to set up an appointment with a Dr. Hurst, but was unable to do so because the doctor's office correctly informed him that since he had told them that his injuries were work related, the visit would need to be approved by his employer's workers' compensation carrier.

The majority states that it has placed more weight on the testimony of the respondent witness, Ms. Finchem, the claimant's supervisor, than on the testimony of the

claimant. When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. White v. Gregg Agricultural Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission is not required to believe the testimony of the claimant or any other witness. The testimony of an interested party is always considered to be controverted. Continental Express v. Harris, 61 Ark. App. 198, 965 S.W.2d 811 (1998). Here, the majority has concluded that the claimant's testimony is suspect because he is an interested party. However, I must point out that Ms. Finchem is also an interested party, and her testimony must also be considered controverted. Ms. Finchem is in charge of reporting injuries to her employer. Obviously, she failed to do her job in the claimant's case. In order to avoid potentially jeopardizing her job, Ms. Finchem has to testify that she did not have notice of the claimant's injury. However, and despite her interest in testifying otherwise, Ms. Finchem's testimony tends to corroborate the claimant's testimony, not, as the majority has found, contradict it. Ms. Finchem testified

that in August, just before school started, she noticed that the claimant had a "wristband" on his wrist. She testified that she asked the claimant what had happened and that the claimant told her that he thought he had sprained his wrist. Ms. Finchem testified that she asked the claimant how he had sprained his wrist and that the claimant told her that he didn't really know how his injury had occurred. Ms. Finchem testified that she was not aware that the claimant had a work-related injury until September 20, 2006 when she was sent to his apartment to fill out paperwork, however, on cross-examination, she admitted that she knew about the nerve conduction tests the claimant had performed at St. Bernard's on September 7, 2006. Furthermore, Ms. Finchem testified that she was aware that the "wristband" she had noticed in August, changed to beige braces after he visited the ER on August 31, 2006. Beyond Ms. Finchem's rather nonsensical claim that she knew about the claimant's injuries but did not realize that they were work related, despite the fact that she was the person to whom the claimant was instructed to report on-the-job injuries,

Ms. Finchem's testimony shows that she had actual notice of the claimant's injuries before September 20, 2006, the date that the claimant's doctor's office had to instruct him in proper workers' compensation procedure, as Ms. Finchem had failed to do so. Simply put, the claimant notified Ms. Finchem of his injuries as soon as he was aware of them. Ms. Finchem was in charge of workers' compensation paperwork. Ms. Finchem did not do her job. The majority should not penalize the claimant for Ms. Finchem's dereliction of duty by allowing the respondent's notice defense to prevail.

In conclusion, I find that the claimant has met his burden of proof by a preponderance of the evidence for compensable bilateral carpal tunnel syndrome injuries and is entitled to reasonable and necessary medical treatment and disability benefits associated with his compensable injuries. Furthermore, as the evidence of record clearly shows that the respondent's agent Ms. Finchem was aware of the claimant's injuries as early as mid-August, 2006, I find that the respondent's notice defense must fail.

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For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner