

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F612944

ROBBIE CLINE, EMPLOYEE	CLAIMANT
LENNOX INDUSTRIES, EMPLOYER	RESPONDENT NO. 1
ACE AMERICAN INSURANCE COMPANY, c/o ESIS, INC., INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 25, 2009

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

Claimant represented by the HONORABLE SHEILA CAMPBELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 was represented by the HONORABLE BETTY HARDY, Attorney at Law, Little Rock, Arkansas.

The Second Injury Fund was excused from participation at this hearing.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed May 29, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The employer-employee-carrier relationship existed on or about January 2005, and at all other relevant times.
3. The claimant's average weekly wage was \$679.30, which would entitle him to a compensation rate of \$466.00 for temporary total disability benefits.
4. The claimant returned to work on June 12, 2006.
5. The claimant has proven by a preponderance of the evidence that he suffered a compensable injury, i.e., bilateral carpal tunnel syndrome, while performing employment services.
6. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from the date he last worked March 1, 2006, until June 12, 2006, the date he returned to work.
7. Claimant has proven by a preponderance of the evidence that the medical treatment by Dr. Davis and Dr. Rhodes, including the bilateral carpal tunnel release surgeries, was reasonable and necessary and related to his compensable work-related injury.
8. Respondents are entitled to an offset for all medical bills paid by claimant's group health insurance carrier and short-term disability pursuant to Ark. Code Ann. §11-9-411.
9. Claimant is entitled to the maximum attorney's fee on the disability benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

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 May 29, 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury in the form of bilateral carpal tunnel syndrome. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer in the maintenance department. The claimant had worked for the respondent employer for about sixteen years. For seven years he worked as a fabricator operator, loading and unloading machines that bend metal and flipping metal. In 2000 or 2001 he begin working in

the maintenance department. His job duties entailed supporting production by doing anything from repairing machines to moving machines. The claimant's job duties would vary from day-to-day depending on what was going on that shift.

The claimant testified that in January of 2005 his hands were hurting and cramping. In September of 2005, the claimant sought treatment from Dr. Davis. Ultimately he came under the care of Dr. Rhodes who performed bilateral carpal tunnel releases in March of 2006. The claimant was off work from March 1, 2006, through June of 2006 when he returned to work. The claimant filed his claim under his group health insurance and received short term disability benefits while he was off work due to surgery and recovery. The claimant did not file a workers' compensation claim until November 29, 2006. He testified that he did not file the claim until he learned from a co-worker on the assembly line that she was receiving worker's compensation benefits for carpal tunnel syndrome.

The claimant admitted that he worked part-time in maintenance for the City of Humphrey on his time off. The claimant contended that he told Tim Brown, the plant nurse, about his hands but Mr. Brown told him it was not work-related and to continue treatment with his medical

insurance. The claimant admitted he did not like dealing with Mr. Brown because of other problems involving other claims under FMLA.

David Patterson testified that he was employed by Lennox and had worked with the claimant in maintenance performing similar work for approximately four or five years. He recalled a conversation between Mr. Brown and the claimant about his complaints, as follows:

Robbie and I went up to the nurse's station, and he was inquiring to Tim Brown that he was having problems with his wrists and had been to the doctor and they told him that he had carpal tunnel, I think it was called. And, he told them that they said they thought it was workman's comp related. And at that time Tim told him, "They don't make that decision, we make it."

Mr. Brown told the claimant he would have to use short term disability if he had to take off work. Mr. Patterson testified that he had a similar problem with a workers' compensation claim that he had eventually filed. He stated that the conversation between Mr. Brown and the claimant occurred prior to the claimant's surgery because the claimant knew he was going to have surgery at the time. He recalled that he later told the claimant prior to the claimant's surgery

about the fact that he had contacted the Commission directly in connection with his claim.

Tim Brown testified that he was the onsite emergency medical technician for Lennox. He is also the administrator of the short term disability, FMLA, workers' comp, and attendance. He testified that he had worked with the claimant on FMLA issues. He recalled a dispute in which the claimant was not happy with an FMLA decision and complained about Mr. Brown to the HR Manager. He testified that the only conversation he had with the claimant was on December 15, 2005, when he learned the claimant had been told he had carpal tunnel and needed surgery. He said that he gave him short term disability paperwork and that the claimant asked him what causes carpal tunnel. Mr. Brown responded by asking him what his doctor had told him and the claimant stated that the doctor was still doing testing. He testified that the claimant did not indicate he wanted to file a workers' compensation claim nor did he refuse to allow him to fill out workers' compensation paperwork. He did contact the claimant about filling out the paperwork to file a workers' compensation claim after his supervisor received a letter from the Commission. He completed a Form N stating that the employer was notified of the claim or accident on February 28, 2007, at 3:00 p.m. He

testified that he could not recall receiving any other carpal tunnel claims from maintenance employees but had received complaints from assemblers. He did not recall the meeting with Patterson and the claimant and disputed the testimony that the claimant told him that it should be a workers' compensation claim. He testified that the claimant never told him that his carpal tunnel came from anything else other than work nor did he tell him that it came from work.

John Meyers testified that he is the Manager of Safety, Health, and Environmental Affairs for Lennox. He has worked in the position as Brown's supervisor since July 1, 2007. He testified that he was familiar with the job duties of a maintenance worker as reflected in the job analysis in the report from Johnson Management Systems and the DVD. He explained that it is a highly technical job involving diagnostics and physical activity such as pulling electrical wire, running conduit, machine repairs, operating different tools, fork lift operation, and others.

He explained that the job varies from day-to-day and from hour-to-hour. He estimated that the job involved the use of power-assisted tools approximately fifteen or twenty percent of the time. He testified that based on his ergonomic surveillance of the job as a

maintenance person, he had not seen any risk factors that could be related to trauma disorders such as carpal tunnel. On cross-examination, he testified that moving wrists ten to twenty times per minute would be considered repetitive and that if a maintenance person had difficulty with a screw, it could involve trauma and to cumulative trauma when coupled with excessive force or extreme posture.

Dr. Rhodes testified by way of deposition. He testified that he did his fellowship in hand surgery and was board certified in orthopedic surgery. He first treated the claimant on January 26, 2006. At that time, the claimant provided a history of hand pain and numbness. He ordered a nerve conduction study which resulted in findings of severe bilateral carpal tunnel syndrome. The claimant did not provide him with any work history. He testified that he was familiar with referrals from Lennox for people with carpal tunnel. He explained that those patients used their hands extensively lifting and using power tools. He testified the use of air guns and hammers could contribute to carpal tunnel syndrome. He performed carpal tunnel release on April 12, 2006, on the left side and on March 1, 2006, on the right side. He did not take the claimant off work. He said the claimant had reported being

symptomatic for a year previous to his initial visit. He testified that after the surgery, the claimant had full range of motion and did not need therapy or an impairment. He noted that his reports showed the claimant was still having incisional pain and he released him from medical treatment on May 15, 2006. He testified that his opinions were stated within a reasonable degree of medical certainty. On cross-examination, he testified that he was not familiar with the claimant's job duties and could not state within a reasonable degree of medical certainty that his work caused his carpal tunnel syndrome. He testified that there were four different categories for a person to develop carpal tunnel: "anatomical, idiopathic, exertional or systemic". He did not find that the claimant had any anatomic reason for having carpal tunnel. He testified that idiopathic means an unexplained reason and that the claimant would fall into either the idiopathic or exertional categories.

The medical records reflect that the claimant has a history of medical problems of hypertension, cervical degenerative disc disease, fibromyalgia. The initial nerve conduction study performed on September 2, 2005 resulted in normal findings with a notation that evaluation of cervical nerve root should be carried out.

A subsequent MRI of the cervical spine resulted in normal findings. The records reflect that a subsequent nerve conduction study performed on January 31, 2006, resulted in findings of severe carpal tunnel syndrome in both upper extremities with the right worst than the left. Reports reflect that Dr. Rhodes performed carpal tunnel release on the right side on March 1, 2006 and the left side on April 12, 2006. On April 27, the claimant returned for a post-op evaluation without complaints. On May 15, 2006, he returned with complaints of continued pain in the left side. He was ordered into therapy and given a medrol dosepak and tramadol. He was scheduled to return back on an as needed basis.

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.

In my opinion, a review of the evidence demonstrates that the claimant has failed to prove that

his carpal tunnel is a work related injury. The evidence shows that the claimant sought medical treatment on his own and put it on his group health insurance. He filed for short term disability. The claimant admitted that he did not like dealing with Mr. Brown and could not recall when the conversation he allegedly had with him regarding his carpal tunnel syndrome.

The testimony of Mr. Brown is also indicative that the claimant did not have a workers' compensation injury. Mr. Brown testified that the claimant had not been happy with him in the past but he had never refused to file a claim for workers' compensation. Mr. Brown recalled their conversation as follows:

Q. Do you ever remember having any conversation with Mr. Cline about his wrists or carpal tunnel syndrome or wanting to file a workers' compensation claim?

A. ... The only conversation I recall is the one that we had on December 15th of 2005. Mr. Cline came into my office and told me that his doctor said he had carpal tunnel and he may have to go out to have surgery. What did he need to do. I explained to Mr. Cline that he would go out on short term disability, and at that time I gave him the paperwork to do so. He then asked me the question what caused carpal tunnel. I told Mr. Cline there were numerous things that caused carpal tunnel, what did his doctor say that was causing his. And he said at that time he didn't know

that he was still doing further testing.

Q. At that point in time did he give you any indication that he wanted to file a claim for workers' compensation benefits?

A. No, ma'am.

Q. Did you refuse to allow him to fill out any paperwork regarding workers' compensation benefits?

A. No, ma'am.

Q. Did you fill out any of the short term disability paperwork for Mr. Cline?

A. No, ma'am.

Mr. Brown confirmed that the short term disability forms are completed by the employee and the employee's physician. He stated that short term disability benefits are only paid when the employee indicates on their form that the condition is not work related. Mr. Brown stated that he completed the claimant's workers' compensation paperwork after the respondent employer was notified that the claimant had filed a claim. The Form N indicated that the respondent employer was notified of the claim on February 28, 2007.

Further, the claimant did not file for workers' compensation until November of 2006, approximately 6 months after his last surgery. It was at

that time that he received a notification that his wages were being garnished for the medical bill balance.

The medical evidence also does not support a finding of compensability. Dr. Rhodes, the claimant's treating physician, did not have anything in his notes that the claimant thought his symptoms were work related. Dr. Rhodes testified that there were many causes of carpal tunnel syndrome and the four primary causes are: anatomical, idiopathic, exertional (using ones hands), and systemic (a disease process such as rheumatoid arthritis, diabetes, thyroid imbalance and amyloidosis.) Dr. Rhodes testified that the claimant's cause could fall into either the idiopathic or exertional.

Therefore, after considering the fact that the claimant filed his medical bills with his group insurance, the fact he filed for and received short term disability benefits, the fact Dr. Rhodes had nothing in his notes associated the claimant's symptoms with the claimant's work, and the fact that the claimant did not file a claim until November of 2006, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury in the form of bilateral carpal tunnel syndrome. The evidence simply does not support a finding that the major cause of the

claimant's carpal tunnel syndrom was due to his job duties with the respondent employer. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner