

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F801847

ELMON G. STEWART, EMPLOYEE	CLAIMANT
PULASKI COUNTY SPECIAL SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 30, 2009

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

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

Respondents represented by the HONORABLE MELISSA WOOD, 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 July 23, 2009. 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 an employer-employee-carrier relationship (sic) on November 2007 at which time the claimant sustained an injury at a compensation rate of \$251.00/\$188.00. Initially, the claim was accepted and benefits were paid until January 31,

2008 when the claim was controverted. The claimant's group carrier, Health Advantage, has paid some expenses on this claim. The claimant did not give notice of this injury until January 11, 2008 and respondents do not owe any benefits or expenses prior to this date.

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. The respondents are directed to pay all medical expenses within thirty days pursuant to Rule 30, with the exception of bills incurred with the Betton Clinic, prior to the date of controversion. The respondents are directed to reimburse Health Advantage.
4. The respondents are directed to pay temporary total disability benefits from February 27, 2008 to September 23, 2008 as the claimant was in her healing period totally incapacitated from working.
5. The respondents are directed to pay permanent partial disability benefits equivalent to a 7% rating to the body as a whole.
6. If they have not all ready (sic) done so, the respondents are directed to pay the court reporter, Linda Parker's, fees and expenses within thirty days of receipt of the bill.
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 July 23, 2009, 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's finding that the claimant proved by a preponderance of the evidence that she sustained a gradual onset injury to her right shoulder in November of 2007. 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 was employed by the respondent employer as a substitute bus driver. She also worked part-time at Comet Cleaners pressing pants. The claimant testified that her right shoulder gradually began bothering her in November and December of 2007. She alleged that the door on the bus she drove was difficult to operate and that she had to open and close the door for ten stops on her route in the morning and ten stops in the afternoon. She testified that she asked the maintenance department to fix the door on two occasions.

The claimant did not file a claim for workers' compensation benefits until January 11, 2008. The claimant initially sought treatment from her family doctor at the Betton Clinic. On January 18, 2008, she complained of shoulder problems for one month, but gave

no history of a work-related injury. The claimant was diagnosed with having adhesive capsulitis of the right shoulder. He also indicated that she had a partial thickness supraspinitis tear. The claimant ultimately underwent surgery on March 12, 2008 and was diagnosed with adhesive capsulitis with subacromial bursitis of the right shoulder.

Ark. Code Ann. §11-9-102(4) (A) (i) (Supp. 2005) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "in the course of employment" when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or

indirectly. City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987).

In addition to establishing the general requirements for compensability set forth in §11-9-102(4)(A)(i), the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). That a compensable injury be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997). "Objective findings" are those that cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). Moreover, objective medical evidence, while necessary to establish the existence and extent of an injury, is not necessary to establish a causal relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. App. 443, 990 S.W.2d 522 (1999). The onset of pain does not satisfy our statutory criteria for benefits. Test results that are based upon the patient's description of the sensations produced by various stimuli are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings. Duke v. Regis Hair Stylists, 55 Ark. 327, 935 S.W.2d 600 (1996). Finally,

medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(i)(B); Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

There is no presumption that a claim is indeed compensable. O.K. Processing, Inc., et al v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). Crouch Funeral Home, et al v. Crouch, 262 Ark. 417, 557 S.W.2d 392 (1977). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act, and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i)(Repl. 2002); Clardy v. Medi-Homes LTC Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001). In other words, in a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that his/her claim is compensable, ie., that his/her injury was the result of an accident that arose in the course of his/her employment and that it grew out of, or resulted from the employment. Carman v. Haworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001); Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993). Further, the claimant must show a causal relationship exists between his/her condition and

his/her employment. Harris Cattle Co. v. Parker, 256 Ark. 166, 506 S.W.2d 118 (1974).

It is well established that the party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 2002). A preponderance of the credible evidence of record means "evidence of greater convincing force." Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See also, Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 42 (1947). In determining whether a claimant has sustained his or her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

In order to establish compensability of an injury, the claimant must satisfy all the requirements set forth in Ark. Code Ann. §11-9-102 (Supp. 2005). See, Reed v. ConAgra Frozen Foods, Full Commission Opinion, February 2, 1995 (Claim No. E317744); see also, Hapney v. Rheem Mfg. Co., 342 Ark. 11, 26 S.W.3d 777 (2000). If the claimant does not contend that the injury is the result of a specific incident that is identifiable by

time and place of occurrence, then the claimant must show that the injury is a gradual onset injury under Ark. Code Ann. §11-9-102(4) (A) (ii) through §11-9-102(4) (A) (vi). In order to prevail on a gradual onset claim, the claimant must prove by a preponderance of the evidence that she 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. In addition, the claimant must prove by a preponderance of the evidence that the injury was the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-02(4) (E) (ii) (Supp. 2005) Finally, the claimant must establish a compensable injury by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D); see also, Hapney, supra.

If an employee fails to establish by a preponderance of the credible evidence any of these requirements for establishing the compensability of the alleged injury, she fails to establish the compensability of the claim and the claim must be denied. Reed, supra.

In applying the controlling law under Act 796 of 1993 to the evidence in this case, the Commission is to strictly construe the Act. Ark. Code Ann. § 11-9-

704(c)(3). Under the gradual onset exception to the specific incident requirement, the claimant must establish a causal connection between her injury and her employment by medical evidence supported by objective findings and she must establish that her injury is the major cause of her disability or need for treatment.

In my opinion, the claimant's job duties do not rise to the level of rapid and repetitive motion. The claimant made ten stops within a two-hour period where she was required to open and close the bus door. Since the claimant asserts that she sustained a work-related gradual onset injury, she must establish that her work duties required rapid repetitive motion.

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.

When analyzing the facts of this case with regard to the standards set forth by the court, opening and closing the bus door ten times in two hours is not rapid and repetitive motion.

In addition to being a bus driver, the claimant also worked for Comet Cleaners pressing pants. She testified that she pressed between approximately 50 pairs of pants every day she worked. In describing her job duties with Comet Cleaners, the claimant testified as follows:

Q What hours did you work at Comet?

A I think I would get there like 9:00, 9:30 sometimes and I would leave there about 1:30.

Q Tell us what it involves to work at the pants press machine.

A You know, they're hot head machines. They automatically

lift down. You just tap them and the head they come down.

Q What comes down?

A The top of the machine. The top of the machine.

Q Okay. So --

A It's a bar. It's a bar. All you do is tap it and it comes down.

Q How many different pants do you think you pressed during the time frame that you worked there on a typical shift?

A I would have like maybe one buggy, one buggy.

Q And how many were in a buggy?

A I'm going to say maybe about 50, maybe more.

Q Okay. So you would take the pants out, press them and then do something else with them after it was pressed?

A Hang them up.

Q What time were you finished with that job?

A Sometimes, I'd get through like -- well, most of the days, I'd get through like 1:00.

Q And that was Monday through Friday?

A Uh-huh. Monday through Friday.

This job appears to be more rapid and repetitive than the bus driving job. Even if the

claimant could prove that her job duties were rapid and repetitive, a finding which I do not make, the claimant also has issues with regard to whether or not she ever reported an injury. The claimant indicated that her alleged injury occurred in mid-November of 2007. She testified in her deposition that she reported her problems with the door to her supervisor, Beulah Coston. However, at the hearing, the claimant testified as follows:

Q Did you tell Ms. Coston that you had any trouble with the door in November?

A I can't remember back that far, but I may have. I don't know. I don't remember back that far.

Q Okay. You remember me taking your deposition on September 11th of last year?

A Yes.

Q And you understand that you were under oath at that time?

A Yes.

Q Okay. I'm looking on page 40 of your deposition.

A But I was also on the medication. I think I stipulated that to you, too.

Q And you also told me that you understood all my questions, didn't you?

A Yes.

Q All right. This is on line two, "All right. So it was early November when you told Beulah your arm was hurting?" What was your response?

A It was the latter part of November I started telling her about the door. They have it on record. They should have it on the record where it's showing about what time it was -- I started to, you know, having problems doing it.

Q So at that time, you told me that you'd actually reported it to Beulah in November.

A It might have been. I don't -- like I said, I was in pain and -- during the time of the deposition, I was up under medication. I tried to remember as much as I could, as much as I could as to what happened.

Q Now, you did tell me you were on medication at that time, but I asked you if you'd understood all my questions and you told me you did; is that correct?

A Yes, I said it.

The respondents offered the testimony of Ms. Coston. She testified that she did not recall the claimant ever complaining with a problem with the door until she filed a claim on January 11, 2008. Further, the claimant's testimony that she sustained an injury in mid-November of 2007 is contrary to the statement she

gave the adjuster that her injury occurred on December 20, 2007 at 4:00 p.m. Furthermore, the claimant gave a history to her physician on March 12, 2008 that she had a seven-month history of increasing right shoulder pain. This would have placed the claimant's alleged injury in mid-August of 2007. The claimant did not even start driving the route she drove until September of 2007.

In my opinion, it would require speculation and conjecture to determine that opening the bus door, waiting for kids to get on and off the bus and closing the bus door a total of ten times in two hours could have possibly caused any alleged injury to the claimant's shoulder. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Simply put, I cannot find that the claimant proved by a preponderance of the evidence that she sustained an injury to her shoulder in the course and scope of her employment with the respondent employer. Accordingly, I would reverse the decision of the Administrative Law Judge.

Accordingly, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner