

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704145

ELLA SWINEY, EMPLOYEE	CLAIMANT
UNIVERSITY OF ARKANSAS AT LITTLE ROCK, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS, CARRIER	RESPONDENT

OPINION FILED MARCH 17, 2009

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

Claimant is not represented by counsel, but appears *pro se*.

Respondent represented by HONORABLE RICHARD S. SMITH, 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 June 3, 2008.

The Administrative Law Judge entered 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-claimant existed among the parties on March 15, 2007.
2. The claimant has failed to prove 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 Ark. Code Ann. §11-9-102.

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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. Based on a de novo review of the record, I find the claimant established by a preponderance of the evidence she sustained a compensable, carpal tunnel injury to her right wrist and hand and is entitled to appropriate medical and disability benefits.

The claimant was first employed by the respondent in July 2006. Her duties were custodial in nature, requiring her to clean classrooms at the UALR Law School. According to the claimant's testimony and witnesses' statements, her job was extremely hand-intensive and, because the claimant is

right-hand dominant, her job duties placed particular stress on her right hand and arm.

In March 2007, the claimant saw Dr. David Kapler, her personal physician, for unrelated health problems. During this visit, the claimant complained of tingling, numbness and related symptoms in her right hand and arm. Dr. Kapler referred the claimant to Dr. Kevin Collins, a Little Rock orthopedist, for an evaluation. In Dr. Collins' narrative report of June 18, 2007, he stated he saw Ms. Swiney on March 29, 2007 and after reviewing her electromyogram and nerve conduction study, he discovered evidence of severe right carpal tunnel syndrome. As a result of that determination, he referred her to Dr. David Rhodes, a Little Rock orthopedist who, according to Dr. Collins, performed carpal tunnel release surgery on her.

Dr. Rhodes, in a letter to Dr. Collins dated April 9, 2007, described his office consultation with the claimant. He, like Dr. Collins, diagnosed the claimant with moderately severe right carpal tunnel syndrome and recommended she undergo corrective surgery. In an addendum to that letter, Dr. Rhodes stated he believed the claimant's condition was job related.

While the claimant has alleged that she has problems in her shoulder and arms and has been diagnosed as having tendinitis and tenderness in the joints, the issues in this case primarily revolve on the diagnosis of right carpal tunnel syndrome. In order to establish entitlement to these benefits, the claimant must prove by the preponderance of the evidence: 1) the injury arose out of and in the course of her employment; 2) the injury caused internal or external physical harm to the body, requiring medical services or resulting in disability or death; 3) the injury was the major cause of the disability or need for treatment; 4) the injury itself must be established by medical evidence supported by objective medical findings. See Cottage Café v. Collette, 94 Ark. App. 72, 26 S.W.3d, 94 Ark. App. 72, 226 S.W.3d, 27 (2006).

There does not appear to be a dispute as to the claimant having satisfied the fourth of the above-listed requirements. That is, an electromyogram and nerve conduction study has clearly established the presence of severe carpal tunnel syndrome in the claimant's right wrist. Likewise, there seems to be no question that this condition

is the major cause of the claimant's disability and need for medical treatment.

However, the respondent argues the claimant's carpal tunnel syndrome did not arise as a result of her job-related activities nor did her activities, while employed by them, cause the carpal tunnel syndrome she developed. On that basis, the respondent denies the claimant can establish the first two requirements as set out above.

In denying the claim, the Administrative Law Judge, affirmed and adopted by the majority, relied entirely on a statement from a report of Dr. David Rhodes, an orthopedist who saw the claimant at the direction of her treating physician. In a report dated, April 9, 2007, Dr. Rhodes set out a history of the claimant's illness and stated as follows:

The patient is a 47 year old right hand dominant female, who states for the past one year she has had right hand pain and numbness. She says it is worse with driving, elbow flexion and wrist flexion and alleviated with rest.

The Administrative Law Judge interpreted the report to establish the claimant's symptoms predated her employment with the respondent. I believe too much emphasis

has been placed on this report. First, I note the claimant became employed with the respondent in July 2006, over nine months prior to the date of the doctor's examination. If the claimant had begun experiencing pain in her hand sometime shortly after becoming employed, it is certainly understandable she would have advised the doctor her injury had been going on for the previous year. Given the usual lack of specificity in these types of oral histories, I believe the Administrative Law Judge relied too much on the precision of the timeline in the doctor's statement. I believe a more reasonable conclusion might be that the doctor's statement suggests the claimant's symptoms began about a year before. While it could be inferred the claimant's symptoms *could* have pre-existed her employment, I believe it is error to construe the doctor's statement as being an absolute bar to the claimant's receipt of benefits.

I also believe using the doctor's statement to conclude the claimant could not have sustained a compensable injury ignores the possibility that, even if the claimant had some pre-existing condition, she could have aggravated the condition while employed by the respondent, thereby creating a compensable injury. The testimonial and

documentary evidence offered by the claimant provides ample evidence of the hand-intensive nature of her work. Her testimony includes descriptions of using her hands to wipe tables and to manually buff and wax furniture. She also described using a vacuum hose to reach into awkward spots and frequent use of the broom, mop, vacuum cleaner, and other cleaning implements. She also testified about emptying numerous trash cans in the campus building which required her to lift and tie entire trash bags. The claimant indicated that she was right hand dominant and all of these activities required her to frequently lift, grab, and hold things with her right hand. She also stated her work day covered eight hours with only limited breaks.

The claimant more specifically described her job in a written statement which was made part of the record. In this statement she described her job at the ULAR Law School as follows:

First Floor: Fourteen offices, I pull trash, dust book shelves and vacuum. Plus an office unit that contains three desk areas, shredder machine room, file room and glass entrance which I wipe down at each end of the hallway.

Legal Clinic Area: The student waiting room. I wipe down tables, dust, and

vacuum. Next is a large computer room. I pull the trash; wipe down tables, dust and vacuum. Next room is a large broad room. I wipe tables, pull trash, and vacuum. Next is the student meeting room. I clean tables, pull trash, dust book shelves, and vacuum. Next room is the kitchenette. I pull trash, clean sink, microwave, and mop floor. Next there are two rooms and a small hallway. I pull trash, clean tables, and vacuum the rooms and hallway. Down the other end of the hall, there are student locker rooms. I pull the trash and vacuum. Then I clean the men and women rest rooms. I clean the sink and mirrors, replace soap, if needed, replace paper towels, tissue, pull trash, clean commode and mop the floors. Next is the Friday court room. This is a very large room which can hold up to 300 people. I clean this room by myself most of the time. When the students have a big event, I have help pulling trash but other than that, I clean it myself. I pull the trash, clean all tables, and vacuum the floors. There are three other rooms in the hallway of the Friday court room which I do the same duties.

Judge Chamber: I clean the tables, chairs, vacuum, and pull trash. The court room is sometimes the last room I clean for the day but on days I come to work at 5:00 am., I am asked to clean it first due to it needing to be used by 8:00 or 9:00 a.m, and I always get it done.

Second Floor: I clean student lounge, wipe down all ten tables, counter top, glass doors, windows, and shelves. The kitchenette area. I clean out all four

microwaves, clean sink and table, wipe down refrigerator, clean coffee machine, coke machine, sweep, and mop the floor.

Student TV Room: I pull trash, wipe down table, clean glass on each side of the door entrance inside and out, dust window, shelves, wipe down juice machine, clean glass of cappuccino machine, sweep, and mop the floor. Across the hall is the water fountain I clean and wipe down, men and women large restrooms. I clean the mirrors and sinks, replace soap, if needed, replace paper towels and tissue, clean commode, pull trash, and mop floors.

Security Guard Office: I pull the trash and vacuum the floor. Next there are fifteen offices. Three of them have glass entrance. I pull the trash, dust, wipe window, shelves, clean glass area, and vacuum. Also, there is a conference room I clean glass table, dust, and vacuum. Also vacuum a long hallway.

Dean Gallery: I pull the trash, dust, clean glass doors, wipe down tables, and sometime vacuum.

All trash was to be taken down the basement outside and put on the back of a white truck or taken to the dumpster outside. These floors were assigned to me on November of 2006. Before I was assigned the first and second floors, I was only pulling trash and dusting from the first floor to the fifth floor. Then I would go to the library side and pull trash, dust, clean, and wipe down all tables from the first floor to the fourth floor.

Clearly, the type of work described by the claimant is hand intensive, requiring frequent grasping, pulling, twisting, and other intensive use of her hands and arms. This is the type of activity which has been shown to cause carpal tunnel syndrome to develop. In fact, Dr. Rhodes opined such was the case. In an addendum to the report of April 9, 2007, he stated:

I spoke with the patient and reviewed her on the job duties. It is my opinion that greater than 50% of the patient's symptoms are related to her job which requires repetitive motion of the hands.

The majority, by affirming and adopting the decision of the Administrative Law Judge did not consider the effects the claimant's job-related activities would have had on the development or aggravation of her carpal tunnel syndrome. In fact, the Administrative Law Judge's analysis of this case ended when she noted the doctor's reference to the claimant having had symptoms for a year. As indicated above, I believe the Administrative Law Judge placed too strict a construction on the doctor's comment and I do not believe the doctor necessarily meant the symptoms had been present for an entire calendar year. But, even if the that

were the case, an aggravation of a pre-existing injury would make this a compensable injury.

As has been held on many occasions, a claimant can establish a compensable injury even if a particular condition had pre-existed a job-related injury. In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. Heritage Baptist Temple v. Robinson, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a pre-existing noncompensable condition by a compensable injury is, itself, compensable. Oliver v. Guardsmark, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

I find the claimant has clearly met her burden of establishing the occurrence of a compensable, carpal tunnel injury. Not only was her work repetitive and hand intensive, her testimony is credible and in accordance with her medical reports and information provided to her employer. In fact, other witnesses who testified at the hearing, including her immediate supervisor, corroborated her testimony regarding

the nature of her work. The testimony of Joseph Abbate, her immediate supervisor, was that the claimant was a good worker who carried out her duties appropriately.

In reviewing the evidence, I believe certain facts are established beyond dispute. First, the claimant had a demanding, hand-intensive job which required repetitive movement, along with frequent grasping, lifting, and squeezing. Further, since the claimant was right-hand dominant, a considerable amount of the stress caused by these job activities were in her right hand. Second, the claimant had a severe case of carpal tunnel syndrome in her right hand. This conclusion is undeniably established by objective testing procedures. Third, the type of work performed by the claimant is known to cause carpal tunnel syndrome, and this Commission has found carpal tunnel syndrome cases to be compensable in which claimants were performing this type of work on many occasions. Fourth, the claimant's treating physician was of the opinion her job caused her to develop carpal tunnel syndrome.

When the above factors are considered, I find it is clear the claimant has met her burden of establishing a compensable carpal tunnel injury. I further find that the

Administrative Law Judge erred in stopping her analysis of this case with her review of Dr. Rhodes' notation to the effect the claimant had sustained an onset of symptoms one year before. As indicated above, I don't believe Dr. Rhodes intended in his statement to be interpreted so strictly, but even if the claimant had undergone some pain in her hand prior to being employed, there is no doubt she was employed in a very hand-intensive job for several months before her symptoms became so severe she could not continue to work. Had her carpal tunnel syndrome been at the severe level when she started, I do not believe she could have continued to perform her job duties for nine months. Such being the case, the claimant's job would have had to have caused a pronounced aggravation of any previous condition she may have had. As the cases cited above reflect, this type of aggravation would create a compensable injury, entitling the claimant to receive workers' compensation benefits.

In conclusion, I find the claimant established by a preponderance of the evidence she sustained a compensable, carpal tunnel injury to her right wrist and hand and is entitled to appropriate medical and disability benefits. For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner