NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F902107 & F903245

CAROL HODGES,
EMPLOYEE — CLAIMANT

WAL-MART ASSOCIATES, INC.,
EMPLOYER — RESPONDENT

CLAIMS MANAGEMENT, INC.,
INSURANCE CARRIER — RESPONDENT

OPINION FILED SEPTEMBER 14, 2010

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE TOD BASSETT, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed February 3, 2010. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 15, 2009, and contained in a pre-hearing order filed July 16, 2009, are hereby accepted as fact.

2. The claimant has proven the existence of objective medical findings regarding her right shoulder difficulties.

3. The claimant has failed to prove by a preponderance of the evidence that her objectively founded right shoulder difficulties were the result of a specific incident on December 27, 2008, or February 27, 2009.

4. The claimant failed to prove by a preponderance of the evidence that her job duties were rapid and repetitive in nature.

5. The claimant failed to prove by a preponderance of the evidence that she suffered a compensable injury in this matter.

6. The claimant failed to prove by a preponderance of the evidence that she is entitled to benefit in this matter.

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.

The claimant alleges that she sustained compensable injuries that are governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injuries are, indeed, injuries that are covered by the Act; however, the claimant has

failed to establish the elements necessary to prove these compensable injuries by a preponderance of the evidence.

Therefore we affirm and adopt the February 3, 2010 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

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I find that the claimant proved by a preponderance of the evidence that she sustained a gradual onset injury to her right shoulder, for which she entitled to medical benefits, including the treatment of Dr. Beallis and Dr. Bylak, and to temporary total disability benefits from March 6, 2009 to a date yet to be determined.

COMPENSABILITY

In order to prevail upon a claim for a compensable gradual onset injury, 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 of out of and in the course of the employment and which required medical services or resulted in disability or death, and that it was caused by rapid repetitive motion. Ark. Code Ann. 11-9-102(4)(A)(ii)(a). 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. Sec. 11-9-102(4)(E)(ii). Finally, the claimant must establish a compensable injury by medical evidence supported by objective findings. Ark. Code Ann. Sec. 11-9-102(4)(D).

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.

In Malone, supra, the Court rejected the Commission's application of a definition of rapid repetitive motion which required the "exact or almost exact movement again and again for prolonged period of time." 333 Ark. at 348; citing Baysinger v. Air Systems, Inc., 55 Ark. App. 174, 934 S.W.2d 230 (1996); Kildow v. Baldwin Piano & Organ, 58 Ark. App. 194, 948 S.W.2d 100 (1997). In Baysinger, the claimant was a welder who used his hands to hammer, grind, shape, polish, and pound pieces of metal with heavy vibrating tools. In that case, the definition of "rapid repetitive motion" was expanded to include multiple tasks involving different movements which could be considered together to satisfy the repetitive element of "rapid repetitive motion."

However, in Lay v. United Parcel Serv., 58 Ark. App. 35, 37, 944 S.W.2d 867, 868 (1997), the Court determined that the multiple tasks of driving, lifting packages and a heavy clipboard, and typing, were insufficient to meet the element of rapidity, because

they were separated by periods of several minutes or more. In Malone, the claimant performed janitorial duties, cleaning a school, in approximately sixteen steps, in which she mopped, dusted, cleaned two large bathrooms and twenty-three classrooms, vacuumed, replaced supplies and emptied waste baskets. The Court determined that, because her activities entailed many different movements, separated in time, though performed many times in a day, her work was not rapid repetitive motion. The Court also noted that the claimant's supervisor testified that her activities were not performed at a notably high rate of speed.

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) (multiple tasks required to be performed 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,

satisfied rapid and repetitive requirement); 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"); Moody v. Addison Shoe Co., 104 Ark. App. 27, 289 S.W.3d 115 (2008)(the claimant's movements - completing a shoe every twelve to fourteen seconds - were faster than the movements found to be sufficiently rapid in Hapney and Moore); Parker v. Atlantic Research Corp., 87 Ark. App. 145, 189 S.W.3d 449 (2004)(rapid and repetitive requirement satisfied with evidence that the claimant inspected approximately 6.5 parts per minute (96 parts every 15 minutes), making two neck movements per part, the equivalent of thirteen neck movements per minute); Pulaski County Special School District v. Stewart, 2010 Ark. App. 487 (problems steering bus and making ten movements over two hours, twice a day, did not rise to the level of rapid or repetitive motion).

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, and sometimes six steps.

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, where her physicians drew a causal connection between the work and her condition, but where there was no evidence as to the speed at which she worked.

The claimant has proven by a preponderance of the evidence that she sustained a compensable gradual onset injury to her right shoulder. The claimant testified that, as a cashier, she scanned items from the belt and placed them in bags. Sometimes she had to lift the bags of items from the bag carousel into the customer's cart. Sometimes she was able to scan the bar code of an item while it was still in the cart. Most of

the items were scanned from the belt and put in the bag. She testified that her job "definitely" involved the repetitive use and motion of her shoulder. She was right-handed so she used her right shoulder more than her left, but she used both. Dr. Bylak opined that the claimant's work was repetitive and that her injury was caused by her repetitive work.

A performance evaluation by the respondent-employer in January 2009 states that the claimant's items per hour average was 499, while the store average was 475. If the claimant scanned an average of 499 items per hour, she scanned 8.3167 items every minute, which is approximately one every seven and one-half seconds.

A report of the claimant's items per hour rates in evidence showed that her lowest items per hour average in December 2008 through the beginning of March 2009 was 381 on January 3, 2009. Three hundred eighty-one items per hour equals 6.35 items per minute, or approximately one item every 15 seconds. Her highest items per hour average was 535 on March 7, 2009, which equals 8.9167 items per minute or approximately 1 every seven seconds.

This testimony, coupled with the performance evaluations and items per hour tallies in the record support a finding that the claimant's work was repetitive and rapid in nature. She could not have scanned one item every seven to fifteen seconds in an hour without rapidly and repetitively moving. She lifted the item, scanned it and bagged it. Her activity varied to include reaching to scan items in a cart and to loading a cart with bags sometimes, but those items per hour averages demonstrate clearly that the claimant was scanning items repetitively over the course of her shift, at a rapid rate.

I find that the claimant has demonstrated that her work was rapid and repetitive such to satisfy the statute. The majority conclusion that the claimant had to engage in a variety of motions belies the fact that she repeated those motions to accomplish the scanning of an item once every seven to fifteen seconds throughout her shift. The cases do not require that a person repeat a single movement rapidly. The claimant's movements included reaching, lifting, moving an item over the scanner, moving the scanner, and bagging. She repeated these movements quickly enough to maintain an average items scanned per minute of between more that

six to almost nine. She could not maintain such an average without rapid and repetitive motion. Interestingly, the majority speculates as to the claimant's experience in bagging and money-taking.

MEDICAL BENEFITS

The claimant, having sustained a compensable gradual onset injury, is entitled to reasonable and necessary medical treatment of that injury. The claimant underwent extensive conservative care until her physical therapy began to cause her pain instead of improving her condition. Dr. Bylak performed surgery on the claimant's right shoulder on July 27, 2009. His post-operative diagnosis was right shoulder chronic impingement, right shoulder chronic AC joint arthritis, partial thickness undersurface tear of rotator cuff supraspinatus tendon, long head biceps tendinosis with tendinitis, grade I SLAP tear and osteoarthritis of glenohumeral joint. The procedures he performed were right shoulder arthroscopic debridement of the glenohumeral joint including debridement of a grade I SLAP tear, debridement of osteoarthrosis of the humeral head and superior glenoid, arthroscopic long head biceps tenotomy, arthroscopic subacromial decompression and arthroscopic distal clavicle resection. The claimant

experienced improvement after the surgery, although Dr. Bylak cautioned that she should look for work which "did not require so much repetitive use of the glenohumeral joint or shoulder joint."

There is no question that the treatment the claimant received by Dr. Carson, Dr. Beallis and Dr. Bylak was reasonable and necessary treatment of her compensable shoulder injury. Her post-surgical improvement is good evidence of the need for that surgery. I note that in the evidence is Dr. McAlister's opinion, of August 21, 2009, that the MRI of the claimant's shoulders did not show a full thickness rotator cuff tear or subscapularis tear. This is of utterly no relevance as the claimant's symptoms supported Dr. Beallis' and Dr. Bylak's course of treatment, including surgery, and because Dr. Bylak observed a partial thickness undersurface tear of the claimant's rotator cuff supraspinatus tendon and a grade I SLAP (a tear of the superior labrum from anterior to posterior, where the labrum is a cuff of cartilage stabilizing the shoulder joint) tear.

The respondents are responsible for the medical treatment of her right shoulder injury, performed by Dr. Beallis and Dr. Bylak, as well as

future reasonable and necessary medical treatment. The fact that the claimant had pre-existing degenerative conditions does not remove liability from the respondents, as she was asymptomatic, other than some achiness which did not prevent her work, until the development of severe pain related to the tears in her shoulder. Dr. Bylak testified that the major cause of her need for surgery was the exacerbation of her degenerative conditions by the lifting she did at work. The claimant showed by a preponderance of the evidence that her work as a cashier, repetitively lifting items, scanning them and bagging them, was the major cause of her need for treatment, because whether she had pre-existing degenerative changes or not, she was asymptomatic in her right shoulder prior to her work with Wal-Mart, but became symptomatic to the point of needing surgery after maintaining a high items scanned per hour average during her employment.

INDEMNITY BENEFITS

The claimant sought temporary total disability benefits from March 6, 2009 to a date to be determined. The claimant was taken off work on that date by Dr. Beallis, to whom the claimant presented after her claim was denied by the insurance carrier. Dr. Bylak stated

that the claimant should avoid repetitive work like the cashiering in which she had been engaged with Wal-Mart. The record shows that the claimant had not been released to work or placed at maximum medical improvement at the time of the hearing. The claimant is entitled to temporary total disability benefits from March 6, 2009 to a date yet to be determine.

After my de novo review of the entire record, I find that the claimant proved by a preponderance of the evidence that she sustained a gradual onset injury to her right shoulder, for which she entitled to medical benefits including the treatment of Dr. Beallis and Dr. Bylak and to temporary total disability benefits from March 6, 2009 to a date yet to be determined.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner