

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F900099

TERESA JENKINS, EMPLOYEE	CLAIMANT
IT'S FASHION, EMPLOYER	RESPONDENT
HARTFORD INSURANCE, CO. OF THE MIDWEST, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 4, 2010

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

Claimant represented by HONORABLE KRISTOFER E. RICHARDSON,
Attorney at Law, Jonesboro, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals the decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she sustained a gradual onset injury to her Achilles tendons. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a store manager. As the store manager, the claimant had many responsibilities including changing the

displays that were on the racks around the walls of the store. To do this, she had a rolling set of stairs with a platform on top which she used to climb up and down to change the displays.

The claimant testified that she did not do any displays on Mondays, and on Fridays and Saturdays the store was full of customers and it was difficult to do anything but wait on the customers. She also testified that she had various things that interrupted her work on the ladder. The claimant testified that the store would get new merchandise on Mondays and typically, Tuesday was the day when they would have to change the displays, sometimes going into Wednesdays. The store got busy on Thursdays into the weekend. The claimant's priority was to wait on customers.

The claimant offered the testimony of Sharisse Perkins. Ms. Perkins is the first assistant manager. She testified that the mannequins could actually be changed with the pole and that she used the pole to bring the entire mannequins down to the floor when she redressed it. She would then put the display back up using the pole. She testified that she did not use the stairs on rollers much at all.

The respondents offered the testimony of Ms. Crystal Trapp, District Manger. Ms. Trapp testified that the duties of a store manager required the changing of the displays. However, the manager is also required to run the day-to-day operations of the retail store including opening and closing and customer service. She stated that customer service was the priority and that whatever anyone was doing, they would have to stop to wait on customers because that was how the store made money. When questioned about how many times the store manager was likely to be on the stairs on a typical day, she replied, "Not very often. And you are lucky if you're up and down it a couple of times." She also stated, "In most stores, it is not a day-to-day activity. There are some days that you don't get on the stairs at all."

In November of 2008, the claimant began having problems with her feet and, ultimately, sought medical treatment. The claimant was assessed with Achilles tendinitis and taken off work. The claimant contends she sustained an injury in the form of bilateral Achilles tendinitis due as a result of rapid repetitive motion, climbing the ladder/stairs within the course and scope of

her employment and that the compensable injury is the major cause of her disability and need for treatment. The Administrative Law Judge found that the claimant had met her burden of proof and awarded benefits. In our opinion, the claimant cannot prove by a preponderance of the evidence that she sustained bilateral Achilles tendinitis as a result of rapid repetitive motion, climbing the ladder or "stairs" in her job.

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.

A review of the evidence fails to demonstrate that going up and down the stairs of the rolling ladder was rapid and repetitive motion. The burden is on the claimant to prove her claim by a preponderance of the evidence and she has failed to do so. The evidence demonstrates that the claimant at most was going up and down a ladder several times a day on maybe two or three days per week. It was not an all day long, every day requirement. Further, the claimant did not prove that her job was repetitive. She had a wide variety of tasks that she did throughout the day.

She waited on customers; she made sure the store was neat and tidy; she arranged mannequins and displays; she made out the schedule; she unloaded freight; she basically was doing many different activities throughout the day.

The evidence demonstrates that the claimant did no more than climb the ladder two or three times a day, two or three days a week. Even when she was on the stairs, she was still in charge of the store and waited on customers, ran the cash register, and made sure the store was running properly. The claimant never submitted any information about the actual number of times she went up and down these stairs per day. However, from her testimony, the testimony of her co-worker and the district manager, it appears that it was not very often. It certainly does not rise to the level of repetitive. Further, the claimant weighs 265 pounds and is on her feet most of the day. The MRI stated that she had a chronic condition that did not appear to be exacerbated by any recent event. Simply put, the claimant has failed to prove by a preponderance of the evidence that her job duty of climbing the ladder was rapid and repetitive. The claimant had numerous duties and the climbing of the ladder was only done two or three times a

day, two or three days a week. Therefore, we find the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury. Accordingly, we reverse the decision of the Administrative Law Judge.

Therefore we find that the decision of the Administrative Law Judge must be reversed and this claim is hereby denied and dismissed.

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. After a de novo review of the record, I find, as did the Administrative Law Judge, that the claimant has sustained compensable bilateral Achilles tendinitis as a result of rapid repetitive motion climbing the ladder/stairs

within the course and scope of her employment, and that the compensable injury is the major cause of the resulting disability and need for medical treatment.

There is not a dispute regarding the nature of the claimant's employment duties as manager of the Blytheville store of respondents. The claimant credibly testified regarding her activities of climbing the ladder to change out clothing, as well as the bars around the store. Further, the evidence disclosed that the claimant's activities were increased when she assisted in the opening of new stores and preparing a store for the visit of the owner of the respondent. Although the claimant's activities on the ladder, in terms of changing out bars and arranging clothing, may have been interrupted to assist customers while working in her own store, the credible evidence reflects that the walls were changed out over the Tuesday through Friday time-frame, which required rapid actions, as well as repetitive motion. In preparing for the opening of the new stores, there were no interruptions to assist customers, nor was the same the case in preparing the store for the visit by the owner.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner