

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H204212**

JOHNNY R. HAYES, Employee

CLAIMANT

WALMART ASSOCIATES INC., Self-Insured Employer

RESPONDENT

OPINION FILED **DECEMBER 29, 2022**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by MICHAEL C. STILES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 6, 2022, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 4, 2022 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the hearing, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on January 20, 2022.
3. The respondents have controverted the claim in its entirety.
4. Claimant's compensation rate would be \$439.00 for temporary total disability benefits.

In our discussion prior to taking testimony, the parties agreed to litigate the following issues:

1. Whether claimant sustained a compensable gradual-onset injury culminating on January 20, 2022.
2. If compensable, whether claimant is entitled to temporary total disability benefits and

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medical benefits.

3. Attorney fees.

All other issues are reserved by the parties.

The claimant contends that “he is entitled to medical treatment and temporary total disability benefits for his right upper extremity injury. Claimant reserves all other issues.”

The respondents contend that:

“1. The respondent contends the claimant, who was hired on May 24, 2021, did not sustain a compensable gradual-onset right elbow injury (that culminated on January 20, 2022) as defined by Arkansas law. Accordingly, the claimant is not entitled to any benefits whatsoever.

2. The respondent has denied and controverted this claim in its entirety; thus, the respondent has not paid any benefits to or on behalf of the claimant as a result of his purported right elbow injury.

3. The claimant’s supposed injury did not occur out of and in the course and scope of the claimant’s employment for the respondent employer.

4. The respondent respectfully contends that the claimant’s job for the respondent employer was neither rapid nor repetitive.

5. The claimant is not entitled to any benefits herein, as the claimant’s need for medical treatment, if any, is unrelated to the supposed gradual-onset injury that culminated on January 20, 2022. Instead, the claimant’s current ailments and need for medical treatment, if any, is related to an unrelated and/or pre-existing condition.

From a review of the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are

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made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on August 4, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable gradual-onset injury on January 20, 2022.

FACTUAL BACKGROUND

Before the testimony began, respondent requested that it be allowed to amend its contentions to include a lack of notice of an injury before the AR-C was filed on June 9, 2022. Claimant objected to the amendment, and that objection was sustained.

Also, before the testimony began, respondent objected to page 4 of claimant's non-medical exhibit. During his testimony, claimant explained how he created the calendar entry and authenticated it to my satisfaction. It was admitted over respondent's objection.

HEARING TESTIMONY

Claimant testified that he began working in the receiving department for Walmart in May of 2021. His first duty was loading, but after about three months, he was moved to the receiving dock, manually unloading semi-trucks of boxes onto a conveyor belt. He was expected to handle seven hundred boxes an hour or seven thousand a night and did so for his eleven-hour shift, three days a week. The boxes would weigh anywhere from half a pound to sixty-five or seventy pounds. As he worked for Walmart, claimant testified that his right elbow progressively started hurting more as he was lifting heavier freight off the floor in a repetitive motion. As the truck was unloaded, there was a conveyor belt behind claimant, and he would lift the boxes from in front of him and put it on the conveyor belt.

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Claimant said that when he began having issues with his right elbow, he reported it to Heather Mays. Specifically, claimant testified that “I reported it to Heather Mays about freight being heavy and having to pick it up off the floor, can we do something about it; it’s really bothering my arm.” Claimant testified that freight should have been on a pallet instead of on the floor. It was his understanding that Ms. Mays photographed the freight on the floor and notified whoever was loading the trailer of the issue. Claimant believed he first complained of his arm hurting in November 2021 and between that time and January 2022, he said his arm was in pain every night. He wore a brace on the arm and took Tylenol daily. Claimant said the brace on his elbow was visible and he had been asked what he had done to his arm, to which he replied, “my arm is hurting from unloading boxes.”

On January 20, 2022, claimant and his wife went to Home Depot to get some building materials for a small project, and when he reached out to get a piece of plywood, he pulled it and felt something pulling his arm, snapping and popping. The sensation went from his arm all the way to his wrist. Claimant said that he could not extend his arm nor he could not pull his arm to his chest. Claimant said he had not gotten the plywood off the shelf when he felt the pop: he told his wife “you are going to have to finish this because I have hurt my arm,” and claimant’s wife was able to put the plywood in the car, as it was not heavy.

Claimant said that he had lost strength in his right arm and does not have a good grip, and he has numbness and tingling in his two right fingers. He had seen a doctor and had surgery, but was still having issues with his arm at the time of the hearing.

On cross-examination, claimant said that he had had no prior right elbow problems. Claimant was shown a medical report from February 5, 2013 in which it was recorded that he was having pain in his right elbow that was at a pain level of ten out of ten, and claimant said the record was an error because the injury was to his right shoulder.

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Claimant testified he had last worked at Walmart on January 17, 2022. When he left work on January 17, he anticipated working the next weekend and did not have a disability that was going to keep him from working the next weekend. Claimant said that he went home early a few days because of his right elbow prior to January 17, 2022. Claimant stated that he told Tim Wicks, one of the managers in that department, that he was done with the truck he was working on and would like to go home. He thought that he said his right arm was hurting. Claimant believed this happened maybe three times. Claimant stated he had not sought any medical treatment for his right elbow before January 20, 2022. He assumed the soreness was due to the job and the repetitive motion involved. Claimant said he never had an emergency, his elbow wasn't bleeding, and he did not need any medical attention right away. He had not asked for Walmart to provide medical treatment for his right elbow and had not used his health insurance for his right elbow prior to January 17, 2022, which was his last day on the job for Walmart.

Claimant said the pain that he felt in his elbow after the incident at Home Depot on January 20, 2022 was different than that which he had experienced before that date. Claimant said he used his Blue Cross group health card for payment when he went to the ER on January 20, 2022. Claimant stated that he had problems with getting Dr. Jeffery Johnson's office to fill out the paperwork that Blue Cross needed, as Sedgwick Claims maintained it had not received the paperwork from the doctor. Eleven weeks later, that issue was resolved.

Dr. Johnson recommended that claimant undergo an MRI, which was eventually performed and revealed tendon tears in claimant's right arm. In April 2022, claimant underwent surgery with Dr. Chen. This surgery was approved, but after the surgery, coverage was denied. On June 9, 2022, claimant filed this workers' compensation claim, which was after he received notice that Blue Cross denied his medical expenses for his right elbow.

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After claimant rested, respondent called Heather Mays, who is one of the managers in the department claimant was working in January 2022. Ms. Mays said claimant had not missed any time from work due to an injury to his right elbow. On the overnight shift there were times there was not enough work to keep that shift busy and some would volunteer to go home, but at no point did the claimant ask her if he could leave early due to his right elbow hurting. Ms. Mays said that claimant had never requested to be seen by a medical professional about his right elbow, because there was a process that they go through whenever such a request was made. Claimant had an incident unrelated to his elbow that required paperwork to be filled out. In her words “even if it was a splinter, we would fill out paperwork. Even if you asked me for a band aid, we have to fill out paperwork for it.”

Ms. Mays said that she had seen claimant wearing a compression sleeve and did not remember him without it. She and claimant had a conversation regarding his wearing it, and claimant told her it was because of a preexisting injury. She recalled claimant complaining about how the boxes had shifted during transit, but those complaints had nothing to do with claimant’s right elbow.

Ms. Mays testified that sometime after his surgery, she became aware that claimant was contending his right elbow issues were related to his job with Walmart. She had received an e-mail from someone with Walmart asking for the accident report, and Ms. Mays responded that there was no accident report because there was no injury reported.

On cross-examination, Ms. Mays said that the conversation she had with claimant regarding the compression sleeve was because she had asked why claimant wore it. Claimant said that he had a preexisting injury to his shoulders. When an incident report was made, Ms. Mays said that she was involved in filling out the initial paperwork and then asset protection proceeded from there. When claimant believed that he had a reaction to something he was exposed to at work, Ms. Mays retrieved the paperwork from the front office, sat with him as he filled everything out and then signed it to

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indicate that she watched him complete the form.

Respondent then called Timothy Wicks who was also a manager over the department where claimant worked in January 2022. Mr. Wicks did not recall claimant missing any time of work due to his right elbow, nor did he recall him leaving work early as a result of his right elbow. Had such a request been made, Mr. Wicks said that he would have to fill out medical paperwork for it and he never completed any paperwork for claimant related to his right elbow. Mr. Wicks recalled being contacted by someone he thought was a caseworker, inquiring about any paperwork related to claimant's injury. He was aware that something had happened outside of work but that was all that he knew.

On cross-examination, Mr. Wicks said that he did not discuss the compression sleeve with claimant, but rather asked Ms. Mays about it and she related to Mr. Wicks that claimant wore it, but it was not a medical issue.

After respondent rested, claimant was recalled in rebuttal. He said the steel shot gun shells in his opinion weighed twenty to twenty-two pounds each and caused pain to his right elbow from having to pick those boxes up from the floor to put them on the conveyor belt. He said he mentioned to Heather Mays and Tim Wicks about his discomfort in lifting those boxes. Regarding the brace, claimant recalled that when Ms. Mays asked about it, he said it was because his elbow was hurting.

REVIEW OF THE EXHIBITS

Claimant's exhibits begin with his visit to the emergency room at Mercy on January 20, 2022. The history taken from the claimant in the nurse's notes was consistent with claimant's testimony at the Hearing: "Pt stated he was lifting plywood and heard a pop in his elbow, then it started hurting." The doctor's note is inconsistent with the testimony and what the nurse recorded: "Patient reports he was at work today and was moving boxes, had a pop in his right upper arm with acute onset of pain."

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(CL.X.1-5)

Claimant followed up with Nurse Practitioner Melissa Martin on January 26, 2022, which contained the following history from claimant: “He was in the ED January 20 with complaints of right arm pain. He might have injured himself at work. He admits to throwing boxes at work, so he’s dealt with mild pain and swelling to his upper right arm for the past month. He also might have injured himself the day of his ED visit. He states he was moving a sheet of plywood while at Home Depot.” Nurse Martin ordered x-rays but did little else to help claimant during that visit. (CL. X. 6-9)

Claimant was next seen by Dr. Jeffrey Johnson at Ozark Orthopedics in Bentonville on February 10, 2022. Claimant was not happy with Dr. Johnson’s office because no MRI had been ordered for him. Dr. Johnson’s note included the following: “With respect to the main reason that he is here, his medial elbow pain. My working diagnosis is medial epicondylitis as his exam is consistent with this. I do think that it is worth obtaining a MRI arthrogram of his right elbow given the “pop” on 1/22/2022 when he picked up the sheet of plywood.” (CL.X.10-13)

On March 9, he was seen by a therapist named Lauren Kelsey at Mercy Therapy Services. The note in that record states that claimant had had an MRI on his elbow and brought the results with him to the visit. (CL.X.14-17) The MRI results showed the following:

1. Medial epicondylitis with associated high-grade partial thickness under surface tear of the common flexor tendon at its humoral attachment.
2. Insertional bicep tendinosis with high-grade partial-thickness tear of the short head of the bicep tendon at its insertion on the radial tuberosity. Adjacent vocal grade one strain of the supinator muscle medially.
3. Additional mild tendinosis of the distal triceps and common extensor tendon origin. (CL.X.18-19)

Following another physical therapy session on March 23, 2022, claimant saw Dr. Andreas Chen at Mercy Clinic Northwest on April 1, 2022 and Dr. Chen performed surgery on claimant’s elbow on April 11, 2022. Dr. Chen performed a right cubital tunnel release and a right flexor pronator

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origin avulsion repair, with a post-operative diagnosis of right cubital tunnel syndrome and right medial epicondylitis. (CL.X.24-31)

The post-operative notes are interesting mainly because of the mention of problems claimant was having with his insurance company. On May 20, 2022, Dr. Chen noted “he has concerns as his insurance company did not approve his surgery; however, it looks according to our notes that his surgery did not require prior approval.” The July 1, 2022, chart note stated “he has not done any therapy as he is without insurance. He currently has an attorney to try to get on workmen’s comp.” It is in this note that Dr. Chen recorded “the patient tells me that he was having significant pain in the right medial aspect of the elbow before his final injury on January 28, 2022. He states that he was doing significant repetitive motion of lifting the boxes and had been lifting seven thousand boxes in an eleven-hour shift. This may have contributed to his injury over the medial aspect of the elbow.” (CL.X.41-44)

The final note from Dr. Chen stated, “unfortunately due to his insurance status, he has been unable to go to therapy visits, but he states he is getting workmen’s comp approved right now.” Under the plan, Dr. Chen recorded “He has not done any therapy. Usually, I do send people to therapy after a flexor pronator repair. I would like him to be [in] therapy. I would like him to sign up for Mercy aid financially if he is ineligible for workmen’s comp. I do think this is a workmen’s comp injury though.”

Claimant’s non-medical evidence included three pages of the job description for the type of employment claimant was doing as an unloader/processor for Walmart. (CL.NM.1-3) Claimant also submitted a calendar for the month of January 2022 which had the following entries handwritten on the calendar:

- January 2: “arm pain at DC.”
- January 9: “arm pain, told Tim and Heather.”
- January 16: “arm pain was sent home early.”
- January 20: “Home Depot arm snapped went to ER.”

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Claimant was asked when the entries on this calendar were made, but he did not know when he wrote those entries. He did not recall if the January 2, 9, and 16 entries were made after January 20, 2022 which was the date he felt a pop in his elbow while moving plywood at Home Depot.

Respondents' exhibits included records from 2013 when claimant was treated at Midwest Orthopedic Center in Illinois. There is a mention of claimant having some pain in his right elbow, but the main emphasis of the treatment was claimant's right shoulder. There is a notation "elbow contusion which is presently systematic." (R.X.1-2) Respondent also included additional records from the January 20, 2022 emergency department visit at Mercy Hospital which included LPN Brandi Gunn's note "PT stated he was lifting plywood and heard a pop in his elbow then it started hurting. PT states he can bend his right arm but cannot straighten it out." (R.X.2-9)

Respondent included the March 1, 2022, office note from Dr. Chen which included the following: "A 58-year-old right hand dominant male, who works at the Walmart Distribution Center, who presents today for evaluation of his right upper extremity. He states he was lifting a sheet of plywood on 1-20-2022 when he felt a pop and had significant pain that radiated from the medial aspect of his elbow to the shoulder and from the radial aspect of his elbow to his wrist." (R.X.10)

Dr. Chen sent claimant to Occupational Therapy at Mercy on March 4, 2022, and the history of the current complaints reads: "Patient reports he was at Home Depot, lifting a piece of plywood when he felt a pop in his right UE. He had an immediate onset of pain." (R.X.11-13) Respondent's exhibits conclude with an e-mail sent by claimant to four people at Walmart which states "Hi guys, have some bad news. I was lifting some plywood last night and I either broke my arm or tore tendons in my right arm. I went to the ER. They told me I probably tore a tendon or ripped a bicep muscle. They were not able to do an MRI and was told to go to a regular physician to get an appointment with a specialist due to the fact that I have previous surgery on my arms."

ADJUDICATION

Claimant's theory of recovery hinges on a finding that the incident at Home Depot where he felt a pop in his elbow while picking up plywood was the culmination of a gradual-onset injury due to rapid repetitive work for respondent. For an injury to be compensable under the gradual-onset, rapid-repetitive-motion law, a claimant must prove by a preponderance of the evidence that (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; (3) the injury was caused by rapid-repetitive motion; and (4) the injury was a major cause of the disability or need for treatment. *Lay v. United Parcel Serv.*, 58 Ark. App. 35, 40, 944 S.W.2d 867, 870 (1997); Ark. Code Ann. § 11-9-102(4)(A)(ii)(a). I announced at the hearing that the testimony showed claimant was engaged in rapid-repetitive movement at his job. Having reviewed the medical records, I believe claimant did suffer an injury that was the cause of his disability and need for medical treatment. However, I am not convinced that claimant met his burden of proof that the injury arose out of and in the course of his employment and was caused by the rapid-repetitive movement.

In reviewing the law that applies to these facts, I found only one case that involved a claimant who asserted an incident that occurred away from work was the culmination of a gradual-onset injury from work. The Arkansas Supreme Court decided a case with similar facts in *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). The second paragraph of the opinion sets forth the relevant facts:

"The record reflects that before reporting to work on November 21, 1997, Appellant experienced shooting pain in her wrists while wiping up some spilled tea from a kitchen counter in her home. According to Appellant, she had been experiencing pain and numbness in her hands and elbows, accompanied by a loss of grip strength, for several months prior to this incident. Appellant admitted that she did not initially report her problems to anyone other than her coworkers because she believed that the pain was simply a "part of the job."

The Full Commission denied Freeman's claim for benefits, and the Arkansas Court of Appeals affirmed that decision. The denial was based on the failure of claimant's orthopedic doctor's unwillingness to say "within a reasonable degree of medical certainty" that claimant's carpal tunnel and tennis elbow were related to her employment. The matter was remanded to the Full Commission, which in an order dated June 29, 2001:

"This matter is hereby remanded to the Administrative Law Judge to make a finding on whether or not the claimant's work activities constituted rapid and repetitive motion, to make a finding on whether or not the claimant's bilateral epicondylitis was work-related, and for a determination of the benefits the claimant is entitled to for her compensable carpal tunnel syndrome."

Like the claimant in the instant case, Freeman's position is that she had been hurting at work for quite some time before she wiped up spilled tea at her house. The failure to report the claim before the injury away from work was not fatal to Freeman's claim, nor was the fact that there was a specific incident that was the culmination of her gradual-onset injury. Both had a two-fold injury; Freeman had bilateral carpal tunnel syndrome with bilateral epicondylitis, while claimant had cubital tunnel and medial epicondylitis in his right arm.

However, there are a couple of significant differences in Freeman's claim and the one before me. First, while Freeman made the connection between her work activity and her injury with clarity, claimant repeatedly attributed the cause of his elbow issues to lifting plywood at Home Depot. It was only after claimant's health insurance refused to pay for his medical care that his emphasis shifted to the possibility that this might be a workers' compensation matter.

Second, one of Freeman's injuries was carpal tunnel syndrome, which is recognized as a gradual-onset injury; therefore, it was not necessary for her to prove that particular injury was caused by rapid repetitive motion. See *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998).

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Regarding the claim for tennis elbow, however, the Supreme Court remanded that issue to the Commission, as Freeman had the burden of proving by a preponderance of the evidence that her upper extremity problems were caused by rapid repetitive motion. Tennis elbow is not recognized as a *per se* rapid repetitive injury. Ark. Code Ann. § 11-9-102(4)(A)(ii)(a). In this case, claimant is required to prove both his cubital tunnel syndrome and his medial epicondylitis, or golfer's elbow, were caused by the rapid repetitive motion his job required.

The Arkansas Supreme Court in *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 447, 990 S.W.2d 522, 524 (1999) stated:

“The plethora of possible causes for work-related injuries includes many that can be established by common-sense observation and deduction. To require medical proof of causation in every case appears out of line with the general policy of economy and efficiency contained within the workers' compensation law. To be sure, there will be circumstances where medical evidence will be necessary to establish that a particular injury resulted from a work-related incident but not in every case.” (Emphasis added)

It was necessary for claimant to provide medical evidence to establish his elbow injury was a result of his work-related activity. As I understand claimant's position, he maintains that the rapid repetitive work he performed in unloading trailers culminated when his elbow “snapped and popped” when he lifted plywood while not at work. However, there is no medical proof that a gradual injury, if any, to claimant's elbow would suddenly get significantly worse due to lifting a piece of plywood that he said was not heavy; tying the two together is not a matter of “common-sense observation and deduction,” but rather would require guesswork on my part. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep't of Corrections v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991)

I am aware that Dr. Chen stated in his September 8, 2022 record that “I do think this is a Workman's Comp injury.” However, I considered that statement in connection with his July 1, 2022

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office note that says:

“The patient tells me that he was having significant pain in his right medial aspect of the elbow before his final injury on 01/28/2022. He states that he was doing significant repetitive motion of lifting boxes and had been lifting 7000 boxes in an 11-hour shift. This may have contributed to his injury over the medial aspect of the elbow.” (Emphasis added.)

Those same records, as well as the May 20, 2022 chart note, mention the problem claimant was having with his personal health insurance. It appears to me that Dr. Chen was trying to be helpful to his patient’s desire to have this claim approved as a work-related injury, but he did not explain how claimant’s condition went from being able to work as he did on January 17, 2022 to suddenly needing medical treatment on January 20, 2022 after he lifted some plywood on his day off. I agree with respondent’s contention in its brief: “But for the January 20, 2022 incident at Home Depot, Claimant did not anticipate seeking medical treatment for his right elbow, nor did he intend to miss his next work shift for Respondent on January 22, 2022.”

Because claimant failed to prove through medical evidence that the nature of his work made his elbow more susceptible to the type of injury he incurred while off work, I find that he did not meet his burden of proving his elbow surgery was due to a work-related injury.

ORDER

Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable gradual-onset injury on or about January 20, 2022. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of \$707.50.

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IT IS SO ORDERED

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE