

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H108467

SAMUEL PEREZ,
EMPLOYEE

CLAIMANT

CARGILL, INC.,
EMPLOYER

RESPONDENT

OLD REPUBLIC INSURANCE COMPANY,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED MARCH 24, 2023

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

Claimant represented by the HONORABLE EVELYN E. BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE LAURA J. PEARCE, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed August 25, 2022. The administrative law judge found that the claimant failed to prove he sustained a compensable injury. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his right shoulder which was caused by rapid repetitive motion.

I. HISTORY

The record indicates that Samuel Perez, now age 45, became employed with the respondents, Cargill, in August 2018. The respondents' attorney examined the claimant at a deposition of record:

Q. So when you were hired by Cargill, what were you hired to do? What was your job to be?

A. My responsibilities?

Q. Yes.

A. I was working in evis. I worked for evis. Evis is what it is called.

Q. Okay. When you went to work, what did you actually do? What jobs did you actually perform?

A. From the time that I started?

Q. Sure.

A. It's called three points in evis....

Q. So when you get to work and you clock in, what is the first thing that you do?

A. I put on my gloves and I go to the line.

Q. Okay. And what do you do on the line?

A. We are doing the rotation.

Q. Okay. How many different stations are there in the rotation?

A. There, there is two....But when there is not enough people, there is three.

Q. And was this the job that you were doing when you were injured?

A. No.

Q. Okay. How about when you were injured, what job were you doing?

A. I was hanging the turkeys that go to the chiller.

Q. And how long had you been assigned to do that job?

A. When I started.

Q. When did you start hanging turkeys?

A. When I started. I did that for about two years there in evis....

Q. Can you describe for me, can you paint me a picture of what that looks like, like what your job looked like?

A. In evis?

Q. This job we are talking about, the hanging the turkeys, walk me through what your day looked like.

A. So, when I get there at evis, I am hanging them by their heads.

Q. And how high is the line that you are hanging them on?

A. More or less around here, about this high (indicating).

Q. And the way you moved your hand, you are pointing at about chest height?

A. Yes.

Q. And where are you picking the turkeys up before you hang them on the line?

A. Off of the band. There is a belt that comes by.

Q. And how high is the belt?

A. About this table height....

Q. And when you show up that day and you start hanging the turkeys, is that the only job that you do for the entire day?

A. Well, you are there for an hour hanging them by their heads because to do that you have to grab them and pull them and put them up on the hook.

Q. And then after that hour, what do you do?

A. And after that hour, we switch off to hang by the feet and then the head again.

Q. And is your portion of that job different when you hang them by the feet than when you hang them by the head?

A. Yes....When we are hanging them by the feet, they put a bench that we have to be on top of to be able to pull the turkeys and then flip them over to hang them by their feet....

Q. So someone at the first station is hanging turkeys by their heads and then the next station you are standing on a bench and you are taking the feet and you are also putting them up, hanging them up by their feet and their head at the same time?

A. Yes....

Q. And then after you hang them by their feet for an hour, do you go back to hanging them by their head or do you do a different job?

A. You go back to hanging by the head.

Q. So when you said three point, when you are doing the three-point job, is it because there is the two feet and the head and then they are hanging by three points?

A. Yes.

The parties stipulated that the employee-employer-carrier relationship existed on June 28, 2021. The respondents' attorney examined the claimant at deposition:

Q. So what were you doing that day before you noticed that you were hurting?

A. Oh, well, that day I was hanging, hanging birds, and I started to feel a heat in my chest and then around here (indicating), but, you know, I had been working and hanging them all day....

Q. So what parts of your body were hurting that day?

A. The hands, elbows, up here (indicating), and the back of my neck....

Q. Are you pointing to your shoulders?

A. Yes....

Q. Was one side worse than the other?

A. Yes, the right side....

Q. So would you have to lift a turkey and then turn in order to hang it or would you just lift it off the band and put it right up on the line?

A. You have to turn....

Q. And how quickly are they coming? In that hour, how many turkeys would you say you hang by the head?

A. Well, honestly, to be really honest, I was just looking at the line, so that is all I know.

Q. So if you are only at that station for one hour, hanging the turkeys by their head for an hour, would you hang 20 turkeys during that time? Would you hang 80 turkeys during that time? Can you give me an idea?

A. Well, I think in an hour, maybe 500.

Q. And is that the same when you are taking them and flipping their feet up?

A. Yes. It is just one line....

Q. Let's say before the month of June, had you had problems with your shoulders before that?

A. So from three points, they changed me over to the chiller and that is when I started hurting.

Q. Why did they change you over to the chiller?

A. They moved me to a position called utility.

Q. Why?

A. Well, the utility position, you go around, you are sweeping or hanging or you can do any job there....

Q. So in January of 2021, you start doing the utility position. Other than the three-point area, what other types of jobs did you do?

A. Well, when they first changed me over from three points, I was in that department – what is it called – they transferred me to a department called all dock and that is where I was working before shipping.

Q. And what did you do in all dock?

A. I was there and I was moving the turkeys off of the truck to go to deboning....In the chiller is where the turkeys are hung that are going to be deboned.

Q. Okay. And is the equipment and the process different if you are hanging turkeys in the chiller than what you've already explained to me for three points?

A. Yes. It is similar.

Q. Okay. Do the turkeys move faster or slower or is it about the same?

A. Faster. Faster.

Q. And how long did you work in the chiller?

A. Well, from the time they took me off palleting until I was hurt....

Q. So what is different about the chiller than what you explained to me about three points?

A. So in the three points, you have to bend over to grab the chicken and then hang it up and in the chiller you don't bend over. So there, all the turkeys are already in a pile and you just have to find a leg and pull it up....

Q. So the turkeys are in a big pile on this moving belt?

A. Yes....

Q. Do you have a requirement – did you have a requirement to hang a certain number of turkeys in a period of time?

A. Yes.

Q. And what was that number?

A. So there were four of us working, so you had to grab one and leave three, and then grab one and leave three....

Q. So before you were switched over to the chiller, had you noticed any pain in any of your body parts that you are complaining of today?

A. No. No. It wasn't until I was in the chiller.

Q. And then one day you were working in the chiller and then all of a sudden everything started to hurt?

A. Yes.

The claimant's attorney examined the claimant at hearing:

Q. Now, before you got injured when you were working on the chiller line, is there a quota? Do you have to do a certain number of turkeys?

A. They have a goal, so many turkeys per day.

According to the record, the claimant treated at Cargill Health

Services on July 9, 2021:

Pain in bilateral shoulders, arms including elbows, hands and fingers with tingling in small fingers and lateral hands and lower arms to elbow; No change....

Date/time of injury or onset of illness: 06-28-2021....

Work related? Yes....

Where the injury/illness occurred: Debone/Rehang...

What object or substance directly harmed the employee?

Hanging turkeys....

• OCC WC, Reduced Count to 50% of regular job dated: 07-07-2021 – 07-21-2021....

The claimant was treated with ice and medication. It was noted, "Return to work at 50% RDCNT." The claimant continued to follow up at Cargill Health Services. It was noted on July 21, 2021, "He reports he has not been working at a rdcnt as instructed, all the time and relates the new pain to working rehang. He has been coming to Health Services Treatments and taking medications as taught. He voices concerns regarding his current position." It was noted, "What object or substance directly harmed the employee? Hanging turkeys."

It was noted on July 22, 2021, "EE instructed to go to Arkansas Occupational Health Clinic."

The record contains a CORRECTIVE ACTION/DISCIPLINE NOTICE presented on or about July 23, 2021:

*Samuel,
On 7/7, you were placed on restrictions of 50%. On 7/9 and 7/16, you were noticed not following your restrictions. You have been verbally communicated by your trainer, medical, and our supervisors to follow your piece count multiple times (see documentation). By not following your restrictions, this will not allow your body to feel better with the ESI you received on 7/7.
Restrictions must be followed at all times. Not following restrictions will lead towards additional disciplinary action....*

Stephanie Dishman noted at Cargill Health Services on July 26, 2021, "EE returns to work to report increased pain and bruise (appears to be 2 to 3 days old) in area just below the right scapula. Continued pain to BUE including shoulders and elbows with tingling to bilateral 5th digit. He has not worked since Wednesday, 07/21/2021....EE instructed to go to Arkansas Occupational Health Clinic once he leaves Health Services."

Additionally, a Nurse Practitioner reported on July 26, 2021:

Patient states that he is concerned about a bruise that has developed to the right side of his ribs. Both elbows, pinky fingers and traps have slightly improved.
Diagnosis/Treatment rendered:
1. Unspecified disturbance of skin.
2. Pain in right elbow.
3. Pain in left elbow....

The claimant can return to work on 07/26/2021 with the following temporary restrictions:
Avoid repetitive bending and extending both elbows.
Use gel guards as needed.
No push, pull, lift more than 10 lbs.

The respondents terminated the claimant's employment on or about July 27, 2021. The claimant's termination was related to excessive and unauthorized absences from the workplace.

Dr. Miles M. Johnson provided a Neurological Evaluation/Electrodiagnostic Report on August 17, 2021:

Patient is a 44-year-old right-handed male with a 3-month history of medial elbow pain bilaterally. He has numbness and tingling in the fourth and fifth digits and medial palm in the right greater than left hand. There is some grip weakness. Does have some neck pain but denies any radiation. Patient has been to Dr. Berestnev and is referred for electrodiagnostic testing of the bilateral upper extremity....

SUMMARY: Bilateral median motor studies are normal. Ulnar elbow conduction velocities are decreased bilaterally recording over the ADM and FDI. Median and ulnar orthodromic sensory latency difference is normal bilaterally. EMG examination of the bilateral upper extremity revealed reduced recruitment in the FDI bilaterally.

Dr. Johnson assessed "Moderate bilateral ulnar neuropathy at the elbows. There is no electrodiagnostic evidence of radiculopathy, plexopathy, generalized peripheral neuropathy or other peripheral entrapment syndromes."

The claimant treated at Community Clinic beginning November 12, 2021. The diagnosis at that time included "Trapezius muscle spasm."

A pre-hearing order was filed on January 6, 2022. According to the text of the pre-hearing order, the claimant contended, "Claimant contends he is entitled to medical treatment for his arms, hands, shoulders and neck. He also contends he is entitled to temporary total disability benefits. The claimant reserves all other issues."

The parties stipulated that the respondents "controvert this claim in its entirety." The respondents contended, "Respondents contend that claimant's injuries do not meet the requirements as to compensability under Act 796. Respondents contend that claimant failed to notify respondents of a work-related injury that he alleges occurred on June 28, 2021."

The parties agreed to litigate the following issues:

1. Whether claimant sustained a compensable injury to his arms, hands and shoulders bilaterally as well as his neck as a result of a gradual onset injury culminating on June 28, 2021.
2. Whether claimant is entitled to medical treatment.
3. Whether claimant is entitled to temporary total disability benefits from the date last worked to a date yet to be determined.
4. Whether claimant's attorney is entitled to an attorney's fee.

Anne Sheen, PA examined the claimant at Community Clinic on

February 18, 2022:

44 y/o M presents with c/o persistent Rt arm pain. States the pain starts by his shoulder blade and radiates down his Rt arm. He denies known injury. States the pain has been worsening and he now gets tingling/numbness in the arm. He has tried taking mobic and flexeril without improvement of his sxS....

Musculoskeletal: Large knot/spasm noted proximal to Rt scapula – very ttp. Pt reports limited ROM of Rt shoulder d/t pain. States pain radiates up his neck w/movements of his shoulder. No spinous abnormalities noted to neck or bony abnormalities noted to bil shoulders, arms.

Ms. Sheen assessed “1. Anxiety with depression” and “2. Trapezius muscle spasm.”

Anne Sheen noted on March 16, 2022, “44 y/o M presents with continued c/o Rt posterior shoulder pain with radiation down Rt arm. He has been seen for this previously and trialed prednisone, NSAIDs, and muscle relaxers without relief. I referred him to PT but they were not able to reach him to schedule appt....Large knot/spasm noted proximal to Rt scapula – very ttp.” Ms. Sheen assessed “1. Trapezius muscle spasm. 2. Right arm pain. 3. Paresthesia of right upper extremity.”

An MRI of the claimant’s right shoulder was taken on March 24, 2022 with the following findings:

Bursal surface fraying of the supraspinatus and tendinopathy is seen. The infraspinatus is intact and demonstrates normal signal. The subscapularis is intact and demonstrates normal signal. The long head biceps tendon is intact and demonstrates normal signal. No muscular atrophy is seen. Mild degenerative changes of the acromioclavicular joint are seen. A type II acromion is identified. Increased signal seen in the anterior labrum consistent with an underlying tear. The glenohumeral cartilage is well-maintained.
IMPRESSION: 1. Tear involving the anterior labrum.
2. Bursal surface fraying of the distal fibers of the supraspinatus.

A hearing was held on May 31, 2022. At that time, the parties agreed to litigate the following issues:

1. Whether the claimant sustained a compensable injury to his right shoulder as a result of a gradual-onset injury culminating on June 28, 2021.
2. Whether the claimant is entitled to medical treatment.

The claimant testified at hearing that he had become employed with another company. The claimant testified that he continued to suffer from pain in his right shoulder, right upper extremity, and neck.

An administrative law judge filed an opinion on August 25, 2022. The administrative law judge found that the claimant failed to prove he sustained a compensable injury to his right shoulder. The administrative law judge therefore denied the claim. The claimant appeals to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-102(4)(Repl. 2012) provides, in pertinent part:

- (A) "Compensable injury" means:
 - (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:
 - (a) Caused by rapid repetitive motion....

In analyzing whether an injury is caused by rapid repetitive motion, the standard is a two-pronged test: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. *Malone v. Texarkana Public*

Schools, 333 Ark. 343, 969 S.W.2d 644 (1998). As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. *Id.*

Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition; the repetitive tasks must be completed rapidly. *Id.*

A compensable injury must also be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D)(Repl. 2012). “Objective findings” are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A)(i)(Repl. 2012).

Ark. Code Ann. §11-9-102(4)(Repl. 2012) further provides, in pertinent part:

- (E) BURDEN OF PROOF. The burden of proof of a compensable injury shall be on the employee and shall be as follows:
 - (ii) For injuries falling within the definition of compensable injury under subdivision (4)(A)(ii) of this section, the burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

“Major cause” means more than fifty percent (50%) of the cause.

Ark. Code Ann. §11-9-102(14)(A)(Repl. 2012). A finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14)(B)(Repl. 2012). Preponderance of the evidence means the evidence having greater weight or convincing force.

Metropolitan Nat'l Bank v. La Sher Oil Co., 81 Ark. App. 269, 101 S.W.3d 252 (2003).

An administrative law judge found in the present matter, “3. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his right shoulder as a result of a gradual onset injury culminating on or about June 28, 2021.” In workers’ compensation cases, the Commission functions as the trier of fact. *Blevins v. Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988). The determination of the credibility and weight to be given a witness’s testimony is within the sole province of the Commission. *Murphy v. Forsgren, Inc.*, 99 Ark. App. 223, 258 S.W.3d 794 (2007). The Commission is not required to believe the testimony of the claimant or any other witness but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Farmers Co-op v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). An administrative law judge’s findings with regard to credibility are not binding on the Full Commission. *Roberts v. Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983). The Full Commission has the duty to decide the case *de novo* and we are not bound by the characterization of evidence adopted by an administrative law judge. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

The Full Commission finds in the present matter that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his right shoulder as the result of rapid repetitive motion. The claimant became employed with the respondents in August 2018. The claimant testified that he worked in “evis” for the respondents, and that he was injured while “hanging the turkeys that go to the chiller.” The Full Commission finds that the claimant was a credible witness. The evidence of record corroborated the claimant’s testimony. The claimant described in detail his repetitive work on the respondents’ “evis” assembly line or conveyor. The claimant estimated that he processed approximately 500 turkeys per hour, which work would calculate to about 8.3 turkeys per minute. The evidence demonstrates that the claimant performed repetitive tasks in a rapid manner. *See Malone, supra*. We find that the claimant’s duties were both repetitive and rapid. Whether or not an employee was performing rapid repetitive motion is not a mathematical formula but is a finding of fact based on the circumstances of each particular case. *Hapney v. Rheem Manufacturing Co.*, 67 Ark. App. 8, 992 S.W.2d 151 (1999). The claimant testified that he was required to process the turkeys “Faster. Faster” when he worked in the respondents’ “chilling” department.

The claimant began treating at Cargill Health Services on July 9, 2021. A company nurse noted at that time, “What object or substance

harmed the employee? Hanging turkeys.” The claimant was given a “Reduced Count” of the number of turkeys to process. The “Reduced Count” restriction is probative evidence implicitly demonstrating that the claimant’s rapid repetitive work for the respondents was causing his symptoms. On July 26, 2021, a company nurse appeared to notice a bruise in the claimant’s right scapula area. The scapula is in the anatomic region of the claimant’s right shoulder where he complained of work-related pain. However, the respondents terminated the claimant’s employment on or about July 27, 2021.

A physician’s assistant reported a “Large knot/spasm” proximal to the right scapula on February 18, 2022. Spasm is a patent objective medical finding establishing a compensable injury. *University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997).

An MRI of the claimant’s right shoulder on March 24, 2022 showed a “tear” of the labrum and “bursal surface fraying” in the supraspinatus tendon. The MRI results are additional objective medical findings establishing an injury. We find that these objective medical findings, that is, the reported spasm and the abnormalities shown on MRI, were causally related to the claimant’s rapid repetitive work for the respondents.

The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a “compensable injury” in

accordance with Ark. Code Ann. §11-9-102(4)(A)(ii)(a)(Repl. 2012). The claimant proved that he sustained an injury causing physical harm to his right shoulder, and that the injury arose out of and in the course of employment. The claimant proved that the right shoulder injury was caused by rapid repetitive motion. The claimant established a compensable injury by medical evidence supported by objective findings, notably the reports of trapezius muscle spasm and “tear” and “fraying” shown on MRI. The claimant proved that the compensable injury was the major cause of his need for medical treatment.

After reviewing the entire record *de novo*, the Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his right shoulder which was caused by rapid repetitive motion. The claimant proved that the treatment of record was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012). There are currently no recommendations for additional medical treatment. For prevailing on appeal to the Full Commission, the claimant’s attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion finding that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right shoulder which was caused by rapid repetitive motion.

The present case is one of credibility. As highlighted by the Majority, it is within the sole discretion of the Commission to determine the credibility of a witness' testimony; however, "[w]here there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts." *Templeton v. Dollar General Store*, 2014 Ark. App. 248, 434 S.W.3d 417 (2014). A claimant's testimony is deemed controverted as a matter of law. See *Ester v. National Home Ctrs. Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998) (testimony of an interested party is taken as disputed as a matter of law); *Flynn v. J. B. Hunt Transp.*, 2012 Ark. App. 111, 389 S.W.3d 67 (2012) ("[T]he

uncorroborated testimony of an interested party is never to be considered uncontradicted."). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007).

The Majority has taken the claimant's testimony at face value when determining that he was a credible witness and that his testimony was corroborated by evidence of record. I must agree with the ALJ's determination that the claimant's testimony was both contradictory and evasive. (Opinion, P. 15). The facts simply do not support the claimant's allegations. While the claimant had been employed with Cargill since 2018 as noted by the Majority, their opinion fails to note that the claimant had only been working in the "chiller/deboner" station since May 2021, only a few weeks prior to his alleged injury. (Cl. Depo., Pp. 28-29). The claimant failed to answer questions regarding this fact at the May 2022 hearing. However, this timing had previously been addressed at the claimant's deposition. *Id.* The claimant's testimony, as accepted by the Commission, is that he hung 500 turkeys per hour, alternating between hanging them by their heads and by their feet (Cl. Depo., P. 24). This, to quote the ALJ, is "contradictory to reason," and is not logical or reasonable. The testimony

also revealed the claimant's job involved both working in the chiller hanging turkeys and deboning and that these activities rotated each hour throughout the day. (Tr., P. 8). The fact that his job duties alternated each hour throughout the day is proof that his work was not rapid and repetitive.

The record simply does not support the claimant's contentions. Between July 7 and August 17, 2021, the claimant visited Cargill nursing staff on seven occasions. (Cl. Ex. 1, pp. 1-27). Initially, medical staff noted that there was no bruising or swelling and only ice treatment was recommended. *Id.* at P. 2. In fact, the only notable issues appear to have been degenerative. *Id.* at P. 4. At his subsequent appointment on July 26, 2021, the claimant reported not working from July 21, 2021 to July 26, 2021. The claimant testified that he woke up with a bruise and could point to no specific cause of the bruise except he thought it was related to his arm being swollen. (Tr., Pp. 24-25). There is no medical proof to support this allegation. In fact, at the time the bruise was reported, it appeared to be "2 to 3 days old," although the claimant had not worked for the previous five days as noted above and was located on the right side of his ribs, not, as he testified, on his back at his shoulder blade. (Cl. Ex. 1, pp. 19, 23). Since the bruise did not appear until approximately one month after the date of the accident, it should be given no weight. Due to the nature, location, and timing of this bruise it defies logic to consider it as evidence

supporting a gradual onset injury or being an objective medical finding that would support an award of benefits.

In my review of the facts of this case, the questions of fact presented by the claimant's testimony cannot be supported by the evidence, logic or reason. The claimant appears evasive in his testimony, failing to answer even basic questions regarding when, where and how his injury occurred. Frankly, the claimant failed to prove causation in this matter. It is for this reason that I respectfully dissent.

MICHAEL R. MAYTON, Commissioner