**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**
**CLAIM NO. H104386**

**BETTY J. JOHNSON,**
**EMPLOYEE** **CLAIMANT**

**VISTA OUTDOOR, INC.,**
**EMPLOYER** **RESPONDENT**

**XL INS. AMERICA/GALLAGHER**
**BASSETT SERVICES, INC.,**
**INSURANCE CARRIER/TPA** **RESPONDENT**

**OPINION AND ORDER FILED MARCH 7, 2023**

Hearing on December 7, 2022, before Administrative Law Judge (ALJ) Mike Pickens in Little Rock, Pulaski County, Arkansas.

The claimant was represented by the Honorable Daniel A. Webb, Webb Law Firm, Little Rock, Pulaski County, Arkansas.

The respondents were represented by the Honorable Guy Alton Wade, Friday, Eldredge & Clark, Little Rock, Pulaski County, Arkansas.

## INTRODUCTION

The parties agreed to the following stipulations, which they affirmed on the record at the hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed at all relevant times including May 14, 2021, when the claimant alleges her work duties were "rapid and repetitive" in nature and culminated in a "gradual-onset" "compensable injury" to her left wrist and/or left hand.
3. The claimant's average weekly wage (AWW) at the time of her alleged injury(ies) was $1,045, entitling the claimant to weekly indemnity rates of $697 for temporary total disability (TTD), and $523 for permanent partial disability (PPD) benefits, *if*

her claim is deemed compensable.

4. The respondents controvert this claim in its entirety.

5. The parties specifically reserve any and all other issues for future determination and/or hearing.

(Commission Exhibit 1 at 2; Hearing Transcript at 5). Pursuant to the parties' mutual agreement the issues litigated at the hearing were:

1. Whether the claimant sustained a "compensable" gradual-onset injury to her left wrist and/or left hand within the meaning of the Arkansas Workers' Compensation Act (the Act), which culminated in a period of TTD beginning May 14, 2021, through a date yet to be determined.

2. If the claimant's alleged injury is deemed compensable, the extent to which she is entitled to medical and TTD benefits.

3. Whether the claimant's attorney is entitled to a controverted fee on these facts.

4. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. at 7).

The claimant contends she suffered a gradual onset compensable injury to her left wrist and/or hand as a result of her "rapid and repetitive" job duties at the respondent-employer, Vista Outdoor, Inc. (Vista Outdoor, formerly Remington Arms). She is entitled to payment of any and all related, reasonably necessary medical expenses; TTD benefits from May 14, 2021, through a date yet to be determined; and a controverted attorney's fee. The claimant specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 2-3; T. at 7; 109-112; 112-115).

The respondents contend the claimant cannot meet her burden of proof pursuant to the Act,

as she did not sustain a "compensable" gradual onset injury to her left wrist and/or hand within the course and scope of her employment at Vista Outdoor. Consequently, the respondents contend they are not responsible for the payment of any medical and/or TTD benefits, or to a controverted attorney's fee. Alternatively, the respondents contend that pursuant to ***Ark. Code Ann.*** Section 11-9-411 (2022 Lexis Replacement), if the claimant's alleged injury is deemed compensable they are entitled to a dollar-for-dollar offset/credit against any TTD benefits the Commission awards the claimant in an amount equal to the amount of short-term disability (STD) benefits for which the claimant applied and drew. The respondents specifically reserve any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 3; T. at 6-7).

## STATEMENT OF THE CASE

The claimant, Ms. Betty Johnson (the claimant), is 61 years old. At the time of her alleged compensable injury in January of 2021 the claimant was working at Vista Outdoor, where she has worked for the last 16 years. She worked on an assembly-line-type operation as a plate loader where she was involved in manufacturing various calibers of pistol ammunition. A more detailed description of the claimant's job duties is set forth on pages 17-68 and 70-81 of the hearing transcript.

Five (5) of the claimant's seven (7) alternating job duties required her to "flip" metal plates of varying weights containing various caliber bullets approximately ten (10) times per minute for one (1) hour at a time. (T. 29; 66-68; 83-88). This metal plate-flipping job was one (1) of seven (7) jobs the claimant performed during the course of a day, as she would alternate between this and other job duties. The claimant testified it was this metal plate-flipping job that caused her

symptoms and her alleged injury, and that she began having pain and numbness in her left wrist and hand beginning some time in January of 2021. (T. 33-34).

The claimant initially thought her left wrist was just sore because she had been furloughed due to the COVID-19 pandemic for some seven (7) to eight (8) months before she started back to work in January 2021. The claimant's left wrist symptoms, the pain and numbness, started approximately six (6) to seven (7) days, or a couple of weeks, after she returned from the COVID-19 furlough, and began getting progressively worse over the next few months up to May 14, 2021, when she was unable to perform her job duties. The claimant admitted she had problems with her right wrist in the past and had undergone a carpal tunnel release surgery on right left wrist, but that that her left wrist had been doing well up until she returned back to work at Vista Outdoor in January 2021 after the COVID-19 furlough. The claimant also admitted she had a past injury at Land O' Frost, as well as a past injury to her right hand at Remington in 2017 (the predecessor company of Vista Outdoor) when she tripped and fell and caught herself with her right hand. She also had trigger thumb on her right hand in 2014. The claimant also has been diagnosed with reflex sympathetic dystrophy (RSD) in her right arm as a result of her 2017 work-related injury. (T. 33-34; 50-53).

The claimant testified that her left wrist pain and numbness continued to get worse between January 2021 and May 2021. She first underwent conservative treatment for her symptoms, but when they did not improve she presented herself for medical treatment which ultimately resulted in Dr. Brian Norton diagnosing her with de Quervain's syndrome, also known as de Quervain's tenosynovitis. The claimant underwent surgery on her left wrist, and returned to work at Vista Outdoor at a new job that does not involve rapid-repetitive motion, or to utilize her wrists in a way

that causes her pain. She testified she has been doing well at her new job, and not experiencing the pre-alleged injury symptoms. (Claimant's Exhibit 1 at 1-41; Respondents' Exhibit 1 at 1-22; T. 44-50).

Mr. Carl Joseph Guthrie, the claimant's supervisor, testified concerning the claimant's job duties, and his testimony was not significantly different from the claimant's description of her job duties. (T. 69-92). Ms. Donna Hendricks, a licensed practical nurse (LPN) and the company nurse, also testified on the respondents' behalf. Ms. Hendricks testified the claimant's job duties were not a "fast-paced" type job, and also that the claimant had been diagnosed with diabetes. She also testified she had no personal knowledge as to what Dr. Moore saw when he visited the plant to observe the job duties the claimant performed. (T. 93-108).

Dr. Moore has opined he does not believe the claimant's job duties are rapid and repetitive, or that her left wrist condition is a result of her work duties; however, he has diagnosed her with de Quervain's syndrome. (RX1 at 18-22). Dr. Norton, the claimant's treating orthopedic surgeon, has opined to the contrary. (CX1 at 1).

## DISCUSSION

### The Burden of Proof

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. ***Ark. Code Ann***. § 11-9-704(c)(2) (2022 Lexis Replacement). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel,* 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). ***Ark. Code Ann.***

Section 11-9-704(c)(3) (2022 Lexis Repl.) requires the ALJ, the Commission, and the courts "shall strictly construe" the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles,* 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party**. *Ark. Code Ann***. § 11-9-704(c)(4) (2022 Lexis Repl.); *Gencorp Polymer Products v. Landers,* 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers' compensation benefits must be based on proof. 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); *Deana Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission's exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees,* 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc*., 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles, supra*.

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission's province to weigh the totality of the medical evidence and to determine what evidence is most

credible given the totality of the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

**Compensability: Gradual Onset Injuries**

The respondents contend the claimant cannot meet his burden of proof pursuant to the Act in demonstrating he has sustained a "compensable" gradual onset injury. ***Ark. Code Ann.*** § 11-9-102 (4)(A)(2022 Lexis Replacement) defines a "compensable injury" which is not the result of a specific incident – *i.e.*, a gradual onset injury – as follows:

> (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. *Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition*[.]

(Emphases and Bracketed material added).

The test for determining whether an injury is caused by rapid and repetitive motion is two (2)-pronged: (1) the task 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). Multiple tasks involving different movements can be considered together to satisfy the "repetitive element" of rapid repetitive motion. Id. The claimant is *not* required to prove rapid and repetitive motion when there is a diagnosis of CTS. *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998).

As with any and all compensable injuries, a compensable gradual onset injury must be established by medical evidence supported by objective findings. ***Ark. Code Ann.*** § 11-9-102(4)(D); ***Ark. Code Ann.*** § 11-9-102(16). For a gradual onset injury caused by rapid repetitive motion the resulting condition is compensable *only if* the alleged compensable injury is the "major

cause" of the disability or need for treatment. ***Ark. Code Ann.*** § 11-9-102(4)(E)(ii); *Medlin v. Wal-Mart Stores, Inc.*, 64 Ark. App. 17, 977 S.W.2d 239 (1998).

Pursuant to the Act, a compensable injury, whether it is from a specific incident, or is gradual onset, must also be established by medical evidence supported by objective findings, which the Act specifically defines as "those findings which cannot come under the voluntary control of the patient." ***Ark. Code Ann.*** § 11-9-102(4)(D); ***Ark. Code Ann.*** § 11-9-102(16). Moreover – and significant if not dispositive in this case – a gradual onset injury caused by rapid repetitive motion is compensable *only if* the alleged compensable injury is the "major cause" of the disability or need for treatment. ***Ark. Code Ann.*** § 11-9-102(4)(E)(ii); *Medlin v. Wal-Mart Stores, Inc.*, 64 Ark. App. 17, 977 S.W.2d 239 (Ark. App. 1998).

Of course, the Act specifically defines "major cause" as "more than fifty percent (50%) of the cause", and states that this major cause requirement "shall be established according to the preponderance of the evidence." ***Ark. Code Ann.*** Section 11-9-102((14)(A)-(B). The "major cause" requirement may be established by the fact the claimant was asymptomatic prior to an incident, and then required medical treatment after the incident. *Parker v. Atlantic Research Corp.*, 189 S.W.3d 449, 87 Ark. App. 145 (Ark. App. 2004). Consequently, based on the applicable law as applied to the facts of this case, I find the claimant has failed to meet the Act's required burden of proof for the following reasons.

First, it should be noted the claimant has been diagnosed by both Drs. Moore and Norton as having de Quervain's syndrome. *The Merck Manual of Diagnosis and Therapy,* (Merck, Sharpe & Dohme, 20th Edition 2018 at 289) defines de Quervain's Syndrome as, "…stenosing

tenosynovitis of the short extensor tendon (extensor pollicis brevis) and long abductor tendon (abductor pollicis longus) of the thumb within the first extensor compartment", and states that the condition, "usually occurs after repetitive use (especially wringing) of the wrist… ." The claimant has worked at Remington, now Vista Outdoors, some 16 years. The job she was performing after she returned from COVID-19 furlough is wrist intensive, involves the lifting and flipping of relatively heavy weight, at what certainly appears to be a relatively rapid, repetitive pace. Furthermore, there exists no medical or other credible evidence of record that would explain the cause of the claimant's diagnosed de Quervain's syndrome in her left wrist.

Second, based on the preponderance of the credible medical and other evidence of record there exists no other credible explanation as to the cause of the claimant's de Quervain's syndrome other than her job duties at Vista Outdoor. Moreover, based on the specific facts of this case I find that Dr. Norton, the claimant's treating orthopedic surgeon, is in a better position given the totality of the circumstances to render the most credible opinion concerning causation. Dr. Norton has succinctly and clearly opined that, "Patient did repetitive lifting/gripping/flipping w left hand which led to the development of de Quervains." (CX1 at 1). While one might nit-pick and argue that Dr. Norton did not specifically state the claimant's job duties were "rapid" in nature, I am of the opinion there exists other evidence of record that may lead a fact-finder to determine the claimant's subject job duties were in fact "rapid" in nature.

Third, and finally, just as a matter of common sense and fundamental fairness, there appears to be no disagreement between Drs. Norton and Moore that the claimant's diagnosed condition is de Quervain's syndrome, which is caused by repetitive motion activities. To find, based on the

totality of the credible medical and other evidence of record herein, that the claimant's rapid and repetitive job duties at Vista Outdoor – especially in the absence of other credible evidence to the contrary – were not the "major cause" of the claimant's condition and need for medical treatment would constitute sheer speculation and conjecture. Since sheer speculation and conjecture are insufficient to support a claim for compensation, it logically follows they cannot be used to deny a claim for compensation, as well. *See, Deana, supra*.

Therefore, for all the aforementioned reasons I hereby make the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations contained in the Second Amended Prehearing Order filed September 19, 2022, are hereby accepted as facts.

2. The claimant has met her burden of proof in demonstrating she sustained a gradual onset "compensable injury" within the Act's meaning to her left wrist which culminated in disability beginning on or about May 14, 2021.

3. The claimant has met her burden of proof in demonstrating the medical treatment she has undergone on her left wrist, including but not limited to the surgery, is related to and reasonably necessary in light of her gradual onset compensable compensable injury which culminated in disability beginning on or about May 14, 2021.

4. The claimant has met her burden of proof in demonstrating she is entitled to TTD benefits from May 14, 2021, until she returned to work for the respondents at a new job on or about May 6, 2022.

5. Pursuant to ***Ark. Code Ann.*** Section 11-9-411 (Lexis Repl. 2022) the respondents are entitled to a dollar-for-dollar offset/credit related to the immediately aforementioned TTD benefits based on the total amount of STD benefits for which the claimant applied and received following her compensable left wrist injury.

6. The claimant's attorney is entitled to a fee based on the controverted TTD benefits from on or about May 14, 2021, through on or about May 6, 2022.

**AWARD**

The respondents are hereby directed to pay benefits in accordance with the "Findings of Fact and Conclusions of Law" set forth above. All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to ***Ark. Code Ann.*** Section 11-9-809, and *Couch v. First State Bank of Newport,* 49 Ark. App. 102, 898 S.W.2d 57 (Ark. App. 1995); *Burlington Indus., et al v. Pickett,* 64 Ark. App. 67, 983 S.W.2d 126 (Ark. App. 1998); and *Hartford Fire Ins. Co. v. Sauer,* 358 Ark. 89, 186 S.W.3d 229 (2004).

If they have not already done so, the respondents shall pay the court reporter's invoice within ten (10) days of their receipt of this opinion and order.

**IT IS SO ORDERED.**

Mike Pickens
Administrative Law Judge