

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H203628

WILLIAM W. HOLMES, EMPLOYEE	CLAIMANT
CONAGRA FOODS, INC., EMPLOYER	RESPONDENT
ACE AMERICAN INSURANCE COMPANY/ BROADSPIRE, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 9, 2023

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

Claimant represented by the HONORABLE LAURA BETH YORK, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed January 31, 2023. 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 finds that the claimant proved he sustained a compensable injury to his left shoulder. We find that the claimant provided timely statutory notice of his compensable injury. The claimant proved he was entitled to reasonably necessary medical treatment and a period of temporary total disability benefits.

I. HISTORY

The record indicates that William Wesley Holmes, now age 54, was hired by the respondents, Conagra Brands, Inc. in September 2000. Mr. Holmes testified that he initially worked on a processing line for the respondent-employer. The claimant testified on direct examination:

Q. What's your current job at Conagra?

A. Spice Utility Prep.

Q. Spice Utility Prep. Do you know approximately when you started in the spice utility prep area?

A. All I know is I been doing it about 17 years.

Q. Okay, that's fair. Now, what do you do as a spice utility prep employee?

A. I – I'm a little nervous, but I'll be alright.

Q. You're fine.

A. They put these blends together for me in one department, and then I drive a truck and take these blends and put them on a rack inside another room, and then I blend them.

Q. So let's break that down a little bit further. About what time do you get to work in the morning?

A. I usually start at four o'clock every morning....

Q. And where is the first place that you go?

A. Well, the first thing I do I have to get a Kevlar glove and a knife....I got to get dressed, put a white coat on, and everything....

Q. Where do you go next?

A. Then I go inside the spice room and get my things I have to have to do the job, which is a boat paddle, and I have to have an apron, and a knife, and a glove, a Kevlar glove....

Q. Are you the only one in that room?

A. Yes, ma'am.

Q. So you work primarily by yourself?

A. By myself. Yes, ma'am.

Q. Now you get there, you have all these items, what do you do next? You mentioned driving a forklift to go get your –

A. Yes, I go to the next room to get them and I drive a forklift. I set them up on a – it's called a spring-loaded thing. I don't know what you call it. It's spring-loaded. It goes up and down. Then I have to walk up. When I get off the truck and go back around – this is a River blender I blend them in....

Q. When you pick up those spices, is a forklift lifting up a pallet?

A. Yeah, it's lifting up a 1200 pound batch....Some of them are much heavier....

Q. Do you do this several times during –

A. It's cumulatively.

Q. Do you drive the forklift over there several times a day or just once during the day?

A. Several times a day....Back and forth.

Q. You drive the forklift over. The pallet gets – the forklift gets the pallets of spices. You deliver that to another area. Is that correct?

A. Yeah, I deliver it to the area where I'm working....On that thing I was talking about.

Q. So there's a spring –

A. There's a spring-loaded deal that holds them in place and I go up the stairs and I start stripping the bags. I have to strip the bag and put it inside of a River blender, which is probably as long as this table right here....

Q. Approximately how many bags of spices are on that pallet?

A. There's a lot.

Q. You don't know a number?

A. I don't know a number. I've never counted them, but I load twelve hundred batches and when we do the others, they're two thousand pounds.

Q. These bags that you're –

A. The bags are 50-pound bags. Yes, ma'am.

Q. They're 50-pound bags. Okay. And you mentioned that you have to strip them?

A. Yes....I mean I have to have my Kevlar glove on and a knife, and I have to take them off the pallet with both hands and set them on a table, which is this long.

Q. It's about two feet long?

A. Yes, and it's about – and it comes up to about right here.

Q. To your waist level?

A. Yes, waist level....I take the pallets off and set them on this table, then strip them....I grab the bags, I strip them, take the outside layer off the bag, put them in a trash can, which is below me. There's a trash can below me which is called a muler, and I set them in that.

Q. Then you use your knife the cut the bag, and you take that outer layer off and throw it away?

A. Yes.

Q. So you're doing that with each one of those –

A. Every bag that's on that pallet.

Q. Then when those bags are de-bagged, I'll call it –

A. It's a little square hole. You just pour it over in there cumulatively. I mean I'm doing it pretty quickly....

Q. Now, approximately how many pallets do you deliver to your area each day?

A. Well, we usually run – I can do four an hour.

Q. Four pallets an hour?

A. Yes.

Q. And those pallets, do they range in weight from 1200 to 2000?

A. Uh-huh, 2000 pounds.

Q. And each one of the bags that you're lifting –

A. Are 50-pound bags. Correct....

Q. So every bag all day long is 50 pounds?

A. 50 pounds. Yes....

Q. So you turn to your right, you pick up a pallet and – I'm sorry, you pick up a bag and you set it in front of you. Is that correct?

A. It is in front of me.

Q. Once it's stripped and opened, you turn to your left and you pour it into a hole. Is that correct?

A. Yeah, until I get it all in there cumulatively.

Q. And so the boat paddle that you have, what do you do with the boat paddle?

A. At the end when I get it all out and if they're all the same blend, I don't have to use that paddle until the last one is done, until I change to another ingredient. I change to a different type of blend. Then I have to take that pallet with both of these hands, and I have to scrape the bottom of that River blender out until I get most of it all out. I do not get all of it, but I try to get most of it out. There's usually about 60 pounds left in there.

Q. When you said you used a pallet, do you mean a paddle?

A. The paddle. It's a boat paddle.

Q. Okay, it's a boat paddle. And approximately how many times a day are you using the boat paddle?

A. Probably four or five times a day.

Q. And you mentioned that you start work at 4:00 a.m. What time does your shift end?

A. I usually get off when I'm done. It's usually different hours. I may work eight, sometimes I work 12 hours, sometimes 10, sometimes nine. I mean you don't ever know. Whenever I get done, I usually leave.

Q. So you're doing this at least eight hours a day?

A. No, more than eight hours....

Q. At the time this accident happened, how many days a week were you working?

A. Five.

Q. Five days a week. Okay. Now, you have been doing this now for 17 years, is that correct?

A. To the best of my knowledge.

Q. How has your shoulder been for the last 17 years up until February of 2022?

A. It's been fine until they started adding more blends.

Q. So what do you mean by that? How did your job change?

A. It changed when they added more blends. We usually only blend 12, about 12 a day. Now we're doing sometimes 16/18 blends a day.

Q. When you say "blends," does that mean –

A. That's them pallets that we're talking about.

Q. Pallets. So they added more pallets to your day. Is that correct?

A. That's correct.

Q. And so tell us what transpired in February of 2022.

A. Well, I started noticing pain in my shoulder, right here, the left shoulder I had the surgery on. I just thought, you know, it was just a pulled muscle or something, so I never went to the nurse or nothing. I just tolerated it. So it began to start burning and getting worse, so I went and told my supervisor Tyler that I was going to go see the nurse, which she is here right now. I went and seen Lisa....

Q. Now, when you went to see Lisa, did you tell her your shoulder was hurting?

A. Yeah. She sent me to my family doctor....

Q. Did you tell Lisa at that time that you saw her, that first time, that this was a work injury?

A. Yes, I believe I did.

Q. Was some workers' comp paperwork offered to you that day?

- A. No.
- Q. What did Lisa tell you to do?
- A. She just told me to go see my family physician.
- Q. And who is your family physician?
- A. Dr. Kirkland.

According to the record, the claimant treated with Dr. Allan K.

Kirkland on February 11, 2022:

Nurse's Note: 53 y/o male unaccompanied here with c/o left shoulder pain. States pain in left shoulder x 1 wk. Pain radiates to deltoid area. Pain is 10/10 when doing any activity or movement with left arm. Heat helps with the pain. Didn't feel anything pop in shoulder, thinks it from over use of arm. No pain when resting. Works at Conagra and does repetitive lifting 50 lb. bags and uses left arm mostly when pouring the bags. Has paperwork that needs to be completed before he can come back to work.

Provider's Note: This 53-year-old male presents to clinic today complaining of left shoulder pain. Symptoms started about a week ago. He has a repetitive motion job as above and feels that it started at work. There was no acute injury. Pain is severe with forward flexion or abduction at the shoulder. He denies any crepitus or prior injury. The right shoulder is doing fine.

Dr. Kirkland assessed "1. Pain of left shoulder joint....Work note given." Dr. Kirkland planned conservative treatment.

The claimant testified on direct examination:

- Q. Do you go back to your employer?
- A. Yes, I went back to see Lisa.
- Q. Did you see her that day or the following day?
- A. That day....
- Q. And what conversation did you have with Lisa at that appointment?
- A. I gave her the paperwork that Dr. Kirkland gave me. I had so many restrictions I couldn't sweep or do nothing so.
- Q. Did you ask for workers' comp?

A. Yes, I did ask for the workers' comp paperwork. Yes, I did.

Q. Was it offered to you?

A. No, she said we couldn't go with that. That's why we were going with Sedgwick....

Q. Sedgwick was your short-term disability carrier?

A. Yes, ma'am.

The record contains a document entitled CONAGRA FOODS, INC. – DS. The document was dated February 11, 2022 and included the following language: “Thank you for reporting this claim to Sedgwick. Below please find a report of the DS claim that was recently reported.” The report also included the language, “What is the reason for this absence? Work Related Injury or Illness....EE has shoulder pain in left shoulder.”

The respondent-employer also provided a Return-to-Work Temporary Modified Duty Agreement dated February 11, 2022. The Temporary Modified Duty Agreement indicated that temporary modified duty would begin on February 14, 2022, and the document included the following language: “In an effort to assist you in recovering from your recent injury/illness, Conagra offers a temporary modified duty program. Temporary modified duty lasts no longer than 90 days and will be reviewed with you on an ongoing basis, at least every 30 days, to determine if it is rehabilitative to you, and if you are progressing toward a full duty release.” The claimant was assigned temporary restrictions: “Lifting limit 10 lbs, seldom carry or lift, primarily sitting with occasional, walking, standing.” However, the Temporary Modified Duty Agreement also included the

following language: “We have identified temporary modified duty work based on your abilities, performing the following job tasks: ‘No accommodation.’” Individuals signing the Temporary Modified Duty Agreement included the claimant, a Human Resources Representative, a Supervisor/Manager, and the Occupational Health Nurse, Lisa Chambers.

Dr. Jefferson Cartwright examined the claimant on March 22, 2022:

William is a 53 year old gentleman referred by Dr. Kirkland for evaluation of his left shoulder. He reports left shoulder pain. He denies neck pain. He denies left upper extremity paresthesias. He reports weakness in the left shoulder. He denies any history of dislocation....He reports no significant improvement after physical therapy....He denies any history of injury but feels that overuse ConAgra may have contributed. He was taken off work a month ago by Dr. Kirkland.... My impression clinically is that the patient’s left shoulder suffers with a combination of issues which seem to include subacromial impingement, subacromial bursitis, bicipital tendinitis, high-grade partial thickness tearing of the supraspinatus, probable low grade partial thickness tearing of the subscapularis, arthritis of the acromioclavicular joint but I cannot rule out any labral pathology given the guarding on examination. Therefore, before making any treatment recommendations, I have recommended that we send the patient for an MRI of the left shoulder. I would like to see him back after he has completed that MRI study so that we can review the findings and then discuss treatment options.

An MRI of the claimant’s left shoulder was taken on April 7, 2022 with the following impression: “Supraspinatus tendon partial thickness tear. 2. Infraspinatus tendinopathy. 3. Marked AC joint arthrosis.”

The claimant followed up with Dr. Cartwright on April 13, 2022: “My impression clinically is that the patient’s left shoulder suffers with a

combination of issues which seem to include subacromial impingement, subacromial bursitis, bicipital tendinitis, high-grade partial thickness tearing of the supraspinatus, probable low grade partial thickness tearing of the subscapularis, arthritis of the acromioclavicular joint but I cannot rule out any labral pathology given the guarding on examination....I would suggest he consider arthroscopy given that he has tried therapy with no benefit.”

Dr. Cartwright performed surgery on April 28, 2022: “Arthroscopic anterior labral repair and capsulorrhaphy of the LEFT shoulder....Arthroscopic rotator cuff repair of the SUPRASPINATUS (superior rotator cuff) of the LEFT shoulder....Arthroscopic repair of a type 2 SLAP lesion of the LEFT shoulder....Arthroscopic resection of the distal clavicle of the LEFT shoulder....Arthroscopic extensive debridement of synovium, posterior labrum, subscapularis, and subacromial bursa of the LEFT shoulder....Arthroscopic lysis of adhesions and manipulation under anesthesia of the LEFT shoulder....Arthroscopic subacromial decompression and acromioplasty of the LEFT shoulder.” The post-operative diagnosis included “High grade partial thickness tearing of the supraspinatus of the LEFT shoulder.” Dr. Cartwright provided follow-up treatment after surgery.

The claimant signed a Form AR-C, CLAIM FOR COMPENSATION, on May 10, 2022. The ACCIDENT INFORMATION section of the Form AR-

C indicated the Date of Accident was February 12, 2022. The cause of injury was described: "Lt. Shoulder. Repetitive Motion Each hour of shift, I pick up 50 lb bags (1200 lbs per pallet, 4 pallets per hour) and set on my work table, strip open bag (remove outer layer of bag) then pour contents from inner layer into rivet blender. Once each pallet is blended, I weigh, seal and move to warehouse location using electric forklift. Then I go back & start over. Also stack empty pallets & trash at end of shift." The CLAIM FOR COMPENSATION was filed with the Commission on May 16, 2022.

A WORKERS COMPENSATION – FIRST REPORT OF INJURY OR ILLNESS was prepared on May 17, 2022. The FIRST REPORT OF INJURY OR ILLNESS indicated that the TYPE OF INJURY/ILLNESS was "L SHOULDER TENDINITIS." The injury was described as OCCUPATIONAL DISEASE OR CUMULATIVE INJURY which occurred while the claimant was "LIFTING." The FIRST REPORT OF INJURY OR ILLNESS also indicated that the injury occurred as the result of "L SHOULDER REPETITIVE MOTION."

The claimant signed a Form AR-N, EMPLOYEE'S NOTICE OF INJURY on May 24, 2022. The ACCIDENT INFORMATION section of the Form AR-N indicated that the Date of Accident was February 12, 2022, and that the employer was notified of the accident at 7:05 a.m. on February 12, 2022. The claimant discussed the cause of injury: "Repetitive Motion –

Each hr of shift, pick up 50# bags, 1200# per pallet, 4 pallets per hr & set on table, strip open X 2, pour contents into river blender. Once blended, weigh, seal & move to warehouse location using elec. fork lift. Go back & start again. End of day – stack empty pallets, c/o trash, etc.”

The claimant received physical therapy visits beginning June 9, 2022.

The record contains a Return-to-Work Medical Assessment Form dated August 1, 2022. The document indicated that the claimant would return to unrestricted work as of August 3, 2022.

The claimant testified that he returned to work for the respondents on August 3, 2022.

A pre-hearing order was filed on September 13, 2022. According to the text of the pre-hearing order, the claimant contended, “On 2/12/2022, claimant was lifting several 50-lb bags onto a table. He has done this for 17 years. On the day of the accident, he became unable to lift any more bags due to pain in his left shoulder. Claimant reported the injury to the nurse, but his claim was denied in its entirety. Claimant sought treatment on his own, He had an MRI to his left shoulder, and it revealed a tear. Claimant underwent surgery. Claimant contends that he sustained a compensable injury in the scope and course of his employment and that he is entitled to

medical benefits, TTD and that his attorney is entitled to an attorney fee. All other issues are reserved.”

The parties stipulated that the respondents “have controverted the claim in its entirety.” The respondents contended, “Respondents contend that Claimant did not suffer a compensable gradual onset or specific incident injury on 2/12/22 while working for Respondent/Employer. The claimant failed to provide notice of a claimed injury until 5/16/22.

Respondents contend that in the event compensability is found, they would not be liable for benefits until receipt of actual notice of a claimed injury.”

The parties stipulated that “if Claimant is able to prove his left shoulder injury to be a compensable injury, the respondent is entitled to a credit for short term disability benefits as provided in the Arkansas Workers’ Compensation Act.”

The parties agreed to litigate the following issues:

1. Whether Claimant sustained a compensable gradual onset injury to his left shoulder culminating on or about February 12, 2022; or alternatively, whether he sustained a specific injury to his left shoulder on February 12, 2022.
2. Whether Claimant is entitled to payment of medical bills.
3. Whether Claimant is entitled to additional medical treatment.
4. Whether Claimant is entitled to temporary total disability benefits from February 12, 2022, to August 3, 2022.
5. Whether Claimant’s attorney is entitled to an attorney fee.
6. Respondents raise Lack of Notice as a defense to the claim.

After a hearing, an administrative law judge filed an opinion on January 31, 2023. The administrative law judge found, among other things, that the claimant failed to prove he sustained a compensable injury. The administrative law judge therefore dismissed 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).

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 adjudicate the claim *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).

An administrative law judge found in the present matter, "2. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset injury to his left shoulder culminating on or about February 11, 2022." The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his left shoulder. The claimant, who we find was a credible witness, has been employed with the respondents since 2000. The claimant worked on the "Spice Utility Prep" line for the respondents. The claimant testified that he unloaded bags of spices from pallets, and the record shows that the claimant's work for the respondents was repetitive. The claimant credibly described "1200 pound" batches on

pallets which he unloaded and processed at a rate of 50 per hour. The claimant's testimony indicated that he performed this work for at least eight hours daily. The claimant's left shoulder gradually began hurting as a result of these work activities.

The claimant testified that he reported these symptoms to the company nurse, Lisa Chambers, beginning about February 11, 2022. At hearing, Lisa Chambers basically denied the claimant's testimony and stated that the claimant did not report that his symptoms were related to work. Nevertheless, the Full Commission recognizes Dr. Kirkland's February 11, 2022 report where Dr. Kirkland stated, "Works at Conagra and does repetitive lifting 50 lb. bags and uses left arm mostly when pouring the bags." The respondents argue that the claimant did not provide statutory notice of his injury. Yet the record clearly includes a Conagra Foods document dated February 11, 2022 which states in part, "What is the reason for this absence? Work Related Injury or Illness...EE has shoulder pain in left shoulder." Further, the Modified Duty Agreement indicated on February 11, 2022 that the claimant had sustained a "recent injury/illness." Individuals signing this document included the claimant, a Human Resources Representative, a Supervisor/Manager, and the Occupational Health Nurse. The evidence therefore demonstrates that the claimant provided timely notice in accordance with Ark. Code Ann. §11-9-

701(b)(1)(A)(Repl. 2012). There were clearly objective findings of injury, *i.e.*, a “partial thickness tear” shown on April 7, 2022. The Full Commission finds that the “partial thickness tear” was causally related to the gradual-onset injury to the claimant’s left shoulder. The claimant underwent left shoulder surgery on April 28, 2022.

The claimant contended on his Form AR-C that he picked up 50-pound bags at the rate of 1200 pounds per pallet, 4 pallets per hour. The claimant credibly testified that these duties were performed at least eight hours daily and sometimes greater than eight hours daily. The evidence shows that the claimant was repetitively lifting 24 50-pound bags from a pallet, four times each hour, for a total of 96 bags per hour. The record shows therefore that the claimant was lifting at least 768 50-pound bags daily. The Full Commission finds that the claimant’s work duties for the respondents were both rapid and repetitive. *See Malone, supra*. The Full Commission also notes that the claimant returned to work for the respondents following his release from surgery.

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 left shoulder, which arose out of and in the course of employment, and was

caused by rapid repetitive motion. The claimant also established a compensable injury by medical evidence supported by objective findings. The claimant proved that the compensable injury was the major cause of his disability and need for treatment.

After reviewing the entire record *de novo*, therefore, the Full Commission finds that the claimant proved he sustained a compensable injury to his left shoulder. The claimant proved that the medical treatment of record, including surgery performed by Dr. Cartwright, was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012). The evidence demonstrates that the claimant remained within a healing period and was totally incapacitated from earning wages beginning February 12, 2022 and continuing until August 3, 2022. The claimant therefore proved that he was entitled to temporary total disability benefits beginning February 12, 2022 and continuing until August 3, 2022. *See Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The respondents are entitled to an appropriate offset in accordance with Ark. Code Ann. §11-9-411(Repl. 2012).

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an

additional 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's determination that the claimant proved by a preponderance of the evidence he sustained a left shoulder injury while employed by the respondent employer on or around February 12, 2022, and is entitled to medical treatment and temporary total disability benefits.

Arkansas Code Annotated section 11-9-102 (4)(A)(ii)(a) provides that a compensable injury includes "(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."

The supreme court in *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1998), noted that the legislature did not establish guidelines as to what constitutes "rapid repetitive motion" and that as a result, that determination has been made by the fact-finder in each case. After reviewing rapid repetitive motion cases, the court in *Malone*, *supra*, established a test for 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. As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition. The repetitive tasks must be completed rapidly." *Id.* The facts of *High Capacity Products v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998), present a compelling picture of what constitutes rapid repetitive motion. There, the testimony indicated that the claimant used an airgun to assemble blocks by attaching two nuts to each block with a quota of one thousand units per day. Her assembly duties required her to attach a nut every fifteen seconds. This 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 in a box. *Id.*

In the present case, the ALJ determined that while “[i]t is certain that the claimant gave testimony that demonstrated he would be working at a rapid pace . . . [i]t is difficult to find it reasonable that some operation or movement of the body is repetitive when that operation or movement only occurs during well less than half of the workday.” (ALJ Op., P. 15). At the November 3, 2022 hearing, the claimant testified that over the course of an eight hour shift, he could deliver and process four pallets an hour. (Hrng. Tr., P. 17). Each pallet consists of forty bags of seasoning weighing fifty pounds each. *Id.* Most days, the claimant lifted, stripped, and emptied approximately twelve pallets during an eight-hour shift, although at times he may be called to work longer shifts and to process sixteen to eighteen pallets per day. (Hrng. Tr., Pp. 16-19). Although the hearing testimony did not investigate how the claimant spent the remainder of his days at work, it is clear that at the pace he describes, the claimant’s processing work, even assuming eighteen pallets per day would be done within approximately 4.5 hours, or a little over half of a shift. For this reason alone, the claimant’s work cannot be considered repetitive. If the claimant was indeed only processing twelve pallets or even up to eighteen pallets over the course of an eight hour shift, I would argue that his duties were neither rapid nor repetitive given the evident lack of time constraints. For this reason alone,

the claimant has failed to meet his burden of proving that his injury was caused by rapid repetitive motion.

According to the testimony of the claimant, a normal workday consisted of him processing only twelve pallets during a shift which would take up much less than half of his shift. Even on the days when he processed up to eighteen pallets during a shift, this work would only take up approximately half of his workday. Since processing pallets only took up a portion of his shift, this activity cannot be considered rapid or repetitive. He did not testify about being under any time constraints or offer any real proof that the processing of the pallets was rapid. He testified that he could process four pallets an hour, but never testified he had to work rapidly to process four in an hour. Since the record does not contain any testimony on this crucial point, the claimant has failed to prove his work was rapid. The claimant testified that on most shifts he processed twelve pallets per shift. The fact he would only handle twelve pallets during an eight hour shift is proof itself that his job was not repetitive. In addition, processing pallets was not his only job duty. According to the WorkSmart Analysis attached as an exhibit to the claimant's deposition, there were twelve duties he was to perform during his shift. (Resp. Ex 3). The record is devoid of any proof or testimony that any of these other duties were rapid or repetitive. The fact the claimant had many other duties to perform during

his shift that were not rapid or repetitive is additional proof that his job duties for the respondent employer were not rapid or repetitive.

The claimant pleads in the alternative that his injury was the result of a specific incident. To prove the occurrence of a specific-incident compensable injury, the claimant must establish that (1) an injury occurred arising out of and in the scope of employment; (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death; (3) the injury is established by medical evidence supported by objective findings as defined in Arkansas Code Annotated section 11-9-102(16); and (4) the injury was caused by a specific incident and is identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i); *Springfield Grocer Co. v. Chaulsett*, 2023 Ark. App. 53, 659 S.W.3d 731 (2023).

There was little testimony on this point at the November 2022 hearing; however, when asked directly both at his deposition and at the hearing whether there was “any type of anything specific that happened in February,” the claimant testified, “No, it just started hurting,” and described a “throbbing” sensation. (Hrng. Tr., P. 34). In fact, the claimant testified that by February of 2022, his shoulder had been hurting for several weeks and he had ignored it. (Hrng. Tr., P. 30).

The claimant can point to no specific incident that resulted in his alleged injury, and he has therefore failed to meet his burden of proof that he sustained a specific incident on or around February 12, 2022.

For the reasons stated above, I respectfully dissent.

MICHAEL R. MAYTON, Commissioner