BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H101972

PHILIP REDFEARN,
EMPLOYEE **CLAIMANT**

OLDCASTLE, INC.,
EMPLOYER **RESPONDENT**

LIBERTY MUTUAL INS. CORP./
LIBERTY MUTUAL INS. GROUP,
INSURANCE CARRIER/TPA **RESPONDENT**

OPINION AND ORDER FILED OCTOBER 5, 2022

Hearing before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge Mike Pickens, on July 8, 2022, in Texarkana, Miller County, Arkansas.

The claimant was represented by the Honorable Gregory R. Giles, Moore, Giles & Matteson, L.L.P., Texarkana, Miller County, Arkansas.

The respondents were represented by the Honorable Zachary Ryburn, The Ryburn Law Firm, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the Prehearing Order filed June 24, 2022, parties agreed to the following stipulations, which they (modified as set forth below and) 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 December 7, 2020, the date the claimant alleges he became temporarily totally disabled from working as a result of a carpal tunnel injury to his right wrist and right hand due to the rapid, repetitive nature of his job duties.

3. The claimant's average weekly wage (AWW) was $1,448.28, which is sufficient to entitle him to weekly compensation rates of $711.00 for temporary total disability (TTD), and $533.00 for permanent partial disability (PPD) benefits, *if* the claim is deemed compensable.

4. The claimant stipulates he applied for and received $295.00 in accident and sickness pay during the period of time he was off work.
5. The respondents have controverted this claim in its entirety.

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

(Commission Exhibit 1 at 1-2; Hearing Transcript at 5-6). Pursuant to the parties' mutual agreement, the issues litigated at the hearing were:

1. Whether the claimant has sustained a "compensable" carpal tunnel injury to his right wrist/right hand within the meaning of the Arkansas Workers' Compensation Act (the Act) which culminated in disability on December 7, 2020.

2. If the claimant's right wrist/right hand carpal tunnel injury is deemed compensable, whether and to what extent he is entitled to TTD and PPD 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. 5-6). In addition, the parties agreed the threshold issue to be litigated at the hearing was whether the statute of limitations (S/L) of ***Ark. Code Ann.*** Section 11-9-702(a) (2022 Lexis Replacement) barred the claimant's claim for benefits. (T. 5-6).

The claimant contends he sustained a compensable carpal tunnel syndrome (CTS) injury to his right hand and right wrist as a result of the rapid repetitive nature of his work. He contends he is entitled to TTD benefits from on or about March 11, 2021, through the date he reached maximum medical improvement (MMI), on or about July 24, 2021. The claimant contends he is entitled to PPD benefits based on the scheduled ten percent (10%) permanent anatomical impairment rating his treating physician assigned based on his right wrist/right hand CTS. The

claimant further contends the medical treatment he has received since December 7, 2020, is related to and reasonably necessary for treatment of the subject injury and, therefore, the respondents should be found liable for payment of his medical bills and any and all related and out-of-pocket expenses. Finally, the claimant contends the respondents should be ordered to pay his attorney a controverted fee pursuant to the applicable law. The claimant specifically reserves any and all other issues for future determination and/or hearing. (Comms'n Ex. 1 at 2-3; T. 5-6; 9-10).

The respondents first contend the claimant's claim for benefits is barred by the applicable S/L of ***Ark. Code Ann.*** Section 11-9-702(a)(1). The respondents further contend the claimant cannot meet his burden of proof pursuant to the Act in demonstrating he has sustained a "compensable" CTS injury. Specifically, the respondents contend the claimant's work duties were not and are not the "major cause" of his CTS, and/or his need for medical treatment. Finally, since they contend the claimant's alleged CTS injury is not compensable, they contend he is not entitled to any medical, TTD, and/or PPD benefits, and his attorney is not entitled to a controverted fee. The respondents specifically reserve any and all other issues for future determination and/or hearing. (Comms'n Ex. 1 at 3; T. 8-10).

STATEMENT OF THE CASE

The claimant, Mr. Philip Redfearn (the claimant), is 53 years old. He has worked for the respondents' plant in Foreman, Arkansas (including their predecessor company, Ashgrove Cement) since August 9, 1993, almost 20 years as of the hearing date. The respondents (as did their predecessor company, Ashgrove Cement) make cement. The claimant began working as a

controlled chemist in 2003. This job requires him to test the quality of the cement. The record includes a video on a thumb drive that shows the claimant's job duties in detail as a picture – or in this case a video – is indeed, worth a thousand words. (Claimant's Exhibit 1; and CX2 at 1). The claimant testified the video accurately represents his job duties. The job duties he alleges caused his CTS. He testified he works 36 hours for three (3) weeks, and then 48 hours for three (3) weeks. The claimant testified he works approximately seven (7) to eight (8) days of overtime, which consists of 12-hour days. Since the video in evidence depicts the claimant's job duties, I will not explain them in great detail, but will allow the video to speak for itself. In essence, the claimant's job requires him to put pellet-shaped samples of the cement in a Buhler bowl which then is placed in a press which causes the pellet to change form from a solid pellet to dust. The claimant then uses a brush to clean-out the Buhler bowl, and then the dust is X-rayed to determine the quality of the cement. The claimant testified he brushes out around 40 to 45 Buhler bowls during an average 12-hour day at the time he began to experience symptoms. The number of Buhler bowls he worked with per day increased after the year 2010. The claimant is right-handed, and used his right hand to brush-out the Buhler bowls as can be seen in the video. (T. 10-36).

In summary, the respondents' representative at the hearing, Ms. Tabatha Bell, testified the video accurately represented the claimant's job duties, but described it as more of "a very textbook example", more of an "instructional video" that could be used as a "training video", and not necessarily the way the claimant or any other worker would necessarily perform this job duty on a consistent basis. Ms. Bell said the claimant would typically clean-out 20 to 25 Buhler bowls per day, not the 40 to 50 which she understood the claimant had mentioned in his testimony. (T. 85-99).

The transcript contains a great deal of both direct testimony and cross-examination back-and-forth between the claimant and the respondents' attorney, and Ms. Bell and the claimant's attorney; however, the video of the claimant's job duties accurately depicts the gist and requirements of the claimant's job duties in testing the cement samples and cleaning-out the Buhler bowls. (T. 9-109; CX1 and CX2 at 1).

The claimant testified that in 2004 he was working at Ashgrove Cement, the respondents' predecessor company, when he was using a wrench to pull on a bar and tore a tendon in his left elbow. The claimant explained he was in a different position in 2004, and had different job duties than he did at the time of the subject claim. This left elbow tendon injury resulted in a workers' compensation claim; the claimant underwent several surgeries on his left elbow and that, during the fourth surgery the claimant's treating physician discovered he had CTS in his left wrist at that time in 2004, but the claimant testified he had never noticed any CTS symptoms at that time because the tendon in his left elbow was hurting so bad. The claimant also testified he never attributed his different work duties, at that time, to be the cause of his left wrist CTS, and he never filed a workers' compensation claim for CTS, at that time. There is no indication in the medical records that the claimant was having any CTS-related symptoms in his right wrist/right hand at that time, and he was not diagnosed with right wrist/right hand CTS at that time. The claimant's treating physician at that time, Dr. Bindra, a physician associated with the University of Arkansas for Medical Sciences (UAMS) apparently performed a CTS release at the same time he repaired the torn tendon in the claimant's left elbow when he/Dr. Bindra "relocated my ulnar nerve." The claimant was never tested for right wrist CTS at that time as there "was never any indication of

right Carpal Tunnel Syndrome at that time." The claimant agreed he had no indication of why it occurred or why the left wrist CTS occurred in 2004, and that he didn't even know he had CTS in his left wrist "until the nerve study with the doctor in Little Rock said I had it." Apparently, the claimant required and had no treatment for the left wrist CTS in 2004, nor has he required any treatment for the left wrist CTS in 2004 or since then until some 16 years later in 2020, which is part of the subject claim. Since 2004 the claimant candidly admitted he has had a total of six (6) workers' compensation claims with the respondents, but these were related only to his left elbow and left knee, not his preexisting left wrist CTS. (T. 54-58; 57; Respondents' Exhibit 1 at 4-14).

The medical record reflects the claimant reported to Dr. Vernon Bowman on December 10, 2020, complaining of moderate numbness in his right hand and right thumb. Dr. Bowman noted this numbness began approximately three (3) months prior; that the claimant's job duties caused the numbness to increase in intensity, but was better when the claimant was not performing his job duties; and noted the claimant had a "repetitive motion injury at work preparing and testing cement samples." Dr. Bowman's initial assessment of the claimant's condition was, "Carpal tunnel syndrome, right upper thumb." He ordered an EMG and nerve conduction study. (CX3 at 2-5).

These initial EMG and nerve conduction studies were conducted on December 15, 2020. The claimant was diagnosed with moderate CTS. The clinic notes for this date state, "Comment: Work related, advise brace and off duty and ortho consult." (CX3 at 6-9). On 6/24/2022, Dr. Mark Wren noted the claimant had CTS which he opined was work related, and he stated his, "Opinion stated within a reasonable degree of medical certainty." (CX3 at 10). A physician's assistant (PA), Raven Falls, also opined the claimant's right hand/wrist CTS was related to his work with the respondents'. (CX3 at 13-14). In a letter dated February 2, 2021, Dr. Bowman confirmed his

opinion that the claimant's right hand/wrist CTS was work-related and stated within a reasonable degree of medical certainty. (CX3 at 23-24). In a letter dated February 25, 2021, Courtney Malone, an advanced practice nurse (APRN) for Healthcare Express, the respondents' company medical provider stated: "I cannot conclude that this task [the claimant's subject work duties with the respondents] has cause [sic] his carpal syndrome and it is most likely an ordinary disease of life." (CX3 at 26) (Bracketed material added). In a report dated February 4, 2021, by Hartman & Associates, a vocational consulting firm located in Garland, Texas, opined the claimant's CTS was not work-related. (Respondents' Exhibit 1 at 1-3).

Ms. Natalie Wilson, a case manager, filed a first report of injury form on December 16, 2020, and a Form AR-2 on February 23, 2021, the latter of which stated the respondents were controverting the claimant's alleged right hand/right wrist injury. (CX3 at 15 and 25). A Form AR-C was filed with the Commission on the claimant's behalf on June 7, 2021. (CX3 at 81).

After a period of conservative treatment which included splinting his right wrist, the claimant eventually was referred to Dr. Thomas Frazier, an orthopedic surgeon who specializes in hand and related injuries and is associated with OrthoAR in Little Rock, Arkansas. (CX3 at 22). Dr. Frazier first examined the claimant on March 9, 2021, reviewed the relevant diagnostic studies, and confirmed the diagnosis of right wrist/right hand CTS, and soon thereafter performed a right carpal tunnel release out-patient surgery on March 17, 2021. (CX3 at 27-37). The claimant thereafter underwent physical therapy (PT), and continued to see Dr. Frazier for follow up after the surgery. (CX3 at 49-51; 52-80; 81-135). Dr. Frazier released the claimant to return to work effective July 25, 2021, and assigned him a 10% permanent anatomical impairment rating to his right hand. (CX3 at 136-137). The claimant has returned to work and was working as of the subject

hearing date.

The record reveals the claimant incurred $902.72 in mileage, and out-of-pocket expenses of $2,692.40 related to treatment of his right wrist/right hand CTS. (CX3 at 139-140).

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).

First, let me state on the record that I found both the claimant and the respondents' witness to be knowledgeable, professional, sincere, and credible witnesses. Both witnesses were articulate and explained their respective positions very well. And, as always, both the claimant's and the respondents' attorneys did an excellent job representing their respective clients. My decision in this case is based, of course, on the applicable law – both statutory and common – and largely on the objective medical evidence as set forth in the medical record.

Based on the applicable law as applied to the facts of this particular case, I am compelled to find the claimant has met his burden of proof in demonstrating both his claim is *not* barred by the applicable S/L, and that the he has met the Act's requirements in demonstrating his right

wrist/hand CTS is more probably than not related to his job duties as depicted on the video evidence in the record. Therefore, as set forth in more detail below, the claimant is entitled to his medical and related benefits such as mileage and out-of-pocket expenses, and to both TTD and PPD benefits as explained below.

Statute of Limitations (S/L) of *Ark. Code Ann.* Section 11-9-702(a)(1)

The respondents first contend this claim is barred by the applicable statute of limitations (S/L) which is set forth in ***Ark. Code Ann.*** §11-9-702(a)(1) (2022 Lexis Repl.) which states as follows:

> A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within (2) years from the date of the compensable injury. If during the two-year period following the filing of the claim the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.

It is long-standing and well-established law in Arkansas that the purpose of the statute of limitations (S/L) in workers' compensation cases is to permit prompt investigation of claims, and treatment or work-related injuries. *Woodard v. ITT Higbie Mfg. Co*., 271 Ark. 498, 609 S.W.2d 115 (1980; *St. John v. Ark. Lime Co*., 8 Ark. App. 278, 651 S.W.2d 104 (1983). Likewise, Arkansas workers' compensation law provides in ***Ark. Code Ann. Section*** 11-9-702(a)(1) that the applicable S/L does not begin to run until the true extent of the injury manifests itself and causes an incapacity to earn the wages he was receiving at the time of the accident. See, *Ark. La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433

(1983); and *Hall's Cleaners v. Wortham*, 38 Ark. App. 86, 829 S.W.2d 424, aff'd, 311 Ark. 103, 842. S.W.2d7 (1992).

Put another way, the S/L does not begin to run until the employee knows or should be reasonably expected to be aware of the true nature and extent of the injury. *Freeman v. Tiffany Stand & Furn*., 20 Ark. App. 183, 726 S.W.2d 294 (Ark. App. 1987); appeal dismissed, *American Mut. Ins. Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (Ark. App. 1983).

Specifically, in the case of an alleged gradual onset injury such as the one at issue herein, whether the gradual onset injury occurs over a period of years, or months, or weeks, or days, the S/L does not begin to run until the claimant should reasonably be expected to be aware of the true nature and extent of his injury. See, *Cooper Tire, supra*.

In this case, the earliest the claimant should reasonably have been expected to be aware of his right hand/right wrist injury and the fact it may very well be work related was when he first reported to Dr. Bowman on December 10, 2020. A nurse case manager filed a first report of injury on December 16, 2020; and a Form AR-C was filed with the Commission on the claimant's behalf on June 7, 2021, well within the two (2)-year S/L which I find began to run on December 10, 2020. (CX3 at 15, 25, and 81). Therefore, it is readily apparent the claimant's claim for benefits herein is not barred by the applicable S/L, as the claimant both reported the alleged subject injury and filed a Form AR-C well within the two (2)-year statutory

deadline.

Compensability: Gradual Onset/CTS

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 Repl.) 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 CTS 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). The Act specifically defines "objective findings" 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).

Finally, a gradual onset injury caused by rapid repetitive motion, including CTS, 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). 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 met his burden of proof pursuant to the Act in demonstrating by a preponderance of the medical and other relevant evidence of record in demonstrating his CTS is more probably than not caused by his job duties. My decision is based on the following rationale.

First, the video as well as the claimant's job description contained in the record depict a job duty that may reasonably be characterized as rapid and repetitive in nature, if that requirement is even relevant on these facts in light of the *Baldwin Piano* case, *supra*. To this finder of fact the video depicts a job duty that requires significant use of the claimant's right wrist in order to brush out the Buhler bowls. I specifically find such job duties are consistent with the development of CTS. Moreover, on the specific facts of this case I also specifically find the opinions of Drs. Wren and Bowman, as well as that of PA Raven Falls that the claimant's right wrist/right hand CTS is work-related to be more informed and credible than those of APRN Courtney Malone and the

Hartman & Associates report who opined the CTS was not work-related.

Second, while the respondents' attorney is to be commended for attempting to attribute the claimant's CTS to other non-work-related activities such as hunting, riding a four (4)-wheeler, shooting a shotgun, welding, and other such activities, there exists no credible evidence in the record, medical or otherwise, supporting this speculative defense theory. (T. 62-70). Just as sheer speculation and conjecture do not support a claim for benefits, sheer speculation and conjecture such as defense counsel's clever line of questioning in this regard cannot and do not support a denial of benefits, either, since sheer speculation and conjecture do not constitute credible evidence. See, *Deana, supra*. In this case, the preponderance of the credible evidence of record, medical and otherwise, supports the conclusion the claimant's right wrist/right hand CTS is work-related on these facts, and constitutes a "compensable injury" within the Act's meaning.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations contained in the Prehearing Order filed June 24, 2022, are hereby accepted as facts.

2. The claimant has met his burden of proof in demonstrating the subject claim is not barred by the applicable statute of limitations of ***Ark. Code Ann***. Section 11-9-102(a)(1).

3. The claimant has met his burden of proof in demonstrating his CTS is more probably than not related to his subject work duties.

4. The claimant has met his burden of proof in demonstrating he is entitled to payment of his medical expenses, and any and all related benefits such as mileage and other out-of-pocket expenses as set forth in the "Statement of Facts", *supra*; to TTD benefits from March 11, 2021, through the date he reached MMI on July 24, 2021, and was released to and did return to work for the respondents; and to PPD benefits based on the scheduled 10% permanent anatomical impairment rating Dr. Frazier

assigned him based on his CTS.

5. The claimant's attorney is entitled to a controverted fee on the immediately aforementioned TTD and PPD benefits.

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

MP/mp