NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H109777

RONALD L. STEWARD,
EMPLOYEE CLAIMANT

INTERNATIONAL PAPER CO.,
EMPLOYER RESPONDENT

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.
CARRIER/TPA RESPONDENT

OPINION FILED MAY 2, 2023

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

Claimant represented by the HONORABLE MATTHEW J. KETCHAM, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by the HONORABLE JOHN P. TALBOT, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed October 6, 2022. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

> 1. The stipulations agreed to by the parties at a pre-hearing conference conducted on May 5, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact, as is the stipulation announced at the hearing regarding the claimant's compensation rate.
>
> 2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable gradual-onset injury to his right bicep.
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> 3. Claimant has met his burden of proof by a preponderance of evidence that he is entitled to temporary total disability benefits beginning June 4, 2021 and continuing through January 31, 2022.
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> 4. Claimant has met his burden of proof by a preponderance of the evidence that he is entitled to medical benefits in the amount of $23,508.36.
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> 5. Respondents have failed to prove by a preponderance of the evidence that claimant is barred from receiving benefits due to false statements on his employment application.
>
> 6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's October 6, 2022 decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the

Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2012).

For prevailing on this appeal before the Full Commission, claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715 (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 sustained a compensable gradual onset right bicep injury while working for International Paper Company.

I. The claimant has not met his burden of proving that he suffered a gradual onset injury caused by rapid repetitive motion.

Arkansas Code Annotated section 11-9-102 (4)(A)(ii) 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-compressor equipment to attach the parts together with nuts, and throwing the units in a box *Id*.

With regard to the alleged injury, the claimant's job with International Paper Company ("IPC") was "general box worker." (Hrng. Tr., P. 8). The claimant started this position in March 2019 and alleges he was injured by

the end of May 2019. (Hrng. Tr., Pp. 8, 12-13). The claimant explained that for this job, “the boxes come down the conveyor belt and they are going on to a table and we have to check through the boxes to make sure that they are correct and no damages. And then we have to push them over to a conveyor belt to the left.” (Hrng. Tr., P. 8). The weight of boxes varied from an estimated five to fifty pounds. (Hrng. Tr., P. 10). Sliding the boxes is assisted by an air pressure thing that helps slide the boxes and by the table being dampened to be slick. (Hrng. Tr., P. 10). In essence, this position consisted entirely of pushing boxes from one conveyor belt to an inspection table and onto another conveyor platform that actually grabs the boxes, turns them, and takes them to another area. (Hrng. Tr., P. 12).

Any claim for a rapid repetitive motion injury here fails at the second prong of the analysis, even if the assessment for the purposes of argument the job was repetitive. There is no proof that the motion required to push boxes from one place to another was rapid. While the claimant alleges that the conveyor moved “fast,” he provided no details on how many boxes he would handle per minute, the number of boxes he handled per shift or how much time was spent on each shift performing these tasks. (Hrng. Tr., P. 10). The claimant has simply failed to provide any proof that his work was rapid in nature other than his self-serving testimony that the conveyor moved fast. Importantly, a claimant’s testimony is never uncontroverted. *Nix*

v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

As an initial matter, the ALJ stated in his Opinion that "Claimant described the work as 'really fast,' and that there were times when the boxes he was charged with inspecting and placing on a different conveyor line were pushing each other; that indicated to me there were times he was not able to keep up with the rapid pace." (P. 15). There was no testimony provided by the claimant that he was not able to keep up with the rapid pace and there was no testimony at all as to the pace other than his statement that it was "really fast." (Hrng. Tr., P. 10). It is up to the claimant to prove by a preponderance of the evidence his job was rapid and repetitive and it is not enough for him to state his own opinion that his job is rapid and repetitive. With that statement, the claimant reached his own legal conclusion which was accepted by the ALJ and the Majority.

Simply put, "[s]peculation and conjecture cannot substitute for credible evidence." Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002) (citing Dena Constr. Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1980)). Since no proof was presented other than the claimant's statement that the conveyor moved fast, he has not satisfied his burden of proof that his job was rapid. The statement by the ALJ that the claimant's testimony indicated to him there were times that the claimant was not able to keep up with the rapid pace does not satisfy the claimant's burden of

proof when the record contained no testimony as to the pace of the claimant's job.

Even if the claimant successfully establishes that his injury was caused by rapid repetitive motion, he has shown no proof of a causal connection between his injury and his work at IPC. When the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury. *Ingram v. Tyson Mexican Original*, 2015 Ark. App. 519 (2015). However, for this rule to apply, the basic test is whether there is a causal connection between the injury and the consequences of such. The burden is on the employee to establish the necessary causal connection. *Id*.

Throughout the claimant's treatment for the right bicep tear, his providers agreed that this was not a workers' compensation matter. First, at an August 31, 2021 visit, Patrick Walton, PA reported that the injury "[d]oes not appear to be a workers comp. issue." (Resp. Ex. 1, P. 56). Then, on October 20, 2021, when specifically asked on a disability form whether the injury was work related, Dr. Steven Smith indicated no. (Resp. Ex. 1, P. 63). Dr. Smith reiterated on January 22, 2022 that this injury was not work related. (Resp. Ex. 1, P. 71). In addition, in his Operative Report dated September 30, 2021, Dr. Smith noted "significant synovitis . . .and actually quite a bit of degenerative change" with "grade 3 chondromalacia with some

delamination of the cartilage" and "[s]ignificant bursitis." (Resp. Ex. 1, P. 62). This is additional evidence that the claimant's medical conditions were not work related.

II. This injury is not compensable due to the *Shipper's Transport* defense.

In *Shipper's Transport of Georgia v. Stepp,* the Arkansas Supreme Court adopted the rule that a claimant's false representation regarding his physical condition in procuring employment will bar the claimant from obtaining benefits if the employer shows that (1) the employee knowingly and willfully made a false representation as to his physical condition; (2) the employer relied on the false representation and this reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury. Whether or not these factors exist are questions of fact for the Commission to resolve findings are supported by substantial evidence. 265 Ark. 365, 578 S.W.2d 232 (1979*)*; *Newsome v. Union 76 Truck Stop,* 34 Ark. App. 35, 805 S.W.2d 98 (1991).

The ALJ correctly determined that the claimant knowingly made false representations as to his physical condition. The claimant was required to complete a questionnaire regarding his physical health, provide his health history to IPC, and undergo a health assessment with Cynthia Johnson, APRN prior to beginning work. (See Resp. Ex. 2, Pp. 2-11). While the

claimant alleges that he did not understand the questions posed on the Arkansas Occupational Health Clinic intake questionnaire, his excuses fall flat. (See Resp. Ex.2, Pp. 8-9). While the claimant states that he assumed the questionnaire was "saying do you have any of these symptoms now," the form is clear in asking, "Have you ever had or have you now" a number of medical conditions including migraines; neck, shoulder, or arm pain, injury or surgery; back pain, strain, herniated disc, or surgery; and a condition which would require a specific work assignment. (Hrng. Tr, P. 44, Resp. Ex. 2, Pp. 8-9). The claimant selected "no" for each, directly contradicting his medical history. (See Resp. Ex. 1, Pp.1-47).

The claimant's misrepresentation of his medical history was a factor in his employment. Due to the claimant's self-reporting on the intake questionnaire, Cynthia Johnson approved him to work with no restrictions. (Resp. Ex. 2, P. 11). IPC expects prospective employees to answer truthfully on these questionnaires. (Hrng. Tr., P. 60). These responses affect an employee's placement within the company and any job restrictions. *Id*. While the ALJ notes that the forms the claimant completed dishonestly were "Post-Offer/Pre-Placement Health" documentation, he fails to investigate the correlation between the information in these forms and the claimant's final hiring and placement with IPC. The health evaluations conducted by IPC impact an employee's placement and duties and surely

impact their ultimate employability. (Hrng. Tr., P. 61). An employer's reliance on false statements by a prospective employee should not be limited to the moment of hiring - this factor is relevant throughout the hiring process. A reasonable interpretation of *Shippers Transport* would support the position of the respondent. The respondent relied on false statements made by the claimant on his employment application when placing him in his specific job, which is a part of the hiring process. A claimant should not be rewarded for making false statements on his employment application. For this reason, IPC's reliance on the claimant's false statements is sufficient to meet the requirements of a *Shipper*'s defense.

The ALJ determined the respondents failed to show a causal connection between the claimant's current complaint and his 2019 car accident. After his May 11, 2019 accident, the claimant presented at Valley Health Care in Fort Smith on June 26, 2019 complaining of "numbness down right arm and into hand" and radiating right arm pain. (Resp. Ex. 2, P. 6). The claimant's complaints of radiating right arm pain continued through his June 27, 2019, June 28, 2019, July 3, 2019 and July 22, 2019 visits with Valley Health. (Resp. Ex. 1, Pp. 10-12, 15). The claimant visited Valley Health an additional three times with continued complaints of numbness and pain in his right arm before being released from care on August 1, 2019. (Resp. Ex. 1, Pp. 16-19). The claimant then began treating with Dr.

Danny Silver at Meridian Clinic in Fayetteville, who stated that the claimant reported his pain "interferes with sleep, work and ADL's." (Resp. Ex. 1, P. 26 error in original). At that appointment, the claimant complained of right arm numbness, right shoulder pain, radiating pain in his right arm and right shoulder along with muscle spasms. (Resp. Ex. 1, P. 24). In his past medical history, his symptoms were listed as "strain of tendons at shoulder and upper arm level, right arm." (Resp. Ex. 1, P. 24). At a September 25, 2019 visit with Dr. Silva, the claimant reported "joint pain, excessive muscle aches, neck pain, upper extremity pain, shoulder pain, and numbness/tingling sensations." (Resp. Ex. 1, P. 30). At that visit, Dr. Silva considered that claimant may have suffered a strain of other muscles, fascia, and tendons at his shoulder, upper arm, and right arm. (Resp. Ex. 1, P. 31).The claimant was informed that he was unlikely to ever fully recover from these injuries. (Resp. Ex. 1, P. 6).

After his alleged injury while working for IPC, the claimant presented to the Good Samaritan clinic in Fort Smith with complaints identical to those from 2019, including "a constant discomfort, achy pain" in his right arm. (Resp. Ex. 1, P. 48). By June 10, 2021, the claimant's right shoulder pain had improved. (Resp. Ex. 1, P. 49). From these similarities, it is evident that the claimant's issues were a result of ongoing damage from his 2019 car accident. At that time, no efforts were made to find a concrete source of the

claimant's right shoulder and arm pain, and his doctors believed he was unlikely to fully recover from that injury. For this reason, the respondents have proved the final prong of the *Shipper's* defense and should not be responsible for the claimant's injury.

Additionally, *Shippers Transport* should not be so narrowly interpreted by the ALJ and the Majority in this case. Had the Supreme Court in *Shippers Transport* been presented with the facts of this case, I think they would have reached the same result as I have reached that the Claimant should be barred for his untruthful answers on his employment application especially because his answers were used by IPC to determine the particular employment activity to which he should safely be assigned, which was part of the overall hiring process. The rule of law in the *Shippers Transport* case should be expanded beyond the actual moment of hiring to encompass the entire hiring process, including job placement. To narrowly define the law of the *Shippers Transport* case destroys the intent of the Supreme Court decision to protect employers when claimants have been untruthful in the responses to the questions on the employment applications. To rule otherwise merely rewards the claimant for being untruthful and punishes the employer and the workers' compensation insurance carrier for relying on these false statements. This limited defense cannot be what the Supreme Court intended when they ruled in the

Shippers Transport case.

For the reasons stated above, I respectfully dissent.

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MICHAEL R. MAYTON, Commissioner