BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H203028

DWIGHT WILSON,
EMPLOYEE **CLAIMANT**

EXPRESS SERVICES, INC.,
EMPLOYER **RESPONDENT**

AIN INS. CO./
SEDGWICK CLAIMS MG'T SERVICES, INC.,
INS CARRIER/TPA **RESPONDENT**

OPINION AND ORDER FILED AUGUST 2, 2023

Hearing conducted on May 4, 2023, before the Arkansas Workers' Compensation Commission (AWCC), Administrative Law Judge (ALJ) Mike Pickens, in Texarkana, Miller County, Arkansas.

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

The respondents were represented by the Honorable Jarrod S. Parrish, Worley, Wood & Parrish, LLC, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the Prehearing Order filed February 16, 2023, 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 with the claimant at all relevant times, including March 21, 2022, when the claimant alleges he sustained a compensable injury to his right wrist, either as a result of a specific incident injury or a gradual onset injury that culminated in disability on that date.

3. The claimant's average weekly wage (AWW) was $500.50, which is sufficient to entitle him to weekly compensation rates of $334.00 for temporary total disability (TTD), and $250.00 for permanent partial disability (PPD) benefits *if* his claim is deemed compensable.

4. The respondents have controverted this claim in its entirety.

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

(Commission Exhibit 1 at 1-2; Hearing Transcript at 6-7). The parties agreed to an additional stipulation at the hearing, that being that the claimant had in fact applied for and was receiving Social Security disability (SSD) benefits, and that pursuant to ***Ark. Code Ann.*** Section 11-9-411 (2023 Lexis Replacement) the respondents are entitled to a dollar-for-dollar credit/off-set based on the amount of SSD benefits paid to the claimant. (T. 5-6)

Pursuant to the parties' mutual agreement the issues litigated at the hearing were:

1. Whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Act (the Act) to his right wrist as a result of either a specific incident or a gradual onset injury which culminated in disability on March 21, 2022.

2. If the claimant's alleged injury is deemed compensable, the extent to which he is entitled to medical and indemnity 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).

The claimant contends he sustained a compensable injury to his right wrist either as a result of a specific incident injury or a gradual onset injury which culminated in disability on March 21, 2022. He contends he is entitled to any and all related, reasonably necessary medical treatment and

related expenses, as well as TTD benefits from the date of his injury through a date yet to be determined. The claimant contends further his attorney is entitled to a controverted attorney's fee on any and all indemnity benefits awarded. (Comms'n Ex. 1 at 2-3; T. 5-6).

The respondents contend the claimant did not sustain and cannot meet his burden of proof in demonstrating he sustained either a compensable specific incident or gradual onset injury which culminated in disability on or about March 21, 2022. The respondents contend the claimant's need for medical treatment for his right wrist, if any, is associated with non-work-related, underlying, and preexisting problems or conditions, and not any alleged work injury, specific or gradual onset. Furthermore, with respect to the alleged gradual onset injury the respondents contend the claimant's job was not rapid and repetitive in nature, and that the medical records/documentation does not demonstrate the claimant's non-repetitive job duties were the "major cause" of his alleged right wrist injury or need for medical treatment. (Comms'n Ex. 1 at 3; T. 5-6).

The record consists of the hearing transcript and any and all exhibits contained therein and attached thereto.

STATEMENT OF THE CASE

The relevant facts are incorporated where applicable in the "Discussion" section of this opinion and order, *infra*.

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 has established it by a

preponderance of the evidence. ***Ark. Code Ann***. § 11-9-704(c)(2) (2023 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) (2023 Lexis Repl.) states that 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) (2023 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); *Dena 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).

As always, both attorneys did an excellent job zealously representing their respective clients and presenting their respective cases at the subject hearing – both of which resulted in a complete record that was most helpful to this ALJ in examining the relevant evidence and rendering the opinion herein. Consequently, based on the aforementioned law as applied to the facts of this case, and the totality of the credible evidence of record – both testimonial and documentary – I am compelled to find the claimant has failed to meet his burden of proof in demonstrating he sustained *either* a specific-incident compensable injury on March 21, 2022, or a gradual onset compensable injury which culminated in disability beginning on March 21, 2022, during the very short period of time he worked for Express Services from March 14, 2022, through March 21, 2022, for the reasons set forth below.

The claimant himself readily admits he did not sustain a specific-incident compensable injury on March 21, 2022. This admission, along with the relevant medical records, demonstrate the claimant has failed to meet his burden of proof in demonstrating he sustained a specific-incident compensable injury on March 21, 2022.

For any specific-incident injury to be compensable, the claimant must prove by a preponderance of the evidence that his injury: (1) arose out of and in course of his employment; (2) caused internal or external harm to his body that required medical services; (3) is supported by objective findings, medical evidence, establishing the alleged injury; and (4) was caused by a specific incident identifiable by time and place of occurrence. ***Ark. Code Ann***. § 11-9-102(4);

Cossey v. Gary A. Thomas Racing Stable, 2009 Ark. App. 666, at 5, 344 S.W.3d 684, 687 (Ark. App. 2009). Of course, the claimant bears the burden of proving the compensable injury by a preponderance of the credible evidence. ***Ark. Code Ann.*** § 11-9-102(4)(E)(i); and *Cossey, supra*.

"Objective findings" are those findings which cannot come under the voluntary control of the patient. ***Ark. Code Ann***. § 11-9-102(16)(A); *Long v. Wal-Mart Stores, Inc*., 98 Ark. App. 70, at 80 250 S.W.3d 263, at 272 (Ark. App. 2007). Objective findings, "specifically exclude such subjective complaints or findings such pain, straight-leg-raising tests, and range-of-motion tests." *Burks v. RIC, Inc*., 2010 Ark. App. 862 (Ark. App. 2010). Objective medical evidence is not essential to establish a causal relationship between the work-related accident and the alleged injury where objective medical evidence exists to prove the existence and extent of the underlying injury, and a preponderance of other nonmedical evidence establishes a causal relationship between the objective injury and the work-related incident(s) in question. *Flynn v. Southwest Catering Co.*, 2010 Ark. App. 766, 379 S.W.3d 670 (Ark. App. 2010). Moreover, the claimant must prove a causal relationship exists between her employment and the alleged injury. *Wal-Mart Stores, Inc., v. Westbrook*, 77 Ark. App. 167, 171, 72 S.W.3d 889, 892 (Ark. App. 2002) (citing *McMillan v. U.S. Motors*, 59 Ark. App. 85, 90, 953 S.W.2d 907, 909 (Ark. App. 1997).

The claimant himself admitted in both his sworn deposition testimony and at the subject hearing that he could not identify a specific incident on March 21, 2022, that caused his right wrist pain. When the respondents' counsel pointed out the claimant could not identify a specific incident on March 21, 2022, wherein the claimant injured his right wrist, the claimant responded, "Right, that's right." (T. 105). He went on to agree with respondents' counsel that the claimant's testimony was that he had, "…a gradual onset of symptoms." (T. 105). In fact, the claimant went on to testify

he had a gradual onset of symptoms, "When I went home that night, yes", "that night" being the evening of March 21, 2022. (T. 105-106).

In addition, the preponderance of the medical evidence of record reveals the claimant had numerous medical problems, including gout, and that he had some history of pain and problems in his right hand and right wrist. (T. 95-104), Respondents' Exhibit 1 at 1-17). Indeed, on December 22, 2021, the claimant went to see his doctor complaining of right hand/wrist pain, and he admitted having told the doctor at that time – some three (3) months before he went to work for Expresses Services – he had been dropping things when he tried to pick up things with his right hand. (T. 99; RX1 at 5-7). At that time the claimant was complaining of various subjective symptoms such as pain and numbness in the area of his right thumb, hand, and wrist, right-sided radiculopathy, and a shooting pain from his right hand to his elbow. (T. 98; RX1 at 5, 6, and 7). From at least September 3, 2015 through March 7, 2022 – the latter date being just one (1) week before the claimant went to work for Express Services – the claimant, as noted above, was having pain and numbness in his right hand to the extent he was dropping things and having trouble gripping things with his right hand. (Id.)

On March 7, 2022 – just one (1) week before the claimant started work at Express Services – the claimant went to see Dr. Wayne Daniels, an orthopedic surgeon with South Arkansas Orthopedic and Sports Medicine, complaining of neck pain, and, "Numbness right index finger and right thumb." (RX1 at 14). Dr. Daniels diagnosed the claimant as having, "Cervical disc disorder with radiculopathy, unspecified cervical region." (RX1 at 16; 14-16). Dr. Daniels wrote in the "IMPRESSION" section of his report the claimant's symptoms were at that time the result of, "Cervical pain with right upper extremity radiculopathy." (RX1 at 16). Consequently, Dr.

Daniels ordered an MRI of the claimant's cervical spine. (RX1 at 16). At that time the claimant was working as a loader for Graphic Packaging. (RX1 at 14). While at times during his hearing testimony the claimant went to great lengths to differentiate between the right hand, thumb, and wrist pain before and after the alleged injury/disability date of March 21, 2022, the totality of both his hearing testimony and the relevant medical records appear to contradict the claimant's testimony in this regard. (T. 38-117; RX1 at 1-31; Claimant's Exhibit 2 at 1-184). In summary, both the claimant's own testimony and the totality of the relevant medical records demonstrate the claimant's right hand, wrist, and thumb numbness and pain were the result of degenerative conditions in his cervical spine, and not his work duties at Express Services. While I can certainly understand his work duties at Express Services may have revived the claimant's symptoms, the totality of the record herein reveals the claimant's right hand, wrist, thumb, and arm pain and numbness were more likely than not the result of the degenerative condition of his cervical spine, and not any injury he allegedly sustained at Express Services.

Finally, I must say I find it interesting the claimant began using his cell/mobile phone to take pictures of his work station/duties very soon after he went to work for Express Services (apparently in knowing violation of his employer's cell phone policy which prevented him from having a cell phone in his work area. (T. 81-83). While the claimant testified, he was taking the pictures to show his wife and grandson what he did at work, I did not find his testimony in this regard to be credible. Indeed, at times it appeared the claimant's initial hearing testimony was inconsistent with his sworn deposition testimony, and the medical record (the claimant alleged at least one of his physicians had incorrectly written concerning the location of his right hand/wrist, etc. pain); however, when respondents' counsel confronted the claimant with these apparent

inconsistencies the claimant admitted that his sworn deposition testimony was accurate. On cross-examination the claimant admitted he was a convicted felon due to having written a "hot check", which I note is a crime of dishonesty. (T. 80-81).

The claimant has failed to meet his burden of proof in demonstrating the work duties he performed for Express Services for some seven (7) days – from March 14, 2022, to March 21, 2022 – were the "major cause" of his right wrist problems. Therefore, he has failed to meet his burden of proof in demonstrating his right wrist problems were the result of a gradual onset compensable injury as defined in the Act.

With respect to an alleged gradual onset compensable injury ***Ark. Code Ann.*** § 11-9-102(4)(A) (2023 Lexis Repl.) defines "compensable 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[.]

(Bracketed material, and emphasis added).

The test for determining whether an injury is caused by rapid 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*.

Just as in the case of any other compensable injury, an alleged gradual onset compensable 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). "Objective findings" are defined as findings which cannot come under the voluntary control of the patient. ***Ark. Code Ann***. § 11-9-102(16)(A);

Long v. Wal-Mart Stores, Inc., 98 Ark. App. 70, at 80 250 S.W.3d 263, at 272 (Ark. App. 2007). Objective findings specifically exclude such subjective complaints or findings as pain, straight-leg-raising tests, and range-of-motion (ROM) tests since they all are subjective in nature and subject to the claimant's voluntary control or manipulation. *See, Burks v. RIC, Inc*., 2010 Ark. App. 862 (Ark. App. 2010).

With respect to 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). "Major cause" means greater than fifty percent (50%) of the cause. ***Ark. Code Ann***. § 11-9-102(4)(E)(ii); *Lowe's Home Ctrs., Inc. v. Pope*, 482 S.W.3d 723 (Ark. App. 2016). The "major cause" requirement may be established by the fact *the claimant was asymptomatic prior to an incident, and then became symptomatic and required medical treatment after the incident*. *Parker v. Atlantic Research Corp*., 87 Ark. App. 145, 189 S.W.3d 449 (Ark. App. 2004) (Emphasis added).

The resolution of the gradual onset compensable injury issue is straight-forward. There was a great deal of testimony concerning the claimant's job duties related to whether the video shown at the hearing was an accurate representation of his actual job duties and, generally, whether the claimant's job duties were in fact rapid and repetitive. (T. 9-21; 39-142; 152-161). However, whether or not one finds the claimant's job duties at Express Services were rapid and repetitive, the totality of both the testimony and medical records reveal that the claimant's job duties certainly may not be accurately characterized as being the "major cause" of the claimant's right wrist

problems and need for medical treatment. The preponderance of the evidence demonstrates the "major cause" of the claimant's right wrist and hand symptoms was more likely than not his cervical spine problems, which resulted in right-sided radiculopathy well before the claimant ever went to work for Express Services; the degenerative conditions of the claimant's hand and right wrist and other joints; and other longstanding conditions. Consequently, it would constitute sheer speculation and conjecture to find the claimant's work duties at Express Services – whether or not they were rapid and repetitive – were the major cause of the claimant's alleged gradual onset injury to his right wrist. And speculation and conjecture, whether plausible or not, do not constitute proof. *Dena, supra*.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this claim.

2. The stipulations contained in the prehearing order filed February 16, 2023, as well as the additional stipulation to which the parties agreed at the hearing – all of which the parties affirmed on the record at the hearing – hereby are accepted as facts.

3. The claimant has failed to meet his burden of proof pursuant to the Act in demonstrating he sustained a specific-incident compensable injury to his right wrist on March 21, 2022.

4. The claimant has failed to meet his burden of proof in demonstrating he sustained a gradual onset compensable injury which cukminated in disability on March 21, 2022. Even if the claimant's job were deemed to be rapid and repetitive within the Act's meaning, the preponderance of the evidence – especially the medical records – reveal the job duties he performed at Express Services were not the "major cause" of his longstanding, preexisting right wrist problems.

5. The claimant's attorney is not entitled to a fee on these facts. If they have not already done so the respondents hereby are ordered to pay the court reporter's

invoice within twenty (20) days of their receipt of this opinion and order.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp