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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA09-323

	Opinion Delivered December 2, 2009
ADDISON SHOE COMPANY ET AL. APPELLANTS	APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. F201791]
V.	
LAVEARN MOODY APPELLEE	AFFIRMED ON DIRECT APPEAL; REMANDED ON CROSS-APPEAL

JOHN MAUZY PITTMAN, Judge

The appellee worked in a shoe factory. She developed severe arm and shoulder pain and filed a claim for workers' compensation benefits. The Commission dismissed the claim, finding that she had failed to prove that her asserted gradual-onset injury resulted from rapid repetitive motion. Appellee appealed to this court. We reversed the Commission's finding that appellee failed to prove that she performed her work rapidly, and we remanded for further consistent proceedings. *Moody v. Addison Shoe Co.*, 104 Ark. App. 27, 289 S.W.3d 115 (2008). The Commission, on remand, found that appellee sustained a compensable gradual-onset injury and awarded benefits. On appeal, appellants argue that the award of benefits was erroneous because there was no substantial evidence of gradual onset, work-relatedness, or major cause. On cross-appeal, appellee argues that the Commission erred in denying her motion for attorney's fees for legal work done prior to the Commission's first

erroneous decision regarding a matter on which she ultimately prevailed. We affirm on direct appeal, and we remand to the Commission to address the cross-appellant's motion for attorney's fees.

To establish a compensable gradual-onset injury, a claimant must prove by a preponderance of the evidence that (1) the injury arose out of and in the course of his employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; (3) the injury was caused by rapid repetitive motion; (4) the injury was a major cause of the disability or need for treatment. *Lay v. United Parcel Service*, 58 Ark. App. 35, 944 S.W.2d 867 (1997); Ark. Code Ann. § 11-9-102(4) (Repl. 2002). A compensable injury must be established by medical evidence supported by objective findings. *Id*. On direct appeal, appellants argue that the evidence is insufficient to show that appellee's shoulder injury was caused by her work and arose out of and in the course of her employment, or that the injury was the major cause of her disability or need for medical treatment.

In determining the sufficiency of the evidence to support decisions of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence, *i.e.*, evidence that a reasonable person might accept as adequate to support a conclusion. *Singleton v. City of Pine Bluff*, 97 Ark. App. 59, 198 S.W.3d 134 (2006). The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Second Injury Fund v. Exxon Tiger Mart, Inc.*, 70 Ark. App. 101,

15 S.W.3d 345 (2000). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002).

The Commission found that appellee had been employed by appellant Addison Shoe Company as a heel padder. She stood at a worktable putting pads into shoes. This required her to reach up with her right hand and get a pack of heel pads from a rack, remove the rubber band from the pack, separate the pads into stacks for left and right shoes, and place the stacks on the worktable. She then picked up three shoes in each hand, placed the six shoes on her worktable, and began installing the pads. She did so by laying a pad in her left hand while her right hand dipped a brush into a large can of glue, brushing the glue onto the pad, transferring the pad to her right hand, inserting the pad into the shoe, and holding it there for a few seconds until the glue set. She repeated this sequence on the other five shoes on her worktable. Then, holding three shoes per hand, she placed the completed shoes on a rack. In this manner, appellee completed approximately one thousand shoes per day. She worked five days per week from 7:00 a.m. to 3:30 p.m., with thirty minutes off for lunch, a fifteen-minute break in the morning, and a ten-minute break in the afternoon. Appellee was employed by appellant at this task continuously for thirty years.

Appellee requested authorization for medical treatment in January 2002 because her right hand and arm had been hurting for some time and she could no longer bear the pain. Her supervisor granted the authorization. Diagnostic studies in March 2002 revealed

abnormal nerve conduction in both upper extremities. She was treated with pain medication. Appellee attempted to return to work. She was laid off because she could not perform her duties and last worked in June 2002. In July 2002, Dr. John Ball opined that her problem was caused by thirty years of overuse. Dr. Ball continued to treat appellee for tendinitis and radial tunnel into 2003. Early in 2004, appellee was seen by Dr. Spencer Guinn, an orthopedic surgeon who, presented with appellee's history of right arm pain radiating into her upper arm and shoulder, performed an MRI that revealed a complete rotator-cuff tear in the right shoulder, for which appellee underwent surgery in April 2004. Although her prior treatments did not give significant relief, the shoulder surgery helped alleviate appellee's arm pain and allowed her to have significantly greater use of her arm and shoulder. Appellee testified that she performed no manual task or household activities from the time that she last worked for appellant in 2002 until her shoulder surgery in 2004. Dr. Guinn's report stated that, in his opinion, based on a reasonable degree of medical certainty, appellee's shoulder condition was related to her work. The Commission specifically found appellee's testimony credible. Finally, the Commission found that there was little, if any, evidence to show that appellee's shoulder condition was caused by anything other than her work. Although there was contrary proof, the facts found by the Commission are supported by substantial evidence, and those facts in turn support the Commission's determination that appellee proved the gradual onset, work-relatedness, and major cause elements necessary to establish a compensable injury. We affirm on direct appeal.

The cross-appeal involves the Commission's authority to modify an order after a notice of appeal has been filed to this court. The Commission awarded appellee attorney's fees for legal work performed at the Commission level after our first opinion, but it neglected to address her entitlement to fees for legal work done prior to the Commission's first erroneous decision regarding this matter on which she ultimately prevailed. Appellee, on cross-appeal, argues that the Commission should rule on her request for attorney's fees. We agree. It appears from the record that the Commission's omission was inadvertent, and that the only reason for the Commission's failure to thereafter correct its error was its mistaken belief that it lost all jurisdiction to rehear the matter once a notice of appeal to this court had been filed. In fact, even though a notice of appeal is filed, the Commission retains jurisdiction to act on a motion for rehearing until the record on appeal is lodged in the appellate court. *Morrison v. Tyson Foods, Inc.*, 11 Ark. App. 161, 668 S.W.2d 47 (1984). Moreover, without regard to the Commission's authority to award fees at the time of the request, it clearly has jurisdiction to do so now that the appeal has been decided. Consequently, we remand for the Commission to consider appellee's request for attorney's fees.

Affirmed on direct appeal; remanded with instructions on cross-appeal.

HART and GLOVER, JJ., agree.

Barber, McCaskill, Jones & Hale, P.A., by: *Robert L. Henry, III* and *Cynthia W. Kolb*, for appellants.

Fogleman & Rogers, by: *Joe M. Rogers*, for appellee.