

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-1077

ROBERT FITZPATRICK
APPELLANT

V.

RHEEM MANUFACTURING
COMPANY and OLD REPUBLIC
INSURANCE COMPANY
APPELLEES

Opinion Delivered APRIL 15, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F508487]

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Robert Fitzpatrick appeals the July 21, 2008 order and the nunc pro tunc order of July 30, 2008, of the Arkansas Workers' Compensation Commission finding that he was not entitled to temporary-total-disability benefits, not entitled to the payment of past medical treatment, and not entitled to future medical treatment as a result of an injury to his cervical spine. The sole issue on appeal is whether the Commission erred in denying appellant's claim for a rapid-repetitive-motion injury to the cervical spine. We hold that the Commission did not err and affirm.

Appellant has been employed by appellee Rheem Manufacturing Company since June 16, 1994. In July 2005, appellant was working as a manifold builder. To build the manifolds, appellant would screw a pipe to a one-pound manifold. The process included him reaching over his head to grab an air wrench, which was attached to a cable, pulling the wrench down,

setting it on top of a valve, and spinning it. When the pipe was almost tight, he would manually crank it to get it lined up in place so the product could be finished. He would place the wrench back in place on a cable. He testified that he had to extend his arms all the way to get the wrench and place it back. He also stated that he looked up each time he grabbed the air wrench and placed it back. This process took twenty seconds to perform, and appellant would usually complete three manifolds per minute. He performed this job for a year and a half, working eight-hour shifts, and sometimes working up to two hours in overtime.

On July 18, 2005, appellant testified that one hand became numb and both were swollen and stiff, and he could not move them. Appellant underwent surgery on his right wrist and hand, in the form of a carpal-tunnel release, on August 17, 2005. This same procedure was subsequently performed on his left hand on September 21, 2005. Appellant continued under active medical treatment for his bilateral-carpal-tunnel syndrome by Dr. Roger Bise, through January 10, 2006. At that time, Dr. Bise noted:

I saw Mr. Fitzpatrick in follow up today to review his repeat nerve conduction study. This was essentially normal and indicates recovery following surgery. He still complains of symptoms but I am not sure the symptoms relate to carpal-tunnel syndrome and some are vague or non specific in nature. I see no indication that he cannot work at this point in time. I will see him in follow up in three months if he desires but I have no recommendations.

Appellant continued to have pain in his right hand, and he was subsequently seen and evaluated by Dr. James E. Kelly, following a change of physicians. After his initial evaluation, Dr. Kelly concluded that appellant's current difficulties were not attributable to the compensable carpal-tunnel syndrome. Dr. Arthur Johnson performed an MRI on appellant,

and opined on May 16, 2006:

Degenerative disk disease changes with disk bulges at C5-C6 and C6-C7 with a lateral C2-C3 disk herniation that would not be responsible for the patient's pain in his extremities.

The patient is to have cervical traction with cervical physical therapy and we will see him back in the clinic in approximately three months. It is not my opinion that this is an acute process. It is related to degenerative changes that have occurred over a period of time.

Appellant contends that, on the same date he sustained the compensable injury to his hands, he suffered an injury to his neck due to rapid and repetitive motion required on his job, the same being misdiagnosed and accepted as carpal tunnel, when in fact, it was a disc herniation of the C2-3 disc. This claim was denied by appellee, and at the hearing before the workers' compensation administrative law judge (ALJ), he sought medical expenses related to his cervical spine and claimed entitlement to temporary-total-disability benefits. The ALJ granted temporary-total-disability benefits for the period between December 15, 2005, and January 10, 2006. However, he denied appellant's claim for medical expenses related to his cervical spine, stating:

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence the existence of a causal relationship between his employment with the respondent and any cervical defects or conditions, which he may have and any difficulties that these defects or conditions may currently be causing. In fact, it is my opinion that the greater weight of the credible evidence fails to show that the claimant's difficulties with his hands and wrists, beginning in July of 2005, are in any way the result of the subsequently observed cervical defects. Rather, the greater weight of the credible evidence shows that the claimant's difficulties with his hands and wrists were the result of employment related bilateral carpal tunnel syndrome.

On July 21, 2008, the Full Commission affirmed and adopted the decision of the ALJ, and by nunc pro tunc order filed July 30, 2008, the Full Commission modified its previous

order only as it related to attorney's fees. Appellant filed a timely notice of appeal, and this appeal followed.

Typically, on appeal to this court, we review only the decision of the Commission, not that of the ALJ. *Daniels v. Affiliated Foods S.W.*, 70 Ark. App. 319, 17 S.W.3d 817 (2000). In this case, the Commission affirmed and adopted the ALJ's opinion as its own, which it is permitted to do under Arkansas law. *See Death & Perm. Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003). Moreover, in so doing, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission. *See id.* Therefore, for purposes of our review, we consider both the ALJ's order and the Commission's majority opinion.

In appeals involving claims for workers' compensation, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirms the decision if it is supported by substantial evidence. *See Kimbell v. Ass'n of Rehab Indus. & Bus. Companion Prop. & Cas.*, 366 Ark. 297, 235 S.W.3d 499 (2006). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether the appellate court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court must affirm the decision. *Id.* 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. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, 218 S.W.3d 351 (2005).

Questions concerning the credibility of witnesses and the weight to be given to their

testimony are within the exclusive province of the Commission. *Patterson v. Ark. Dep't of Health*, 343 Ark. 255, 33 S.W.3d 151 (2000). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Id.* 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 that it deems worthy of belief. *Id.* Thus, we are foreclosed from determining the credibility and weight to be accorded to each witness's testimony. *Arbaugh v. AG Processing, Inc.*, 360 Ark. 491, 202 S.W.3d 519 (2005).

Further, we recognize that the Commission has the duty of weighing the medical evidence as it does any other evidence, and the Commission has the authority to accept or reject medical opinions. *Coleman v. Pro Transp., Inc.*, 97 Ark. App. 338, 249 S.W.3d 149 (2007). When the Commission weighs medical evidence and the evidence is conflicting, its resolution is a question of fact for the Commission. *Cedar Chem. Co. v. Knight*, 99 Ark. App. 162, 258 S.W.3d 394 (2007). The interpretation given to medical evidence by the Commission has the weight and force of a jury verdict, and this court is powerless to reverse the Commission's decision regarding which medical evidence it chooses to accept when that evidence is conflicting. *Hill v. Baptist Med. Ctr.*, 74 Ark. App. 250, 48 S.W.3d 544 (2001).

Appellant contends that the Commission erred in denying his claim for a rapid-repetitive-motion injury to the cervical spine. Arkansas Code Annotated section 11-9-102(4)(A)(ii)(a) defines a compensable injury as 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 caused

by rapid repetitive motion. Carpal-tunnel syndrome is specifically categorized as a compensable injury falling within this definition. Ark. Code Ann. § 11-9-102(4)(A)(ii)(a).

Appellant argues that his job included his reaching above his head, extending his arms fully, pulling down an air wrench attached to a cable, using that wrench to screw a pipe to the manifold in his hand, and setting the wrench back in place above his head. He said he had to look up each time to find the wrench, and that the process took around twenty seconds to complete. He testified that he performed this process three times per minute for up to a ten-hour period of time.

Pursuant to Arkansas Code Annotated section 11-9-102(4)(E)(ii), the employee's burden of proof of a compensable injury, which is categorized as a rapid-repetitive-motion injury, is a preponderance of the evidence. The statute further requires that the resultant 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).

The elements of a rapid-repetitive-motion injury are (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. *Holland Group, Inc. v. Hughes*, 95 Ark. App. 369, 237 S.W.3d 120 (2006). Appellant claims that there is no dispute that his job required rapid-repetitive motion and that he met his burden of proof for the criteria required to find his injury was sustained by rapid-repetitive motion. See *Hapney v. Rheem Mfg. Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000) (where evidence that claimant had to bend her neck every twenty seconds satisfied rapid-repetitive-motion tests).

Appellant asserts that he proved by a preponderance of the evidence that the major cause of his need for treatment was the rapid-repetitive motion, which caused his cervical-

spine injury. He explains that after his carpal-tunnel surgeries, Dr. Roger Bise noted that he did not have a good result on his right hand. On January 16, 2006, Dr. Bise noted that appellant still complained of the symptoms, but that he was not sure the symptoms related to carpal-tunnel syndrome. After he received a change of physician from the Commission to Dr. James E. Kelly, Dr. Kelly ordered an electro-diagnostic study, which confirmed the cervical-spine problems. Dr. Greg Loyd, the plant doctor, noted on February 22, 2006, that appellant possibly had a cervical-nerve-root impingement.

Appellant contends that only after his first visit with Dr. Kelly on March 6, 2006, did he realize his complaints of pain and problems to the neck were a result of a cervical-spine injury. Dr. Kelly opined that appellant had cervical radiculitis and not true carpal-tunnel syndrome. The MRI of March 10, 2006, showed a central and right-posterolateral herniation of C2-3 disc, including a moderate-bilobular posterior-disc protrusion at C5-6 and C6-7. Dr. Arthur Johnson, a neurosurgeon referred by Dr. Kelly, opined on May 16, 2006, that appellant had degenerative-disk-disease changes with disk bulges at C5-C6 and C6-C7, with a lateral C2-C3 disk herniation that would not be responsible for the patient's pain in his extremities. Dr. Kelly wrote in a letter dated October 16, 2006, to appellant's attorney that he could not give a "yes or no" answer as to whether appellant's job duties caused his cervical-spine injuries without knowing appellant's specific job duties.

Appellant claims that, even though the ALJ found that a causal relationship did not exist based upon the medical evidence, appellant's testimony of the nature of his job along with his symptoms are consistent with cervical-spine injury and are sufficient proof that his cervical-spine injury is compensable. He points out that no medical evidence was shown to

prove that he had a preexisting cervical-spine condition or previous injury. He contends that, because there was testimony that he had rarely been sick and never went to the doctor prior to this, he met his burden of proof that the major cause of the need for treatment was his work-related injury. *See Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001) (where there was not evidence as to any other possible causes for the herniations at issue, and no evidence that Mr. Jones experienced any significant neck problems prior to the work-related accident, the Commission did not err in finding that Mr. Jones satisfied the “major cause” requirement in proving a compensable injury); *see also Barnes v. Greenhead Farming*, 101 Ark. App. 129, 270 S.W.3d 873 (2008) (where based on the medical evidence, the testimony elicited at the hearing, the absence of testimony from the appellee controverting same, and the Commission’s unsupported findings of fact, this court held that fair-minded persons could not reach the conclusion of the Commission to deny benefits for Barnes’s low back and right hip, leg, and foot injuries, reversing the Commission). Appellant contends that the Commission’s decision should be reversed and remanded for the award of benefits.

Appellant maintains that his symptoms masked a second injury from the same cause. He claims a gradual onset injury of July 18, 2005, led to the surgeries and also caused his spine injury. He points out that the consensus of the medical evidence confirms that he suffers from a spine injury. Between July 18, 2005, and November 15, 2005, he had surgery on both hands. On January 16, 2006, Dr. Bise noted that appellant still had right-hand problems and stated “I’m not sure the symptoms relate to carpal-tunnel syndrome and some are of vague or nonspecific nature.” Appellant contends that the symptoms of carpal-tunnel syndrome and cervical-spine radiculitis are the same and do not mutually exclude one injury over another.

He contends that his complaints have been consistently made throughout the course of his treatment and are exactly in accordance with the type of problems someone has if they have a cervical abnormality such as his.

He maintains that the undisputed cause of his radiculitis are his job duties. The evidence was that he was required to look up and pull an air wrench attached to a cable, then release it back in place. This happened every twenty seconds during an eight-hour shift, sometimes with a two-hour overtime, for a year and a half. He contends that, although this is a fact issue to be determined by the Commission, there is no substantial evidence to conclude that the cervical radiculitis was caused from any other source other than his job.

Appellee contends that appellant failed to prove that he sustained a compensable injury. We agree. The issue before this court is whether appellant has proven a causal connection between his cervical-spine problems and his employment, and we uphold the Commission in finding that he did not prove that connection. Appellant did not testify that he had any neck strain while doing his job or that he had to bend his neck swiftly while doing his work. Appellant failed to provide any evidence, medical or otherwise, indicating that his employment was the major cause of his neck problems.

The controlling statute requires appellant to prove that his injury arose out of and occurred during the course of his employment, and that appellant prove by the greater weight of the evidence that a causal relationship exists between medically established and objectively documented cervical defects and appellant's employment. See Ark. Code Ann. § 11-9-102(4)(A)(ii). Dr. Kelly noted on October 16, 2006, the same day he wrote the letter to appellant's attorney, that appellant's problem *could* be related to his work *if certain facts* exist.

In the letter, he wrote that appellant's problems *are* related to his employment if those same facts exist. Dr. Kelly was clear only in that he was unable to determine whether appellant's cervical problems are causally related to his employment. Dr. Johnson determined that appellant had degenerative-disk disease, which was not attributable to an acute injury or trauma. Dr. Kelly specializes in plastic and reconstructive surgery, which is why he referred appellant to Dr. Johnson, a neurosurgeon.

Appellee claims that Dr. Kelly's opinion that appellant's symptoms resulted in cervical radiculitis rather than bilateral-carpal-tunnel syndrome is unsupported by the medical evidence. Appellee points to the study done by Dr. William Griggs, a neurologist, in an EMG-NCV performed July 28, 2005, which indicated that appellant suffered from bilateral-carpal-tunnel syndrome. Dr. Johnson stated on May 16, 2006, that appellant's cervical condition was not responsible for the pain in his extremities. Appellee maintains that the greater weight of the evidence does not support Dr. Kelly's conclusion.

Appellee argues that appellant's testimony about his employment activities as a manifold builder did not show that his job placed any particular stress on his cervical spine. Further, the testimony that he had been active and healthy up until this time tends to prove that his active life and age have caused his cervical condition. In the medical records of April 22, 2003, appellant noted to Dr. Sally Goforth that he felt "pins and needles around his neck and shoulders." Appellant testified that in November and December 2005, his neck, shoulder, hip, leg and foot began bothering him. This was four months after he stopped working for appellee.

Therefore, we are not convinced that fair-minded persons with the same facts before them could not have reached the same conclusions arrived at by the Commission. Based upon the aforementioned evidence, the Commission did not err in finding that appellant failed to prove a causal relationship between his cervical complaints and his employment with appellee. We hold that the Commission's findings were supported by substantial evidence. Accordingly, we affirm.

Affirmed.

PITTMAN and HENRY, JJ., agree.