UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Caterpillar Logistics Services, Inc., Respondent, ---------- UAW Local 974, Authorized Employee Representative.	DOCKET NO. 09-0901

Appearances:

Kevin Koplin, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Brent Clark, Esq., Elizabeth Ash, Esq., Seyfarth Shaw, LLP, Chicago, Illinois
For Respondent

Stephen Yokich, Cornfield and Feldman, Chicago, Illinois
For Authorized Employee Representative

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an investigation of a Caterpillar Logistics, Inc. ("Respondent") facility in Morton, Illinois, between December 11, 2008 and June 5, 2009. As a result of the investigation, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging one other-than-serious violation of the Act with a proposed penalty of $900.00. Respondent timely contested

the Citation. United Auto Workers Local 974 ("Union") requested, and was granted, party status pursuant to Section 10(c) of the Act. A trial was conducted over the course of September 21-23 and November 1-3, 2010 in Peoria, Illinois.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. The parties' stipulations establish that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of the Act, the Complainant must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharmaceutical Products*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶25,578 (No. 78-6247, 1981).

Stipulations

The parties offered, and the court accepted, the following stipulations:

1. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Act. (Respondent's *Answer and Affirmative Defenses* dated 10/4/2010).
2. Respondent is, and at all times hereinafter mentioned was, a corporation, with anoffice and place of business at 500 Morton Ave., Morton, Illinois, and at all times hereinafter mentioned, was engaged in distributing parts and related activities. (Respondent's *Answer and Affirmative Defenses* dated 10/4/2010).
3. Respondent, at all times hereinafter mentioned, was engaged in a business affecting

commerce in that Respondent was engaged in handling goods or materials which had been moved in commerce. (Respondent's *Answer and Affirmative Defenses* dated 10/4/2010).

4. Respondent, at all times hereinafter mentioned, was an employer employing employees in said business at the aforesaid workplace. (Respondent's *Answer and Affirmative Defenses* dated 10/4/2010).
5. Complainant issued to Respondent a Citation and Notification of Penalty, and pursuant to Section 10(c) of the Act, Respondent duly filed, by mail, with a representative of the Complainant, a notice of contest which contested the aforementioned Citation and Notification of Penalty and the penalty proposed therein; and said notice of contest was thereupon duly transmitted to the Occupational Safety and Health Review Commission. (Respondent's *Answer and Affirmative Defenses* dated 10/4/2010).
6. The work station at which MK worked in Consol Pak is a table slanting downward toward the associate. The back portion of the table farthest from the associate is approximately 40 inches from the floor. The front part of the table closest to the associate measures approximately 35 5/8 inches from the floor to the top of the lip on the table, and 35 inches from the ergonomic mat to the top of the lip. The lip is approximately ¼ inch high. (*Joint Stipulation of Facts and Issues* dated 9/10/11).
7. The "yellow tote" used in the Consol Pak department is 42 inches long, approximately 19 inches wide, and 6 1/2 inches high. (*Joint Stipulation of Facts and Issues* dated 9/10/11).
8. The "red tote" used in the Consol Pak department is 27 inches long, 19 inches wide, 6 3/4 inches high, and weighs approximately 7 pounds. (*Joint Stipulation of Facts and Issues* dated 9/10/11).
9. The scanning gun used by MK in the Consol Pak department is approximately 9 inches long. The outside of the handle of the scanning gun is approximately 5 1/2 inches long while the inside of the handle of the scanning gun is approximately 4 1/4 inches long. (*Joint Stipulation*

of Facts and Issues dated 9/10/11).

10. MK's identity should be protected from disclosure in the decision issued in this proceeding. (*Joint Stipulation of Facts and Issues* dated 9/10/11).
11. Steve Mitchell is an employee of Caterpillar and is the Local Safety Chairman ofUAW Local 974. (Signed *Stipulation* dated 11/1/2010).
12. Caterpillar offers a number of classes on health and safety issues to its employees, including classes that cover ergonomic issues. (Signed *Stipulation* dated 11/1/2010).
13. In 2005, Mr. Mitchell took a class entitled "Applied Industrial Ergonomics and Engineering Guidelines." The documents contained in Union Exhibit 1 were part of the course materials for this class. These materials were prepared by a company called Humantech. Caterpillar currently offers a course with the same title. (Signed *Stipulation* dated 11/1/2010).

Additional Factual Findings

Nine witnesses testified at the trial: (1) MK, the employee whose illness is at issue in this proceeding; (2) Karl Armstrong, OSHA Compliance Safety and Health Officer ("CSHO"); (3) Dr. Norma Just, Respondent's staff physician; (4) Dr. Robert Harrison, Complainant's expert physician witness; (5) Andrew Comai, Union's expert ergonomist witness; (6) Howard Edwards, Respondent's Corporate Safety Manager; (7) Dustin Wagner, Respondent's Safety Manager for the Morton, Illinois facility; (8) Todd Brown, Respondent's expert ergonomist witness; and (9) Dr. Richard Covert, Respondent's expert physician witness. (Tr. 114, 246, 393, 437, 734, 875, 1011, 1091, 1267). Based on their testimony and discussion of evidentiary exhibits, the court makes the following additional factual findings.

This case focuses on whether a medical condition (right elbow epicondylitis) experienced by MK was a recordable, work-related illness which should have been listed on Respondent's OSHA 300 Log.[1] MK was hired to work in Respondent's parts distribution facility in Morton,

1 The alleged date of the violation is August 5, 2008, the day Respondent's company physician diagnosed MK's condition as epicondylitis. However, the parties agreed that recording work-related illnesses on an OSHA 300 Log

Illinois in October, 2007. (Tr. 115). She initially worked in Department 7686, pulling parts from supply racks, placing them in boxes or totes, and sending them along to the next department. (Tr. 115). On April 28, 2008, she transferred to the night shift in Respondent's Consol Pak department ("Consol Pak"). (Tr. 118). Consol Pak consisted of work stations at the end of fifteen roller conveyor lanes, where employees received plastic totes containing various parts ordered by Caterpillar dealerships. (Tr. 119; Ex. C-9). Each part, or bag of parts, was known as a Materials Request ("MR"). (Tr. 186-188).

The typical work process in Consol Pak consisted of: (1) stepping on a pedal to release totes from the end of a conveyor onto a work station, (2) inputting data into a hand-held scanner, (3) using the hand-held scanner to scan each tote and all of the parts (or bags of parts) contained in each tote, and (4) removing the parts from each tote, turning around, and placing them in a cardboard shipping box ("Type 63 Box"). (Tr. 126, 129, 130, 145-147, 213-215, 218; Ex. C-1, C-2, C-3, C-4, C-5, C-6, C-9). Respondent's policy prohibited totes, including parts, from weighing more than fifty pounds each. (Tr. 121).

Each employee typically handled two or three roller conveyor lanes at a time, processing an average of 400-1000 MR's per shift. (Tr. 914). There were often multiple parts in each MR, resulting in employees handling 2,000 to 3,000 parts per shift. (Tr. 119). On a very busy day, MK testified that she may handle as many as seven lanes and process as many as 4,000-6,000 parts during a single shift. (Tr. 119, 139). Respondent's records revealed that MK averaged 642 MR's per shift during her time in Consol Pak from April 28, 2008 to July 2008. (Tr. 924-925, 1028; R-38, R-39).

In addition to the normal cycle of work described above, MK and other Consol Pak employees had other duties which were performed periodically throughout their shift. First, employees were required to assemble their own Type 63 cardboard shipping boxes by folding them into a cube shape and using a long staple gun to secure the flaps. (Tr. 140, 147; Ex. C-7, C-

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is a continuing obligation based on information obtained even after the alleged recordability date. (Tr. 674).

8, C-9). MK was allowed to assemble and keep 2-3 boxes in her work area at a time. (Tr. 143-144, 148; Ex. C-9). Consol Pak employees typically assembled and filled 8-16 shipping boxes per shift. (Tr. 898). Second, the plastic totes occasionally got stuck on the roller conveyors and employees used a long pole with a hook to reach down the conveyor to grab totes and pull them into their station. (Tr. 123). Third, especially on one particular lane, the foot pedal sometimes failed to lower the stop bar, and employees had to lift totes, with parts, over the bar to bring them into their workstation. (Tr. 123-124). Fourth, the hand-held scanners occasionally failed to read the bar codes on parts, so the scanning motions had to be repeated until the scan properly registered. (Tr. 130, 240). Fifth, MK occasionally had to carry totes with parts in them to other departments for processing. (Tr. 137). Sixth, when a stack of empty totes accumulated in a Consol Pak employee's work area, the stack of totes was slid over to a conveyor to be moved out of the area. (Tr. 219). Seventh, once each Type 63 shipping box became full, a shipping label was printed and stapled to the box, and the box was moved out of the area. (Tr. 222-223). Lastly, in the category of occasional Consol Pak duties, totes containing parts were sometimes placed on the floor in Consol Pak by passing forklift drivers. (Tr. 229). Any totes delivered in this manner were given priority processing over totes which came in by roller conveyor. (Tr. 229)

In late May and early June of 2008, MK began experiencing pain in her right forearm and right elbow. (Tr. 151). She also began to experience some pain, although significantly less, in her left elbow. (Tr. 151). She had never had any problems with her elbows until she began working in Consol Pak. (Tr. 154, 189, 233-234). She purchased and used an elbow wrap from a retail store, but the pain persisted. (Tr. 152). At first, MK believed her arm pain was just the result of sore muscles from performing a new and different job. (Tr. 230). But in June of 2008, MK noticed that the pain in her right elbow was increasing, so she informed several of her supervisors (they changed frequently during this period) of her condition. (Tr. 153-154, 156-160,

210).

On July 10, 2008, MK visited Respondent's on-site medical clinic and reported her arm pain to Nurse Jeremy Brakeman. (Tr. 161-162, 210). She completed an Employee Incident Report, on which she indicated "sharp pain at elbow, right elbow-arm" and attributed the pain to "work in Consol Pak at the Morton facility, repetitive arm movement to do my job." (Tr. 163; Ex. C-11). She listed June 23, 2008 as the incident date, referencing a time when her pain level was highest as she was trying to lift her right arm to punch-out on the time clock. (Tr. 153-154, 164, 210; Ex. C-11). Nurse Brakeman temporarily reassigned MK to another department and restricted her to a "one-handed job until seen by company MD." (Tr. 162; Ex. C-13).

On July 15, 2008, MK met with company physician, Dr. Norma Just, who has been employed by Respondent as a staff physician for twenty years. (Tr. 394, 164-165, 398, 611; Ex. C-14). MK told Dr. Just that she suspected her elbow pain was caused by the repetitive scanning motion required in Consol Pak. (Tr. 206, 611). MK also described her non-work activities to Dr. Just: house cleaning, laundry, and grocery shopping, but no participation in any sports. (Tr. 195, 197, 203, 204). After discussing MK's work and non-work activities, Dr. Just concluded that her Consol Pak duties might be causing the elbow pain. (Tr. 403-404, 612-613). Dr. Just told MK at that time that she did not know what her condition was, was not sure how to treat it, and recommended that she visit her personal physician. (Tr. 164-166). Dr. Just prescribed continued light-duty work restrictions, but was later informed that no such job was available for MK. (Tr. 227, 414, 578-579; Ex. C-14, C-18). Therefore, MK was off work from July 15, 2008 through October of 2008, because her elbow pain prevented her from performing her duties in Consol Pak and an alternative position conducive to her work restrictions was not available. (Tr. 166; Ex. C-14).

Dr. Just explained that a medical evaluation alone was not sufficient to determine work-relatedness, so she requested that Respondent's safety personnel conduct an Ergonomics/Safety

Evaluation of MK's work area in Consol Pak. (Tr. 600-601; Ex. C-15). After receiving her request, Dustin Wagoner, Safety Manager for the Morton facility, visited Consol Pak for "30 minutes to an hour." (Tr. 1036-1038, 1053). He had never had any training on epicondylitis and had never evaluated a job for risk factors related to epicondylitis. (Tr. 1052). His observations and evaluation focused primarily on the force and movements involved in using the scanning gun. (Tr. 945-947). Mr. Wagoner never spoke with MK, or any other Consol Pak employee, in conducting his work-relatedness assessment. (Tr. 1064-1065). Nor did he ever obtain any information about how MK specifically performed her duties in Consol Pak. (Tr. 1056-1057, 1064).

Mr. Wagoner was initially contacted, conducted his assessment, and formed his final opinion, all on July 15, 2008. (Tr. 1036, 1081; Ex. R-44, R-45). The totality of written materials (notes, observations, conclusions, etc.) which he prepared as part of his investigation into work-relatedness consisted of twenty-three sentences on two pieces of paper. (Tr. 1081; Ex. R-44, R-45). He ultimately concluded that "I do not believe that the use of the scanner would be a risk factor for lateral epicondylitis." (Ex. C-15). When questioned about his assessment and conclusions at trial, in relation to a video-tape of work activity in Consol Pak, Mr. Wagoner testified that he believed some employees were "exaggerating" their movements on the video. (Tr. 1050). There was no support in the record for Mr. Wagoner's contention.

Dr. Just next saw MK for a follow-up visit on August 5, 2008, at which time she diagnosed her condition as epicondylitis, a musculoskeletal disorder of the elbow commonly referred to as "tennis elbow." (Tr. 414-415). Also that day, based primarily on Dustin Wagoner's Ergonomics/Safety Evaluation, Dr. Just concluded that MK's condition was not work-related for OSHA purposes and indicated the same on a "Determination of Work Relatedness" form. (Tr. 417, 601-602; Ex. C-16). Dr. Just was aware at the time that some medical literature associated certain jobs with epicondylitis, but she did not believe the jobs in

those studies were similar to Consol Pak. (Tr. 614, 645-646). Despite her conclusion, she left the lines on the "Determination of Work Relatedness" form asking whether there was "medical evidence that this diagnosis may be caused by certain workplace exposures" and whether there were "non-occupational factors which are primarily responsible for this diagnosis" both blank. (Tr. 416-419; Ex. C-16).

MK's next medical visit was with her family doctor, Dr. McMillan, who also diagnosed her with epicondylitis. (Tr. 166-167). Dr. McMillan told MK that her condition was related to her work activities. (Tr. 171). On August 19, 2008, MK visited Dr. Just again and informed her of Dr. McMillan's findings. (Tr. 167-171). In response, Dr. Just scheduled MK for an appointment with Dr. Adamson at Great Plains Orthopedics, who had been treating Respondent's employees for twenty years. (Tr. 171, 415-416). Dr. Adamson also confirmed Dr. McMillan's and Dr. Just's diagnoses of epicondylitis. (Tr. 416).

During her three months away from work, MK had additional follow-up visits with Dr. Just, while she received treatment from Dr. Adamson. (Ex. C-14). Dr. Adamson's treatment included physical therapy sessions, strengthening exercises at home, and steroid shots in her arm. (Tr. 172-173, 577). MK also filed a worker's compensation case during this time, under which she received temporary total disability benefits while away from her job. (Tr. 177, 241). As instructed, she reduced her household activities during her time off and tried to limit use of her right arm by keeping it at her side. (Tr. 207).

MK returned to work in Consol Pak in October of 2008, but continued to receive treatment for her condition. (Ex. C-14). Soon after returning to work, MK participated in the annual health examinations provided at Respondent's facility. (Tr. 173-174). The physician performing the exams, Dr. Wegman, told MK that she needed to stop working in Consol Pak because the repetitive motions were preventing her elbow from healing and could result in permanent nerve damage. (Tr. 173-174).

After another follow-up visit on November 13, 2008, Dr. Just filled out a second "Determination of Work Relatedness" form on which she indicated that there were "non-occupational factors which are primarily responsible for this diagnosis." (Ex. C-17). However, the court notes that Dr. Just conceded at trial that she did not actually know of any specific non-work causes for MK's epicondylitis. (Tr. 419-420, 666, 949). Respondent's Corporate Safety Manager, Howard Edwards, made the ultimate decision to not record MK's epicondylitis on Respondent's OSHA 300 Log, after consultation with Dr. Just and Safety Director Dustin Wagoner. (Tr. 271-272, 877, 888, 906).

On December 8, 2008, OSHA received a complaint alleging ergonomic hazards and failure to properly record work place injuries and illnesses on Respondent's OSHA 300 Logs. (Tr. 256; Ex. C-12). CSHO Karl Armstrong was assigned to conduct the investigation. (Tr. 255). During his inspection, CSHO Armstrong reviewed employee medical records, observed the Consol Pak area while work was being performed, obtained information concerning the quantity and weight of parts handled, and interviewed individuals who had participated in the decision not to record MK's epicondylitis in Respondent's OSHA 300 Log. (Tr. 262-268). CSHO Armstrong ultimately recommended the issuance of a citation based on Respondent's decision not to record MK's epicondylitis in its OSHA 300 Log. (Tr. 373).

Every witness during the trial agreed, consistent with American Medical Association Guide to Evaluation of Disease and Injury Causation, that the three most pertinent risk factors for determining the cause of a musculoskeletal disorder such as epicondylitis are: (1) force, (2) posture, and (3) repetition. (Tr. 469, 598-599, 656, 893, 966, 1051, 1382-1383; Ex. R-19). It is not necessary to have all three risk factors present to indicate causation, but there is typically a correlation between force and posture, or force and repetition. (Tr. 1063, 1382-1383).

Dr. Harrison, Complainant's expert physician witness, presented an impressive education and background in the study and treatment of work-related illnesses. (Ex. C-26). He is employed

as a Clinical Professor of Medicine for the University of California at San Francisco, as well as a Physician Epidemiologist for the California Department of Public Health. (Tr. 438-440). Eighty to ninety percent of his work consists of diagnosing and treating work-related illnesses. (Tr. 439). Dr. Harrison is board-certified in Internal Medicine and Occupational Medicine; has authored approximately 40 peer-reviewed medical articles; serves on an ANSI committee which focuses on diagnosis, treatment, and prevention of work-related musculoskeletal disorders; and teaches a graduate level course at the University of California at Berkeley focusing on diagnosis, treatment, and causation of environmental injuries and illnesses. (Tr. 442-443, 447, 453). He has treated thousands of patients with work-related musculoskeletal disorders, including epicondylitis. (Tr. 454-455).

Dr. Harrison reviewed MK's medical records, her deposition testimony, a three-hour video of work activities in Consol Pak,[2] and interviewed MK by telephone. (Tr. 458). His professional medical opinion was that there were sufficient risk factors (poor postures of the wrist, hand, and forearm, moderate repetition, and light force) present in Consol Pak work activities to conclude within a reasonable degree of medical certainty that MK's epicondylitis was work-related. (Tr. 461, 468, 482; Ex. C-47). Furthermore, as with every other witness in this case, Dr. Harrison was unable to identify any non-work activity as the likely cause of her condition. (Tr. 484, 489).

Epicondylitis is caused by damage to the muscles and tendons that connect to the elbow. (Tr. 467, 1273-1274, 1283). Dr. Harrison acknowledged that it can result from both work and non-work activities. (Tr. 467). He further explained that the physiologically neutral position of the hand, wrist, and forearm is with the thumb pointed up, as if about to shake someone's hand. (Tr. 468, 529). The posture risk factor, in a causal analysis, focuses on any deviations from this

2 During the discovery phase of the litigation, the parties observed and video-taped employees working in Consol Pak for approximately three hours. (Tr. 277; Ex. C-9). MK testified, and the court accepts, that the video accurately depicts her job duties when she worked in Consol Pak. (Tr. 190).

neutral position. Pronation is movement which rotates the thumb downward from this neutral position. (Tr. 529; Ex. C-28). Supination is rotating the thumb so that the palm faces upward. (Tr. 529; Ex. C-28). Wrist extension is lifting the hand upward. (Ex. C-29). Flexion is moving the hand downward. (Ex. C-29). Ulnar deviation is moving the wrist laterally outward. (Ex. C-29). Radial deviation is moving the wrist laterally inward. (Ex. C-29). "Excessive" or "extreme" deviations from the neutral position are those which go beyond 45 degrees, but are not necessary to make a determination that poor postures are present as risks factor for epicondylitis. (Tr. 529, 532-533).

While viewing the Consol Pak video, Dr. Harrison observed employees engaging in repeated, poor postural positions of the wrist, hand, forearm, and elbow, such as excessive wrist pronation and supination, wrist extension, ulnar deviations, elbow flexion, and occasional wrist extension and flexion. (Tr. 463-464, 468-469, 470, 477, 499, 502, 520-523, 525, 527-528; Ex. C-9, C-28, C-29, C-31, C-32, C-33, C-34, C-35). From this, he determined that poor posture was a risk factor which was present in the Consol Pak job. Even Dr. Just and Corporate Safety Manager Edwards conceded at trial that photographs and video of work activities in Consol Pak demonstrated deviations of wrist and arm postures from the neutral position (Tr. 589-593, 596-597, 652-654, 690, 695-697, 902, 905).

As to repetition as a risk factor, Dr. Harrison testified that there is no fixed definition in the medical community, but two cycles per minute is generally considered to be repetitive. (Tr. 478, 480, 503). Every witness agreed, with the exception of CSHO Armstrong,[3] that the average cycle time for scanning a tote in Consol Pak was about 30 seconds (two totes per minute). (Tr. 268, 272-273, 478, 703-706, 897, 1247, 1351). From his own observations of Consol Pak work activities, Dr. Harrison determined that repetition was a risk factor which was present in the Consol Pak job. (Tr. 478).

3 CSHO Armstrong evaluated the video of the Consol Pak job being performed and concluded that employees averaged 3.7 part scans per minute. (Tr. 279; Ex. C-24). Since his calculations contradicted every other witness, the court rejects his calculation on this issue.

All of the witnesses, including Dr. Harrison, agreed that force, the third risk factor, was low and of minimal relevance in evaluating a causal connection between MK's condition and the Consol Pak job. (Tr. 468, 485, 510, 513-514, 896, 1330-1331).[4] Dr. Harrison further explained that even if force was eliminated as a risk factor completely, there were sufficient posture deviations of the wrist, forearm, and elbow, combined with sufficient repetition, to convince him that MK's epicondylitis was work-related. (Tr. 514).

In contrast, Dr. Covert, Respondent's expert physician witness, testified that he did not see any wrist or arm posture problems in performing the Consol Pak duties. He testified that for non-neutral postures to be a contributing factor, they must be extreme, at or near full pronation or full supination, or wrists fully flexed or fully extended. (Tr. 1334). His opinion was inconsistent with the testimony of Dr. Harrison, Dr. Just, Mr. Edwards, and the AMA Guide to Evaluation of Disease and Injury Causation, and therefore, given no weight by the court. (Tr. 529, 532, 596, 902-904; Ex. R-19).

When asked his opinion of what constitutes high repetition, Dr. Covert referred to a study in which 1,250-1,500 hand/arm movements per hour were considered repetitive. (Tr. 1346-1347). This breaks down to about 21-25 hand movements per minute. The Consol Pak shift consisted of 420 minutes of total work time. (Tr. 992). Therefore, Dr. Covert would require 8,750 to 10,500 hand movements per shift for repetition to be a present risk factor. Mr. Brown, Respondent's ergonomist, testified that cycling a single plastic tote, containing only *one* part, required 8-9 hand/arm movements. (Tr. 1248). The court notes that the video footage of Consol Pak work activities clearly reveals that most totes contained multiple parts, necessitating additional hand/arm movements per tote. (Ex. C-9).

Applying Dr. Covert's test for repetition: 9 hand/arm movements per scanned tote (assuming only one part in each tote), multiplied by an average of 2 totes per minute, multiplied

[4] Dr. Covert testified that when you have low weight (as in Consol Pak) with high repetition, such combination is sufficient to find a causal connection between MK's condition and the Consol Pak job. (Tr. 1404).

by a 420 minute shift, equals an average of 7,560 hand/arm movements per shift in the Consol Pak job. That number falls just below Dr. Covert's threshold for repetitiveness. When factoring in repeated scanning motions due to the failure of the scanning gun, the fact that most totes contained more than one part to be scanned, and the array of other less-frequent jobs each employee had to perform periodically throughout each shift (constructing shipping boxes, moving stacks of empty totes, grabbing totes with the pole, etc.), the court finds that, even using Dr. Covert's test, the Consol Pak job duties were repetitive.

Based on information in several studies discussed by the physicians and ergonomists who testified at trial, researchers have found evidence that certain non-work-related characteristics can increase the risk of developing epicondylitis: excessive weight, being female, a history of smoking, diabetes, and the use of certain medications. (Tr. 490, 538, 1155, 1365). However, Dr. Covert could not testify within a reasonable degree of medical certainty that any of MK's non-work activities or characteristics caused her epicondylitis. (Tr. 1370-1371, 1440, 1444).[5] Nor could he testify within a reasonable degree of medical certainty that her epicondylitis was caused by her Consol Pak duties. (Tr. 1322). In sum, Dr. Covert could not, within a reasonable degree of medical certainty, find any cause for MK's epicondylitis.

Both Dr. Harrison and Dr. Covert provided expert medical testimony which was helpful and relevant to this proceeding, and in some instances, both doctors were in agreement. For areas in which they disagreed, based on his significant education, experience, and ability to clearly articulate the basis for his opinions, the court gave greater weight to the testimony of Dr. Harrison than Dr. Covert. Accordingly, the court concludes that posture, repetition, and force (although to a much lesser degree) were present in the Consol Pak duties as risk factors for epicondylitis.

One issue raised by Respondent is that the increased pain in MK's left elbow during her

[5] This inability to identify any non-work activity as the likely cause of her condition was consistent with Dr. Harrison's testimony (as well as every other witness in this case). (Tr. 419-420, 484, 489, 666, 949).

three months off work supported its conclusion that her epicondylitis was not work-related. However, Dr. Harrison explained this phenomenon to the satisfaction of the court. First, he noted that MK first reported experiencing some pain in her left elbow back in July 2008, although to a much lesser extent than her right elbow, while still working in Consol Pak. (Tr. 491-492). Dr. Harrison testified that that his review of the work activities depicted in the Consol Pak video revealed risk factors for epicondylitis in the left elbow as well. (Tr. 491-492). Second, Dr. Harrison explained that it is common for a person experiencing pain from epicondylitis in one arm, with instructions not to use that arm, to compensate for the necessary activities in their daily life, by overusing the opposite arm. (Tr. 492).

At the time of trial, MK was still employed by Respondent, but was working in a different department, placing parts in racks. (Tr. 175-176). She testified that her condition has improved and that she is no longer receiving any medical treatment for epicondylitis. (Tr. 178).

Discussion

Citation 1 Item 1

Complainant alleged in Citation 1 Item 1 that:

> *29 C.F.R. §1904.4(a): A work-related illness meeting the criteria for recordability was not recorded on the OSHA 300 Form or equivalent. On or about August 5, 2008, an employee suffered from a work-related illness, epicondylitis, that resulted in restricted work, days away from work and medical treatment. The employer did not record this illness on its OSHA 300 or equivalent form.*[6]

6 Complainant originally alleged a violation of 29 C.F.R. §1904.29(b)(1), but Complainant amended the regulatory reference when it filed the Complaint to 29 C.F.R. §1904.4(a), pursuant to Commission Rule 34(a)(3) and F.R.C.P. 15. (Tr. 326-333).

The cited standard provides:

> *29 C.F.R. §1904.4(a): Each employer required by this Part to keep records of fatalities, injuries, and illnesses must record each fatality, injury and illness that: (1) is work-related, and (2) is a new case; and (3) meets one or more of the general recording criteria of §1904.7 or the application to specific cases of §1904.8 through §1904.12.*

All employers covered by the Act are required to comply with Part 1904 record-keeping requirements unless specifically exempted. 29 C.F.R. §1904, *Subpart B – Scope.* No exemption was urged in this case, and upon review, the court finds none that were applicable to Respondent. 29 C.F.R. §§1904.1, 1904.2, and *Appendix A to Subpart B.* Based on the record, as well as the parties' stipulations, Respondent was required to maintain, and did maintain, OSHA 300 logs. (Ex. C-25). It was undisputed that MK's condition was correctly diagnosed as epicondylitis, which resulted in lost work days, work restrictions and limitations, temporary reassignment to a different position, and medical treatment beyond first aid. (Tr. 166-167, 414-416, 889). Therefore, MK's condition met the general recordability criteria in the regulations. 29 C.F.R. §1904.7(a) & (b). It was also clearly established that MK's condition was a "new case" in that she had not previously experienced an injury or illness of the same type that affected the same part of her body. 29 C.F.R. §1904.6(a).

Therefore, the remaining issue, and *the* focus of the parties' dispute in this case, is whether or not MK's condition was "work-related." Several subsections of the §1904 regulations provide guidance in determining work-relatedness. For example:

> *29 C.F.R. §1904.5(a): Basic requirement: you must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly*

aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in §1904.5(b)(2) specifically applies.

and;

29 C.F.R. §1904.5(b)(3): How do I handle a case if it is not obvious whether the precipitating event or exposure occurred in the work environment or occurred away from work? In these situations, you must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition.

An employee's work activities do not have to be *the* cause of an injury or illness, but rather *a* cause of an injury or illness. 29 C.F.R. §1904.5(b)(2)(ii), (iii), (iv), (v), and (vi) (*referencing recordability exemptions for non-work activities which are the* ***sole cause*** *of an injury or illness*). In this instance, none of the fact or expert witnesses who testified were able to identify a non-work activity as a likely cause of MK's epicondylitis. While this fact is certainly not dispositive of the case, it is relevant to a determination of whether MK's work activities may have caused or contributed to her illness.

To be absolutely clear, the court is not implying any reversal of the burden here. It is Complainant's burden to show, by a preponderance of the evidence, that MK's epicondylitis was work-related, and therefore recordable on Respondent's OSHA 300 Log. *Home Depot*, 22 BNA OSHC 1863, 2009 CCH OSHD 33,031 (No. 07-0359, 2009). It is not Respondent's burden to prove that MK's condition was caused by non-work activities. As the Commission stated fairly recently, an employee's "work itself must be a tangible, discernible, causal factor to render an

injury or illness work-related." *Home Depot* at *3. "Pure speculation that some event in the workplace may have caused or contributed to an injury or illness would not be enough..." *Id*.

In this case, Complainant has presented sufficient evidence to establish that MK's epicondylitis was work-related. As Dr. Just testified, a physician's evaluation of a patient alone is insufficient to determine work-relatedness. (Tr. 408). Therefore, the court closely examined the evidence surrounding the Ergonomic/Safety Evaluation requested by Dr. Just, and performed by Safety Manager Dustin Wagoner. First, although virtually every witness agreed that an examination of force, repetition, and posture were essential to determining a possible causal connection, Mr. Wagoner focused primarily on the force necessary to operate the scanning gun. Second, Mr. Wagoner spent less than one hour observing Consol Pak work activities for the purposes of his assessment. Third, he had never had any training on epicondylitis and had never evaluated a job for risk factors related to epicondylitis. Fourth, Mr. Wagoner did not speak with MK, or any other Consol Pak employee, about their actual job duties in conducting his work-relatedness assessment. He never obtained any information about how MK specifically performed her job. Lastly, Mr. Wagoner's assessment was started and completed in the same day, and the entire universe of notes, observations, conclusions, etc., consisted of only twenty-three sentences on portions of two pieces of paper. Based on the factors that both Complainant's and Respondent's witnesses identified for a thorough work-relatedness assessment in this type of situation, the court concludes that Respondent's assessment of work-relatedness was deficient. The record establishes that a thorough work-relatedness assessment would have revealed the presence of all three risk factors (improper wrist, forearm, and elbow postures, combined with moderate repetitiveness, and low force) for epicondylitis in Consol Pak.

By August 5, 2008, several relevant events had occurred: (1) MK had reported her elbow pain to multiple supervisors and to Respondent's medical staff; (2) MK had been diagnosed with epicondylitis by Respondent's staff physician; (3) MK had been temporarily re-assigned to

another department with work restrictions, (4) MK had been off work for three weeks as a result of her condition; (5) Respondent completed a work-relatedness assessment (albeit deficient) of the work activities in Consol Pak. The improper arm, hand, and elbow postures, repetition, and force necessary to work in Consol Pak were apparent on that date, and a thorough and complete analysis of these risk factors would have revealed indications of work-relatedness.

The preponderance of the evidence convinces the court that there were tangible, discernible, causal factors indicating that MK's work activities in Consol Pak were at least a contributing cause, if not the sole cause, of her epicondylitis. *Home Depot*, supra. Articulated in other terms, the evidence establishes at least *some* causal connection between MK's work activities and MK's epicondylitis. *Pepperidge Farms*, 17 BNA OSHC 1993, 1995-97 CCH OSHD ¶31,301 (No. 89-265, 1997). Accordingly, MK's condition should have been recorded on Respondent's OSHA 300 Log.[7] It was not, and Respondent had specific knowledge that it was not.[8] Therefore, Citation 1 Item 1 will be affirmed.

Affirmative Defenses

Respondent withdrew its previous assertion of a statute of limitations defense on October 7, 2010, and did not argue any other affirmative defenses in its post-hearing brief. Accordingly, any additional affirmative defenses which were pled are deemed abandoned. *Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1991 CCH OSHD ¶29,395 (No. 89-2713, 1991).

7 The court notes the recent Federal Register publications concerning 29 C.F.R. §1904.4 and musculoskeletal disorders. As the recent Federal Register publications apparently relate only to modification of OSHA 300 Forms to include specific columns for recording musculoskeletal disorders, they are not relevant to the disputed issues in this proceeding. See 75 F.R. 4728-01 & 10738-01.

8 Complainant failed to offer Respondent's 2008 OSHA 300 Log into evidence. However, as Corporate Safety Manager Edwards, Safety Manager Wagoner, and Dr. Just all testified in detail concerning Respondent's reasons for not recording MK's condition, the court will treat its omission from the 2008 log as an undisputed fact despite the log's absence from the record.

Penalty

In calculating the appropriate penalty for affirmed violations, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. §666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993).

It is well established that Commission judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995). Respondent is a large employer, with approximately 12,000 employees in 50 facilities throughout the United States. (Tr. 876-877). Based on Respondent's size, the nature of this non-serious record-keeping violation, and the totality of the factual circumstances discussed above, the court assesses penalty as set out below.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1 is AFFIRMED and a penalty of $900.00 is ASSESSED.

Date: May 24, 2011
Denver, Colorado

/s/
PATRICK B. AUGUSTINE
Judge, OSHRC