

**BEFORE THE ARKANSAS WORKERS COMPENSATION COMMISSION**

**CLAIM NO. F408488**

<b>GERALD McCLUSKY, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>NORANDAL, EMPLOYER</b>	<b>RESPONDENT</b>
<b>ACE AMERICAN/ESI, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JULY 13, 2005**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on April 15, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE JAMES R. BURTON, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MARK MAYFIELD, Attorney at Law, Jonesboro, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to workers' compensation benefits.

On March 22, 2005, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Gerald McClusky, the claimant, and that of Connie Davenport, coupled

with medical reports and other documents comprise the record in this claim.

### DISCUSSION

Gerald Dean McClusky, the claimant, with a date of birth of February 1, 1946, commenced his employment with respondents on August 6, 1964. Claimant is a high school graduate. Respondent-employer is a manufacture of aluminum foil.

The testimony of the claimant reflects that over the course of his 40 years employment by respondent, he performed the job duties of a packer approximately 25 years. Claimant described the mechanics of his job duties:

Well, you take metal that's been rolled and cooked. They take it to the oven and cook it. It's on racks. You take it off of there and put it on a packing table and dress it down. They check it for wetability and everything. And then we put it in plastic bags, take it up and weight it, and then we have to record the weight on it. And they've made tickets for it, you know, for each roll, and we put it in an aluminum rack ad strap it out in two straps, most of it - you know, the majority of it goes that way. And they also have others that goes on pallets that's weighed differently and we don't handle it much. The forklifts handle it.(T. 8).

Claimant estimated that the weights of the rolls of foil ranged from 500 to 2700 pounds.

Claimant noted that a pipe is inserted through the roll of foil and six to eight rolls placed on a rack. The testimony of the claimant reflects that overhead work is involved in his job:

Well, the first two rolls that comes off of the rack - this time I got hurt - we had to go - had to go over your head to hook your hook in the core to pick it up. After you get the first two rolls off, you go on down on the rack and you're back down waist high.(T. 9).

The testimony reflects that respondents has in place a hoist system over the packing line that assist in the movement of the rolls. Claimant explained:

We back this in to the packing line - take it off of the rack, and set it on the tables.

And the hoist goes up and down this rail. (T. 10).

Claimant's testimony reflects that the hoist is powered, and that in addressing the first two rolls, he has to reach "way up over your head". Claimant explained:

The hooks up there come on - on the rack, and then pick it up and take it across and then down to the table. (T. 10).

Claimant testified that his job was a "two-man" job, and that he worked with another employee, Landon Williams.

In describing the accident and injury which serves as the basis for the present claim of July 30, 2004, the testimony of the claimant reflects:

Well, I was working with a boy that usually sets uprights. He was working overtime. And we had been working three on the line. And this boy wasn't used of handling hooks. We've got some new hooks in that's extremely heavy outright. We hadn't them but about two or three weeks, I don't know. And, we had complained about them all we could and Ms. Davenport said we didn't have no choice, we had to have them because they was OSHA approved, you know, and the others wasn't. But, they are hard to handle. And this boy was running the hoist on the other side, which he did on the other side and I run the computer on my side. Well, we was getting the second roll off the top, and I was going back to the back roll to hook my hook in there and just about had it in there, and just about the time I got there, well, he pushed the wrong button - puts this hoist - you know, goes up and down this rail?

And when he does that, he pulls you back, but in order to release that where I wouldn't have been - all this strain on me, I'd hit that roll and that roll, if I remember right, was one of the biggest rolls we had - about a 2700 pound roll - and that's a lot of money, you know, and I didn't want to ruin that roll of metal, so I didn't turn it loose, so I just rode it back. In a minute, he brought it back, you know, but - and I didn't realize right then that I'd hurt myself, you know, till we come on down and then it begin to hurt, you know, more and more. (T. 10-11).

While the claimant observed that the movement/accident was a jerking motion, he is uncertain if

it jerked him off his feet:

I don't really know. It could have, you know, it probably at least cleared my feet, but it just pulled me up against the rack really, is what it done. It could have pulled me back this direction. (T. 12).

Claimant's testimony reflects that his chest hit the rack. Claimant noted that both of his arms were fully extended over his head as he grabbed the hook apparatus.

Claimant worked a twelve-hour shift, from 6:00 a.m. to 6:00 p.m. The testimony of the claimant reflects that the accident occurred at approximately 3:30 p.m. Claimant asserts that he did not work the remainder of his shift:

I didn't do that. They had me out the rest of the day. It was hurting and the next two days, the two that I was talking about before, we worked through on line then. The other boy didn't work, since it was overtime. The next day, we worked two on line.

Well, the other two that worked with me, they took care of that part, and all I done was run the computer, and they took care of me all that time. And then the next week, I waited a while, think it was going to get better, and finally called Ms. Davenport about - I guess about Wednesday or something. A couple of day later I thought, well, it ain't going to get no better, so I called her and asked her if she would get me an appointment with the company doctor, Dr. Falwell, and she did.(T. 14).

In described his symptoms, which he attributed to the accident, claimant testified that he had pain all the time, as well as soreness in his lower back and arms. After going to the doctor claimant treated his complaints with ice to his lower back and shoulders. Claimant testified:

And I found out by putting that ice on my neck it would relieve the pain in my arm - arms mostly. It was going in both arms - still does. And so I decided it was probably - a lot of it was coming right out of this part of this neck, but I did not realize that at the time when I got hurt, that I had probably pulled that neck, too, you know, and so I didn't put it on the accident report.

But it's giving me as much problem now as anything - the neck

and the - I get up in the morning and my hands is asleep a lot of times, and they . . .(T. 15).

Claimant's testimony reflects that he is uncertain if he relayed complaints of neck pain at the time he initially reported his accident to Ms. Davenport. Claimant concedes that he did not tell Dr. Falwell of his neck complaint at the time he was initially seen following the July 2004, accident. Claimant acknowledge that after seeing Dr. Falwell, he chose to see Dr. Kent, his family doctor, as his one-time change of physician relative to his July 30, 2004, compensable injury.

Claimant is uncertain if he relayed his neck complaints to Dr. Kent at the time of the initial treatment following the July 30, 2004, accident, on August 13, 2004, however offered that he probably did in light of the treatment with Dr. Chan that followed. Claimant testified that he relayed a specific incident injury to Dr. Kent at the time he saw him. The testimony of the claimant reflects that when he was seen by Dr. Falwell following the accident, an appointment was scheduled for him with Dr. Chan. Once he came under the treatment of Dr. Kent, the scheduled appointment with Dr. Chan was advanced.

Regarding residuals which he attributes to the July 30, 2004, accident, claimant explained that his neck stays sore all the times, and that when he wakes up in the morning, many times he has numbness in both hands. Claimant attributes the afore to residuals of his injury growing out of the July 30, 2004, accident. Regarding the constant pain in the back of his neck, claimant testified:

Yes, sir. Right in there. And I get a lot of pain because - I think - I'm not no doctor, but it feels like up and down this arm - right here in this hand - sometimes, it feels like somebody drove a nail in it right there (right arm and right hand -dorsal surface above

the wrist). (T. 16).

Claimant identified pain on the top of his hand above the right ring finger.

Claimant acknowledged that he had some longstanding problems with arthritis, for which he had been taking medication. Claimant also took medication (Lotrel) for blood pressure prior to July 2004.

The testimony of the claimant reflects that approximately four (4) years prior to the July 2004, accident he had a problem for which he went to Dr. Chan and on June 13, 2002, received one epidural injection in his neck on the right C2 nerve root. Claimant asserts that following the procedure he had no further problems or complaints until the July 2004, accident. Claimant is uncertain what precipitated the need for the earlier treatment with Dr. Chan. Claimant acknowledges that there was some neurological testing performed in 2002 by Dr. Chan. Further, the testimony of the claimant reflects that during his treatment with Dr. Chan in 2002, in addition to his neck pain, he had pain in his shoulder and numbness in both hands.

The testimony of the claimant reflects that in addition to a MRI scan of the cervical spine, he also underwent a EMG/nerve conduction study by Dr. Peggy Brown, a Seacy neurologist. Claimant acknowledged that he was informed by Dr. Brown that he had carpal tunnel syndrome. Claimant testified that approximately two (2) months prior to the July 2004, injury, he was seen by Dr. Kent because of shoulder pain and was provided medication.

The testimony of the claimant reflects that the first doctor he saw following the July 2004, accident was Dr. Wade Falwell, the company doctor. Thereafter, claimant's testimony reflects that he saw Dr. Coleman Kent, who provided a lumbar injection. Claimant was later referred by Dr. Falwell back to Dr. Patrick Chan, a Searcy neurosurgeon, who he had previously

seen. Claimant's testimony reflects that rather than seeing Dr. Chan, he ended up been seen by Dr. Savu, a Jonesboro physiatrist. Claimant maintains that he met with Dr. Savu for the initial visit, however he was never provided any treatment.

The claimant was diagnosed by Dr. Kent with a rotator cuff tear on the right side. Claimant received treatment under the care of Dr. Jason Brandt, a Jonesboro orthopedic surgeon, relative to the diagnosed right rotator cuff tear. Dr. Brandt directed to claimant to remain off work for a period of time, and later released his to sedentary one arm work. Claimant received temporary total disability benefits during the time he was off work pursuant to the direction of Dr. Brandt.

Claimant asserts that he did not received temporary total disability benefits for all of the time he was off work pursuant to the directions of his treating physicians. Specifically, claimant's testimony reflects:

Well, when I was off - I can't remember the date - probably back in August or September, I was off about three weeks or something like that - the doctor took me off a month - Dr. Kent took me off a month. And he - till the time I got to see Dr. Chan - and when I seen Dr. Chan, he gave me these injections and told me I could go back to work on light duty earlier that what Dr. Kent had said a month, or so I think it was about three weeks. Well, during that time, I didn't receive nothing, and like I was telling you the other day, I went to a chiropractor on my own - Sonny okayed it, and which it was on my own - it had nothing to do with them, cause I done it myself, and so that was on me. And then, after that, is when I - I was just trying to find some help somewhere and I wasn't getting nobody to help me find anybody to do anything for me. But, I went back to Dr. Kent and he said there's gotta be something done, you know. And, they finally got me an appointment with Dr. Savu.

And they had okayed Dr. Savu, and at that time, Dr. Savu was going to start on me at the top of my neck, where he intended to start. So, I thought they was accepted the top of my neck.

And that was where he was going to start. Well, anyway, during this time, my blood pressure wen up out of sight. I went back to Dr. Kent and he said, we've got to put you in the hospital and see what's going on. So, the put me in the hospital, and they give me pain medication, and when he give me pain medication, my blood pressure dropped right back down to, I think it was 124 over 70 something. He said the pain was causing it. (T. 20-22).

Claimant was in St. Bernards Regional Medical Center for three days in January 2005, during which time a stress test was performed, he was provided pain medication for his arm, and he underwent a MRI on his shoulder and a MRI on his neck. The testimony of the claimant reflects that is was as a result of the shoulder MRI scan that the right rotator cuff tear was diagnosed and he was referred to Dr. Brandt for surgical repair. Claimant testified that the shoulder is still pretty sore.

Regarding his lower back, claimant's testimony reflects its not much better. Claimant had seen Dr. William Ackerman, a Little Rock pain management specialist, the week of April 11, 2005. The testimony of claimant reflects that Dr. Ackerman gave him some exercises to do at home, medication, and a return appointment the day before he was scheduled to return to Dr. Brandt. Claimant has a May 8, 2005, return appointment with Dr. Brandt relative to his rotator cuff injury, and a May 7, 2005, return appointment with Dr. Ackerman relative to his low back complaint.

Claimant's testimony reflects that he had not had any medical treatment relative to his neck complaint, which he attributed to the July 30, 2004, accident, since his scheduled treatment with Dr. Savu was interrupted by his elevated blood pressure. Claimant asserts that by the time he finished with the afore, he was directed to Dr. Terrence Braden instead of back to Dr. Savu. Claimant noted the he was referred by Dr. Braden to two weeks of physical therapy, which made

everything worse. Claimant testified that he returned to Dr. Braden and was informed that he had nothing further in the way of treatment to offer, but expressed the desire to refer him to a Little Rock neurosurgeon.

The testimony of the claimant reflects that his employment with respondents was terminated as a result of a disagreement. As a consequence of the afore, he was not again seen by Dr. Savu.

Claimant testified that at the time he was seen by Dr. Chan in August 2004, he relayed complaints of pain in both his neck and back, which he attributed to the July 30, 2004, accident, and was informed by same that he could only treat one at a time. The claimant denies telling Dr. Savu during the January 3, 2005, visit, that his injury was of a gradual onset in nature. Claimant asserts that when he went to St. Bernards Regional Medical Center on January 4, 2005, he had complaint of right arm pain, not left arm pain. Claimant was diagnosed with angina during the visit.

Claimant's testimony reflects that respondents assert that they accepted his low back injury and right rotator cuff tear as compensable relative to the July 30, 2004, accident, they did not pay the medical cost associated with same. Claimant maintains that the afore was filed on his regular insurance. The testimony of the claimant reflects that the only provider that he went to for treatment relative to the July 30, 2004, accident that was outside of the workers' compensation system was the chiropractor, Dr. Gerald Fowlkes. Claimant further noted that he did not receive temporary total disability benefits for the period January 3, 2005, through January 12, 2005, during the time he was admitted to the St. Bernards Regional Medical Center.

Claimant acknowledged that following his surgery, Dr. Brandt authored a release for his

to return to sedentary one-arm work for six weeks. Claimant testified that he was not ready to return to work at the time, and as a consequence he spoke to someone in Dr. Brandt's office.

Claimant's testimony reflects, relative to the release:

Well, when I went out there, Ms. Davenport said she didn't have anything for me to do right then. She said she'd try to give me something in a week or two.

And so, during that week or two, I had this cast on and I couldn't even fasten my pants, you know, with the cast on. (T. 43).

Claimant concedes that respondent-employer was trying to work with him at that time. Claimant testified that he called Dr. Brandt's office, and he was faxed a release to his home.

The testimony in the record reflects that the termination of the claimant's employment with respondents centers on the dispute surrounding a January 31, 2005, medical release authored by Dr. Brandt and Advance Orthopedics. One of the documents reflects off work until "2/14/05", while the other reflects off work until "2/24/05". (JX. #1, p. 87-88).

Claimant's testimony reflects that by February 14, 2005, he could have returned to work if he had been provided light-duty work within his restrictions. The testimony of the claimant reflects that in 2002, while the cervical spine showed a disc at C4-5, with fecal sac impingement, he was not referred to a surgeon at the time. Claimant testified that the physician who directed him to apply ice to his low back and shoulder in connection to the July 30, 2004, accident was Dr. Kent.

Claimant last discharged employment duties for respondents on December 10, 2004. Claimant maintains that both releases dated January 31, 2005, with different release dates, were furnished by Dr. Brandt's office. Claimant also introduced the original faxed release of January

31, 2005, which was received from Advanced Orthopedic with the "2/24/05" release date.

Claimant denies that he altered the document. (CX. #1) Claimant testified regarding the document receive at his home fax machine from Advance Orthopedics:

I don't - I think this was the original that come through first, I'm not sure. It come through with a cover sheet and my wife wrote across the cover sheet, Attention to Connie, and sent the cover sheet and the, I guess, all this. (T. 62).

The testimony of the claimant reflects that in his present physical condition, he is unable to perform his regular job duties in the employment of respondents. With respect to the light job duty of operating the computer, the testimony of the claimant reflects:

Well, what I was doing before was running the computer, you know, on light duty . . . and now this arm has still not got the soreness out of it so I don't know whether I could run it or not. But I don't know for sure whether I can or not. (T. 58-59).

Connie Davenport, Environmental Health and Safety Supervisor for respondent-employer, testified that a part of her job duties was to serve as a liaison between injured employees and respondent. Ms. Davenport has worked ten (10) years in her present capacity for respondent. In 2001, Ms. Davenport took the responsibility of handling workers' compensation claims when the company downsized. Prior to the afore, Ms. Davenport did the accident investigations and followed through. Regarding her contact with the claimant following his injury, Ms. Davenport testified:

He had the injury on a weekend, and I was told of the injury on a Monday, and he called me to get a doctor's appointment with our company doctor, Dr. Falwell, and I got it for him. (T. 64).

Ms. Davenport's testimony reflects that the claimant relayed that he had hurt his low back in the accident, however when he completed the Form N he also listed his arm. Ms. Davenport

testified that Dr. Falwell took the claimant off work for four (4) days following the initial visit. Thereafter, on August 9, 2004, Ms. Davenport noted that she accompanied the claimant to his visit with Dr. Falwell, and a discussion was had regarding the claimant seeing Dr. Chan.

Ms. Davenport denies that the claimant mentions anything about having a problem with his neck from the on-the-job injury from the time the injury occurred until the end of 2004. Ms. Davenport further denied that the claimant mentioned anything about his neck bothering him.

Ms. Davenport provided the following testimony regarding the January 31, 2005, release to return to work from Advance Orthopedics:

Oh, yeah. I got a phone call, and he asked me if I had received a fax from Dr. Brandt, and I told him I hadn't, and he kept talking and he said he was going to be off work, and I said, well, why did he change his mind, and he said well, I can't work. And I said, well, do you have a fax, and he said, yes, I do, and I said, well, then just fax it over to me and let me see it and it will go in the file. (T. 65).

Ms. Davenport testified that when she received the fax from the claimant she had some questions about it because she had been furnished an off work release from the claimant on January 27, 2005, with restriction of sedentary one-arm work. (JX. #1, p. 86). Regarding her plans following receipt of the January 27, 2005, release, Ms. Davenport's testimony reflects:

Well, Gerald and I talked, and his arm was in a cast and he told me he couldn't button his pants. His supervisor and the production manger had said they didn't have anything on the floor for him to do at that time. And so, we had a young man whose mother had cancer and he did a lot of our filing and paperwork in the lab, so I asked him if he could possibly do - and we'd give him the time off that we didn't have anything, you know, until about the 14<sup>th</sup>, and then we would probably have some office work which meant just sitting and filing and sorting papers. (T. 66).

The testimony of Ms. Davenport reflects that claimant said the he thought he could do the job.

Ms. Davenport testified that in her experience with respondents she had not seen situations in which people would be injured and complain of a multiplicity of a variety of problems, noting that she usually sees contact injuries. Ms. Davenport added that it is unusual to see strain type injuries at respondent. Ms. Davenport testified that she was unaware of any situation where the claimant had been written up or disciplined at respondent; or a situation where the claimant's honesty or truthfulness had been called into question. Ms. Davenport's testimony reflects, regarding any allegation of making unauthorized changes on reports or document by the claimant:

I don't know about it, but, as far as HR, I won't know, so it would all be in what I take care of, and as far as I know, no.(T. 69).

Ms. Davenport testified that conducted a follow-up relative to the claimant's July 30, 2004, accident, however the first time she heard anything about the worker jerking the hooks the wrong way was during the hearing. In terms of the verbal report of the accident made by the claimant, Ms. Davenport testified:

He told me that he - that we'd gotten the new hooks in and they were complaining that they were heavier, and he told me that the hooks were heavy and that in inserting and using it, that he had injured his back and arm.

Well, I didn't think of it as gradual, but I couldn't understand why that one would cause him so much pain, either, and like I said, I didn't hear the other until today. (T. 70).

While Ms. Davenport testified that she accompanied the claimant to the second visit to Dr. Falwell following the July 2004, accident, and as such was present during the discussion to schedule an appointment with Dr. Chan, a neurosurgeon, her understanding of the nature of the claimant's principal injury was to his low back. Ms. Davenport asserts that claimant initiated the

discussion with Dr. Falwell regarding a referral to Dr. Chan. Ms. Davenport denies that claimant complained of neck pain during the visit to Dr. Falwell in which he requested to be seen by Dr. Chan. Ms. Davenport asserts that she first learned that the claimant was asserting an injury to his neck as a part of the July 2004, accident following his deposition, which was shortly prior the hearing. Ms. Davenport later acknowledged seeing a copy of the Form AR-C which was filed by the claimant's attorney in January 2005, listing a claim for injuries to his neck, right shoulder, and lower back.

The medical in the record reflects that on April 11, 2002, claimant underwent a MRI scan relative to his cervical spine at White County Medical Center at the request of Dr. Patrick Chan, a Searcy neurosurgeon. The MRI report relative to the diagnostic procedure reflects:

At C4-5 significant herniation of disc seen along with disc bulge and marginal osteophyte formation. These changes cause marked flattening of the thecal sac, impingement on right lateral recess and impingement on neural foramina.

At C5-6 minimal disc bulge flattens thecal sac slightly.

At C6-7 disc bulge with dorsal protrusion of disc material flattens and indents the thecal sac with flattening of the ventral aspect of the cord. (JX. #1, p. 4).

On April 11, 2002, claimant also underwent an EMG/nerve conduction study under the care of Dr. Peggy Brown, a Searcy neurologist, at the request of Dr. Chan.(JX. #1, p. 5-7). On June 13, 2002, claimant underwent an injection of the right C2 nerve root for diagnosed right suboccipital pain, under the care of Dr. Chan.

The first physician to see the claimant following the July 30, 2004, accident was respondents' designated medical provider, Dr. Wade Falwell, on August 2, 2004. The history

relayed by the claimant to Dr. Falwell was that of an injury to his low back, and bilateral shoulders that occurred the Friday, July 30, 2004, prior to the visit. (JX. #1, p. 18). No reference is made to a neck complaint by the claimant in the records of Dr. Falwell during either of the claimant's visits. (JX. #1, p. 18-23). The report of Dr. Falwell relative to the August 12, 2004, visit of the claimant reflects the assessment of the claimant's complaints as right shoulder strain, back strain and djd back. The report also reflects the entry "pt wants referral Dr. Mosley - Memphis", "seeing Dr. Chan Searcy Sept. 3, 04". (JX. #1, p. 23).

The medical reflects that on August 13, 2004, claimant was seen by Dr. W. Coleman Kent, his family physician, pursuant to a one-time change of physician request relative to the compensable July 30, 2004, accident. The history, as reflected in the August 13, 2004, clinic note of Dr. Kent, relative to the claimant, reflects:

CHIEF COMPLAINT: Gerald was recently in an accident at work and not major in that it was more of a non-traumatic type thing, but he had severe back pain since then. Patient has just not had any help. In addition to this he has a low-grade temperature and thins that he has the flu. (JX. #1, p. 24).

Dr. Kent's impression of the claimant's complaint following the August 14, 2004, examination was "severe lumbago with sciatica" along with upper respiratory infection and mild bronchitis. Dr. Kent did arrange for a MRI of the claimant's lumbar spine as a result of his examination. Claimant underwent the lumbar MRI scan on August 18, 2004. (JX. #1, p. 27-28).

On August 23, 2004, claimant was seen by Dr. Patrick Chan pursuant to a referral by Dr. Kent. On a History and Physical report, Dr. Chan's office recorded that the claimant sustained an injury on July 30, 2004, "pulled heavy object overhead", low back pain and right shoulder pain. (JX. #1, p. 33). A drawing included as a part of the evaluation by Dr. Chan during the claimant's

August 23, 2004, visit indicates pain in both shoulders, lower back and numbness down both legs. (JX. #1, p. 35). The diagram does not reflect any indication of pain in the claimant's neck.

A August 23, 2004, narrative report of Dr. Chan relative to the evaluation of the claimant reflects:

This is a 58 Year old factory worker that has been off work since 8/17/2004 due to a work injury that occurred on 07/30/2004. Patient pulled heavy object over head and felt low back pain and right shoulder pain. Had right shoulder pain before but worse after work injury. Patient stated neck pain worse after work injury. Complains of numbness and paresthesia in left hand.

Low back pain new after work injury. Symptoms radiate to bilateral lower extremities to ankles with the right greater than left and numbness/paresthesia in bilateral legs.. .(JX. #1, p. 36).

In an off-work slip authored during the August 23, 2004, visit, Dr. Chan directed, "no excessive bending/\_\_\_\_\_ neck & lower back". (JX. #1, p. 37). Claimant underwent an injection relative to his back under the care of Dr. Chan on August 30, 2004 (JX. #1, p. 39).

A September 1, 2004, clinic visit by the claimant to Dr. Kent reflects that his chief complaint was followup on his low back problem which was still in pain. (JX. #1, p. 40). There is no mention of the claimant's neck complaint during subsequent medical visits following the notation in the August 23, 2004, records of Dr. Chan.

A reference to the claimant's neck pain does not appear in the medical records again until an evaluation by Dr. Calin A. Savu, a pain management specialist, pursuant to a referral by Dr. Kent. The January 3, 2005, report of Dr. Savu, relative to the claimant, reflects in pertinent part:

HISTORY OF PRESENT ILLNESS: Mr. McClusky is a pleasant 58-year-old gentleman with a history of progressive low back and neck pain, which appears to have been triggered by some changes occurring at his employment site. At that time, some object that he

continuously repetitively lifts throughout his shift have been changed and replaced with much heavier correspondence. He describes a number of incidents where people complained increasingly about that change. . . . He describes a rapidly progressive syndrome of low back discomfort, which progressed steadily during his work shifts and reached a peak toward the evening hours. . . . His neck pain developed in parallel. Both the neck and the low back pain are described as a combination of deep-seated aching and burning discomfort with occasional sharp exacerbations.

\* \* \*

NECK/MUSCULOSKELETAL: Very stiff gait with a wide base minimal range of motion in the lumbosacral and the cervical region with both areas showing significant flattening of the normal lordosis and with decreased posterior extension predominantly. Significant tenderness is elicited on palpation of the lumbosacral and cervical facets as well as over both SI joints. . . . (JX. 1, p. 62).

Regarding his diagnosis following the January 3, 2005, evaluation of the claimant, Dr. Savu indicated that the claimant's neck pain was "very likely due to a facet syndrome with associated myofascial pain". (JX. #1, p. 63).

During claimant's January 4, 2005, admission to St. Bernards Regional Medical Center for angina, he underwent several diagnostic studies, to include a cervical spine MRI. The MRI report, reflects, in pertinent part:

C3-C4: There is right neural foraminal narrowing due to osteophytosis.

C4-C5: There is posterior disc bulging at this level. This indents the contour of the thecal sac. There is also right neural foraminal stenosis due to disc bulging and osteophytosis. (JX. #1, p. 68).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, as well as application of the appropriate statutory provisions and case law, I make the following:

## **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On July 30, 2004, the relationship of employee-employer-carrier existed among the parties.
3. On July 30, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$453.00/\$340.00, for temporary total/permanent partial disability.
4. On July 30, 2004, the claimant did not sustain an injury to his neck arising out of and in the course of his employment.

## **CONCLUSIONS**

Claimant reported a work-related accident to appropriate supervisor personnel of respondent which occurred on July 30, 2004. Respondents accepted the injuries to the claimant's low back and right shoulder growing out of the accident as compensable and paid corresponding temporary total and medical benefits. Claimant asserts that in addition to the low back and right shoulder complaints, he also suffered an injury to his neck in the July 30, 2004, accident and is entitled to corresponding temporary total and medical benefits relative to same. Respondents deny that the claimant sustained an injury to his neck in the July 30, 2004, accident.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence: an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body

which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined by Ark. Code Ann. § 11-9-102 (16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102 (4) (A) (i). Should the claimant fail to establish by a preponderance of the evidence either of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The credible evidence in the record reflects that claimant received treatment relative to his cervical spine as early as 2000. Further, on June 13, 2002, claimant received an injection at the C2 nerve root under the care of Dr. Patrick Chan, a neurosurgeon. Claimant was taking pain and anti-inflammatory medication prior to the July 30, 2004, accident. While claimant registered complaints relative to his low back and shoulders growing out of the July 30, 2004, accident, there reference to neck symptoms prior to the August 23, 2004, visit to Dr. Chan.

Dr. Chan had previously treated the claimant relative to his neck complaint in 2002. Dr. Chan's records identified the claimant's low back complaint as "new after work injury", the same is not the description provide to the entry of records relative to the claimant's neck. No further mention of the claimant's neck complaint is reflected in the medicals in the records until a January 3, 2005, evaluation by Dr. Savu, a pain management specialist.

More telling is the lack of any history of a neck injury in the records of Dr. W. Coleman Kent, the claimant's family physician, who the claimant selected as a one-time change of treating physician relative to his July 30, 2004, compensable injury. The medical history of the claimant as recited in the August 13, 2004, initial visit to Dr. Kent is devoid of references to neck

complaints growing out of the July 30, 2004, accident. Finally, diagnostic studies relative to the claimant's cervical spine do not demonstrate appreciable differences in findings from June 2002, to January 2005. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that he sustained an injury to his cervical spine arising out of and in the course of his employment with respondents on July 30, 2004. The claim is respectively denied and dismissed.

**IT IS SO ORDERED.**

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**Andrew L. Blood, Administrative Law Judge**